The Turkish competition board re-evaluates a complaint of abuse of dominant position in the pharmaceutical sector upon the annulment decision of the State Council (Roche Mustahzarlar&#305;)

Turkey, Unilateral practices, Annulment, Abuse of dominant position, Tender procedures, Regulated prices, Pharmaceutical

The Turkish Competition Board (hereinafter referred to as “CB”) had re-evaluated the allegations about the abuse of dominant position by Roche Mustahzarlar&#305; A.S. (hereinafter referred to as “Roche”), upon the annulment decision of the 13th Chamber of the State Council numbered 31.03.2008 and numbered 2006/3795 P, 2008/3413 D. on CB’s previous decision numbered 06-32/396-M, dated May 4, 2006 [1].

In the complaints against Roche, it was alleged that Roche was preventing the pharmaceutical warehouses other then Beser Ecza Deposu (hereinafter referred to as “Beser”) from entering into the Social Security Institutions (hereinafter referred to as “SSI”) tenders on the biotech goods and was further violating the competition legislation by partitioning the market, fixing prices and discriminating between the pharmaceutical warehouses.

Relevant market

CB stated that when defining the relevant market, there are two different methods, which may be applied. First method is to define the relevant market in detail by determining its exact borders and scope. As to second method, CB states that rather then searching for a strict definition, the most narrow market could be considered as the relevant market. When applying the second method, if no dominant position is assessed in the above mentioned narrow market, then there will be no need to apply the first method, since it will be apparent that there would not be a dominant position also in the larger market. In this case, CB had chosen to apply the second method.

It is stated that pharmaceutical companies realize their sales as (i) free market sales, as directly to pharmaceutical warehouses and indirectly to pharmacies through pharmaceutical warehouses and (ii) tender sales, as giving bids to tenders of SSI, government and university hospitals either directly or through its sales to pharmaceutical warehouses.

As the above mentioned narrow approach was adopted by the CB for this case, CB had chosen to consider the free market sales and tender sales as two separate markets. Moreover, CB further restricted the relevant market to sales for SSI tenders only and tried to assess Roche’s ability to act as a dominant actor in such a narrow and regulated market.

CB also examined if there are any existing substitute goods of competitors for the biotech products of Roche, which could also be presented to SSI tenders, and found out that there is also another product of Gurel Ilac Ticaret A.S. (hereinafter referred to as “Gurel”) containing the similar active elements which can be used in the treatment of cancer and dialysis patients. Thus, CB determined that there are two substitute products in the relevant market.

Assessment of dominant position
CB had determined the market shares of the above mentioned undertakings in the relevant market by examining the SSI tender documents for the years 2002 and 2003.

CB stated that the output data relating to previous tenders prevent from making a reasonable determination of dominant position similar to other relevant markets. In a normal relevant product market, where sales are made freely between buyers and sellers, market shares of undertakings are strong implications of market power and dominant position of such undertakings. However, CB underlined that the case would be different in tenders, since each tender is a challenge for a new competitive environment, a new product and a price battle.

In this scope, CB determined that in the present relevant market, where there are at least two existing competitors, the achievement of the majority of the previous bids by one undertaking does not either imply its dominant position in such market, or mean that it would not have any competitors in the following tenders.

CB also noted that the production capacity of the competing undertakings would be significant in the present case. If the other undertakings in the relevant market could not be able to provide the amount of products summoned by tenders, then it would be controversial whether they can be assessed as real competitors. CB finally stated that it is crucial for achievement of the competitive environment as to each tender summoned, the competitors to satisfy all the specifications of the relevant tender and should have a production capacity to provide the summoned amount of goods.

In the light of the above explanations, CB stated that (i) in our case the production capacity of each substitute product would be able to satisfy the amounts to be summoned by SSI tenders, (ii) these substitute products would also be able to compete with Roche’s products as to price levels in the tenders to be summoned and (iii) the achievement rate of any competitor in previous tenders does not imply that they will obtain the following tenders. Thus, CB concluded that Roche is not in dominant position in the relevant market.

Abuse of dominant position

At first hand, CB stated that an undertaking which is not in dominant position could not be accused of abuse of such dominant position under the scope of Article 6 of the Act on Protection of Competition Numbered 4054 [2] (hereinafter referred to as “Competition Act”). However, taking in to consideration the allegations which took place both in the complaints, the Investigation Boards’ Report and Indictment of the Chief Public Prosecutor, as to abuse of dominant position, CB decided to evaluate the abuse allegations independent from the existence of dominant position.

Price discrimination and excessive pricing

Pursuant to Article 6/2-b of the Competition Act, "...making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts" is considered as the abuse of dominant position.

However, CB stated that creating competition in a tender is the responsibility of the party summoning the tender. By the logic of tenders, the summoning party has the ability to raise or decrease the prices by using its ability to purchase in mass amounts and moreover, such a party has the right to cancel the tender if it can not achieve its goal for price.

Thus, any price compatible with the specifications of each tender can not be considered as discriminating and/or excessive from the viewpoint of competition legislation.

Discrimination by refusing to provide products
The second allegation was that Roche was only working with Beser in SSI tenders for biotech products and positively discriminates Beser by not supplying any biotech products to other warehouses for SSI tenders.

CB noted that the Block Exemption Communiqué [3] on Vertical Agreements is providing an exemption in block from the prohibition in Article 4 of the Competition Act [4], for all vertical agreements having an exclusive nature, provided that they contain the required conditions. In other words, the agreements entered into by the undertakings in dominant position also benefit from this Communiqué and just because of this fact, such agreements would not constitute the abuse of dominant position.

Moreover, Investigation Boards' Report alleges that Roche was preventing competition by only working with a sole warehouse. CB herein states that by this allegation Investigation Board only refers to in-brand competition and misses out the competition between different brands. Since there are substitute products in the market, such warehouses always have the opportunity to engage with such other brand/s for entering into the tender.

Excluding the competitors

The last allegation is that Roche was pushing Gurel out of the market. However, how the act of excluding Gurel from the relevant market was not defined in the allegations.

Roche was only working with one warehouse and in principal was not decreasing the offered price under the maximum level determined by the government for SSI tenders. CB stated that these two facts were invalidating the allegations. According to the CB's opinion, Roche was encouraging its competitors to enter into the relevant market by applying the utmost limit of prices. Secondly, by working with only one warehouse, Roche avails the other distribution channels for the use of its competitors. This also enables the competitors to enter into the relevant market rather than pushing them out.

Decision of CB

In the evaluation of the file, CB decided that all the allegations in this case had been dealt within previous decisions of CB and there is no new evidence to be evaluated. Therefore, CB rejected the complaints by majority of votes.

The Vice-President of the CB stated in his dissenting opinion that the annulment decision of the 13th Chamber of the State Council numbered 31.03.2008 had been appealed. CB should have first awaited the outcome of the said appeal before concluding any decision and should have considered and discussed the merits of the appeal award in its final decision.

Conclusion

Although this decision was taken by CB after detailed investigations in the relevant market by taking into consideration the unique features of the market, competitors and products, it is not possible not to agree with the dissenting opinion of the CB's Vice-President, in order to (i) achieve the coherent decisions at different decision making levels, (ii) not to cause any vagueness on the dependability of the CB's decisions and (ii) prevent any further time prolongations.

[1] To consult the decision, see the following link: http://www.rekabet.gov.tr/dosyalar/....

[2] To consult the complete text of the Competition Act, please see the following link:
http://www.rekabet.gov.tr/index.php/....

[3] To consult the complete text of the Block Exemption Communiqué, please see the following link:
http://www.rekabet.gov.tr/dosyalar/....

[i] To consult the complete text of the Competition Act, please see the following link : http://www.rekabet.gov.tr/index.php...

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