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COMPETITION COMMITTEE**

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ROUNDTABLE DISCUSSION ON EVIDENTIARY ISSUES IN MERGER REVIEW

-- Turkey --

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EVIDENTIARY ISSUES IN MERGER REVIEW: TURKISH EXPERIENCE

1. Article 7¹ of the Act on the Protection of Competition no. 4054 (The Competition Act no. 4054), Communiqué numbered 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué no. 1997/1), and the Communiqué numbered 1998/4 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid are the relevant legislation concerning mergers and acquisitions under the Turkish Competition Law²

1. Obtaining information in the merger review process

2. According to Communiqué no. 1997/1, mergers or acquisitions exceeding certain thresholds are subject to authorization of the Competition Board. In order to take the authorization of the Board, notification shall be made by the Notification Form (Form-2) enclosed with the Communiqué no. 1997/1. This Notification Form is the basis of the information that would be used during the examination process, and the first step in obtaining information concerning the merger review process.

3. This information should be complete and correct for the Turkish Competition Authority (TCA) to start its examination process.

4. Article 5 of the Communiqué no. 1997/1 states that notification shall be made jointly by persons or undertakings. Notification is also valid when made by either of the parties. Notification may also be made by legal representatives of persons and undertakings referred. In this case, certificates showing the authorized representatives should be attached to the Notification Form. Moreover, a copy of the agreement or decision related to the merger or acquisition which is the subject of the Notification should be enclosed with this Form. Within this regard, initially:

- information on the identity of the undertakings;

1. “Mergers or Acquisitions

Article 7- Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited. The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.”

2. These legislation can be reached at <http://www.rekabet.gov.tr> by clicking into “English” and then “legislation”.

- general information about the merger or acquisition including personal and financial information of the parties;
- information on the relevant market; and
- information on the conditions for market entry and the potential competition

are provided by the parties to the TCA.

5. This information is necessary and useful especially during the “**preliminary examination**” process of the mergers and acquisitions that is explained below.

6. According to Article 10³ of the Competition Act no. 4054, the “preliminary examination”, which is the first step for a merger review under Turkish competition law, needs to be completed in 15 days. According to **Article 7** of the Competition Act no. 4054 if all the relevant information required by the Notification Form is complete and precise, it is obligatory for the Board to come to a conclusion. If the Board during its examination finds out that the file is incomplete, then it could send a letter to the notifying parties and the relevant third parties requesting the completion of the lacking information or the documents. Thus, upon the completion of the relevant information from all sides, the 15 day-period of the preliminary examination starts from scratch.

7. At the end of this process, the Competition Board (Board) should either permit or oblige to duly notify the parties via its preliminary objection letter that it decides to deal with this transaction under “**final examination**”. If the Board decides to further investigate the transaction under the “final examination”, then the aforementioned transaction will be suspended and cannot be put into practice until the final decision is made. Under such circumstances, provisions of Articles 40-59 of the Competition Act no. 4054 shall be applicable. Articles 40-59 regulate the “Procedure in Examinations and Inquiries of the Board”. However, under the current legislation, one can put forward that there should be a special and a faster procedure for the “final examination” process rather than observing the procedure regulated in the aforementioned articles. Article 40 provides that “on its own initiative or upon the applications filed with it, the Board decides to open a direct **investigation**, or to conduct a **preliminary inquiry** for determining whether or not it is necessary to open an investigation.” In other words, final examination as referred to in Article 10 is interpreted as an investigation procedure. Nevertheless, those provisions (40 to 59) are mainly suitable for the procedure that needs to be followed during an antitrust investigation, namely Article 4 (restrictive agreements) and Article 6 (dominant position) cases under the Competition Act no. 4054.

8. According to the Turkish Competition Law, those privatization transactions above a certain limit are considered as **acquisitions**, thus they are subject to authorization from the Competition Board. To this end, there is a special Communiqué no 1998/4 on the “Procedures and Principles to be Pursued in Pre-

3 . **Notification of Mergers and Acquisitions to the Board**

Article 10- As of the date the Board is notified of merger or acquisition agreements falling under Article 7, the Board is, as a result of the preliminary examination to be performed by it within fifteen days, obliged to permit the merger or acquisition transaction, or if it decides to deal with this transaction under final examination, it is obliged to duly notify, with its preliminary objection letter, those concerned of the fact that the merger or acquisition transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it. In this case, the provisions of Articles 40-59 of this Act shall be applicable. Where the Board does not respond to or take any action for the application as to a merger or acquisition within due time, merger or acquisition agreements shall take effect and become legally valid after 30 days as of the date of the notification.

Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid". Its aim is to determine the procedures and principles to be pursued in pre-notifications and authorization applications to be filed with the Competition Authority in order for acquisitions to be carried out by the Presidency of Privatization Administration and the other public institutions or organizations to become legally valid, in accordance with Articles 7 and 27/f of the Competition Act no. 4054.

9. As is known, in various jurisdictions there is a distinction in the procedure applicable for merger assessment and an antitrust investigation by its very nature. Merger assessment is more of an ex-ante nature, while an antitrust investigation requires an ex-post nature examination. Therefore, the tool(s) needed for such ex-ante analysis should be different than an ex-post investigation process. In addition to that, merger evaluations should be completed faster compared to others in order to give more transparency to those parties who are willing to take part in such transaction and to let the inflow of investments. As can be seen from the wording of Article 40, the Competition Act no. 4054 refers to preliminary inquiry and investigation prepared basically for antitrust investigations that take at least 6 months to complete. This is quite a long process in the case of a merger investigation. Thus, due to these challenges on the procedural and substantive sides, the Board which is the decision making body of the TCA abstains from the strict use of the procedure defined in Articles 40-59 in its past experiences. Rather, the Board tried to find a legal solution to overcome this difficulty. Having said that, it would be timely to mention that the relevant articles in the Competition Act no. 4054 should be amended in such a way to overcome the procedural and substantive difficulties. In addition to that there is an ongoing study for the preparation of a new communiqué on mergers and acquisitions at least to solve the problems arising from the solely implementation of Communiqué 1997/1.

2. Cases

2.1 *Carrefoursa/Gima Decision (dated 17.06.2005 and numbered 05-40/557-136)*

10. The TCA authorized the acquisition of Gima and Endi by Carrefoursa in the retail market in its *CarrefourSa/Gima* decision. The Board highlighted that in the modern retailing market, those stores above 1000 square meters differentiated in the eye of consumers due to services offered by them (such as the variety of products, largeness of the car park capacity, offering miscellaneous side services). The existing Communiqué no 1997/1 is based on the concept of dominance. Thus, the dominance analysis was carried out in the relevant product markets⁴ for that case.

11. According to the relevant articles of the Competition Act no 4054, when the Board decides that the existing information is not sufficient enough to carry out the necessary examination or they are in need of carrying an in-depth inquiry, they might ask for a "final examination" through which more detailed search can be executed. Such doubt arose during the preliminary examination. In general, preliminary and final examinations are carried out by the competition experts in charge and presented before the Board for the final decision. In that specific case of *Carrefoursa/Gima*, the experts suggested to further investigate the case to obtain more information to evaluate whether competition within the relevant market is affected by this transaction via creation of or strengthening a dominant position as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country as prohibited in Article 7.

4 . Relevant markets are: supermarket below 1000 square meters and above 1000 square meters excluding retail purchasing market, discount stores market, and hypermarkets.

12. The Board decided not to open a final examination due to difficulties arising from the procedural aspects as mentioned above and the facts that were provided until that time. The Board is aware of the fact that the procedure foreseen in the Act is not wholly compatible with the merger cases, it tries to overcome this difficulty via asking the competition experts in charge to continue their work within line with the relevant powers foreseen in Articles 14 and 15⁵ The Board delegates its right to request for information regulated in Article 14 to the case handlers in this case. The right to conduct on the spot investigations foreseen in Article 15 states that the "...Examination is performed by the competition experts employed at the disposal of the Board. While carrying out an examination, experts carry with them an authorization certificate showing the subject-matter and purpose of the examination, and that an administrative fine shall be imposed should incorrect information be provided." In this specific case, the Board emphasized that the competition experts can execute Articles 14 and 15 and finalize the said examination within the time limits foreseen for the preliminary examination to ensure the efficient usage of the system.

13. As can be seen from this case, under the Competition Act no 4054, during a merger review the TCA starts gathering data via the "Notification Form", then via Articles 14 and 15 may ask any information relevant not only from those parties whose interests are at stake but also from all public institutions and organizations. In addition to that Article 7 of the Communiqué no 1997/1 authorizes the Board to request for information from third parties and their participation in hearings during a merger review.

2.2 *Migros/Tansaş Decision (dated 31.10.2005 and numbered 05-76/103-287)*⁶

14. The TCA authorized the transaction of acquisition of Tansaş Retail Store Business Trade Inc. (Tansaş) by Migros Turkish Trade Inc. (Migros) and Koç Holding Company (Koç).

15. Two separate product markets were defined in the *Migros/Tansaş* decision, being the retail market and the supply (purchase) market. In determining the relevant product market in the retail market, the Board held the discussions in the *CarrefourSa/Gima* decision, and highlighted that in the modern

5. **Articles 14 and 15 of the Act on Competition no 4054 are as follows:**

Request for Information

Article 14- In carrying out the duties assigned to it by this Act, the Board may request any information it deems necessary from all public institutions and organizations, undertakings and associations of undertakings. Officials of these authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period to be determined by the Board.

On-the-Spot Inspection

Article 15- In carrying out the duties assigned to it by this Act, the Board may perform examinations at undertakings and associations of undertakings in cases it deems necessary. To this end, it is entitled to:

- a) Examine the books, any paperwork and documents of undertakings and associations of undertakings, and take their copies if needed,
- b) Request written or oral statement on particular issues,
- c) Perform examinations on the spot with regard to any assets of undertakings.

Examination is performed by experts employed at the disposal of the Board. While going for an examination, experts carry with them an authorization certificate showing the subject-matter and purpose of the examination, and that an administrative fine shall be imposed should incorrect information be provided.

(Supplementary paragraph: 01.08.2003-4971/Article 25): *Those concerned are obliged with providing the copies of information, documents, books and other instruments requested. In case an on-the-spot inspection is hindered or likely to be hindered, the on-the-spot inspection is performed with the decision of a criminal magistrate.*

6. "Annual Report 2005", <http://www.rekabet.gov.tr/Annual.html>

FMCGs (Fast Moving Consumer Goods) retailing market, those stores above 1000 square meters differentiated in the eye of consumers due to services offered by them (such as the variety of products, largeness of the car park capacity, offering miscellaneous side services), emphasizing that the one above the threshold referred to can be determined as a distinct market. On the other hand, in examinations performed under the transaction referred to, particularly in those regions where concentration was experienced, the establishment made was that stores below 1000 square meters could also take place within the scope of the relevant market. Therefore, even though the threshold has been determined as 1000 square meters, the analysis of dominant position was also made for the market definition where the threshold referred to was lowered to 300 square meters.

16. In the decision, a separate emphasis was put on the necessity that the supply market be defined on the basis of the group of products. The reason is that the critical factors in the purchase market as regards the producer are the flexibility for the producer to modify its production and to be able to sell its production in different channels. It is not possible to expect from producers to produce all products sold in a supermarket setting and therefore to speak about a single supply market. In this regard, it is required that the examination to be performed in relation to the purchasing power be done so by means of defining as separate markets the groups of products where products which substitute for each other within the meaning of production come together. Consequently, when FMCGs sold in a supermarket setting are taken into account, the purchase market was defined as separate relevant product markets, being meat and meat products, white meat and egg products, bakery products, dairy products, beer, wine and alcoholic drinks, non-alcoholic drinks, hot beverages (coffee and tea), confectionery products (such as chocolate, cake), basic foods (such as flour, sugar, rice), frozen products, baby foods, domestic animals feeds, body care products, and house cleaning products.

17. As was in the *CarrefourSa/Gima* decision, regarding the retail market, the Board stressed that the geographic market could be made on a provincial basis in its broadest sense due to the reasons such as consumers' transport opportunities, quality of the product and the highness of research costs in the retail market, and it narrowed the geographic market down to the level of administrative districts in certain regions. For the purchase market, the geographic market was determined as the Republic of Turkey.

18. During the “**on-the-spot investigations**” carried out in Çeşme, Edremit, Nazilli and Kuşadası regions, where a dominant position is possible to exist after the acquisition, it was understood that there are building sites that are convenient for founding a store larger than 1000 square meters. Moreover, the fact that it is easy to find a place for opening a store larger than 300 square meters or to switch another activity field to a FMCG retailer in the centers of these regions has been considered as factors that strengthen potential competition. In cases where the relevant market is defined as more than 300 square meters, potential competition opportunities increase. In this frame, it has been concluded in the Decision that the acquisition will not result in competition restriction by creating a dominant position in relevant markets.

19. As a result, the Board has permitted the acquisition of Tansaş by Migros since it does not lead to creation of a dominant position within the frame of Article 7 of the Act.

20. For the examination of the above merger case, one can see that the TCA used the information in its analysis provided by the relevant parties via the Notification Form, information gathered from third parties such as undertakings that are operating in the relevant market and the consumers during the “on the spot investigations”, as well as various independent surveys that were carried out by private research companies.

3. Utility of information/ evidence obtained

21. The various categories of information and evidence provided by the relevant parties via the Notification Form, information gathered from third parties (competitors, consumers, supervisors), as well as various independent surveys that are carried out by private research companies are all relevant and useful during a merger review. As long as statements by third parties are in parallel to each other, those information can be considered reliable. For instance, information collected should be compared to each other. At the same time, surveys carried out by universities or independent research companies can be used to double check the reliability of the information.

4. Presenting evidence in the courts

22. In year 2005, the cement factories belonging to Uzan Group and confiscated by the Saving Deposit Insurance Fund (TMSF) were put up for sale. Since TMSF is a public institution, this transaction is considered as an acquisition via privatization and thus it is evaluated under the Communiqué on Privatizations numbered 1998/4. As mentioned above, privatization transactions above a certain limit are considered as **acquisitions** under the Competition Act no. 4054 and subject to necessary provisions found under the above mentioned privatization communiqué.

23. In that respect, 9 cement factories were put up for sale. When the concentration effects were taken into consideration, the Board did not permit acquisition of *Ladik* cement factory by the highest bidder based on the fact that it would create a collective dominance, whereas it permitted its acquisition by the second successful bidder. With respect to privatisation of *Şanlıurfa* cement factory, the Board denied its acquisition by one of the two successful bidders as collective dominance would be created in the relevant market and instead permitted its acquisition by the other bidder. Finally, the Board did not permit acquisition of *Gaziantep* and *Van* cement factories by the successful bidders due to creation of dominance in the relevant markets.

24. Following the Board's decision concerning the cement factories, in three cases (out of four) those successful bidders that were rejected by the Competition Board, filed an appeal to the Council of State.⁷ The investigations of those cases at the Council of State are all ongoing:

25. In the *Ladik* case, the Council of State requested the defence of the TCA including all the necessary information about the decision following the appeal request of the highest bidder Akçansa Company. The TCA in its response provided a detailed economical analysis about the definition of the relevant market and the market structure. To this end, the TCA defined the market by using Elzinga-Hogarty test, and then by using HHI index and C4 test it carried out a concentration test within the geographic market via various examples from the EU and the US. In addition to that, it mentioned about barriers to entry, structural links among the undertakings actively taking part in the relevant market. Last but not least, it gave the past conducts of the undertakings that are party to this transaction. However, the Council of State ceased the enforcement of the decision basically based on the claim that the Competition Act no 4054 didn't mention "collective dominance" but "dominance".

26. In response to that the TCA submitted its counter plea entailing its objections. It stressed once more on the above mentioned issues. At the same time, it stressed the necessary articles of the Act on

7. According to Article 55 of the Competition Act no. 4054, appeals may be made to the "Council of State" within due period against the final decisions, measure decisions, fines and periodic fines of the Board, as of communicating the decision to the parties. Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines.

Competition no 4054 and the communiqués to show and convince the Council of State that the concept of “collective dominance” is covered by the mentioned Act. Nevertheless, the plea request of the TCA is rejected. The case is still pending before the Council of State.

27. In the *Şanlıurfa* and *Gaziantep* cases, the TCA submitted its plea comprising its objections to the Council of State giving a detailed economical and legal analysis. Both of the cases are still pending before the Council of State.