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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON VERTICAL MERGERS

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21-22 February 2007.

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1. Rules on merger control are regulated in the Act No 4054 on the Protection of Competition (the Competition Act) and Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No 1997/1).[1] These constitute the basic legislation on merger control. The basic aim of merger control rules is to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. Therefore, dominance test delineates the basic framework for merger review.

2. It should be mentioned that there are no definitions for different types of mergers in the legislation apart from list of cases considered as a merger or an acquisition. However, in an earlier case[2], Competition Board provides the following explanation on vertical mergers: "… *vertical concentrations that may be defined as merger of undertakings which take place in different stages of the production of a product* …" It seems from the wording that there should be a vertical connection between the relevant markets. As to the difference between vertical and conglomerate mergers, one decision[3] by the Competition Board provides that the merger in question demonstrates features of conglomerate mergers as the parties are producers of different products and shift from one product to another is very hard as it requires large costs. Moreover, conglomerate mergers happen to be in relevant markets that do not overlap and have no vertical connection and as a result rarely cause negative impacts on competition.

3. Similar to the absence of definition of various types of mergers, the legislation does not provide particular guidelines applicable to vertical mergers. There are some general remarks in Communiqué No 1997/1 on principles to be taken into account in the assessment of mergers regardless of merger's being vertical, horizontal or conglomerate. According to the relevant article "… *the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, ...the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors* …" are to be taken into consideration while assessing mergers. As is seen from the principles, the criteria to assess mergers are not exhaustive and they are complemented by evaluations in the case law of the Competition Board.

4. Following explanations might be provided regarding some competitive assessments by the Competition Board in its decisions involving vertical mergers. However, it should be mentioned that the case law on vertical mergers is still being developed.

5. Based on the definition provided above, the Competition Board in the same decision mentions that vertical concentrations do not change the market structure directly. However, it is also provided that they may create significant entry barriers and competitive disadvantages. Therefore, it may be said that despite the fact that vertical concentrations do not change the number of competitors; an important

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1 Privatisation transactions are subject to Communiqué numbered 1998/4 on the Procedures and Principles to be pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid. However, provisions of Communiqué No 1997/1 are also applicable to acquisitions via privatisation transactions provided that they are not contrary to Communiqué No 1998/4.

2 *DUSA/KORDSA*, 3.3.1999; 99-12/95-37.

3 *EADS,* 18.4.2000, 00-14/135-67.

competitive problem they involve is foreclosure of the market to new entry.[4] Whether the remaining undertakings operating in the downstream markets will be able to find alternative suppliers of input following the transaction is considered important in clearing vertical mergers.[5] Thus the possibility of foreclosure is an important aspect considered in the review of vertical mergers. In this context, in case acquired upstream firm already sells most of its production of the raw material to the acquirer downstream firm might indicate that there would be no actual change in the relevant markets.[6] No market share indicators are available to prove foreclosure and individual analysis is done in each case.

6. In one case[7] regarding the acquisition via privatisation of a fertiliser producer by another one already operating with a strong market position in the market, the likely impact of the transaction in distribution stage have been taken into account. It is very advantageous that a fertiliser producer has a countrywide distribution network. Following the acquisition, it was thought that the acquirer whose dealers already outnumbered any of the fertiliser producers could increase its bargaining power further by increasing the number of its dealers with the participation of the dealers of the acquired company as well as by extending the supply of urea. As a result of increase in the bargaining power and extension of supply of urea, number of dealers already tied to the acquirer via exclusive purchase contracts would increase and this, by raising the entry barrier nature of distribution network, would complicate sales by importers to final users.

7. In another privatisation case[8] regarding acquisition of Turkish Petroleum Refineries Corporation (TÜPRAŞ) holding 86% of the crude oil refining capacity in Turkey by an acquirer under the control of an oil producer, the Competition Board cited that following benefits might be obtained by undertakings via vertical integration:

- diminishing operational costs
- ensuring the security of raw material supply
- diminishing capital costs and ensuring profit stability
- maintaining and developing the existing market
- eliminating those problems arising out of long-run agreements
- providing reliable data and the possibility of being able to make a long-run plan

8. Such benefits are cited as general remarks that have led to increasing vertically integrated structure in primary (exploration, production) and secondary (refining, transportation, storage, distribution) operations of the oil markets worldwide. In this case, it was thought that as imports in Turkish oil market is mainly characterised by spot purchases, TÜPRAŞ could increase its capacity depending on advantages to be obtained by vertical integration in purchasing raw material and this might create barrier to market entry because increase in capacity could sustain the spot character of the imports and prevent imports from having a structural character based on long-run agreements. Therefore, while the privatisation transaction was authorised, it was decided that because advantages arising from vertically integrated structure could

4 *Degussa/RAG*, 27.2.2003; 03-13/136-64.

5 *Degussa/RAG*, 27.2.2003; 03-13/136-64. *Privatisation of Div-Han*, 25.3.2004; 04-22/247-52.

6 *Kuraray/Troplast,* 6.1.2005; 05-01/5-5.

7 *Privatisation of IGSAŞ*, 3.11.2000; 00-43/464-254.

8 Privatisation of TÜPRAŞ, 29.1.2004; 04-09/77-19.

create barrier to market entry in imports and refining sector, investments to increase capacity should be observed following the acquisition to make an assessment under rules on abuse of dominance.

Conclusion

9. As seen from the above explanations, the key concern about the vertical mergers is the possibility of foreclosure due to vertical integration. In this regard, the TCA has examined the vertical mergers carefully to see whether there is any foreclosure or not as a result of the merger. In this regard, in order to avert the risk of a possible vertical foreclosure, the TCA considered the existence of actual or potential alternatives. On the other hand, the TCA has taken into consideration the possible efficiency gains from the merger when evaluating the final impact of the transaction on competition.