Turkish Competition Authority to Reinvent Effects Doctrine in Pharmaceutical Industry: Roche Decision

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Article by Bahad?r Balk?

Introduction

On 27 September 2018, Turkish Competition Authority ("**TCA**") published its decision[1]concerning the allegations that Roche Müstahzarlar? A.?. ("**Roche**") had violated articles 4 and 6 of the Law on the Protection of Competition ("**Competition Act**"). Within this scope, the TCA re-evaluated whether (i) Roche's agreement with a pharmaceutical wholesaler, Co-Re-Na Ecza Deposu D??. Tic. Ltd. ?ti. ("**CORENA**"), which imposed an export ban on the buyer and (ii) its alleged interference with other wholesalers for interrupting their supply of goods to CORENA is in accordance with the law. This decision is crucial as it will shed some light on the TCA's approach towards export ban clauses. As will be explained below, the TCA insisted on its previous conclusion that the export ban in the agreement falls out of the scope of the Competition Act. The details of TCA's reasoning will only be made public when the reasoned decision of the TCA is published.

A Brief History of the Case

The TCA first initiated a preliminary inquiry to analyse CORENA's claims lodged against Roche, which simply indicated that the articles 4 and 6 of the Competition Act has been violated. CORENA alleged that Roche refused to sign a supply agreement with CORENA, in connection with its refusal to remove the export ban in the agreement, despite the objection made by CORENA. The allegations further pointed out that Roche prevented its other wholesalers from dealing with CORENA.

The TCA concluded that there were no legal grounds to initiate a full-fledged investigation based on these allegations in light of the evidence obtained during the preliminary inquiry[2]. Upon the TCA's decision, CORENA filed an appeal before the Turkish Council of State. In 2016, the Turkish Council of State annulled TCA's decision on the grounds that it contradicts with the Competition Act and thus the TCA was required to make a re-run of the previous case[3]. Following the decision adopted by the Council of State, the TCA has initiated an investigation which it has recently concluded. As the reasoned decision to be published later, the TCA decided that Roche's behaviour put under the scope via allegations, could not be deemed as a violation of the Competition Act and thus

Roche shall not be required to pay any administrative fine.

Merits of the Case

When the allegations were first brought before the TCA in 2010, the merits of the case were scrutinized under the following topics:

1. the export ban clause included in the purchase agreement for pharmaceutical products between Roche and CORENA, and
2. Roche's interference to other suppliers (i.e. other wholesalers) for restricting CORENA's capability to supply.

With regards to the first point set forth by the TCA, the clause restricting exports in the supply agreement was not considered to fall within the scope of the Competition Act. In its assessments, the TCA indicated that the export ban in question did not affect the Turkish pharmaceutical market as the agreement merely prevented the sales of goods abroad and thus only affected the markets outside of Turkey. Pursuant to the "*effect doctrine*" set forth in the Competition Act**[4]**, territorial applicability of the act is limited with conduct that affects any relevant market within Turkey.

A re-sale restriction, which only prohibits the buyer from exporting the relevant goods, falls outside of the Competition Act's scope per the effect doctrine, since it only isolates the foreign markets from competitive restraint that the sales of goods in question could have exposed in the absence of such restraint. Nevertheless, this is not the case for export bans that prevent the reseller to conduct sales to customers within Turkey who may then export the goods in question (*i.e.* indirect export bans). For instance, the TCA distinguishes between direct and indirect export bans as in its Takeda Decision**[5]**, indicating that a direct export ban prohibits a buyer from exporting a given product, whereas indirect export bans disable the buyer from selling such product to a purchaser in Turkey with a potential to export afterwards. Pursuant to this two-pillared approach adopted by the TCA**[6]**, a direct export ban falls outside of the Competition Act's scope, whereas an indirect export ban is within its scope and it may only be valid in case it satisfies the conditions for an individual exemption set forth in the article 5 of the Competition Act.

In its 2010 decision, the TCA held that the export restriction in the agreement should be deemed as a direct export ban even though the wording of the clause was not unambiguous**[7]**:

"Therefore, it is not possible to undertake direct or indirect sales (exportation, etc.) of the products sold to the warehouse by Roche, to the countries outside the Republic of Turkey and/or to the persons and institutions located in such places or to release such products outside the territory of the Republic of Turkey by different means with commercial

purposes."

The TCA particularly underlined that the relevant clause only prohibits Roche's customers' sales of Roche products outside of Turkey and that it does not include any restrictions as to their sales to customers or regions within Turkey.

With regards to the second allegation, the TCA concluded that the mere refusal of CORENA's purchase request by other wholesalers do not constitute sufficient evidence to establish a violation. The TCA indicated that a violation would be proven only if the wholesalers' refusal could be associated with either the clause restricting exports, or the *de-facto* pressure imposed by Roche. Upon further examination and based on the information received from the wholesalers that were pointed out in the allegations of CORENA, the TCA determined that it was not possible to establish a causal link between the agreements or Roche's conduct and wholesalers' refusal to deal with CORENA.

Opinion of the Council of State and the TCA's Contrasting Approach

The Council of State of Turkey has annulled the decision of the TCA, indicating that the alleged conduct could affect Turkish markets and thus the allegations shall be assessed in light of the evidence obtained throughout the case and further elaboration of findings within the scope of an investigation was necessary. The reasoning of the Council of State was as follows[8]:

"(…) when the scope of the Act is considered, it is evident that the allegations included in the application regarding the complaint of the plaintiff would have effect in the Turkish market, and with regards to the other allegations, that the evidence provided by the plaintiff enclosed to its letter of complaint shall be evaluated in detail, acutely."

The critical issue with respect to Council of State's foregoing assessment is that it does not specify whether it deems that direct export bans may affect Turkish markets or the relevant clause in Roche's distribution agreements include an indirect export ban.

The outcome of the TCA's investigation, which was initiated following the Council of State's decision was long awaited as it could finally show how the TCA interpreted Council of State's remarks and it could clarify how the TCA determines whether a certain restriction constitutes a direct or an indirect export ban. The short decision of the TCA lacks any detail whatsoever and it only states that the TCA did not find a violation.

The reasoned decision would clarify how the TCA reached this conclusion. There are two alternatives depending on TCA's interpretation of Council of State's decision.

If the TCA considered that the Council of State had disagreed with its position that the relevant clause did not include an indirect export ban, the reasoned decision will probably

include an individual exemption analysis with respect to the indirect export ban imposed by Roche. The established precedents of the TCA show that it generally grants individual exemptions to indirect export bans in the pharmaceutical industry[9]. This is the most likely outcome and would come as a relief.

If, on the other hand, the TCA considered that the Council of State had disagreed with its position that a direct export ban is outside the scope of the Competition Act, the reasoned decision would be the first of its kind where a direct export ban is deemed to be within the scope of the Competition Act and is subjected to an individual exemption assessment. If this unlikely scenario is realized, this could potentially have significant impacts not only on the pharmaceutical industry but on many other industries as well since direct export bans are extremely common in Turkey.

To sum up, the short decision did not eliminate the current uncertainty concerning the evaluation of direct export bans under Turkish competition law. Although the chances of seeing an unexpected decision is very low, the suspense still remains due to the high stakes.

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[1] Decision of the TCA dated 26.09.2018 and numbered 18-34/577-283. The text of the decision in Turkish is available at **http://www.rekabet.gov.tr/Dosya/geneldosya/1-roche.pdf**

[2] Decision of the TCA dated 17.06.2010 and numbered 10-44/785-262.

[3] Decision of the Council of State numbered E. 2010/4617, K. 2016/4241.

[4] The effects doctrine is founded by the article 2 of the Competition Act, which reads as the following: "*This Act covers all agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the borders of the Republic of Turkey; abuse of dominance by dominant undertakings in the market; any kind of legal transactions and behavior having the nature of mergers and acquisitions which may significantly decrease competition; and transactions concerning the measures, observations, regulations and supervisions aimed at the protection of competition.*"

[5] Decision of the TCA dated 03.04.2014 and numbered 14-13/242-107.

[6] Decision of the TCA dated 03.04.2014 and numbered 14-13/242-107, para 28.

[7] Decision of the TCA dated 17.06.2010 and numbered 10-44/785-262, para 70.

[8] Decision of the Council of State numbered E. 2010/4617, K. 2016/4241, p. 8.

[9] Decision of the TCA dated 05.02.2015 and numbered 15-06/71-29.