Turkey: A review of merger commitments

Horizons | Concurrences N° 2-2010
www.concurrences.com

Ercüment ERDEM
ercument@erdem-erdem.com

| Professor, Galatasaray University Law School, Istanbul
| Conseiller auditeur, Autorité de la concurrence
Turkey: A review of merger commitments

1. Commitments are the remedies offered by the parties in order to overcome the competition concerns arising out of a merger transaction.

2. For a long time, the Competition Board (“CB”) has authorized the operations of concentration normally not acceptable under competition rules under certain conditions that it has imposed to the parties. More recently, its practice has been converted to merger clearance within the framework of commitments proposed by the parties despite the absence of any special provision in the competition legislation.

1. Legal Basis

3. Commitments are not expressly regulated by the Act on the Protection of Competition No. 4054 (“Act”). The only article referring to this system is Article 6 (3) of Communiqué No. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (“Communiqué”).

2. Types

4. Although the CB gives place to both structural and behavioral commitments within its decisions, it principally opts for structural remedies as in European Competition Law. Article 15 of the Commission notice on remedies acceptable under Council Regulation states that structural remedies are preferred to behavioral remedies because they do not require medium or long-term monitoring measures.

In line with this practice, two types of structural remedies can especially be observed in the CB’s decisions:

⇒ Divestiture: the CB gave till now numerous decisions on the base of divestiture remedies. Indeed, in its Roche decision, the CB authorized in 2003 an operation of concentration on condition that one of the parties divests its feed enzyme business. This decision does not include any limitation of area. Following this decision, in Syngenta decision of 2004, the CB authorized an operation of concentration on condition that one of the parties divests its sunflower seed business in a determined area. Recently, in its Vatan Gazetesi’s (Vatan Newspaper) decision rendered in 2008, the CB authorized the operation of the divestiture commitments within two years.

⇒ Transfer of License: the CB gave three decisions related to this subject till now. In Glaxo Wellcome’s decision of 2000, the CB authorized the merger of two drug companies on the condition to transfer certain drug brands in Turkey to third parties.

---

1. To consult the complete text of the Competition Act, please see the following link: http://www.rekabet.gov.tr/index.php?sayfa=sayfacerik&id=165
2. To consult the complete text of the Communiqué No. 1997/1, please see the following link: http://www.rekabet.gov.tr/dosyalar/bblig/2bblig29.doc.
3. OJEU, 2008/C – 267/01.
7. Decision Glaxo Wellcome / SmithKline, 03.08.2000, 00-29/308-175.

Abstract

Despite the absence of a special provision related to commitments in the Turkish competition legislation, the Turkish Competition Board (“CB”), for a long time, has authorized the operations of concentration normally not acceptable under competition rules under certain conditions imposed to the parties. The CB, more recently, converted its practice to a merger clearance within the framework of the commitments proposed by the parties. This practice points out the same characteristics as the commitments already recognized in EU competition law. In order to fill the gap in the legislation, the commitments and conditional authorization have been included in the Draft Law Amending the Act on the Protection of Competition.
Following this decision, the CB authorized in its Nazar trademarks’ decision of 2007 the operation of concentration of two chewing gum companies on the commitments to realize two successive transfers of brand. Finally the CB authorized in 2008 the operation of concentration of two margarine companies on the commitments to transfer certain commercial brands.

5. Behavioral remedies set forth in CB’s decisions are as follows:

- Limitation of the entrance and exit of determined brands during certain periods: the CB, in its P&G’s decision, authorized the operation of concentration of two toothbrush companies with such remedies to be applied within the European Economic Area.

- Suspension of flights: the CB in Lufthansa’s decision granted individual exemption to the operation of concentration of two airlines on condition that they suspend their flights.

- Capacity limitation: the CB authorized in 2008, in its Toros Gübre’s decision the operation of concentration on condition that one of the companies limits its production capacity during three years.

3. Submission

6. In Turkish Competition Law, the submission rules, i.e., when and by whom the commitments are to be submitted, have not been yet regulated. However, in our view, only the parties are entitled to submit commitments, as is the case under European law. Consequently, the CB shall not be entitled to dictate commitments for two principal reasons:

- “Appropriate commitments”: due to their deep knowledge of the case and the relevant market, only the parties can submit appropriate commitments. The Communiqué provides for the CB to impose conditions for its merger clearance. However, the conditions that the merger clearance will be subject to, will not have the same consequences as of the commitments. The imperfect knowledge of the CB on the market and the undertakings may cause unfavorable results and not reach the expected goal. The CB granted some conditional authorizations although there were no commitments submitted by the parties.

4. Contents

7. Commitments must set forth that they will eliminate the identified competition concerns in the relevant market:

- Complete commitments: commitments must include all factors, such as the suitable purchaser or the assets to be divested which serve to eliminate competition concerns.

- Ad hoc commitments: in order to reach the expected goal and eliminate all competition concerns in the relevant market, all commitments must be determined in accordance with the case at hand. The CB, in some decisions, fully agreed with the Commission’s decisions without making further analyses.

5. Implementation

8. The implementation phase is the most important phase because it permits the merger clearance to be put into practice:

- Implementing factors: the correct implementation of the commitments are to be ensured through determinant factors, such as trustees to monitor the implementation or time limits which guarantee the implementation within a relatively short time period.

- Absence of implementing factors: the absence of implementing factors in CB’s decisions may cause a failure to eliminate competition concerns by reason of imperfect implementation. For instance, some of CB’s decisions do not include the nomination of a trustee in order to monitor the correct implementation of the commitments.

---


9 Decision Marmara Gıda / GıdaSa, 07.02.2008, 08-12/130-46.


13 Decision Metro / Migros, 19.03.1998, 574242-52; decision POM, 18.02.1999, 99-8/06-23, decision Glaxo Wellcome / SmithKline (fn. 7), decision Toros Tarım / Sümer Holding (fn. 12) and decision Doğan Gazetecilik / Vatan Gazetesi (fn. 6).

14 In the decision Toros Tarım / Sümer Holding (fn. 12), the CB decided to limit the capacity although the parties had not submitted commitments. However, this imposed a greater burden than necessary on the parties because it presented an eventual increase in the operation activities of the parties.

15 CB’s decisions generally do not include why the submitted commitments would eliminate competition concerns: decision TUPRAS, 21. 10. 2005, 05-71/981-270.

16 The CB does not include all factors in its decisions. For instance, the decision Glaxo Wellcome / SmithKline (fn. 7) does not include any reference to a suitable purchaser.

17 Decision DSM N V – Roche Holding AG (fn. 2) and decision Syngenta Crop Protection AG – Astazeneca Holdings B V – Koninklijke Venderhave Groep B V (fn. 5).

18 Decision Toros Tarım / Sümer Holding (fn. 10); decision Deutsche Lufthansa AG – Condor Flugdienst GmbH (fn. 7) and decision TUPRAS (fn. 15).
6. Sanctions

9. In order to fill the gap in the competition legislation, the CB, on the basis of Article 4 of the Act, generally decides to launch an ex officio investigation if the commitments are not correctly implemented.

7. Conclusion

10. The Turkish merger control regime contains deficiencies both in legislation and in practice. These deficiencies result from the absence of special provision in competition legislation and from the CB’s incomplete decisions. In order to fill the gap in the legislation, the commitments and conditional authorizations have been included in the Draft Law Amending the Act on the Protection of Competition. However, this provision only provides a general outline without providing details. Therefore a communiqué dealing with the commitments and the conditional authorizations shall be put in place as soon as possible in order to create a much more secure legal environment for the undertakings.

Annex: Turkish merger commitments decisions

20

The Turkish Competition board grants conditional authorization for the complete acquisition of Financière Lafarge by the Army Solidarity institution, 18 November 2009
The Turkish Council of State orders stay of execution of Competition Board’s remedies inherent to its conditional clearance decision in daily political newspapers market (Vatan Newspaper/ Dogan Group), 11 March 2009
The Turkish Competition Board states that the remedies imposed in a previous merger clearance decision are fulfilled (Green Castle), 4 December 2008
The Turkish competition board, while accepting the failing company defense, clears a merger conditional to remedies in the daily political newspapers market (Vatan Newspaper/ Dogan Group), 10 March 2008
The Turkish Competition Authority cleared a privatisation in the phosphate rock market subject to limitation of production (Toros), 21 February 2008
The Turkish Competition Authority cleared an acquisition in the food products market subject to brands divestiture and appointed a trustee (MGS-Gidyasa) 7 February 2008
The Turkish Competition Authority cleared an acquisition in the private hospitals market subject to limitation of the non-compete obligation (Ozel Maya-Sevgi Sadyk-Ten Medikal-Gületr Medikal / Pafak), 7 February 2008
The Turkish Competition Authority cleared a merger in the wholesale of commodity polymers market subject to limitation of the non-competition clause (NTC - Itochu Holland), 31 January 2008
The Turkish Competition Authority cleared a merger in the medical devices markets subject to limitation of the non-competition obligation (GE-AMS), 27 December 2007

The Turkish Competition Authority authorised a foreign-to-foreign merger cleared by the EC Commission subject to partly the same remedies imposed at the EC level (Owens-Saint Gobain), 13 December 2007
The Turkish Competition Authority cleared an acquisition in the lime market subject to limitation of the non-compete obligation (Ozture / Carmeuse), 9 October 2007
The Turkish Competition Board clears a merger in the chewing-gum market conditional to the transfer of a brand license and appoints a trustee (Interquim/Cadbury Schweppes), 23 August 2007
Turkish Competition Board clears with remedies a major acquisition in the industrial, medical and special gases sector considering, inter alia, non-compete provisions to be ancillary restrictions (Linde Gaz/BOS), 11 July 2007
The Turkish Competition Authority cleared a merger in the plastics business markets subject to limitation of the confidentiality clause duration (GE-Sabic Europe), 4 July 2007
The Turkish Competition Authority clears the creation of a joint-venture while limiting the scope and duration of the non-compete obligation (CIDE-In-Girisim), 20 June 2007
The Turkish Competition Authority cleared with remedy a merger in the port cargo services market subject to non-discrimination remedy (TCDD - Port of Izmir), 5 June 2007
The Turkish Competition Authority cleared a merger in the non-life insurances services subject to limitation of the duration of the non-compete clause (Dige-Is-Girisim), 13 December 2007

19 Decision Metro / Migros (fn. 11); decision Glaxo Wellcome / SmithKline (fn. 7) and decision Bankasi / Fiba Bank, 18.09.2001, 01-44/433-111
20 Detailed English case summaries of these decisions have been drafted for the Merger Remedies Matrix research program. Available on line to e-Competitions subscribers on www.concurrences.com. See
The Turkish Competition Authority cleared an internal shares transfer as a merger subject to the removal of the non-compete obligation from the transaction agreement (Inteltek-Intrakot), 22 December 2005

The Turkish Competition Authority cleared a merger in the oil products market subject to third parties access to refinery facilities (Tupras - OIB), 21 October 2005

The Turkish Competition Authority cleared a merger in the toothpaste and toothbrush markets subject to divestiture (Procter&Gamble-Gillette), 8 September 2005

The Turkish Competition Authority cleared a merger in the GSM market subject to remedies, including limitation of the duration of the non-compete and confidentiality clauses (Alfa Telekom Turkey - Cukurova), 8 September 2005

The Turkish Competition Authority cleared a merger in the hot adhesive markets subject to limitation of the duration of the non-competition clause (Ergon/National Organik), 6 January 2005

The Turkish Competition Authority cleared a merger in the maritime transportation sector subject to limitation of the scope of the joint-venture (TNT/Koc Group), 16 December 2004

The Turkish Competition Authority cleared - ex post - a merger in the logistics services market while requesting annulment of a non-compete clause after the termination of the joint-venture (Unikom/Unilever-SEEF), 30 September 2004

The Turkish Competition Authority cleared a merger in the sugar, beet and maize seeds markets subject to divestiture (Syngenta-Astazeneca), 29 July 2004

The Turkish Competition Authority cleared a merger in the nylon products markets subject to limitation of the duration of non-compete and confidentiality clauses (Invista/Koch-E.I. Dupont), 26 February 2004

The Turkish Competition Authority rendered its view that a shares’ transfer qualifies as a concentration and that it will monitor the target’s investments (Tupras), 29 January 2004

The Turkish Competition Authority cleared a merger in the chemicals sector subject to divestiture (GSM-Roche Vitamins), 11 September 2003

The Turkish Competition Authority cleared a merger in the food oil markets subject to various remedies including limitation of the duration of the exclusive sale and distribution agreements (Unikom/Unilever-SEEF), 17 July 2003

The Turkish Competition Authority cleared a merger in the cosmetics market with remedies including limitation of the duration of non-solicitation clause (Eczacibasi-Ayon), 1 May 2003

The Turkish Competition Authority held that bidders for a privatization tender will not be required to file notification for clearance, provided, if they win the tender, that they have sole control of the special purpose vehicle (Takım/SMM Hesfibel), 1 May 2003

The Turkish Competition Authority cleared a merger in the confectionery market subject to remedies, including termination or revision of the obligation preventing the acquisition of shares of a competing company for investment purposes (Cadbury-Pfizer), 3 April 2003

The Turkish Competition Authority cleared a merger in the sheet glass processing market with remedies including limitation of the scope of the non-compete obligation (School-Orin), 20 February 2003

The Turkish Competition Authority cleared a merger in the corn starch and glucose syrups markets subject to remedies, including termination or revision of the obligation preventing the acquisition of shares of a competing company for investment purpose (Montedison-Cargill), 6 June 2002

The Turkish Competition Authority cleared a merger in the shopping cards market subject to deletion of the non-compete clause (Boyner-Fiba), 18 September 2001

The Turkish Competition Authority cleared a merger in the pharmaceuticals sector subject to limitation of the non-compete clause (Abbott-BASF), 20 February 2001

The Turkish Competition Authority cleared with remedy a merger in the pharmaceuticals sector subject to remedies, including transfer of licences to third parties (Glaxo-SmithKline), 3 August 2000

The Turkish Competition Authority cleared a merger in the construction and contracting businesses markets subject to limitation to bid in future tenders to one of the JV’s parent companies (Koç-Garanti Koza), 4 August 1999

The Turkish Competition Authority cleared with remedy the concession of operation rights of several electricity distribution facilities from the state-owned electricity incumbent (TEDAS), 16 October 1998

The Turkish Competition Authority cleared a merger in the pipes markets subject to periodical notifications of prices, production and sale figures (Borusan Mannesmannrohren), 20 August 1998

The Turkish Competition Authority cleared a merger in the agricultural vehicles and equipment markets subject to mandatory appointment of companies as distributors (Trakmek New Holland), 28 May 1998

The Turkish Competition Authority cleared a merger in the retail distribution market subject to one of the parent company refraining to be active in the relevant market (Migros Metro), 19 March 1998
**Concurrences** est une revue trimestrielle couvrant l’ensemble des questions de droits communautaire et interne de la concurrence. Les analyses de fond sont effectuées sous forme d’articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L’actualité jurisprudentielle et législative est couverte par dix chroniques thématiques.

---

**Editorial**

Elie Cohen, Laurent Cohen-Tanugi, Claus-Dieter Ehlermann, Ian Forrest, Eleanor Fox, Laurence Idot, Frédéric Jenny, Jean-Pierre Jouyet, Hubert Legal, Claude Lucas de Lysysec, Mario Monti, Christine Varney, Bo Vesterdorf, Louis Vogel, Denis Waebelroch...

---

**Interview**

Sir Christopher Bellamy, Dr. Ulf Böge, Nadia Calvino, Thierry Dahan, Frédéric Jenny, William Kovace, Neelie Kroes, Christine Lagarde, Mario Monti, Viviane Reding, Robert Saint-Esteben, Sheridan Scott, Christine Varney...

---

**Tendances**

Jacques Barrot, Jean-François Bellis, Murielle Chagny, Claire Chambolle, Luc Chatel, John Connor, Dominique de Gramont, Damien Géradin, Christophe Lemaire, Ioannis Lianos, Pierre Moscovici, Jorge Padilla, Emil Paulis, Joëlle Simon, Richard Whish...

---

**Doctrines**

Guy Canivet, Emmanuel Combe, Thierry Dahan, Luc Gyselen, Daniel Fasquelle, Barry Hawk, Laurence Idot, Frédéric Jenny, Bruno Lasserre, Anne Perrot, Nicolas Petit, Catherine Prieto, Patrick Rey, Didier Théophile, Joseph Vogel...

---

**Pratiques**

Tableaux jurisprudentiels : Bilan de la pratique des engagements, Droit pénal et concurrence, Legal privilege, Cartel Profiles in the EU...

---

**Horizons**

Allemagne, Belgique, Canada, Chine, Hong-Kong, India, Japon, Luxembourg, Suisse, Sweden, USA...

---

**Droit et économie**

Emmanuel Combe, Philippe Chone, Laurent Flochel, Penelope Papandropoulos, Etienne Prister, Francesco Ronati, David Spector...

---

**Chroniques**

**ENTENDES**

Michel Debroux
Laurence Nicolas-Vullierme
Cyril Sarrazin

**PRATIQUES UNILATÉRALES**

Frédéric Marty
Anne-Lise Shroy
Anne Wachsmann

**PRATIQUES RESTRICTIVES ET CONCURRENCE DÉLOYALE**

Muriel Chagny
Mireille Dany
Marie-Claude Mitchell
Jacqueline Riffault-Silk

**DISTRIBUTION**

Nicolas Erkdeo
Dominique Ferre
Didier Fere

**CONCENTRATIONS**

Olivier Belliard, Jacques Guntner, David Hull, Stanislas Martin, Jérôme Phlippe, Igor Simic, David Tava, Didier Theophile

**AIDES D’ÉTAT**

Jean-Yves Chret
Jacques Derenne
Christophe Giotlo

**PROCÉDURES**

Pascal Cardonnel
Christophe Lemaire
Agnes Maitepierre
Chantal Momege

**RÉGULATIONS**

Joëlle Adda
Emmanuel Guillaume
Jean-Paul Tran Thieth

**SÉCETEUR PUBLIC**

Bertrand du Marais
Stéphane Rodrigues
Jean-Philippe Kovar

**POLITIQUE INTERNATIONALE**

Frédérique Dautrett-John
Francois Souty
Stéphanie You

---

**Revue des revues**

Christelle Adjéman
Umberto Berkani
Alain Ronzano

---

**Bibliographie**

Centre de Recherches sur l’Union Européenne (Université Paris I – Panthéon-Sorbonne)
<table>
<thead>
<tr>
<th>Revue Concurrences</th>
<th>Review Concurrences</th>
<th>HT Without tax</th>
<th>TTC Tax included (France only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abonnement annuel - 4 n° (version papier)</td>
<td>1 year subscription (4 issues) (print version)</td>
<td>445 €</td>
<td>454,35 €</td>
</tr>
<tr>
<td>Abonnement annuel - 4 n° (version électronique + accès libre aux e-archives)</td>
<td>1 year subscription (4 issues) (electronic version + free access to e-archives)</td>
<td>395 €</td>
<td>472,42 €</td>
</tr>
<tr>
<td>Abonnement annuel - 4 n° (versions papier &amp; électronique accès libre aux e-archives)</td>
<td>1 year subscription (4 issues) (print &amp; electronic versions + free access to e-archives)</td>
<td>645 €</td>
<td>771,42 €</td>
</tr>
<tr>
<td>1 numéro (version papier)</td>
<td>1 issue (print version)</td>
<td>140 €</td>
<td>142,94 €</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Bulletin électronique e-Competitions</th>
<th>e-bulletin e-Competitions</th>
<th>HT Without tax</th>
<th>TTC Tax included (France only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abonnement annuel + accès libre aux e-archives</td>
<td>1 year subscription + free access to e-archives</td>
<td>575 €</td>
<td>687,7 €</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Revue Concurrences + bulletin e-Competitions</th>
<th>Review Concurrences + e-bulletin e-Competitions</th>
<th>HT Without tax</th>
<th>TTC Tax included (France only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abonnement annuel revue (version électronique) + e-bulletin</td>
<td>1 year subscription to the review (online version) and to the e-bulletin</td>
<td>745 €</td>
<td>891,02 €</td>
</tr>
<tr>
<td>Abonnement annuel revue (versions papier &amp; électronique) + e-bulletin</td>
<td>1 year subscription to the review (print &amp; electronic versions) + e-bulletin</td>
<td>845 €</td>
<td>1010,62 €</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Renseignements</th>
<th>Subscriber details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nom-Prénom</td>
<td>Name-First name : .......................................................... e-mail : ..........................................................</td>
</tr>
<tr>
<td>Institution</td>
<td>Institution : ..........................................................</td>
</tr>
<tr>
<td>Rue</td>
<td>Street : .......................................................... Ville</td>
</tr>
<tr>
<td>Code postal</td>
<td>Zip Code : .......................................................... Pays</td>
</tr>
<tr>
<td>N° TVA intracommunautaire/VAT number (EU) : ..........................................................</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Formulaire à retourner à</th>
<th>Send your order to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institut de droit de la concurrence</td>
<td>25 rue Balard - 75 015 Paris - France</td>
</tr>
<tr>
<td>Fax : + 33 (0)1 42 77 93 71</td>
<td></td>
</tr>
</tbody>
</table>

**Conditions générales (extrait) | Subscription information**


Orders are firm and payments are not refundable. Reception of Concurrences and on-line access to e-Competitions and/or Concurrences require full prepayment. Tarifs for 1 user only. Consult us for multi-users licence. For “Terms of use”, see www.concurrences.com.

**Frais d’expédition** Concurrences hors France : 30 € | 30 € extra charge for sending hard copies outside France