



## **The Turkish Competition Board Emphasizes the High Standards Applied in the Assessments Regarding the Allegations Concerning Discrimination and Refusal to Supply in the Pharmaceuticals Sector**

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### **I. Introduction**

The Turkish Competition Board (“**Board**”) has recently assessed the allegations that Allergan İlaçları Ticaret A.Ş. (“**Allergan**”) engaged in discriminatory conduct and abused its dominant position by way of refusal to supply in its preliminary investigation decision<sup>1</sup>. The complainant, Denge Ecza Deposu Ticaret A.Ş. (“**Denge**”), alleged that Allergan supplied some of its pharmaceutical products only to certain warehouses, rejected Denge’s request to work with Allergan and hindered Denge’s activities by restricting its access to Allergan’s products. The Board’s decision is remarkable as it assesses the allegations in detail under both Article 4 (anticompetitive agreements) and Article 6 (abuse of dominant position) of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by discussing the competition literature on certain concepts such as indispensability and essential facilities doctrine and making references to the decisional practice in the European Union.

### **II. Relevant Product Market**

The Board emphasized the dual-level nature of the distribution activities in the pharmaceuticals sector and stated that pharmaceutical warehouses operate in the wholesale level while pharmacies engage in retail sale of products. To that end, the Board stated that there are two main types of pharmaceutical warehouses, namely (i) warehouses that distribute to community pharmacy channel and (ii) tenderer warehouses. It also noted that the

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<sup>1</sup> The Board’s decision (25.2.2021; 21-10/129-54).

allegations set forth within the casefile relate to warehouses focusing on the resale of pharmaceutical products procured from manufacturers to community pharmacies.

In terms of the market characteristics, the Board emphasized the extensive regulations from obtaining licenses to storage and distribution of pharmaceutical products and stated that profit margins of warehouses are determined by public authorities, indicating warehouses' limited control over prices of products. As to the relevant product market definition, the Board carried out its assessment based on ATC-3 classification and defined eight separate product markets for Allergan's relevant eye care products subject to the preliminary investigation. The Board defined the relevant geographic market as Turkey.

### **III. The Board's Substantive Assessment**

#### *The Board's Assessments under Article 4 (Anticompetitive Agreements)*

The Board initially assessed Denge's allegations under Article 4 (anticompetitive agreements) of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). In its assessment under Article 4, the Board assessed as to whether Allergan's agreements concluded with pharmaceutical warehouses include any restriction that may restrict intra-brand and/or inter-brand competition.

In this regard, the Board stated that Allergan's relevant agreements do not include any provision related to exclusivity or non-compete obligation. Accordingly, the Board concluded that the agreements do not have any negative impact on the inter-brand competition in any way.

As to intra-brand competition, the Board pointed out the regulated nature of pricing of pharmaceutical products through relevant public regulations and stated that Allergan's agreements do not have any impact on the intra-brand competition due to the relevant regulations. To that end, the Board also assessed the clause in Allergan's agreements prohibiting the sale of Allergan's products outside of Turkey and concluded that the relevant clause does not directly affect competition in Turkey by referring to its past decisional practice involving export bans.

Moreover, the Board evaluated whether sales to other warehouses are restricted by Allergan and whether Allergan seeks any criteria in selecting warehouses that it plans to work with. After reviewing Allergan's agreements, the Board concluded that the agreements between

Allergan and its warehouses do not include any provision prohibiting sales to other warehouses. In other words, warehouses can freely sell to other warehouses. The Board also stated that Allergan considers reasonable criteria in determining the warehouses it will work with, such as the warehouse's financial status, compliance to the legislation in force, size and capacity. The Board also underlined that Allergan can work with other warehouses; if there is such a need in the future due to the market needs and progress of the sales.

Consequently, the Board concluded that Allergan's relevant agreements do not lead to any competition law violation under Article 4 of Law No. 4054.

*The Board's Assessments under Article 6 (Abuse of Dominant Position)*

Allergan's refusal of Denge's request has been considered as a unilateral conduct by the Board. To that end, the Board classified Allergan's alleged conducts as refusal to supply and assessed as to whether Allergan engaged in anticompetitive refusal to supply by rejecting Denge's request. Even though for such analysis, cumulative criteria of (i) existence of dominant position and (ii) abusive conduct are sought under Turkish competition law, the Board did not specifically evaluate whether Allergan enjoys dominant position in the relevant markets and directly proceeded with the assessment as to whether Allergan's relevant conducts are of abusive nature.

The Board stressed that the following three criteria are sought collectively in order to determine a violation by way of refusal to supply: (i) the refusal should relate to a product which is indispensable to compete in the downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market and (iii) the refusal should be likely to lead to consumer harm.

In this regard, the Board stated that the main concern stemming from exclusionary conducts is the likelihood of anticompetitive foreclosure effect by referring to the Board's Guidelines on Abuse of Dominance as well as relevant regulatory framework in the EU<sup>2</sup>. The Board noted that in case refusal is carried out by a dominant undertaking, which is active in the downstream market, the conduct is more likely to lead to restrictive effects.

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<sup>2</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct By Dominant Undertakings.

The Board then referred to the legislative framework in the EU as well as the Board's and Commission's decisional practice involving refusal to supply and concluded that in order to determine a violation by way of refusal to supply, regardless of whether it aims at rivals or customers, refusal should be correlated with the exclusion of rivals. In other words, anticompetitive refusal to supply is deemed to arise to the extent dominant undertaking's conduct indicates the exclusionary effect against rivals.

In this regard, the Board reminded the classification adopted in the Commission Discussion Paper<sup>3</sup> as to market foreclosure and stated that vertical foreclosure may arise if refusal is made where dominant undertaking operates in the downstream market in competition with its customers by referring to the Commission's *Commercial Solvents* decision<sup>4</sup>. In this regard, the Board emphasized that there are few cases discussing horizontal foreclosure stemming from a refusal to supply conduct against non-rival customers by referring to the Commission's *United Brands*<sup>5</sup> and *Boosey and Hawkes* decisions<sup>6</sup>. To that end, the Board stated that such practices may be evaluated under horizontal foreclosure in cases where (i) refusal is made in order to discipline dominant undertaking's distributor to not promote rivals' products and (ii) dominant undertaking refuses to supply to a potential competitor.

Moreover, the Board emphasized that there is no meaningful competition between a dominant undertaking and a mere reseller of its products, implying that refusal to supply against mere resellers would not be problematic in terms of competition law. All in all, the Board noted that dominant undertaking's conduct should be aimed at a downstream or upstream rival in order to determine an abusive conduct by way of refusal to supply.

The Board then assessed as to whether Allergan's conduct leads to anticompetitive refusal to supply in light of the criteria set out in the Board's Guidelines on Abuse of Dominance.

In terms of indispensability, the fact that warehouses act merely as resellers has been considered as a factor indicating that Allergan's products do not serve as an input for warehouses. Moreover, the Board stated that while there are 69 warehouses focusing on community pharmacies, only 12 of them has a distributorship relationship with Allergan, inferring that Allergan's products are not indispensable in terms of competition in the

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<sup>3</sup> DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses.

<sup>4</sup> C-7/73 [1974] ECR, EC.

<sup>5</sup> Case 27/76 [1978] ECR, EC.

<sup>6</sup> OJ 1987 L 286/36.

downstream market. Low share of Allergan's products among Denge's overall activities has also been considered in that regard.

As to the element on the elimination of effective competition, the fact that Allergan is not active in terms of pharmaceutical warehousing has been considered to eliminate any vertical foreclosure allegations. Nevertheless, the Board conducted an analysis as to whether effective competition has been hindered due to Allergan's conducts and concluded that Allergan's conducts did not result in the elimination of effective competition due to Denge's marginal presence in the market as well as the ability to procure Allergan's products from other warehouses. Similarly, the Board found no consumer harm associated with Allergan's conduct as Allergan is not active in terms of warehousing activities and due to the fact that the pricing of products in question is heavily regulated.

Consequently, the Board dismissed all of the allegations and decided not to initiate a full-fledged investigation against Allergan.

#### **IV. Conclusion**

The Board's decision shows that the pharma manufacturers' conducts involving refusal to supply to pharmaceutical warehouses, which merely re-sell the relevant products, are highly unlikely to violate competition laws as the requirements of the relevant applicable test are very strict and may only be fulfilled in very exceptional situations. In this regard, the decision also provides detailed assessments on the evaluation of refusal to supply in competition law, by referring to the legislative framework and the decisional practice in Turkey as well as EU.

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