Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

Friday, 12 July, 2019

Competition in the Pharmaceutical Industry

Contribution by The Turkish Competition Authority

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Competition in Pharmaceutical Industry: Turkish Competition Authority

The Turkish Competition Authority (TCA)'s experience in the health sector mostly relates to the pharmaceutical sector. Therefore, our contribution will focus more specifically on the pharmaceutical sector rather than on healthcare markets in general.

1. General View of the Pharmaceuticals Sector in Turkey

Prices in the pharmaceutical sector is specifically regulated by the government based on a reference system which refers to the prices in five to ten members of the European Union (EU) each year.[1] According to this system, average of minimum sales price provided to pharmaceutical distributors by the producers in these countries is taken as a starting point. Then, Euro is converted to Turkish Liras (TL), by taking 70% of previous year's average Euro/TL exchange rate. Government is the biggest buyer of pharmaceuticals and thanks to this system it receives large discounts. Therefore, prices in Turkey are lower than in most EU countries.

2. Cases in Turkey

There are certain kind of cases that the TCA deals in pharmaceutical sector. These are summarized below:

First type of allegation that is often brought up is discrimination. Pharmaceutical distributors (warehouses) file complaints claiming that producers discriminate between distributors about price or terms of payment. Such complaints are examined in the context of Under Article 4[2] of Act No 4054 on the Protection of Competition (Act No 4054), which corresponds to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). In the decision of *Abbott&Emek Decision*[3] it was alleged that Abbott had discriminated against Emek in agreement with other pharmaceutical warehouses. TCA decided that the complaint should be rejected as it was understood that there was no agreement restricting competition.

Second type of cases that TCA frequently handle are exemptions which are examined under Article 5 of Act No 4054, which corresponds to Article 101(3) of TFEU.

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[1] This year, these five countries has been identified as France, Spain, Italy, Portugal and Greece.

[2] "e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,"

[3] 26.10.2017 dated, 17-35/550-237 numbered TCA decision.

Exemption cases include block or individual exemptions that can involve horizontal or vertical agreements. The cases under Article 5 on pharmaceutical sector, constitutes the majority of TCA's workload regarding pharmaceutical sector. For example, *GlaxoSmithKline (GSK)&Bilim İlaç Decision*[4] is one of the most recent decisions where an individual exemption analysis for a marketing agreement was conducted. Under this agreement Bilim İlaç supports marketing activities for GSK's product named Seretide. At the same time, Bilim İlaç is a generic manufacturer of Seretide with Ventofor Kombi in the same market based on ATC-3 classification. In this case, the existence of a pay-for-delay agreement hidden behind the cooperation was examined. Bilim Ilaç was questioned if there was any application for a new generic drug patent other than Seretide which can be a rival for GSK and whether it had been recently withdrawn.In the light of the information at hand and analysis conducted, the agreement was granted individual exemption.

Lastly, exclusionary behavior of a dominant firm is evaluated under Article 6 of Act No 4054, which corresponds to Article 102 of TFEU. Most of the complaints which are filed to the TCA within the scope of this article are related to refusal to supply. In the decision of *Daiichi Sankyo&Simge*[5]*,* it was claimed that Daiichi Sankyo abused his dominant position by refusing to supply to Simge, which is one of Daiichi Sankyo's pharmaceutical distributors. In this decision, it is emphasized that although it effects the customers, in order to identify an action as an exclusive abuse, theory of harm must be based on exclusion of competitors through refusal to supply. The decision also emphasizes that there are exceptional cases, in which the possibility of refusal to supply to a non-competing customer is likely to lead to horizontal closure. After analyzing the behaviour of Daiichi Sankyo and Simge, it was concluded that there was no current or potential competition among these firms and Daiichi Sankyo's market power in upper market would not be used to exclude Simge which operates in lower market.

3. TCA's Approach for Pay-for-Delay Agreements

There are various kind of agreements between originators and generic manufacturers such as license, supply, distribution, joint marketing and production.

[4] 13.03.2017 dated, 17-10/119-54 numbered TCA decision.

[5] 22.05.2018 dated, 18-15/280-139 numbered TCA decision.

In the pharmaceutical sector, although exemption cases constitute the most of our workload, recently awareness has been raised for pay-for-delay agreements that may constitute competition violations between rivals.

The objective of pay-for-delay agreement can be achieved by other types of agreements as well. For example, originator might give a licence to the generics manufacturer in one market so that it does not enter another market. In a similar manner, marketing or distribution agreements can prevent generic manufacturers from entering the market. Therefore, it is important to evaluate the contracts' terms carefully to understand the implicit intention behind the agreement. In recent cases[6], TCA pays special attention to certain type of behavior (e.g. withdrawal of patent applications for new generic drugs) in the market in order to contribute to price and quantity competition through strengthening generic competition.

[6]For example, 13.03.2017 dated, 17-10/119-54 numbered and 31.05.2018 dated, 18-17/299-149 numbered TCA decisions.