Concentrations in FMCG Industry Under Close Scrutiny: Turkish Competition Board Unconditionally Clears an Acquisition by Migros Following an In-Depth Phase II Review

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(1) Introduction

The Turkish Competition Board ("***Board***") published its reasoned decision concerning the acquisition of sole control over four stores of Elbin Gıda İnşaat Tekstil Hayvancılık Sanayi ve Ticaret Limited Şirketi ("***Erfa***") in Bilecik by Migros Ticaret A.Ş. ("***Migros***").[1] Following a Phase II review initiated on April 6, 2023 regarding the transaction, the Board ultimately found that the transaction would not significantly impede effective competition and thus unconditionally approved the transaction. This is the second time the Board unconditionally cleared an acquisition by Migros as a result of Phase II review in the last three years.[2]

The decision is a recent example of the increasing focus of the Turkish Competition Authority ("***Authority***") on the concentrations in the fast-moving consumer goods ("***FMCG***") industry, with a dozen of predating merger decisions, most of which involved Migros as the acquirer.[3] The Authority's focus on FMCG industry is already evident from the Preliminary Report on Sector Inquiry Regarding FMCG Retail ("***Preliminary Report***")[4] that was published on February 5, 2021, followed by Final Report on Sector Inquiry Regarding FMCG Retail ("***Final Report***")[5] published on March 30, 2023. Recent full-fledged investigations which resulted in

[1] The Board's Migros/Elbin decision dated 14.09.2023 and numbered 23-43/820-291.
[2] The Board also granted unconditional approval to Migros' acquisition of 25 stores of Ay-mar Ticaret Ltd. Şti. in Phase II review with its decision dated 23.06.2022 and numbered 22-28/449-181.
[3] E.g. the Board's Migros/Yunus Market decision dated 23.03.2023 and numbered 23-15/272-92; Migros/B Online decision dated 23.03.2023 and numbered 23-15/273-93; Migros/Meteor decision dated 12.10.2023 and numbered 23-48/904-322; Migros/Ay-mar decision dated 23.06.2022 and 22-28/449-181; Migros/Üçler decision dated 07.07.2022 and numbered; 22-32/507-204; Migros/Carrefoursa decision dated 04.05.2021 and numbered 21-25/307-140; Migros/Adese decision dated 01.07.2021 and numbered 21-33/430-215; Migros/Dörtler decision dated 16.01.2020 and numbered 20-04/38-20; Altun/Şafak decision dated 22.10.2020 and numbered 20-47/649-283.
[4] For the Preliminary Report, please see; https://www.rekabet.gov.tr/Dosya/sektor-raporlari/htmperakendeciligisektorincelemesionraporu-20210705115428725-pdf.
[5] For the Final Report, please see; https://www.rekabet.gov.tr/Dosya/htm-sektor-nihai-raporu.pdf

hefty administrative monetary fines imposed on major FMCG retailers and suppliers also showcase the Board's highly active enforcement in FMCG industry.[6]

(2) The Relevant Product Markets and their Geographic Scope

The Board identified a horizontal overlap between Migros and the acquired stores in FMCG retail. Based on paragraph 248 of the Final Report and the Board's previous decisional practice, the Board indicated that FMCG retail can be segmented into organized (modern) and traditional channels, and evaluated that organized retail constitutes a separate product market from a consumer's perspective due to product portfolio and prices. As a result, the Board defined the horizontally affected market as the market for FMCG organized retail, which comprises national retail chains, discount stores and regional/local retailers.

In terms of the geographic scope of the FMCG organized retail market, by referring to the Final Report, the Board indicated that the determining factor in the geographic market definition is the customer attraction areas, in other words, how far consumers would be willing to travel for their shopping. The Board stated that the consumers may be willing to travel a certain distance for shopping purposes, and thus, it could be argued that the scope of the geographic market could be determined within this distance. The Board also emphasized that the cost incurred to cover this distance included not only monetary costs but also transaction and time costs.

Based on the findings in the Final Report, the Board acknowledged that retailers consider stores that are located within 5-10 minutes of driving distance or 5-10 minutes of walking distance to them as their competitors. The Board's decisional practice also points out the need to define the geographic scope of FMCG market as regional/local. Although the previous decisions of the Board included city-based or even district-based geographic market definitions, for the transaction at hand, the Board indicated in parallel to the findings in the Final Report that the increasing level of concentration in FMCG organized retail market in recent years and the changes in the market structure might necessitate narrower geographic market definitions. Accordingly, considering the concentration level in the market has increased recently and it is expected that the market will be more concentrated in the future, and also taking into account consumer behaviour, the fact that traffic conditions resulting from urbanization are leading consumers to shop from closest stores to them and that small scale stores that address to

[6] E.g. the Board's decision dated 28.10.2021 and numbered 21-53/747-360; the Board's decision dated 15.12.2022 and numbered 22-55/863-357.

narrower regions are becoming more popular, the Board noted that there are sufficient reasons to define a narrower geographic market compared to the Board's previous cases.

In this respect, the Board adopted an approach to define the geographic scope of the market as the borders of a region within which consumers can easily access sales points. Accordingly, in order to analyse the impact of the transaction in each geographic impact area, the Board examined the driving and walking distances of the four stores within the districts they are located. Based on this approach, the Board determined the geographic impact area for "Erfa 3" store as a geographic distance of "0-1,000 metres", and the geographic impact areas for "Erfa 1", "Erfa 2" and "Erfa Center" stores as a geographic distance of "0-3,000 metres". These geographic impact areas are defined as the relevant geographic markets for FMCG organized retail market.

Taking into account the activities of AG Anadolu Grubu Holding A.Ş. ("***Anadolu Group***"), which is the ultimate controller of Migros, and the products sold in the relevant Erfa stores to be acquired, the Board identified that the transaction resulted in the following vertically affected markets which are upstream to the market for FMCG organized retail: (i) cola drink, (ii) flavored soda, (iii) plain soda, (iv) packaged water, (v) mineral water, (vi) fruit juice, (vii) iced tea, (viii) sports drink, (ix) energy drink, (x) stationery equipment, (xi) fresh vegetables and fruits, and (xii) wholesale retail. In terms of the geographic scope of these markets, considering that there are no regional differences with regard to market entry, access to sources of supply, production, distribution, marketing and sales conditions, the Board defined the relevant geographic market as Turkiye.

(3) The Board's Substantive Assessment in terms of the Horizontally Affected Market and the Unilateral Effects of the Transaction

In terms of the horizontal overlap in the market for FMCG organized retail, the Board assessed the market shares of the combined entity in each geographical area, as well as the market shares of the closest competitor of Migros, the difference between the market share of the combined entity and its closest competitor, and the market share increment of Migros due to the transaction. The Board assessed the market shares of the combined entity and its competitors both based on size of store sales space (in square meters) and sales value. In terms of market shares based on sales space, the combined entity's market shares in each four geographic impact area (i.e. Erfa Center, Erfa 1, Erfa 2 and Erfa 3) would remain below 30%. The Board also found that post-transaction, in terms of the number of stores in each geographic impact area, Migros would be the third largest competitor in Erfa Center, Erfa 1 and Erfa 3, whereas Migros would be the fourth largest competitor in Erfa 2. Post-transaction, each of BİM Birleşik Mağazalar AŞ ("***BİM***"), Şok Marketler Ticaret AŞ ("***Şok***") and Yeni Mağazacılık AŞ ("***A101***") will continue to have more stores than Migros in each geographic impact area.

In terms of each geographic impact area, based on sales space-based market shares, Migros would be third largest competitor after Şok and BİM in Erfa Center; Migros would be third largest competitor after Şok and A101 in Erfa 1 and Erfa 2; Migros would be third largest competitor together with Şok after BİM and A101 in Erfa 3. Although the combined entity's market shares based on sales space would remain well below 30% and there are larger competitors in each geographic area, the Board still conducted an in-depth analysis of the competitive impact of the transaction on the grounds that the transaction would result in a large undertaking that operates at national level (i.e. Migros) acquiring a local chain's market share, and Migros could be able to increase its market share post-transaction in FMCG organized retail market where economies of scale and scope matter. Having also reviewed the HHI indexes pre- and post-transaction in each geographic area based on sales space, the Board found that the transaction would not lead to competition concerns.

Despite this finding, the Board indicated that value-based market shares of the combined entity and its competitors might lead to more accurate understanding of potential competition concerns and conducted a substantive analysis by assessing the market shares based on sales value of the stores in each geographic impact area.

Accordingly, in terms of Erfa Center, the Board found that combined entity would become the third largest player following BİM and A101, the concentration resulting from Erfa's existing market share transferring to Migros in the market would remain relatively low. The Board also considered the national chain markets and discount stores operate in this geographical area, stating that with the entries of TK Tarım Kredi Pazarlama ve Marketçilik AŞ ("***Tarım Kredi***") and Hakmar Gıda Tur. Hay ve İnş. San. Ltd. Şti. ("***Hakmar***"), there has been a slight decrease in market shares of BİM and A101, while other entities have experienced a slight increase in their value-based market shares. Given these factors, the Board concluded that the transaction would not raise competitive concerns for Erfa Center store.

For Erfa 1 store, based on sales value, Migros would become the fourth largest player following A101, BİM, and Şok, and the concentration resulting from Erfa's existing market share transferring to Migros in the market would remain relatively low. Similar to the assessment for

Erfa Center, the Board acknowledged that national chain markets and discount stores are active in the area, and the market shares of A101 and BİM has decreased since the entry of Tarım Kredi and Hakmar, while other players slightly gained market share. As a result, the Board found that the transaction would not raise competitive concerns for Erfa 1 store.

For Erfa 2, based on sales value, Migros would become the third largest competitor after A101 and BİM, while for Erfa 3, Migros would be the fourth largest competitor after BİM, A101 AND Şok. The Board also determined that the entry of Tarım Kredi and Hakmar into Erfa 2 resulted in a decrease in BİM's market share, while other undertakings including A101 increased their market shares. In addition, since the entry of Erfa, Migros and Seç Marketçilik AŞ ("***Seç***") into Erfa 3 area, the market shares of all discount markets, in particular BİM, have decreased. As such, the Board concluded that the transaction would not raise competitive concerns for Erfa 2 and Erfa 3 stores either.

The Board also reviewed the HHI indexes pre- and post-transaction in each geographic area based on sales value and found that post-merger HHI will be above 2000 in each area and delta will be slightly above 150 in Erfa Center, Erfa 1 and Erfa 2, while it would be below 150 in Erfa 3. That being said, the Board evaluated that the increase in HHI is essentially caused by the high market shares of discount stores in the market, and not by the market shares of the transaction parties. In this respect, the Board concluded that the change in HHI in these geographic areas would not result in any competitive concerns given that there are stronger competitors in the market than Migros, there are new entrants to the market, market share to be acquired with the transfer of Erfa stores would be relatively low and the change in HHI only slightly exceeds the level indicated in the Guidelines on the Assessment of Horizontal Mergers and Acquisitions ("***Horizontal Guidelines***") of the Authority.

The Board also evaluated the growth in each geographic impact area and found that FMCG organized retail market has been growing in terms of store space in each area in the last three years. The Board also determined that this growth essentially stemmed from the combined entity's competitors (i.e. A101, BİM, Şok, Seç, Tarım Kredi and Hakmar), the market is not static, the incumbent players are able to grow by opening up new stores, and therefore there could be fluctuations and changes in the market shares of the players in the market if this growth trend continues.

Furthermore, the Board underlined that in the relevant geographic impact areas, there are national chain stores active such as BİM, A101 and Şok which benefit from economies of scale and scope, and as a result of the transaction, Erfa, which is a local chain store, will transfer its stores in these areas to Migros, which will be able to compete more effectively with national chain stores by benefitting from economies of scale and scope.

The Board also remarked that the emergence of alternative sales channels and their growth with the development of e-commerce transformed FMCG retail into a multi-channel structure; and the newly developing e-commerce may bring the undertakings active in FMCG market to face with competition as the pandemic conditions changed the consumer habits in the relevant market. The Board further acknowledged that consumer preferences and switching costs are the main determinants in the competitive landscape in FMCG retail market, and there are no costs incurred by consumer for switching retailers since consumers are able to shop from whichever retailer they prefer if they can find reasonable prices and quality.

Finally, the Board sought opinions of national and local chain stores operating in Bilecik, where the acquired stores were situated. In this context, A101, BİM, Şok, Balmar Dayanıklı Tüketim Gıda Tekstil Nakliyat San. ve Tic. Ltd. Şti. ("***Balmar***"), Carrefoursa Carrefour Sabancı Ticaret Merkezi AŞ ("***Carrefoursa***"), Hakmar, and Tarım Kredi were consulted, and they stated that due to the limited scope of the acquisition involving four stores, the transaction would have a small-scale impact and would not raise any competitive concerns in the region due to reasons such as concept and product differences. As a result, the Board found that there is sufficient competitive pressure on the combined entity in all geographical impact areas, where the combined entity will be either third or fourth largest player.

(4) The Board's Assessment of Potential Input and Customer Foreclosure Concerns in the Vertically Affected Markets

Regarding input foreclosure concerns in the vertically affected markets, given that Erfa's market share in terms of the Turkish market for FMCG retail and FMCG organized retail is negligible, the impact of the transaction on the market shares of Migros in Turkiye would be very limited, and Anadolu Group would want to supply products to other customers who constitute a significant portion of FMCG market in Turkiye. In this respect, the Board found that it would not be reasonable for Anadolu Group to engage in input foreclosure and Anadolu Group would not have any incentive to engage in such practices.

The Board indicated that Anadolu Group's market share in terms of packaged water, plain soda, mineral water, energy drink, iced tea and fruit juice is limited, and an input foreclosure strategy would not be feasible for Anadolu Group since refraining from supplying to downstream customers other than Migros would result in significant loss of revenues. As for cola drink and flavored soda, where Anadolu Group's market share is relatively high compared to its other products, the Board acknowledged that it would be economically viable for Anadolu Group to make its products available in Migros' competitors to reach its entire customer base. If Anadolu Group were to refuse to supply its products to Migros' competitors, Anadolu Group would not be able to compensate for its losses through sales in Migros stores. The Board also noted that if consumers could not find Anadolu Group's products in Migros' competitors' stores, they would switch to products of Anadolu Group's competitors, which would harm Anadolu Group's sales. As such, the Board concluded that it would not be reasonable for Anadolu Group to engage in input foreclosure.

As for potential customer foreclosure concerns, the Board noted that Erfa stores to be acquired would only have a limited impact on Migros' market share. In addition, the suppliers that might be foreclosed from the acquired Erfa stores will have alternative organized retail stores to which they can direct their sales and in case of potential foreclosure, the suppliers foreclosed from the combined entity's stores will have the ability to compensate for their losses. Accordingly, the Board concluded that the transaction would not lead to any customer foreclosure concerns. As a result, the Board found that the transaction would not lead to the significant impediment of effective competition in the vertically affected markets.

(5) Conclusion

In the light of the foregoing substantive assessment, the Board unanimously decided to unconditionally approve the transaction as a result of its Phase II review. The Board's reasoned decision provides in-depth analysis of the market dynamics for the FMCG retail market and stands out with its thorough assessment with regards to the geographic scope of the market, which resulted in a narrower market definition compared to previous decisions. The Board's decision also sets a very recent example of a visible trend in merger review in recent years where the Board grants unconditional approval to a transaction despite initiating a Phase II review. Indeed, there are several decisions where the Board unconditionally cleared notified transactions as a result of its Phase II review in the last five years, one of them being another acquisition by Migros.[7] The Board's Migros/Erfa decision shows that the Authority will not hesitate to initiate Phase II review if it is likely that a transaction might hamper competition,

[7] Please see the Board's Saint-Gobain/Dalsan decision dated 08.12.2022 and numbered 22-54/829-339, Migros/Ay-mar decision dated 23.06.2022 and numbered 22-28/449-181, Fragar/Gülçiçek decision dated 25.06.2020 and numbered 20-31/388-174.

but the Board’s reasoning also gives hope to transaction parties in the sense that it is not impossible to obtain unconditional approval as a result of this review process.

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