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Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority conditionally approves the acquisition of an aviation fuel supply and storage company by a rival (*POTAS / Antalya Airport Fuel Supply and Storage Facilities*)

MERGERS, ENERGY, MERGER NOTIFICATION, REMEDIES (MERGERS), JOINT CONTROL, TURKEY, COORDINATED EFFECTS, MERGER (NOTION), CHANGE OF CONTROL, MERGER CLEARANCE (PHASE I), TRANSPORT (AIR)

Turkish Competition Authority, *POTAS / Antalya Airport Fuel Supply and Storage Facilities*, Decision, 12 May 2023 (Turkish)

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e-Competitions News Issue Preview

This case summary aims to offer insight into POTAS Decision [1] (“**Decision**”) of the Turkish Competition Board’s (“**Board**”). In the Decision, the Board examined the POTAS Akdeniz Akaryakıt Dağıtım AŞ’s (“**POTAS**”) acquisition of rights to construct and operate fuel supply and storage facilities owned by Fraport TAV Yatırım Yapım ve İşletme A.Ş. (“**Fraport TAV**”) at Antalya Airport [2] (the “**Target**”) within the scope of the new concession period (“**the Fraport TAV – POTAS Transaction**”). Upon the Board’s examination and the proposed commitment package the transaction was conditionally approved by the Board.

Background and Relevant Markets

The Board first delved into the ownership structure of POTAS. In that context, the Board noted that as a preparatory step to the transaction at hand, the joint control over POTAS was acquired by Petrol Ofisi Anonim Şirketi (“**Petrol Ofisi**”) and Sera Group [3].

In terms of the parties’ activities in Türkiye, the Board highlighted that POTAS was established as a joint venture to engage in the purchase and transportation of fuel oil and related pipeline operations, sales, handling, storage, warehousing aviation operations and aircraft refueling services. The Board noted that POTAS’ primary aim is to acquire the rights and obligations for the investment and operation of aviation fuel facilities at Antalya Airport from Fraport TAV, as specified in the Tender Specifications of *General Directorate of State Airports Operations* [4] (“**DHMI**”) dated December 1, 2021. This transfer encompasses the rights to construct aviation fuel supply and storage facilities, along with a 25-year concession starting in 2027.

In its assessment regarding the relevant product market within the scope of the Fraport TAV – POTAS Transaction, the Board distinguished two distinct categories of aviation fuels: aviation gas, which is mainly imported and used in relatively small amounts, and jet fuels, which is widely used and in which Jet A-1 is considered to be the predominant variant. The Board concentrated on jet fuels and evaluated that the jet fuel supply chain comprised of three tiers; (i) refineries, (ii) fuel companies, and (iii) primarily airline companies and the general aviation sector which includes all types of flights except non-military and scheduled air transportation as the end-users and provided detailed information on the supply processes and regulatory requirements foreseen in each tier. Subsequent to its detailed explanations, the Board, making reference to its precedents [4] assessed that the airport storage and supply services constituted a separate market, distinct from jet fuel sales services and the pricing, costs associated, regulatory requirements, and customer base attached to such services differed greatly from jet fuel sales. The Board noted that the jet fuel sales, where undertakings sold the product through (i) operation of storage facilities, or (ii) procurement of services from licensed providers, or (iii) using collection agents for fuel transfer, should be evaluated separately since such services differed from process of transfer of the jet fuels to aircrafts. To put its assessment into context, the Board remarked that the supply and storage services are complementary to jet fuel sales activities given that the undertakings engaging in jet fuel sales activities require supply and storage services to transfer such fuel to the airplanes and these undertakings either provide supply and storage services themselves or outsource these services. Consequently, the Board defined two separate relevant product markets as follows: (i) 'jet fuel storage and supply services market' and (ii) 'jet fuel sales market'.

Additionally, the Board's assessment of the relevant geographic market in the aviation sector underscores that each airport serves as a distinct market due to the logistical challenges and flight safety risks associated with seeking alternative fuel sources. Consequently, Antalya Airport was determined to be a distinct relevant geographic market.

During its assessment, the Board diligently gathered information and documentation from a diverse range of stakeholders such as DHMI, airline companies, and other participants within the aviation fuel market. This comprehensive approach aimed to ensure a thorough understanding of the broader industry dynamics and the specific details of the transaction under review. Notably, the undertakings approached for information not only cooperated by furnishing insightful explanations about the transaction but also took the opportunity to articulate specific concerns they harbored. This engagement facilitated a more nuanced perspective, providing the Board with a holistic view of both the positive and potentially challenging aspects associated with the transaction. As a result, the assessment reflects a balanced understanding of the Fraport TAV – POTAS Transaction's implications on competition within the aviation fuel market.

Assessment on the Horizontal and Vertical Overlaps

In an effort to determine the horizontal and vertical overlaps that would arise as a result of the transaction, the Board examined the activities of the parent entities of POTAS, namely Petrol Ofisi and Sera Group as well as the activities that POTAS is contemplated to undertake in Türkiye. The Board noted that the activities of Petrol Ofisi include fuel oil, LPG and autogas, mineral oil production, distribution, storage, and sales activities whereas the activities of Sera Group include construction. In that context, the Board determined that the transaction would result in a horizontal overlap between the activities of Petrol Ofisi and POTAS in the market for "jet fuel sales market" and a vertical overlap between the activities of Petrol Ofisi and POTAS in the markets for "jet fuel storage and supply services market" and "jet fuel sales market".

In terms of the horizontally affected markets, the Board considered that the unilateral effects arising from the horizontal overlap would be minimal since POTAS would operate independent in the market and indeed will enter the market as a new player, as a full-functional joint venture, making autonomous decisions regarding the sale of petroleum products and establishing its business structure within its sea and land logistics network, including

intermediate terminal storage areas, if necessary. In contrast, Petrol Ofisi will continue to operate using its existing supply, logistics, and intermediate terminal storage network. Considering POTAS's status as a newly established venture with no prior market presence, the Board determined that the transaction would not eliminate a competitive player or reinforce the market power of Petrol Ofisi due to unilateral effects. Consequently, no competitive issues arising from unilateral effects are anticipated within the scope of the relevant transaction.

As for the coordinated effects, the Board remarked that although there is a potential coordination risk given that POTAS and one of its joint venture parents, Petrol Ofisi, would be both active in Antalya Airport in jet fuel sales activities, the transaction would not hinder competition in the market by inducing coordinated effects, due to the fact that airlines typically hold jet fuel tenders at airports for relatively short periods (1-2 years), and there are no barriers to airlines changing suppliers at the end of the tender period, and the sector is subject to various regulations. The Board remarked that currently there are active joint ventures in the jet fuel storage market among fuel companies and airlines, operating independently or in collaboration with other storage undertakings at various airports across Türkiye and the fact that there have not been any examinations and/or complaints into these undertakings with coordination allegation is in support of the view that coordination risk is low. The Board further emphasized that information exchange, limited to sales quantities and unrelated to price and sales conditions, is not considered competition-sensitive in the aviation fuels market, citing its precedents [5]. The Board noted that obtaining such information within joint ventures would not likely to result in a competition-restricting outcome. This, coupled with the evaluation suggesting a weak probability of competition restrictive effects due to information sharing, have led to the assessment that the notified transaction will not impede competition in the market through the creation of a coordination inducing effects.

In terms of the vertically affected markets, the Board, from a supply chain perspective, considered the 'jet fuel sales market' offered by Petrol Ofisi as a downstream market of the 'jet fuel storage services market', where POTAS would be active from 2027 onwards. As a result of the competitive assessment, the Board remarked that the main competitive concern related with the transaction would be the prevention of competing fuel companies' access to storage facilities or creation of competitive disadvantage for these companies by way of cost increases. The Board noted that the transaction entailed the risk of exclusionary behaviors, specifically due to the fact that Petrol Ofisi held control over POTAS. To that end, the Board remarked that there would be a theoretical incentive for input foreclosure, given that POTAS would have the ability to effectively exercise input foreclosure and compensate for its profit loss in the downstream market, where Petrol Ofisi holds high market shares. Additionally, the Board noted that the input is crucial and indispensable for the undertakings to continue their operations in jet fuel sales market in Türkiye considering Antalya Airport's position among other airports in Türkiye.

Assessment on the Commitments

POTAS has presented a commitment package to eliminate the potential competition law issues identified in the previous section. The commitment package includes the following commitments:

- To make complete submissions for obtaining all the legal permits without delay and undertake procedures necessary for providing storage services to third parties. POTAS will ensure that no delay would occur in terms of obtaining the license and provision of the storage services to third parties.
- To accept the access requests of third parties to storage services following the transaction. Access requests will be fulfilled by taking the supply security and capacity rates and access fee will be implemented in accordance with Energy Markets Regulatory Authority's ("EMRA") tariffs. Storage services could only be provided to firms that undertakes delivery of goods liability to an airline company

- To undertake the services to fulfil requests of third parties to purchase goods from the storage area as well as underwing refueling with purchased or stored goods in accordance with approved tariffs.
- To increase its storage prices, based on the EMRA's tariffs effective as of the transaction date, annually at a rate of inflation related to the price formation in the sector. Any cost increases occurring due to additional investments entailed by the growth of the Antalya Airport market or force majeure events or regulatory decisions can be reflected to POTAS' prices. POTAS commits to show each service items within the storage and supply services separately in the invoices that it would issue.
- To implement Open Access Principles in accordance with DHMI's tender documents and international best practices.
- To operate fuel facility 24/7 and keep the facility open to all undertakings evidencing the permits necessary for aviation fuel sales and show each service items within the storage and supply services separately in the invoices that it would issue.
- To ensure access of facility for fuel supply in Antalya Airport to all undertakings evidencing the permits necessary for aviation fuel sales.
- To act indiscriminately to all undertakings.
- The prices charged to system users will be based on EMRA's approval and the prices that are not regulated by EMRA could not be increased more than 75% of the increase of US consumer price index for that year, unless the parties agrees to the contrary.
- To put its best efforts with its subsidiaries and affiliated parties to ensure a competitive environment in Antalya Airport, marine terminals that is a part of fuel supply chain of Antalya Airport and related pipeline facilities.

In light of the information provided above, it has been concluded that the competitive concerns that may arise as a result of the notification transaction are addressed by the commitments proposed by POTAS and are considered sufficient to remedy potential competition issues. Therefore, the Board conditionally approved the transaction is subject to the commitments presented. Furthermore, the Board has stated in its decision that the commitments introduced regarding the approval decision will constitute obligations and in the event of a breach of these obligations, along with other measures, administrative monetary fines stipulated in Article 17 of Law No. 4054 [1] shall be applied to the parties.

Conclusion

The Decision provides a thorough analysis of the conditional approval provided for the Fraport TAV – POTAS Transaction. It offers an up-to-date perspective on concentrations within the aviation fuel sector, reinforcing the Board's earlier decisions that have sectoral mergers through well-crafted commitments. This approach underscores the Board's dedication to promoting competition while considering the nuanced intricacies of the aviation industry.

[1] Decision of the Board dated 12.05.2023 and numbered 23-22/426-142.

[2] Antalya Airport, operational since 1960 and serving international flights since 1985, had its

operational rights transferred to Fraport TAV following the Board's decision dated 29.03.2018. In this decision it is noted that it is the 14th busiest airport in Europe based on the 2018 Airports Council International data. Moreover, according to the 2022 flight data from DHMI, Antalya Airport is Turkiye's busiest airport after Istanbul Airport and Sabiha Gökçen Airport. Additionally, DHMI's 2022 passenger count places it as the airport with the second-highest passenger traffic in Turkiye, following Istanbul Airport. Antalya Airport is a hub for 266 airline companies.

[3] Decision of the Board dated 23.02.2023 and numbered 23-10/158-49

[4] *Mobil Oil- THY Opet* Decision of the Board dated 16.07.2014 and numbered 14-24/482-213.

[5] *BP/Shell/THY Opet* Decision of the Board dated 28.12.2006 and numbered 06-95/1202-365.

[6] If obligations introduced or commitments made by a final decision or interim measure decision are not complied with, the Board shall, for each day, impose on the undertaking an administrative fine amounting to five in ten thousand of the annual gross revenues of the relevant undertaking. This fine shall be based on the financial year concluding before the decision or, if it is not feasible to calculate, the financial year closest to the date of the decision.