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Turkish Competition Board Decision Gives Insight Into its Opinion About Collective Dominance

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The Turkish Competition Board **("Board"**) has recently become increasingly aggressive with merger control enforcement. The number of Phase II investigations is increasing, along with subsequent clearances conditioned on fulfillment of certain remedies. The Board recently published the reasoned decision for a Phase II investigation, providing a glimpse into the Board's perspective on collective dominance.

In the Öz Maya/Dosu Maya decision (15 December 2014, 14-52/903-411), the Board concluded via a majority of votes (at a second meeting on the topic) that the structural and behavioral remedies offered by the buyer were acceptable. The buyer's proposed remedies were deemed to satisfactorily eliminate concerns that a collective dominance scenario might arise.

The buyer (Öz Maya) is the Turkish subsidiary of a global bread yeast manufacturer (Lesaffre), while the target (Dosu Maya) is a local player in the bread yeast market. The bread yeast market can be split into two segments: dry bread yeast and fresh bread yeast. Competitive concerns arise only in the fresh bread yeast market, so the Board's analysis only focuses on this market segment.

In Turkey, the fresh bread yeast market is characterized by its oligopolistic nature. A limited number of suppliers supply a homogenous product to a large number of uniform customers. There is low brand loyalty and there are no significant barriers to entering the market. There are only four market players in Turkey, reducing to three post-transaction. The transaction would cause the merged undertaking to become the market leader, with only one significant competitor (the current market leader).

The Board determined that the merged entity would not be in a position to determine the market's commercial parameters independently from its competitors. Therefore, the Board held that the merged entity would not be in a dominant position post-transaction. However, two undertakings would control the majority of the market post transaction. Therefore, the Board noted that the transaction raises collective dominance concerns.

Accordingly, the Board held that the proposed transaction could not be granted unconditional clearance. In reaching this decision, the Board considered the following factors:

- Low entry barriers due to idle capacity.
- The importance of producer-supplier relationship in the market.
- The market's static nature.
- The product's shelf-life and homogeneous nature.
- Insufficient buyer power.
- Low price elasticity of the demand.
- Post-transaction coordination risks.

Upon receiving the Boar's conclusion, the parties offered a remedy package. The Board granted transaction clearance, conditioned upon certain remedies being fulfilled. The decision was controversial, with three out of six Board members dissenting at the first Board meeting. The Board's decision-making mechanism requires a second meeting to be held if the first meeting results in a deadlock. At the second meeting, the Board's president receives a deciding vote, which was cast in favor of accepting the remedy package.

The agreed remedy package has structural as well as behavioral elements:

Structural remedies

The decision suggests that Lesaffre's distributor (2000 G?da) is one of the biggest distributors in the market and the only distributor which is controlled by its supplier.

The Board emphasized the market's low brand loyalty due to the product's homogenous nature. The Board held that these factors increase the significance of distributors and their individual relations with customers. Accordingly, the ability for distributors with good customer relations to influence customer decisions about suppliers is an important market feature.

The Board went on to decide that vertical integration provides Öz Maya with easy reach to customers through 2000 G?da, as well as the ability to influence downstream prices and increase price transparency. Öz Maya's easy access to market prices, market information and competitor price information expose it to coordination risks.

Accordingly, the Board held that divestiture of 2000 G?da would bring a competitive market structure. The remedy includes the merged entity entering a distributorship agreement with 2000 G?da after Öz Maya's divestiture.

Behavioral remedies

The agreed remedy package contains behavioral elements such as:

- Maintaining the price difference of Öz Maya and Dosu Maya products.
- Continuing existing Dosu Maya contracts, unless just termination cause exists.
- Distributing, through Öz Maya distributors, Dosu Maya products in cities where there is no Dosu Maya distributor.
- Annually reporting the price levels of Dosu Maya products and their difference with Öz Maya products to the Authority.
- Removing territorial exclusivity and non-compete clauses which restrict the ability of Öz Maya's distributors to compete.
- Organizing regular competition law compliance trainings.
- Limiting Dosu Maya's and Öz Maya's prices with four different price caps.
- Not acquiring plants which import fresh bread yeast to Turkey.

The remedy package is likely to raise some eyebrows since the decision was made via a casting vote from the Board's president. Three dissenting Board members raised their concerns on whether the proposed package actually addresses the competitive concerns. Indeed, most of the remedies noted above seem to fail to address potential coordination issues, market transparency and collusion risks. In this regard, it remains to be seen whether the remedy package is a cure for collective dominance concerns.

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