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The Role of Innovation in Enforcement Cases – Note by Türkiye

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm>.

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1. Introduction

1. Competition law includes many non-price dimensions of competition, including quality, variety, pre- and after-sales service and advertising. Consumer benefit therefore does not only mean lower prices, but also includes access to a high quality and variety of products and services, as well as innovation, given its critical importance for economic growth and consumer welfare.

2. Essentially there is a two-way relationship between innovation and competition. On the one hand, innovation leads to increased competition in the market, and on the other hand, increased competition leads to more innovation. At this point, the long-term effects of competition violations on innovation may be more important for consumer welfare than short-term price effects. Therefore, it can be said that innovation is under the scrutiny of policymakers in Republic of Türkiye (hereafter Türkiye), as in other countries, due to its importance.

3. In this contribution, under each heading, the legal framework enabling the evaluation of innovation effects in Türkiye will be discussed first, and then the approach of the Turkish Competition Authority (TCA) will be explained with sample decisions.

2. Innovation in mergers

4. In this section, firstly, the legal framework drawn by the Law No. 4054 on the Protection of Competition (Law No. 4054) and the relevant secondary regulations will be given in the evaluation of the impact of mergers on innovation competition.

5. Article 7 of the Law No. 4054, which regulates the control of mergers, stipulates that: It is illegal and prohibited for one or more undertakings to merge, or for an undertaking or a person to acquire – except by inheritance – assets, or all or part of the partnership shares, or instruments conferring executive rights over another undertaking, where these would result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position. The Guidelines on the Evaluation of Horizontal Mergers and Acquisitions (Horizontal Guidelines) dated 2022 was published in order to set forth the general principles to be taken into account in the preliminary assessments to be made by the Turkish Competition Board (Board) on horizontal mergers.

6. Paragraph 6 of the Horizontal Guidelines states that “*Effective competition brings a number of benefits to consumers. These include lower prices, quality products and a wide choice of products and services. By controlling mergers, the Board prevents mergers that may significantly increase the market power of undertakings, thereby depriving consumers of these benefits. As a result of a significant increase in market power, one or more undertakings may be able to profitably increase prices, reduce the quantity of production, reduce the quality or variety of goods or services, or reduce or delay innovation. Quality, which can be defined as product attributes other than price, such as functionality, durability, reliability, design, performance or safety, can often play a central role in consumers' purchasing decisions. Mergers may lead to price increases through unilateral effects as well as a decrease in product quality.*”

7. The first sentence of paragraph 40 of the Horizontal Guidelines reads as follows: “Some undertakings have more influence on the competitive process in the market they operate than their market shares or similar indicators suggest.” The beginning of paragraph 41 of the Horizontal Guidelines states that “In markets where innovation is an important competitive force, a merger may increase the merged undertaking's ability and incentive to bring innovations to the market, which may result in creating competitive pressure on competitors to offer innovations in that market or increase the current pressure.” In the continuation of the same regulation, as another option, it is regulated that “a merger between two innovative undertakings operating in a market may significantly impede effective competition; similarly, an undertaking with a relatively low market share will be considered a significant competitive force if it has a promising, emerging product”.

8. Paragraphs 85 and 86, which were added to the Horizontal Guidelines on innovation assessment in 2022, reveal the sensitivity of the TCA on this issue. According to the legislation, the essential effect of the merger on innovation depends on the nature of the innovation activities carried out, the structure of the relevant product markets, the dynamics of innovation competition in the market, and the importance attributed to innovation by undertakings and consumers. In determining the importance of innovation in the market, the size of the undertakings' R&D investments, the importance of intellectual property rights or the economic justification of the merger may also be taken into account.

9. As also set out in the Horizontal Guidelines, competitors in terms of innovation activities may correspond to a subset of competitors in the relevant product market or may include undertakings that do not have activities in the relevant product market, but own assets used in innovation activities. Undertakings whose innovation activities and strategies substantially overlap and are directed towards producing closely competing products may be close competitors in terms of innovation activities. Mergers that bring together complementary assets in terms of innovation activities may have an innovation-enhancing effect. In an analysis of the dynamics of innovation competition, the extent to which the innovation activities of undertakings overlap or are complementary, the extent to which they create competitive pressure on the merged firm, and the obstacles to the conduct of innovation activities are important. This assessment will be based on the undertakings' innovation capacities taking into account variables such as the number and quality of patents, the number of R&D laboratories and the number of R&D employees, rather than their market shares in the relevant product market.

10. Therefore, based on the above-mentioned explanations, it is seen that the TCA attaches importance to innovation as a competition parameter in its legislation. On the other hand, the Board's decisions so far do not provide a detailed assessment of the impact of mergers on innovation competition¹. In some of its decisions, the Board has accepted that the merger may create efficiency in terms of R&D activities and investments with a brief and general evaluation within the framework of the parties' claims². In more number of Board decisions, within the scope of the justifications of the transaction, the Board stated that the merger would benefit from synergies in R&D fields, make it possible to develop

¹ In the Board's decision dated 27.8.2009 and numbered 09-40/986-248, it was stated that “...it should be taken into consideration that not only prices but also service quality and innovation and development in the service process may be adversely affected as a result of the elimination of competition.” However, a more comprehensive assessment was not made.

² Board decisions dated 10.11.2022 and numbered 22-51/745-309; dated 11.5.2006 and numbered 06-33/410-107; dated 28.5.2002 and numbered 02-32/367-153. However, it should be noted that the aforementioned decisions essentially concluded that the mergers subject to review did not give rise to competitive concerns.

innovative products, increase R&D activities, etc., but did not make any evaluation regarding these issues³.

3. Innovation in abuse of dominance investigations

11. In Türkiye, the unilateral behavior of dominant undertakings in the face of disruptive innovations may be evaluated within the scope of the provisions of subparagraph (a) of Article 6 of the Law No. 4054, “Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market” and subparagraph (e), “Restricting production, marketing or technical development to the prejudice of consumers”.

12. In this context, paragraph 25 of the Guidelines on Exclusionary Conduct of Undertakings in a Dominant Position states that “The basis of the Board evaluation on exclusionary conduct is the examination of whether the behavior of the dominant undertaking leads to actual or potential anticompetitive foreclosure. Anti-competitive foreclosure is the obstruction or prevention of access to sources of supply or markets for actual or potential competitors as a result of the conduct of the dominant undertaking, to the detriment of the consumers. Harm to consumers may occur in the form of increased prices, decreased product quality and level of innovation, and reduced variety of goods and services.”

13. When we look at the Turkish approach to the issue, in the Board's Google/Android⁴ decision dated 2018, it was evaluated that Google has a dominant position in the "licensable mobile operating systems" market, and that the tying and exclusivity provisions in the agreements signed with device manufacturers provide all the conditions of the tying practice, which is considered as a violation under Article 6 of Law No. 4054. In this context, it was stated that the exclusive installation of the Google Search application on the devices violated Article 6 of Law No. 4054 and strengthened and made permanent the anti-competitive effect caused by the tying practice regarding the Google Search application.

14. In the Google/Shopping⁵ decision of the Board dated 2020, the Board decided that Google was in a dominant position in the general search services and online shopping comparison services markets and that Google violated Article 6 of Law No. 4054 by placing its competitors offering shopping comparison services at a competitive disadvantage, making the activities of rival undertakings more difficult and causing distortion of competition in the shopping comparison services market.

15. When the decisions are analyzed with a holistic approach, it is seen that competition authorities or courts generally base the theory of harm on the reduction of consumer preferences when dealing with the unilateral behavior of dominant undertakings regarding innovation assessments. In this context, it is understood that competition authorities or courts aim to protect the competitive process by keeping markets open to new entries.

³ Board decisions dated 8.10.2001, No. 01-48/486-121; dated 6.1.2010, No. 10-01/6-4; dated 8.1.2009, No. 09-01/10-8; dated 11.06.2009, No. 09-27/572-133; dated 21.04.2011, No. 11-25/476-145; dated 04. 11.2014, No. 14-43/796-357; dated 10.10.2017, No. 17-31/520-224; dated 08.01.2015, No. 15-02/8-6; dated 29.03.2018, No. 18-09/155-75; dated 01.10.2009, No. 09-43/1097-277.

⁴ Decision dated 19.09.2018 and numbered 18-33/555-273.

⁵ Decision dated 13.02.2020 and numbered 20-10/119-69.

4. Conclusions

16. Due to its critical importance for economic growth and consumer welfare, ignoring innovation in competition law and policy no longer seems to be an option for competition authorities. However, the assessment of innovation in investigation and merger cases requires further study and discussion in many respects.

17. It may be difficult for competition authorities to analyze the conduct of undertakings as it may have both positive and negative consequences in the context of competition law. The fact that innovation is difficult to prove due to its unpredictability, that its benefits emerge in the long term, and that a decrease in the parties' incentive to innovate may harm the consumer have led to a cautious approach to the evaluation of innovation. However, at this point, it is considered that the assessments to be made by competition authorities regarding the type of innovation activities, the intensity of innovation competition between the merging parties, the competitive power of existing or potential rival innovative firms, the obstacles to the conduct of R&D activities, the structure of the related product market and the ability of undertakings to own the benefits arising from innovation will benefit the increase in competition in the innovation market.