



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON CROSS-BORDER REMEDIES IN MERGER REVIEW

-- Turkey --

The attached document is submitted by the delegation of Turkey to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV of the agenda at its forthcoming meeting on 15 February 2005.

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1. General Considerations

The Turkish Competition Authority (TCA) has had a practice of merger review for about 7 years. Considering this experience of the TCA in merger review, it could be argued that we have faced a significant number of cases with cross-border affects. In other words, the merger reviewed by the TCA has also been subject to review under other jurisdictions that affected the merger in question. In most of these cases with cross-border affect, the TCA have cleared the mergers as they have raised no competition concerns for the relevant markets.

Out of many cross border mergers that might have had impact on the Turkish market, the TCA has faced a limited number of cross border merger cases, which raised competition concerns. The TCA have cleared these cases by imposing certain substantive conditions with a view to eliminate the competition concerns. In this respect, there are two recent experiences: one in 2003 and the other in 2004. However, in designing the conditions to be imposed, the TCA has closely examined the practice of other competition authorities with regard to these specific cases. In particular, the experience of the EC Commission has presented significant input for the TCA. In two cases, being aware of the conditions imposed by the EC Commission, the TCA has concluded that it would be sufficient to impose the similar conditions with those of the EC Commission to protect the competition in the market after the merger takes effect. In these cases the TCA has closely examined the competition concerns raised by the relevant mergers as well as possible remedies to end these concerns. In this context, the prior practice of the EC Commission has become a good guide. Being satisfied with imposing similar conditions, the TCA has paid attention not to impose additional burden on the merging parties. It is important to keep in mind that an over-zealous application of remedies might prevent the efficiency increasing mergers from taking effect. Therefore, in particular with regard to cross border mergers that are notified to different jurisdictions, the competition authorities should be more careful in designing remedies in cases where the merger would raise any competition concern. In particular, in the absence of clear rules for international cooperation for merger review, the undertakings being a party to a merger may face differing and conflicting remedies, which may ultimately lead them to give up from merging.

2. Cross Border Remedy Cases: The Turkish Experience

For the purposes of these submissions two cases will be examined. In these cases, the TCA has directly imposed substantive conditions to clear the merger. In the third case, the TCA has not directly imposed any condition; however, it has implicitly taken into consideration the fact that the conditions attached by the EC Commission have already eliminated the competition concerns, then there is no need to take further step to impose any condition.

DSM N.V. and Roche decision (Board Decision dated 11.9.2003 and numbered 03-60/730-342):

DSM case concerns the acquisition of Roche's vitamins and chemicals division by DSM. The Board determined the relevant product markets as phytase/animal food phosphate NSP divisive enzymes. The aggregate market shares of parties concerned in phytase market and NSP divisive enzymes were deemed as anticompetitive. On the other hand, parties concerned applied for the EC Commission and presented a commitment. In its decision, the Commission concluded that by the commitment the parties would remove serious doubts on the concentration's compliance with the Common Market¹.

¹ "Commission clears DSM's acquisition of the vitamins and fine chemical division of Roche", IP/03/1079, 23.07.2003

In 1994, Gist-Brocades, a subsidiary of DSM, signed an agreement with BASF AG on R&D, production, marketing, sale and distribution of animal food enzymes. According to the agreement, DSM manages the R&D and production division, whereas BASF focuses on sales and distribution. On the other hand, in 1998 RV&FC, a subsidiary of Roche Group, signed an R&D agreement with Novozymes A/S on developing new animal food enzymes. The Commission emphasised that DSM/BASF and Novozymes/RV&FC agreements include phytase and also NSP digestive enzymes, both agreements make Novozymes and BASF dependant to their partners on their own animal food enzyme activities, and benefit sharing and research mechanisms cause a highly economic integration. In this context, the Commission added that as a result of concentration between DSM and RV&FC, there is a structural connection between DSM/BASF and Novozymes/RV&FC alliances, and an intersecting area between parties' operations on production and distribution activities occurs.

Taking into account that after the acquisition DSM would have an important position in both alliances, the Commission pointed out that the acquisition would abolish the competition between Novozymes/RV&FC and DSM/BASF. Therefore, DSM undertook to terminate the DSM/BASF alliance on animal food enzymes and divest animal food enzymes operations to a third party. DSM and BASF agreed on divestiture of the alliance, and the Commission accepted the commitment. Similarly, the Board approved the acquisition transaction subject to DSM's divestiture of its animal food enzyme operations with BASF.

Syngenta/Advanta decision (Board Decision dated 29.7.2004 and numbered: 04-49/673-171):

Syngenta Crop Protection AG ("Syngenta"), a subsidiary of Syngenta AG, is a manufacturer of seeds and crop protection products such as fungicides and herbicides. Advanta B.V. ("Advanta"), a joint venture between AstraZeneca Group and Koninklijke Vanderhave Groep B.V., is active for R&D activities, production and marketing of pharmaceutical products. In 2004, Syngenta applied for acquisition of Advanta. The relevant product markets are determined as sugar beet seed market, sunflower seed market and corn seed market, which are the intersecting activities of enterprises concerned in Turkey. The Board decided that in sugar beet seed market, the acquisition would not cause any restriction of competition. However, in sunflower seed market after the acquisition an increase in the market share would occur and that the transaction would create a dominant position as a result of which effective competition is impeded in the sunflower seed market.

Therefore, the Board cleared the transaction with the condition that Syngenta sell out its operation in this sunflower seed market to a third party. In Acquisition Agreement enterprises concerned have decided to transfer Advanta's operations in the sunflower seed market to a third party. The EC Commission did also consider that certain remedies should be imposed in this merger transaction. The parties submitted a proposal to transfer Advanta's operations in the sunflower seed market to Fox Paine & Company, LLC. The remedies imposed by the EC Commission was in parallel to the condition imposed by the TCA.

Acquisition of Sulzer by Promatech (Board Decision dated 16.10.2003 and numbered: 03-68/812-360): This case is about the acquisition of Sulzer Textil the textile machinery division of Swiss company Sulzer Ltd. By Italy's Promatech SpA, another manufacturer of weaving machinery. Before this transaction was notified to the TCA, the EC Commission had already reviewed² it and found that Promatech would have dominated the Western European market for rapier weaving machines with a very high market share. The other competitors in the EU, Picanol and Dornier would have very small market share in comparison. To address the EC Commission's concerns, Promatech offered to divest Sulzer

² "Commission clears takeover of Sulzer Textil by Promatech subject to divestment", IP/02/1140, 24.07.2002

textile's rapier weaving machine business in Schio and Zuchwil. These commitments completely removed the competition concerns and the EC Commission cleared the case.

Following the notification of the case, the TCA did carefully examine the impact of the transaction on the Turkish market. As the market in question is of crucial importance for Turkey's motor industry, which is textile, the TCA attached great importance in analysing the possible impacts of the transaction. At the time of examination of this transaction, the TCA was knowledgeable about the decision of the EC Commission. In this regard, while examining the case, the TCA did take into consideration the remedies imposed by the EC Commission. The market for weaving machinery in Turkey was under threat as in the case of the EU. However, the TCA considered the fact that the conditions imposed by the EC Commission did already eliminate the concerns for the Turkish market and therefore it did clear the case

Conclusion

The practice of the TCA in these three cases demonstrates the approach of the TCA with regard to cross-border merger remedies. The TCA is well aware of the fact that any further unnecessary conditions should not be imposed on the merging parties to eliminate the anticompetitive concerns. In this regard, in particular what is important is to follow the practice by other jurisdictions with a view to imposing as similar conditions as possible for the mergers, with a view to escaping to impose unnecessary and/or conflicting remedies.