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ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM THE DOMINANCE TEST TO THE SLC/SIEC TEST

-- Turkey --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 9 June 2009.

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1. First paragraph of Article 7 of the Act No 4054 on the Protection of Competition (the Competition Act) provides for the basic framework of the merger control rules in Turkey and is as follows;

> *"Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, 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."*[1]

2. As is seen from the wording of the first paragraph of Article 7, dominance test is the standard for merger review under the Competition Act. Therefore, the basic concern is whether one or more undertakings in a particular market will gain the power to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers post-merger as a result of which competition is significantly decreased.[2] The Turkish Competition Authority (TCA) is of the view that Article 7 prohibits both single dominance as well as collective dominance as a result of which competition is significantly decreased.

3. The TCA uses HHI levels to determine possible competition concerns that could arise post-merger. For instance, in one case concerning the *Privatisation of Gaziantep Cement Factory*[3], the TCA cited the European Commission's approach found in *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*[4] and provided that it would be necessary to give weight to analyses of possible anti-competitive effects the horizontal merger

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1 According to second paragraph of Article 7, the Competition Board, the decision making body of the Turkish Competition Authority shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Competition Board and for which permission has to be obtained, in order them to become legally valid. In line with this provision, Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 1997/1) has been issued. Moreover, regarding privatisation transactions, Communiqué 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 (Communiqué No 1998/4) has been adopted. However, it should be said that provisions of Communiqué No 1997/1 are also applicable to privatisation transactions provided that they are not contrary to Communiqué No 1998/4. According to the Communiqué No 1997/1, "*... 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. It should be noted that these criteria to assess mergers are not exhaustive and they are complemented by evaluations in the case law of the Turkish Competition Authority.

2 Based on the definition of dominant position in Article 3 of the Competition Act as "*The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*".

3 Dated 20.12.2005 and numbered 05-86/1190-342. Information on this case is limited to three cities, namely Gaziantep, Adıyaman and Şanlıurfa that are defined as the relevant geographic market following Elzinga-Hogarty test.

4 OJ C 31, 5.2.2004, p. 5–18.

might lead to where the HHI was above 2000 and the change in the HHI (the delta) was above 150. In this case, as HHI was far above 2000 (4068 and 3882 in 2003 and 2004 respectively) and the delta was around ten times 150 (1605 and 1441 in 2003 and 2004 respectively), the TCA was of the opinion that the transaction would lead to anti-competitive impact at such a level that detailed dominance analysis was required. Moreover, the same decision has also cited *Horizontal Merger Guidelines*[5] of Department of Justice (DOJ) and the Federal Trade Commission (FTC) where the market is deemed highly concentrated if HHI is above 1800 and "*... where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise*". Based on the criteria in *Horizontal Merger Guidelines* of DOJ and the FTC, as the average HHI of the last three years was above 4052 (more than two times 1800) and the average delta of the last three years was above 1588 (fifteen-sixteen times 100 points), it was confirmed that the transaction would cause anti-competitive impact at a level requiring detailed dominance analysis.

4. In this decision, it was decided that the acquiring undertaking would have a high market share which would cause negative impact on the competitive conditions in the market when positions of the rival cement companies were taken into account. Moreover, the acquiring undertaking would acquire a dominant position in the market as a result of which competition in the market would significantly decrease due to homogenous nature of the product, limited sales area because of high transport costs, high entry barriers (the need for high amount of capital, economies of scale, vertical integration, need for comprehensive distribution network), transparency in the market, low price elasticity of demand, technological maturity in the relevant market, and lack of third party undertakings that could exert competitive pressure in the relevant geographic market. In the end, the TCA did not authorise the transaction.

5. The case mentioned above was a single dominance case. To provide an example for a collective dominance case, another decision of the TCA in the same market, namely *Privatisation of Ladik Cement Factory*[6] will be provided.[7]

6. In *Privatisation of Ladik Cement Factory*, the CR4, which was 97% before the merger, would rise to around 99% post-merger requiring detailed analyses on competitive structure of the market. Again, the TCA cited the criteria in *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European Commission. Although the post-merger HHI was 3814 for the year 2004, well above 2000, the delta was 107 for the same year, below 150, in this case. However, the TCA mentioned that *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European Commission required detailed dominance assessment under certain circumstances even where the delta was below 150, but the HHI was above 1000 or 2000. One of these circumstances is where one of the parties to the merger is a rival undertaking operating in the same market with a small market share or a

5 Issued on April 2nd of 1992.

6 Dated 20.12.2005 and numbered 05-86/1188-340.

7 See also *Privatisation of Şanlıurfa Cement Factory*, dated 20.12.2005 and numbered 05-86/1191-343, where the second highest bidder was not permitted to take over the company due to collective dominance concerns.

potential rival undertaking that could enter the market.[8] In line with this, one of the parties to the merger (SABANCI) was operating in the relevant geographic market, albeit with small presence. Moreover, that party was operating in many other geographic markets of the relevant market and holding a position that could enter other geographic markets with new investments or mergers. Therefore, HHI values and the delta seemed to indicate a market with possible anti-competitive structure post-merger. Similarly, the TCA also cited that the possible merger also indicated a highly concentrated market where anti-competitive effects could occur according to *Horizontal Merger Guidelines* of the DOJ and the FTC.

7. However, the TCA also mentioned that apart from market shares the analysis to prove dominance required assessments of other criteria such as number of players in the relevant market, entry barriers, characteristics of the relevant product market, structural links among undertakings in the relevant market, risk of contact in more than one market, history of the anti-competitive behaviours among undertakings in the relevant market and some other factors.

8. As to number of players in the relevant market, existence of few undertakings in the relevant market facilitates tacit understanding or collusion and its stability for a long period of time. Moreover, this makes it easy for the others to detect the party that does not comply with the anti-competitive agreement. A market structure composed of three or four undertakings at the most is prone to collective dominance whereas collective dominance becomes harder in markets where number of undertakings exceeds five. In this case, although the number of undertakings would decrease from six to five post-merger, number of main players was three (SABANCI, OYAK and YLOAÇ) as their combined market share was 96%. Therefore, the TCA took into account only those three undertakings in its analyses of dominance.

9. The entry barriers in the market was high when need for capital, sunk costs, economies of scale, excess capacity and vertical integration were considered.

10. When the characteristics of the market were considered, the TCA was of the opinion that homogenous nature of cement, low price elasticity of demand, maturity of the technology used, transparency of prices in the cement market, absence of third party undertakings that could exert competitive pressure on the undertakings deemed to be collectively dominant, stable increase in demand, absence of buyer power were features of the market facilitating emergence of a tacit collusion on parameters of price and quantity. An additional factor important for tacit collusion is whether undertakings encounter each other frequently. Fragmented and frequent nature of demand in the cement market facilitates undertakings to learn market behaviours of each other and punish the relevant undertakings when the tacit collusion is broken. In sum, the structure of demand increases the risk of tacit collusion in the cement market.

11. Regarding structural links among undertakings in the relevant market, the acquiring party (SABANCI) exercised joint control over a JV (OYSA) with one of its competitors (OYAK) and there were interlocking directors between the JV (OYSA) and the two competing undertakings (SABANCI and OYAK). Moreover, the TCA, in one of its earlier decisions, found existence of coordination distorting competition between the two competing undertakings (SABANCI and OYAK) in the cement market via the JV (OYSA). Within this framework, the TCA thought that the existence of the JV (OYSA) could lead

[8] See paragraph 20 of *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European Commission:

"*The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:*

(a) a merger involves a potential entrant or a recent entrant with a small market share; …"

to coordination and harmonisation of competitive behaviours of the two competing undertakings (SABANCI and OYAK) and their acting as if they were a single undertaking and therefore involved the risk of tacit collusion (between SABANCI and OYAK) in the relevant market.

12. As to risk of contact in more than one market, contact in terms of especially different product groups may have facilitating impact for tacit collusion among undertakings. Contact in more than one market enables the undertakings to gather more information on their competitors and gives the opportunity to punish those that do not comply with an anti-competitive agreement. Moreover, contact in more than one market is seen as one of the greatest evidence for the existence of a punishment mechanism in an oligopoly which is regarded as one of the most important factors of collective dominance and which ensures continuity of the tacit collusion. Within this framework, two competing undertakings, SABANCI and OYAK, had overlapping activities in more than eleven markets. Moreover, the risk of contact in more than one market was realised in relevant product markets of cement and ready-mixed concrete in Central Anatolia, Marmara and Mediterranean geographic regions between SABANCI and OYAK. Furthermore, the risk was also present for OYAK, SABANCI and YLOAÇ in Central Anatolia and Marmara geographic regions for cement and ready-mixed concrete.

13. In terms of history of the anti-competitive behaviours among undertakings in the relevant market, the TCA considers that history of anti-competitive behaviours even in different geographic markets increases the risk of tacit collusion in the future. The TCA considered the anti-competitive activities of the three undertakings (SABANCI, OYAK, YLOAÇ) in other geographic markets and concluded that Ladik Cement Factory, the factory to be privatised, might have had a competition increasing role against those three in the relevant geographic market as no anti-competitive conduct was investigated previously in this geographic market. Therefore, the TCA decided that there was the risk that acquisition of Ladik Cement Factory by one of those three undertakings (SABANCI, OYAK, YLOAÇ), which previously conducted anti-competitive practices in other geographic markets, could lead to loss of the former's role of increasing competition and cause negative changes in parameters of price and quantity.

14. Apart from those, the TCA considered existence of identical market shares as a factor that could facilitate coordination of competitive behaviours. Accordingly, the TCA took into account that SABANCI and YLOAÇ would have similar market shares post-merger and this could increase the risk of tacit collusion. Assuming that SABANCI and OYAK would act as if they were a single undertaking, the relevant market would be a duopoly (of OYAK-SABANCI and YLOAÇ) with market shares close to each other. The fact that the undertakings in the relevant market had similar capacities and symmetrical features in terms of vertical integration also proved existence of collective dominance. Moreover, according to the TCA the existence of very high excess production capacity also indicated that the relevant undertakings had the ability to punish and could use it whenever they wanted.

15. Based on the analysis above, the TCA decided that SABANCI would not become dominant in the market post-merger when market shares belonging to it and the rivals were taken into account. However, SABANCI, OYAK and YLOAÇ would hold collective dominant position which could be defined as emergence of risk of anti-competitive tacit collusion among two or more undertakings and their collective holding of the power granting the ability to determine parameters such as price and quantity independent of their competitors and customers in the relevant market as a result of the effect of changing structure of the market and structural and behavioural factors. Therefore, the takeover of Ladik Cement Factory by SABANCI, the highest bidder, was blocked by the TCA.

16. As is mentioned above, the TCA is of the view that Article 7 of the Competition Act prohibits both single dominance as well as collective dominance as a result of which competition is significantly decreased. However, when an appeal was made before the Council of State, the supreme administrative court, against the decision of the TCA, the Council of State ruled that the Competition Act prohibited only

single dominance and therefore stayed the execution of the decision by the TCA which was based on collective dominance.[9] As a result, it may be said that the decision by the Council of State indicated that collective dominance was not subject to the prohibition under Article 7 of the Competition Act.

17. Currently, according to a bill sent to the Parliament on July 31st, 2008, the standard test for merger review would be the one applicable in the EU, which is significant impediment to effective competition (*SIEC*). The general reasoning of the bill mentions that changes in the *acquis communautaire* and especially those in the *Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings* (the EC Merger Regulation) should be taken into account for a more modern competition law as well as from the perspective of negotiations with the EU. The reasoning for the particular article in the bill to adopt the new standard test for merger review provides that it would be possible to assess unilateral as well as coordinated effects more soundly via economic analyses following adoption of the new test. Moreover, the fact that the new test cites "creation of dominant position or strengthening an existing dominant position" among the principal examples where competition is significantly decreased will enable the use of previous experience gained by the TCA so far and ensure legal certainty. Furthermore, in addition to "creation of dominant position or strengthening an existing dominant position", the new test is to prohibit transactions in case competition is significantly decreased via unilateral effects in oligopolistic markets. Finally, the bill overtly cites collective dominance in addition to single dominance under Article 7 of the Competition Act following the decision by the Council of State against the decision of the TCA, namely *Privatisation of Ladik Cement Factory*.

[9] Decision of the 13th Chamber of the Council of State, dated 1.3.2006 and numbered 2005/10038. The Council of State also dismissed reasoning by the TCA that the history of past anti-competitive conduct in cement sector could be used as a presumption that such conduct would also happen post-merger. Moreover, it also argued that existence of risk of contact in other geographic markets was contradictory as those markets did not match the relevant geographic market defined by the TCA in this case.