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Contribution from Turkey

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Judicial Perspectives on Competition Law

-- Turkey --

1. Turkish Competition Authority (TCA), which began its operations in 1997, is celebrating its 20th anniversary this year. This is a relatively short period of time in the life of an organization, yet thanks to the decisions taken by the Turkish Competition Board (Board) and the judicial review of these decisions, competition legislation and the importance of TCA has been recognized not only by the academic circles, but also throughout the society as a whole.
2. Similarly, although TCA is a relatively young agency, it has been mentioned with praise in monitoring reports. The Authority is organized as an “independent administrative authority” within the Turkish Administrative system, and it endeavors to constantly renew and improve itself without receiving orders from any other office and by closely monitoring all relevant national and international legislation, and to deserve the important place it holds by making significant investment in human resources.
3. Just like all types of administrative acts and transactions by any other public institution, the professional decisions of the Authority are subject to judicial review. This review is conducted by Administrative Courts. Despite occasionally becoming a topic of discussion, specialized courts have not yet been implemented in Turkey.
4. Even though it may be said that the decisions of competition authorities, which fulfill a specialized function, could be better understood and interpreted by “Specialized Courts,” the TCA have not experienced significant problems in this respect. This is of course helped by the meticulous work of the Authority experts when conducting examinations and writing reports, as well as by the fact that Board members competent in the fields of law, economics and business master the subjects during their six-year tenure, and by the well-prepared arguments presented. However, a significant part is also played by the judges who protect the balance between the jurisdiction and powers of the Board and the sphere of judicial control during judicial review in a very fair manner.
5. Judges in Turkey - like in many places around the world - do not have close relationships with the Authorities. This does not necessarily mean that they would never participate in the symposiums and other meetings organized by the Authorities. Still, Courts display a more remote structure, preferring to resolve issues within themselves through their own means when carrying out their judicial review function. Even during trial, they refrain from asking many technical questions.
6. The Authority has closely followed the practices of all of the more experienced global competition authorities, particularly those related to the EU law, and has been willing and active to harmonize itself and its legislation with these developments. While both TCA and the Courts had been feeling their ways in the beginning, with time they acquired a better understanding of competition law practices and each other, and grew together. In this process, the Courts showed the utmost respect to the field of specialization of the Authority, with the Authority implementing the requirements of the Court decisions, not simply on the surface but by internalizing them. This was principally a process of mutual learning.

7. During the first few years of its operation, certain decisions taken by the Board were annulled by the Courts due to mistakes of procedure. In time, the number of annulled decisions decreased, but the Courts began to identify certain mistakes of economic assessment instead of procedure.

8. An example is the TCA's decision about the Türk Havayolları A.O. (Turkish Airlines) which was annulled by the 13th Chamber of the Council of State.

9. Pegasus Hava Taşımacılığı A.Ş., which is a private airline company operating in Turkey and making flights exclusively out of one of the two airports in İstanbul (Sabiha Gökçen Airport), made an application to TCA and claimed that Turkish airlines, flying out of both of the airports, abused its dominant position by engaging in exclusive practices in both domestic and international flights. TCA did not find a violation in the investigation conducted and rejected the complaint.

10. This decision was taken to the court and the first instance court, Ankara 11th Administrative Court, annulled this decision on the grounds that TCA made a ruling without acquiring sufficient evidence and conducting extensive analyses into whether or not there was an abuse of dominant position.

11. After the annulment, TCA appealed the court decision before the Council of State, which is the court of appeals for administrative matters. However, the appeal of the Authority was dismissed by the 13th Chamber of the Council of State. In its decision the court found that TCA conducted inadequate examinations, and made the following observations:

“An examination of the Board decision and investigation report comprising the subject matter of the case shows that in addition to the assessments conducted, the investigation should have included a comparative assessment of the prices implemented by Pegasus separately for the dates before and after THY started its operations out of Sabiha Gökçen Airport together with Anadolu Jet, should have made a more detailed price analysis on this subject, should have examined whether there was a direct or indirect cross-subsidy mechanism in the market in question that could distort competition in the market, should have conducted a cost-price analysis using the same method for the complainant Pegasus in addition to THY/Anadolu Jet on a route-by-route basis to reveal its profit/loss situation, and should have evaluated Pegasus's data together with THY/Anadolu Jet price analyses, but failed to do any of those.”

12. Despite the fact that a majority of the decisions taken by the TCA have been affirmed by the courts, the examination of a few Court decisions presented below can be used to form an opinion on the approach of the courts to some decisions requiring economic analyses.

1. The Decision of the Board dated 17.11.2011 and numbered 11-57/1473-539 (the Decision about AFM - Mars Sinema Acquisition)

13. In its decision, the Board concluded that the transaction would not restrict competition significantly; however, the parties might create competitive pressure on each other in 38 relevant geographic markets identified in four provinces. Moreover, according to the economic analyses made, the transaction would increase consumer prices and restrict competition significantly in five micro markets. Nevertheless, deciding that the commitments made by the parties would be able to eliminate the competitive concerns that competition in the relevant market would be significantly restricted, the Board authorized the transaction.

14. 13th Chamber of the Council of State took a decision to give a stay of execution against the Board decision on the following grounds: The commitments would not terminate the obvious leadership of the parties in the relevant market; there were not any undertakings big enough to exert competitive pressure on the entity to be formed after the acquisition; although concentration rates and market shares would relatively decrease as a result of the commitments, the figures observed after that decrease would not indicate a competitive market structure; the effects of actual investment plans on market shares and concentration rates were not taken into account. However, the decision of the Plenary Session of Administrative Law Chambers of the Council of the State abolished the aforementioned decision. That time, 13th Chamber of the Council of State annulled the Board decision in question on the same grounds according to its decision. Afterwards, the Plenary Session of Administrative Law Chambers reversed the relevant decision of the Chamber due to procedural reasons and the transaction was realized according to the first Board decision.

2. The Decision of the Board dated 25.08.2009 and numbered 09-38/925-218 (the Decision about Mey İçki - Anadolu Efes Acquisition)

15. The Board concluded that the transaction would not strengthen Efes's dominant position and authorized the transaction on the following grounds: The brand "Tekel Birası" was not active; it used to have a very small market share while it was active; there were not any buyers who wanted to buy the brand; an old brand with a sentimental value would be offered to customers again as a result of the acquisition; and the transaction would increase consumer preference.

16. 13th Chamber of the Council of State found the Board decision contrary to law and first gave a stay of execution and then annulled it with its decision on the following grounds: Efes maintained its longstanding dominant position with its currently increasing market share; entry barriers in Turkish beer market were quite high; considering the fact that brand loyalty and consumer loyalty in the market were in favor of Efes together with the ban on advertising, it was very difficult to enter the beer market with a new brand; "Tekel Birası" brand used to have a certain market share until its production ended; even it was not produced any more it was still a recognized brand to a certain extent; the rapporteurs calculated the possible effects of the transaction on the concentration in the market and estimated that the anticompetitive effects of it might be high; the transaction would strengthen Efes's dominant position and restrict competition in the market significantly. The Plenary Session of Administrative Law Chambers approved the aforementioned decision.

3. The Decision of the Board dated 15.12.2014 and numbered 14-52/903-411 (the Decision about Maya-Lessfare (Öz Maya) Acquisition)

17. In its decision, the Board concluded that it was not likely that any of the undertakings would be dominant in the fresh yeast market individually following the transaction; however, it was possible that the second largest firm and the merged undertaking might create a joint dominant position in the market in which there would be three players after the merger; the notified merger might significantly restrict competition in the market and could not be authorized. Nevertheless, deciding that the commitments made by the parties would be able to eliminate the competitive concerns that competition in the relevant market would be significantly restricted, the Board authorized the transaction.

18. Ankara 8th Administrative Court annulled the Board's decision asserting that the yeast market would have an anticompetitive structure due to high market shares held by the parties to the transaction after the transaction; there was not buyer power in the downstream market; the parties to the transaction were imposed administrative fines within the scope of article 4 of the Act on the Protection of Competition, which showed that the yeast market was susceptible to price fixing activities even before the transaction; coordination risk would increase after the transaction and the parties might abuse their dominant positions together; the commitments made by the parties were not capable of eliminating competitive concerns. The file is still at the appeal stage.