
A Preference for Structural Remedies over Behavioural Remedies

A Preference for Structural Remedies over Behavioural Remedies: Effectiveness of Behavioural Remedies has been Questioned by the Administrative Court

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Turkish Competition Authority ("TCA") had granted a conditional clearance to transaction concerning acquisition of MARDAS, which is a port operator in the Marmara Region, by LİMAR that is under control of Arkas Group¹, which has joint control over MARPORT. However, upon the request of by Kumport Liman Hizmetleri Lojistik San. ve Tic. A.Ş. ("KUMPORT"), which is a competitor of MARDAS, Ankara 9th Administrative Court ("**Administrative Court**") has decided to suspend execution of the TCA's decision on the ground that the commitment package offered by the acquirer, which solely included behavioural remedies, was not sufficient to eliminate competitive concerns arising out of the transaction².

The decision of the Administrative Court is of significance since it shows that the Administrative Court has a very strong preference of structural remedies over behavioural ones. It seems that this decision may lead to heated debates as to the hierarchy between structural remedies and behavioural remedies and especially the role of behavioural remedies in general.

It was held by the TCA that in case MARDAS is purchased by Arkas Group, MSC and Arkas Group would have controlled three of four container terminals and therefore they would hold a joint dominant position on the market for container handling services in the northwest Marmara region. Indeed, there are only four port operators, namely MARPORT, ASYAPORT, KUMPORT and MARDAS in the relevant market in the northwest Marmara region with the respective market shares of 53.3%, 19.7%, 18.8% and 8.2%. While MARPORT (which is the largest market player in the relevant market) is under the joint control of Arkas Group and MSC, ASYAPORT is controlled by MSC.

Thus, total market share of Arkas Group and MSC would reach to 81.2% in the northwest Marmara region after Arkas Group's acquisition of MARDAS. Given the consideration of the high market share, it was concluded that the transaction might lead to horizontal coordinated effects and result in significant lessening of competition in the relevant market.

To remedy TCA's competitive concerns, Arkas Group proposed a commitment package comprising of several behavioural remedies. To eliminate horizontal coordinated concerns, Arkas Group undertook to separate the legal and operational management of MARPORT and MARDAS to create a Chinese Wall that would prevent the flow of all kinds of commercially sensitive information and ensure that MARPORT and MARDAS would not determine their strategies collectively. This commitment also included a supervision mechanism under which an independent auditor would oversee the effective functioning of the Chinese Wall. In addition, to eliminate vertical concerns, Arkas Group further proposed an access remedy whereby certain privileges

regarding ship docking and field use capacity at rate of 30% is granted to the potential customers of MARDAS for a five-year period and supplemented this access remedy with a non-discrimination obligation. The TCA held that these behavioural commitments were sufficient for the elimination of all competitive concerns.

Yet, the Administrative Court held that the proposed behavioural remedies were insufficient to remove possible competitive concerns. The Administrative Court had identified three main problems, namely; (i) behavioural remedies should not be accepted if it is possible to provide a more effective structural remedy, (ii) the parties did not sufficiently demonstrate that the remedies would eliminate competitive concerns and (iii) behavioural remedies were not accompanied by an effective monitoring mechanism.

With respect to the first problem, the Administrative Court mainly relied on the TCA's Remedies Guidelines while assessing whether the behavioural remedies may be deemed sufficient in the case at hand. The Administrative Court reminded that the Guidelines expressly set forth that behavioural remedies should only be approved in cases where an equally effective structural remedy is not possible and, on the condition that the behavioural remedies are capable of attaining a level of efficiency similar to structural remedies in eliminating competitive concerns.

As to the second problem, the Court emphasized that it is under the responsibility of the parties to provide all information to demonstrate the sufficiency of the commitment in eliminating competitive concerns. In the said case, however, although the TCA was of opinion that possible competition concerns could be eliminated through the behavioural remedies, the Administrative Court was not satisfied with the explanations.

Finally, in relation to the third problem, the Administrative Court stipulated that the commitment package lacked an effective monitoring mechanism, especially considering that a monitoring expert was not clearly appointed within the scope of the commitment package. The Court expressed that the effective implementation of behavioural remedies depends on the presence of a well-established supervision mechanism. This is mainly due to the fact that behavioural remedies are more likely to create continuing commercial relationship between the transaction parties and third parties, the efficient management of which is fundamental for the success of the behavioural remedies.

It is critical to note here that it is not understood from the wording of the decision whether the Administrative Court is of the opinion that there actually was an alternative structural remedy which should have been proposed in the case at hand instead of the behavioural remedies. When the facts of the case are considered, it does not seem probable that the Administrative Court might have considered that MARPORT, which is the only other asset of Arkas Group in the relevant market, should have been divested. It would indeed be quite extraordinary to expect an undertaking to divest an asset that corresponds to over 50% market share to be able to acquire an asset that corresponds to less than 10% market share. Thus, we believe that the Administrative Court did not expect Arkas Group to provide such a structural remedy but only pointed out that it must have ensured that its behavioural remedies were as efficient as any structural remedy that could have been proposed.

Although the Administrative Court's decision is ambiguous, it is highly probable that the Court would have accepted behavioural commitments if their sufficiency in eliminating all the competitive concerns were explained in detail, the way in which they would be applied was set forth under a transparent structure and they were accompanied by an efficient monitoring mechanism.

For example, the Chinese Wall remedy may have been rendered more effective by appointing an independent monitoring expert with a wide range of authorities who would have direct contact with the TCA and submit regular reports concerning the acquirer's compliance with the remedies. Moreover, the enforceability and the supervisability of the non-discriminatory access remedy could have been increased if a "reference access offer" that would automatically become binding when signed by access-seeking third-parties, which specifically set forth the conditions under which non-discriminatory access would be provided to third parties and comprised a clearly defined swift and objective dispute resolution mechanism, was submitted to the TCA.

As a result of the Administrative Court's decision, the TCA will have to re-initiate a final examination concerning the transaction and Arkas Group will be expected to provide new commitments that could satisfy the Court's expectations. We might have a more comprehensive understanding of the Administrative Court's standpoint if the sufficiency of the renewed remedies is also challenged before the Court after the finalization of the second examination.

Footnotes

1. TCA's decision dated 08.05.2018 and numbered 18-14/267-129.
2. Ankara 9th Administrative Court's decision dated 18.01.2019 and numbered 2018/2277 E.