

The Turkish competition board grants a conditional authorization to an acquisition in the alcoholic beverages market (Burgaz / Mey)

Turkey, Mergers, Dominant position, Remedies (mergers), Market power, Agriculture/Food products

Turkish Competition Board (Rekabet Kurulu), 12 July 2010, Commitment Approval, Case n 09-56/1325-331, Mey/Burgaz Acquisition

Ercüment Erdem, e-Competitions, N° 32670, www.concurrences.com

The Competition Board ("Board") authorized the acquisition of *Burgaz Alcoholic Beverages Commercial and Economic Union* ("*Burgaz*") which the Saving Deposit Insurance Fund offered for sale by *Mey İAşki Sanayi ve Ticaret A.Ş.* ("*Mey*") under certain conditions. The summarized decision ("Decision") was published on the official website of the Competition Authority on July 12, 2010.

Decision's Background

The Board, in its decision dated 18 November 2009 and numbered 09-56/1325-331, unanimously rejected the acquisition of *Burgaz* by *Mey* within the scope of Article 7 of the Act on the Protection of Competition N° 4054 (hereinafter referred to as the "Act"). The Board rejected the acquisition because in case of acquisition:

The competition would be significantly restricted,

Mey would have its dominant position strengthened in the raki market and

Mey would become dominant in the other markets for alcoholic beverages other than the market for raki.

Nevertheless, in its decision, the Board rejected the proposed acquisition without asking the parties to submit their commitments. However, in order to permit the improvement of both the social welfare and the economy, it would be more appropriate if the Board had asked the parties to submit commitments instead of simply rejecting the proposed acquisition. It is also stated in Article 6 of the [Commission Notice](#) on remedies acceptable under Council Regulation (EC) n° 139/2004 and under Commission Regulation (EC) n° 802/2004 [1] (hereinafter referred to as the "Notice") that the Commission must inform the parties of the negative effects of the concerned operation on the competition with a view to permit them to submit commitments.

Commitments Submitted to the Board

Concerning the proposed acquisition, *Mey* submitted commitments to the Board including principally the condition of the divestiture of the Votka 1967 trademark on June 25, 2010. The submitted commitments are structural commitments and thus include a change of title on the property of the parties which are parties to the acquisition.

Conditional Authorization Decision

The Board decided that, even though the commitments submitted by *Mey* are in principle capable of preventing the undertaking from obtaining dominance in the vodka market following the acquisition, the ancillary provisions of the commitments raise concerns as to the timely realization of the commitments so as to ensure that the assets will not lose their value and competition will not be restricted.

Nevertheless, the Board, saving the other conditions of the commitments, decided that the said operation of acquisition will be authorized since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act N° 4054 and thus in significant lessening of competition under the following conditions:

The statement that "unless" *Mey* is able to secure any trademark, patent, and logo relating to the expression of Istanbul, the trademark of Votka 1967 will not be divested, but instead, Istanbul brands will be included in the divestiture, is omitted from the commitment.

The point relating to the executives, officers, employees, advisors, stakeholders, distributors, and capital owners is omitted from the article that is under Article 4.1 of the commitment and sets the conditions for buyers, and this same change is made to Article 1.3 of the "Divestiture Expert Contract".

Within the duration of the first divestiture period, production under the trademark of Votka 1967 is transferred to *Burgaz* facilities, and production under the trademark of Istanbul is transferred to *Mey* facilities. Our comments set forth under point 1 are also valid here.

Votka 1967 is subject to the oversight of the supervision expert. As the Board cannot supervise the implementation of submitted commitments during the transition period and the divestiture, a supervision trustee (or "monitoring trustee" as stated in the Notice) will do it for the Board. Articles 117 et seq. of the Notice also provide that a supervision trustee shall be appointed. Within this scope, the decision of the Board is correct.

The monthly reporting duty of the commitment party is included in the "Supervisory Expert Contract". As also stated in Article 118 of the Notice, the supervision trustee will be the Board's "eyes and ears". Within this scope, the decision of the Board is correct.

The statement in the "Divestiture Expert Contract" that "the divestiture expert must not cause any damages to *Mey* in the sale of the assets" is not understood as applying a minimum price. As also set forth in Articles 121 and 122 of the Notice, in addition to the supervision trustee, a divestiture trustee must also be present and must be proposed by the parties.

The budget to be determined within *Mey* for the *Burgaz* business is made objectively in a way not to restrict the activities of *Burgaz* and to include the necessary investment. Our comments set forth under point 1 are also valid here.

Moreover, the Board, by taking into account the difference between condition and obligation, stated that those provisions of the commitment and the aforementioned conditions relating to the divestiture of raki, gin and liquor businesses and the

trademark of Votka 1967 within [...] period of time shall be defined as conditions; whereas the other provisions will be defined as obligations. The Board also decided that the authorization will be deemed invalid if the conditions are not fulfilled within the due period and/or if the annexed contract provisions are not implemented. The decision of the Board is correct. As a matter of fact, it is clearly stated in Article 20 of the Notice that in case of a breach of a condition the compatibility decision will no longer be applicable and that, in case of breach of an obligation, the clearance decision may be revoked and fines may be applied.

Conclusion

The decision is parallel with the Commission's decisions. Indeed, both *Mey*, which is the party submitting commitments and the Board, applied many of the provisions set forth in the Notice. The parties submitted entire and effective commitments and decided on trustees in order to permit the implementation of commitments. As for the Board, with a view to protect the competitive environment, it brought amendments related to the efficiency of commitments, curtailed periods, and differentiated conditions and obligations.

[1] [OJ C 267, 22.10.2008, p. 1-27.](#)

Ercüment Erdem | Erdem & Erdem (Istanbul) | ercument@erdem-erdem.com

This document is protected by copyright laws and international copyright treaties. Non-authorized use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.