The Turkish Competition Board did not grant an exemption to the restriction of the sales of food supplements in e-commerce channels

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I. Introduction

On June 3, 2022, the Turkish Competition Board ("***Board***") published its reasoned decision dated September 9, 2021 and numbered 21-42/611-298, rejecting Solgar Vitamin ve Sağlık Ürünleri Sanayi ve Ticaret A.Ş.'s ("***Solgar***") exemption application for its dealership agreements ("***Board's Decision***").

The dealership agreements concerning the distribution of food supplements were planned to be signed between (i) Solgar and Navita İlaç ve Sağlık Ürünleri Sanayi ve Ticaret A.Ş. ("***Navita***"), an undertaking controlled by Solgar and (ii) twelve pharmaceutical warehouses and approximately 25.000 pharmacies for the duration of 5 years ("***Dealership Agreements***"). The Dealership Agreements contemplated that each pharmaceutical warehouse signed the relevant agreements will be designated as a Solgar dealer whereas each pharmacy agreed to comply with the principles set out in the relevant agreements will be designated as Solgar sub-dealers. Accordingly, the pharmaceutical warehouses would act as an intermediary for the signing of the relevant agreements between Solgar and pharmacies and monitor whether these pharmacies follow the principles set out by Solgar.

Solgar requested the Board to grant a negative clearance for its Dealership Agreements or grant an individual exemption to them.

The Board in its decision deemed that the Dealership Agreements (i) are within the scope of Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") which prohibits *inter alia* all agreements between companies that have as their object or effect the prevention, restriction or distortion of competition, and (ii) do not benefit from the protective cloak of the Block Exemption Communique No. 2002/2 on Vertical Agreements ("***Communique No. 2002/2***"). With respect to the individual exemption evaluation, the Board decided that the Dealership Agreements may not be granted with an individual exemption as they do not satisfy the criteria set out by the sub-paragraphs (a), (b) and (d) of Article 5 of Law No. 4054.

The Board's Decision is noteworthy as it delves deep into the competition restricting effect of prohibiting the sales of food supplements through the e-commerce platforms. In terms of the recognition of the eminent position of the e-commerce platforms in the retail sales, it should also be noted that on April 14, 2022, the Turkish Competition Authority ("***Authority***") published its Final Report on the E-Marketplace Sector Inquiry ("***Final Report***") upon its Preliminary Report on the E-Marketplace Sector Inquiry ("***Preliminary Report***") dated May 7, 2021, noting the swift development of the e-commerce channel and stating that e-commerce is becoming an essential channel for retail commerce.

II. The Board's Evaluation of the Dealership Agreements Within the Scope of the Communiqué No. 2002/2

The Board first found that the Dealership Agreements include restrictions that fall within the scope of Article 4 of the Law No. 4054 since they (i) prohibit the pharmaceutical warehouses from making sales to any reseller other than the pharmacies designated as Solgar sub-dealers, (ii) prohibit the sales/exchange of products among the pharmacies designated as Solgar sub-dealers and (iii) prohibit the sales of pharmacies to anyone other than the final consumer.

Therefore, the Board decided that the Dealership Agreements may not be granted a negative clearance and proceeded with its evaluation of the contemplated dealership system, within the scope of the Communiqué No. 2002/2.

Pursuant to the Communiqué No. 2002/2, vertical agreements may benefit from the protective cloak of block exemptions, thus avoiding the prohibition of Article 4 provided that (i) the supplier's market share in the market where it provides the products and services subject to the agreement does not exceed a certain threshold[1] and (ii) they do not contain restrictions provided in Article 4 of the Communiqué No. 2002/2.

[1] Although during the period that the Board made its assessment on the case, the relevant threshold was 40%, this threshold has been lowered to 30% with the amendment made by the Communiqué Numbered 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements on 5 November 2021.

In its assessment of the market share, the Board noted that if the market is defined as the market for the food supplements, Solgar's market share is below the relevant threshold, whereas if the market is defined based on the ATC-3 categories, there would be 35 relevant product markets and in only 4 of these markets, Solgar has a market share that is above 40%.

Nevertheless, the Board noted that vertical agreements that contain "*restrictions in relation to regions or customers where or to whom the goods or services which are the subject of the contract shall be sold by the purchaser*" may not benefit from the safe harbour of Communiqué No. 2002/2 if the exceptions laid out in sub-paragraph (b) of Article 4 of Communiqué No. 2002/2 are not applicable. Accordingly, the Board ruled that the Dealership Agreements could not benefit from the block exemption as they prohibited the pharmacies from (i) making wholesales to third parties, (ii) making sales to third parties other than final consumers (especially other pharmacies) as well as exchanging products with these persons and (iii) making sales to e-commerce customers and they do not fall within the scope of the exceptions laid out in the Communiqué No. 2002/2.

III. The Board's Individual Exemption Evaluation

Following its finding that the Distributorship Agreements do not benefit from the block exemption, the Board carried on with its individual exemption evaluation for the contemplated system. To be eligible for an individual exemption, a restrictive agreement must (a) ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, (b) allow the consumers a fair share of the resulting benefit, (c) not eliminate competition in a significant part of the relevant market and (d) not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b). An agreement should satisfy all four conditions in order to obtain an individual exemption.

For its individual exemption evaluation, the Board obtained the opinions of various e-commerce platforms' as well as vitamin/food supplements producers' opinion regarding the market and the online sales of the said products.

First, the Board evaluated whether the contemplated system ensures any new development and improvements or, economic or technical development in the production or distribution of goods and in the provision of services. The Board noted that Solgar would not change its distribution network as it would sign the relevant agreements with the pharmaceutical warehouses and pharmacies that it currently works with and stated that the contemplated system mainly concerns prohibiting the online sales of the relevant products. Relatedly, the Board remarked that, with the contemplated system, consumers would be able to buy the Solgar products only through the channel of pharmacies while other channels would be eliminated. According to the Board, elimination of different channels cannot be considered to increase the efficiency of the distribution. The Board also stated that although Solgar indicated with its application that its main purpose is to prevent sales of counterfeit products and products brought to Turkey illegally, the Dealership Agreements in fact restrain the pharmacies' sales to third parties, hence the restrictions are not relevant with the aim proposed by Solgar. Furthermore, the Board referred to the opinions of other vitamin and food supplements producers and the e-commerce platforms and indicated that the prices offered in alternative sales channels were considerably lower and thanks to these channels, the consumers are able to purchase products outside the working hours of the pharmacies. In light of these, the Board deemed that the contemplated dealership system of Solgar did not satisfy the first criterion for granting an individual exemption.

Further, the Board analyzed the Dealership Agreements against the second criterion of individual exemption and evaluated whether the contemplated system allows the consumers a fair share of the resulting benefit. In its analysis, referring to its Preliminary Report, the Board mentioned that the transaction volume for the products in the category of health, medical products and food supplements increased by 150% in 2020 in e-commerce. Therefore, the Board remarked that elimination of the online channels would have a significant impact on the consumers. The Board reiterated that the online sales channels enable consumers to purchase the products even outside the working hours and without going to the pharmacies. The Board also mentioned that the consumers are able to reach more alternatives in the online channels when compared to physical channels that are subject to shelf space or storage area limitations.

The Board also noted that although the consumers may be informed about the product in pharmacies before their purchases, such information may only be helpful for consumers who are unsure about the product that they intend to buy and underlined that the information provided by the pharmacies may be affected by the commercial interest of the pharmacy employee given that food supplements are not treated as drugs. On that front, the Board also highlighted that the reviews of other consumers and the Q&A mechanism established between the consumer and the seller in the e-commerce channels could also serve for informing the consumers, seeking advice on a given product. Therefore, the Board found that it cannot be said that the physical channels are more advantageous in terms of informing the consumers.

Moreover, the Board provided a list comparing the recommended resale price and the prices offered in the e-commerce channels for the top 10 best-selling products of Solgar. The Board remarked that, for all products compared, the online sales prices were considerably lower than the recommended resale price of Solgar. The Board thus concluded that if the sales on online channels were prohibited, the consumers would be deprived from the chance of purchasing products for a lower price.

Lastly, the Board mentioned that Solgar products are sold online in Europe as well as the United States of America.

As to the Solgar's claim that the contemplated system would be helpful in preventing the sales of counterfeit products as, with the contemplated system, Solgar would establish a secure traceability for its products, the Board stated that although the supplier may take necessary precautions in order to handle this problem, prohibiting the sales of products in every channel other than pharmacies would not be a proportionate measure and would not benefit the end consumer. The Board also highlighted that the relevant government bodies apply necessary mechanisms to combat this problem. Moreover, the Board referred to the information provided by the e-commerce platforms on the mechanisms they have adopted to prevent the sales of counterfeit products. Accordingly, the Board noted that the relevant platforms have some control and monitoring mechanisms, for example, in case there is a complaint that a seller supplies counterfeit products, they require invoices and other relevant documents from the seller in order to verify the supply sources and authenticity of the product. Further, the Board also noted that the e-commerce channels reported that the complaints received by the consumers about the counterfeit products are very rare.

In light of the given evaluation, the Board indicated that the contemplated system did not allow the consumers a fair share of the resulting benefit, hence failed to satisfy the second criterion of individual exemption.

With respect to the third criterion, the Board agreed that the contemplated dealership system would not eliminate competition in a significant part of the relevant market given the low market share of Solgar for the products subject to the Dealership Agreements and the lack of entry barriers in the market.

As for the final criterion, i.e. not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b), the Board deemed that the last criterion is not satisfied stating that the Dealership Agreements would eliminate any sales channels other than pharmacies and such a restriction limits competition more than what is compulsory for preventing the sales of counterfeit problems.

Therefore, the Board decided that the contemplated dealership system of Solgar cannot be granted with an individual exemption.

IV. Conclusion

The Board's Decision focused on the role of e-commerce channels in the sale of food supplements and analyzed in detail how prohibition of sales in the e-commerce channel may have an impact on competition and consumers in the relevant market. In light of the Board's Decision and considering that the significant role of the e-commerce channels in the retail sales was also recognized by the Authority in its Preliminary Report and Final Report, it can be stated that vertical agreements that include restrictions of sales in e-commerce channels will be under the spotlight and evaluated thoroughly by the Board.

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