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Turkish Competition Board examines potential conglomerate and market closure effects of transactions

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Introduction

On 30 June 2022, the Turkish Competition Board unconditionally approved[(1)] the acquisition of sole control over Ondura SAS (Ondura) by Kingspan Group Plc (Kingspan).

The decision concerned a request for approval of the acquisition of the entire share capital and sole control of Ondura by Kingspan through Kingspan Group Limited from various funds owned by Naxicap Partners (Naxicap).

The board's decision serves as further guidance on the conglomerate effects of mergers and acquisitions, compared with vertical and horizontal relationships. This article:

- analyses the board's assessments and findings; and
- provides a summary of the board's recent decisions on the same subject.

Decision

Before delving into its substantive analysis, in accordance with article 5 of Communiqué No. 2010/4 on Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, the board determined that the transaction qualified as an acquisition. The board stated that the turnover thresholds specified in the first paragraph of article 7 of Communiqué No. 2010/4 were exceeded. It then delved into its substantive analysis as to whether there was a horizontal or vertical overlap between the activities of the parties to the transaction by evaluating their activities.

The target, Ondura, had three subsidiaries – namely, Onduline Group SAS (Onduline), Alwitra GmbH, and CB SA. Onduline was the only subsidiary that was commercially active in Turkey; it focused on roofing sheets and tiles and waterproofing membrane.

The acquirer, Kingspan, was the producer and supplier of thermal insulation products and a shareholder of a joint venture that focused on producing and supplying thermal insulation products in Turkey. The activities of the acquirer, Kingspan, included the production and supply of:

- thermal insulation products;
- insulated sandwich panels;
- insulation boards;
- lighting and ventilation solutions;
- sustainable water and energy solutions; and
- flooring technology for data centres.

Kingspan had a joint venture in Turkey, which was mainly engaged in the production and sale of thermal insulation products (sandwich panels).

Horizontal relationship

The board found that there was no horizontal overlap between the target and the acquirer in terms of the markets in which they operated in Turkey.

Vertical relationship

The board stated that Kingspan's subsidiaries (Groupe Bacacier SAS (Bacacier), Balex Meral LCC (Balex) and Joris Idee Auvergne SAS (Joris Ide)) and Ondura conducted commercial activities, concentrating on the sales of their product lines. The transactions between Kingspan's subsidiaries and Ondura did not take place in Turkey, and did not affect their activities in Turkey. Therefore, there was no vertical relationship between the activities of the acquirer and the target.

Non-horizontal relationship

On the other hand, the board stated that insulation materials, which were among Kingspan's activities, and waterproof membranes, produced by Ondura, may be used together by certain buyers. The board further stated that if the transaction was approved, Kingspan might offer these products to consumers separately or through package sales. In competition law, similar acquisitions or mergers are referred to as "multi-market mergers" (conglomerates). The board stated that there was no other conglomerate relationship between Kingspan's and Ondura's other products.

In its evaluation of non-horizontal relationships, the board referred to the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, which define "multi-market mergers" as transactions where the relationship between the merging undertakings is neither strictly horizontal (ie, there is no presence in the same relevant market) nor vertical (ie, there is no supplier-buyer relationship). The board further stated that competition law practice particularly focuses on situations where the merging parties are engaged in markets that are closely related to each other.

In this context, it was stated that mergers in markets covering products and services with complementarity or low-level substitution relationships – or activities within a certain range of products or services that are purchased by the same customer group or use substantially similar inputs in their production – are subject to scrutiny. The Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions state that it is a generally accepted assumption that multi-market mergers are highly unlikely to substantially lessen competition. However, the following paragraphs of the same guidelines set out under which circumstances such transactions may lead to the possibility of market foreclosure.

The board accordingly analysed the market share of Ondura in the waterproofing membranes market, which constituted the source of the evaluations made within the scope of the multi-market merger issue in the case. Through this evaluation, the board found that certain competitor undertakings had a market share higher or close to Ondura's market share in the production of waterproof membranes.

Concerning insulation materials, Kingspan stated that it was only a very small player in this market in Turkey and did not produce locally; the closest insulation material production facility to Turkey was in Poland. In addition, Kingspan stated that it did not monitor competition in this market and, therefore, could not provide any information on the competitive environment in Turkey. In parallel, Kingspan was not able to provide information on its market share in the Turkish insulation materials market but did provide information on its sales volume and sales value. Accordingly, the board evaluated the provided information regarding Kingspan's global market share.

In addition, the parties stated that:

- only a limited number of Ondura's membrane products could be used in combination with Kingspan's insulation materials;
- Kingspan's thermal insulation products and insulation materials could be purchased by the same customers; and
- Ondura's activities would expand Kingspan's existing product portfolio.

Finally, the board concluded that there was no horizontal or vertical overlap between the activities of the parties in Turkey and that there was no vertical or horizontal overlap between the parties globally.

In light of the foregoing statements and assessments, the board decided that a multi-market (conglomerate) relationship limited to certain products in the waterproof membranes and insulation materials markets had occurred and that the transaction in question was a conglomerate merger of the product expansion type. However, the board stated that Kingspan would not have a unique portfolio after the transaction (as other suppliers, such as Soprema SAS, Bauder Ltd, and BMI Group Holdings UK Limited, had the same product range). The parties had strong competitors in the waterproof membranes and insulation materials market in Turkey and globally with the ability to offer insulation materials, particularly Soprema SAS and Firestone Building Products Company, LLC.

Approval

As a result of the examination and evaluations made within the framework of the information available in the file, the board ultimately concluded that the transaction subject to the notification would not significantly reduce effective competition in any market in the whole or in a part of the country. In particular, it would not create a dominant position or strengthen an existing dominant position. Therefore, the board granted unconditional approval to the transaction.

Recent examples of similar board decisions

Luxottica/Essilor

The board's most notable decision in this field concerns the merger of Luxottica, an Italian eyewear company, with Essilor, a French ophthalmic lenses supplier.[(2)] In this case, the board evaluated the possible leveraging effects of Luxottica's market power in the sunglasses and optical frames market for the ophthalmic lenses market.

The board identified competitive concerns regarding:

- the transaction's horizontal effects in the wholesale of sunglasses and the wholesale of prescription optical frames; and
- conglomerate effects associated with the transaction.

The board approved the merger on the condition that Essilor's Merve Optik was divested and also under certain behavioural commitments. In this decision, the board carried out an assessment in line with the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions and also assessed the transaction within the scope of portfolio effects, which are not referred to under the guidelines.

In its follow-up *Luxottica* decision,[(3)] the board reassessed the commitments set out in the framework of the previous decision, conditionally clearing the transaction. As a result, the board decided to extend the duration of the three-year behavioral commitments specified under the conditional approval decision for a period of three years from the expiry date.

Vandewiele/Savio

The board also analysed conglomerate effects in its decision on the acquisition of sole control of Savio Macchine Tessili SpA (Savio) by Vandewiele NV (VDW).[(4)] The board stated that there was no horizontal or vertical overlap between the activities of the target and the acquirer. That said, the board continued its analysis on the possible conglomerate effects of the transaction bearing in mind that the products offered by Savio and VDW were interrelated and concerned the same industry.

The board further stated that different products belonging to separate relevant product markets may affect demands of each other due to their complementary nature or the low-level substitutability between them. The board referred to the definition provided by the Organisation for Economic Co-operation and Development (OECD) on this matter. The OECD defines the portfolio effect (or range effect), which may arise in mergers and acquisitions involving complementary or low-level substitutes, as:

pro-competitive and anti-competitive effects that may arise in mergers combining branded products (i) in which the parties enjoy market power, but not necessarily dominance; and (ii) which are sold in neighbouring or related markets.

The board also stated that it had competition law concerns regarding conglomerate acquisitions focused on market closure through tying and bundling practices.

The board conducted an analysis as to whether it would be viable for the acquirer to engage in tying and bundling practices as a result of the transaction. The board concluded that there was no collective sale tendency or practice in terms of the products manufactured by VDW and Savio. The board then analysed the parties' and their competitors' market share in Turkey and globally and the production capacities of undertakings operating in the relevant markets to determine whether production capacities would allow switching to other manufacturers. Consequently, the board considered the transaction to be a conglomerate concentration realised in the form of product expansion and stated that it would not create any restrictive effects in the relevant markets. Accordingly, it unconditionally approved VDW's acquisition.

CMA CGM/GEFCO

The board's *CMA/GEFCO* decision[(5)] is another example in which the board analysed the potential market foreclosure effects of a notified transaction. The transaction concerned the acquisition of sole control of GEFCO by CMA CGM.

In its decision, the board stated that it was possible to examine the situations where a non-horizontal merger may cause existing and potential competitors to have difficulties or obstacles in accessing supply sources or markets and thereby reduce the ability and/or incentive of such competitors to compete (market foreclosure) in two aspects:

- input foreclosure; and
- customer foreclosure.

The board first examined customer foreclosure as a result of vertical overlap by looking into the parties' Turkish and global shares in the freight forwarding market. As a result of the low market shares of the parties, the board found that customer foreclosure was unlikely to occur after the transaction.

When the possibility of input foreclosure was examined, the board found that undertakings engaged in container line transport activities were in intense competition for freight forwarders, which constituted a significant portion of carrier revenues. In this respect, if CMA CGM provided container line transport services to freight brokers other than GEFCO on a limited basis or did not provide this service at all, other carriers would start to provide services to these customers. Therefore, the board held that CMA CGM was obliged to provide services to freight forwarders other than GEFCO operating in the downstream market. Accordingly, the board decided that CMA CGM could not impose input foreclosure as a result of the notified transaction.

The board ultimately unconditionally approved the transaction.

Comment

In its recent decision, the board made an in-depth assessment of multi-market mergers and potential foreclosure effects within the scope of non-horizontal acquisitions. The board did not confine itself to a mere assessment of whether there was any horizontal or vertical overlap between the activities of the parties. Instead, it was keen to comprehensively analyse whether the conglomerate effects, which are generally found to be less problematic in terms of competition law.

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Endnotes

(1) Ondura (30 June 2022; 22-29/475-190).

(2) Luxottica/Essilor (1 October 2018; 18-36/585-286).

(3) Luxottica/Essilor (25 November 2021; 21-57/799-395).

(4) Vandewiele/Savio (29 April 2021; 21-24/285-128).

(5) CMA/GEFCO (2 June 2022; 22-25/402-166).