Non-competition clauses under Turkish competition jurisprudence

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Any concentration between parties may also include certain restrictions. In particular, restrictions are imposed on the vendor if the vendor has a substantial customer portfolio, distribution network and know-how in the market and the purchaser is new to the market in question. In such situations, non-compete and non-solicitation clauses, restrictions on intellectual property rights and supply and purchase agreements may be imposed on the vendor to protect the business and the goodwill of such business acquired by the purchaser. Such restrictions are generally defined as 'ancillary restrictions' under competition legislation. Under normal circumstances they would be considered to restrict competition in the market; however, in case of the implementation of a concentration, they are not considered anti-competitive but as necessary if the scope, duration and geographical area of such restrictions do not exceed what the implementation of the concentration reasonably requires.

Under EC Merger Regulation, the Commission provided guidelines with regard to 'ancillary restrictions' with its Notice on Ancillary Restraints published in 1990.[1] In 2001, the Commission published the Notice on Restrictions Directly Related and Necessary to Concentrations. Such notice was superseded by the Commission's Notice on Restrictions Directly Related and Necessary to Concentrations, dated 5 March 2005.[2] Under the new Notice, the Commission states that restrictions must be "necessary to the implementation of the concentration", which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty. Restrictions necessary to the implementation of a concentration are typically aimed at protecting the value transferred, maintaining continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity. In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which objectively restricts competition the least.

Non-competition clauses under Turkish competition law

General principles of non-competition clauses

It has to be pointed out that unlike EC Competition Law, there is no specific legislation with respect to ancillary restraints under Turkish antitrust legislation. The Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board[3] does not include any provisions referring to ancillary restraints. Indeed, in one of its decisions,[4] one of the Board members dissented a Board decision stating that the Board had not yet established guiding principles with respect to the conditions under which a non-compete or confidentiality obligation in a share transfer agreement or a similar agreement would be considered an ancillary restraint.

Instead of guiding principles, the decisions of the Board give guidance with respect to the implementation of ancillary restraints in concentrations. The decision on SKW/Ercan Group, dated 19 November 1998 and numbered 91/736-153, was the first decision whereby non-compete restrictions were considered to be conduct prohibited under article 4 of Law No. 4054 on the Protection of Competition; however, the Board held that such restrictions may qualify for individual exemption provided that their duration was limited to a certain period of time.

The Board for the first time assessed non-compete restrictions as ancillary restraints in its decision on PGI/Vateks, dated 3 March 1999 and numbered 99-12/94-36, by making reference to the decisions of the European Court of Justice. In such decision, the Board stated that a limitation on the duration of the non-compete restriction in the agreement to three years was an objective and reasonably necessary ancillary restraint.

In its early decisions,[5] the Board stated that both the European Commission and the European Court of Justice limited the duration of non-compete restrictions for a reasonable period of time; although such period varied depending on the circumstances of each event, it was evaluated that such period could vary from two to five years: in case of transfer of customer portfolio, the duration was limited to two years, whereas in case know-how, licence and reputation of the company were also transferred in addition to the customer portfolio, the reasonable period could increase to up to five years.

The Board seeks three conditions[6] when evaluating non-competition restrictions as ancillary restraints:

Restrictions imposed solely on parties to the concentration

In its decisions, the Board has held that restrictions should not impose obligations on third parties other than the contractual parties. Any agreement imposing restrictions cannot be considered an ancillary restraint, even if such restrictions constitute an inseparable aspect of the transaction and thus such conduct shall be subject to article 4 and article 6 of Law No. 4054 on the Protection of Competition. It was concluded by the Board that covenants regarded as ancillary restraints should only restrict the freedom of parties in the market but they should not affect the economic conduct of third parties or undertakings unless it is an inevitable result of the transaction.

Directly related and necessary to the implementation of the concentration

As regards the criterion of 'direct relation', such restrictions should arise from the nature of the transaction. Restrictions should be necessary to facilitate the implementation of the concentration; however, they are considered to be secondary compared to the main purpose of the concentration. Contractual arrangements that create and structure concentrations are not evaluated within the concept of ancillary restraints.

To assess whether a restraint fulfils the norm of 'necessary to the implementation of the transaction', the Board maintains that in the absence of such restraint, the concentration would be likely to fail or to be implemented under more uncertain conditions with higher costs over an appreciably longer period.

Proportionality

The Board considers that for a restraint to be considered ancillary

to the concentration, not only its characteristics but also its scope, duration and geographical field of application should be assessed as to whether it creates any limitations which are greater than necessary for the legitimate objective of implementing the concentration. If a less restrictive alternative may achieve the same result, parties should opt for the less restrictive one.

In cases where the non-competition clause is limited to the field of activity of the vendor, such covenant would be found to be proportionate by the Board with respect to the scope of the concentration. Furthermore, the geographic area restricted by the non-competition clause should be limited to those locations where the vendor has activities. The scope of the geographic area can only be extended if the vendor has made investments to launch its products and services in such territory.

With respect to duration, in general, non-competition clauses are justified for periods of up to three years when the concentration involves the transfer of customer loyalty and especially when the goodwill[7] and know-how are transferred together. When only goodwill is transferred, non-competition clauses are justifiable if their duration is up to two years. Nevertheless, the Board also maintains that these periods are not binding and restrictions of longer duration may be evaluated case by case and they may also be considered as ancillary restraints if circumstances in the relevant transaction justify their duration.[8]

In fact, it was held that non-competition clauses of four years satisfy the criterion of proportionality to protect the relevant portfolio since the purchased entity was bound by contracts to be terminated within three to four years at time of consummation of the transaction.[9] Similarly, in another decision, the Board took into consideration the aspects of the case at hand and decided that a five-year non-competition obligation imposed on the share purchase agreement with respect to a contract executed between the vendor and its related party was justifiable since such period was deemed as necessary given the shareholding relation between the related party and the vendor.[10] In this respect, the Board took into consideration the characteristics of the relevant product market and the overlapping activities of vendor and buyer companies in the relevant geographic markets while evaluating a non-competition obligation, the term of which was six years, and decided that such period was permissible given that the relevant product market required vast experience and extensive research to do business; that there were no overlapping activities of the parties in the relevant product market; and that such restriction had no effect in the Turkish market (since both parties were not domiciled in Turkey).[11]

Non-competition clauses in joint ventures

Non-competition restrictions between the parent undertakings and the joint venture are considered directly related and necessary to the implementation of the concentration during the term of the joint venture to eliminate the risk of coordination between the parent undertaking and the joint venture. However, the term of non- competition restriction should not go beyond the lifetime of the joint venture. In the past, the Board stated in its decisions that post-term non-competition restrictions are acceptable if the duration of such restriction is three years in case of the existence of know-how and goodwill and two years in case of the existence of goodwill only. However, in its recent decisions, the Board has expressed that such obligations should be evaluated at the time of termination of joint control and the transfer of shares in the joint venture.[12]

Either in case of a restrictive non-competition clause in a joint venture agreement or in the acquisition of an undertaking, if the Board concludes that the duration of a non- competition restriction is more than what is reasonably required, conditional approval will be granted to the transaction in question, provided that the duration of such restrictive clause is reduced according to the above-explained criteria.[13]

Conclusion

It should be emphasised that the Board evaluates non-competition restrictions as ancillary restraints provided that they are formulated in compliance with the criteria applied in the relevant jurisprudence of the Board. The Board takes the view that non-competition restrictions are necessary for the real transfer of value targeted with share purchase or joint venture agreements, or both, and that they are permissible insofar as they are directly related and necessary for the implementation of the concentration.

Notes

1 2001/C 188/03.
2 [2005] O.J. C56/24.
3 OG – 12.08.1997, 23078.
4 See the decision of the Board dated 27 May 2003 and numbered 03-35/414-181.
5 Decisions of the Competition Board dated 28 April 1999 and numbered 99-21/170-89; dated 3 June 1999 and numbered 99-27/244-148; dated 6 October 1999 and numbered 99-45/476-301; dated 14 December 1999 and numbered 99-57/612-389; and dated

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15 February 2000 and numbered 00-7/62-29.

6 Decisions of the Competition Board dated 22 June 2006 and numbered 06-45/578-158; dated 11 January 2007 and numbered 07-01/10-5; dated 20 July 2006 and numbered 06-53/683-190; and dated 2 March 2006 and numbered 06-16/187-47.

7 The Board interprets goodwill in a broad sense and trademarks, logos, service marks, trade names, customer lists and files and contracts executed with customers, which qualify as non-tangible assets are considered within the scope of goodwill. (Decision dated 19 October 2006 numbered 06-77/998-284).

8 Decision of the Board dated 28 June 2005 and numbered 05-41/579-147.

9 Decision of the Board dated 26 May 2006 and numbered 06-36/458-120.

10 Decision of the Board dated 17 June 2005 and numbered 05-41/581-149.

11 Decision of the Board dated 16 March 2006 and numbered 06-19/238-61.

12 Decision of the Board dated 8 September 2005 and numbered 05-55/831-224; dated 08 July 2005 and numbered 05-44/629-162; and the decision dated 26 May 2006 and numbered 06-36/460-122.

13 Decisions of the Board dated 7 April 2005 and numbered 05-22/261-72; dated 6 May 2005 and numbered 05-31/393-96; dated 23 March 2006 and numbered 06-20/257-64.