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Turkey: Parental Liability For Competition Law Infringements Of Subsidiaries Under Turkish Competition Law

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The following discussion compares the approach of the Turkish Competition Authority ("Authority") with that of the European Commission ("Commission") in the application of parental liability and the imposition of fines to parent companies. The current stand of the Authority with respect to the issue of liability of a parent company for the involvement of its subsidiary in anti-competitive behavior remains at odds with the Commission's approach on the subject.

Under the European Union competition law practice, it is an established principle that parent companies could be held responsible for the competition law infringements of their wholly owned, non-wholly owned subsidiaries as well as for their joint ventures. Although the principle is well-established, a number of issues relating to the parental liability still remain open under the European Union law. This is illustrated by several recent cases pending before the European courts. The first one involves the Commission's appeal in *Commission v Stichting Administratiekantoor Portielje* (Case C-440/11 P). The Attorney General Kokott's non-binding opinion comes against the General Court's decision in *Stichting Administratiekantoor Portielje*, arguing that the General Court erred in law in deciding that a parent undertaking that does not engage in an economic activity cannot be held responsible for the subsidiary's infringement. Attorney General Kokott accepted the Commission's argument in this case that Gosselin (the subsidiary) and Portielje (the family foundation which controls all of the shares in the capital of Gosselin) together form a single undertaking. Another pending case and an interesting issue involves the referral by a Dutch company to the European Court of Human Rights of the issue on whether the parental liability presumption infringes the right to be presumed innocent under Article 6 of the European Convention on Human Rights.

The Concept of an Undertaking and Applicable Fines under Turkish Competition Law

The concept of an undertaking is stipulated in the relevant legislation, particularly under Article 3 of the Act on the Protection of Competition (Law No. 4054), which provides that an undertaking is "Natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole." Hence, with the said article, the principle of economic unity is well-embedded in the legislation. The decisional practice of the Turkish Competition Board ("Board") establishes that family ties alone could be sufficient to deem economic unity (*e.g. see*, *Construction Companies*, 12-24/666-188, 03.05.2012; *Privatizations of Electricity Companies*, 10-78/1645-609, 16.12.2010).

The amounts of fines applicable in cases of infringement are stipulated under Law No. 4054. Article 16 provides that "(...) To those who commit behavior prohibited in Articles 4, 6 and 7

of this Act, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision (...)". Furthermore, Article 4/2 of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position provides that "The amount of fine to be determined may not exceed ten percent of the annual gross revenue of the undertakings and associations of undertakings or the members of such associations to be fined, generated at the end of the fiscal year preceding the final decision (...)".

The relevant articles indicate that the base fine is calculated on the basis of annual gross revenue of the undertaking to be fined however, the Board has exceptional decisions where it only considers the revenue in the relevant market (*Kastamonu Coaches*, 06-11/143-33, 9.2.2006) or exclude the revenue obtained from exports (*White Meat Cartel*, 09-57/1393-362, 25.11.2009). Recently, the High State Court explicitly stated that it is against the regulation to calculate the administrative monetary fine on the basis of the revenue obtained in the relevant market (13th High State Court, 2012/965 K). Within this realm, the decisional practice of the Board in the calculation of the appropriate administrative monetary fines shows that the Board has not so far referenced to the aggregate global group turnover (i.e. global turnover of an international undertaking), but limited to the turnover of the legal entity that is the addressee of the decision.

Parental Liability Examined

In cases where the Authority finds that a certain engagement amounting to a restriction occurs among the entities that are within the same economic unit, the Board makes use of the principle of the "group privilege", in which the undertakings cannot be considered to have violated the relevant provisions of competition law concerning the prohibition of anti-competitive agreements, decisions and concerted actions (Article 4 of Law No. 4054). In another recent case concerning Turkish Halkbank (12-24/666-188, 03.05.2012), the Board stated that the alleged agreement between the Turkish Halkbank and the concerned insurance companies could not be evaluated under Article 4 of Law No. 4054 given that the relevant entities are part of the same economic unity. Similarly, in another recent case involving several construction companies (12-24/666-188, 03.05.2012) which were alleged to have engaged in a bid rigging, the Board established that the relevant entities were part of the same economic unit and therefore would not be caught by Article 4 of Law No. 4054. (*See Also*,12-17/496-139,06.04.2012; *T.C. Ziraat BankasÄ±*, 10-66/1393-515, 21.10.2010; *Oyakbank/TukaÅx*, 04-66/952-230, 19.10.2004).

The Board has explicitly acknowledged economic entity principle in other cases, such as in abuse of dominant position cases; however, it did not impose liability on the ultimate parent. One case in particular where the Board established "limited" parent liability was in case of Doğan Yayın Holding ("DYH") (11-18/341-103, 30.03.2011), where the Board deemed the relevant undertakings (i.e. Hürriyet Gazetecilik ve Matbaacılık A.Ş., Doğan Gazetecilik A.Ş., Bağımsız Gazeteciler Yayıncılık A.Ş., Doğan Daily Nevs Gazetecilik ve Matbaacılık A.Ş.) to be within the same economic entity of DYH and that DYH would be responsible in the investigation. DYH, however, has activities outside of the named print entities, and its activities range from magazines, television and radio channels, digital media and other media activities. Doğan Şirketler Grubu Holding, which is the 75% shareholder of Doğan Yayın

Holding, engages in business activities ranging from tourism to energy and telecommunication. The case involved the abuse of dominant position through rebate systems and discounts, in which the Board imposed monetary fines to DYH's individual above mentioned print media entities. Although the Board discussed economic entity principle and found that the above mentioned entities are all in the same economic unity, in the imposition of the fines, the Board did not calculate the fines based on DYH's turnover, but rather calculated based on the specific entities' turnover (i.e. Hürriyet Gazetecilik ve Matbaacılık A.Ş., Doğan Gazetecilik A.Ş., Bağımsız Gazeteciler Yayıncılık A.Ş., Doğan Daily Nevs Gazetecilik ve Matbaacılık A.Ş.).

In some of the cases, it is possible to find that the Board fined parent companies, such as in cases where parent companies have a joint venture; however, these cases show that the parent companies themselves also engaged in the anti-competitive behavior along with the joint venture itself. For instance, in *Print Distribution* Case (07-63/777-283, 02.08.2007), BBD, YAYSAT, both of which are media groups, and BIRYAY, a joint venture between BBD and YAYSAT, were fined for abuse of dominance through the prevention of another undertaking from entering into the area of commercial activity. The Board applied monetary fine to all three undertakings individually as they were all part of the infringement.

Differently but not conversely, in Siemens/Sintek (07-34/349-129, 24.04.2007), the Board condemned Siemens Turkey and Sintek, which was the distributor of Siemens, for, inter alia, their participation in an illegal restrictive joint venture, AMBER. AMBER was a newly-established company, yet to become operational. The Board did not fine the joint venture (AMBER). Similarly, in Cement Cartels, the Board fined parent companies (ÇimSA and Adana Çimento) of a joint venture (OYSA) restricting competition through a coordinative joint venture (OYSA) and for preventing competition in the market; however the Board did not fine the joint venture. Similar to the approach in the aforementioned cases, the Board, in BİMAŞ (02-64/803-325, 21.10.2002) fined the parent companies (DTV and Satel) of the joint venture (BİMAŞ) on the basis of their illegal collusion through the joint venture. The monetary fines were applied on the basis of each of the parents regardless of their shares in the joint venture. In the same decision, the Board applied administrative monetary fine to BİMAŞ as well, however, the fine was applied on the basis of a failure to notify a notifiable agreement.

Conclusion

As the above discussion shows, in some cases, the Authority acknowledges the economic unit aspect, and deems subsidiaries and their parent companies as acting "principals of a single undertaking." The consequence emanating from this is that the Authority does not find the relevant restriction (such as bid-rigging and price-fixing) among the undertakings within the same economic unit as violating competition law as the undertakings at issue cannot be considered as separate undertakings. There are also some cases where the Authority established a unique form of "limited" parental liability. However, unlike the Commission's approach, even in cases where the Authority finds some form of a "limited" parental liability, the Authority does not impute responsibility to the ultimate parent that holds decisive influence over the group.