**An Analysis of Remedies in Concentrations under Turkish Competition Law**

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## I. Introduction

Merger remedies have an important role in the assessment of problematic concentrations which also create certain efficiencies. Since 2014, the number of the transactions that have been made subject to Phase II review by the Turkish Competition Board has shown increase. In connection with this trend, it is also observed that remedies are implemented to remove competition law concerns raised by some of these mergers. Accordingly, the importance of conditional clearances and the remedies has been strengthening under Turkish merger control regime.

This article first presents the mainstream principles, design and implementation of merger remedies and then looks into recent application of remedies by the Turkish Competition Board ("Board") in Phase II review of concentrations[1]. Particularly *Bekaert/Pirelli*[2] is significant where the Board granted an approval conditioned on the effective use of behavioral remedies. Recent decisions of the Board signal that remedies are likely to be used more frequently in the future as constructive tools in removing the anticompetitive effects of a concentration and utilizing its efficiencies.

Remedies proposed to eliminate the competitive concerns resulting from the concentration are generally classified as "structural" and "behavioral". The Turkish competition law regime classifies remedies in this line, as well.[3] A structural remedy relates to the concentration's structure which generally requires the divestiture of a certain business whereas a behavioral

[1] *see THY/OPET/Mobil Oil* decision numbered 14-24/482-213 and dated 16 July 2014, *Bekaert/Pirelli* decision numbered 15-04/52-25 and dated January 22, 2015, and *AFM/Mars* decision numbered 11-57/1473-539 and dated November 17, 2011.
[2] *see Bekaert/Pirelli* decision numbered 15-04/52-25 and dated January 22, 2015.
[3] Guidelines on the Remedies that are Acceptable by Turkish Competition Authority in Merger and Acquisition Transactions, para. 18.

remedy concerns the behavior of the parties in the market.[4] That said the Board's recent approach to remedies attests that such categorization is in fact irrelevant for the purposes of remedy mechanism. Whether structural or behavioral, the proposed remedy must be assessed in terms of its efficiency in preventing the creation or strengthening of a dominant position and removing the competition law concerns.[5]

Structural remedies, by their nature, are permanent and do not require monitoring measures unlike behavioral remedies.[6] In this respect, behavioral remedies could be burdensome and generate direct and indirect costs.[7] Furthermore, the complexity and execution of behavioral remedies for a long time may endanger achieving the intended effect of the remedy or create loopholes through which the undertaking may evade the purpose of the remedy.[8]

However, behavioral remedies may be useful as well in cases where a structural remedy is not feasible or practical.[9] If, for example, divestiture is impossible or ineffective, as it may be in vertical concentrations, a behavioral remedy which grants open access of competitors to infrastructure (access remedies)[10] may be employed independently. Additionally, behavioral remedies are reversible and flexible which makes them preferable in certain cases where the market is changing rapidly, such as technology markets.[11]

The Board, alike the Commission, prioritizes the structural remedies over behavioral remedies and prefers the remedy proposals to include structural remedies as long as the conditions allow it and it is feasible.[12] In the past, the Board accepted behavioral remedies generally as a support to structural remedies due to their said drawbacks, or for minor competition law

[4] *id. Also see* Allison Jones, Brenda Sufrin, EU Competition Law Text, Cases and Materials, Fifth Edition, p. 1247.
[5] Alistair Lindsay, Alison Berridge, The EU Merger Regulation: Substantive Issues, Fourth Edition, p. 633.
[6] Allison Jones, Brenda Sufrin, EU Competition Law Text, Cases and Materials, Fifth Edition, p. 1248.
[7] The direct costs of behavioral remedies may arise from designing, monitoring and enforcing the remedy whereas behavioral remedies may also create indirect costs which may accrue in case of a distortion in the market caused by the lengthy enforcement or evasion of the obligations of the remedy. See Ariel Ezrachi, Under (and Over) Prescribing of Behavioral Remedies, The University of Oxford, Centre for Competition Law and Policy, Working Paper (L) 13/05, p. 3.
[8] Ariel Ezrachi, Under (and Over) Prescribing of Behavioral Remedies, The University of Oxford, Centre for Competition Law and Policy, Working Paper (L) 13/05, p. 2-3.
[9] *id.* at p. 2.
[10] *see Turk Telekomünikasyon/Invitel* decision numbered 10-59/1195-451 and dated September 16, 2010.
[11] Ariel Ezrachi, Under (and Over) Prescribing of Behavioral Remedies, The University of Oxford, Centre for Competition Law and Policy, Working Paper (L) 13/05,p.3.
[12] *id.* at, p. 2.

problems.[13] Recent decisions of the Board where behavioral remedies are heavily used[14] or found sufficient to remove the competition concerns[15] indicate that the Board further recognizes advantages of this tool.

## II. The Guidelines on Remedies in Mergers and Acquisitions Transactions and the Board's Decisional Practice

Remedies find their legal basis under Article 14 of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Board's Approval ("Communiqué")[16] which provides that the parties to a concentration that raises competition law concerns may propose remedies in order to remove such concerns. The Board, in its Guidelines on the Remedies that are Acceptable by Turkish Competition Authority in Merger and Acquisition Transactions ("Guidelines")[17] further provides guidance on the mainstream principles and requirements concerning the acceptable remedies. The Guidelines, alike the Commission Notice on remedies acceptable Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("Notice"),[18] explicitly underline the Board's preference for divestitures which present their results in the short term and do not require monitoring[19] in contrast to behavioral remedies which are exceptional and secondary to structural remedies.[20]

The Guidelines provide that the parties have the discretion whether to provide any remedy or not, and that the Board may let the parties revise the proposed remedies in case it does not find the proposed remedy sufficient to remove the competition law concerns.[21] Since the parties have the most detailed information in order for the Board to analyze the feasibility and sufficiency of the proposed remedies, the parties are responsible to provide all necessary

[13] OECD, DAF/COMP (2011)13, p. 201. *see* Board's *THY-Do&Co/Usaş* decision numbered 06-96/1225-370 and dated December 29, 2006.
[14] *see Lesaffre/Dosu Maya* decision numbered 14-52/903-411 and dated December 15, 2014.
[15] *see Bekaert/Pirelli* decision numbered 15-04/52-25 and dated January 22, 2015.
[16] *see* the Communiqué available at http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/S%C4%B1k%C3%A7a+Sorulan+Soru/teblig83.pdf.
[17] *see* the Guidelines available at http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fKilavuz%2fkilavuz15.pdf.
[18] *see* the Notice available at http://ec.europa.eu/competition/mergers/legislation/files_remedies/remedies_notice_en.pdf.
[19] Para. 18 of the Guidelines and para. 15-17 of the Notice.
[20] Para. 19 of the Guidelines.
[21] *id.* at para. 8, *see Lesaffre/Dosu Maya* decision numbered 14-52/903-411 and dated December 15, 2014.

information required for the assessment, and show that the proposed remedies are sufficient to remove the competition law concerns.[22]

The Guidelines list several fundamental conditions for remedies to be accepted.[23] The proposed remedies must be based on legal and economic principles, protecting the efficiencies arising from the transaction to the maximum extent, and the level of competition prior to the concentration. Importantly, the remedies must protect the competition itself, not the competitors. The conditions of a remedy must be explicit and feasible.

***Case Law on Remedies***

The above argued preference of the Board toward structural remedies is also apparent from its decisions. In consistence with the principles set forth in the Guidelines, the Board welcomes structural remedies, and supplements them with behavioral remedies in its decisions. Therefore, the Board's strict stance in favour of imposing structural remedies has evolved to removing the identified competition problem through accepting certain behavioral remedies.

In *AFM/Mars*,[24] the notified transaction concerned the acquisition of joint control over two movie theater operators, AFM and Mars, by Esas Holding and Actera. Considering that the targets were two of the largest movie theater operators in Turkey, the Board found the transaction problematic and took the case into Phase II review. Upon the commitments regarding the divestiture of certain assets (i.e. the divestiture of nine movie theater businesses and the closure of three movie theaters) and a behavioral remedy to notify the Board for a term of five years of average ticket prices, to allow the Board to monitor the market, the Board granted a conditional clearance to the transaction. During the judicial review, 13th Chamber of the Council of State annulled the decision of the Board on the grounds that the remedies accepted are not sufficient to remove the competition law concerns; yet 13th Chamber's decision was also reversed later, rendering the Board's decision lawful. The decision is an example of a case where a behavioral remedy was used to supplement and support the divestiture of certain assets.

[22] Para. 9 of the Guidelines.
[23] *id.* at para. 12.
[24] *see AFM/Mars* decision numbered 11-57/1473-539 and dated November 17, 2011.

On the other hand, sometimes, even structural remedies may be found inadequate. In *Beta Marina/Setur*,[25] the Board did not even grant a conditional clearance to the transaction which concerned the acquisition of the shares of Beta Marina and Pendik Turizm Yat Marina by Setur. The Board found that the notified transaction results in the creation of a dominant undertaking and therefore significantly impedes competition in the market. Even though Setur offered to exclude the acquisition of the operating rights of Kalamış Marina, the Board decided that such commitment is not aimed at or sufficient to remove the competition law concerns raised by the transaction.

The Board granted approvals to transactions which did not pose significant competition law concerns with behavioral remedies in Phase I. In *THY-Do&Co/Usaş*,[26] the proposed transaction concerned the acquisition of the assets used in in-flight offerings and the personnel of Uçak Servisleri ("Usaş") by THY-Do&Co, a parent company of which is THY, a major Turkish airline. Finding that Usaş is in a leader position with a high market share in in-flight offerings market and that the largest customer in the market is THY, realizing the 50% of the purchases in the market, the Board was concerned regarding the potential customer foreclosure effects of the transaction. Moreover, the Board received several complaints and petitions asking the Board not to grant a clearance for the transaction on the grounds that the transaction will foreclose the market and restrict the access of other airlines to in-flight offerings market. The Board asserted that the transaction may indeed impede the competition in the market for passenger transportation via airline by raising rivals' costs. Considering the anti-competitive effects of the transaction, the Board granted a conditional clearance for the transaction, subject to THY-Do&Co's commitment to abstain from engaging in exclusionary conduct in favor of THY. Even though the remedies accepted by the Board in the said case consisted of pure behavioral remedies (i.e. abstaining from engaging in exclusionary conduct), the decision came with dissenting opinions of the Board members. In the dissenting opinions, it is emphasized that non-discrimination is an obligation on all undertakings, and that the decision does not impose any monitoring mechanism on the purchases from Usaş.

[25] *see Beta Marina/Setur* decision numbered 15-29/421-118 and dated July 09, 2015.
[26] See *THY-Do&Co/Usaş* decision numbered 06-96/1225-370 and dated December 29, 2006.

Given that *THY-Do&Co* was a decision of 2006, the Board following the Commission[27] drew its approach towards behavioral remedies much more clearly with the Guidelines in 2011.

In another decision with regard to THY,[28] the transaction concerned the establishment of a joint venture between THY and Havaalanları Yer Hizmetleri ("Havaş") which provides ground services for airline companies in several airports. The joint venture agreement set forth that THY and TGS (the joint venture) will enter into a contract for the supply of ground services for a term of 5 years with a possibility of a renewal for another 5 years. As THY have a significant market power in the market for airline transportation (downstream market) and is the largest customer in the market, the Board was concerned that THY may raise its rivals' costs by refusing to supply and foreclose the market and therefore took the transaction into Phase II review. The parties, in order to remove the competition law concerns of the Board, amended the said agreement and provided fair dealing clauses which provided that THY may enter into supply agreements with other ground service providers at the end of the first 5 year term. The Board granted an approval to the transaction on the condition that THY will notify the Board in case THY's market share in an airport exceeds %40 and the term of the ground service agreement to be executed for the related airport is longer than 3 years.

The Board's decision regarding the acquisition of Bağımsız Gazeteciler Yayıncılık and Kemer Yayıncılık ve Gazetecilik (Vatan Gazetesi) by Doğan Gazetecilik[29] provides another example in terms of the application of behavioral remedies. Considering that the transaction raises competition law concerns, the Board conditioned the approval of the transaction on certain structural and behavioral remedies. Accordingly, it was decided that the loyalty and trademark rights of Vatan Gazatesi to be transferred to a third party. In addition, significantly, finding that an executive of Vatan Journal Group will also be acting as an executive of Doğan Gazatecilik, the Board decided for the removal of the said executive from the office of Vatan Journal Group in order to establish its independence.

The Board's approach explained above is in line with the Commission's as well since it is also reluctant in accepting solely behavioral remedies in a concentration which may be

[27] Para. 69 of the Notice.
[28] *see THY/Havaş* decision numbered 09-40/986-248 and dated August 27, 2009.
[29] see *Vatan Gazetesi* decision numbered 08.23/237-75 and dated March 3, 2008.

considered to raise competition law concerns. In the Notice, the Commission underlines this point of view by also stating that "the divestiture commitments are the best way to eliminate competition law concerns."[30] The Commission, in *GE/Honeywell*[31] and *Tetra Laval/Sidel*[32] decisions, rejected the behavioral remedies proposed by the parties. In these transactions, the parties, in order to remove the competition law concerns of the Commission offered to abstain from certain commercial behaviors, such as bundling products. The grounds for the Commission's rejections were that the commitments consisted of only promises and required excessive monitoring to ensure the resolution of competitive concerns.[33] However the Court of Justice of the European Union, in its decision of *Commission v. Tetra Laval BV*[34] changed its approach towards remedies by stating that the Commission must consider any proposed commitment when determining the likelihood of anti-competitive effects of the concentration. Accordingly, the Commission accepted behavioral remedies, specifically "conduct" commitments in several cases where the proposed commitments were deemed as sufficient to remove competition law concerns. In *Wegener/PCM/JV*,[35] for example, the Commission accepted the commitments of the parties to the transaction regarding selling advertising space separately and ring-fencing the joint venture.[36] Moreover, in *Kali und Salz/MdK/Treuhand*,[37] the proposed commitment was to sever links with the main competitor and the Commission found the commitment appropriate since such links with the competitor were the reason of competition law concerns.[38]

**III. Recent Decisions of the Board Concerning Behavioral Remedies**

Even though the Board approached to behavioral remedies reluctantly, two recent decisions of the Board suggest that the behavioral remedies are becoming more important. Significantly, in *Bekaert/Pirelli* where ELIG acted for Bekaert, the Board upon its Phase II review concluded

[30] Para. 17 of the Notice
[31] *see* Case No. COMP/M. 2220 (2004/134/EC).
[32] *see* Case No. COMP/M. 2416, annulled on appeal Case T-5/02, [2002] ECR II-4381, *aff'd* Case C-12/03 P, [2005] ECR 1-987.
[33] Allison Jones, Brenda Sufrin, EU Competition Law Text, Cases and Materials, Fifth Edition, p. 1250.
[34] *see* Commission v. Tetra Laval BV. (C-12/03P) [2005] E.C.R. I-987.
[35] *see* Commission's case COMP/M.3817 (2005/C 131/03).
[36] Alistair Lindsay, Alison Berridge, The EU Merger Regulation: Substantive Issues, Fourth Edition, p. 636
[37] *see* Case M. 308. [1994] OJ L186/30.
[38] Allison Jones, Brenda Sufrin, EU Competition Law Text, Cases and Materials, Fifth Edition, p. 1250.

that behavioral remedies are on its own sufficient to address the competition law problems.[39] In *Lesaffre/Dosu Maya*,[40] the Board accepted a series of behavioral remedies.

***Bekaert/Pirelli***

*Bekaert/Pirelli* is significant since the Board found the behavioral remedies proposed by Bekaert, concerning uninterrupted supply commitment to local customers of the parties, sufficient to resolve the anticompetitive effects of the transaction. The transaction concerned Bekaert's acquisition of steel tire cord business of Pirelli Tyre ("Pirelli"). The Board found that the transaction would have anticompetitive consequences since Bekaert would be in a dominant position post-transaction and there would be insufficient competitive pressure on Bekaert. Accordingly, the Board took the transaction to Phase II investigation whereas both the Commission and the Brazilian Competition Authority approved the acquisition by Bekaert. However, in its decision, the Board explained that, unlike the EU and Brazil, there are fewer undertakings active in the relevant product market in Turkey (for example, Asian manufacturers were not active in Turkey). Accordingly, the Board decided that the transaction would confer the transaction parties with a considerable degree of market power and significantly impede effective competition in the relevant product markets.

In order to resolve the anticompetitive concerns of the Board, Bekaert proposed entering into supply agreements with the existing competitors for 3 years. These agreements proposed in the scope of the commitment by Bekaert did not include any purchase requirement and thus allowed the customers to buy from other suppliers. Additionally, Bekaert proposed to provide supplementary customer service support. Moreover, with its commitment, Bekaert undertook to supply all amount demanded by its customers. The Board, considering the proposed commitments, found that Bekaert would not be able to impose prices on the customer during the commitments since customers would be capable of switching to other suppliers. In addition, Bekaert would not be able to limit its supply since it commits to provide the customers with the entire amount demanded. Ultimately, the Board found that the commitments proposed by Bekaert are transparent and foreseeable and the said commitments for a term of 3 years is sufficient to create a competitive pressure on Bekaert also considering

[39] *see Bekaert/Pirelli* decision numbered 15-04/52-25 and dated January 22, 2015.
[40] *see Lesaffre/Dosu Maya* decision numbered 14-52/903-411 and dated December 15, 2014.

existence of the Asian or Belarusian potential competitors abroad. Therefore, the Board found that the proposed commitments of Bekaert are sustainable, apprehensible and sufficient to resolve the anticompetitive effects of the transaction and granted a conditional approval to the transaction.

As seen above, the remedies proposed by Bekaert consisted of pure behavioral commitments and yet were found sufficient by the Board to remove the anticompetitive concerns arising from the transaction. In its assessment of the proposed commitments, the Board did not consider the nature of the remedies but its sufficiency and effectiveness in resolving the anticompetitive effects. Consequently the case may be considered as a benchmark in terms of the application of behavioral remedies and it also approves that the behavioral remedies may have significant roles in conditional clearances.[41]

***Lesaffre/Dosu Maya***

In *Lesaffre/Dosu Maya*, the Board assessed the proposed transaction regarding the acquisition of sole control over Dosu Mayacılık ("Dosu Maya") by Lesaffre et Compaigne ("Lesaffre"). Dosu Maya was one of the leading yeast producers in Turkey whereas Lesaffre was also active in the same market. The Board found that the concentration has its effects in the markets of dry and fresh yeast. However, the Board decided that the concentration did not raise any competition law concerns in the market for dry yeast, it found that, upon the consummation of the transaction, the combined undertaking would hold a joint dominant position with Pak Maya (another player in the market) and this would impede and distort the competition in the market.

Even though the parties proposed commitments during Phase I, the Board did not find these commitments sufficient and took the case into Phase II review. During the in-depth investigation, the parties amended their commitments which included the divestiture of certain assets, executing a distributorship agreement with a potential buyer for a minimum period of 3 years, protecting the fresh yeast brands of Dosu Maya, expanding the geographical presence of Dosu Maya in Turkey by keeping the prices at a certain level and removing the

[41] Ariel Ezrachi, Under (and Over) Prescribing of Behavioral Remedies, The University of Oxford, Centre for Competition Law and Policy, Working Paper (L) 13/05, p. 3.

territorial exclusivity and the supplier exclusivity clauses from the agreement between Özmaya and its dealers, conducting competition compliance programs, and not acquiring Akmaya. The Board found these commitments as sufficient and effective to remove the competition law concerns arising from the transaction and granted a conditional approval to the transaction.

Commitments proposed by the parties in this case consisted of both structural and behavioral remedies. The Board, for the first time with Lesaffre/Dosu Maya decision, accepted the commitment of implementing a compliance program for three years to support the remedy package. It found that structural remedies supported by a series of behavioral remedies were sufficient to resolve the competition law concerns. As is seen, the Board may request from the parties to revise their proposed commitments if the initial propositions are found inadequate.

**IV. Conclusions**

Whether classified as structural or behavioral, remedies are important for merger control regimes since they are the tools in removing the competitive concerns raised by a transaction and utilizing the efficiencies of such transactions.

Even though competition authorities generally consider structural remedies superior to the behavioral remedies and approach to granting sole behavioral remedies with reluctance, behavioral remedies are also useful and constructive mechanisms in resolving the competition law concerns arising out of the transaction.

In light of the recent decisions of the Board, from the ongoing trend over the last year, it would not be assertive to state that the Board's reluctance towards behavioral remedies is moderating and it is likely that the behavioral remedies will be considered and accepted more frequently in the future. Therefore, the evolving practice under Turkish merger control regime as regards remedies is expected to yield efficiency gains.

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