MERGER AND ACQUISITION CONTROLS IN TURKEY AND IN TURKISH-EU RELATIONS: AN AGENDA FOR FUTURE

This article examines the law and practices related to merger and acquisitions (M&A) in Turkey. An overview of the strengths and weaknesses of the Competition Board is carried out with a set of suggestions as to how it may be possible to prepare for the needs which may arise in light of the anticipated changes in Turkey-EU relations. The importance of domestic constituency building and the priority of SMEs, as well as the importance of judiciary reform are emphasized. The article touches upon critical issues such as the weak level of consumer organization in Turkey as well as the insufficient level of respect of the Board's advice by political actors. The interaction between development of Turkey-EU relations on other fronts and the issue of M&A is outlined and certain scenarios are analyzed in this framework.

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At the time this article was written[1] Turkish-European Union (EU) relations were at a crossroads. It would not be wrong to assert that the decisions to be made in December 2004 will have a huge impact on all aspects of Turkey's future for better or worse. Even if the EU decides to start membership negotiations with Turkey without any precondition, it is obvious that it will be a long and painful process.

This article aims to examine the future of Turkish merger and acquisition (M&A) law from the perspective of this long process. Needless to say, this process will to a great extent affect the future of the Turkish economy, which will in return shape the environment in which M&A laws are applied. What are the challenges that Turkey may face in with regard to M&A? What steps should be taken to solidify the interests that are protected by M&A law?

In attempting to answer these questions, two scenarios will be considered. In the first, Turkish-EU relations grow steadily closer and in the second, these relations stagnate or even deteriorate. The latter does not presuppose a "December 17th disaster." If and when negotiations start, it seems quite probable that there will be some periods when Turkish-EU relations encounter serious problems. The experience of some EU member states during negotiations indicates this possibility.

Another clarification as to the scope of the article is that, whereas the M&A issues may relate to many different fields of law such as obligations law, labor or tax law, this research basically focuses on M&A issues arising from competition law. Competition law and policy were introduced to Turkey's agenda in the framework of relations with the EU in general and the establishment of the Customs Union (CU) in particular.[2] Therefore they are more likely to be affected by the future of these relations.

Part I summarizes the adoption of M&A disciplines in Turkey and describes their content along broad lines. Part II attempts to give an assessment of the steps already taken and place them within the broader perspective of global and EU competition policies. Part III and IV consider respectively the 'less favorable' and 'more favorable' relationship scenarios and try to answer the aforementioned questions.

Turkish M&A Law in a Nutshell

Disciplines regulating the competition aspects of M&A in Turkey are specified by Law 4054 Regarding the Protection of Competition. The most important factor which was effective in preparing the Act was the obligations imposed on Turkey by international agreements; especially those under the Association Agreement (Ankara Agreement) of September 12, 1963 between Turkey and the EEC. According to article 16 of the Association Agreement, principles referred to in the provisions of the Rome Treaty concerning competition, tax and the harmonization of legislation shall be applicable within the framework of the association relationship. As a matter of fact, the Turkish Competition Act draws largely on articles 85 and 86 of the Rome Treaty.[3] The favorable atmosphere created by the EU-Turkey Customs Union, which took effect on January 1, 1996, has undoubtedly played an important role

[1] This article was written a few days prior to December 17, 2004, the day on which the EU will decide whether or not to begin the accession negotiations with Turkey in 2005.
[2] Nanette A.E.M. Neuwahl, "The EU-Turkey Customs Union: A Balance , but No Equilibrum," *EFA Review*, Vol. 4 (1999), p.37.
[3] Articles 81 and 82 in accordance with the Amsterdam Treaty.

during the process of adopting Law 4054 Regarding the Protection of Competition.[4] Although the law was enacted in 1994, it was not until March 1997, when the Turkish Competition Board (hereafter referred to as "the Board") was formed, that it actually became operative.

As the "customs union decision stipulates that Turkey shall implement a competition policy which is substantially similar to that of the EU", "the Law on the Protection of Competition incorporates a parallel wording of the Articles 81 and 82 [of the Rome Treaty] and the relevant sections of EU merger regulation. In addition, the implementing legislation issued by the Turkish Competition Board (or in other words the block exemption regulations) are modeled after the block exemption regulations of the EU. In short, the legislative framework of Turkish competition law is very similar to that of the EU."[5]

Article 7 of the law outlines the principle rule on the M&A:

> Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services in the whole or a part of the territory, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer to it/him the power to hold a managerial right, is illegal and prohibited.

In other words, mergers and acquisitions,

a) which aim to create or strengthen a dominant position in the whole or part of the country and

b) have the effect of reducing competition significantly in a market for goods and services are unlawful and prohibited.

In light of this principle, Communiqué 1997/1[6] [of *the Turkish Competition Board*] defines the mergers and acquisitions subject to merger control rules and sets forth the legal thresholds which require notification of a merger or acquisition falling within the definition provided in the Communiqué."[7] "Accordingly, in order for a merger, acquisition or joint venture to be considered under competition law, first it is required that the said transaction take place between independent undertakings, and as a result of the transaction, control should be transferred from one undertaking to the other."[8] Furthermore there is an obligation to obtain permission (pre-merger notification) from the Competition Board for such a merger, acquisition or joint venture transaction, if the total market share, of the undertakings party thereto, in the relevant market exceeds 25 %, or their total turnover exceeds 25 trillion TL (amended by Communiqué 1998/2).

"Once the Board receives a filing for a merger or acquisition transaction, there is a fifteen-day period for preliminary inspection. At the end of such a period, the Board may take any of the following actions:
a) render a decision granting full permission,
b) render a decision granting conditional permission,

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[4] 2002 Annual Report of the Turkish Competition Board, pp. 2-4.
[5] See Sinan Ülgen and Yiannis Zahariadis, "The Future of Turkish-EU Trade Relations: Deepening vs. Widening" in this issue of *Turkish Policy Quarterly*.
[6] All Competition Board Documents may be found on www.rekabet.gov.tr
[7] An overview of Merger Control Rules in Turkish Competition Law, Paksoy Law Firm web site, www.paksoy-law.com.
[8] 2002 Annual Report of the Turkish Competition Board.

c) request further information, documents or meetings
d) render an interim decision and notify the parties that the filing is subject to further investigation and that the parties should suspend closing pending a final decision of the Board.

If the Board remains silent and fails to take any of the above actions within 30 days of the date the filing is completed, this shall be regarded as *tacit approval.*"[9]

Turkish M&A Law in the Global and European Context: An Assessment

Turkish M&A law should first of all be considered within the global context. The enactment of the Turkish Competition Law is a part of a wave of competition policies adopted by a large number of developing/reforming economies over the last decade.[10]

Kovacic convincingly asserts that there are three major trends which characterize this process vis-à-vis M&A disciplines:

a) the expanding territorial reach of national and regional competition laws,
b) the increase in the number of countries that require pre-merger notification,
c) the emergence of substantive EU standards as the dominant framework for evaluating the competitive consequences of specific transactions.[11]

The Turkish example is perfect proof of all three points. Regarding point "a" The Turkish Competition Board has, since the very beginning, made it clear that it would assert its jurisdiction over any M&A, even if neither of the undertakings had its headquarters in Turkey, provided that the M&A in question had an effect on the Turkish market. This is an application of the so-called "effects doctrine."[12] Moreover, as mentioned in the previous section, Turkish law provides for pre-merger notification and it basically incorporates a parallel wording of EU law as a result of Turkey's customs union obligations.

The reasons for and global implications of this wave are beyond the scope of this article. For our current purpose, it may sufficient to note that by enacting Law No. 4054 Turkey has put herself in league with most of the other emerging economies. However, one question remains: why did many countries opt for the EU model rather than the US model? Kovacic provides the answer:

a) The desire of many nations in Central and Eastern Europe, the former Soviet Union or Northern Africa to join the EU or to have better access to EU markets,
b) The perception by some transition economies that the European approach, which emerged in a civil law context, is more compatible with their own civil law institutions than the US system,
c) The perceived superiority of EU competition law's substantive norms: transition economies might prefer the more egalitarian nature of EU competition standards to

[9] Supra note 7.
[10] Robert H. Lande, "Creating Competition Policy for Transition Economies," *Brooklyn J. Int'l Law*, Vol. 23 (1997), p. 339.
[11] William E. Kovacic, "Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies," *U Cin. L. Rev.*, Vol. 66 (Summer 1998), p. 1075.
[12] Board Decision of 28 January 1999 on an acquisition between E.I. DuPont de Nemours and Tongkook Synthetic Fibres Co. Ltd.

the stronger efficiency-orientation of US antitrust policy; EU standards provide a more flexible framework for achieving political and social objectives that go beyond attaining greater efficiency. [13]

To these three one may also add the deliberate and effective policy conducted by the EU to promote its rules as the global standards whereas the US has refrained from doing so.[14]

As for Turkey, it would not be wrong to assert that the first factor, that is the desire to join the EU, carried more weight than the others. Developing effective competition policies and institutions was one of the obligations arising from the CU decision, in addition to the fact that it is one of 28 chapters of the *acquis comunautaire*. As the initial purpose was to harmonize Turkish legislation with the EU *acquis*, any assessment should first consider to what extent this goal has been attained.

The EU Commission in its 2004 regular progress report on Turkey states that "in the field of anti-trust rules, harmonization with the *acquis* appears reasonably well advanced." However, that is not to say that the system is devoid of shortcomings. Commission concerns that also relate to the M&A disciplines are two-fold:

a) *Shortcomings in enforcement of the Board's decisions/penalties*: This concern is basically related to the "delays encountered in the handling of appealed cases in the Supreme Administrative Court" (*Danıştay*). It is striking that at the time this article was written only EURO 500,000 had been collected out of EURO 60 million assessed as fines.
b) *Lack of Respect for the Board*: The Commission points out that the voice of the Board is not taken seriously enough by the other government agencies. This fact is also mentioned in the Board's Annual Report[15], saying that one of the principal work loads of the body is to issue 'Remarks' (advisory opinions) regarding the competition law aspects of economic legislation when they are being drafted. However, so far their experience is that either different government agencies do not ask for any opinion at all, or, that even if they ask for a 'Remark' they do not take them into consideration properly. This issue raises concerns regarding the political support of competition policy in general and the Board in particular, and this concern is reinforced by recent attempts by the government to reduce the autonomy of the Board as an independent regulatory authority.[16] On the other hand, it may be incorrect to bedevil Turkish politics in that regard since some commentators relate this phenomenon to the Board's failure to implement policies to develop and promote a culture of competition within the society at large.[17] Furthermore İşmen asserts that "the Competition Board is much more focused on

[13] Supra note 11.
[14] Sharon E. Foster , "While America Slept: The harmonization of Competition Laws based upon the EU Model," *Emory Int'l L. Rev.,* Vol. 15 (Fall 2001), p.467.
[15] 2003 Annual Report of the Turkish Competition Board, p. 13; the Remarks may be found on the Board's web site www.rekabet.gov.tr.
[16] 2004 EU Commission Regular Progress Report pp. 92-95; The principal complaint of the Commission vis-a-vis the Turkish competition policy is the lack of compliance on the part of Turkey on the regulation of the state aids in conformity with the EU standards. However this issue is the beyond the scope of this research.
[17] Deniz Ilgaz, "Turkey Aims at Full Harmonisation with the EU Acquis Communautaire in Intellectual Property as a Requirement of Membership," in Peter G. Xuereb (ed.), *Euro-Mediterranean Integration: The Mediterranean's European Challenge - Vol. III*, (Malta: Publishers Enterprises Group Ltd, 2002)

and concerned with business centers, its main foes, than it is with its main clients, consumers and small and medium-sized enterprises."[18]

To put these concerns into context, one should not assume that these are symptoms peculiar to Turkey. Kovacic in his survey of the "distinctive traits of transition (economic) environments" points out seven principal hurdles that emerging economies face in their path to establish sound M&A policies: durability of publicly imposed limits on rivalry, fragile political foundations (weak political foundation of new competition authorities), weak indigenous competition policy expertise, dysfunctional courts, frail transparency safeguards, resource shortages and data shortcomings (data to be used in the definition of products and markets which is essential for any M&A investigation).[19]

That these same problems have, and continue to be, encountered in Turkey is obvious to everyone. However, excessive pessimism is unwarranted since, with its work so far, the Board has contributed greatly to the development of competition policies in Turkey. Some even argue that the Board is "among the best-performing regulatory institutions in Turkey."[20] Over the past seven years considerable expertise in the field of competition law in general, and in M&A in particular has been developed. The performance of the Board has also been commended by the EU Commission.

At this stage, a short quantitative analysis of the work of the Board may be useful. As of the end of 2003, 2576 applications had been filed with the Board and 2103 of them had been resolved. 531 of these applications were related to M&A. Almost half of these applications (244) were found to fall outside the Authority's scope. Eighty-nine percent or 256 out of 287 of these applications were given authorization to proceed with the relevant M&A process. Twenty-nine of these files were given conditional approval (11%) and only 2 were denied approval (0.8%).[21] Considering that the EU Commission, from 1990 up until November 30, 2004, issued 2560 final decisions in M&A cases and found 2233 of them (87%) compatible with the disciplines, giving conditional approval to 184 (7%) of the applications and prohibited only 18 (0.7%) of the would-be M&A transactions,[22] we would not be off-base to assert that the Turkish experience is in parallel with its European ancestor. Another important figure is the 'foreign character' of the applications to the Board: out of 69 M&A applications being considered in 2003 only 22 were concerned with domestic enterprises (making up 31% of the total). 15 of these 69 M&As were of a 'domestic-foreign' character, while M&As between foreign enterprises accounted for 32 of the cases; that is, 47 of these 69 applications (68%) involved a 'foreign enterprise'. [23]

As a conclusion of this short assessment we may make the following points:

a) Adoption of competition policies and consequent M&A rules in Turkey was part of a wider global trend, yet the process in Turkey was initially triggered by the desire to join the EU.

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[18] Tolga İşmen, "A Critical Assessment of Competition Policy in Turkey," *Turkish Policy Quarterly*, Vol.2 No.3 (Fall 2003), pp. 89-91.
[19] Supra note 11.
[20] Canan Balkır, "The Customs Union and Beyond," in Libby Ritenberg (ed) *The Political Economy of Turkey in the Post-Soviet Era: Going West and Looking East?* (Westport, Conn: Greenwood Press, 1998), pp. 52-77.
[21] 2003 Annual Report of the Turkish Competition Board pp. 68-70.
[22] http://www.europa.eu.int/comm/competition/mergers/cases/stats.html; other cases were referred to the members states.
[23] Supra note 21.

b) Parallel with the global trend, Turkish M&A rules have been based on the EU model; although there are still some shortcomings, M&A legislation is to a great extent in line with the EU *acquis* and harmonization has proved to be a success in this field. The most significant characteristic of M&A legislation is that it requires pre-merger notification.
c) The problems that Turkey is facing in the area of M&A resemble to a great extent the problems all transition\emerging economies have with newly-established competition authorities. Enforcement and lack of constant political support seem to be the two most important factors in the Turkish case.
d) The Board has generally proven to be successful. Yet it has still some shortcomings, such as its failure to promote a culture of competition within the society.
e) The decisions of the Board regarding M&A concern foreign business as well as, if not more so than, domestic business. Considering that as of June 2003 there was $35 billion worth of foreign direct investment in Turkey and that 4 of the 5 biggest foreign investor nations in Turkey are members of the EU (France being the biggest with a 16.36% share of the total foreign investment, followed by the Netherlands with 15.84%, Germany with 13.03% and the UK with 8.08%)[24] it would not be wrong to assert that the adoption of EU rules regarding the M&A has been a sound decision in terms of creating a more favorable investment environment which will increase the predictability and security that business is primarily looking for.

M&A Law in Difficult Times

As mentioned in the first lines of this article, there is no guarantee whatsoever that the relations with the EU will continue developing and consequently improve steadily, even if the negotiations start. For this reason, there is a need to foresee the possible challenges that Turkish M&A law might face in such times and to contemplate some possible preventive policies.

It is very difficult to forecast the possible economic impacts of such difficult times in detail. Yet, the claim that this kind of political atmosphere would jeopardize the economic growth of Turkey is clearly not unsubstantiated, given the high degree to which Turkish fiscal balance is dependent on international support. Although there is not certainty as to the list of factors contributing to the increase of Foreign Direct Investment (FDI), much of the research asserts that both Greenfield and M&A FDI are spurred by GDP growth.[25] Moreover, the political situation is as important as the economic environment especially for FDI, and such difficult political relations between Turkey and the EU may well find some, if not many, repercussions in the European business community, which makes up a considerable majority of the foreign direct investors in Turkey as was mentioned above.[26] It follows that a decrease in the already low level of FDI should be expected under such a scenario, and there would definitely be an ensuing decrease in M&A activity as the bulk of these transactions is comprised of foreign businesses. These difficulties would be independent of M&A law. However, this would certainly have a great impact thereon. What could be the most significant of these impacts with regard to M&A?

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[24] T.C. Başbakanlık Hazine Müsteşarlığı, 2003 1. yarıyıl Yabancı Sermaye Raporu, p.3.
[25] Calderon Cesar et al., "Greenfield FDI and Mergers and Acquisitions: Feedback and Macroeconomic Effects," *World Bank Working Paper*, January 2004.
[26] For a detailed explanation of the role of political stability vis-a-vis the FDI, from the perspective of the stability of institutional frameworks of market economy in developing countries, see Brunetti Aymo et al., "Institutions in Transition," *World Bank Policy Research Working Paper*, August 1997.

Although many answers may be provided to questions regarding technical and legal harmonization, the most important policy-centered impact may be the weakening of the EU's role in Turkey as the champion of the implementation and development of competition law in general and M&A disciplines in particular. As discussed in the previous section, so far, the development of competition law in Turkey has been carried out first and foremost, if not exclusively, within the framework of the harmonization of national legislation with the EU *acquis*. Consequently, the EU, and especially the EU Commission, has played a watchdog role vis-à-vis the adoption and implementation of relevant legislation. Furthermore, if we keep in mind the recent attempts by the Turkish government to delineate the autonomy that the independent regulatory authorities enjoy, the weakening of the EU's role as the engine of this legal-reform process may have serious consequences. The incentive to fill the loopholes of the system may weaken severely. One would have to defend, under such scenario, the relevance and importance of a well-functioning and globally integrated competition policy, independent of arguments regarding Turkish-EU relations and FDI flows; that is, of course, if one believes in the need for such a policy. What then should be done by those who believe in the necessity of such competition policies?

The answer lies in a broader concept of competition policy: "…there is a tendency to equate 'competition policy' with enforcing prohibitions against restrictive business practices. This might be called an anti-trust centric view of competition policy. Properly understood, competition policy encompasses a large collection of policy instruments by which a country can promote business rivalry." [27]

What may these different policy instruments be? In general terms, one could cite competition advocacy, education and constituency development, promotion of research and studies in the field of competition apart from antitrust enforcement.[28] Education and constituency development seem to be the most significant ones in Turkey as, in order to be able to effectively advocate competition policy concerns within the government, the Board needs to utilize additional political weight, which it does not seem to enjoy currently. Moreover the promotion of research within especially university circles in particular will provide the Turkish competition community with further arguments and contribute to the education of a new-generation of government and business officials who would be more sensitive to competition policy concerns.

What needs to be done in the short term is the initiation of a comprehensive educational program, under the leadership of the Board, with a view to informing "business officials, consumers and government policy makers about the merits of market process.(…) Performing the education function can help the competition agency build a political constituency for market-oriented policies."[29] The choice of the constituency is of crucial importance at this stage. As we saw in the quote from İşmen above, the most suitable constituency is consumers and small and medium-sized enterprises (SME), which stand to suffer the most from the erosion of the competition rules. It is true that consumers are not as well organized in Turkey as they are in other Western countries. It follows that the priority should be given to the

[27] William E. Kovacic, "Theory Informs Business Practice: Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," *Chi.-Kent. L. Rev.*, Vol. 77 (2001), p. 265.
[28] Ibid. For a critical view of these instruments, see A.E. Rodriguez and Mark D.Williams, "The Effectiveness of Proposed Antitrust Programs for Developing Countries", *N.C.J. Int' l L. & Com. Reg*., Vol. 19, p.209, (Winter 1994); Craig W. Conrath and Barry T. Freman, "A Response to the Effectiveness of Proposed Antitrust Programs for Developing Countries," *N.C.J. Int'l L. & Com Reg.*, Vol. 19 (Winter 1994), p.233.
[29] Supra note 25.

education of SMEs and government officials, including, but definitely not limited to, officials from other independent regulatory authorities.

The curricula should put emphasis on the role of competition policy for the creation of a well-functioning market economy, for the protection of SMEs and for the aggregate growth of the domestic economy; that is, it must be made clear that the implementation of competition policies are necessary not only for the sake of sound relations with the EU, and that the developments that have taken place in Turkey are a part of broader global movement which has been influencing not only EU candidate states but also a large constituency from Latin America to South East Asia.

This seems to be the most plausible way for the Board to make its voice heard when it might not enjoy the backing of Brussels. The level of competent human resources with regard to competition policies in Turkey has reached such a level as to enable the Board to conduct such an education campaign.

Before we turn into the next scenario, one point has to be clarified. Launching an educational campaign on competition policies is not a bad-times-only proposition. However, its importance in such times is more important, thus it was analyzed in this section. That is not to say that this suggestion should be neglected if relations with the EU develop smoothly. It is also clear that it is not pertinent solely to M&A. However it is clear that in such times the very integrity of the entire competition policy framework may be at stake and the implementation of M&A disciplines would require the general advocacy of competition law in general.

M&A Law in Good Times

Just as we need to prepare for difficult times so should we for the good times. Good times are not immune to problems, especially if one is talking about law and economics.

> "The opening of EU negotiations is seen by many insiders and outsiders as vital to Turkey's economic prospects. Negotiations would be interpreted by investors as substantially reducing economic and political risk, which would make a big difference to the sustainability of public debt, and allow lower interest rates, thereby encouraging more investment and growth. Beginning negotiations with the EU is a decision which would set Turkey apart from other emerging economies, such as those of Latin America."[30]

This is the general view shared by many both in Turkey and Europe. What would further and sustainable growth mean for Turkey in terms of M&A? As mentioned above, the economic evidence put forth by a World Bank study[31] suggests that growth attracts FDI, either as M&A or Greenfield investment, and M&A is more likely to lead to Greenfield investment. Foreign businesses tend to prefer to enter a market or increase its market share in collaboration with local players. Moreover, another World Bank study suggests that "foreign investment is focused on high-value-added sectors and on large profitable firms."[32] Hughes asserts that

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[30] Kirsty Hughes, "Turkey and the European Union: Just Another Enlargement?," *Friends of Europe Working Paper*, June 2004.
[31] Supra note 25.
[32] Caroline Freund and Simeon Djankov, "Which Firms do Foreigners Buy? Evidence from the Republic of Korea," *World Bank Policy Research Working Paper*, September 2000

Turkey may receive up to EURO 4 billion a year as FDI, should she manage to realize further reforms such as the reform of the judiciary.

When one considers all these points together, it could be said that with the start of negotiations it would be quite possible to see a new wave of FDI into Turkey which would first take the form of M&A and aim at large domestic companies, which would in turn increase the possibility of creating or consolidating dominant positions in the Turkish market that might have competition-restricting effects. In other words, more complex M&A cases are awaiting the Board.

What might be the complications of this new wave of mergers and what should be done? There are many points that may be analyzed in response to these questions; however one seems to be of special importance as it is located at the heart of many discussions regarding M&A law: assuming that an M&A is considered to be competition-restricting what should be done? Should it be prohibited or given conditional approval? If the answer is the latter, what should be the remedies favored by the Board?

Regarding the first point, there is for the most part consensus that prohibition is best only as a last resort. "If a merger is judged to be anticompetitive, its prevention is obliviously an effective remedy."[33] If it is possible to eliminate these anticompetitive effects without prohibiting the M&A *in toto,* every effort should be made to avoid the prohibition. Put simply, M&A in developing countries, in most of the cases means entry of new capital which is a scarce commodity in these economies. Besides, as a matter of principle, the free will of businesses should be subject to deference as much as possible, and they must be offered the possibility of proceeding with the transaction if the undesirable side-effects may be dealt with by specifying conditions. The very low percentage of total prohibitions both by the EU Commission and the Board proves that this view is also shared by these institutions. Then the remaining question is what effective remedies for such M&A are.

Two basic types of remedies may be identified within existing M&A practice and literature: "partial divestiture of assets or operations sufficient to eliminate the anticompetitive effects; or orders regulating or modifying the conduct of the merged firm to prevent the feared anticompetitive effects."[34] The former is a structural the latter a behavioral remedy. Which one is preferable? The prevailing opinion in the literature is that structural remedies should be preferred to behavioral ones: structural remedies do not require continuing oversight and regulation by the competition agency whereas behavioral ones do. Especially, taking into account the fact that, with the increase of M&As, the Board would already be faced with a bigger work load, it makes sense to make maximum use of the scarce resources by avoiding behavioral remedies. Moreover "they may be rendered ineffective, irrelevant, or at worst, competitively harmful over time as market conditions change."[35] In light of the past experiences of other jurisdictions it seems plausible to recommend that the Board refrain from prescribing behavioral remedies.

What is an example of a structural remedy? For instance, "one or both of the merging firms may operate in many markets (product or geographic), but the merger may be anticompetitive

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[33] Shyam R. Khemani et al., "A Framework for the Design and Implementatin of Competition Law and Policy," pp. 53-56, World Bank-OECD, November 1998.
[34] Ibid., pp 53-56.
[35] Ibid.; Russell W. Pittman, "Symposium: Second Annual Latin American Competition and Trade Round Table: Introduction," *Brooklyn J. Int'l L.*, Vol. 25 (1999), p. 263,

in only a few. If assets could be divested in those few markets so that the competition is maintained, the merger could be permitted."[36] By the same token, the merged undertaking may be required to "license a relevant part of its proprietary technology to other firms as a means of introducing new competition"[37] The licensing of the intellectual property may be construed as a divestiture hence structural.

An example may be the mergers of Sanofi\Synthelabo and Pfizer\Pharmacia, both scrutinized by the EU Commission. The Commission decided that the mergers could limit the choice of certain drugs. In response, the parties proposed transferring some of their products to their competitors. The Commission found that these commitments would restore the competition and accepted the mergers.

Another example is the merger between the food companies Unilever and Bestfoods. The Commission after its scrutiny concluded that the merger would reduce competition in the markets for instant soups, pasta sauces, jams etc. The parties in return proposed to sell EURO 1 billion worth of their business to their competitors, only then did the Commission give a conditional clearance to the merger.

As may be seen from the examples, merger controls give an important amount of power to the competition authorities in their relations with the enterprises. In this regard, we are faced with one last question which needs to be addressed in order to be able to give sound direction to Turkish M&A policy in 'good times': what should be the political principle governing this power? In other words, what should be the underlying purpose of merger control? On the face of it, that may seem to be an easy question. Since M&A is part of the broader competition law, naturally the purpose would be the protection of the competition in order to 'maximize economic efficiency'. Then, the question is, should the maximization of economic efficiency be the sole purpose of competition policies? One's answer would differ widely depending on his political view, conceptions of the market, etc. However an analysis of past state practice shows that, the maximization of economic efficiency has seldom been the sole purpose.[38]

"Implementation of antitrust orders, including merger controls, in all antitrust systems has sometimes involved the pursuit of economic, political, and social policy objectives that go beyond improvements to economic efficiency…Non-efficiency objectives play a relatively large role in transition economy merger control. Among other factors, transition economy competition authorities will consider whether the merger will increase the capacity of domestic firms to compete for export sales or increase domestic employment levels. Merger review provides an occasion to impose conditions that promote achievement of other objectives…"[39]

Merger controls in that way may play a balancing role between the profits of the investment made by big multinational enterprises in the domestic market and their negative effects.[40]

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[36] Supra note 33, pp. 53-56.
[37] Ibid., pp. 53-56.
[38] Ibid., pp. 1-8.
[39] William E. Kovacic, "Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies," *U Cin. L. Rev*., Vol. 66 (Summer 1998), p. 1075.
[40] Russell W. Pittman, "Symposium: Second Annual Latin American Competition and Trade Round Table: Introduction," *Brooklyn J. Int'l L*,. Vol. 25 (1999), p.263, 1999.

An interesting example of the use of antitrust mechanisms for non-efficiency purposes is the case of South Africa. "To gain approval of the country's Competition Board for specific transactions, parties to mergers in South Africa sometimes promise to increase employment or business ownership opportunities for black citizens. In close cases that present a mix of anticompetitive and pro-competitive possibilities, the Competition Board will consider such commitments as a factor favoring approval of a transaction."[41]

Although there are some who bedevil the use of antitrust tools in such a way,[42] the use of such measures may be helpful both to the economy and to the attainment of political and social objectives so long as they comply with certain standards:

a) *Such uses should not lead to inefficiency and anticompetitiveness*: To pursue a non-efficiency objective does not mean to support inefficient applications. For instance, the Board may pursue a policy of protection of SME as much as possible. As an attribute of this policy, whenever a divestiture is being considered an SME may have the priority to buy the divested asset. However, this should be the case only as long as the relevant SME possesses the capacity to manage the divested asset and consequently capacity to create competition for the newly created merger. Otherwise, both the divested asset and the competition in the market would be sacrificed as a result of misconceived application of the policy.
b) *Such uses should be non-discriminatory*: In this regard especially the non-discrimination between domestic and foreign investors is of vital importance. If the Board tended to consider creation of jobs in some specific geographic regions of Turkey as a factor which would favor the approval of a close case it should do so both for domestic and foreign investors. To impose such a requirement only on foreign investors would create on unlevel 'playing field.'
c) *Such uses should be transparent and predictable*: The factors which may play a positive role in the decisions of the Board should be made transparent and before implementation of such uses begins. If the Board was to take into consideration a social policy objective, it should declare that and make it clear with instruments such as guidelines regarding how it is going to interpret this.
d) *Such uses should be based on precedents in international competition case-law*: It would be much easier to legitimize such measures if they were inspired by some precedents, especially from Western competition case-law. Research for such a precedent would also reveal the outcome of this application and thus would give an indication as to its viability.

Such uses of merger controls would definitely be more difficult than the simple application of an economic efficiency test, however, the rewards for the Turkish economy may be worth it. One may state many political and social policy objectives as candidates for such favorable treatment. Although this issue definitely requires some more detailed analysis, in our mind, the ones that seem to deserve more attention are as follows:

a) *Protection of SMEs*: This would help increase the competitive advantage of the domestic, would contribute to the creation of new jobs and would also create\consolidate a constituency that supports the Board's policies; consequently increasing the Board's advocacy power.

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[41] Supra note 39.
[42] William H. Page, "Antitrust Review of Mergers in Transition Economies: A Comment with some lessons from Brazil", *U. Cin. L. Rev.*, (Summer 1998), Vol. 66, p.1113.

b) *Reduction of Regional Economic Disparities*: This would first of all have important political consequences, which would, in turn, contribute to the political stability that would circularly create a more favorable environment for further investment.
c) *Transfer of Technology*: Pursuance of such a policy would play an important role in the transformation of the Turkish economy into a more competitive, information-based one, in line with EU objectives.

Before concluding, one has to emphasize as clearly as possible the fact that to accomplish these policy objectives, complementary character and an effective enforcement mechanism are absolutely essential. Apart from some procedural enhancements[43], the need for a reform of the judiciary is obvious, especially in the field of competition law. The delays in handling cases are already very serious.[44] With a possible increase in the number of M&As, the judiciary might become totally blocked. Moreover, structural remedies would normally include many complex legal procedures and transactions, which would increase the number of disputes. As a starting point, special professional education programs for judges dealing with competition law cases, which would aim at formation of juridico-economic reasoning and increased awareness of European and other competition law cases should be considered. However, the Board can not take the lead in such a project as it is currently formulated and will be the most frequent defendant in front of these judges. Nevertheless this type of action may prove palliative and a more radical reform may be needed.

Conclusion

The future agenda of Turkish M&A law is very much dependent on Turkish-EU relations, as was it in the past. In the event that this relationship stagnates or deteriorates, M&A law as well as competition law in general, may face a legitimacy crisis. Hence there is a need for domestic constituency building on the part of the Board to be prepared for such a possibility. SMEs should be the first target of such a campaign.

On the other hand, if relations ameliorate, there will be different concerns on Turkey's M&A Law agenda. One of the most important of these concerns is the choice of appropriate remedies when an M&A is found to have anticompetitive elements. In these cases, the Board should opt for structural remedies. In the application of these structural merger control remedies, the Board should take into account political and social objectives, such as protection of SMEs, reduction of regional economic disparities and the transfer of technology.

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[43] Sinan Ülgen, "The customs union as the catalyst of globalisation," *Turkish Policy Quarterly*, Vol. 1, No. 2, (Spring, 2002).
[44] Kirsty Hughes, "Turkey and the European Union: Just Another Enlargement?," *Friends of Europe Working Paper*, June 2004 p.14.