

Suspension Requirement in Turkish Merger Control: A Recent Decision for Greenfield Joint Ventures

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When legislators establish merger control policies, they can choose to make merger control filing a mandatory or voluntary task. Some jurisdictions, including Turkey, involve a suspension requirement, which requires applicants to suspend implementation of a transaction until they receive clearance from the relevant competition authority. Breaches of such suspension requirements are referred to as "gun jumping" violations and bear significant legal and financial risks for the transaction parties.

For transactions above a certain threshold, the Turkish merger control regime prohibits implementation - (i) without notification to the Turkish Competition Authority (the "**Authority**") or (ii) before receiving the Authority's clearance. Determining what constitutes the implementation of a transaction is relatively straightforward for transactions involving acquisition of shares, rights, assets, etc. However, this determination is less clear for transactions that involve greenfield joint ventures¹.

This article discusses suspension requirement issues related to greenfield joint ventures under the Turkish merger control regime. A recent decision by the Turkish Competition Board (the "**Board**") suggests that the Board may be changing its established approach to determining "implementation".

Suspension Requirement under the Turkish Merger Control Regime

Turkish law deems mergers or acquisitions illegal if through creating or strengthening a dominant position, the transaction will result in significant lessening of competition in a market for goods or services within the whole or a part of the country (Article 7 of the Law No. 4054 on Protection of Competition - "**Law No. 4054**").

Identifying which transactions require the Board's clearance is a policy decision which is decided by the Board itself (Article 7 of the Law No. 4054). Accordingly, the Board issued Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("**Communiqué No. 2010/4**"). Communiqué No. 2010/4 sets forth certain turnover thresholds for the transaction parties. If the transaction parties' turnover exceeds these thresholds, the transaction must obtain the Board's clearance.

For transactions exceeding the thresholds, failure to obtain clearance would result in legal validity issues and administrative monetary fines. Implementing a transaction which exceeds the threshold for mandatory merger control filing, without obtaining the Board's clearance, would trigger an administrative monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (Article 11 and Article 16(1)(b) of the Law No. 4054). If this is not calculable, the fine is based on the turnover generated in the financial year nearest to the date of the fining decision. The fine applies to the acquirer in an acquisition transaction or to both merging parties in a merger transaction.

Communiqué No. 2010/4 sheds light on what constitutes implementation of a transaction, stating that "*change of control*" would constitute "*implementation*" and the date on which change of control has occurred is considered to be the implementation date (Article 10(7) of Communiqué No. 2010/4).

Pinpointing the change of control (i.e. the implementation) is relatively straightforward for transactions involving acquisition of shares, rights, assets etc. of an existing business. However, for greenfield joint ventures, it is harder to determine whether the suspension requirement is violated by incorporating a new jointly controlled undertaking, which is technically able to operate independently, but chooses to postpone its activities until receiving the Board's clearance or whether a jointly controlled undertaking must be commercially active in order to constitute a breach of the suspension requirement. The Board has developed a consistent response to these questions, but a recent decision has raised eyebrows about whether the Board is signaling a position change.

Below are the Board's precedents, explaining the Board's established interpretation (Tekno Ray and Anayurt decisions), then the different interpretation adopted in the Board's most recent decision (ATG decision).

Tekno Ray Decision

The Tekno Ray decision (dated 23 February 2012, numbered 12-08/224-55) concerns incorporation of a jointly controlled undertaking which planned to operate in the solar energy systems market. Tekno Ray was incorporated on 19 October 2011 and its Articles of Association were published in the Trade Registry Gazette on 26 October 2011 which would mean that it was registered with the trade registry and established its legal personality (together with its decision making bodies) under Turkish laws. Although Tekno Ray was incorporated and thus in a position to operate commercially, its commercial operations were waiting for the Board's decision. Therefore, Tekno Ray did not have any active commercial operation at the time of the Board's review. Tekno Ray's incorporation was notified to the Board on 12 January 2012.

The Board's decision considered the facts and legal landscape above, then applied a provision in Communiqué No. 2010/4 which states that control can be acquired *de jure* or *de facto*. Accordingly, the Board concluded that although Tekno Ray's commercial activities were still pending, its incorporation was sufficient to infer the change of control (i.e. implementation). Therefore, the Board imposed an administrative fine for the violation of the suspension requirement.

Anayurt Decision

The approach adopted by the Board in the Anayurt decision is consistent with its earlier approach in the Tekno Ray decision. Both decisions involve the incorporation of a jointly controlled undertaking.

The Anayurt decision (dated 25 June 2014, numbered 14-22/422-186) concerns incorporation of a jointly controlled undertaking, planning to operate in the underground mining, exploration and mine management industry. Anayurt was incorporated on 5 September 2013 and its applications for mining permits and licenses were still pending at the time of the Board's decision. Therefore, Anayurt had no commercial activities when the Board was notified on 9 May 2014.

It appears that the case-handlers concluded a violation of the suspension requirement had occurred and requested Anayurt's counter-arguments. One of Anayurt's arguments seems to be that since it does not have any turnover or market share (i.e. no commercial activities), it is not an independent full-function joint venture yet.

The Board indicated that lack of turnover or market share had no bearing on the joint venture's independent full-function nature. The Board went on to say that obtaining the necessary licenses and permits to become fully operational will naturally take some time. Therefore, the Board concluded that incorporating Anayurt without obtaining the Board's clearance was a violation of the suspension requirement and imposed administrative monetary fines.

ATG Decision

The ATG decision (dated 16 July 2014, numbered 14-24/488-218) concerns incorporation of a jointly controlled undertaking, planning to build and operate a high-speed train railway station. The transaction was notified to the Board after ATG's incorporation. At the time of the Board's decision, the site for the station construction had not been properly delivered and thus the construction work had not commenced as planned. Therefore, at the time of the Board's decision, ATG did not have any commercial activity.

The Board considered whether a suspension requirement violation existed. It concluded that ATG would become a full-function joint venture only when the construction has been completed, adequate personnel are employed, and there is an office building.

This interpretation suggests that the Board deems ATG to be a full-function joint venture only after it has commenced its commercial activities. In the ATG decision, the Board seems to view ATG's lack of commercial activities as proof that it does not yet have fully-functional status and the absence of such status excuses liability. The Board did not consider ATG's incorporation in and of itself to be a violation of the suspension requirement. Ultimately, the Board concluded that ATG was not a full-function joint venture at the time of the decision and did not impose any administrative monetary fines.

Conclusion

The Tekno Ray and Anayurt decisions show an approach which holds that for transactions which are subject to the suspension requirement, the Board would deem incorporation of a jointly controlled undertaking in and of itself to be a violation of the suspension requirement. Particularly in the Anayurt decision, Anayurt was not in a position to operate commercially (due to lacking the necessary permits and licenses) but the Board did not take this into account in its assessment and concluded a violation regardless.

However, the recent ATG decision sends mixed signals for greenfield joint ventures about what the Board will deem to be "implementation", something which in turn triggers the suspension requirement. The Board might be implying a change of position and the incorporation of an undertaking may no longer be sufficient to infer a suspension requirement violation anymore; active commercial activities might become the new norm.

The dissenting opinion in the Board's in the ATG decision takes side with the Board's previous approach. This may in itself be interpreted as a sign that the majority position taken in the ATG decision is a controversial one. The ripples of the ATG decision need to be closely watched to conclude a fundamental position change by the Board.

1. For the purposes of this article, the term "greenfield joint venture" refers to a joint venture which is incorporated to operate in a product market that previously neither of the parents have activities.

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