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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Turkey --

25 February 2014

This note is submitted by Turkey to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

1. Yes, mergers that meets specific size and geographic nexus thresholds are subject to mandatory notification provisions in Turkey [1]. According to the Act No 4054 on the Protection of Competition (the Competition Act), mergers that meet the specified thresholds can only be legally valid following the authorization of the Competition Board. Therefore, as a rule, companies are prohibited from consummating the merger until the final decision of the Board. However, if 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.

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

2. According to Article 7 of the Competition Act; mergers which would result in significant lessening of competition with a view to creating a dominant position or strengthening an existing dominant position in a market for goods or services within the whole or a part of the country is illegal and prohibited. Also, the Competition Board is empowered to determine 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. In the Competition Act, there is a provision concerning failure to notify mergers to the Board, in which case the Board is empowered to examine the non-notified merger and take necessary measures to eliminate all de facto situations committed contrary to the law. But, there is no provision in the Act concerning the mergers that do not meet the notification thresholds.

3. If we look at the case law, we see that if the thresholds are not met, Turkish Competition Authority (the TCA) directly decides that the case is not notifiable and does not examine the case any further. Therefore, it could be said, at least in practice, that the TCA does not review the mergers that does not meet the notification thresholds.

[1] According to "Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board" (Communiqué no 2010/4); authorization of the Board shall be required for the relevant transaction to carry legal validity in case, (a) Total turnovers of the transaction parties in Turkey exceed one hundred million TL, and turnovers of at least two of the transaction parties in Turkey each exceed thirty million TL, or (b) The turnover in Turkey for the acquired asset or operation in acquisition transactions, or for at least one of the transaction parties in merger transactions exceeds thirty million TL, and at least one of the other transaction parties has a global turnover exceeding five hundred million TL.

4. If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

5. As it is explained in the previous point, in practice the TCA does not review the mergers that does not meet the notification thresholds.

6. Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

7. In Turkey, consummated mergers are subject to investigation only if they are notifiable.

3. Review of mergers that should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

8. Yes, parties that fail to notify a merger that was subject to mandatory notification provisions are subject to penalties. According to article 16 of the Act, if mergers and acquisitions that are subject to authorization are realized without authorization, the Board shall impose an administrative fine by one in thousands of annual gross revenues of undertakings, generated by the end of the financial year preceding the decision. In such a case, the administrative fine is imposed to either of the parties in merger transactions and only to the acquirer in acquisition transactions. In 2013, for example, the amount of fine imposed due the failure of notification of the mergers and acquisitions that should have been notified was approximately € 80,000.

9. If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

10. According to article 11 of the Competition Act, where an anticompetitive merger for which notification to the Board is compulsory and it is not notified, the Board should decide that the merger transaction be terminated, together with fines; all de facto situations committed contrary to the law be eliminated; any shares or assets seized be returned, if possible, to their former owners, whose terms and duration shall be determined by the Board, or if not possible, these be assigned and transferred to third parties; the acquiring persons may by no means participate in the management of undertakings acquired during the period until these are assigned to their former owners or third parties, and that other measures deemed necessary by it be taken.

11. So far, although there have been several cases of notification failures, none of them was considered as anticompetitive. Therefore, no remedies have been taken in cases which were consummated before notification.

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

12. If the TCA has decided not to challenge a merger or approved a merger with remedies, normally it cannot review the same transaction for the second time. However, according to Article 16 of the Communiqué No 2010/4, if the decision was taken based on incorrect or misleading information given by the parties, or when the conditions or obligations attached to the decision are not met, then the TCA can and shall reinvestigate and challenge the transaction if it is anticompetitive. As for the time limit, there is no specific regulation concerning the time limit for the above-mentioned situations. But for all administrative offences there is a general statute of limitations, according to which, an offence (for which fine is calculated on pro rata basis) cannot be investigated by the administrative authorities if a period of 8 years has passed since its occurrence.