

# Competition Board publishes reasoned decision on pharmaceutical industry

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## Introduction

### Assessment of TEB's market position

### Assessment of exclusivity arrangements

### Administrative fine

### Measured for promotion of competition in market

## Introduction

The Competition Board recently published a reasoned decision (December 6 2016; 16-42/699-313) following its investigation into whether the Pharmacists' Association (TEB) and the Pharmacists' Association Commercial Enterprise (TEBII) had violated Article 6 of Law 4054 on the Protection of Competition by abusing their dominant position in the market for the supply of pharmaceuticals from abroad through their exclusivity practices and other actions.

Following the investigation, the board decided unanimously to impose an administrative monetary fine amounting to 1.5 % of the TEBII's Turkish turnover for the 2015 financial year (which corresponded to TRY18,062,307.32), as it concluded that:

- the TEBII enjoys a dominant position in the market for the supply of pharmaceuticals from abroad; and
- the TEBII had abused this dominant position by entering into exclusive agreements with suppliers.

## Assessment of TEB's market position

The board concluded that the TEBII held a strong position in the market for pharmaceuticals procured from abroad. Further, the board found that the Social Security Institution's (SGK's) refusal to execute protocols with pharmaceutical warehouses constituted an entry barrier to the market. In addition, the board indicated that the TEBII had become the sole distributor in the market for pharmaceuticals supplied from abroad following the cancellation of the authorisation granted to pharmaceutical warehouses by the Ministry of Health. In light of these findings, the board concluded that the TEB had enjoyed a dominant position in the relevant market and evaluated the agreements executed between the TEBII and the companies that procure pharmaceuticals from abroad in terms of exclusivity. To that end, the board determined that:

- the agreements included exclusivity arrangements; or
- the pharmaceutical companies had been working exclusively with the TEBII, which amounted to *de facto* exclusivity.

## Assessment of exclusivity arrangements

Having considered the TEBII's dominant position in the market, the board indicated that the possibility of the pharmaceutical warehouses in question to enter the market had been significantly reduced due to:

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- the TEBII's supply agreements, which contained exclusivity provisions; and
- the SGK's administrative actions.

The TEBII's exclusivity agreements were found to increase market foreclosure, both actually and potentially, and to harm customer benefits. To that end, the board decided that the documents in the case proved that the TEBII's actions would lead to market foreclosure. Thus, the board found that the TEBII had:

- carried out abusive conduct by executing exclusivity agreements with companies which procured pharmaceuticals from abroad;
- hindered its competitors' activities; and
- violated Article 6 of Law 4054.

### **Administrative fine**

As the TEBII's violation of Law 4054 had lasted more than one year and less than five years, aggravating factors were considered under Article 5(3)(a) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and the Abuse of Dominant Position. Further, the board also considered the SGK's motivation as a public authority and deemed it to be a mitigating factor as per Article 7(1) of the regulation. As a result, the board determined the ratio of the administrative fine to be 1.5% of TEBII's Turkish turnover generated in the 2015 financial year.

### **Measured for promotion of competition in market**

The board also instructed the Competition Authority president to send an opinion to the Ministry of Health and the SGK to promote competition in the supply of pharmaceuticals from overseas. The board stated that the SGK had adopted a discriminatory approach in favour of the TEBII and prohibited agreements with pharmaceutical warehouses, even in cases where legislation allowed such practice. The board found that promoting competition in the market for pharmaceuticals procured from abroad would:

- ensure that patients had an alternative procurement source; and
- improve services in the market.

Further, due to the price competition among supplier companies to provide the SGK with pharmaceuticals at the cheapest price available, the SGK's burden in terms of overseas pharmaceuticals would decrease. The board highlighted that following the authorisation of pharmaceutical warehouses to import pharmaceuticals from abroad, a decrease in commission rates (from 11% to 3.9%) occurred, despite a lack of competition on equal conditions. The board concluded that this indicates that promoting competition in the market would serve the public interest.

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