

**COMMENTS OF
THE TURKISH COMPETITION AUTHORITY
on
DRAFT COMMISSION NOTICE
Guidelines on the assessment of non-horizontal mergers under the Council Regulation on
the control of concentrations between undertakings**

On 13 February 2007, the Commission of the European Communities published draft Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“The Guidelines”), launching a debate on this document.

Turkey is a candidate country to the European Union and the association agreement between Turkey and the EEC¹ requires that the contracting parties should maintain the applicability of the provisions of the Rome Treaty on the harmonization of competition law. In this regard, Turkish Competition Authority is pleased to submit these comments to the Commission of the European Communities².

The views expressed herein have not been approved by the Turkish Competition Board, and hence should not be construed as representing an official policy of the Turkish Competition Authority. Furthermore, these views are being presented on behalf of the Turkish Competition Authority only and do not bind the government of the Republic of Turkey.

I. OVERVIEW

Double markups (e.g. para. 13) will exist only when the firms have some degree of market power (positive mark-ups) in both markets. The Guidelines do not explicitly make this point. Moreover, the procompetitive effect of eliminating double mark-ups is accompanied by a second-order effect that can increase the profitability of obtaining incremental market power by either of the merging parties. Specifically, vertical integration of two firms, each with some degree of market power, can render profitable a unilateral increase in either firm’s market power that would

¹ Association Agreement between Turkey and the EEC, 12 September 1963 OJ 217, 29.12.1964.

² The contributions of Mr. Serdar Dalkır (Micra Associates, Washington D.C., USA) in the preparing of these comments is gratefully acknowledged.

have been unprofitable before the merger (because the additional profits would have to be “shared” with the upstream or the downstream firm).

II. MARKET SHARE AND CONCENTRATION LEVELS

Para. 25 makes reference to both coordinated and non-coordinated concerns, but the list of exceptions (a)-(d) largely addresses coordinated action. An example of an exception that addresses non-coordinated action is provided below:

- (e) either of the merging parties is likely to find it profitable to unilaterally increase its horizontal market power that would not have been profitable in the absence of the merger.

III. VERTICAL MERGERS

A. Non-coordinated effects: foreclosure

It has been suggested that in allegations of foreclosure (and more generally raising rivals’ cost) the test for anticompetitive intent is the predation test: “does the observed conduct make economic sense in the absence of excluding the competitor?” See, for example, Gregory J. Werden “Identifying Exclusionary Conduct Under Section 2: The ‘No Economic Sense’ Test,” *Antitrust Law Journal* 73 (2) (2006): 413-33.³ Under this standard, the Guidelines would be expected to explicitly acknowledge that the conduct will not be held anticompetitive if it does make economic sense even when the competitor is not excluded in part or in whole.

1. Input foreclosure

B. Incentive to foreclose access to inputs

Foreclosure (e.g. para. 40) may itself affect the foreclosing firm’s upstream (external) margin relative to its downstream (internal) margin. The first sentence of para. 40 might be altered to

³ In contrast, the test for anticompetitive effect is the exclusion test.

read, for example, “The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream absent foreclosure.”

Moreover, a vertically integrated firm would not normally have separate upstream and downstream margins except in the sense of external vs. internal margins. Language may be added to clarify this point.

The point that the Guidelines address with respect to the efficiency of the upstream division of an integrated firm relative to alternative suppliers can be modified to address the “mirror image” with respect to the relative efficiency of the downstream firms; the following paragraph provides an example:

The costs associated with reducing sales to rival downstream suppliers are higher, when the downstream division of the integrated firm is less efficient than the foreclosed rivals. Such costs are also higher if the downstream division of the merged firm is capacity constrained or rivals' products are more attractive due to product differentiation.

C. Overall likely impact on effective competition

In general, the extent of the price reduction (e.g. in Para. 53) is directly proportional to the merging parties’ pre-merger margins; the Guidelines do not make that point in their present form.

V. CONGLOMERATE MERGERS

Conglomerate mergers can be expected to lead to very similar issues as vertical integration (e.g. in case of complementary input suppliers). In so far as the term “conglomerate” applies to complementary products, “conglomerate merger” will practically have the identical set of effects as a vertical merger; and as such, comments submitted with respect to the Guidelines’ sections on vertical mergers (especially from an economics perspective) will apply to conglomerate mergers almost without change.