

## Competition Law Perspective on The Prohibition of Exports in the Supply of Pharmaceuticals

**Update: Investigations open on Roche Müstahzarları San. A.Ş. upon 13th Chamber of the Council of State's annulment of the Competition Board's decision no. 10-44/785-262.**

### I. Background

The Competition Board ("the Board") has had the chance to examine the clauses containing restrictions or prohibitions on exports in contracts for the supply of pharmaceuticals put in place by the supplying firms. The complaint filed by Co-Re-Na Pharmacy Warehouse ("Corena") contained allegations that Roche Müstahzarları San. A.Ş. ("Roche") had, different to contracts of 2008 and 2009, added a clause on prohibition of exports in the 2010 contract, had consequently refused to supply to Corena, and that other Pharmacy Warehouses also refused to supply to Corena when approached for supplies. Upon the Board's decision not to open investigations, Corena applied to the Council of State for the annulment of the administrative decision. The decision of the Board was annulled with the decision of the 13th Chamber of the Council of State of 16.12.2016 no. 2010/4617 E., 2016/4241 K., following which the Board re-examined the documents and information present in the file in a meeting held on 08.06.2017 and decided to initiate an investigation on Roche's activities.

### II. Competition Board's stance on restrictions on exports in the pharma sector

The Competition Act No.4054 is applicable to activities of undertakings as far as they produce an impact on Turkish markets ("impact theory"). This theory has been put into practice in many of the Board's decisions. More specifically with the Hyundai/Uçar Otomotiv (07-59/684-240) and Levi Strauss (08-41/565-213) decisions the Board seems to have kept a consistent stance on the where the impact of export prohibitions hit. The Board, just as in these decisions, measures the impact of export prohibitions and where they might materialise and accordingly does not consider that export prohibitions fall under the scope of the Competition Act for lack of effect on Turkish markets.

The Board, after deciding the way it did in Roche/Corena, granted a declaration in Novo Nordisk (05.02.2016, 15-06/71-29) that the contract in question containing an export prohibition did not infringe competition law. The Board then granted a declaration along the same lines in Servier (23.06.2016, 16-21/363-169), making reference to the earlier Roche and Novo Nordisk decisions, reasoning that the prohibition of exports would not affect Turkish markets.

### III. The decision of the Council of State

The matter that comes forward and is repeated multiple times in the decision of the Council of State is as follows:

"... it is beyond doubt that the Board decides not to open investigations in the event that the preliminary investigations reveal that there is positively no activity, decision, or agreement that infringes competition law, but that in the event that the evidence and information collected in preliminary investigations are not sufficient to come to that conclusion the Board must open investigations." (Council of State, 13th Chamber, 16.12.2016 T., 2010/4617 E., 2016/4241 K., pp.4).

Coming from this, it can be said that the reasoning behind the annulment was that the Board had failed to do enough research to enable itself to form a certain opinion that opening investigations would be superfluous. Indeed the Board did ask Corena to provide information on their sales both within and outside of the country and the percentage of Roche products in the sales figures, and was left in want after Corena promised but never did supply the information. The Board however decided not to investigate.

In addition, the Council of State did mention the following in passing:

"... still it is obvious that the allegations put forth by the applicant in their complaint form, if true, would have an effect on Turkish markets." (Council of State, 13th Chamber, 16.12.2016 T., 2010/4617 E., 2016/4241 K., pp. 8)

The Council of State provided no reasoning for this statement.

### IV. Expected impact of the Council of State's decision on export prohibitions

The exact scope of the investigations cannot be extracted from the notice published on the website of the Competition Authority. It must not be forgotten that the annulled decision contained more than one allegation. What can be taken away from the decision is that the Council of State found the Board's examination inadequate and unsatisfactory. There is additionally the finding that an export prohibition would affect the Turkish markets. In any case, neither the decision of the Council of State nor the Board's decision to open investigations directly affects the stance adopted by the Board. The matter should be re-evaluated after the Board comes to a conclusion after investigations