

Competition Board grants conditional approval to Migros acquisition following Phase II review

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Introduction

The Competition Board recently published its reasoned decision regarding the acquisition of sole control of Migros Ticaret AŞ by Anadolu Endüstri Holding AŞ (AEH), the holding company of the Anadolu Group.⁽¹⁾ The Anadolu Group jointly controls various important food and beverage companies (eg, Coca-Cola İçecek AŞ and Anadolu Efes Biracılık ve Malt Sanayii AŞ), while Migros is an important supermarket chain in the Turkish organised fast-moving consumer goods retail sector. Following an in-depth Phase II review of the transaction due to competition concerns, the board granted conditional approval for the transaction based on the commitments that AEH submitted.

Competition law concerns

The Competition Board noted that the horizontal overlap between the parties due to Anadolu Group's Ekomini retail stores did not pose any competition concerns. Instead, it focused on the vertical dimension of the concentration. The board focused on the potential for:

- input foreclosure;
- customer foreclosure; and
- coordinated effects that might arise as a result of vertical integration.

Ultimately, the board's major concern related to the beer market, due to its conclusion that Anadolu Efes – a joint venture between the Anadolu Group and SabMiller OLC – has been in a dominant position in the Turkish beer market for some time.

Input foreclosure

The board concluded that the transaction would not result in input foreclosure, as AEH had no incentive to reduce its supplies to competing retailers. The board reasoned that pursuing an input foreclosure strategy with respect to beer products, or any other relevant upstream markets, would result in a significant sacrifice of sales for AEH and would therefore make no economic sense.

Customer foreclosure

The board reasoned that vertical integration could lead to customer foreclosure in the beer market and strengthen Anadolu Efes's dominant position by excluding Tuborg – its only significant competitor in the Turkish beer market – without suffering any loss of profit from Migros. In reaching this conclusion, the board emphasised the fact that Migros is the largest retailer in the beer market, as well as the largest customer of Anadolu Efes and Tuborg among organised retailers making direct sales to consumers. The board also supported its concerns with an opinion from the Competition Authority's economic analysis unit. The board reasoned that the existence of the Migros club card system would allow AEH to access additional customer information and put it in a more advantageous position. Based on the above points, the board concluded that the vertical integration

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could potentially strengthen AEH's dominant position in the upstream beer market.

Coordinated effects

Regarding coordinated effects, the board noted that the transaction could lead to increased risk for coordination in three ways:

- Migros could share commercial information regarding Anadolu Group's competitors in the upstream markets with Anadolu Group companies;
- Anadolu Group companies could provide Migros with commercial information regarding its competitors in the retail sector; and
- Commercial information regarding Anadolu Group's competitors in the upstream markets could be shared with Migros's competitors in the retail sector.

As a result, the board emphasised the need to establish a mechanism to prevent the sharing of commercially sensitive information to mitigate the risk of coordination and increase transparency in the market. However, it refrained from issuing an unconditional clearance for the transaction and took it into Phase II review in the first quarter of 2015.

Proposed remedies

Pursuant to the Competition Authority's Guidelines on Remedies Acceptable to the Turkish Competition Authority in Mergers and Acquisitions, the parties to a merger or acquisition that results in competition concerns can submit proposals for potential structural or behavioural remedies, in an effort to eliminate the competition law concerns arising from the concentration. Structural remedies concern divestitures, whereas behavioural remedies regulate the future market behaviour of the parties.

To mitigate the board's concerns, AEH submitted a set of behavioural commitments. It committed that for a period of three years after the consummation of the transaction:

- Migros will maintain its existing commercial relations with Anadolu Efes's competitors and engage in commercial relations with new entrants in the beer market based on objective commercial criteria;
- Migros will not hinder the sale of products competing with Anadolu Efes and will not diminish the shelf and display space available to them, except where based on objective reasons; and
- AEH will not interfere with the commercial relations between Migros and its competitors.

AEH also committed to establish a supervision and reporting system regarding the commitments through the use of an independent third-party monitoring company.

Further, to address the competition law concerns arising from the coordination risks, AEH also offered the commitment that:

- the operational management, staff and organisational structure of Migros and other Anadolu Group companies will be kept separate;
- AEH and Migros will not share commercially sensitive information regarding their competitors; and
- regarding the beer market, Migros will share only customer relationship management information regarding Anadolu Efes with AEH and will refrain from sharing any commercially sensitive information regarding Anadolu Efes's competitors in the beer market or consumers who prefer competing products.

Comment

The Competition Board concluded that the commitment package was adequate to eliminate the competition law concerns outlined above and granted the transaction conditional approval.

This decision is one of the few cases where a transaction has been taken to Phase II review and subsequently only obtained conditional approval due to vertical concerns.

In parallel with the underlying concerns, the decision contains detailed guidance on competitive concerns that could occur as a result of vertical integration, assessing not only the unilateral effects – such as input and customer foreclosure – but also coordinated effects which could arise as a result of potential information exchanges and increased transparency. The board's analysis of the importance of factors such as AEH's customer relationship management data on consumer preferences is particularly important for the assessment of vertical integrations involving suppliers and retailers.

The board once again found behavioural remedies acceptable for eliminating competitive concerns, in line with recent decisions such as *Bekaert v Pirelli*.⁽²⁾ This is noteworthy, since the Competition Authority's guidelines state that structural remedies are generally preferable for addressing competition law concerns arising as a result of concentrations, as they produce results in the short term and require no further monitoring. Behavioural remedies (eg, facilitating access to essential infrastructure or raw materials or establishing firewall mechanisms) can also be deemed sufficient, but only where they are judged to be at least as effective as divestitures.⁽³⁾

While noting the above stance in the guidelines, the *Migros* decision also referred to the US Department of Justice's Policy Guide to Merger Remedies, noting its position that behavioural remedies can be effective for addressing competition law concerns raised by vertical concentrations, thereby signalling its willingness to be more accepting of behavioural remedies in vertical cases.

Finally, the commitments proposed by AEH regarding information sharing provide further guidance regarding potential remedies for addressing coordination concerns.

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Endnotes

(1) July 9 2015, 15-29/420-117.

(2) January 22 2015, 15-04/52-25.

(3) See paragraph 19,73 of the Guidelines on Remedies Acceptable to the Turkish Competition Authority in Mergers and Acquisitions.

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