The Concept of Undertaking under Turkish Law

The concept of **undertaking** is crucial as it determines the extent to which specific competition law provisions apply, a major example being the evaluation to be made under Article 4 of the Competition Act regarding agreements, concerted practices and decisions limiting competition. For an evaluation to be made under Article 4 of the Competition Act, there must be plurality of actors. In other words, there should be at least two different undertakings, the activities of which may be considered to be in breach of the said article.

The Concept of Undertaking and Related Terms

The concept of undertaking is important within the context of the application of specific competition rules and provisions. The scope of application may vary depending on the nature of the undertaking. Therefore, the definition of undertaking provided by the relevant laws and the implementation of this definition by the relevant authorities, whether national or international, matters significantly.

Law on Protection of Competition no. 4054 ("Competition Act") (Rekabetin Korunması Hakkında Kanun) defines undertakings as natural and legal persons who produce, market and sell goods or services in the market, and units which can take decisions independently and constitute an economic unit.

The wording of the above article places the emphasis on whether an economic unit is established. Therefore merely taking into account the legal status of a unit is not sufficient for the purposes of the concept. In fact, one may conclude from certain decisions by the Competition Board ("Board") of the Turkish Competition Authority that the Board considers an undertaking as a general concept rather than something determined by its legal status alone.

The concept of undertaking is especially crucial in the evaluation of conspiracies between undertakings and the determination of dominant position as per Article 4 and Article 7 of the Competition Act. In addition to evaluations made under Article 4 and Article 7 of the Competition Act, the concept of undertaking is also involved in monitoring mergers and acquisitions. In fact, merger and acquisition transactions conducted between different legal entities in the same undertaking are not subject to competition law provisions and rules.

Following from the definition, the factors to be taken into account while determining whether two different entities form a single undertaking are control, economic unity and family ties.

Economic Unity

The principle of economic unity was adopted in the definition of undertaking in the Competition Act. According to the principle, a subsidiary is taken into account with its related parent company/companies. A legally independent undertaking with economic activities and another undertaking which has control over its decision-making mechanism may together be regarded as a single economic unit and considered a single undertaking for the purposes of competition rules and provisions. Thus, even if several units are operating under different legal forms, they may be taken into account as a single undertaking.

Control

For the purposes of Communiqué no. 2010/4 on Mergers and Acquisitions Requiring the Authorization of the Competition Board ("Communiqué no. 2010/4") (2010/4 Sayılı Rekabet Kurulundan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ), control may be affected by rights, contracts or any other means which, either separately or in combination, in fact or by law, grant the ability to decisively influence an undertaking. Such influence may be exercised through an ownership right or an operative right of use on all or part of the assets of

an undertaking, or by rights or contracts which provide decisive influence on the structure or decisions of the bodies of an undertaking.

According to the European Court of Justice ("ECJ") in AEG Telefunken AG v. Commission [1983] ECR 3151, [1984] 3 CMLR 325, where a parent company has a majority of the shares of its subsidiary, the subsidiary is not independent and the parent company may exercise decisive influence over it. The ECJ considers several factors regarding control of a company in addition to share-holding, such as whether the parent company is able to control the board of directors of the subsidiary, the amount of profit acquired by the parent company, and whether the subsidiary complies with directions given by the parent company on matters such as marketing and investment.

The definition of control affects the concept of undertaking since a unit with economic activities is considered an undertaking if able to make decisions independently. Therefore, whether it is possible to confer control to an undertaking in the context of the abovementioned conditions will be scrutinized to draw the scope of the application of competition law rules and practices.

Family Ties

Family ties between undertakings alone may be considered sufficient for those undertakings to be considered a single entity. This is because, according to Section 3 of the Commission Notice on the Concept of Concentration under Council Regulation (EEC) No. 4064/89 on the Control of Concentrations between Undertakings ("Commission Notice"), family ties alone may be considered a factor for determining control.

It is stated in Section 3 of the Commission Notice that the control is nevertheless acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control. This section further provides that there may be exceptional situations where the formal holder of a controlling interest differs from the person or undertaking having the actual power to exercise the rights resulting from this interest. A related example is given in which an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights. Following from this example, the situation is seen as one in which the control is acquired by the undertaking that is behind the operation and in actuality has the power to control the target undertaking. The type of evidence needed to establish this type of indirect control was specified as factors such as the source of financing or family ties.

Even if it does not directly regulate the concept of undertaking or the term control, Block Exemption Communiqué on Vertical Agreements no. 2002/2 ("Communiqué no. 2002/2") (2003/3 ve 2007/2 sayılı Rekabet Kurulu Tebliğleri ile Değişik, Dikey Anlaşmalara İlişkin Grup Muafiyeti Tebliği Tebliğ No: 2002/2) illustrates the importance of family ties in the context of competition law in Article 5, which regulates non-compete obligations imposed on the purchaser.

A non-compete obligation imposed on the purchaser is limited to a maximum period of five (5) years. However, there is an exception to this limit if the ownership of the facility to be used by the purchaser while continuing its activities based on the agreement belongs to the provider together with the land or under a right to build over, which has been secured from third persons not connected with the purchaser. According to the wording of the article, family ties alone may prevent the application of the exception to the duration of the non-compete obligation.

This raises questions about the effect of family ties on the concept of undertaking, the connection between the extent of economic relations and the degree of family ties. One indication is Board Decision no. 01-39/391-100, which found that persons may constitute a single economic entity on the sole grounds of having the same surname. Moreover, in Board Decision no. 01-03/10-03, people with different surnames but associated with family ties were held within the same economic group as a single undertaking.

The implementations of the Board regarding the effect of family ties on determining an undertaking may raise concerns about the freedom of enterprise and whether it is being restricted by the applications of the Board.

The Board has discussed in its recent decision regarding the privatizations of Boğaziçi Elektrik Dağıtım A.Ş., Gediz Elektrik Dağıtım A.Ş., and Trakya Elektrik Dağıtım A.Ş., no. 10-78/1645-609 that the family ties between Mehmet Kazancı, MMEKA-Makine İthalat Pazarlama ve Ticaret A.Ş (which is partly controlled by Mehmet Kazancı) and Kazancı Group caused the said parties to be held as a single under-

taking. As for considering the said parties as a single undertaking solely on the grounds of family ties, the Board has compared the freedom of enterprise, freedom of contract and freedom of competition with the principles regarding protecting competition.

Considering a real person and the family corporation of which the real person is a shareholder a single undertaking and subject to different evaluations under the Competition Act may be regarded as a restriction on the freedom of enterprise. The Board in this context has clarified the fact that a real person within a family corporation shall still be permitted to pursue independent activities within the freedom of enterprise. However, the Board also stated that restraining freedom of enterprise for acquisition transactions conducted by means of a unity of interests through family ties is considered a cause for competition law.

Another aspect the Board emphasized was the fact that a family member is not necessarily considered part of the family corporation economic unit. In a few exceptional cases, family members were considered separate undertakings despite their consanguinity. To demonstrate this, the Board referred to its Decision no. 09-49/1220-308, the parties of which were AGS Parafin Sanayi ve Ticaret A.Ş. ("AGS Parafin") and Mercan Kimya Sanayi ve Ticaret A.Ş. ("Mercan Kimya"), each controlled separately by two siblings. Considering these two undertakings separate and independent undertakings despite the consanguinity, the Board took into consideration several factors listed as follows;

i. Detailed research conducted on the client undertakings of Mercan Kimya and AGS Parafin,

ii. Separate organizational structures of Mercan Kimya and AGS Parafin,

iii. Lack of unity of interests and economic relations between Mercan Kimya and AGS Parafin,

iv. Lack of mutual shareholders and/or directors within Mercan Kimya and AGS Parafin for the past five (5) years, and

v. The admission by the complainant company that Mercan Kimya and AGS Parafin actually act competitively within the market.

In accordance with the decision of the Board concerning Mercan Kimya and AGS Parafin, it should be noted that an assessment as to whether a single undertaking or a separate undertaking is formed between persons linked as a family shall be conducted substantially, taking into account the timing, consequences and execution of the organization, rather than merely focusing on the formal aspects.

Undertakings within the Context of the Competition Act

The concept of undertaking is associated with the evaluations made under the Competition Act regarding **(i)** determination of the dominant position, **(ii)** agreements between undertakings and **(iii)** monitoring of merger and acquisition transactions.

Pursuant to Article 4 of the Competition Act, agreements and concerted practices between undertakings and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. In accordance with the wording regarding agreements between undertakings in Article 4 of the Competition Act, the implementation of the concept of undertaking determines the scope of application of the article.

For the purposes of the Competition Act, agreements between parties who constitute an undertaking within an economic unit do not satisfy the "plurality of parties" principle. In fact, such agreements are regarded as agreements conducted within an undertaking itself. As a result, the agreements between parties who constitute an undertaking within the economic whole are not subject to Article 4 of the Competition Act.

Having mentioned the scope of Article 4 of the Competition Act along with the concept of undertaking, it should also be noted that the Board has held in some of its decisions that acquisition transactions conducted by parties as partnerships may be subject to evaluation under Article 4 of the Competition Act. In this context, the question arises as to in which cases joint ventures are regarded as agreements under Article 4 of the Competition Act and in which cases they are regarded as a concentration under Article 7 of the Competition Act. Following from the decisions of the Board in Uludağ Decision no. 10-56/1070-399 and in Çamlıbel Decision no. 10-56/1069-398, concentration causing joint ventures, in which the parties' activities and powers within the joint venture are conjoined, are subject to evaluation under Article 7 of the Competition Act. On the other hand, cooperation causing joint ventures, which provide the parties to the joint venture with cooperation

and which are regarded as an agreement between undertakings, are subject to evaluation under Article 4 of the Competition Act.

In another decision, Board Decision no. 04-66/952 230, regarding the scope of application of the Competition Act, Oyak Holding A.Ş. ("Oyak Holding") and Tukaş Gıda Sanayi ve Ticaret A.Ş. ("Tukaş Gıda") were accused of acting together with the purpose of expelling Merko Gıda Sanayi ve Ticaret A.Ş. ("Merko Gıda") from the market. The Board held Oyak Holding and Tukaş Gıda were a single entity under Oyak Group and accordingly, not subject to an evaluation under Article 4 of the Competition Act as to whether the parties conducted concerted practices against Merko Gıda and the complaint was rejected.

The Board, while justifying its decision to consider Oyak Holding and Tukaş Gıda a single entity, emphasized the fact that Oyak Holding and Tukaş Gıda were controlled by the same entity, Oyak Group.

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