***Potential Consequences of Acquisitions of Minority Shareholdings under Turkish Competition Law***

Authors**:** Gönenç Gürkaynak, Esq., Elif Açelya Balkı and Sinan Diniz, ELIG, Attorneys-at-Law

The acquisition of a minority shareholding may come under the Turkish Competition Authority's ("***Authority***") scrutiny in two ways, mainly: 1) it may result in *de facto* or *de jure* sole or joint control, depending on the rights possessed by the minority shareholders and/or shareholding structures and past voting patterns; and 2) it may not result in control but in cross-shareholding structures amongst competitors in a concentrated market which may raise questions about coordinated effects. This article discusses the circumstances under which the abovementioned consequences may arise under Turkish competition law with references to the relevant legislation and the most noteworthy cases in this regard.

**Acquisition of *De Jure* Sole/Joint Control**

The most common and straightforward consequence of an acquisition of a minority shareholding is the acquisition of sole or joint control over an undertaking through the controlling rights provided to the minority shareholder. The scope of these rights may change from one case to another, depending on the content of the shareholders' agreement or other tools in this respect.

To begin with, a minority shareholder may acquire sole control over an undertaking, if it holds the power to manage the activities of the undertaking, decide on the strategic matters and assign more than half of the members of the board of directors by itself.[1] These shares are referred to as the "privileged shares" or, if in previously state-owned undertakings, as "golden shares". That said, these cases are quite rare in practice.

Another form of sole control through minority shares is the negative sole control which is explained in the Authority's Guidelines on the Concepts of Mergers & Acquisitions and Control ("***Guidelines on Control***") as follows: "*A typical situation (...) where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder*"[2]. The Turkish Competition Board ("***Board***") determined a negative sole control situation in its *Hedef Medya* decision[3], where Doğuş Holding, the minority shareholder with 40% shares in Hedef Medya, had no power to make strategic decisions solely but could prevent the majority shareholder to make any strategic decisions through its minority shareholding rights.

[1] Competition Authority's Guidelines on the Concepts of Mergers & Acquisitions and Control, para 43.
[2] *Ibid*., para. 44.
[3] *Hedef Medya*, 12-14/445-127, 29.03.2012

Interesting enough, the Board did not name the situation as a "negative sole control of a minority shareholder" in the decision.

On the other hand, in majority of the acquisitions of minority shareholdings, it usually results in joint control structures. Many of the Board's precedents[4] and the Guidelines on Control[5] list the most plausible cases where the minority shares could provide rights which are beyond "ordinary" and enable the shareholder to exercise joint control over the target. These rights are usually called "veto rights" on the decisions which are essential for the strategic activities of the joint venture[6]. These veto rights must be related to strategic decisions on the business policy of the joint venture such as the budget, the business plan, major investments or the appointment of senior management[7]. It is accepted sufficient for the minority shareholders to acquire joint control through some or even one veto right as such. The Board conducted this approach in many decisions parallel to the EU Commission's conduct before July 2013 and it Guidelines on Control provided for a proper explanation, again in line with the EU guidelines[8].

Finally, joint control by minority shareholders may occur in rare situations when the minority shareholders do not hold veto rights but two or more of them gain joint control over the undertaking by acting as stable coalitions. In such cases, the minority shareholders may be able to block the strategic decisions of the joint venture successfully only with each other's agreement. However, if these coalitions are not stable and majority is set by a different combination of minority shareholders in each case, this is called "*shifting alliances*"[9] and do not provide joint control to the shareholders.

**Acquisition of *De Facto* Sole/Joint Control**

Where the formal rights arising out of the acquisition of a minority shareholding (e.g. voting rights, veto rights, etc.) do not amount to providing *de jure* control, the Board also analyzes whether the acquisition has resulted in a change in *de facto* control. The concept of *de facto* control is dealt with extensively in the Guidelines on Control.

The Guidelines on Control provides that a *de facto* sole control situation arises primarily where, based on past patterns of attendance, the holder of a minority shareholding has a high chance of forming the majority in the shareholders' meetings[10]. Where the track record of

[4] For instance, *Airties*, 10-65/1388-514, 14.10.2010; *Deutsche Bank*, 10-65/1371-509, 14.10.2010; *Seef Foods*, 08-71/1149-446, 15.12.2008; *Saudi Telecom Company*, 08-29/366-120, 17.4.2008.
[5] *Guidelines on Control*, para. 51-54.
[6] Guidelines on Control, para. 51.
[7] Guidelines on Control, para. 53.
[8] Adopted on July 16, 2013.
[9] Mentioned in the Board's decisions: *Cimpor*, 12-24/665-187, 03.05.2012; *Hayat Holding*, 11-28/548-166, 04.05.2011; *Aşkale*, 10-27/385-140, 31.03.2010;
[10] Guidelines on Control, para. 45.

attendance patterns makes a *de facto* sole control situation likely, the Board would conduct a forward looking analysis where it also takes into account potential changes to the past pattern of attendance which may come about after the acquisition[11]. In its analysis, the Board takes note of various factors such as whether the rest of the shares are dispersed among many shareholders or relatively concentrated, whether there are links (structural or economic) between the large minority shareholder and other shareholders or whether the other shareholders' investment is strategic or merely financial. The relevant criterion of *de facto* sole control is whether the large minority shareholder will be able to form the majority in shareholders' meetings in a consistent manner.

The Board has applied the above standard and decided on the existence of *de facto* sole control on various occasions. For example, in *Axalto/Gemplus*[12], the Board took note of the attendance rates in the shareholders' meetings of Gemplus, which had remained below 80%, and therefore the acquisition of 43.7% of Gemplus' shares by Axalto Holding resulted in the acquisition of sole control. Similarly, in *Jacobs/Akila*[13], the Board found a shareholding of 29.3% sufficient to provide sole control. The Board recognized that Akila's shares were highly dispersed and that therefore a shareholding of 29.3% would make Jacobs the largest shareholder by far. Analyzing the past attendance meetings at shareholder meetings, the Board found that the attendance rate had not arisen above 52.5% for the past five years and therefore a shareholding of 29.3% would be sufficient to provide sole control of Akila.

In addition to the ability to form the majority in the shareholders' meetings, the Guidelines on Control also provides that the economic dependency created by instruments such as long-term supply agreements for crucial resources and/or loans by customers or suppliers, coupled with structural links such as management or shareholding, may result in *de facto* control over an undertaking. The Board's *Besler/Turyağ* decision[14] constitutes an example where the Board based its finding of control on economic dominance. In the relevant transaction, Besler would be able to appoint only one out of five directors in Turyağ's board according to the shareholders' agreement. The Board noted the following: (i) the financial contribution of Besler would be crucial to Turyağ, (ii) the other shareholders were unlikely to act independently of Besler, due to the strong position, as well as financial strength, of the Ülker group of which Besler formed a part in the relevant product market, and (iii) Ülker group was also the largest customer for some of Turyağ's products. The Board also noted certain economic connections between the other shareholder groups (Çallı and Uğur families) and the Ülker group. As a result of the above considerations, the Board found that Besler would possess the sole control of Turyağ after the acquisition.

[11] *Ibid*.
[12] *Axalto/Gemplus*, 06-33/410-107, 11.5.2006.
[13] *Jacobs/Akila*, 06-27/319-74, 14.4.2006.
[14] *Besler/Turyağ*, 10-64/1355-498, 12.10.2010.

The above considerations are also relevant to a joint control scenario. For example, in *Luxotica*,[15] the Board decided that, while one party had the *de jure* right to control the company, target was jointly controlled due to the main shareholder groups' history of acting together.

Ultimately, both the relevant provisions of the Guidelines on Control and the decisional practice of the Board show that the Board look at the totality of the circumstances in its assessments of whether an acquisition of shares will lead to *de facto* control.

**Cross-shareholding Structures Which May Raise Questions about the Coordinated Effects**

While the acquisition of a minority stake not conveying any control rights would be outside the scope of merger control regime, the acquisition of minority rights in competing undertakings may potentially come under the scrutiny of the Board under Article 4 of Law No. 4054 on Protection of Competition ("***Law No. 4054***"), which is closely modeled on and akin to Article 101 of the TFEU, due to the possibility of facilitation of coordination raised by such shareholdings in rival undertakings.

The fact that an acquisition of a minority shareholding can be challenged under Article 4 has been established in the Board's *Nitro-Mak*[16] decision. The relevant transaction concerned the indirect acquisition of a minority stake in a Turkish company which came under the Authority's radar due to the suspicion of a potential standstill obligation. The Board ruled upon close inspection that the transfer of shares did not result in a change of control and therefore was outside the scope of the Turkish merger control regime (thus no standstill obligation violation). Nevertheless, the Board opined that given the concentrated nature of the market in question, the acquisition could be evaluated under Article 4. This investigation did not proceed further because the acquirer had already moved to divest the shares[17]. Nevertheless, the *Nitro-Mak* decision is of crucial importance as it laid down the the Authority's potential inclination to go after even those acquisitions that do not not conferg control. Since *Nitro-Mak* decision, there has not been a similar decision in which an acquisition of shares not conferring control was considered within the scope of Article 4 and therefore the exact approach that the Board would take in such a case is not altogether clear.

Past investigations concerning horizontal coordination between competing undertakings provide guidance with respect to the potential approaches. For example, in the *Erdemir/Borçelik/ArcelorMittal* decision[18], the Board found that Erdemir's 9.34%

[15] *Luxotica*, 10-33/507-184, 22.4.2010.
[16] *Nitro-Mak*, 07-29/268-98, 29.3.2007.
[17] In the case at hand, the acquirer had already taken steps to sell the relevant shares to another undertaking and therefore the Board saw no need to undertake an analysis under Article 4.
[18] *Erdemir/Borçelik*, 09-28/600-141, 16.6.2009.

shareholding in Borçelik led to coordinative effects between the two companies in the form of frequent information exchanges and mandated the divestiture of Erdemir's shareholding in Borçelik. The Board also found that Erdemir's 25% shareholding in ArcelorMittal Ambalaj Çeliği ("***A.M. Ambalaj***"), a local subsidiary of ArcelorMittal, facilitated coordination between Erdemir and A.M. Ambalaj for the purpose of limiting the supply of steel products and required the divestment of Erdemir's shares. Particularly, the share purchase agreement and the commercial agreement in relation to Erdemir's purchase of A.M. Ambalaj shares were found to have the purpose and effect of restricting competition. The Board reasoned its position by referring to the *Nitro-Mak* decision and explained that "*an acquisition of a minority shareholding in a competitor in a highly concentrated industry can be considered within the ambit of Article 4, even in the absence of any other restrictions of competition*". As a result, while the decision rests on evidence of actual coordination in the market, it provides further support for the position that the Board could utilize Article 4 in relation to the acquisition of shares in a competitor.

In the earlier *Türkiye – İtalya Ro-Ro* decision,[19] also mentioned by the Board in *Erdemir/Borçelik/ArcelorMittal*, the Board stated that interlocking directorates and high-level executives between competing undertakings in highly concentrated industries would inevitably lead to coordination. As a result, the Board ordered behavioral remedies to make sure that no employee of UN Ro-Ro would take a position in the management of Ulusoy Ro-Ro's board of directors and vice versa.

Based on the two decisions above, if the Board goes after the acquisitions of minority shares in competing undertaking within the realm of Article 4 , it will likely order behavioral remedies to prevent coordination or may order the divestment of shares altogether. Both *Erdemir/Borçelik/ArcelorMittal* and *Türkiye – İtalya Ro-Ro* have included administrative monetary fines imposed against the undertakings, but the fining decisions were based on actual coordination in the market. Given that the Board did not seek a fine in *Nitro-Mak* decision and was content with the voluntary divestment of shares, it seems unlikely that the mere acquisition of a minority share, without any accompanying anti-competitive conduct, would trigger administrative monetary fines. That said, in the absence of an enforcement record, the issue remains to be seen.

**Conclusion**

In light of the foregoing, it is fair to conclude that minority shareholdings may not provide anything more than a capital investment in an undertaking or may very well be a controlling device if designed properly. Another scenario is that the acquisition of the minority shares would not amount to a sole or joint control by the minority shareholder but a cross-shareholding structure in a rival undertaking. Either way, the acquisition of minority shares

[19] *Türkiye – İtalya Ro-Ro*, 05-46/668-170, 13.7.2005.

requires great attention of the potential acquirers and the competition law counsels. That is because minor tunings in shareholders agreements or the other tools providing rights to the minority shareholders as well as the market structures may give rise to important consequences in terms of controlling powers and shareholding structures.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

*(First published in Mondaq on September 1, 2014)*