

The reasoned decision of the Turkish Competition Board (the "TCB") concerning Allergan İlaçları Tic. A.Ş. ("Allergan") dated 8.9.2022 no. 22-41/594-248 is published on the website of the Turkish Competition Authority (the "TCA"). The TCB has decided that there is no basis for imposing an administrative fine on Allergan on the grounds that Allergan's acts allegedly constituting refusal to supply and discrimination in the distribution of the Botox products, which Allergan acts as the exporter of, cannot be qualified as an abuse of dominant position under article 6 of the Law No. 4054 on the Protection of Competition.

Phases of the File

The file was first brought to the TCB's agenda upon the application submitted on 16.08.2012 by Ulusal Ecza Deposu İlaç ve Estetik Ürünleri İthalat İhracat San. ve Tic. A.Ş. ("Ulusal"), an independent warehouse that distributes pharmaceuticals. The TCB initially decided to launch a preliminary inquiry on Allergan under its decision dated 20.09.2012 no. 12-14/1373-M, yet in consequence of such inquiry, it was decided under the decision dated 03.01.2013 no. 13-01/3-3 that there was no basis for launching an investigation on Allergan. However, Ulusal filed an administrative action before Ankara 10th Administrative Court for the annulment of the TCB's relevant decision. The action was initially dismissed by the court of first instance under the decision dated 16.09.2013 with file no. 2013/618 and decision no. 2013/1370, which was then reversed by the decision passed by the 13th Chamber of the Council of State on 07.07.2020 with file no. 2014/7119 and decision no. 2020/1774. Eventually, Ankara 10th Administrative Court revisited the matter, approved the decision of reversal and, under its decision dated 22.09.2021 with file no. 2021/961 and decision no. 2021/1452, ruled on the annulment of the relevant decision of the TCB.

Examination by the TCB

Following the judicial decision, the TCB handled the matter once more and, this time, decided to launch an investigation.

The TCB has determined that Allergan is the market leader in the Turkish "botulinum toxin" market which is in the nature of duopoly in terms of the Botox product in dispute, and has not put forward a definite determination of dominant position as it would not change the evaluation specific to the file, and conducted its examination on the axis of whether the acts in dispute could be considered as abusive conduct or not.

Refusal to Supply

Consistently with its previous decisions, the TCB has stated that refusal to supply would constitute an abuse only if the following three conditions are met cumulatively: (i) refusal is related to a product and service which is essential for competing in the downstream market, (ii) refusal is likely to eliminate effective competition in the downstream market, and (iii) refusal causes damage to consumers. The TCB has considered that the Botox product is not essential for the activities of pharmaceutical warehouses, and the other conditions are not in

place with respect to the acts under investigation. Eventually, the TCB has decided that Allergan's acts cannot be evaluated as refusal to supply in the nature of an abuse.

Allegation of Discrimination between Buyers

The TCB has compared average unit prices of sales by Allergan to pharmaceutical warehouses by years and determined that there is no case of application of a price that is specifically discriminatory for the complainant Ulusal and moreover, the average price of sales to Ulusal in 2011 was lower than the average price in most of the sales to other pharmaceutical warehouses. Thus, in terms of the allegation of discrimination, no infringement has been determined either.

Conclusion

In the light of the findings and evaluations stated above, the TCB has concluded that the allegation of refusal to supply of the Botox product to and discrimination towards Ulusal by Allergan could not be described as abuse of dominant position under article 6 of the Law no. 4054, and under its decision dated 08.09.2022 no. 22-41/594-248, the TCB has ruled that there is no basis for imposition of an administrative fine on the relevant undertaking.

The views expressed in this memo are those of the authors and aimed only at providing brief information on the relevant subject matter. This memo does not constitute a legal document or a legal opinion or legal advice. Please do not hesitate to contact our offices should you require more detailed information on any of the issues mentioned in this memo.