

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Turkey****27 November 2018**

This document reproduces a written contribution from Turkey submitted for Item 5 of the 130<sup>th</sup> OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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## Turkey

1. Like in most jurisdictions, Turkey also employs a pre-merger mandatory notification system as a general rule. According to the Article 7 of the Act No: 4054 on the Protection of Competition (Competition Act), Turkish Competition Authority's Board (Board) has the right to issue a communique to declare which types of mergers and acquisitions should be notified to the Turkish Competition Authority (TCA) in order for a merger or an acquisition transactions to become valid. Therefore, we can say that merger and acquisition which is above a certain turnover threshold must get approval from the Board in order to become valid<sup>1</sup>.

2. However, it is important to note that Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No: 2010/4), which lays down the rules for pre-notification, departs from pre-notification rule with regard to series of transactions in securities on stock exchange, by which control is acquired from various sellers (Article 10/6). In addition to that, series of transactions in a period of three years, which are concluded between the same parties or in the same market by the same undertaking are considered as a single transaction with respect to calculating the turnovers of the parties to the transaction (Article 8/5).

3. The consequence of failure to notify a merger/acquisition which is subject to the Board's authorization is stated in Article 11. According to Article 11;

*“Where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall take the merger or acquisition under examination on its own initiative, when it is made aware of the transaction in any way. As a result of the examination;*

*a) it allows the merger or acquisition in case it decides that the merger or acquisition does not fall under the first paragraph of Article 7, but imposes fines on those concerned due to their failure to notify.*

*b) in case it finds that the merger or acquisition falls under the first paragraph of Article 7, it decides that the merger or acquisition transaction must be terminated and fines imposed; that all de facto situations committed contrary to the law must be eliminated; that any shares or assets acquired must be returned, if possible, to their former owners, within those terms and duration as determined by the Board, or if not possible, these must be assigned and transferred to third parties; that the acquiring persons may by no means participate in the management of undertakings acquired until these are assigned to their former owners or third parties, and that other measures deemed necessary by it must be taken.”*

4. As stated in Article 11, even if the transaction is found not to be creating or strengthening dominant position after the examination, the parties to the merger/acquisition are fined by the Board.

5. The fine is determined according to the Article 16 of the Competition Act, which states that

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<sup>1</sup> There are no instances regarding a transaction where no clearance is deemed to be given by the Board and yet the transaction is still consummated.

“ ...

*b) ) mergers and acquisitions that are subject to authorization are realized without the authorization of the Board,*

...

*To those who commit behavior prohibited in Articles 4, 6 and 7 of this Act, an administrative fine shall be imposed ... , generated by the end of the financial year preceding the decision, or generated by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board.*

...

*the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations an administrative fine by **one in thousand** of annual gross revenues of undertakings and associations of undertakings or members of such associations ... Pursuant to sub-paragraph (b) of this paragraph, administrative fine is imposed to either of the parties in merger transactions and only to the acquirer in acquisition transactions.*

... “

6. Therefore, failing to notify a merger transaction subject to the Board’s authorization results in a fine of 0.1 % of annual gross revenues of undertakings involved and in acquisition transactions, failure to notify results in a fine of 0.1 % of annual gross revenue of the acquirer. As could be understood from the article, no aggravating or mitigating factors are taken into account when determining the percentage of the fine.

7. TCA also has the power to conduct a dawn raid for merger/acquisition transactions. According to the Article 15 of the Competition Act, the Board may perform examinations at undertakings and associations of undertakings in cases it deems necessary while carrying out the duties assigned to it by the Competition Act. In the last 20 years, the Board conducted a dawn raid for only 3 cases<sup>2</sup>, 2 of which it took to final investigation stage (Phase II review) and fined the parties of the transaction because of failing to notify the transaction to the Board. The Board authorized the transactions in both of these cases.

8. The final point to be mentioned about the notification of merger and acquisition transactions is the limitation period. The limitation period to open a case against an unnotified merger is stated in the Law of Misdemeanors. According to the Law of Misdemeanors, if a merger or an acquisition transaction goes unnoticed for 8 years, the Board cannot prosecute the transaction and thus cannot issue a fine. The limitation period starts at the time that the control is assumed by the acquirer or the merging entity. In the last 20 years, there have been 9 cases<sup>3</sup> where the Board decided not to issue a fine to the

<sup>2</sup> Decision No: 07-34/351-131, Decision Date: 24.4.2007; Decision No: 10-56/1089-411, Decision Date: 26.08.2010 and Decision No: 10-66/1402-523, Decision Date: 21.10.2010.

<sup>3</sup> Decision No: 04-49/669-169, Decision Date: 29.07.2004; Decision No: 05-15/186-63, Decision Date: 17.03.2005; Decision No: 05-88/1219-352, Decision No: 05-49/700-188, Decision Date: 28.07.2005; Decision Date: 29.12.2005; Decision No: 08-15/148-50, Decision Date: 14.02.2008; Decision No: 11-06/101-34, Decision Date: 27.01.2011; Decision No: 11-64/1684-619, Decision Date: 29.12.2011; Decision No: 11-28/537-160, Decision Date: 04.05.2011 and Decision No: 12-68/1684-619, Decision Date: 27.12.2012.

merging parties of a transaction or the acquirer of a transaction because the limitation period had expired.

9. When we look at TCA's 20 years of history regarding failure to notify a merger or an acquisition decision before the transaction closes (gun jumping cases), we see that it has issued a total of 3.496.781,39 TL fine in 51 decisions. All of these decisions are approved and the related parties were fined. More detailed statistics regarding TCA's experience with gun jumping violations can be found in the table below.

**Table 1. TCA's Experience Regarding Gun Jumping Violations**

Years	Number of Cases	Amount of Fines Issued (TL)	How the Board Learned About the Case	
			Application	Other
1997 - 2007	27	820.617,01	24	3
2008	3	39.325,00	3	0
2009	8	1.986.301,44	5	3
2010	8	226.873,58	6	2
2011	1	1.697,92	1	0
2012	1	119.056,94	1	0
2013	1	242.813,48	1	0
2014	1	30.452,00	1	0
2015	0	0,00	0	0
2016	1	31.236,02	1	0
2017	0	0,00	0	0
<b>Total</b>	<b>51</b>	<b>3.496.781,39</b>	<b>43</b>	<b>8</b>

10. As can be seen in the table, most of the gun jumping decisions (84 %) were taken as a result of an application of either the same merger or acquisition transaction or a related merger or acquisition transaction.

11. The other means that the Board learned about the unnotified merger and acquisition transactions are as follows:

- a complaint (Decision No: 10-27/393-146, Date: 31.03.2010 and Decision No: 10-56/1089-411, Date: 26.08.2010),
- documents found in a dawn raid (Decision No: 09-21/439-107, Date: 06.05.2009 and Decision No: 09-14/300-73, Date: 13.04.2009), and
- press release (Decision No: 00-49/519-284, Date: 12.12.2000; Decision No: 05-78/1053-295, Date: 10.11.2005; Decision No: 05-48/1149-329, Date: 21.07.2005 and Decision No: 09-33/728-168, Date: 15.07.2009)

12. Another important trend seen in the table is, the number of fines issued for gun jumping has dramatically decreased, even as low as to zero, in the last 7 years. This can be attributed to the increased competition advocacy activities of the TCA and increase in the number of lawyers who have sufficient knowledge of the Competition Act. Therefore, it can be safely stated that Turkey is not among the competition agencies, which have increased their enforcement efforts against gun jumping cases as stated by the background note of the OECD secretariat.

13. With regard to suspensory effects of merger notifications, under Competition Law, undertakings must remain as distinct entities until the Board clearance. For example, in the

past, the Board found that aforementioned obligation was not respected in the following instances: appointments of managers or members to target's board<sup>4</sup>, public announcement by the acquirer as if the transaction is already complete<sup>5</sup>, intervention by the buyer to billing affairs, reviewing employee contracts and discussions about issuing business cards for employees of the target<sup>6</sup>, providing services to the target's customers on behalf of the target<sup>7</sup>, controlling target's schedules, who operates in television broadcasting, with regard to television shows and commercial advertising<sup>8</sup>. Currently there is no clear guidelines published by the TCA to tackle the issue. Therefore undertakings should be careful in order not to consummate their transactions prior to the Board's approval. While there might indeed be a trade-off between stand-still obligations and efficient consummation of mergers, in TCA's experience, as almost all of the applications are decided within less than 30 days, it is not a big concern in practice. In that respect, a detailed case-by-case analysis gives better insight to undertakings regarding the issue.

14. Lastly, gun-jumping is seen as a single procedural infringement under Competition Law. However it may also amount to a substantial infringement where an anti-competitive information exchange/agreement between competitors is in place or when an anti-competitive transaction of concentration is consummated. Even though this has never been an issue in an investigation, it does not mean TCA will not open an investigation to the parties of a merger/acquisition which are suspected to have infringed the Article 4 of the Competition Act.

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<sup>4</sup> Decision No: 01-58/601-156, Decision Date: 04.12.2001 and Decision No: 10-56/1089-411, Decision Date: 26.08.2010.

<sup>5</sup> Decision No: 10-56/1089-411, Decision Date: 26.08.2010.

<sup>6</sup> Decision No: 10-56/1089-411, Decision Date: 26.08.2010.

<sup>7</sup> Decision No: 03-31/380-167, Decision Date: 08.05.2003.

<sup>8</sup> Decision No: 05-78/1053-295, Decision Date: 10.11.2005.