The Concept of Misleading Information and the Administrative Fines Under the Turkish Merger Control Regime

Kluwer Competition Law Blog
October 25, 2019

Bora Ikiler, Armanc Canbeyli (BASEAK)

Please refer to this post as: Bora Ikiler, Armanc Canbeyli, 'The Concept of Misleading Information and the Administrative Fines Under the Turkish Merger Control Regime', Kluwer Competition Law Blog, October 25 2019,
http://competitionlawblog.kluwercompetitionlaw.com/2019/10/25/the-concept-of-misleading-information-and-the-administrative-fines-under-the-turkish-merger-control-regime/

Mergers and acquisitions are effective tools for boosting innovation and commercial advancement. With the rising globalism in the circulation of goods and services, undertakings are forced to seek mutually beneficial collaborations to refrain from being outmaneuvered by the creative destruction that defines the way of doing business in the modern day. Vertical integrations that may cut down the costs or horizontal partnerships that may rise an efficient scale economy or enhance R&D are among the positive outcomes of M&A transactions. At the flip side of this coin, M&A transactions may also hinder competition by establishing or strengthening an abusive concentration over the post-transaction markets. Therefore, the assessment of such transactions proves to be a knife-edge task for the competition authorities, as they aim to ensure a competitive free market order and refrain from hindering (commercial or technological) innovation at the same time.
Accordingly, the duty to assess the pros and cons in an objective manner and render a judgement call that is both accurate and well funded with adequate input from the market stakeholders falls upon the competition watchdog of that jurisdiction. However, as the transaction under scrutiny is yet to be consummated, a considerable chunk of competition authorities' assessment will rely on projecting the post-transaction competitive order. When we put such duty in execution, it becomes apparent that the first and foremost need of a competition authority is to have an uninterrupted and efficient flow of information. Not only such information shall grant an accurate insight to the authority on the merits and the parties' of the transaction but also it must be adequate to project the transaction's effects and render its opinion.

In pursuit of the required information, the transaction parties – as the executors and ultimate beneficiaries of the transaction – emerge as an obvious and natural source of information. However, the same reason that makes the parties a primary source of information also makes their input more questionable. Accordingly, the parties have more motivation for seeking to manipulate the facts of the transaction and bend the competitive assessment in their favor. Therefore, a natural sense of check and balance requires to have at least one other source of information to verify the parties' input. The stakeholders of the relevant market emerge as the other primary source of information. Considering that competitors, customers, suppliers or distributors of the parties -all of whom have practical insights on the relevant market- are to be affected by the outcome of the transaction, their input may also be valuable for the competitive assessment under way. Accordingly, the competition authorities are generally equipped with far-reaching powers to collect information. As one can only bite as hard as his/her teeth, the competition authorities also need punitive powers to complement their information collecting abilities and dissuade undertakings from providing inaccurate or manipulated information on the transaction structure, market powers or any other topic that may be of importance during the competitive assessment.

Against this backdrop, recent case law developments indicate that there is an inclining enforcement trend against misleading information in the EU. Considering that the Turkish competition law is closely modeled on its European counterpart, we may also expect to see a similar inclination in our jurisdiction as well. To that end, this article evaluates the jurisprudential enforcement of misleading information fines with a comparative approach between Turkish and European merger control rules. In doing so, we also open a separate window for the European Commission's ("**EC**") landmark fine to General Electric ("**GE**"), which brought the topic back under discussion. In an effort to localize the aftermath of the EC's said decision, we also cross-reference the insights therein with Turkish merger control regime and evaluate the decisional practice of the Turkish Competition Authority ("**TCA**") at this front.

Misleading information fines under Turkish merger control regime

Under Turkish competition law regime, providing inaccurate and/or misleading information during a merger control filing calls for a fixed rate administrative fine in the amount of 0,1% of the relevant undertakings annual turnover. Accordingly, the Law on Protection of Competition No. 4054 ("**Competition Law**") adopts a considerably softer punishment for such actions than its European counterpart where the provision of misleading information is punishable by a rate of 1% of the annual turnover.

Akin to the European competition regulations, fining decisions pertaining to provision of misleading and/or inaccurate information do not hold a frequent position within the Turkish enforcement track-record. However, presumably due to the considerable difference between the gravity of the corresponding fine, the TCA seems to have produced more fining decisions at this front than the European regulators. That said, fining decisions due to misleading information may appear within the context of antitrust investigations as much as merger control filings under the Turkish practice.

When we assess the TCA's relevant jurisprudence, we see that hermeneutical information is not always considered as an infringing action. In ***Arcelik-TP Vision* decision[1]**, where Arçelik applied for the purchase of certain devices from TP Vision, the TCA stated that although the exclusivity clause in the submitted agreement was misinterpreted by the parties, the correct version of the relevant clause (along with the entire agreement) was openly submitted to them and therefore found no grounds for rendering a fining decision.

***Jacobs's* decision[2]** also delved into a similar situation where the TCA cleared a merger control application regarding the transfer of 30% shares by a Jacobs Turkey affiliate to Kasap Family. In this decision, a member of the Competition Board issued a concurring opinion where he provided that in the filing; the parties stated that the 30% shares to be transferred would not provide control to the Kasap family over the target. However, the relevant Board member reasoned that such shareholding, in fact, would confer control to the Kasap family and therefore advocated for the necessity of an administrative monetary fine due to misleading information.

Although we cannot follow the background of the relevant agreement, where the TCA and the parties had different understandings on the joint control clauses from the public version of the reasoned decision, we can still infer that the TCA adopted a rather understanding approach despite the strong objection in the concurring opinion. Accordingly, the TCA did not consider that the parties' interpretation (or misinterpretation for the case at hand) of the joint control issue constitutes misleading information practice and eventually cleared the transaction without imposing any fines.

However, the Turkish scrutiny over misleading information has not been always this tolerant and there have been certain decisions where the TCA adopted a rather formalistic stance against such instances. Accordingly, in ***Dow Chemicals decision[3]***, where the transfer of dust coating business to Akzo Nobel was cleared along with a fine due to misleading explanations on the parties' activities, the TCA set forth that providing false or misleading information shall be punishable, regardless of whether the relevant undertaking was acting on purpose or by mistake. The TCA further details this firm approach by explaining that the Competition Law requires such practices **to be fined on an occurrence basis**. Accordingly, the TCA reasons that their fining decision is not to be affected by the parties' intention in or the effects of the misleading information on the clearance process. It is also provided that the misleading information practice shall be assessed regardless of the market definition.

Similarly, the ***Omya decision[4]*** of the Council of State also demonstrate that provision of false or misleading information may be fined regardless of the moral or practical rationale for such action.

On a similar yet broader approach, the TCA assessed the importance of misleading information on the competitive assessment of the proposed transaction in its ***Black Stone decision[5]***. Accordingly, the TCA explained that the information in question was pertaining to the control structure and the determination of the overlapping markets, which are important for their review of the transaction. Although this link was assessed and established, the TCA provided that the relevance of the misleading information with the competitive assessment of the transaction is not a determining factor in imposing a fine on this ground.

Another important aspect of this decision is the methods the TCA used in determining the misleading information. The relevant fine in Blackstone decision was triggered within a merger control application, where the provided information raised a suspicion on the TCA. Acting on this suspicion, the TCA went back to four of its previous decisions concerning the parties to crosscheck the accuracy of the provided information. As the duty to verify the parties' input falls onto the TCA, we see that they are equipped to use their internal sources and information processed in its previous case law as much as other methods in pursuit of the misleading information fines.

Lastly, in its **Efes-Mey İçki decision[6]**, where the acquisition of the Tekel beer was cleared, the TCA undertook a detailed misleading information assessment. In the said merger control application, the parties provided contradicting explanations on the filing process. Accordingly, although the filing submitted by Efes stated that the document represents the joint intention of both parties; Mey İçki objected to this and explained to the TCA that the filing was made without their consent. Due to this contradiction, the TCA assessed whether there are grounds for a misleading information fine and reasoned that the nature of the contradiction does not qualify as false or misleading information. The reference point of the TCA in such determination was the Council of State's Omya decision, where it defines the misleading information as information that is not true, real or trustworthy. Consequently, the TCA cleared the transaction without any fines for misleading information.

As explained above, merger control is not the only ground for misleading information fines. Accordingly, such fines may also appear over the course of the TCA's antitrust investigations. In an effort to provide a complete set of jurisprudential insights, we delved into some of the significant precedents of the TCA on the provision of misleading information within the investigation context.

By this token, one of the most recent fines imposed by the TCA due to misleading information is seen in its ***Poultry decision[7],*** where it probed a number of white meat producers due to exchange of commercially sensitive information. In its defences, one of the investigated parties provided that most of their sales were conducted abroad. However, the TCA determined that the relevant undertaking's sales were mostly domestic and imposed a corresponding monetary fine.

Another example of misleading information fines that are imposed within antitrust investigations in Turkey is the ***Adıyaman Chamber of Commerce and Industry (ATSO) decision[8]***. In this precedent, the TCA fines ATSO for providing misleading information regarding a meeting, regardless of the "**by mistake defence**" of ATSO.

As explained above, the TCA not only fines the provision of misleading information but also the failure to respond to their information request provide the requested information. Accordingly, in its ***Rize Ses decision[9]***, the TCA has sent out information requests to 15 market players, which were not a party to the investigation, to understand the dynamics of the investigated market. However, one of these players failed to response and provide the requested information, for which the TCA imposed a fine. Considering that the fined undertaking was not under investigation, the relevant decision demonstrates the TCA may fine such practices regardless of any additional factor.

Misleading information under EU merger control regime and the GE decision

After focusing on the legislative and jurisprudential aspects of the Turkish practice, it will be beneficial to cross-reference this insight with the corresponding EU rules and the recent GE decision. Accordingly, the European competition law regime punishes the provision of misleading information by 1% of the relevant

undertaking's annual turnover. However, the EC rarely uses this tool and the number of fining decisions are extremely low within the decisional practice of the EC.

In fact, the fining decision against GE, which comes after the fine imposed during the Facebook-Whatsapp transaction, is the second of its kind in the entire enforcement history of the regulation introduced in 2004.

Therefore, we think it is prudent to put the circumstances surrounding the fined transaction under the magnifying glass. In this regard, at the beginning of 2017, GE applied to the EC to clear the acquisition of LM Wind .At the initial stage of the application,, the production capacity of its overseas wind turbines was limited with only a 6 MW power plant. The undertaking also provided that there is no such a current or contemplated production, which may actualize such capacity. However, after receiving the input of the other market players and stake holders in the renewable business line, the EC concluded that GE, in fact, had the already possessed the capacity 12 MW production.

Labeling this misinformation as critical to the competitive assessment of the proposed transaction, the EC has cleared the transaction on its actual merits on one hand and imposed a EUR 52 million monetary fine for providing misleading information on the other. In the aftermath of this decision, the competition law scholars familiar with the European enforcement predominantly opined that this might be a sign to indicate that the EC will start taking a stricter stance against misleading information in merger control reviews.

In accordance with such reviews, Commissioner Vestager's following statement on the issue also stands as a testament that we may indeed experience a sharper enforcement era with respect to the misleading information assessment under the merger control regime; "*Our merger assessment and decision-making can only be as good as the information that we obtain to support it. ... The fine imposed today on General Electric is proof that the Commission takes breaches of the obligation for companies to provide us with correct information very seriously*."

Conclusion

In light of the foregoing, we see that the European practice seems to adopt an inclining enforcement trend against the provision of misleading information. However, one fair aspect of this inclination may be the fact the EC's assessment attributes a high importance to the criticalness of the information under scrutiny. In other words, while the EC shows a rigid stance against misleading information pertaining to issues critical for the competitive assessment, it seems to leave more room for honest mistakes that do not have a subsequent impact on the essentials of the proposed transaction.

When we cross-reference the insights provided in the GE decision with the Turkish practice, we see that the TCA has followed a rather formalistic approach and fined misleading information on an occurrence basis without needing further assessments on the parties' morals or the information's importance. That said, recent jurisprudential examples indicate that the TCA may have more tolerance for misinterpretation of the relevant information as displayed in Arçelik-TP Vision and Jacob's decisions above.

Considering that antitrust investigations and/or merger control applications require a multi-dimensional input from the parties that covers both the legal and economic aspects of the issue with an intention to clarify the merits in an objective yet pro-business manner; this fine-line task may entail a natural level of room for human error and honest mistakes. Accordingly, the competition law enforcement should also have a corresponding level of flexibility for such instances and assess the moral and practical aspects of the relevant instance in an objective manner.

At any rate, as an EU-based jurisdiction, Turkey is ever sensitive to the enforcement trends of its European counterparts and the recent inclination of the EC may drive the TCA to keep an active eye on the false or misleading information practices. Although the TCA demonstrates a combined jurisprudence that contains both formalistic and tolerant approaches on different situations, it is always prudent to approach all TCA communications with an associated level of caution and try to ensure the accuracy of all transmissions regardless of the context.

---

[1] Turkish Competition Board's decision dated 03.05.2016 and numbered 16-15/243-105.

[2] Turkish Competition Board's decision dated 17.10.2018 and numbered 18-39/632-307.

[3] Turkish Competition Board's decision dated 18.03.2010 and numbered 10-24/339-123.

[4] Council of State's decision dated 13.12.2012 and numbered 2009/869 E., 2012/3794 K. and Turkish Competition Board's decision dated 18.09.2008 and numbered 08-54/847-338.

[5] Turkish Competition Board's decision dated 08.02.2018 and numbered 18-04/64-37.

[6] Turkish Competition Board's decision dated 07.02.2019 and numbered 19-06/54-20.

[7] Turkish Competition Board's decision dated 13.03.2019 and numbered 19-12/155-70.

[8] Turkish Competition Board's decision dated 03.07.2017 and numbered 17-20/310-136.

[9] Turkish Competition Board's decision dated 28.02.2017 and numbered 17-09/107-49.