

The Turkish High State Court annuls the Competition Board's decision concerning parallel export restrictions in a vertical agreement (*Roche / Corena*)

Anticompetitive practices, Pharmaceutical, Agreement (notion), Turkey, Annulment, Anticompetitive object / effect

Turkish High State Court, Roche/Corena, 2010/4617 E., 2016/4241 K. 16 December 2016

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This case summary includes an analysis of the annulment decision of 13th Chamber of the High State Court (2010/4617 E., 2016/4241 K) (“**High State Court**”). The High State Court cancelled the Turkish Competition Board's (the “**Board**”) decision on parallel export restrictions in vertical agreements. In its decision [1], the Board concluded that the export ban placed on a pharmaceutical wholesaler, CO-RE-NA Ecza Deposu Dış Ticaret Ltd. Şti. (“**Corena**”) by the supplier, Roche Müstahzarları San. A.Ş. (“**Roche**”) does not affect competition within the borders of Turkey, and therefore it was not within the scope of the Law No. 4054 on Protection of Competition (“**Law No. 4054**”). The Board also evaluated the allegations that Roche exerted a vertical restraint on its wholesalers by preventing them from supplying Roche products to Corena. The Board concluded that export bans were outside its jurisdiction and decided not to initiate a full-fledged investigation against Roche which eventually led Corena to seek a judicial remedy before the High State Court.

Background

Corena is a pharmaceutical wholesaler the main activity of which is exporting medicinal products for human use. Corena had been sourcing its products from Roche and other pharmaceutical companies consecutively in 2007, 2008 and 2009.

Roche had been supplying pharmaceutical wholesalers with its products with yearlong sales agreements. In the beginning of 2010, Roche introduced an export ban provision to its contracts and supplied its products to wholesalers which agreed to sign the agreement that includes the parallel export ban. The relevant provision on the export ban as set out in the agreement between Roche and pharmaceutical wholesalers is as follows:

“With this agreement, the wholesaler is permitted to sell Roche products within the borders of Turkey. The products supplied by Roche in Turkey are packed and prepared (including their prospectus) in accordance with the relevant Turkish legislation. To that end, Roche products shall not be directly and/or indirectly sold (exported etc.) to other countries and/or persons and entities in other countries outside of Turkey.”

Corena placed an order on although it had not signed the amended agreement with Roche. Corena informed Roche that if the export ban is removed from the agreement text, it would sign the agreement. Roche communicated to Corena that exporting its products and failing to comply with the legislation in the importing country may result with Roche’s legal and criminal liability in these countries and refused to supply the products unless the agreement is signed by Corena. According to the decision, in an attempt to source Roche products from alternative channels, Corena placed orders with other pharmaceutical wholesalers, though its orders were denied by the wholesalers due to the export ban introduced by Roche.

As a result, upon the complaint of Corena, the Board initiated a pre-investigation against Roche to analyze the allegations and focused on two main points in its assessment:

- (i) the export ban placed on the vertical agreement between Corena and Roche
- (ii) prevention of other pharmaceutical wholesalers’ sales of Roche products to Corena

The Board stated that the restrictions imposed by a supplier that may restrict the territory or customer groups will be considered within Article 4 of the Law No. 4054. Agreements that fix the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms and conditions of purchase or sale are considered having the object or effect to prevent and distort the competition. Therefore agreements that restrict territory and customer sales are prohibited under Law No. 4054. With that in mind, the Board also stated that restrictions to the sales territory outside Turkey will not be considered within the meaning of Article 2 of Law No. 4054 which determines the territorial scope of the Law No. 4054. Pursuant to Article 2, the scope of the Law No. 4054 is limited to agreements, practices, transactions and decisions that lead to an effect on the Turkish markets. To that end, the Board concluded that since the relevant provision of the agreement would not affect human medicines markets in Turkey, it is considered to be outside the scope of Law No. 4054.

As for the pharmaceutical wholesalers that allegedly were not allowed to supply Roche products to Corena, the Board stated that there was not sufficient evidence to conclude that Roche was indeed pressuring the wholesalers not to supply Corena. The Board also stated that the complainant failed to provide sufficient information with regards to potential effects and magnitude of Roche's alleged conducts. Therefore the Board found that the lack of sufficient evidence to verify Corena's claim and the absence of collaboration of the complainant during the pre-investigation process raised suspicion concerning the merits of the allegations.

In conclusion, the Board decided not to initiate a full-fledged investigation as (i) the parallel export ban is considered to be outside the scope of Law No. 4054 and (ii) there was lack of evidence with regards to the allegations of restricting wholesalers' sales to Corena.

High State Court's Decision

Corena sought judicial remedies before the High State Court against the Board's decision [2]. The investigating judge and the High State Court prosecutor concurred in their separate opinions to dismiss the case before the court as they both separately stated that the parallel export ban introduced by Roche would not violate Law No. 4054 since export bans were outside its scope and that the allegations concerning Roche pressuring other pharmaceutical wholesalers to not to supply Corena were without merit considering that the Turkish Competition Authority did not find any evidence supporting the allegations during the pre-investigation process.

That said, the High State Court did not concur with the opinions of the investigating judge and the High State Court prosecutor. The High State Court remarked that it is evident that Corena's allegations had an effect in Turkish market and that the evidences annexed to the complaint petition of Corena must have been taken under serious scrutiny of the Board. The High State Court concluded that the Board must initiate an investigation in cases where there is not satisfactory evidence to assess the accuracy of allegations rather than not opening an investigation. As a result, the High State Court annulled the decision of the Board's decision.

Comments

Turkish decisional practice illustrates two pillared approach to export ban: (i) The direct export bans and (i) indirect export bans. As to the direct export bans brought by the supplier, the Board evaluated that such restrictions are deemed outside the jurisdiction of the Board, under Article 2 of Law No. 4054. A number of Board's precedents [3] indicate that the direct export ban placed on the distributors, under which the distributors' sales are limited within Turkey, would not violate the Turkish competition law. The reasoning of the Board is that an export ban placed on a Turkish distributor could be in violation of other jurisdictional

competition laws outside of Turkey. However the impact of the direct export ban does not affect competition within the borders of Turkey, and thus would not violate Turkish competition law. On the other hand, in terms of the indirect export bans, the Board highlighted that indirect foreign sales cannot be prohibited by the supplier in vertical agreements since the effects of such a restriction could appear within Turkey, given that the initial sale (i.e. sale from the distributor to the customer in Turkey) would be realized in Turkey [4].

In light of the foregoing, Corena is a cornerstone decision considering that it may introduce a new front to the established Board's precedents on export bans. Even though the High State Court annulled the Board's decision on rather a procedural ground that in lack of sufficient information and evidence the Board must proceed to a full-fledged investigation; the High State Court's findings may prove to be significant. Although the High State Court did not elaborate on how the export ban would create an effect in Turkish markets or its magnitude, its finding that export bans may create an effect in Turkish markets, is consistent with the Board's approach to indirect export bans.

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[1] Roche/Corena (17.06.2010, 10-44/785-262).

[2] Prior to an amendment in 2012, High State Court was the first instance court for seeking judicial remedies against Board decisions. After the amendment which was brought with the Law No. 6352 (published in the Official Gazette Date: July 5, 2012, Numbered: 28344), the competent administrative courts in Ankara became the first instance court for judicial review of the Board decisions.

[3] Glaxo Wellcome Plc. 02-57/727-289, 26.9.2002; Hundai/Uçar Otomotiv (11.07.2007, 07-59/684-240); Pfizer/Dilek 07-63/774-281, 2.8.2007; Sodima (08.07.2004, 04-46/597-145); Levi's (27.06.2008, 08-41/565-213)

[4] Pfizer/Dilek Ecza Deposu (02.08.2007, 07-63/774-281)