
Of SIEC-Test and Thresholds: Merger Control 2022 in Turkey

Of SIEC-Test and Thresholds: Merger Control 2022 in Turkey

Article by Fevzi Toksoy, Bahadır Balkı and Hanna Stakheyeva

Introduction

The substantial rules of the Turkish merger control are taken from the corresponding EU provisions. The amendments to the [Turkish Competition Law in 2020](#) introduced the SIEC test to improve the concentration control regime and harmonize it with the EU rules even further. The amended Merger Communiqué in 2022 revised the thresholds as a response to the national currency devaluation and rapid developments in technology/digital markets, intending to prevent killer acquisitions, as well as decreasing the Turkish Competition Authority's (TCA) caseload. In this short article, we would like to provide you with the important aspects of merger control in Turkey, including the main changes that came into effect following the reform of the Turkish Competition Law in June 2020.

Welcoming the SIEC test in Turkey

Just like the EU, Turkey is also in a constant process of improving its legislation. In June 2020, [Law No 7246 Amending the Law on the Protection of Competition](#) ("Amendment Law") entered into force. The Amendment Law was aimed to: (i) harmonize the Turkish Competition Law with the EU legislation even further and (ii) eliminate certain problems encountered in practice. One of the most significant of these amendments relevant to concentration control was the adoption of the SIEC test, which replaced the dominance test for the examination of concentrations.

The application of the SIEC test in merger control has been quite contested. For years Turkey considered switching to the SIEC test to ensure compliance with the EU legislation and used a more flexible standard in the detection of anticompetitive concentrations.ⁱⁱⁱ Following the intense discussions and studies, the SIEC test was eventually introduced into the Turkish Competition Law in 2020. Prior to the amendment, creating or strengthening a dominant position was deemed as a prerequisite to evaluating whether a concentration gave rise to competitive concerns. As of June 2020, Turkey applies the SIEC test for assessing concentrations. Article 7 of the Turkish Competition Law prohibits those merger or acquisition transactions that can result in significant impediment to competition in a relevant market.

Article 7 of the Turkish Competition Law

<i>Former Version—Dominance Test</i>	<i>New Version—SIEC Test</i>
Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking—except by way of inheritance—of its assets or all or a part of its	It is illegal and prohibited for one or more undertakings to merge, or for an undertaking for a person to acquire—except by inheritance—assets, or all or part of the

partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant impediment of effective competition within a market for goods or services in the entirety or a proportion of the country, particularly in the form of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.	partnership shares, or instruments conferring executive rights over another undertaking, where these would result in a significant impediment of effective competition within a market for goods or services in the entirety or a proportion of the country, particularly in the form of creating or strengthening a dominant position.
--	---

With the help of the SIEC test the TCA is now able to track down the transactions that are missed by the dominance test.^[2] As stated in the [Preamble](#) of the amending legislation:

“ In addition to the transactions resulting in the creation of a dominant position or the strengthening of the existing dominant position, transactions that have the ability to significantly impede the effective competition may also be prohibited.”

There are already a few examples demonstrating the TCA’s practical application of the SIEC test, for example, the case *EssilorLuxottica/Grandvision*^[3]. The point that draws attention here is that EssilorLuxottica’s dominance (or its absence) was not seen as a prerequisite for granting clearance but was considered as a part of the economic analysis. There was a horizontal overlap in terms of retail sale activities of sunglasses, and a vertical overlap in terms of other activities.^[4] The TCA assessed the dominant position within a range of different elements such as market shares, market entry conditions and buyer power. Accordingly, it was concluded that EssilorLuxottica was dominant in certain markets, plus there were some horizontal and vertical overlaps.

The TCA stated that concentrations can significantly impede competition in two ways, including by: (i) creating or strengthening a dominant position as a result of the transaction and (ii) cooperating with undertakings with which there was no coordination prior to the transaction. To eliminate these competition concerns, EssilorLuxottica made commitments about input and customer foreclosures, as well as the exchange of sensitive information, leading to a conditional clearance.

The remarkable point in the decision in terms of the SIEC test is the parties’ submission of commitments regarding vertical markets, even though the dominant position was not determined. While the dominant position test was insufficient to go beyond the dominance evaluation, together with the economic evaluations made within the scope of the SIEC test, competitive concerns that could be observed even in the absence of a determination of a dominant position were put forward and the transaction was cleared conditionally.

Migros/Carrefour^[5] can be cited as another example of the TCA’s new practice. The TCA evaluated the transaction regarding the acquisition of the tenancy right of 34 stores of Carrefour by Migros. The TCA took into consideration the 40% market share as the critical threshold in its assessment in terms of market shares. However, the TCA’s assessment was not limited to market shares and dominant position analysis. In this direction, it was stated that new entries to the market were

possible and that there was no obstacle for competitors to increase their capacity. In addition to these, the TCA also examined whether there was a possibility of market foreclosure through input foreclosure and customer foreclosure. It was concluded that there would be no market foreclosure. Based on these considerations, the TCA concluded that there would be no significant impediment to effective competition and cleared the transaction. We can follow here how the TCA conducted the concentration review in light of the new legislation: although it was determined that a dominant position would not be created as a result of the transaction, the examination was not limited to this.

The *Marport*^[6] case is also among the very first examples in which the SIEC test was applied by the TCA within the scope of the amendment made in Article 7 of the Turkish Competition Law. It is also the first case that was blocked by the TCA due to the application of the SIEC test. The decision emphasized that the SIEC test may prohibit the transactions that significantly impede competition, within the evaluation of theories of harm, in addition to the transactions that result in the creation of a dominant position or the strengthening of the current dominant position. It was further stated that the main difference between the SIEC test from the dominance test may be seen in terms of the transactions that do not create a dominant position or strengthen an existing dominant position but in which the undertakings can increase the price unilaterally after the transaction. Although the opinion of the reporters within the scope of the examinations was that the transaction should be cleared, the TCA concluded that the transaction subject to the notification would result in a significant impediment to effective competition within the scope of Article 7 of the Turkish Competition Law and thus the transaction was not cleared.

Thresholds

The notification procedure and time frame of merger control in Turkey are broadly aligned with the ones in the EU. The Turkish Competition Law requires prior notification to the TCA of transactions, which involve a change of control on a lasting basis if the following financial thresholds (applicable as of 4 May 2022) stated in Article 7 of Communiqué 2010/4 are met:

- the aggregate turnover of the transaction parties in Turkey exceeds TRY 750 million (approx. EUR 42.13 million),^[7] and the turnover of at least two of the transaction parties each in Turkey exceeds TRY 250 million (approx. EUR 14.04 million); or
- either the turnover in Turkey of: (i) the acquired assets or businesses in acquisitions, or of (ii) any of the transaction parties in mergers exceeds TRY 250 million, and the worldwide turnover of at least one of the other transaction parties to the transaction exceeds TRY 3 billion (approx. EUR 168.5 million).

As an equivalent of the value of transaction test in some jurisdictions, in 2022 Turkey introduced a special threshold for the concentrations involving technology undertakings. In other words, there are special thresholds for the mergers that involve “technology undertakings,” i.e. “*undertakings that have activities in the areas of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agriculture chemicals and health technologies, or assets related thereto*” (Article 4(1)(e) of the Merger Communiqué).

According to Article 7(2) of the Merger Communiqué, the TRY 250 million thresholds prescribed in Article 7(1) shall not apply to concentrations having as target technology undertakings, which either operate or conduct research and development activities in the Turkish market, or alternatively provide services to Turkish users. This aims at catching a greater number of transactions in the digital/high-tech markets with a view to preventing killer acquisitions.

It should be stressed that the notification requirement is also applicable to foreign-to-foreign transactions to the extent that the mentioned thresholds are met.

Concluding remarks

The important aspects of Turkish merger control discussed above, and the developments related to them allow a sounder and fairer control over domestic transactions, on the one hand, and constitute a significant step in the sense of international adaptation, on the other hand, where it allows global mergers to be evaluated with the same criteria applied in the EU. Additionally, concentrations involving technology undertakings are placed under a special focus/threshold in Turkey as of May 2022 with a view to catching all concentrations in the digital/high-tech markets and preventing killer acquisitions. While it is different from the “*value of transaction test*” adopted by its peers in the EU, Germany, and Austria, it may be viewed as a unique Turkish equivalent of the “*value of transaction test*,” or at least it is expected to bring about the same results from its application. It seems that there will be more merger caseload and increased scrutiny in the technology markets in the upcoming years. This is yet to be seen how the “*technology undertaking*” exception will be applied in practice. But it is clear already that for practical reasons it would be nice to have a piece of guidance clarifying the terms and principles (such as the description of financial technology services, the definition of the technology company, and what constitutes “*operates or carries out R&D activities in Turkey*”).

[1] This was desirable both to achieve harmonization with the EU and because the revised EU formulation provided a more flexible and refined standard for identifying anticompetitive transactions. // Turkey—Peer Review of Competition Law and Policy, OECD 2005, p. 69.

[2] Sesli, E. & Canbeyli, A. Shift of Paradigm in the Merger Control Regime: How Will Turkey Implement the Significant Impediment to Effective Competition (SIEC) Test?, 2021 // Available at <https://www.mondaq.com/turkey/antitrust-eu-competition-/1073862/shift-of-paradigm-in-the-merger-control-regime-how-will-turkey-implement-the-significant-impediment-to-effective-competition-siec-test-> (accessed November 2, 2021).

[3] The case is related to the acquisition of GrandVision N.V.'s ("Grandvision") sole control by EssilorLuxottica S.A. ("EssilorLuxottica"), see [TCA Decision No 21-30/395-199 dated 10.6.2021](#).

[4] EssilorLuxottica, through its various subsidiaries, operates in the wholesale of sunglasses and optical frames; production and wholesale of ophthalmic lenses; production and distribution of ophthalmic machinery, equipment, and consumables; sales of spare parts and after-sales maintenance and repair services; and wholesale and retail sale of sunglasses. Grandvision operates in Turkey in the retail sale of sunglasses, prescription glasses (ophthalmic lenses and optical frames) and contact lenses via its subsidiary Atasun Optik Perakende Ticaret A.Ş. ("Atasun"). Relevant product markets were determined as "wholesale of stock lenses," "wholesale of semi-processed lenses (RX lenses)," "wholesale of branded sunglasses," "wholesale of branded and prescription optical eyeglass frames" and "production and distribution of ophthalmic machinery, equipment and consumables" markets.

[5] TCA's Decision No 21-25/307-140 and dated 4.5.2021.

[6] [TCA's Decision No 20-37/523-231 dated 13.8.2020](#). The concentration related to the acquisition of the sole control of Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (“Marport”) by Terminal Investment Limited Sarl (“TIL”).

[7] With an exchange rate of EUR 1= TRY 17.8, in accordance with the applicable [European Central Bank](#) rate as of 26 September 2022.