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

Conglomerate effects of mergers – Note by Turkey

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This document reproduces a written contribution from Turkey submitted for Item 1 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

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1. In Turkish Competition Law, dominance test is applied for the control of mergers and acquisitions. According to the said dominance test, it is stated in Article 7 of the Act no 4054 on the Protection of Competition that merger or acquisition by one or more undertakings, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.

2. In relation to which types of mergers and acquisitions require the authorization of the Competition Board, the Communiqué on Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No:2010/4) was issued. The said Communiqué uses turnover threshold in applications for authorization.

3. Mergers and acquisitions creating a dominant position or strengthening an existing dominant position are prohibited as a result of the above-mentioned legal provision and the dominance test. Conglomerate mergers and acquisitions are also evaluated within this framework. Whether undertakings that are active in adjacent markets with respect to relevant product market or that have complementary relationships become dominant or strengthen their dominant positions as a result of the merger is taken as a basis.

4. The Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, (the Guidelines) explain how conglomerate mergers and acquisitions are handled apart from horizontal mergers and acquisitions. The Guidelines were drafted taking into account the developments in “Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings” (EC Guidelines) issued by the European Commission. As known, EC Guidelines notes that according to the SIEC test preferred by the European Commission for the control of mergers and acquisitions, the merged entity might have a significant market power but the said market power does not necessarily have to indicate a dominant position. On the other hand, in order not to be contrary to Article 7 of the Act, it is stated in the Guidelines that in case the merged entity created as a result of non-horizontal mergers is not dominant in at least one of the relevant markets, it can be accepted that the merger will not negatively affect competition. This also applies to conglomerate mergers and acquisitions, which is the most important difference between the Guidelines and EC Guidelines.

5. In this scope, the Guidelines follow the systematic of EC Guidelines and follow the theory of harm. The Guidelines evaluate whether the merged undertaking has the ability or incentives to leverage its strong position in one market to other markets by means of bundling, tying or other exclusionary practices. With respect to coordinating effects, there is a reference to findings and observations made in the Guidelines on the Assessment of Horizontal Mergers and Acquisitions, which was drafted taking into account “Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings” issued by the European Commission.

6. Although there are many Turkish Competition Board (hereinafter “Board”) decisions regarding conglomerate mergers and acquisitions, Luxottica and Essilor merger¹ is notable as it has global significance. Luxottica and Essilor made an application to the Competition Authority on 22.05.2017. The Board took the transaction under final

¹ The Board decision dated 01.10.2018 and numbered 18-36/585-286.

examination due to competitive concerns. As a result, the transaction was conditionally approved.

7. Luxottica is active in the production and sales of sunglasses as well as the production and sales of optical frames. Essilor is active in the production and marketing of ophthalmic lenses and optical tools, production and sales of optical machines, equipment and consumables as well as in the area of sunglasses and reading glasses. While Essilor does not have retail activities in Turkey, Luxottica is engaged in retail trade of sunglasses and optical frames through its subsidiary. The Board defined the relevant markets as “wholesale of designer brand sunglasses”, “wholesale of designer brand prescription optical frames” and “wholesale of ophthalmic lenses”.

8. In its decision, The Board stated that the transaction created horizontal concerns, as both undertakings were active in the markets for “wholesale of designer brand sunglasses” and “wholesale of designer brand prescription optical frames”. In addition, in the markets of “wholesale of designer brand prescription optical frames” and “wholesale of ophthalmic lenses” there is a complementary relationship. The said three markets cover almost all of the needs of an optician; thus, anticompetitive portfolio effects are also at issue.

9. In analyzing whether the parties have the ability and the incentives to create competitive concerns, the Board made both ex-ante and ex-post evaluations. With respect to bundling and tying concerns, a reference was made to the Board decision² regarding Luxottica taken about three months before the application. It was stated that Luxottica violated the Act no 4054 by means of similar conduct.

10. In the said decision, depending on the statements of competitors and undertakings active at optician level as well as example of e-mails and working forms showing Luxottica’s system’s functioning, the Board concluded that Luxottica’s discount system was imposing a large product range. The Board decided that Luxottica’s discount system, which was imposing the purchase of a large product range and based on target turnover, created exclusivity due to its aspects increasing loyalty.

11. Within the framework of the merger file, the Board made the following observations:

- The merged entity will have a product range that will meet opticians’ almost all needs.
- Its existence in the sales of ophthalmic machinery and equipment together with designer brand sunglasses shows that the merged entity will have a vertically integrated structure.
- The merged entity will be dominant in the market for wholesale of designer brand sunglasses and have strong brands, Ray-Ban being in the first place, in its product portfolio.

12. Moreover, the Board also highlighted that the merged entity may leverage its market power in sunglasses market to other markets. Beside its power in sunglasses market where dominance is observed even before the merger, the merged entity will be very strong

² The Board decision dated 23.02.2017 and numbered 17-08/99-42.

obviously in one market³ and in another market; thus the transaction might create conglomerate effects.

13. Lastly, taking into account the fact that an optician's fundamental activity areas are consisted of retail sale of sunglasses, wholesale of prescription optical frames and retail sale of ophthalmic lenses, the Board noted that the merged entity will meet a huge part of an optician's needs after gaining significant market power in relevant markets and this may support an important portfolio power that may be used against competitors.

14. Upon those concerns, the parties offered divestiture commitments to solve horizontal overlaps and to relieve anticompetitive conglomerate concerns stemming from portfolio power. They also offered additional behavior commitments to relieve anticompetitive conglomerate concerns. Under the scope of divestiture commitments, the parties offered to divest Essilor's one subsidiary active in the markets for "the wholesale of designer brand sunglasses" and "the wholesale of designer brand prescription optical glasses frames". This divestiture eliminates the horizontal overlap and decrease the portfolio power. The parties also offered that they will not tie ophthalmic lenses, optical frames and sunglasses products and they will not impose contractual or actual exclusivity provisions to opticians.

15. As known, the success of behavioral commitments in eliminating competitive concerns in merger and acquisition files are frequently discussed in the literature and competition law community. In the decision in question, the parties offered structural commitments beside the behavioral commitments. It is concluded that anticompetitive conglomerate concerns are solved. Undoubtedly, the changes in market structure and price movements will show a clearer picture with regard to commitments' effects.

16. In relation with anticompetitive conglomerate effects in digital markets, the Competition Authority has not received a merger or an acquisition application by big IT companies. It is possible to suggest that threshold systems play a role here. In this framework, the working group under the body of the Competition Authority carries out a meticulous work to see whether it is necessary to amend or revise the threshold system used in mergers and acquisitions, especially in IT areas and digital markets.

³ Although it is not necessary to make dominance analysis in the market for wholesale of ophthalmic lenses, the Board stated that Essilor is on the threshold of dominance in this market.