MERGER REMEDIES UNDER TURKISH COMPETITION LAW AND MODERNIZED EC NOTICE: MINOR ISSUES OF BIG IMPORTANCE

TÜRK REKABET HUKUKUNDA VE YENİLENMİŞ AVRUPA KOMİSYONU DUYURUSUNDA YOĞUNLAŞMALARIN KONTROLÜNDE TAAHHÜT: KÜÇÜK KONULARIN BÜYÜK ÖNEMİ

Hanna STAKHEYEVA[♣]

Abstract

This paper presents an overview of the essential issues that play a role in formulation and implementation of effective merger remedies in the European Community, such as the major principles applicable to merger remedies, rights and role of third parties, issue of confidentiality and access to information, advantages and disadvantaged of structural and behavioral remedies, etc. Despite the lack of specific rules on merger remedies in Turkey, the paper also analyzes the existing practice and provisions on merger remedies under the Turkish Competition law in the light of the European rules and suggests that Turkey should adopt its detailed rules on merger remedies especially considering Turkey's integration to the EU and in order to increase transparency and certainty of business parties. With that view the paper may serve as a guide for the Turkish Competition Authority in drafting their own special rules on merger remedies.

Key Words*: Merger Remedies, SIEC Test, EC Notice, Confidentiality, Third Parties.*

Öz

Bu çalışma Avrupa Birliği'ndeki etkin birleşme taahhütlerinin formülasyon ve uygulamasında rol oynayan birleşme taahhütlerine uygulanabilir önemli ilkeler, üçüncü tarafların hak ve rolleri, bilgiye erişim ve gizlilik konusu, yapısal ve davranışsal taahhütlerin avantaj ve dezavantajları gibi elzem onuların genel bakışını sunmaktadır. Türkiye'de birleşme taahhütlerine özgü kuralların

[♣] University of Amsterdam, LLM.

yokluğuna rağmen, çalışma Türk Rekabet hukukundaki var olan uygulamayı ve birleşme taahhütlerine getirilen koşulları analiz etmekte ve özellikle Türkiye'nin AB'ye entegrasyonu, şeffaflığı ve iş aleminin belirliliğini artırmak bakımından, Türkiye'nin birleşme taahhütlerine ilişkin olarak detaylı kuralları benimsemesini önermektedir. Bu görüşle çalışma, Türk Rekabet Kurumu'nun birleşme taahhütlerine ilişkin kendi kurallarını tasarlarken bir rehber hizmeti görebilir.

Anahtar Kelimeler: *Birleşme taahhütleri, SIEC testi, Avrupa Komisyonu Duyurusu, Gizlilik, Üçüncü taraflar.*

INTRODUCTION

The process of formulation and procedural implementation of effective merger remedies depends on a number of small, but essential issues, such as: the substantive test; the role of third parties; the issue of who may propose the commitments; confidentiality and information asymmetries; the choice between structural or behavioural remedies; the degree of interaction between the antitrust authority and the merging parties, as well as cooperation of the antitrust authorities at the remedy stage, should a transaction trigger competition concerns in several jurisdictions. The recently adopted modernized EC Notice on Merger Remedies[1] has clarified and modified these issues and is expected to have direct influence on the adoption of the respective rules on merger remedies in the Republic of Turkey, which should result in more converging approaches of the two jurisdictions to conditional clearance decisions.

The importance of convergence of the Turkish and the European approaches to the formulation of merger remedies cannot be underestimated. First of all, Turkey is the first and only country that has the Customs Union with the EU without being a member of the EU, and the seventh biggest trade partner of the EU.[2] Secondly, Turkey is an accession candidate country and it is under an obligation to "ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively." [3]

[1] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 22.10.2008 EN Official Journal of the European Union C 267/11 (the New Merger Remedies Notice)

[2] Rehn, O. (2008), "45 Years from the Signing of the Ankara Agreement: EU-Turkey – cooperation continues," SPEECH/08/581, Conference on EC Turkey Association Agreement, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/581&format=HTML&aged=0&language=EN&guiLanguage=en 7.03.2009

[3]Decision of Association Council 1/95 concerning the completion of the Customs Union between Turkey and the EU (hereinafter – Customs Union Decision). Moreover, Turkey 2007 Association Partnership stresses the importance of fulfilling the commitments of "legislative approximation

Despite the fact that the government of Turkey has shown great progress in harmonising its legislation to the EU rules,[4] the alignment process must continue,[5] particularly following the reform of the EC merger control regime, as a result of which a number of differences has appeared between the Turkish and European systems.

Thirdly, in recent years "mergers and acquisitions involving EU and Turkish companies have increased dramatically."[6] According to Article 43 of the Customs Union Decision in cases where the Turkish and EU undertakings are involved, both the Turkish Competition Authority (the TCA) and the European Commission (the EC or Commission) are the competent authorities. Most of such mergers and acquisitions meet the relevant thresholds and have to be notified both to the Commission, in accordance with the EC Merger Regulation 139/2004, and to the TCA, as provided for in Law No.4045 on Protection of Competition. The notified transactions may be cleared unconditionally, cleared conditionally or simply prohibited. The Commission in practice more frequently resorts to the conditional clearance decisions, rather than to straightforward prohibition of mergers. With that view it has been constantly developing and improving its rules on merger remedies. Conditional clearance decisions have also begun to be increasingly rendered in the Republic of Turkey[7] because merger remedies are able to modify the outcome of the transaction and at the same time lead to the realisation of certain merger benefits. However, unlike the Commission, Turkey still lacks detailed rules on merger remedies.

The problem may raise where the merger`, which has to be notified both to the EC and to the TCA, is faced with differing remedies. This puts additional burden on the parties concerned and ultimately may lead them to abandon the transaction.[8] Therefore, the antitrust authorities of both jurisdictions in rendering the conditional clearance decisions should be careful not to impose additional

---

and implementation of the *acquis* in accordance with the commitments made under the Association Agreement, Customs Union and related decisions of the EC-Turkey Association Council."

[4]Atak, E. (2005) Harmonisation of Turkish Legislation and Practice with that of The European Union, http://www.tbmm.gov.tr/ul_kom/kpk/pre1.doc 7.04.2009; OECD (2005) Peer Review, pp. 24-28.

[5] Competition: International Dimension and Enlargement – Turkey – Adoption of the Community *Acquis*, Evaluation 2008, http://europa.eu/scadplus/leg/en/lvb/e12113.htm

[6] Rehn 2008.

[7] According to the official information, in 2007 the Competition Board adopted 17 conditional clearance decision, in 2005 - 6 conditional clearances, in 2003 – only 2, http://www.rekabet.gov.tr/dosyalar/belgeler/belge89/7.pdf, 7.04.2009

[8] OECD, (2005) Roundtable Discussion on Cross-Border Remedies in Merger Review. Turkey. DAF/COMP/WP3/WD92005)11 , p.2.

burden on the parties concerned. The recent practice shows that the TCA sometimes takes into account the merger remedies in decisions rendered by the Commission. For example, in several of its decisions the TCA has imposed exactly the same remedies as the Commission.[9] However, this is not always the case. In some cases where the Commission identifies no competition concerns in transaction, the Turkish Competition Authority does impose remedies on the parties which are related to the adverse affects of the merger that are likely to occur only within the Turkish boundaries. [10] While this is acceptable, as each jurisdiction is characterized by its "special features of the local regulatory framework and economic context"[11], similar approach of the two jurisdictions to the merger remedies can contribute to more effective remedies, as well as help to avoid conflicting and very often overly burdensome remedies, uncertainties both for the private parties and the competition authorities.

With that view, this paper provides an overview of the legal framework for merger remedies in Turkey and the EU. With the view to determining the problematic and diverging areas, it discusses and draws parallels between the Turkish and European approaches to merger remedies by analyzing such essential issues in the formulation and implementation of effective merger remedies as: the substantive test; the role of third parties; the issue of who may propose the commitments; confidentiality and information asymmetries; the degree of interaction between the antitrust authority and the merging parties; and advantages and disadvantages of structural and behavioral remedies. In addition, the paper provides insights at the major novelties introduced by the new EC Merger Remedies Notice. Furthermore, the paper suggests that Turkey adopt its specific guidelines on merger remedies especially considering Turkey's integration to the EU and in order to facilitate the design and implementation of merger remedies in line with the TCA's requirements, increase transparency in the merger control and certainty of the business parties, as well as make the cooperation of the EC and TCA easier.

1. LEGAL FRAMEWORK OVERVIEW

In case a merger raises significant competition concerns, its success largely depends on the design and implementation of the effective remedy or in other

[9] *Owens-Saint Gobain*, 2007, No. 07-90/1153-446 (Case No COMP/M.4828); *DSM-Roche Vitamins*, 2003, No. 03-60/730-342 (COMP/M.2972); *Procter & Gamble-Gillette*, 2005, No. 05-55/836-228 (Case COMP/M.3732); *Syngent-Astrazeneca*, 2004, No.04-49/673-171 (*Syngent CP-Advanta*, Case COMP/M.3465).

[10] *Rockwood-SudChemie*, 2005, No.05-88/1229-358; *Glaxo-SmithKline*, 2000, No.00-29/308-175.

[11] The Merger Remedies Matrix. Synthesis Report. A cross-country comparison of merger remedies: Experience and practice (2008), p.5.

words undertakings or commitments[12] put forward by the parties to the transaction to deal with competition concerns. As the competition Commissioner Neelie Kroes correctly pointed out, "remedies are very important in merger control as they may clear the way for companies to merge, while at the same time ensuring that effective competition is maintained."[13] Merger remedies in cconditional clearance decisions provide the merging parties with more options as to the outcome of their merger notification. At the same time the conditional decisions make the antitrust authorities more intervening in the transactions. In order to be able to resort to merger remedies and effectively apply them, as well as make the antitrust authority's intervention in the transaction more understandable and predictable for the parties, the relevant legal framework is essential.

In the European Union the legal basis for merger remedies is to be found in Article 6(2), Article 8(2) of the EC Merger Regulation 139/2004 (ECMR).[14] It states that the Commission may decide to declare a concentration compatible with the common market following modifications by the parties. In October 2008 the European Commission finally adopted a new Notice on Merger Remedies with a view to providing an improved guidance on such modifications by modernizing the previous Merger Remedies Notice[15] in the light of the ECMR and Implementing Regulation[16] and clarifying to companies how best to respond to the competition concerns identified by the Commission in the course of merger clearance process in order to get a deal through.

In particular, the new Merger Remedies Notice introduces Form RM for submitting information on the proposed merger remedies; clarifies the role of the Trustee in the structural remedies; describes divestiture and access remedies in more detail. Furthermore, it explains and stresses the importance of a new principle - "requisite degree of certainty of implementation", as well as changes

[12] Terms "remedy", "commitment" and "undertaking" are used interchangeably, according to Blanke, G. (2006) The Use and Utility of International Arbitration in the EC Commission Merger Remedies, Europa Law Publishing, Groningen, p. 5.

[13] Kroes, N. (2008), "Mergers: Commission revises Remedies Notice and amends Merger Implementing Regulation," http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1567&format=HTML&aged=0&language=EN&guiLanguage=en, 7.03.2009.

[14] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJL 24, 29.1.2004, p.1-22.

[15] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 02.03.2001, p.3.

[16] Commission Regulation (EC) No 802/2004 of April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p.1., Chapter VI.

the substantive/compatibility test from dominance to significant impediment of effective competition. In addition, the new Merger Remedies Notice increases the interaction between the parties and the Commission in designing merger remedies by providing the parties with a possibility to withdraw unnecessary commitments and/or to modify merger remedies at a certain stage. Some scholars[17] criticize the new EC Merger Remedies Notice for being too detailed, as it implies that the Commission will not be flexible in its approaches to merger remedies. However, this is not necessarily true. The Commission simply has provided the companies with more guidelines and explanation with regard to what the Commission expects from the parties.

In the Republic of Turkey there are no specific provisions or "explanatory tools"[18] on merger remedies despite the fact that the Turkish competition law has been deeply influenced by the European Union competition law.[19] Interestingly, but there are no clear provisions in the Turkish Law No. 4045 on Protection of Competition,[20] which empower the TCA to render the conditional clearance decisions either. The only basis for merger remedies can be found in the Article 6 of the Communiqué 1997/1 on Mergers and Acquisitions[21] which stipulates that the Board may authorize a merger on condition that other measures deemed appropriate by it are taken and certain obligations are complied with. Some scholars[22] argue that this is not enough for the TCA to be able to render conditional clearance decisions and that the Article 6 of the Communiqué should be in the text of the Law on Protection of Competition.[23] On the other hand the power of the TCA to issue communiqués is provided for in Article 7 of the

[17] Senyucel, O. (2009), "Inferences for Turkey in the Light of New EC Commission Notice on Remedies," Symposium, Remedies in Merger Control, Istanbul, 17 June 2009.

[18] Toksoy, F.M. (2007), Competition Law Aspects of Mergers and Acquisitions in the EU and Turkish Law: Does Turkey Call for a Merger Reform? The Answer and a Policy Proposal. PhD Thesis, European Community Institute, Marmara University, Istanbul, p.315, http://www.actecon.com/TOKSOY%20Thesis.pdf.

[19] Erdem, H.E. (2006), "Turkey follows Europe's lead on competition," International Financial Law Review, http://www.iflr.com/Article/1984516/Turkey-follows-Europe39s-lead-on-competition.html, 7.04.2009.

[20] Law on Protection of Competition No 4054, Turkey, Official Gazette ***No*** 22140, 13.12.1994.

[21] Communiqué 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, Turkey, Official Gazette No 23078, 12.08. 97.

[22] Erdem, E. (2009) Galatasaray University, Symposium, Remedies in Merger Control, Istanbul, 17 June 2009.

[23] In fact, there is a draft Law on protection of competition on the agenda of the Turkish Parliament which explicitly cites merger remedies in Article 7 of the Law.

Law on protection of Competition.[24] Hence, the law directly refers to the communiqués, so it can be implied that the TCA has power to resort to conditional clearance decisions.

The Decision of Association Council 1/95 concerning the completion of the Customs Union between Turkey and the EU (Customs Union Decision or Bilateral agreement) provides, though not explicitly, some additional legal framework for merger remedies. To be more specific, the TCA and the Commission have been cooperating closely on the basis of Article 43 of the Customs Union Decision, which stipulates that the TCA notifies and requests the Commission to apply certain measures should the Competition Board of the TCA believe that the merger on the territory of the EU affects competition in the territory of Turkey. This is a reciprocal right and obligation which means that the Commission is also authorized to request the Turkish Competition Board to resort to certain measures to restore competition in the market. Following the request, the notified party at first considers whether or not to resort to certain actions. It is a sole discretion of the notified party to undertake or not certain action with respect to the notified request. Similarly, it is a sole discretion of the notifying party to undertake the enforcement action with respect to certain transaction. In any case it is under the obligation to inform the notifying party of its decision and outcome.

Furthermore, Article 36 of the Customs Union Decision, which stipulates that the EC and the Turkish Competition Authority shall exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy, can also be applied in the process of cooperation of the antitrust authorities at the remedy stage. Apart from that, there are no clear rules for cooperation in the merger review.

It is clear from the abovementioned that the EC, unlike Turkey, provides a solid legal framework for merger remedies. The absence of explicit provision in law, as well as detailed guidelines on merger remedies in Turkey complicates the cooperation of the TCA with the Commission at the stage of merger remedies, particularly when there are no clear rules for cooperation in merger review. Moreover, it implies that there is not enough transparency and the parties to the transaction do not have sufficient information and certainty as to how the Turkish Competition Board formulates the remedies. Adopting the specific rules on

[24] "The Board shall declare, via *communiqués* to be issued by it, the 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."

merger remedies would "create an assessment discipline both for the notifying parties and for those who review the transactions."[25]

2. ESSENTIAL ISSUES IN MERGER REMEDIES

It can be argued that formulation and implementation of effective merger remedies depends on a number of issues, such as the role of third parties, the choice between the structural or behavioral remedies, the key principles applicable to merger remedies, etc. To assess each of the issues and understand their importance for the merger remedies process, the paper will first look at the issues that have been introduced by the modernized EC Notice and which are formally missing in Turkey; however, a careful examination of such issue will be useful for the TCA in the process of drafting its guidelines on merger remedies (2.1). The second section of this chapter will deal with essential issues that exit, but they are diverging in the two jurisdictions (2.2). The converging issues will be discussed in the final section of this chapter (2.3).

2.1 Essential and New Under the Modernized EC Notice

This section of the paper provides an overview of the issues that are important for the formulation of an effective remedy, which have been introduced or modified by the new EC Merger Remedies Notice and formally are missing in the Turkish law. Careful examination of such issues may contribute to the prospective adoption of the specific rules on merger remedies in Turkey and the improvement of the current practice of the TCA in this sphere.

2.1.1 Requisite Degree of Certainty of Implementation

The antitrust authority should accept the commitments from the merging parties only where it has no doubts as to their success in dealing with the competition concern and the effective implementation.

The modernized Merger Remedies Notice introduces a new condition for the acceptable commitments, namely that the Commission must be able to conclude "with the requisite degree of certainty"[26] that the remedies will be implemented. Such formulation emphasizes the importance of a remedy to be comprehensive, effective and sufficiently workable. Such "workability" of a remedy may depend on a variety of related factors, such as: third party rights in relation to the business or difficulties in finding a suitable purchaser. It is for the parties to remove such uncertainties as to the successful implementation of the remedy proposed or compensate such uncertainties by proposing an alternative

[25] Toksoy 2007, p.316.
[26] Point 10 of the new Merger Remedies Notice

remedy, i.e. 'crown jewel,' in order to get a green light from the Commission. Otherwise, as provided for in Point 14 of the new EC Merger remedies Notice, the Commission may prohibit the transaction if the parties submit such commitments that it is impossible for the Commission to conclude with a requisite degree of certainty that the remedies will be implemented fully and that they will restore the effective competition on the market. In other words, the remedies proposed by the parties should be clear and certain, "comprehensive and effective"[27]. The parties must approach the Commission with the commitments explaining them in considerable detail[28] in order to convince the Commission about the success of the eventual outcome of the merger remedies process.

To be able to conclude with the requisite degree of certainty that the remedies will be successfully implemented, the Commission in its turn may resort to insisting on including in the text of the commitments some *additional safeguards*, such as 'up-front'[29] or 'fix-it-first'[30] provisions. The difference between the two provisions can be clearly spotted with the help of the divestiture example. In the case of *'up-front'* provision, the parties are not obliged to identify a buyer, but simply undertake that they are not going to complete the notified transaction before they have entered into an agreement with a purchaser for the business to be divested [31] and have implemented the remedy approved by the Commission. This creates considerable incentives for the parties concerned to implement the remedy as soon as possible in order to be able to complete the transaction. *'Fix-it-f*irst' provision implies that the parties make the identity of the purchaser, as well as the substance of a binding agreement between them, known to the Commission during the process of approving remedies. As explained in the new Merger Remedies Notice,[32] fix-it-first provisions are normally included in the decisions when the identity of the buyer is crucial, e.g. when there is only a limited number of potential buyers considered suitable. Hence, the main difference between the 'up-front' and 'fix-it-first' is that in the case of the latter option the identity of the buyer is known to the Commission prior to authorization.

---

[27] *General Electric v Commission*, (2005), Case T-210/01, ECR II-5575, Para 52.

[28] Korah, V. (2007), An Introductory Guide to EC Competition Law and Practice. Ninth Edition, Hart Publishing, Oxford and Portland, Oregon, p. 422.

[29] This provision can be found both in the previous Merger remedies Notice, Point 20, and the new Merger Remedies Notice, Point 53.

[30] A 'fix-it-first' provision has been recently introduced by the new Merger remedies Notice, Point 56.

[31]For example, *Omya/Huber PCC*, Case COMP/M.3796, *DSM/Roche Vitamins*, Case COMP/M.2972.

[32] Point 57 of the new Merger Remedies Notice.

Another example of additional safeguards from the parties required by the Commission in case there is no "requisite degree of certainty" in the implementation and success of the commitments is the '*crown jewel*' provision. The 'crown-jewel' is a term introduced by the new Merger Remedies Notice for the alternative remedies.[33] It implies that when the Commission has doubts that the proposed remedies would be successfully implemented due to their complexity or existence of third party pre-emptive rights, the parties to the transaction must propose the second alternative remedy which they will be obliged to implement should they fail to implement their initial commitments. Such second commitments should be at least as effective as the first proposed ones and should leave no doubts as to their implementation and possibility of creating a viable competitor. The possible implication that may arise out of crown jewels is the likely manipulations by the potential purchasers of the divested assets who are likely to try to extract crown jewels knowing that they are subject to time pressure. Therefore, the existence of such provision should be confidential at least until the time it is triggered.

Under the Turkish competition law there are neither specific provisions nor practical examples on crown-jewels. However, it should be stressed, that the possibility to resort to the alternative commitments increases the chances of the parties to the merger that their remedies will be accepted by the antitrust authority and the transaction will be cleared. However, this creates uncertainty and insecurity, as well as additional costs for the parties concerned.

The aforementioned suggests the process of approving merger remedies should require additional safeguards from the parties. It is quite reasonable as the Commission will not accept the commitments, should it have any doubts as to their effective implementation. Such precaution may help to avoid the risk that the implemented transaction would need to be dissolved afterwards if the parties fail to implement their commitments. However, such safeguards, as well merger remedies in general should be designed taking into account the principle of proportionality.

2.1.2 Principle of Proportionality

Proportionality of merger remedies to the competition problem is essential. As correctly pointed out by P. Papandropoulos "the need to ensure the effectiveness of a remedy goes hand in hand with the necessity to respect the principle of

[33] Point 45 of the new Merger Remedies Notice; Point 22 of the previous Merger Remedies Notice.

proportionality."[34] Only remedies that are proportionate are able to effectively eliminate the competition concern and at the same time not to deprive the parties from the anticipated merger benefits.

The principle of proportionality is one of the general principles of the Community law.[35] It requires that measures adopted by the EC institutions should not exceed what is necessary in order to achieve the objectives pursued; when there are several appropriate measures, the choice has to be made in favor of the least onerous. After the ECJ judgment in *Cementbouw v Commission*[36] the principle of proportionality has to be applied to merger remedies.[37] The new EC Merger Remedies Notice explicitly stipulates that the "Commission will review where the commitments submitted by the parties are proportionate"[38] to the competition problem. The least burdensome remedies that are able to effectively eliminate the competition concern fully are sought by the Commission. The cost of implementing the remedies should be considered together with the effectiveness of the remedies.

On the one hand it seems that the parties cannot argue the proportionality of the remedies because they are the ones who voluntarily propose certain merger remedies. As correctly pointed out by Advocate General Kokott,

> "there are therefore strong grounds to suppose that the undertakings themselves consider their commitments to be appropriate, necessary and reasonable for resolving a competition problem identified by the Commission, especially since in the view of the undertakings concerned a conditional authorization generally represents a less onerous means by comparison with the prohibition of their concentration."[39]

According to the findings of the International Competition Network Merger Working Group,[40] some jurisdictions do not find it appropriate to

---

[34] Papandropoulos, P. Tajana, A. (2006), "The Merger Remedy Study – In Divestiture We Trust?" E.C.L.R., pp.443 – 454, p. 453.

[35] *IATA and ELFAA* (2006), Case C-344/04 ECR I-403, Para 79

[36] *Cementbouw Handel & Industrie BV v Commission*, (2007), Case C-202/06 P, ECR I-0000

[37] Cot, J.-M. (2008), "Proportionality of remedies: The ECJ upholds the CFI judgment in the Cementbouw case (Cementbouw Handel & Industrie BV/Commission)", Concurrences, No 1-2008, no 15328, http://www.concurrences.com/article_revue_web.php3?id_article=15328&lang=en, 5.03.2009.

[38] Point 85 of the new EC Merger Remedies Notice.

[39] Opinion of Advocate General Kokott (2007), *Cementbouw Handel & Industrie BV v Commission of the European Communities*, Case C-202/06 P, 2008/C 51/24, Para 69.

[40] ICN Merger Working Group: Analytical Framework Subgroup, Merger Remedies Review Project, Report for the fourth ICN annual conference, Bonn, 2005, http://www.icn-bonn.org/Remedies_Study.pdf, p.3.

consider the principle of proportionality in designing remedies once it has been found that a merger poses significant competitive detriment in a relevant market. Remedies are seen as already less onerous compared to the outright prohibition. This was also argued by the Commission in *Alrosa v Commission.*[41]. Despite the fact that the case concerns remedies under Regulation 1/2003, the interpretation of the principle of proportionality in Alrosa judgement and its application by the Commission can be related to merger cases as well because it constitutes a general principle of the EC law. The ECJ held that in spite of the voluntary nature of the commitments, the Commission is not relieved of the need to comply with the proportionality principle, because "it is the Commission's decision which makes those commitments binding. The fact that an undertaking considers, for reasons of its own, that it is appropriate at a particular time to offer certain commitments does not of itself mean that those commitments are necessary."[42] Furthermore, the ECJ stated that the Commission in its decision may make the proposed commitments binding only in part,[43] where it finds that the remedies proposed are too excessive. Hence, the Commission bears the responsibility for the proportionality of the remedies proposed by the parties. It is widely believed that finding a balancing point between the effectiveness of the remedies and their proportionality will become the "the main challenge"[44] for the antitrust authorities.

The government of Turkey has undertaken to "[…] ensure that […] the principles […] in force in the Community, as well as in the case-law developed by EC authorities, shall be applied in Turkey."[45] Since the ECJ's judgments and the Commission's decisions according to the mentioned Article of the Customs Union Decision should be evaluated as precedents under the Turkish Competition Law, the principle of proportionality should also be considered when determining and implementing remedies.

2.1.3 Withdrawal of Unnecessary Commitments and Possibility of Modified Remedies

Withdrawal. The possibility to withdraw unnecessary commitments, as well as to modify the remedies can be regarded as the efficient tools for the formulation and implementation of the effective and proportionate remedies, as the interaction between the parties and the antitrust authority increases as the result.

---

[41] *Alrosa Company Ltd v Commission of the European Communities*, Case T-170/06 (2007), Para 80.
[42] Para 105, Alrosa.
[43] Para 139, Alrosa.
[44] Papandropoulos, Tajana 2006, p. 453.
[45] According to Article 39.2 of the Customs Union Decision.

The common practice is that the merging parties are willing to propose more commitments than needed with the view to ensuring that the Commission would approve the remedies and saving the time that is extremely valuable for the business. The new Merger Remedies Notice seems to provide a solution to such "over-fixing" problem – possibility to withdraw unnecessary commitments.[46] It stipulates that if the Commission in its final assessment of a case comes to the conclusion that there are no competition concerns in the market, it will inform the parties accordingly and they may withdraw the unnecessary commitments. Should the parties do not withdraw them, the Commission will simply ignore such commitments in the decision. This is completely in line with the ECJ's ruling in Alrosa on the issue of proportionality, as discussed above, that "there is nothing to prevent the Commission from making proposed commitments binding only in part or to a particular extent."[47]

The new EC Merger Remedies Notice at the first glance seems to be not quite clear whether the Commission provides the parties with the possibility to withdraw the commitments only when there is no competition concern at all, or whether it may also happen in the cases when the parties have proposed more commitments than it is necessary to remedy the competition concern. The wording of the provision suggests that the withdrawal should be possible only when in the course of the investigation the Commission concludes that there is no competition concern in the merger. However, the principle of proportionality applicable to the merger remedies, as discussed above, suggests that the withdrawal of over-fixing remedies should also be possible in other cases as well.

Modifications. Very often the Commission comes to the conclusion that the remedies proposed by the parties are not enough to remove the competition problem. Hence, the parties will seek a possibility to approach the Commission with the modified commitments. Such modifications to the proposed commitments are possible, but in a limited number of cases. In Phase I, such modifications should be an immediate response to the result of consultations and should be presented as clarifications and/or improvements to the commitments to ensure that they are more effective and workable.[48] In Phase II everything is even stricter – the modifications to the commitments can be accepted only when the Commission can clearly determine, on the basis of its assessment of the already available information and existing market testing, and without conducting any additional market testing that such commitments will completely resolve the competition

[46] Point 84 of the new Merger Remedies Notice.
[47] Para 139, Alrosa.
[48] Point 83 of the new Merger Remedies Notice.

problems identified. Moreover, the Commission should have enough time for assessment of such modification and consultations with Member States.

There is another possibility to modify merger remedies after the Commission has been satisfied with the remedies proposed and accepted certain commitments from the parties. Such *review clause*[49] has been introduced by the New Merger Remedies Notice and provides the parties to the transaction with the possibility to modify or substitute the proposed commitments or grant an extension of deadlines for implementation. The review clause may be included in the commitments irrespective of the type of remedies. The parties have to show a very good cause to do so and submit their request within a specified deadline. A request to extend the deadline for the implementation of the commitments is very relevant for the divestiture commitments; whereas modification or substitution are much more relevant for the behavioral merger remedies due to market conditions that are very likely to change in the course of lengthy implementation of behavioral commitments. But then there has to be a several years gap between the decision of the Commission and the parties' request for modification. In addition, third parties play a considerable role in this process as the Commission prior to adopting any decision to modify or substitute the commitment will take into account their views.

Therefore, the new Notice of Merger Remedies considerably increases the interaction between the parties and the Commission in designing merger remedies. In addition, this proves the Commission's rather flexible approach to merger remedies, as mergers are unique and formulation of merger remedies is not a "one size fits all"[50] exercise.

2.2 Essential and Diverging

What follows is the analysis of the dissimilarities existing between the EC and Turkish approaches with respect to the issues that are crucial for the formulation of an effective remedy. Harmonization of such issues would be beneficial as it would make the cooperation between the Commission and the TCA easier.

2.2.1 Substantial Test: SIEC Rather Than Dominance

The importance of the substantive test or the compatibility test cannot be underestimated. It is an instrument with the help of which the antitrust authorities

[49] Points 71-76 of the new Merger Remedies Notice.

[50] American Bar Association, (2009) Joint Comments on the European Commission's Draft Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, http://ec.europa.eu/competition/mergers/legislation/files_remedies/aba_2.pdf 5.03.2009, p.4.

assess and decide whether a merger raises competition concerns and hence, whether certain merger remedies are needed. The Turkish and the EU merger control regimes differ with respect to the test for compatibility of the proposed merger with the market. Such differences may have impact on the assessment of mergers and consequently, the formulation of merger remedies.

The EC ceased to employ the "dominance" test since the ECMR came into force.[51] The evolution of the compatibility test is reasonable "since markets are evolving and the approach must be adapted to constant changes in the competition environment."[52] Moreover, there have been doubts as to the efficiency of the dominance test in assessing some mergers in the oligopolistic markets, namely where the undertakings are able to exercise the market power without holding the dominant share in the market or coordinating their behavior. In E. Fagerlund's opinion, "the final confirmation for the need for a reform of the substantive test was the criticism the Commission received after the overturning CFI decisions in cases *Airtours*, *Schneider* and *Tetra Laval*."[53]

Accordingly, the new EC Merger Remedies Notice stresses[54] that the test for compatibility of the transaction is whether it would significantly impede effective competition in the common market, the so called SIEC test. It is broader than the "dominance" test because creating or strengthening of the dominant position, in spite of being the major, however it is only one of the ways of significantly impeding the effective competition in the market. Competition on the market may be affected as a result of concentrations of firms which do not hold the large market shares[55], coordinated[56] and non-coordinated effects[57] of concentrations. The SIEC test is designed to fill in such an enforcement gap.

---

[51] "It seems that the major motivation for reform was to divorce merger control from the abuse of dominance doctrine in Article 82, so that the two legal provisions would develop independently" - Monti, G. (2008), "The New Substantive Test in the EC Merger Regulation Bridging the Gap Between Economics and Law?" LSE Law, Society and Economy Working Papers, London School of Economics and Political Science Law Department, http://ssrn.com/abstract=1153661, 7.04.2009.

[52] Wilson, J. (2003), Globalization and the Limits of National Merger Control Laws, International Competition Law Series, Kluwer International, The Hague, p 193.

[53] Fagerlund, E. (2005), "Collective Dominance under EC Merger Regulation No 139/2004," Lund University, p.35, http://web2.jur.lu.se/internet/english/essay/masterth.nsf/0/DF327D8C5BFBF990C125701300648D73/$File/exam.pdf?OpenElement.

[54] Point 4 of the new Merger Remedies Notice.

[55] For example, *T.Mobile Austria/Tele.ring*, Case M.3916.

[56] For instance, *Sony/BMG*, Case COMP/M. 3333.

[57] For example, *GE/Honeywell*, COMP/M.2220.

The Turkish competition law regime according to Article 7 of the Turkish Law on Protection of Competition No 4054 still[58] applies the "dominance test" to determine whether the transaction is compatible with the relevant market.[59] To be more precise, the TCA first of all carries out the dominance test and if it comes to the conclusion that the merger creates or strengthens dominant position, it then checks whether or the not the transaction would significantly impede the competition on the market. Thus, the Turkish law "defines the determination of the dominant position as a prerequisite"[60] for the assessment of whether the competition is significantly impeded through the dominant position of the parties to the merger. However, mergers may impede competition without necessarily creating or strengthening the dominant position of the parties.

One might reasonably argue that the shift from the "dominance test" to the SIEC test complicates the merger control process, as the traditional merger control consisting of the legal analysis of market shares of the parties is now supplanted by detailed economic analysis under SIEC test and becomes more unpredictable. In addition, high standard of proof is required from the antitrust authority.[61] According to the opinion expressed at the European Roundtable of Industrialists, "the dominance test – if properly applied and tied to an economically realistic finding of dominance, by which effective competition would be significantly impeded - offers clear advantages over the SIEC test in terms of clarity of interpretation and application as well as having a long-standing history in case law."[62] Indeed, it can be argued that to some extent the existing EC case law loses its significance.

However, according to Dr. M. Fevzi Toksoy,[63] dominance will continue to be a major factor in assessing the compatibility of the mergers.[64] Hence, the differences between the SIEC and the dominance tests should not be exaggerated. Nevertheless, the SIEC test rather than the dominance test is a considerable

[58] There has been a proposal of a new law which would change the "dominance"test to the SIEC test. - Davies, J. (2007), Merger Control. The international regulation of mergers and joint ventures in 61 jurisdictions worldwide, Global competition review, p.321.

[59] OECD (2005), Policy Brief. Competition Law and Policy in Turkey, OECD, Paris, http://www.oecd.org/dataoecd/61/39/35412083.pdf , 7.03.2009, p.3.

[60] Toksoy 2007, p.237.

[61] Fagerlund 2005, p.33.

[62] The European Roundtable of Industrialists (ERT). European Commission Proposals for Reform of EU Merger Control, 23 June 2003, p.2.

[63] Toksoy 2007, p.101.

[64] According to E. Fagerlund, there are 2 more possible alternatives for assessing the SIEC-Dominance relationship: "1.The test is an actual dual test with two criteria and two steps of evaluation. 2. The test is a combination of SIEC test and dominance test where both dominance and SIEC will be evaluated together and as meaning the same," *p.40.*

improvement of the merger control. It broadens the scope of merger control and provides more certainty that the mergers, which do not necessarily meet the dominance criteria, but impede the competition in the market, will be prohibited. Moreover, being one of the first discrepancies between the Turkish and European approaches to merger control regime, it should be reconsidered by the TCA.

2.2.2 Remedies: Imposed or Proposed?

The question of who can propose the commitments or impose the remedies, i.e. the parties or the antitrust authority, is a no less important issue that has an impact on the formulation of effective remedies. Where the remedies are designed by a party that is considered to be better placed to assess the feasibility of the merger remedies, then they are more effective.

The possibility of proposing the commitments or imposing the remedies constitutes another substantial difference in the approaches taken by the EC and the TCA to merger remedies. While in Europe it is the responsibility and right of the parties to the transaction, in Turkey everything is not so straightforward.

The new EC Merger Remedies Notice expressly stipulates that it is "for the parties to concentration to put forward commitments; the Commission is not in a position to impose unilaterally any conditions to an authorization decision, but only on the basis of the parties' commitments".[65] The Commission is only entitled to identify and communicate competition concerns to the parties in order to allow them to come up with adequate remedies.

As for the approach taken by the TCA, there is no clear provision as to who is entitled to propose remedies. Article 6 of the Communiqué 1997/1 as amended stipulates that in cases where the proposed merger triggers competition concerns, the Turkish Competition Board may nevertheless authorize such merger on condition that other measures [meaning, remedies] deemed appropriate by the Board are taken and certain obligations are complied with by the merging parties. The aforementioned suggests that the burden of putting commitments forward lies not on the parties to the merger, but constitutes a priority of the TCA. As stated by Arif Esin,[66] the parties cannot negotiate merger remedies with the Turkish

[65] Point 6 of the New Merger Remedies Notice.
[66] Esin, A. (2007), "Turkey: Concentration under Competition Law in Turkey," http://www.mondaq.com/article.asp?articleid=50278.

Competition Board. However, according to Zumrut Esin[67] the notifying parties in practice may themselves propose certain remedies.

While "the development of any remedies package is an interactive process,"[68] the absence of the express provision in the Turkish law on who can put forward the commitments creates uncertainties and should be eliminated. In this respect it can be argued that the EC approach is quite reasonable as the parties to the transaction are in a better position to decide and formulate the remedies to be proposed to the antitrust authority for its approval because it is their business involved. Indeed, the parties are considered to be better placed to assess the viability and competitiveness of the business, which is particularly important for the divestitures. This is in line with the opinion of Prof. Dr. Prof. Ercüment Erdem[69] who believes that the priority in this issue should be given to the role of the notifying parties. In particular, the antitrust authority should listen and try to correct the problem with the help of the parties' commitments. Furthermore, the notifying parties are always the "asking parties" and hence they should approach the antitrust authority with the corresponding remedies.

2.2.3 Issue of Confidentiality And Information Asymmetries

Information is a crucial aspect in the process of designing and implementing an effective remedy due to the following reasons. Firstly, as stated by Motta Massimo, "[…] a remedy that in theory solves a certain problem might not be effective in practice […] because there are information asymmetries among the merger parties, third parties and the Competition authorities,"[70] as the result of which the antitrust authority is likely to be satisfied with wider remedies than are actually necessary. Secondly, information serves as a basis for the decisions and expectations of the parties concerned and very often it may become an object for possible abuses and manipulations by the parities. That is why finding a balancing point between the transparency requirements and the right to confidentiality is extremely important.

[67] Esin, Z. İşmen, E. (2008), Merger remedies: Turkey, Concurrences, Institute of Competition Law, http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=719#ancre418, 17.03.2009.

[68] Cook, C.J. Kerse, C.S. (2005), EC merger Control, Fourth Edition, Sweet & Maxwell, London, p. 282.

[69] Erdem, E. (2009), Galatasaray University, Symposium, Remedies in Merger Control, Istanbul, 17 June 2009.

[70] Motta Massimo, Polo Michele, Vasconcelos Helder (2007), Merger Remedies in the European Union; an overview, Antitrust Bulletin, http://goliath.ecnext.com/coms2/gi_0199-7520692/Merger-remedies-in-the-European.html 10.02.2009.

Transparency is vital for optimizing the effectiveness of a remedy,[71] as well as compliance by the merging parties with their commitments. However, transparency should not be absolute. The parties have right to professional secrecy and business secrets. In this respect both the Turkish and the EU legislation limits the transparency requirement by the right to confidentiality. For instance, Article 18 of the EC Implementing Regulation provides that information shall not be communicated by the Commission in so far as it contains business secrets or other confidential information. Article 53 of the Turkish Law of Protection of Competition also stipulates that the decisions of the Board shall be published on the internet page of the Authority in such a way as not to disclose the trade secrets of the parties.

The question then is how much information contained in the confidential versions of the Commission's decision should be available to the public and, for example, in case of divestiture commitments, known to a potential purchaser. In order to make a decision about the acquisition of a divested business the prospective purchaser needs to obtain complete information about the business. However, the sellers may abuse their right to confidentiality in the divestiture process by restricting the information available to a perspective purchaser in order to limit the competition from the purchaser in the future. Due to the insufficient information provided to the potential purchaser, he is unable to assess the situation fully and becomes "a weak purchaser"[72] and consequently a weak competitor.

At the same time the potential purchasers may just as well abuse the information made available to them. For example, if the candidate purchasers know the timetable for divestiture, in particular when the parties are subject to short time period for divestiture, or the nature of an alternative remedy, they may use it for their bargaining strategies and hence affect the sale price for their profit or try to extract crown jewel from the sellers. Also, if the potential purchasers know that they are the only interested candidates, they are likely to bargain harder for the detriment of the sellers. [73]

Such problem of possible abuses and manipulations of information by the parties is common both for Turkey and the EU.

In the EU, with the view to dealing with such information asymmetries, as well as allowing the Commission to better evaluate the effectiveness of a remedy

[71] ICN Merger Working Group 2005.
[72] Merger Remedies Study (2005), Public version, DG COMP, European Commission, http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf 20.01.2009, 4.02.2009.
[73] Merger Remedies Study 2005.

proposed, the parties to the transaction are required to submit all the necessary information in a new remedies form (Form RM)[74]. This novelty has been introduced by the amended Merger Implementing Regulation. The Commission assesses the remedies on the basis of the information provided by the parties in the RM Form. The key issue is that Section 4 of the RM Form expressly requires the parties provide a non-confidential summary of the nature and scope of the commitments offered. The Commission may use this summary for the market test of the commitments offered with third parties. Moreover, such non-confidential version may also be used in cross-border discussions of the Commission with non-EU competition authorities in the framework of Community's bilateral cooperation with such countries.[75] As provided for in Article 36 of the Customs Union Decision, the EC and the Turkish Competition Authority shall exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy.

As for the Turkish law, it does not contain provisions for the parties to specify what they consider to be confidential information in their notification form. [76] The Turkish Competition authority has the discretion to decide which information is confidential and which is not. As pointed out by T. Togan and P. Eryürekli, despite the lack of clear guidance, it is commonly accepted that the market share figures, turnover and customer and supplier information are confidential. [77]

Neither the EC nor the Turkish approach is perfect. Under the Turkish law the fact that the TCA decides what information is confidential may, on the one hand, be considered as a preventive measure against the possible information abuses by the merging and third parties. But on the other hand, it may be regarded as the violation of the parties' right to confidentiality and protection of business secrets. The fact that EC provides the parties with a possibility to specify what should be treated as confidential may give rise to more possible manipulations by the merging parties. Hence, the balancing point under such circumstances should be the following: the parties should indeed be able to specify what information they consider to be confidential and should be protected as business secrets. However, they should provide the antitrust authorities with a sufficient reasoning behind their views on the confidential nature of certain information.

---

[74] Point 7 of the new Merger Remedies Notice; Annex IV of the Implementing Regulation.
[75] Point 80 of the new Merger Remedies Notice.
[76] Turan, T. Eryürekli, P. Paksoy. Competition 2006/07 Volume 1, PLC Cross-Border Competition Handbook // http://www.paksoy.av.tr/pdf/Merger-Control-in-Turkey.pdf, pp.443 – 452, p.444.
[77] Turan, Eryürekli, p.444.

Another possible way of dealing with the possible information abuses in merger remedies, particularly at the implementation stage, is resorting to the help of the Trustee. In this respect the new EC Merger Remedies Notice clarifies the role of the Trustee[78] and indeed provides some additional solutions to the issue of information asymmetries. It is expressly stated that one of the tasks of the Trustee is to verify that the potential purchasers receive adequate information about the business to be divested. Moreover, the Trustee acts as a contact person for any inquiries from third parties in relation to the remedies. Again, the Trustee is also under the obligation to keep confidential any business secrets of the parties.

In Turkey the practice of appointing the Trustee has not been so rich. For example, according to the Merger Remedies Matrix,[79] as of April 2008, to support the implementation of the merger remedies the Trustee has been appointed only in two cases: *Greencastle-Intergum*[80] and *Gıdasa-MGS*.[81] Interestingly, in Greencastle-Intergum case, the appointment of the Trustee was offered by the parties, whereas in Gıdasa-MGS the appointment of the Trustee was done by the TCA without any offer from the parties. This demonstrates that there are no specific provisions on the appointment of the Trustee in Turkey. According to Prof. Dr. Ercüment Erdem, resorting to Trustee as to the tool for monitoring the implementation of the commitments by the parties is not suitable for the Turkish law. First of all, the TCA is not as loaded with the notifications as the Commission. In fact, the transfer of the work load from the Commission to the Trustee was one of the reasons for the establishment of this position in the Community. Secondly, it is easier for the TCA to carry out the monitoring of the implementation of the commitments because it is the TCA that evaluates the transaction and the commitments; hence it has all the information. Monitoring the implementation without the specially appointed third party, the Trustee, saves time and money. While this argument is quite reasonable, still it can be anticipated that the new EC Merger Remedies Notice will influence the attitude and practice of the TCA concerning the Trustee as a tool for monitoring the implementation and dealing with information asymmetries.

The aforementioned represents considerable development in facilitation of collecting and assessment of information in the EC, which is likely to have certain impact on the Turkish merger control regime. However, whether it really solves the problem of information asymmetries and minimizes the risks of possible

[78] Point 119, Point 4 of the new Merger Remedies Notice.
[79] Merger Remedies Matrix, the e-Competitions Bulletin, Reports, Turkey, Concurrences, http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=728.
[80] No 07-67/836-314 (2007).
[81] No 08-12/130-46 (2008).

abuses by the market participants will be known in the course of time and practice.

2.2.4 Structural v Behavioral Remedies

Determining what type of remedy to apply to a certain transaction is very important. As correctly pointed out by D.A. Valentine, "just as a correct prescription is as important as an accurate diagnosis in medicine […] in antitrust imposing the right remedy is just as important as correctly analyzing the transaction." [82] The Merger Remedies Notice provides that the type of remedy for the competition concerns identified has to be examined on a case-by-case basis.[83] According to the ECJ judgments in *Tetra Laval* [84]and *ARD,*[85] it is immaterial to categorize the commitments as either structural or behavioral, as long as they are able to deal with the competition concern. But in practice, the Commission is in favour of the structural, in particular divestitures,[86] rather than behavioral[87] remedies. Under the Turkish Competition law there is no such distinction. In practice both types of remedies are employed by the Turkish Competition Board.[88] However, unlike the European Commission, the majority[89] of the conditional clearance decisions in Turkey have concerned non-compete clauses,[90]

---

[82] Valentine, D.A. (2000), "Merger Enforcement: Multijurisdictional Review and Restructuring Remedies," Remarks before the International Bar Association, Legal Challenges for Latin Americans in the New Millennium Third Regional Conference, Santiago, Chile, http://www.ftc.gov/speeches/other/dvmergerenforcement.shtm, 7.03.2009.

[83] Point 16 of the new Merger Remedies Notice.

[84] *Commission v Tetra Laval*, Case C-12/03, (2005) ECR 1-987.

[85] *ARD v Commission*, Case T-158/00, (2003) ECR II-3825.

[86] Point 17 of the new Merger Remedies Notice, "Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may be the best mean of resolving problems resulting from vertical or conglomerate concerns. […]."

[87] Point 17 of the new Merger Remedies Notice, "[…] Commitments relating to the future behaviour [….] may be accepted only exceptionally in very specific circumstances. […] if their workability is fully ensured by effective implementation and monitoring…"

[88] According to the Merger Remedies Matrix at http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=725#ancre418.

[89] i.e. 84 our of 112 decisions, http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=725#ancre418.

[90] For example, the TCA cleared: an acquisition in the private hospitals market subject to limitations of the noon-compete obligation *(Ozel Maya-SevgiSaglik-Tev Medikal-Gurler Medikal/Safac*); a merger in the wholesale of commodity polymers market subject to limitation of the non-competition cause (*NTC-Itochu Holland*); a merger in the shopping malls real estate market subject to limitation of the non-compete clause duration (*AVM-MFI Arcaden*); a merger in the medical devices market subject to limitation of the non-compete obligation (*GE-AMS*), Merger Remedies Matrix, http://www.concurrences.com/abstract_bulletin_web.php3?id_article=21804&lang=en.

confidentiality obligations,[91] and access to facilities or infrastructure,[92] i.e. contained behavioral remedies. The question that arises is what reasoning can be behind the fact that the TCA seems to be more in favour of the behavioral remedies, while the Commission clearly gives preference to the structural ones. There is an opinion that such differences are the result of the different "levels of experience and confidence"[93] in the ability of the antitrust authorities to negotiate and/or monitor the implementation of a certain type of remedy. However, in order to be able to answer this question, it is important to elaborate on each of the types of merger remedies in more detail.

Structural remedies according to the European Commission are deemed to be the most effective, "the benchmark" for other remedies,[94] as they are able in a relatively short period of time to create or strengthen competition on the market through the emergence of new firms-competitors. They are much preferred in wholesale and retail mergers,[95] or generally speaking when "dealing with high post-merger turnovers."[96]In V. Korah's opinion, structural remedies "solve the competition problem once and for all."[97] However, at the same time they are often accused of "over-fixing", i.e. going far beyond the elimination of the identified competition concern.[98]

The new Merger Remedies Notice in comparison with the previous one provides different types of possible remedies within the sub-group of structural remedies, such as: divestitures of stand alone business;[99] carve-outs of parts of integrated business;[100] divestiture of assets;[101] rebranding.[102]

---

[91] TCA cleared: a merger in the plastic business market subject to limitation of the confidentiality clause duration (*GE - Sabic Europe*); a merger in the chemicals sector subject to the limitation of the duration of the confidentiality obligation (*SAN/BASF –Lanxess*), 29 June 2006, e-Competitions, Merger Remedies Matrix,
http://www.concurrences.com/abstract_bulletin_web.php3?id_article=21914.

[92] For example, the TCA cleared a merger in the oil products market subject to granting third parties access to refinery facilities (*Turpas-OIB*),October 2005,
http://concurrences.com/abstract_bulletin_web.php3?id_article=21791.

[93] The Merger Remedies Matrix, p.15.

[94] Point 61 if the new Merger Remedies Notice

[95] The Merger Remedies Matrix, p.16.

[96] Bougette P. (2008), "Market structures, political surroundings and merger remedies: an empirical investigation of the EC's decisions," European Journal of Law and Economics, 2008 25:125-150, p.137.

[97] Korah 2007, p. 422.

[98] Vasconcelos, H. (2007), "Efficiency gains and structural remedies in merger control," Universita Bocconi, Centre for Economic Policy Research, Discussion paper No.6093.

[99] Point 32 of the new EC Merger Remedies Notice.

[100] Point 35 of the new EC Merger Remedies Notice.

One of the essential features of all the divestiture commitments is that the business to be divested has to be viable and competitive and include assets and all personnel "providing essential function"[103] for the business or at least sufficient to meet the "on-going needs of the divested business."[104] The Commission points out that "viable" normally means that the business operates independently of the merging parties on a stand-alone- basis[105] and gives preference for a divestiture of a stand-alone businesses.

However, under the influence of the principle of proportionality, the Commission has adopted a less strict approach. After the new Merger remedies notice the Commission may also consider a divestiture of business that has strong ties/integrated with the merging parties and require the carve out, so called "carve-outs." But this is only possible on the condition that the Commission is certain that such a carve-out will be able to operate on a stand-alone basis. The same applies to the divestiture of assets which did not form a uniform business in the past, but after the divestiture can be considered as a competitive and viable business. [106] The Commission must be able to conclude that the "resulting business will be immediately viable in the hands of a suitable purchaser."[107]

Another structural remedy that is considered to be less effective in restoring effective competition compared to a divestiture is re-branding – a remedy where the license is granted for a certain period of time during which a licensee develops its own new brand with the view to capturing the market share of the licensor and maintain it by way of such re-branding.

In order for the structural remedy to be effective, the following issues must be carefully considered by the parties and the authority. First of all, the scope of the business to be divested as the divested business has to be big enough to be an effective competitor. Secondly, selection of a suitable purchaser can be considered as the "single most important cause for remedy's ineffectiveness."[108] The suitable purchaser has to be independent of the parties to the transaction; it

[101] Point 37 of the new EC Merger Remedies Notice.
[102] Point 39 of the new EC Merger Remedies Notice.
[103] Point 26 of the new Merger Remedies Notice.
[104] Point 26 of the new Merger Remedies Notice.
[105] Point 32 of the new Merger Remedies Notice.
[106] *AstraZeneca/Novartis*, Case COMP/M.1806, 26.07.2000.
[107] Point 37 of the new Merger Remedies Notice.
[108] Merger Remedies Study 2005.

must possess the financial recourses, relevant expertise, as well as ability to maintain the divested business as a viable competitor.[109]

One of the biggest concerns with the structural remedies, in particular divestures, is that there might be no purchaser at all, as for example was the case in *Boeing/McDonnell Douglas*[110]. In the Boeing case the divestiture remedy could not be accepted by the Commission because it found that there were no parties wishing to acquire DAC from Boeing, nor were there potential entrants to the commercial jet aircraft market.[111] Consequently, Boeing undertook to maintain DAC as a separate legal entity for ten years and to regularly report to the Commission on DAC's performance. Moreover, Boeing committed itself to refrain from any further exclusive deals for a period of ten years, as well as from enforcing the exclusivity rights in the existing agreements. Generally speaking, Boeing offered to give its competitors access to non-exclusive licenses for patents and know-how. The package of such behavioral remedies was eventually accepted by the Commission and it declared the merger compatible with the market.

The case proves that structural remedies are not the best solution in all situations. According to Dr. Stanley Wong there is a "strong presumption in favour of structural remedies from an agency perspective"[112] because they are clear and easier to monitor. However, they might not be the best remedy to a certain competition concern. There might be cases where there are no likely purchasers to be found and prolonging the period for finding such purchaser may jeopardize the business on the companies. Moreover, as correctly pointed out by Motta Massimo, even if there is a potential buyer, a "successful entry by the acquirer of the divested assets is not synonymous with restored competition"[113] because the purchaser and the seller of such assets very often have incentives to cooperate with each other or the situation after the divestiture might lead to a more symmetries and thus favour collusion. That is why sometimes behavioral remedies may be a better solution.

---

[109] The standard purchaser requirements are provided for in Point 48 of the new Merger Remedies Notice.

[110] Boeing/McDonnell-Douglas, ***Case*** IV/***M.877 91997,*** OJEC L 336/16.

[111] Aribaud, J-L. (1997), "Summary of the most important recent developments," EC Competition Policy Newsletter, vol 3 No 2,
http://ec.europa.eu/competition/speeches/text/sp1997_040_en.html, 26 May 2009.

[112] Wong, S. (2009), "Merger Remedies – Lessons from the Ireland and the EC," speech presented at Symposium "Remedies in Merger Control," 17 June 2009, Istanbul,
http://www.rekabet.gov.tr/dosyalar/images/file/Egitim/2Wong.ppt#263,1,Merger Remedies.

[113] Motta Massimo (2007), "Merger remedies in the European Union: an overview," Antitrust Bulletin.

Behavioral remedies (or "conduct remedies"[114]) are sometimes more preferable than the structural ones, according to A. Ezrachi, due to their "flexibility and reversibility."[115] Another argument that supports the choice for the behavioral remedies is that they are less burdensome and have lower cost of implementation.[116] Turkey is a good example of the jurisdiction which gives preference for the behavioral remedies.[117]Behavioral remedies mainly address vertical concerns and are commonly used in the new or changing markets, markets of technology and network industries. The most common behavioral remedies accepted by the Commission are the access remedies[118] usually in the form of granting access to key technology, infrastructure, intellectual property rights, information and know-how on a non-discriminatory basis to third parties, competitors in order to facilitate their market entry. According to P. Bougette, access remedies are most common to the energy sector due to the high fixed cost that are characteristic to this sector and thus it is "difficult to impose structural remedies" [119] on the companies.

The acceptance criteria of such remedies by the Commission envisaged in Point 63 of the new Merger Remedies Notice are the following: sufficient degree of certainty that the remedy would lead to actual entry of new competitors in the market; any significant impediments to effective competition would be eliminated; and equivalence in their effect to divestitures. The common view among the scholars[120] is that the complexity of such access commitment is in their long duration and monitoring efforts. However, P. Papandropoulos and A. Tajana believe that "the general view that behavioural remedies are harder to enforce and costly to monitor is not necessarily correct"[121] because such remedies do not always deal with pricing that requires monitoring; and in any case the market participants are very often resorted to in such monitoring. Indeed, the third parties

[114] ICN Merger Working Group 2005, p.7.
[115] Ezrachi 2006, p. 463.
[116] International Chamber of Commerce, Comments of the EC's Draft Notice on remedies acceptable under council Regulation No 139/2004 and under Commission Regulation No 802/2004, http://ec.europa.eu/ompetition/mergers/lgislation/files_remedies/icc.pdf.
[117] According to the Merger Remedies Matrix, the trend of showing the preference only for the behavioural remedies is driven by Turkey, Lithuania, Hungary and the Czech Republic (p.14). Interestingly that France, Italy and Spain also show a "far stronger preference towards commitments on conduct," either alone or in conjunction with the structural remedies (p.13).
[118] Points 62-66 of the new Merger Remedies Notice.
[119] Bougette 2008, p.137.
[120] Wish 2003, p.852; Cook, Kerse 2005, p.286; Blanke 2006, p. 15.
[121] Papandropoulos, Tajana 2006, p. 449.

complaint mechanism plays an important role in monitoring and enforcement of behavioral remedies.[122]

To sum up, advantages and disadvantages are common to both types of the remedies. Structural remedies are normally preferable as they deal with the competition problem directly and lead to a permanent change of the structure, while behavioral remedies are considered to be more burdensome due to lengthy implementation and monitoring implications. Moreover, it is commonly believed that the complexity of behavioral remedies create certain "loopholes"[123] which the parties to a transaction are likely to take advantage of. But structural remedies may just as well be risky as they are irreversible and may even facilitate collusion.[124] It is true that "an effective package of remedies may contain both structural and behavioural elements."[125]

2.3 Essential and Converging

2.3.1 Role of Third Parties

The Commission and the TCA, as well as the merging parties recognize the importance of third parties in the process of merger clearance due to their ability to intervene[126] in the merger review process and play a crucial role in formulation of merger remedies. Third parties are able to influence the antitrust authorities' decisions as to the effectiveness of the remedies. Moreover, they may serve as a useful monitoring mechanism to ensure the compliance of the parties concerned with the commitments. It is believed[127] that the role of the third parties in the EU has increased dramatically after the change of the substantive test under the ECMR 2004, because the broader SIEC test, as discussed above, widens the scope of the cases the third parties can intervene in.

Merger remedies in conditional clearance decisions may affect third parties' rights due to its aim to restore and preserve the effective competition in

[122] For more information on the role of third parties see below.
[123] Ezrachi 2006, p. 462.
[124] Motta Massimo 2007.
[125] ICN Merger Working Group 2005, p.7.
[126] For example, in *Sony Music and BMG* case, the third parties, represented by the organization of music producers *Impala*, managed to influence the Commission's authorization decision with the help of the ECJ. In particular, they appealed the Commission's authorization decision to the ECJ and consequently the merger was nullified. See, *Independent Music Publishers and Labels Association (Impala) v Commission*, (2006) Case T-464/04 ECR II-2289; *Sony/BMG*, Case COMP/M.3333, OJ 2008, C 94, p.19.
[127] Satchwell, A. (2008), "EU Merger Review Policy: An Increasing Role for Third Parties?" IPAA Conference, http://www.indiana.edu/~west/documents/Satchwell-EUMergerReviewPolicy_000.pdf, p.2.

the market. However, they are binding only upon the parties to the transaction. Thus, the antitrust authority is not in a position to require third parties to implement the commitments, irrespective of whether or not the success of the remedy depends on third parties. It is quite obvious that third parties would try to impede the implementation of remedies that affect them, thus causing delays in their implementation and additional costs to the parties of the transaction. Therefore, it is a sole responsibility of the parties to the transaction to make sure that there are no risks related to third party approval that may hinder the effective implementation of the commitments. The risks and uncertainties associated with third parties are the following: lengthy negotiations with the joint venture partners in order to be able to exit or dissolve the joint venture; exercising blocking rights; third parties realizing their importance in implementation of commitments and hence demanding too much in exchange for their co-operation, etc.[128] According to J. R. Calzado and E. B. de La Serre[129] the merging parties "should therefore strive to manage third-party reactions in advance, for instance, by contacting their customers and explaining to them the efficiencies created by the transaction," in order to avoid the possible complications caused by the "surprise submissions"[130] from the third parties.

In addition, as has already been discussed above, third parties influence the antitrust authority's decision as to the acceptability of the modified or substituted commitments. The Commission also resorts to third parties, in particular those, whose positions are directly affected, with the view to market testing the proposed commitments by allowing third parties to assess the effectiveness of the proposed remedies on the basis of the information contained in the non-confidential version of the commitments. [131] The Turkish Competition Authority pursuant to Article 7 of the Communiqué also very often resorts to third parties, such as the customers, competitors, suppliers of the parties to the transaction, with the view to verifying information provided for by the parties and market testing.

Moreover, third parties play an important role in monitoring and enforcement of merger remedies through complaint mechanism. Third parties are

[128] A more extensive list of third party influence can be found in the Merger Remedies Study 2005.
[129] Calzado, J. R. La Serre, E. B. (2009), "Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?" The European Antitrust Review, http://www.globalcompetitionreview.com/reviews/10/sections/37/chapters/401/judicial-review-merger-control-decisions-impala-saga-time-policy-choices/
[130]DG Competition Best Practices on the conduct of EC in merger proceedings, Point 16, http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.
[131] Point 79 (d), 91(d) of the new Merger Remedies Notice.

sometimes called "a cost free monitoring tool."[132] Customers, suppliers or competitors are considered to be best placed to identify and report the non-compliance of the parties with their commitments, despite the fact that sometimes they may be prevented from such "reporting role" due to the lack of understanding of the measures or verifiable information.

To sum up, the role of third parties in formulation, implementation and enforcement of merger remedies cannot be underestimated and is recognized both by the Commission and the TCA. With that view, the rights of third parties have to be carefully considered in the course of designing and proposing remedies due to their likely impact on the implementation process. This is particularly the case where the parties to the transaction propose remedies involving obligations/assets over which they do not exercise sole control. In such cases the Commission is likely to accept the proposed remedies but only together with the crown-jewels.

CONCLUDING REMARKS

The paper has studied in detail major issues that effect the formulation and implementation of merger remedies by the EC and TCA, such as: the substantive test; the role of third parties; the issue of who may propose the commitments; confidentiality and information asymmetries; the choice between structural or behavioural remedies; the degree of interaction between the antitrust authority and the merging parties. Despite the lack of specific rules on merger remedies in Turkey, the existing provisions on merger remedies in the Turkish Competition law and practice have been analyzed in the light of the European rules. As the result, the paper has revealed both important convergences and divergences. In general, it may be concluded that,

- The SIEC rather than 'dominance' test should be employed to assess the compatibility of a transaction with the market and decide whether to resort to the merger remedies or not.
- Despite the fact that formulating remedies is an interactive process between the parties and the competition authority, the burden of proposing the commitments should lie on the parties to the transaction, as they are better placed to assess the feasibility of the remedies proposed, viability and competitiveness of business.
- Information asymmetries should be dealt with by means of introducing a special remedy form that the parties concerned have to fill in diligently and submit to the competition authority. On the basis of this form the competition authority will decide whether the proposed commitments are acceptable or not. Moreover, the parties concerned should be expressly given the right to identify what

[132] Ezrachi 2006, p. 474.

information they, rather than the competition authority, consider to be confidential. Resorting to a Trustee may be another way of dealing with information asymmetries.

- Remedies should be proportionate to the competition concern. Since the European Community principles are applicable in Turkey, the principle of proportionality should also be considered when determining and implementing remedies.

- Remedies should be acceptable when the competition authority is able to conclude with a requisite degree of certainty that they will be implemented fully and that they will restore the effective competition on the market. In less certain situations the competition authority may resort to 'up-front,' 'fix-it-first' or 'crown jewel' options.

- The possibility to modify, as well as to withdraw the unnecessary commitments should be available for the parties concerned in a limited number of cases. Such possibilities increase the interaction between the parties and the competition authority, and hence the effectiveness of the remedies.

- Rights of third parties have to be carefully considered in the course of designing and proposing remedies due to their likely intervention in merger review process and impact on the remedy implementation process. This is particularly the case where the parties to the transaction propose remedies involving obligations/assets over which they do not exercise sole control.

- The type of remedy for the competition concerns identified has to be examined on a case-by-case basis. Advantages and disadvantages are common to both types of the remedies.

In Turkey there is a need for more transparency to facilitate the parties to a merger and the TCA to design and implement merger remedies. It should be mentioned that there is a considerable difference between what is stipulated in the Turkish law and the respective practice of the TCA. Some provisions of the law are not clear, e.g. who can propose the commitments, or missing in the Turkish competition law, e.g. the possibility of the parties to specify what information they want to be treated as confidential; however, the TCA employs them in practice very often taking the EC Notice as the bases. Such uncertainties should be eliminated by expressly reflecting in the Turkish legislation the practice of the TCA, which is in line with the European rules in most cases.

Furthermore, considering Turkey's integration to the EU, it is advisable that Turkey adopts its detailed rules on merger remedies taking into account the small, but essential issues analyzed in the paper. This will increase the legal certainty of the notifying parties, the process of design and implementation of effective merger remedies, as well as cooperation between the Commission and the TCA at the remedy stage in multi-jurisdictional transactions.

BIBLIOGRAPHY

ATAK, E. "Harmonisation of Turkish Legislation and Practice with that of The European Union," http://www.tbmm.gov.tr/ul_kom/kpk/pre1.doc, 7.04.2009.

BLANKE, G. (2006), The Use and Utility of International Arbitration in the EC Commission Merger Remedies, Europa Law Publishing, Groningen.

BOUGETTE P. (2008), "Market structures, political surroundings and merger remedies: an empirical investigation of the EC's decisions," European Journal of Law and Economics, Issue 25.

CALZADO, J. R. LA SERRE, E. B. (2009), "Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?" The European Antitrust Review 2009, http://www.globalcompetitionreview.com/reviews/10/sections/37/chapters/401/judicial-review-merger-control-decisions-impala-saga-time-policy-choices/, 5.03.2009.

Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 22.10.2008 EN Official Journal of the European Union C 267/11.

Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 02.03.2001.

Commission Regulation (EC) No 802/2004 of April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004.

Communiqué 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, Turkey, Official Gazette No 23078, 12.08. 97.

Competition Best Practices on the conduct of EC in merger proceedings, http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf, 5.03.2009.

Competition: International Dimension and Enlargement – Turkey – Adoption of the Community *Acquis*, Evaluation 2008, http://europa.eu/scadplus/leg/en/lvb/e12113.htm, 5.04.2009.

COOK, C.J. KERSE, C.S. (2005), EC merger Control, Fourth Edition, Sweet & Maxwell, London.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJL 24, 29.1.2004.

DAVIES, J. (2007), Merger Control. The international regulation of mergers and joint ventures in 61 jurisdictions worldwide, Global competition review.

Decision of Association Council 1/95 concerning the completion of the Customs Union between Turkey and the EU.

ERDEM, H. E. (2006), "Turkey follows Europe's lead on competition," International Financial Law Review, http://www.iflr.com/Article/1984516/Turkey-follows-Europe39s-lead-on-competition.html, 7.04.2009.

ERYÜREKLI, P. TOGAN, T. (2006), Country Q&A, Competition 2006/07 Volume 1, Paksoy http://www.paksoy.av.tr/pdf/Merger-Control-in-Turkey.pdf 10.04.2009, 5.04.2009.

ESIN, A. (2007), "Turkey: Concentration under Competition Law in Turkey," http://www.mondaq.com/article.asp?articleid=50278, 5.03.2009.

ESIN, Z. İŞMEN, E. (2008), Merger remedies: Turkey, Concurrences, Institute of Competition Law, http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=719#ancre418, 17.03.2009

EZRACHI, A. (2006), "Behavioural Remedies in EC Merger Control: Scope and Limitations," World Competition 29(3).

FAGERLUND, E. (2005), Collective Dominance under EC Merger Regulation No 139/2004, Lund University, http://web2.jur.lu.se/internet/english/essay/masterth.nsf/0/DF327D8C5BFBF990C125701300648D73/$File/exam.pdf?OpenElement, 7.04.2009.

International Chamber of Commerce, Comments of the EC's Draft Notice on remedies acceptable under council Regulation No 139/2004 and under Commission Regulation No 802/2004, http://ec.europa.eu/ompetition/mergers/lgislation/files_remedies/icc.pdf, 7.04.2009.

International Competition Network (2005), ICN Merger Working Group: Analytical Framework Subgroup. Merger Remedies Review Project. Report for the fourth ICN annual conference, Bonn, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Remedies_Study.pdf, 7.03.2009.

KORAH, V. (2007), An Introductory Guide to EC Competition Law and Practice. Ninth Edition, Hart Publishing, Oxford and Portland, Oregon.

Law on Protection of Competition No 4054, Turkey, Official Gazette ***No*** 22140, 13.12. 94.

Merger Remedies Matrix, e-Competitions Bulletin, Reports, Turkey, Concurrences, http://www.concurrences.com/merger_remedies_one_question.php3?id_rubrique=728, 7.04.2009.

Merger Remedies Study (2005), Public version, DG COMP, European Commission, http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf 20.01.2009, 4.02.2009.

MONTI, G. (2008), "The New Substantive Test in the EC Merger Regulation Bridging the Gap Between Economics and Law?" LSE Law, Society and Economy Working Papers, London School of Economics and Political Science Law Department, http://ssrn.com/abstract=1153661, 7.04.2009.

OECD (2005), Cross-Border Remedies in Merger Review. Turkey. Roundtable Discussion. DAF/COMP/WP3/WD92005)11, OECD, Paris.

OECD (2005), Policy Brief. Competition Law and Policy in Turkey, OECD, Paris, http://www.oecd.org/dataoecd/61/39/35412083.pdf ,7.03.2009.

PAPANDROPOULOS, P. TAJANA, A. (2006), "The Merger Remedy Study – In Divestiture We Trust?" European Competition Law Review, pp.443 – 454.

REHN, O. (2008), "45 Years from the Signing of the Ankara Agreement: EU-Turkey – cooperation continues," SPEECH/08/581, Conference on EC Turkey Association Agreement, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/581&format=HTML&aged=0&language=EN&guiLanguage=en, 7.03.2009.

SATCHWELL, A. (2008), "EU Merger Review Policy: An Increasing Role for Third Parties?" IPAA Conference, http://www.indiana.edu/~west/documents/Satchwell-EUMergerReviewPolicy_000.pdf, 7.04.2009.

SENYUCEL, O. (2009), "Inferences for Turkey in the Light of New EC Commission Notice on Remedies," Symposium, Remedies in Merger Control, Istanbul, 17 June 2009.

TOKSOY, F.M. (2007) Competition Law Aspects of Mergers and Acquisitions in the EU and Turkish Law: Does Turkey Call for a Merger Reform? The Answer and a Policy Proposal. PhD Thesis, European Community Institute, Marmara University, Istanbul, http://www.actecon.com/TOKSOY%20Thesis.pdf, 7.05.2009.

TURAN, T. ERYÜREKLI, P. PAKSOY. Competition 2006/07 Volume 1, PLC Cross-Border Competition Handbook //http://www.paksoy.av.tr/pdf/Merger-Control-in-Turkey.pdf, 7.04.2009.

WILSON, J. (2003), Globalization and the Limits of National Merger Control Laws, International Competition Law Series, Kluwer International, The Hague.

WHISH, R. (2003), Competition Law, Fifth Edition, Lexis Nexis UK.

ECJ Case-law

Airtours v *Commission* (2002)*, Case T-342/99,* ECR *II-2585.*

Alrosa Company Ltd v Commission of the European Communities (2007), Case T-170/06.

ARD v Commission, Case T-158/00, (2003) ECR II-3825.

Cementbouw Handel & Industrie BV v Commission, (2007), Case C-202/06 P, ECR I-0000.

Commission v Tetra Laval, Case C-12/03, (2005) ECR 1-987.

EasyJet v Commission (2006), Case T-177/04, ECR II-1931.

EDP v Commission (2005), Case T-87/05, ECR II-3745.

General Electric v Commission, (2005), Case T-210/01, ECR II-5575.

IATA and ELFAA (2006), Case C-344/04 ECR I-403.

Independent Music Publishers and Labels Association (Impala) v Commission, (2006) Case T-464/04, ECR II-2289.

Zuid-Hollandse Milieufederatie and Natuur en Milieu (2006), Case C-174/05, ECR I-2443.

Decisions of the Commission

Alcatel/Finmeccanica/Alcatel Alennia Space & Telespazio, Case COMP/M.3680, 28.04.05.

AstraZeneca/Novartis, Case COMP/M.1806 – 2000/C 53/04, 26.07.2000.

Boeing/*McDonnell-Douglas*, Case *IV/*M.877 91997, *OJEC L 336/16.*

BP/EE.ON, Case COMP/M.2533 – 2001/C 222/06 , 20.12.01.

DSM/Roche Vitamins, Case COMP/M.2972 – 2004/C 69/07, 23.07.03.

GE/Intrumentarium, Case COMP/M.3083 – O.J. L109/1, 2.09.03.

Glaxo-SmithKline, Case No.00-29/308-175, 03.08.2000.

Omya/Huber PCC, Case COMP/M.3796 – 2005/C 63/03, 19.07.06.

Owens-saint Gobain, Case COMP/M.4828.

Procter & Gamble-Gillette, Case COMP/M.3732.

Rockwood-SudChemie, Case No.05-88/1229-358, 29.12.2005.

Sony/BMG, Case COMP/M.3333, OJ 2008, C 94.

Sygenta CP-Advanta. Case COMP/M.3465.

T.Mobile Austria/Tele.ring, Case M.3916, 2005/C 287/05.

Decisions of the TCA

DSM-Roche Vitamins, 2003, No. 03-60/730-342.

Glaxo-SmithKline, 2000, No.00-29/308-175.

Greencastle-Intergum, 2007*,* No 07-67/836-314.

Gıdasa-MGS, 2008, No 08-12/130-46.

Owens-Saint Gobain, 2007, No. 07-90/1153-446.

Procter & Gamble-Gillette, 2005, No. 05-55/836-228.

Syngent-Astrazeneca, 2004, No.04-49/673-171.

Rockwood-SudChemie, 2005, No.05-88/1229-358.