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ROUNDTABLE ON FAILING FIRM DEFENCE

-- Contribution by the Delegation of Turkey --

This note is submitted by the Delegation of Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21 - 22 October 2009.

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FAILING FIRM DEFENCE

-- Note by Turkey[1] --

1. The Control of Concentrations

1. An important subject concerning the function of competition policy during the crisis is "control of concentrations". Adoption of a more flexible approach in the evaluation of concentrations during the crisis and even by-passing the supervision of competition authorities on "public interest" grounds constitutes an important debate topic in current crisis.

2. As it is the case in other areas of competition policy, it would be a big mistake to circumvent competition law enforcement in the evaluation of concentrations during the financial crisis on "public interest" grounds. Mergers and acquisitions made in an environment with no competition supervision would increase the concentration within the market, and the burden thereof will be paid by the consumers. At this point, one can claim that anti-competitive effects of those mergers and acquisitions authorized during the crisis may be prevented through ex-post remedies after the crisis has passed. However, we believe that this is far from a real solution. This is because, allowing anti-competitive consolidations within the economy may cause irreparable damages. On the other side, when the operational costs of ex-post supervision on competition authorities are taken into consideration together with the limited resources of those authorities, it may not be possible to conduct an effective ex-post supervision concerning the anti-competitive market structures in the whole economy.

3. Basically, the current case-law in competition law regarding the control of concentrations allows a "flexible" approach concerning the acquisition of undertakings which are in financial distress. As it is known, “failing firm defense” has generally been taken into consideration by competition authorities where one or more of the parties to the transaction are carrying a serious risk of going out of business. Therefore, it is possible to authorize the acquisition of undertakings in trouble without making crisis-specific amendments in the application of the current rules.

4. During the current crisis, Turkish Competition Authority has not yet received a merger notification incorporating the failing firm defense. However, this defense was taken into account in some of the past decisions of the Turkish Competition Authority. The first of these decisions is the *Erciyas*[2] decision. In the decision concerning the acquisition of some of the assets of Toros Biracılık ve Malt Sanayi A.Ş. (Toros) by Erciyas Biracılık ve Malt San. A.Ş. (Erciyas), it can be seen that the failing firm defense was accepted, though not explicitly. It was determined that the dominant position in the market would be strengthened after the notified transaction. Nonetheless, it was stated that it would be impossible for Toros to continue its operations and that disallowing the transaction would lead to a waste of resources for both

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1 This contribution is an excerpt from the contribution of Turkey submitted to the Competition Committee for the Roundtable on Real Economy: The Challenges for Competition Policy in Periods of Retrenchment (DAF/COMP/WD(S009)9/ADD2) held on 16 – 18 February 2009.

2 Competition Board Decision dated 12.2.1998 and numbered 379-43, (Official Gazette, dated 19.11.1998, and numbered 23528).

the economy of the country and for the parties. Also, within the same decision, it was found that no other undertaking wished to acquire the assets owned by Toros and that Erciyas intended to invest and increase its production capacity by acquiring the relevant assets. The transaction under consideration was authorized for the aforementioned reasons, in spite of the possibility for a strengthening of the dominant position and a significant restriction in competition.

5. Another decision whereby the Competition Board accepted the "failing firm defense" was *Uzel*[3] decision. Failing firm defense was considered in the decision concerning the acquisition by Uzel Holding A.Ş. (Inc.) (Uzel), of Efe Otomotiv Sanayi ve Ticaret A.Ş. (Efe Automotive Industry and Trade Inc.) (Efe). In this market where the parties to the acquisition produced components used in automotive sector, Uzel's market share would reach 62 % after the acquisition and there would remain two main undertakings. It was likely that there would be significant restriction of competition in the market in the post-transaction process. However, without the acquisition, Efe would most likely be excluded from the market. The decision expressly stated a view in support of "defending the failing firm". Even though concentration would increase significantly in the relevant market post-acquisition, it was stated that Uzel's market share could have increased even where the transaction was not authorized. Furthermore, the decision also mentioned that the production capacity of the failing undertaking would leave the market and that there were no alternative mergers and acquisitions which were less restrictive of competition. It was also stated that machinery and manpower could remain idle. Therefore, the likelihood of negative social effects in the absence of the transaction was also pointed out.

6. In the recently taken *Vatan Newspaper*[4] decision which involves failing firm defense, it was decided that the acquisition of Vatan Newspaper by Doğan Group would result in the group's market share reaching 40 % in terms of net sales and 64 % in terms of advertisement revenue, and that the synergy and portfolio effect brought about by the inclusion of Vatan Newspaper in the group was capable of increasing the market share even further both in terms of the number of net sales and advertisement revenue, that therefore the transaction would result in the strengthening of the dominant position of Doğan Group; however the transaction was conditionally authorized on the grounds that the indebtedness of Vatan Newspaper to Doğan Group was not a collusive act entered into for making use of failing firm defense, that the bankruptcy of Vatan Newspaper was inevitable, that there was not a better alternative buyer for the competitive structure in the market, that in the absence of the merger the brand of Vatan Newspaper would inevitably be excluded from the market and the resulting gap would most likely and substantially be filled by Doğan Group, and that the effects which restrict competition and which would arise in the market if the transaction is authorized would still arise if the transaction was not authorized.

7. Given the abovementioned decisions of the Competition Board, it can be said that generally four conditions are to be met for the failing firm defense to be accepted in Turkish competition law. The first condition is that the failing firm would leave the market in the near future. The second is the nonexistence of alternative mergers and acquisitions which would restrict the competition less. The third condition is the impossibility of the failing undertaking to stay in the market through methods such as its reconstruction or narrowing down its activities. The last condition is that, even in the absence of the merger and acquisition, the market share of the failing undertaking would pass to the acquiring undertaking.

8. While evaluating mergers and acquisitions in a crisis period, in addition to the evaluations concerning the substance of the transaction, finalization of the merger and acquisition examination in a short time is of great importance as well. This is because, ensuring that the measures taken in a crises period produce maximum benefit depends, before all else, on the timely initiation of the measure. At this

[3] Competition Board decision dated 20.07.2000 and numbered 00-27/294-164 (Official Gazette dated 05.03.2002 and numbered 24686).

[4] Decision dated 10.3.2008 and numbered 08-23/237-75.

point, it might be beneficial if the competition authorities finalize the evaluations of the mergers and acquisitions notified to them as soon as possible, without waiting for the statutory timeframes, and thus ensure legal clarity for undertakings as soon as possible. But of course, an important duty rests with the undertakings in this process too, in terms of notifying the merger and acquisition accurately and cooperating constructively with the competition authority in the evaluation process, so that the final decision can be taken within a short time.

9. Provided that it is limited to the crises period, another solution which can be adopted so that the expected benefit of the planned merger and acquisition takes effect promptly is the finalization of the merger and acquisition without waiting for the competition authority's final decision. Especially where there are no serious concerns as to the merger and acquisition and where irreparable damages are not likely, adoption of such a method by competition authorities might prove beneficial for the expedition of the process. But there is no doubt that the application of this option in practice is primarily dependent on such a power being granted to competition authorities by the relevant legal arrangements. For instance, under Turkish competition law, the Competition Authority does not hold such a power[5].

[5] Under the Act No. 4054 Article 16, carrying out a merger and acquisition without the authorization of the Competition Authority is subject to administrative fines.