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ROUNDTABLE ON THE ROLE OF EFFICIENCY CLAIMS IN ANTITRUST PROCEEDINGS

-- Note by the Delegation of Turkey --

This note is submitted by the delegation of Turkey to the Competition Committee FOR DISCUSSION under Item XII at its forthcoming meeting to be held on 24-25 October 2012.

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ROUNDTABLE ON THE ROLE OF EFFICIENCY CLAIMS IN ANTITRUST PROCEEDINGS

-- Note by Turkey --

1. The assumption that promoting economic efficiency and thus ensuring efficient allocation of resources is one of the basic objectives of competition policy is generally accepted by both academicians and by competition authorities. In recent years, as the role of economic analysis in competition law enforcement is increasing in importance, efficiency claims have become of considerable magnitude. As a result of that, an increasing number of jurisdictions are referring to efficiency assessments in larger number of regulations. However, a general consensus in methodology of the assessment of efficiencies has not been reached yet and different approaches still exist. The vague nature of efficiencies in economic terms and the tension between economic efficiency and protecting the competitive structure of markets are the core issues in this ongoing debate. Despite these different approaches about how to deal with efficiency claims, it is a fact that efficiency claims are taken into account in antitrust enforcement.

2. Parallel with these developments and similar to other competition authorities, Turkish Competition Authority (The TCA) is also giving increasing importance to assessment of efficiencies in recent years especially in mergers and acquisitions and abuse of dominance cases. As the TCA is closely following the developments in modernization of competition enforcement in the European Union and is well aware of "effect based" arguments in this field, it has taken noteworthy steps in the assessment of efficiencies in its proceedings.

3. The leading field in efficiency assessments of the TCA is mergers and acquisitions. Rules on merger control in Turkey are set forth in the Act on the Protection of Competition (the Competition Act) on the Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 2010/4) which came into force in 2011. Prior to Communiqué No 2010/4, remedies in mergers and failing firm defenses have been used as an analytical tool for efficiency assessments in merger regime in Turkish jurisdiction. Additionally, in recent years, with introducing new regulations, The TCA is trying to encourage firms to actively carry out efficiency defenses in merger and acquisition proceedings. In terms of efficiency defense, Communiqué No 2010/4 which was replaced with Communiqué No 1997/1, obviously has more room for efficiency claims compared to Communiqué No 1997/1.

4. According to the former legislation (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" were to be taken into consideration while assessing mergers. But with the new communiqué, (the Communiqué No 2010/4), "developments in the technical and economic process, which are not in the form a barrier to competition" clause was replaced with "efficiencies that ensure benefits to consumers" clause. Considering the critiques claiming that the clause of "developments in the technical and economic process, which are

not in the form a barrier to competition" makes it difficult to defend efficiencies; the elimination of that clause clearly creates a new playing field and more advanced era for efficiency assessments. The Application Form annexed to the Communiqué No 2010/4 also includes questions asking detailed information about possible efficiency gains. In other words the Application Form, by its composition, necessitates an assessment that must consider the efficiency claims. Moreover, it is obvious that efficiency considerations are more important than then they are before, but they are still only one of the factors that are considered during the overall assessment of the mergers and acquisitions. The wording of Communiqué 2010/4 requires that efficiencies should ensure benefits to consumers. In other words, efficiency gains which are advantageous for consumers should outweigh the restriction in competition.

5. A careful examination of Turkish case law clearly shows that efficiency defenses have been taken into account prior to Communiqué No 2010/4 as well. In Privatization of İGSAŞ (Toros Gübre)[1] case, the TCA stated that the merger would lead to some efficiency gains that stem from a broader distribution network and cost savings due to efficient use of harbors by the acquirer parties. However, despite the potential efficiency gains, the TCA concluded that the acquisition would create and strengthen a dominant position which may lead to exclusion of rivals, thus prohibited the transaction. A similar approach was taken in Privatization of Samsun Gübre, an undertaking operating in agricultural fertilizers market[2]. The TCA took into account that the parties could create important efficiencies in purchasing, marketing, distribution functions and efficiencies in means of decreasing fixed cost. The TCA also stated that the potential efficiency gains would pioneer an increase in market share of the merged entity. However, considering the competitive structure and actual competition in relevant market, the TCA approved the merger. Similarly in Mey İçki/Burgaz[3] case, scale and scope economies and cost advantages were counted as topics that need to be considered in the assessment of barriers to entry to the market. These three cases clearly establish that static efficiency gains, especially allocation efficiencies such as cost savings are taken into account by the TCA, yet these efficiency assessments are made in the light of market structure and potential and actual competition in the relevant market. Efficiencies which lead to creation or strengthening of a dominant position and are not beneficial to consumers are not considered in a way favorable to the claimants. For example, in GıdaSa/MGS[4] case, the TCA explicitly stated that all of the factors mentioned in Communiqué No 1997/1 must be considered during the overall assessment and that even if there were efficiency gains peculiar to mergers and acquisitions the priority should be given to protection of competitive structures of the markets.

6. In Antalya Airport[5] case, the TCA agreed that the management of two separate international arrivals terminals by single firm could generate some efficiency gains in security planning and cost savings. The TCA concluded that this efficiency gains would outweigh negative effects on competition that could arise because of the existence of sector specific tariffs and other issues. In Schering/Merck[6] case, the TCA stated that the negative effects of increasing market shares of merging parties on competition would be compensated by potential efficiency gains which were not directly mentioned in the decision. These two decisions point out that the TCA applies a balance test between potential efficiency gains on the one hand and potential negative effects of the merger on the other.

1 Decision dated 03.11.2000 and numbered 00-43/464-254.

2 Decision dated 05.05.2005 and numbered 05-30/373-92.

3 Decision dated 18.11.2009 and numbered 09-56/1325-331.

4 Decision dated 07.02.2008 and numbered 08-12/130-46.

5 Decision dated 16.05.2007 and numbered 07-41/452-174.

6 Decision dated 21.10.2009 and numbered 09-48/1203-304.

7. Additionally, there are two merger cases in which efficiency defenses are explicitly stated and analyzed in detail. In Lafarge/OYAK[7] cement case, the TCA stated that efficiency gains should be taken into account as well as buying power and barriers to entry in the assessments. However, the TCA concluded that when considering the characteristics of cement markets, it was less likely to have efficiencies related with scope and scale economies that cause cost savings after the merger transaction was consummated. Besides, there were no efficiency claims offered by the merging entities for the cement market but only some claims related with cost-savings were raised in the ready mixed concrete market, so the TCA did not evaluate the efficiency claims related to a different market.

8. The case related with the Privatization of Çamlıbel Electricity Distribution[8] also includes one of the most comprehensive efficiency claim assessment in merger cases. In this case, an efficiency defense related to converging markets was raised by the firms operating both in electricity and natural gas market. By mentioning that natural gas market was in an early stage of investment, and that although being a mature market, electricity market would also require additional investments in distribution channels, the TCA paid special attention to efficiency claims. In the decision, efficiency claims related to cost savings were taken into consideration by referring to clause in Communiqué No 1997/1 of "interests of intermediaries and end consumers". By implicitly referring to requirement that efficiency gains should be conduct specific, the TCA claimed in this case that 2-4 % of total cost savings would be directly related to synergies originating from the convergence. It is understood from the decision that the efficiency gains through cost savings were interpreted as advantageous for the end consumers and that assessment had an important role in the approval of the merger. Together with the clause in Communiqué No 2010/4 which favors "efficiencies that ensure benefits to consumers", this decision shows that the standard applied in merger analyses is "consumer welfare standard"[9].

9. As mentioned above, abuse of dominance is another field where efficiency claims are taken into account. In Turkish practice, it is generally accepted that being in a dominant position cannot prevent an undertaking from protecting its own legitimate commercial interest by behaviors compatible with the proportionality principle. In other words, if he can provide objective justifications for its conduct, an undertaking will not be deemed to abuse his dominant position under Article 6 of the Competition Act[10].

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7 Decision dated 18.11.2009 and numbered 09-56/1338-341.

8 Decision dated 08.04.2010 and numbered 10-29/437-163. For similar assessments, please see the decisions dated 08.04.2010 and numbered 10-29/438-164, 10-29/439-165, 10-29/440-166; dated 11.03.2010 and numbered 10-22/296-106, 10-22/297-107, 10-22/298-108.

9 For similar assessments, please see the decisions dated 03.01.2008 and numbered 08-01/12-9 *Canan Kozmetik /Loreal;* dated 08.10.2001 and numbered 01-48/486-121 *Legrand/Schneider*; dated 21.08.2007 and numbered 07-65/804-299 *Demirdöküm/Vaillant*; dated 08.07.2010 and numbered 10-49/929-327 *Lafarge/OYAK*.

10 Article 6 of the Competition Act is as follows: The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abusive cases are, in particular, as follows: a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market, b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts, c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price, d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market and e) Restricting production, marketing or technical development to the prejudice of consumers.

The relevant provision includes a general prohibition of abuse of dominant position with a non-exhaustive list of examples considered as abuse. Together with objective necessity and meeting competition defenses, efficiency claims are the most common considerations as objective justifications. The courts also consider objective justification –efficiency claims in particular- assessments in their decisions. For example in a predatory pricing case, Council of State stated that "the consistent price reductions from 2003 to 2005 could not be legitimized through objective justifications" and that "there were no objective justifications such as cost saving, efficiency or productivity growth for the price cuts, besides, the price reductions were applied only in lines which rivals were operating" [11].

10. When decisions of The TCA in abuse of dominance cases are examined, it is seen that significant number of cases include efficiency assessment. Refusal to deal (RTD) cases are leading cases that include efficiency analysis. In most of RTD cases, TCA stated that even if it is prima facie abusive, behaviors having objective justification, which by majority refers to efficiency gains, which outweigh the negative effects on competition do not infringe Article 6 of the Competition Act. For example, in Cable TV decision[12], in which the dominant undertaking refused the demands of its rivals to access to the cable infrastructure, The TCA mentioned that efficiency gains and cost savings that lead to an increase in revenue can be defended as objective legitimate interest but refused that defense by stating that such defenses can not be favored if they lessen the competition in the relevant market. Sanofi-Aventis decision[13] is another case where efficiency claims were examined. In this case, Sanofi-Aventis, a dominant undertaking in pharmaceuticals market was accused of distorting competition in distribution market by refusing to deal with and of implementing discriminatory business practices to small scaled pharmaceutical warehouses. The TCA examined whether the objective necessity claims mentioned by the dominant undertaking could be explained by efficiencies through cost reductions. The TCA established that, dealing with small scaled pharmaceutical warehouses did not carry any financial risks and did not cause additional costs in ordinary distribution costs. Having applied a balancing test, the TCA concluded that potential efficiency gains in means of cost saving were negligible comparing to negative effects of exclusion of pharmaceutical warehouses in distribution market. The TCA reminded that, objective justification defense were to be accepted on the condition that competition in respect of a substantial part of the products concerned was not eliminated. These cases clearly establish that, the TCA pay special attention to proportionality principle. Just like in merger cases, in abuse of dominance cases the TCA carries out a balance test between the efficiency gains and its negative effects on the market, and accepts efficiency defenses if the practices in question do not eliminate competition in substantial part of the relevant market.

11. On the other hand, in some other cases the TCA welcomed obvious efficiency gains and the Coca Cola predatory pricing case[14] was one of those. The TCA examined whether there were economic efficiencies that would justify the dominant undertakings' prima facie abusive pricing practices. The TCA mentioned that during the economic crisis, decline in households' income would also lead to a decrease in carbonated drinks demand that have high price elasticity. In this sense the TCA stated that price reductions of dominant undertakings intended to compensate the decreases in demand during economic crisis could be regarded as legitimate business justification. Considering also that the exclusion of rivals was a low possibility and there were no signal for exclusionary intent, TCA concluded that the pricing practices were not deemed abusive under Article 6 of the Competition Act.

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11 Decision dated 24.01.2006 and numbered 06-03/51-11.

12 Decision dated 10.02.2005 and numbered 05-10/81-30.

13 Decision dated 20.04.2009 and numbered 09-16 /374-88.

14 Decision dated 23.01.2004 and numbered 04-07/75-18

12. A more comprehensive efficiency assessment was made in Frito Lay[15] decision in which Frito Lay, the dominant undertaking in packed chips market was accused of exclusionary conducts. In the decision, the TCA established that "even if it distorts competition to the detriment of the rivals, the behavior of a dominant undertaking can not be abusive if the dominant undertaking has objective justifications related with internal efficiency of the firm." This pro-efficiency approach was balanced with proportionality principle in the decision. According to the TCA, proportionality would constitute the second stage of the analysis and there needed to be acceptable relations between behaviors of the dominant undertaking and consequences of it on the competition in the market. In its decision, the TCA paid special attention to differentiate abusive behavior and competition on the merits. Although the TCA accepted that the behaviors of the dominant undertaking had restrictive effects on the rivals, it concluded that compared to effective business model of the dominant undertaking and its efficiency outcomes, these restrictions had limited and negligible effect on the competition, thus did not find any infringement.

13. In sum, an overall assessment of the TCA's abuse of dominance decision indicates that, static efficiency gain claims such as allocative efficiencies are mostly considered. As mentioned above, increasing revenues by cost reductions (Cable TV decision), cost efficiencies (Sanofi-Aventis decision), marketing efficiencies (Frito Lay decision) are some of those factors considered in efficiency assessments.

15 Decision dated 06.04.2006 and numbered 06-24/304-71.