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# Analysis by Turkish Competition Board of non-full function joint ventures in recent individual exemption decision

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### Introduction

On 26 October 2022, the Turkish Competition Authority published the Turkish Competition Board's decision<sup>(1)</sup> regarding an application filed by SK Innovation Co Ltd. The application requested negative clearance or individual exemption to be granted in favour of the joint venture agreement (the transaction) concerning Changzhou BTR New Material Co Ltd, which is jointly controlled by:

- SK Innovation;
- BTR (Jiangsu) New Material Technology Co Ltd; and
- EVE Asia Co Ltd.

The agreement concerned the manufacture of triple cathode materials and the sale of these materials to SK Innovation, EVE and their subsidiaries.

The board held as follows:

- The transaction gave rise to potential risks of coordination under article 4 of Law No. 4054 on the Protection of Competition and was, therefore, not eligible for negative clearance.
- Considering that the parties' market shares in the relevant markets were not substantial enough to significantly impede competition, the transaction benefitted from individual exemption under article 5 of Law No. 4054.

This article explains the board's assessment as to joint control and full functionality of Changzhou BTR and the transaction in terms of both negative clearance and individual exemption, and provides a brief analysis on the decision.

### Decision

#### **Relevant product and geographic markets**

Within the scope of the transaction, SK Innovation, EVE and BTR Jiangsu intended to jointly control Changzhou BTR, a wholly owned subsidiary of BTR Jiangsu, before the transaction. Although Changzhou BTR was established in 2021, it had not commenced its activities as of SK Innovation's application before the authority in October 2021. After the transaction, Changzhou BTR was expected to develop, manufacture, import and export high-nickel cathodes and materials. Changzhou BTR's main purpose as a joint venture was to manufacture triple cathode materials for the lithium-ion battery industry and supply triple cathode materials to SK Innovation, EVE and their subsidiaries.

As triple cathode materials are significant in the production of lithium-ion batteries, the board assessed that the cathode materials manufactured by Changzhou BTR and one of its parent companies, BTR Jiangsu, were inputted into batteries manufactured by SK Innovation and EVE. Therefore, the board found that the activities of Changzhou BTR overlapped horizontally with BTR Jiangsu and vertically with SK Innovation and EVE.

The board defined the relevant product market for the purposes of the transaction as the "triple cathode materials market" on the grounds that Changzhou BTR would be active in this market.

The relevant geographic market, for the purposes of the transaction, was defined as "Turkey" as the board held that the competition conditions within the country did not give rise to significant regional differences.

#### **Joint venture**

Pursuant to the agreement between SK Innovation, BTR Jiangsu and EVE, Changzhou BTR, which had been under the sole control of BTR Jiangsu prior to the transaction, would be jointly controlled by SK Innovation, BTR Jiangsu and EVE.

Accordingly, in order to determine whether Changzhou BTR should be evaluated as an acquisition within the scope of article 7 of Law No. 4054 or as a cooperation agreement within the scope of article 4 of Law No. 4054, the board analysed whether the criteria for joint control and full functionality of joint ventures were satisfied within the scope of the transaction, as per article 5(3)<sup>(2)</sup> of Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board.

#### **Joint control**

Upon evaluating the agreement, the board held that SK Innovation, BTR Jiangsu and EVE could all nominate directors for Changzhou BTR's board of directors, and that various matters required unanimity of the directors. Based on this and in light of paragraph 50<sup>(3)</sup> of the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control (the Guidelines on Control), the board held that SK Innovation, BTR Jiangsu and EVE had to agree on significant matters concerning Changzhou BTR. Therefore, Changzhou BTR would be jointly controlled by these three undertakings.

### *Full functionality*

Under the Guidelines on Control, for joint control to be fully functional, it must also qualify as an independent economic entity established on a lasting basis (ie, having adequate capital, labour and an indefinite duration). To that end, the joint venture must:

- have sufficient resources to operate independently on the market;
- perform activities beyond one specific function of the parent companies;
- be independent from the parent companies in sale and purchase activities; and
- operate on a lasting basis.<sup>(4)</sup>

In line with this, the board's assessment focused on whether Changzou BTR would be independent from its parent companies (ie, SK Innovation, BTR Jiangsu and EVE) in its sale and purchase activities concerning triple cathode materials.

Within this scope, the board noted that Changzou BTR was not prevented from selling to other undertakings in the market so long as SK Innovation and EVE's demand for triple cathode materials was satisfied. Based on this and paragraph 86 of the Guidelines on Control,<sup>(5)</sup> the board scrutinised Changzou BTR's annual production and sales plans between 2022 and 2026 and observed that almost all the triple cathode materials to be produced by Changzou BTR were intended to be supplied to SK Innovation, EVE and their subsidiaries. Accordingly, the board held that Changzou BTR did not fulfil the condition of being independent from its parent companies in its sale and purchase activities and was, therefore, not a fully functional joint venture.

Therefore, the board found that the transaction could not be regarded as an acquisition but instead constituted a cooperation agreement.

### **Negative clearance**

Pursuant to article 8 of Law No. 4054, upon the application by the undertaking or associations of undertakings concerned, the board may, on the basis of information in hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of Law No. 4054.

The board determined that the transaction, which in reality constituted a cooperation agreement, gave rise to a risk of coordination between:

- SK Innovation and EVE, which both carried out activities relating to lithium-ion power batteries and lithium-ion energy storage batteries; and
- BTR Jiangsu and Changzou BTR, which both carried out activities relating to triple cathode materials.

Accordingly, the board held that the transaction had the potential to restrict competition in the market under article 4 of Law No. 4054<sup>(6)</sup> and that, therefore, the transaction could not be granted negative clearance.

### **Individual exemption**

As per article 5 of Law No. 4054, agreements and concerted practices between different undertakings, as well as the decisions of associations of undertakings, are exempt from the application of article 4, provided that:

- they ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services;
- the consumer benefits from such developments;
- they do not eliminate competition in a significant part of the relevant market; and
- they do not restrict competition more than necessary to achieve the goals set out in the first two points.

Based on its assessment and findings, the board held that, although the transaction could not be granted negative clearance under article 8 of Law No. 4054, it could and should benefit from individual exemption pursuant to article 5 of Law No. 4054.

### *New developments and improvements*

The board held that BTR Jiangsu's know-how relating to triple cathode materials, combined with SK Innovation and EVE's capital, would increase production capacity for triple cathode materials. Further, the board held that SK Innovation and EVE had the potential to ensure continuity and foreseeability in the supply of triple cathode materials by using the material in the batteries they manufactured. Therefore, the board decided that the transaction fulfilled the first condition of individual exemption.

### *Consumer benefits*

The board stated that as Changzou BTR's activities had the potential to relieve supply problems by increasing the supply of cathode materials used in lithium-ion batteries and, accordingly, contributing to price decreases. In this regard, the board decided that the activities of Changzou BTR would directly benefit undertakings using triple cathode materials in lithium-ion battery production and indirectly benefit end consumers demanding products in which lithium-ion batteries are used. Therefore, the board held that the transaction fulfilled the second condition of individual exemption.

### *Elimination of competition in significant part of relevant market*

The board stated that the main concern leading to the possibility of elimination of competition in a significant part of the relevant market was the potential for coordination between:

- BTR Jiangsu and Changzou BTR; and
- SK Innovation and EVE.

Within this scope, the board analysed the parties' market shares in the markets in which coordination had the potential to occur (ie, the markets for lithium-ion power batteries, lithium-ion energy storage batteries and triple cathode materials) and held that the parties' market shares in these markets were considerably low. In light of this, the board decided that competition elimination was not possible in a significant part of the relevant markets and that the transaction fulfilled the third condition of individual exemption.

### *Restriction of competition more than necessary*

The board noted that, while Changzhou BTR would supply the triple cathode materials to SK Innovation and EVE and prioritise their demand, the agreement did not prevent Changzhou BTR from supplying triple cathode materials to SK Innovation and EVE's competitors upon reaching the sufficient production amount. Further, the board held that the agreement did not oblige SK Innovation and EVE to purchase triple cathode materials only from Changzhou BTR, or BTR Jiangsu to end its activities in the triple cathode materials market in order to not compete with Changzhou BTR. Accordingly, the board held that the agreement did not include provisions that would restrict competition more than necessary to satisfy the first two criteria of individual exemption and that the fourth and last condition of individual exemption was satisfied.

### **Comment**

The board stated in its individual exemption assessment that Changzhou BTR was free to supply triple cathode materials to its parents' competitors upon reaching a certain amount of production. However, while assessing full functionality, the board also held that almost all the triple cathode materials that Changzhou BTR would produce would be supplied to SK Innovation, EVE and their subsidiaries. This demonstrates the difference in the board's approach to the agreement's provision stating that Changzhou BTR would supply triple cathode materials to SK Innovation, EVE and their subsidiaries. While the prioritisation of SK Innovation and EVE's demand by Changzhou BTR made Changzhou BTR dependent on its parent companies, it did not constitute excessive restriction of competition or ineligibility for individual exemption.

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### **Endnotes**

- (1) The board's decision dated 23 June 2022, Nos. 22-28/452-183.
- (2) Article 5(3) of Communiqué No. 2010/4 provides that the formation of a joint venture which would permanently fulfil all the functions of an independent economic entity will constitute an acquisition.
- (3) Paragraph 50 of the Guidelines on Control provides that joint control exists, in the clearest way, where there are two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary that an agreement exist between them. However, if there is an agreement, it must be consistent with the principle of equality between the parent companies in order to constitute joint control. Equality is also achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.
- (4) Guidelines on Control, paragraphs 81-93.
- (5) Under paragraph 86 of the Guidelines on Control, where sales from the joint venture to the parent companies are lasting in nature, the question of whether the joint venture has the necessary hardware to play an active role in the market and can be considered economically autonomous from an operational viewpoint, regardless of these sales, should be assessed. In this assessment, the proportion of sales made by the joint venture to its parent companies to the total production of the joint venture is an important factor.
- (6) Article 4 of Law No. 4054 prohibits agreements and concerted practices between different undertakings as well as the decisions of association of undertakings that have as their object or effect or potential effect of restricting competition.