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The Ankara 8th Regional Administrative Court reverses the 13th Administrative Court's decision that annulled the Turkish Competition Authority's decision on an exemption application of a FMCG Company for its selective distribution agreement (*Johnson & Johnson*)

UNILATERAL PRACTICES, DISTRIBUTION/RETAIL, AGREEMENT (NOTION), BLOCK EXEMPTION (REGULATION), SELECTIVE DISTRIBUTION, PHARMACEUTICAL, PARALLEL IMPORTS, TURKEY, EXEMPTION (INDIVIDUAL)

Ankara 8th Regional Administrative Court, *Johnson & Johnson*, Case No:2022/894 E., 2022/1032 K, Court decision, 23 September 2022

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This article aims to provide a case analysis of the Ankara 8th Regional Administrative Court's ("**Regional Court**") judgement annulling Ankara 13th Administrative Court's ("**Administrative Court**") judgement that annulled the Turkish Competition Board's ("**Board**") Johnson&Johnson Sıhhi Malzeme Sanayi ve Ticaret Limited Şirketi ("**J&J**") decision on the exemption application of J&J for its selective distribution agreement which was later revisited by the Board following the annulment decision of the Administrative Court.

Initial Assessment of the Board

In 2019, J&J applied before the Turkish Competition Authority ("**Authority**") requesting the Board to assess whether its Warehouse Sale Agreement for Human Medicine ("**Agreement**") to be executed with nine selected pharmaceutical warehouses regarding the distribution of four of its pharmaceuticals (Imbruvica, Zytiga, Stelara and Darzalex) fell within the protective cloak of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"), and, if not, whether the Agreement satisfied the conditions for an individual exemption as per Article 5 of the Law No. 4054 on the Protection of the Competition ("**Law No. 4054**"). The Agreement aimed to establish a selective distribution system in which nine pharmaceutical warehouses

would be appointed as authorized warehouses of the relevant four pharmaceuticals, with an obligation to not to resell, supply or exchange such pharmaceuticals to other warehouses and to not export them outside of Turkey. In that sense, the Agreement constituted a quantitative selective distribution system and J&J stated that main goal of the Agreement was to prevent these pharmaceuticals being subject to parallel export.

In parallel with the European Commission's practice and its previous decisions, the Board evaluated the relevant product market and concluded that all four products had rivals and the market share of J&J for each of these four pharmaceuticals were below the pre-amended threshold of 40% stipulated under the Communiqué No. 2002/2. Considering the Board's established precedent of granting block exemption to selective distribution systems in which the suppliers' market share were below the safe harbor set forth under Communiqué No. 2002/2, it could have been expected for the Board to conclude the Agreement would benefit from block exemption. However, the Board followed an unconventional path by stating that "*the products should require a selective distribution system due to their characteristics and the criteria should be necessary to secure the effective distribution of the products*".

The Board highlighted that selective distribution systems were usually preferred for automobile, cosmetics and durable consumer goods for brand image protecting purposes and the pharmaceutical sector did not require such system. Although J&J argued that the four products in question had certain distinctive characteristics and therefore were an exemption even within the pharmaceutical sector; the Board concluded that the Agreement could not be considered within the selective distribution system. The Board stated that the Agreement did not only restrict active sales but also restricted passive sales given that the appointed warehouses were banned from selling or exchanging the products to other warehouses. Therefore, the Board concluded that despite J&J's market shares were below the safe harbor, this would not be sufficient to benefit from block exemption and a separate assessment for individual exemption should be carried out.

J&J claimed that limiting the number of warehouses was necessary for preventing parallel exports and that the explicit export ban clause in the Agreement would not be sufficient to prevent parallel exports. Although the Board acknowledged that the pharmaceuticals could be subject to parallel exports, it ultimately concluded that the export ban clause should be sufficient and the selective distribution system would restrict the competition more than what is necessary. Based on these assessments, the Board found that neither block nor individual exemption could be granted to the Agreement.

The Administrative Court Disagrees with the Board's Assessment

J&J appealed the Board's decision and brought the case before the Administrative Court claiming that (i) the decision contradicted the Board's precedent as well as the relevant legislation, (ii) the Agreement would not result in hampering and impediment of the consumers' accessibility to the products and (iii) if such exemption was not granted availability of the products would be imperiled.

The Administrative Court highlighted that the market share of J&J for each of the pharmaceuticals in question was below the pre-amended threshold of 40%, and even below the amended threshold of 30%. Contrary to the Board's findings, the Administrative Court stated that consumers' accessibility to the products would not be hampered or impeded with the selective distribution system set forth under the Agreement considering that all cities in Turkey would be supplied by at least two warehouses and that an emergency distribution system would prevent any shortage and allow the consumers to access the products in less than 24 hours.

The Administrative Court also quashed the Board's argument that the export ban clause in the Agreement would be sufficient in terms of preventing parallel exports, concluding that a selective distribution system would impede competition more than necessary pointing out the solid cases where medicines traced with batch codes were exported.

Regarding the Board's individual exemption assessment, the Administrative Court countered the Board's argument that pharmaceutical industry did not require technical and professional capabilities by stating that it in fact required certain capabilities including feedback from patients thanks to the specific regulations. Additionally, the Administrative Court stated that current legislations did not provide concrete measures to prevent parallel exporting of the products, and eventually ruled that the Board's rejection was unlawful, annulling the decision of the Board.

Following the Administrative Court's annulment decision, the Board revised its decision which rejected to grant exemption to the Agreement. In its latter decision, the Board complied with the Administrative Court's decision and granted block exemption to the Agreement for its selective distribution system with a majority of the votes.

The Board's Turn to Appeal: Regional Court Decision

Following its latter decision, the Authority appealed the annulment decision before the Regional Court. In its assessment regarding block exemption, the Regional Court found that the Agreement was a vertical agreement within the meaning of Article 4 of Law No. 4054, and although J&J met the prerequisite condition for the block exemption due to its market share, the envisaged selective distribution system was not deemed necessary for the pharmaceutical sector. Therefore, the criteria on which the selection of distributors in the application was based could not be explained by the characteristics of the products in question, thereby concluding that the sales restrictions imposed on the warehouses excluded the Agreement from the protective cloak of block exemption.

As for the individual exemption, the Regional Court -stated that although the Agreement might have contributed to the distribution of products and the provision of services, post-Agreement structure should have been evaluated in all aspects. Accordingly, since the relevant warehouses would not be able to sell, supply or exchange products to warehouses outside the system, the Regional Court concluded that implementation of the Agreement would only result in interference with the resale of the distributors rather than increase in efficiency noting that the envisaged system was not essential to ensure the availability of the products in Turkey. Regarding the consumer benefit, the Regional Court concluded that despite it would provide partial benefit; the ban on the sale of nine warehouses might make it difficult or delay the access of patients to medicine.

Overall, the Regional Court concluded that a product of vital importance for consumers could not be evaluated in the same category with other products in terms of public interest and it would be in the public interest to keep the distribution network of a product of vital importance as wide as possible.

Conclusion and the Next Step

The J&J case was of significant importance at each step of the process. The initial decision of the Board was one of the rare occasions where it strayed from its precedents by rejecting the exemption application for a selective distribution system on the grounds that "*products should require a selective distribution system due to*

their characteristics” despite its market shares were below the safe harbor explicitly provided under the Communiqué No. 2002/2.

The Administrative Court’s decision was also noteworthy as it circumvented the attempt of the Board to assess the nature of the product while granting exemption to quantitative selective distribution systems.

The Board’s revised decision granted block exemption to the Agreement and allowed J&J to implement the contemplated selective distribution system. However, as the Regional Court reversed the annulment decision, the execution of the Administrative Court’s decision was automatically stayed.

Needless to say, the parties may opt to bring the case before the Council of State for final judicial review, and the time will shed further light on this ongoing debate.