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Recent Developments under Turkish Competition Law

2023 Spring Issue

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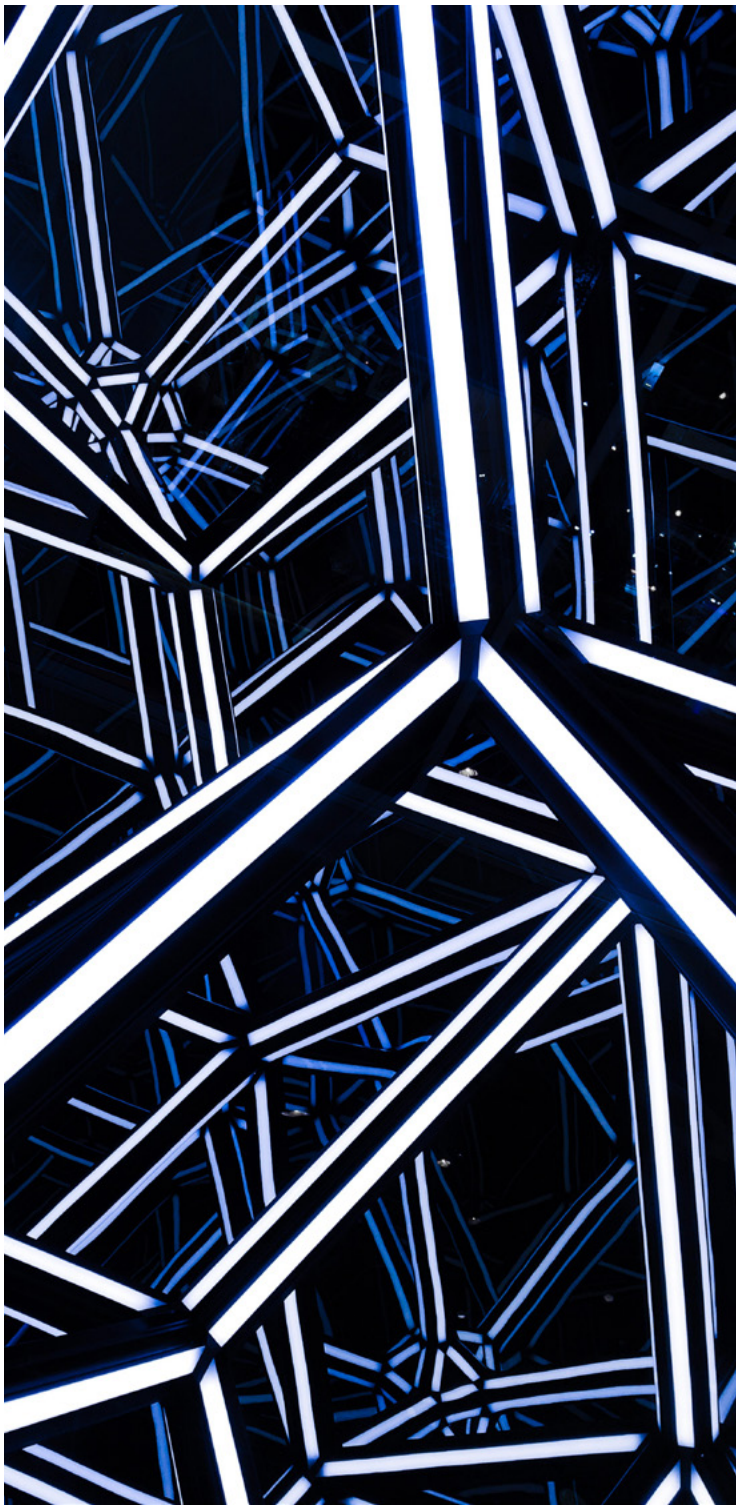

Introduction

It has been an active three months in Turkey from a competition law perspective. In this Spring Issue, we begin our remarks with the intense work schedule of the Turkish Competition Authority (the "**Authority**" or the "**TCA**"), particularly in terms of its sector-based studies and the increasing probes into multiple companies. Indeed, the TCA has been very focused on initiating and/or concluding inquiries in many sectors, including FMCG, online advertising, mobile ecosystems and earthquake recovery markets. Additionally, the TCA recently published its market study on the impact of the digital transformation on competition law, in which it comprehensively evaluated digital trends, on-going investigations against several tech companies, decisions involving digital markets and platforms as well as the current challenges that regulators face due to digitalization.

Our recent edition also refers to the latest gun-jumping case in Turkey, in which Elon Musk was fined by the Turkish Competition Board (the "**Board**" or the "**TCB**") in March 2023 because he failed to notify of the Twitter deal. The transaction essentially required clearance in Turkey and is probably the first case where the acquirer was fined for gun-jumping under to the recently introduced "technology undertaking" concept. Along these lines, it is fair to say that the number of cases that fall within the technology undertaking exception significantly increases. Indeed, the Board published seven (7) new cases in April 2023[1] in which it found that all the target companies fell within the technology undertaking definition due to their activities in multiple industries such as pharmacology, financial technologies and software.

In accordance with the recent developments, this Issue will focus initially on the importance attributed by the TCA to the technology undertaking concept, by outlining the Musk/Twitter deal. It will then go on to the recent sector inquiries that have been high on the TCA agenda lately. In this regard, we will summarize the findings of the long-awaited FMCG sector inquiry report and then refer to the market study on digital transformation, highlighting the trends and competition problems emerging from digitalization. We will also mention the TCA's intervention during the times of crisis, as the TCA initiated a separate sector inquiry into the earthquake recovery markets that were impacted by the major earthquakes that hit Turkey in February. On this note, it is also noteworthy that this tragedy likely raised the workload of the Authority, as it led to multiple oral hearings being postponed, which ultimately creates uncertainty for companies in these challenging times. Finally, we will evaluate co-marketing arrangements from a competition law perspective.

We hope you find this Spring edition helpful.

Togan Turan

1 See Makronet/Softline (22-50/733-305, 03.11.2022), Hedef/Vepara (22-53/816-335, 01.12.2022), Playtika/Ace Academy Playtika (22-54/823-336, 08.12.2022), Micro focus /Open Text (22-51/745-309, 10.11.2022), EBRD/Invent Analytics (22-51/744-308, 10.11.2022), Hızlıpara/Re-pie (22-51/744-308, 10.11.2022), AmerisourceBergen/Pharmalex (22-22-52/775-319, 23.11.2022)

• GUN-JUMPING

Elon Musk jumped the gun in Turkey: the Twitter deal incurred a monetary fine

by Büşra Aktüre, Ece Bezmez

On 6 March 2023, the Authority officially announced the Board's decision to fine Elon Musk for failing to notify the TCA of the USD 44 billion deal to acquire Twitter.

For background information, Board approval is required for certain types of mergers and acquisitions in which there is a change in control and the turnover of the transaction parties exceeds certain thresholds. More specifically, the turnover thresholds are defined under Article 7(1) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board ("**Communiqué No. 2010/4**"), as follows:

(a) the transaction parties' aggregate turnover in Turkey exceeds TRY 750 million (EUR 43.1 million) and the turnovers in Turkey of at least two of transaction parties exceeds TRY 250 million (EUR 14.3 million) respectively; or

(b) the global turnover of at least one transaction party exceeds TRY 3 billion (EUR 172.6 million), and (i) the target asset or business in an acquisition or (ii) at least of one of the remaining transaction parties in a merger has a turnover in Turkey exceeding TRY 250 million.

The recent amendments introduced to Communiqué No. 2010/4 state that the TRY 250 million Turkish turnover thresholds under Article 7(1)(a) and 7(1)(b) will not be sought for technology undertakings that (i) are active in the Turkish market (i.e. generate revenue in Turkey), (ii) have R&D activities in Turkey or (iii) provide services to users located in Turkey.

The definition of technology undertakings is quite broad and covers undertakings active in the following sectors: (i) digital platforms, (ii) software and gaming software, (iii) financial technologies, (iv) biotechnology, (v) pharmacology, (vi) agrochemicals and (vii) health technologies.

In light of the above definition, Twitter (the target) evidently fell within the definition of technology undertaking. The Board indeed found that Musk's worldwide turnover was in excess of TRY 3 billion and therefore the transaction automatically became subject to clearance in Turkey, regardless of Twitter's turnover. As a result, even though the Board approved the transaction, stating that it did not significantly impede effective competition, it imposed an administrative monetary fine of 0.1% of Musk's Turkish turnover for 2022 because he failed to notify of the Twitter deal.

The TCA indeed assesses the issue of gun-jumping, and, when such an event occurs, it does not hesitate to impose sanctions on the relevant parties. Indeed, the Board fined BMW AG, Daimler AG, Ford Motor Company and Volkswagen Aktiengesellschaft in 2020 for not notifying of the establishment of IONITY Holding GmbH & Co. KG, their joint venture[2]. Again, in the recent *Brookfield/JCI* case[3], the Board fined the acquirer because the notification was made 5 months after the closing date and thus the transaction was completed before being approved by the Board.

Especially considering the widespread public attention on the Twitter deal, it did not come as a surprise that the Board imposed monetary fines so quickly on Musk, as the TCA attributes great importance to its new "technology undertaking" concept. It is fair to say that the TCA adopts a somewhat different approach in seeking to catch "killer acquisitions" as compared to other competition authorities. This new TCA method brings certain challenges for both companies and practitioners, particularly given the wide scope of the definition, which may soon cover most companies due the increasing use of technology in almost all aspects of modern business.

2 The Board's decision numbered 20-36/483-211 and dated 28.07.2020
3 The Board's Brookfield/JCI decision dated 30.04.2020 and numbered 20-21/278-132

The Twitter deal came at the right time for the TCA to demonstrate once again how serious it takes its new amendment on tech-related sectors. The reasoned decision has not been published yet – and hence the lack of details on the case - but it certainly proves that the TCA has its eyes on tech-related markets and will not hesitate to impose sanctions on parties/persons that do not comply with the amended rules. Multiple recent Board decisions confirm this. The reasoned decision will also shed light on details regarding how the TCA assessed the control structure of companies such as SpaceX and Tesla, which are led by Musk, when making the turnover calculation.

• SECTORAL

The long-awaited FMCG sector Final Report has been published

by Gülçin Dere, İrem Uysal

On 5 February 2021, the Authority published its preliminary findings regarding competition issues in the Turkish Fast Moving Consumer Goods ("**FMCG**") Retail Sector[4]. Based on a comprehensive inquiry and requests for information sent to stakeholders in the sector, the Authority published the Final Report on the Turkish FMCG Retail Sector Review ("**Final Report**") on 30 March 2023, which contains the following significant findings and recommendations:

Concentration analysis of the FMCG retail market

According to the Final Report, the levels of market concentration in the FMCG retail sector are increasing rapidly, with the discount markets being the fastest growing sub-segment. While the weight of the top four retailers in the sector was 26% in 2010, this ratio reached 77% by the end of 2021. A comparative analysis of annual market shares shows that the top four retailers have increased their market share, while local and regional markets have lost theirs.

Evaluation of notification thresholds for merger and acquisitions in the FMCG retail sector

Although the Authority proposed to introduce a sectoral notification threshold for M&A transactions in the Preliminary Report, it abandoned this view in the Final Report. Indeed, the Authority found that concentration in the sector had occurred through new stores opening rather than through slow-moving and unnoticed acquisitions. Given the increasing concentration in the FMCG retail sector, the Authority concluded that the geographic market could be defined more narrowly at the local level, or according to store sizes, rather on a county basis[5]. As such, the Board is expected to define the geographic market more narrowly in future M&A transactions. On the other hand, the Authority concluded that the application of lower turnover thresholds on a sectoral basis would reduce the efficiency of M&A transactions between relatively small retailers, hinder their growth and prolong transactions

4 Please refer here for the Turkish original of Preliminary Report and here for Final Report.
5 See the Board's Migros/Carrefoursa decision dated 04.05.2021 and numbered 21-25/307-140; the Board's Migros/Adese decision dated 01.07.2021 and numbered 21-25/307-140.

Assessment of buyer power in FMCG retailing in relation to private label products and Chinese Wall practices

The Authority found that the buyer power of the four largest retailers in the supply market increases with their market share and market power. In this context, the Authority found that the effect of the buyer power is more evident when suppliers supply private label products to retailers. Taking into account the increase in the production of private label products, the Authority concluded that the retailers selling these products the most are the largest undertakings with the highest market share.

In this context, Chinese Wall practices were briefly mentioned in the Preliminary Report and extensively discussed in the Final Report. In the context of FMCG retailing, Chinese Wall practices can be explained as "building a wall" around the communication channels between the relevant business units of undertakings in order to prevent the exchange of competitively sensitive information between private label product manufacturers and retailers[6]. In the Final Report, the Authority emphasized that Chinese Wall practices should be assessed on a case-by-case basis, taking into account the specifics of each case and the competitive dynamics of the relevant sector

Regulatory proposals on buyer power in the FMCG retail sector

The Authority stated that in order to ensure the effective and continuous implementation of the proposed regulations on unfair commercial practices, an independent authority could be established to impose penalties as a deterrent. In addition, the Authority suggested that the opening of second stores by retailers within a single economic entity and within a certain distance could be prohibited by linking the opening of new stores by chain stores to distance criteria rather than population criteria.

Furthermore, the Authority concluded that due to the increasing buyer power of retailers, a buyer market share threshold may be included in the regulation on vertical agreements. Accordingly, the abuse of buyer power can only be prevented by introducing a regulation similar to that of the European Union into Turkish legislation[7].

Digitalization in FMCG retailing

In contrast to the Preliminary Report, the digitalisation of FMCG retailing was assessed as a separate chapter, with the following categories highlighted in the Final Report: (i) the growing number of undertakings, (ii) the importance of digital marketing and social media, (iii) consumer insights and individualized marketing, and (iv) next generation payment systems. The Authority confirmed that digitalization leads to intensified and diversified communication cycles between consumers and producers. Furthermore, the Authority announced that the ratio of the digital FMCG retail sector to the organized retail sector was 1% in 2018, with this increasing to 7% in 2021

6 The Board referred to the Chinese Wall practice in its AEH/Migros decision dated 09.07.2015 and numbered 15-29/420-117

7 Please refer here for Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain in English. See also Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

• DIGITAL TRANSFORMATION

Market study on the impact of the digital transformation on competition law

by Deniz Benli, İrem Uysal

The widespread use of the Internet and technology have had a significant impact on business models and operations around the world. This transformation has also led to changes in consumer preferences in digital markets. In response, the Authority conducted a study to assess which competitive interventions might be appropriate for digital markets, how competition law and policy might evolve in the near future, and what policy changes might be necessary. In this context, the final version of the Market Study on the Reflections of Digital Transformation on Competition Law (the "**Study**") was published on the TCA's website on 18 April 2023[8].

Digitalisation in Turkey: trends, current situation and potential

The Study examined a number of indicators to assess the state of digitalization in Turkey, including (i) the number of internet users, (ii) the average age, (iii) the number of mobile internet users, (iv) the time spent on the internet, (v) the number of active social media users, (vi) the time spent on social media, (vii) the top five most used social media platforms, (viii) the top five social media applications where users spend the most time, (ix) digital advertising expenditure, (x) online shopping, (xi) the prevalence of digital payment methods. Based on this empirical data, it is forecasted that Turkey will perform better than the global average in terms of digitalization, and that this progress will continue to accelerate as infrastructure issues are resolved.

Competition problems emerging with digitalisation

The Study mentions the characteristics of digital markets that create competition law concerns, such as (i) first-mover effects, (ii) high entry/investment costs, (iii) economies of scale and scope, (iv) network effects and (v) data ownership. The Study predicts that these concerns mainly arise in four areas of competition law enforcement: (i) defining the relevant market, (ii) identifying market power, (iii) identifying anti-competitive conduct, and (iv) finding remedies. These challenges have led the Board to increase its focus on digital markets, resulting in an increasing number of investigations and sector inquiries over the course of the past 10 years.

Investigations and decisions of the TCB on digital markets

A review of the investigations carried out by the TCB in relation to digital markets shows that a significant number of cases were decided in recent years, all falling under Article 6 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), which prohibits abuse of dominance. The Study reports that a total of 15 digital market investigations have been concluded and another 5 are currently pending. The Study also highlights that the TCA has been an active participant in sector reviews through the publication of reports such as the "E-Marketplace Platforms Inquiry" in 2022 and the "Online Advertising Sector Inquiry" in 2023, demonstrating its close attention to digital markets.

Steps taken by competition authorities in the world

The Study notes that the TCA's approach is in line with that of foreign competition authorities, which implement new legislative instruments and conduct

8 The TCA's announcement, which includes a link to the Study, can be accessed here in Turkish.

similar inquiries based on similar competition law concerns. The Study explains that many foreign competition authorities share similar concerns about digital markets, and provides a detailed discussion of the regulations that have been adopted or implemented in relation to these markets. The Study predicts that if public intervention is delayed or ineffective in addressing the competition concerns arising from the behaviour and practices of platform service providers, which are commercial enterprises acting to maximize their profits, digital markets will continue to favour these enterprises at the expense of the general public. The Study suggests that competition issues will continue to grow if these concerns are not addressed, thus demonstrating that competition law concerns in digital markets are not just local but global.

Possible competition violations observed in digital markets

Data portability and interoperability: data portability and interoperability are considered pro-competition, and preventing such is thus considered anti-competitive.

Favouring and/or promoting products and/or services: according to the Study, dominant market players take the following actions in order to give an unfair advantage to their own products or services: (i) featuring their products or services more prominently; (ii) using data collected through their platform to favour their own products or services; (iii) blocking competitors' access to the basic platform service in the upstream market, or (iv) pre-installing or integrating their products or services into devices.

Tying and bundling: the Study suggests that companies with significant market power in digital markets may still harm consumers by closing the market for the tied product, without being dominant. The Study confirms that tying and bundling is deemed to occur if the following conditions are satisfied: first, the undertaking should have a dominant position in the product market; second, the structural characteristics of the market in which the foreclosure takes place should be sufficient; third, the products should previously have been available separately; fourth, the purchase of one product should be conditional on the purchase of the other product; finally, the practice should create entry barriers.

Exclusivity, Most Favoured Customer practices and unfair provisions: the Study explains that the risk of market tipping is one of the main competitive concerns in digital markets and inherent network effects as well as exclusivity practices aggravate this risk by preventing commercial users from using multiple platforms simultaneously. Also, exclusivity practices are deemed to create entry barriers. In addition, unfair provisions imposed on commercial users (such as high subscription/access fees or contract terms that put commercial users at a significant disadvantage and lack transparency) should be analysed under Article 6 of Law No. 4054. Finally, it is suggested that the following three potential types of harm may arise as a result of most favoured customer practices: (i) reduced competition, (ii) price rigidity, and (iii) limited market entry or growth.

Lack of transparency: the Study highlights the importance of transparency for the proper functioning of digital markets, particularly in the following areas: (i) informing users about the terms and conditions of the service they are using; (ii) disclosing the parameters used to rank content on the platform; and (iii) informing users about the advertising they may encounter while using the service.

Concerns regarding mergers and acquisitions: the Study categorizes competitive concerns regarding mergers and acquisitions in digital markets into two groups: first, there is a lack of review in terms of the transactions that fall below the merger control thresholds or fail to meet the review conditions; second, traditional reviews sometimes fail to take into account or anticipate the potentially restrictive outcome and possible anti-competitive effects of transactions in digital markets (such as market power or entry barriers). The Study proposes alternative threshold reference points, such as the transaction value, in order to prevent transactions with significant market effects from bypassing the merger control regime due to unmet turnover thresholds.

Market insights on basic platform services

The Study examines the competitive landscape and concerns in several digital markets, including intermediary services, search engines, social media platforms, video-sharing platforms, peer-to-peer services, operating systems, cloud computing and online advertising. Common issues such as entry barriers, favouritism and the potential of dominant undertakings to use their position in one market to gain an unfair advantage in others are identified as key concerns across all these services. The study highlights that the different stakeholders, including consumers and large technology companies, share similar views on the challenges and practices in digital markets and the need for policy adjustments.

Conclusion – what's next?

The Study reveals that the TCA admits the difficulties around detecting anti-competitive practices in digital markets and intervening in a timely manner. Early intervention may discourage innovation and investment, while late intervention may lead to market foreclosure.

• SPECIFIC CASES

Crisis Times: the TCA assesses earthquake recovery markets

by Büşra Aktüre, Lara Akça

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On the 6 February 2023, 11 cities in the south-eastern part of Turkey - Adana, Adıyaman, Diyarbakır, Gaziantep, Hatay, Kahramanmaraş, Kilis, Malatya, Osmaniye, Şanlıurfa and Elazığ - were shaken by two consecutive earthquakes with magnitudes of 7.8 and 7.5 each respectively. Accordingly, on the 17 March 2023, the TCA announced that the TCB had initiated a sectoral inquiry to determine the competition problems that may arise in the markets in those 11 cities affected by the earthquakes.

The TCA announcement highlights its desire to build a permanent and rapid communication channel with primarily public institutions, such as chambers and commodity exchanges, in the disaster area. In this way, the TCA aims to take proactive steps in terms of identifying possible competitive concerns that may delay both the social and economic

photo by Dave Goudreau on Unsplash

recovery in those 11 cities affected by the earthquakes.

On the same date as the announcement, the president of the TCA provided some insight into the purpose of this sector inquiry through a public statement, which is as follows; *"The rapid recovery of economic and social life in the region will undoubtedly depend on the speed of the reconstruction of homes and businesses. Ensuring the health and continuity of supply chains is of vital importance for the success of such a large operation. In this respect, it is necessary to ensure that public and private sector resources can be utilised in the most efficient manner in the face of sudden and high demand for certain sectors, particularly construction and logistics. For this purpose, it is essential for our country and a priority task for our Authority to prevent and deter clear and severe competition violations that may occur, on the one hand, and, on the other, to direct undertakings toward efficient, pro-competition cooperation in order to ensure that supply processes are not disrupted(…).*

With the sector inquiry process initiated by our Authority, we aim to identify possible competitive problems that may delay the social and economic recovery process in the earthquake region and to ensure that proactive steps can be taken by

coordinating with other relevant public institutions and organisations when necessary. We thus aim to prevent some undertakings from engaging in anticompetitive activities by turning this period into "opportunism", on the one hand, and, on the other, we aim to provide the necessary guidance for the competitive design of cooperation between undertakings during the reconstruction and reconstruction of the region."

In brief, through the sector inquiry, the TCA essentially intends to prevent undertakings from engaging in activities that restrict or distort competition in the face of sudden and high demand in certain sectors as a result of the earthquakes. It also aims to provide pro-competition guidance for horizontal collaboration concerning the reconstruction and re-design of the impacted area.

This sector inquiry of the TCA due to the earthquakes has been a surprise development, which may have been triggered by the recent pandemic. More specifically, the Covid-19 pandemic led the extraordinary increase in demand and sudden price movements in certain sectors, which, in return, might have resulted in the TCA becoming more experienced and sensitive to such challenging times. Indeed, during the pandemic, competitive concerns about the pricing behaviour of retail chain markets, manufacturers and wholesalers engaged in the trade of food and cleaning supplies led to increased scrutiny of the fast moving consumer goods sector by the TCA through two separate investigations[9], which resulted in high administrative fines issued by the Board. In another significant decision[10], the TCB found that the allegation that the undertakings operating in the field of mask production violated Law No. 4054 on the Protection of Competition by increasing prices together during the COVID-19 pandemic. Moreover, in another investigation[11], the Board evaluated the allegation of whether the prices of undertakings operating in the production of non-woven fabrics had increased significantly since the Covid-19 outbreak. Thus, as can be seen from these recent examples, the Authority has an increasing tendency to thoroughly examine certain sectors with unusual price movements due to challenging times.

Overall, the sector inquiry report will shed full light on the TCA's approach and findings on the topic, it is safe to say that the TCA has become very cautious in times of crisis, and will closely monitor the markets that could be impacted from such crises.

• CO-MARKETING

The necessary evil in pharmaceutical industry: co-marketing arrangements

by Kansu Aydoğan, Selen Toma, İrem Deyneli

Co-marketing arrangements are legitimate instruments of cooperation that are quite commonly applied in the pharmaceutical industry, where two different undertakings agree to sell and market the exact same medicinal product(s) under their own trademarks, for treating the same disease, by obtaining a co-marketing license and linking the marketing authorisation of the co-marketed product to the main product. Through this arrangement, two undertakings cooperate to reach a wider sales network and promote the commercialization of the relevant product(s). As co-marketed medicinal products are required to be manufactured in the same facility, this arrangement generally also results in a contract manufacturing relationship between the undertakings. More precisely, an undertaking that has obtained a marketing authorisation for a medicinal drug sells the finished but unpackaged medicinal product to the other undertaking in order for this undertaking to market the same medicinal product under its own trade mark, thereby providing a true example of a horizontal arrangement in the pharmaceutical industry. Similarly, decisions of the Board highlight that co-marketing agreements aim to sell and market a medicinal product in the relevant geographical market by the undertakings that are parties to the co-marketing agreements, independently of each other and under separate brands[12].

Within the scope of these co-marketing arrangements, the parties generally agree on certain aspects, such as production, packaging, supply and licensing. In view of this and considering

9 The Board's FMGC I decision numbered 21-53/747-360 and dated 28.10.2021 and FMGC II decision numbered 22-55/863-357 and dated 15.12.2022

10 The Board's decision dated 30.12.2020 and numbered 20-57/798-355

11 The Board's decision dated 14.10.2021 and numbered 21-49/697-345.

12 See Merck/Bilim İlaç decision (12-38/1086-345, 18.07.2012); Abbot/EIP decision (07-23/227-75, 15.03.2007); Sandoz/Eli Lilly decision (07-63/776-282, 02.08.2007).

that the parties operate at the same level in the relevant market and are considered to be competitors, these agreements are considered to be horizontal in nature and, accordingly, might give rise to certain competition law problems under the Turkish competition law regime, especially if they are used to implement price fixing or market sharing arrangements or as a vehicle for exchange-sensitive information.

Evaluation of co-marketing arrangements under Turkish Competition Law

Co-marketing arrangements between two undertakings are typically characterised as horizontal agreements, although they include certain elements of vertical agreement (such as the supply relationship or a distribution arrangement). The existence of additional elements such as production, packaging, supply and licensing does not negate the fact that the main objective of this arrangement is the cooperation of undertakings operating at the same level in the economic chain.

The Board has also acknowledged that such agreements qualify as horizontal agreements and can benefit from an individual exemption provided that they fulfil the conditions set out in Article 5 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**")[13]. In this regard, for co-marketing agreements concluded between competing undertakings that operate in the same relevant pharmaceutical market, the following criteria must be met:

a) The agreement must ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services;

b) The consumers must benefit from the above-mentioned improvement/development;

c) The agreement must not eliminate competition in a significant part of the relevant market; and

d) The agreement must not restrict competition more than is necessary to achieve the goals set out in paragraphs (a) and (b).

Brief overview of the Board's precedents on co-marketing arrangements

(i) The Board's decision in Merck Sharp & Dohme/ Bilim İlaç

The Board's decision in *Merck Sharp Dohme/ Bilim İlaç*[14] evaluated the individual exemption request for various agreements executed between Merck Sharp & Dohme International Services B.V., Merck Sharp Dohme İlaçları Ltd. Şti. ("**MSD**") and Bilim İlaç Sanayii ve Ticaret A.Ş. ("**Bilim İlaç**"), for the purposes of co-marketing human medicinal products containing active substances named "sitagliptin phosphate monohydrate" (Januvia) and "metformin hydrochloride, sitagliptin phosphate monohydrate" (Janumet) used in the treatment of Type II Diabetes.

Before delving into its analysis, the Board stipulated that the agreement between the parties was of the nature of a co-marketing agreement, and then listed the essential components of such agreements:

- The agreement must be between two independent undertakings;
- Although the content of the product subject to the agreement was the same, the version offered for sale would be different;
- One of the parties would be the owner (or an affiliate) of the product subject to the agreement, and would hold all the marketing and sales rights of the relevant product;
- The agreement would be executed for a certain period of time and cover a specified geographical area.

The Board then held that the co-marketing agreements were cooperation agreements by nature, and that the original drug manufacturer (Merck Sharp Dohme) and the co-marketer

13 See Merck/Bilim İlaç decision (12-38/1086-345, 18.07.2012) and Drogsan/Reckitt Benckiser decision (15-28/344-144, 07.07.2015).
14 Merck/Bilim İlaç decision (12-38/1086-345, 18.07.2012)

(Bilim İlaç) operated at the market level where the ex-factory cost was established / and where undertakings with human medicinal product licences were present. Accordingly, the Board held that the agreement subject to the exemption in question was a co-marketing agreement, which should be evaluated as a horizontal cooperation agreement even though it contained certain vertical elements. As a result, the Board held that such agreements could not benefit from the block exemption provided under Block Exemption Communiqué on Vertical Agreements No. 2002/2.

Within the scope of the individual exemption analysis, the Board concluded that the agreements subject to the exemption would ensure that the drugs containing the active ingredient Januvia and Janumet were delivered to consumers through a different distribution channel other than MSD, in a market where market entry is difficult in terms of legislation, technique and economy. In addition, the Board stated that competition would increase in the market for oral antidiabetics, which also includes important players such as Novartis and Bristol Myers Squibb, and held that the condition for economic or technical development had been satisfied. The Board also stated that the human medicinal products could be marketed through a wider team with the co-marketing arrangement, and this would therefore increase access to the product, to the benefit of the consumers. Finally, the Board concluded that the promotional restrictions were reasonable, considering that the products, being new and under patent protection, may require continued work on licensing. Considering the above, the Board granted an individual exemption to the co-marketing arrangement between MSD and Bilim İlaç.

(ii) The Board's decision in *Drogsan/Reckitt Benckiser*

Similarly, the Board's decision in *Drogsan/Reckitt Benckiser*[15] evaluated the individual exemption request regarding the exclusive granting of co-marketing rights to Reckitt Benckiser by Drogsan regarding "Chloroben Oral Spray 30 ml", for which Drogsan held the human medicinal product licence. The co-marketing right granted to Reckitt Benckiser contained the right to sell, distribute, market and promote the co-marketed product in Turkey under a brand to be determined by Reckitt Benckiser and approved by the Ministry of Health. Within the scope of this arrangement, the parties plan to act independent in their dispositions regarding the product. Indeed, Drogsan will be solely responsible for the pricing, training of the promotional staff, packaging, marketing, distribution and sales of the product, whereas Reckitt Benckiser will supply the finished product from Drogsan.

After evaluating the terms of the agreement, the Board classified the agreement as a typical example of a co-marketing agreement within the scope of the Guidelines on Horizontal Cooperation Agreements. The Board then stipulated that the agreement allowed the product currently offered to the market by a single undertaking at a single price, to be offered by two competition undertakings with different prices and marketing strategies, thus increased competition in the relevant product market. Also, considering that the agreement did not contain a provision regarding the prices of the products, the price competition for the same product would increase, to the benefit of the consumers. After also concluding that the agreement would not eliminate a significant part of the competition in the relevant market and would not disproportionately restrict competition, the Board granted an individual exemption for the co-marketing arrangement between Drogsan and Reckitt Benckiser.

Conclusion

There is reason to believe that co-marketing agreements are beneficial for both licensed manufacturers and marketers, and are capable of creating efficiency through increased use of technology or broader access to finished products. Considering these benefits, co-marketing arrangements constitute an attractive mechanism to the players in the pharmaceutical industry. However, as can be observed from the Board's decisions, such arrangements must bear certain characteristics in order for them to be recognized as pro-competition and thus benefit from the individual exemption under Law No. 4054. On this note, it is of vital importance for such agreements to be evaluated thoroughly, case by case, in the light of the criteria set out in Article 5 of Law No. 4054, and to examine whether they are being used in pursuit of restrictions that go beyond legitimate objectives in a way that enables price fixing or market sharing arrangements, or are being used as a vehicle for the exchange of sensitive information.

15 Drogsan/Reckitt Benckiser decision (15-28/344-144, 07.07.2015).