

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN MERGER CASES

-- Turkey --

28 June 2011

The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 28 June 2011.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- Email address: antonio.capobianco@oecd.org]

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1. This contribution is intended to give information on the approach of the Turkish Competition Authority (TCA) to merger remedies by assessing the important decisions of the Competition Board, the decision making body of the TCA.

2. First of all, it would be convenient to start with the relevant legislation. Both the Competition Act¹ and the new Communiqué No: 2010/4² concerning the Mergers and Acquisitions (Communiqué No: 2010/4) allow the Competition Board to clear mergers and acquisitions with remedies provided that the remedy removes the competitive concerns contrary to the Competition Act. In other words, the remedy should eliminate the problem caused by the merger; which is the creation or strengthening of a dominant position as a result of which competition is significantly lessened.

3. Although remedies are foreseen in the relevant legislation, there is neither a specific guideline nor a best practices text for implementing merger remedies and submission by the parties of commitments. Nevertheless, there is a draft text on merger remedies which is waiting to be approved by the Competition Board.

4. The draft text on merger remedies is mostly based on the European Commission's *Commission Notice on remedies acceptable under the Council Regulation (EC) No: 139/2004 and under Commission Regulation (EC) No: 802/2004*. However, in line with the experience obtained by the TCA, the draft text is simpler, easier to understand, and does not mention too many exceptions. It chooses fix-it first type to up-front buyers, and also does not mention crown jewels.

5. Although the draft text on merger remedies puts forward a particular procedure for presenting commitments; since it has not yet been approved, it would be suitable to explain the current system. Currently, there is no specific procedure for accepting a commitment as a remedy. However, commitments are evaluated under the Communiqué No: 2010/4. According to Article 14 of the Communiqué No: 2010/4, undertakings may give commitments completely eliminating competition problems arising from the merger.

6. Commitments may be offered by the parties during the preliminary examination (lasting 15-days³) or final examination (lasting 6 months⁴) phases. There is neither a specific time line for proposing or revising commitments, nor a responsibility on the parties to propose any commitment, nor a difference in procedure of proposing commitments in each examination phase. Although the parties usually present their remedies through commitments, there are some cases in which the Competition Board brought its own remedies by imposing obligations on the parties in its decisions.

7. As mentioned before, there is not yet any specific policy or best practices guideline for merger remedies in Turkey. Therefore, there is no particular preference for structural remedies. However, in the past decisions of the Competition Board including remedies, we can observe both behavioral⁵ and structural⁶ remedies as well as hybrid⁷ remedies depending on the characteristics of the case.

¹ Act No: 4054 on the Protection of Competition.

² Communiqué No: 2010/4 replaced the former Communiqué No: 1997/1 and entered into force on 1st of January 2011.

³ In case the commitment is given during the preliminary examination phase, the notification shall be deemed to be made on the date the text of the commitment is received by the TCA.

⁴ It may be extended up to another 6 months.

⁵ See the decisions of the Competition Board, namely *THY/HAVAS/TGS*, dated 27.8.2009 and numbered 09-40/986-248, involving fair dealing clauses, *Mazıdağı/Toros*, dated 21.2.2008 and numbered 08-16/189-62,

8. For a recently adopted structural remedy, a merger of the two most important spirit producers can be given as a good example for the procedure. The largest raki (a kind of highly alcoholic beverage similar to uzo) producer controlling almost 70-75% of the market intended to purchase its rival firm which then had almost 10-15% market share and was the second player in the market. Briefly, the merger was creating or strengthening the dominant position of the acquiring firm in raki, vodka and gin markets. After negotiations with the parties, they offered a commitment which was adopted by the Competition Board as a remedy containing divestitures in raki, vodka and gin markets and in the related liquor market due to portfolio effects. To ensure the success of the remedy, the acquirer committed to divest certain assets in a specific time frame. The commitment also included a clause that in case the divestiture could not be finalized in accordance with the time frame, a divestiture/sales trustee would implement the divestiture. Furthermore, a monitoring trustee has been appointed to examine the viability of the business to be divested. The functions like production and sales of the business to be divested were subject to a hold separate arrangement and would be managed separately from the merged firm in another facility⁸.

9. The above mentioned remedy includes a stand alone business divestiture in raki, gin and liqueur markets, and a carve-out concerning an interchange in vodka brands between the divesting entity and the merged firm. In other words, the divestiture of a stand alone business is possible under Turkish competition law. However, there is no defined policy adopted by the TCA to do so. Besides, there are cases where a divestiture of less than a stand alone business had been adopted by the Competition Board. A case where a divestiture of less than a stand alone business adopted is the *GıdaSA* case⁹. In this case the competition concerns in the industrial margarine market were eliminated by the condition to transfer licenses concerning two particular brands to third parties exclusively and indefinitely.

10. As an example to a behavioral remedy, the commitment adopted in the preliminary examination of the acquisition of the telecommunication firm Invitel's certain subsidiaries by Turkish telecommunication leader Türk Telekom can be given¹⁰. The Competition Board was of the opinion that the acquisition would strengthen the dominant position of Türk Telekom in both relevant markets of "infrastructure services supplied with fiber optic cables in Ankara-İzmir-İstanbul-Edirne route" and "infrastructure services supplied with abroad originated fiber optic cables in Thrace region". In order to eliminate the competition concerns, the acquirer proposed commitments enabling access to those markets. With the commitments, Vodafone, which was purchasing infrastructure services from Memorex (a subsidiary of Invitel) before the transaction, would be able to operate as an alternative infrastructure service provider in both markets by renting fiber optic infrastructures for 18 years from Memorex. Thus, although Memorex and Türk Telekom merged, Vodafone entered the market and the number of players in

involving a production capacity limit; *THY&DoCo*, dated 29.12.2006 and numbered 06-96/1224-369 and 06-96/1225-370, involving dealing with the distributors on non-discriminatory terms; and *TUPRAS*, dated 21.10.2005 and numbered 05-71/981-270, involving facilitating access by importers to LPG importing facilities.

⁶ See the decisions of the Competition Board, namely *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314; *Syngenta/Advanta*, dated 29.07.2004 and numbered 04-49/673-171, involving a divestiture in sunflower seed business; *GE/InVision Technologies*, dated 26.5.2004 and numbered 04-38/433-109, involving the divestiture of the acquired firm's assets in mobile NDT X-rays equipments market.

⁷ See the decision of the Competition Board, namely *P&G/Gillette*, dated 08.09.2005 and numbered 05-55/836-228, involving a divestiture of the battery-powered toothbrush business and licensing clauses.

⁸ See the decision of the Competition Board, namely *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314.

⁹ See the decision of the Competition Board, namely *GıdaSA*, dated 7.2.2008 and numbered 08-12/130-46.

¹⁰ See the decision of the Competition Board, namely *Türk Telekom/Invitel*, dated 16.9.2010 and numbered 10-59/1195-451.

the market remained the same. Although this remedy may enable Türk Telekom to complicate competitive behaviours of Vodafone and is not designed to facilitate other players to enter the markets, there is not yet any decision by the Competition Board finding violation of the Competition Act.

11. In practice, the Competition Board so far adopted behavioral remedies such as access remedies¹¹, supplying periodical market information¹², fair dealing clauses¹³ and limiting production capacities¹⁴. Except access remedies, other behavioral remedies are largely adopted by the Competition Board if the competition concerns arising from the merger are less significant.

12. As mentioned above, monitoring trustees were employed to monitor the protection of the value of the to-be divested business in *Greencastle/Intergum* and *Mey İçki/Burgaz* cases¹⁵. The monitoring trustees supplied monthly reports providing the TCA with information on the performance of to-be divested businesses, the divestment procedure, the potential buyers as well as their own opinions on these issues. Moreover, for example in *Mey İçki/Burgaz* case, in order to hold separate the divested entity, a hold separate manager was appointed and the changes in key-personnel were reported.

13. It is not common for the TCA to require divestitures to be finalized before a merger closes. Usually after the remedies are adopted in the decision of the Competition Board, the merger can be finalized. However, there is no restraint on the Competition Board to require the implementation of the remedy before the merger can be finalized.

14. In order to ensure that commitments are implemented, the Competition Board prefers to adopt a specific time frame in its decisions. However, the time frame is generally relatively longer compared to that adopted by the European Commission or antitrust authorities in the US and it is not very exceptional to extend the time periods. An average of one to two years for implementation of the commitments/remedies is more common. For example in *Greencastle/Intergum*¹⁶ case, the Competition Board required the parties to find a licensee in ten months and offered another six months for the divestiture trustee. However, in the last days of the ten-month period, an extra ten months was granted and the remedy was fulfilled close to the end of this period.

15. Although it has not yet been experienced, it is legally possible to impose administrative fines on the firms which do not fulfill their commitments and require the parties to terminate the merger. In both breaching the principal commitments (the conditions) and the obligations related to procedure, it is possible to impose administrative fines.

16. To ensure that the divestiture satisfies the purpose of the remedies, the TCA also approves sale of the assets, which are subject to the divestiture, to the potential buyer. For instance, in a merger of two

¹¹ See the decisions of the Competition Board, namely *Türk Telekom/Invitel*, dated 16.9.2010 and numbered 10-59/1195-451 and *Privatisation of TÜPRAŞ*, dated 21.10.2005 and numbered 05-71/981-27.

¹² See the decision of the Competition Board, namely *Borusan/Mannesmann*, dated 20.08.1998 and numbered 80/617-119.

¹³ See the decisions of the Competition Board, namely *THY/DoCo*, dated 29.12.2006 numbered 06-96/1225-370 and, again *THY/DoCo* dated 29.12.2006 and numbered 06-96/1224-369.

¹⁴ See the decision of the Competition Board, namely *Toros / Sümer Holding Mazıdağı Fosfat Tesisleri*, dated 21.02.2008 and numbered 08-16/189-62.

¹⁵ See the decisions of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314; *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314.

¹⁶ See the decision of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314.

confectionary producers¹⁷, due to arising competition issues in sugar-free gum market, the Competition Board has approved the proposed buyer as it had the necessary sectoral experience, had no connection with the merging parties and did not lead to any competition concerns.

17. To control the fulfillment of the commitments, reporting requirements can be mentioned in the decision of the Competition Board. The professional staff of the TCA handling the case also controls the enforcement of the commitments and the remedy.

18. When the TCA is notified of a merger, it is announced in its official website. Thus, third parties have the opportunity to submit their opinions on the merger. However, if the case has important aspects or a remedy proposal, the professional staff of the TCA in charge of the case usually asks for opinions of the relevant third parties like rivals, suppliers or distributors.

19. To sum up, the TCA aims to improve its conduct and procedures in the merger remedies area as the cases and commitments get technically more complex and more detailed. Moreover, the TCA shows its increasing interest on the subject by working on publishing guidelines on merger remedies.

¹⁷ See the decision of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314.