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The Concept of Potential Competition – Note by Turkey

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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1. Introduction

1. A theory of harm based on the elimination of "potential competitor" has come under increased focus globally. Although this concept is not new in antitrust law, it gained prominence from concerns of mergers and acquisitions in the digital and pharmaceutical sectors. Within the scope of this OECD Roundtable on "The Concept of Potential Competition", the Turkish Competition Authority (TCA) aims to present its recent experience concerning competition law enforcement.

2. Sector Inquiries

2. On 7 May 2021, the Turkish Competition Authority (TCA) published the preliminary findings report on its e-marketplace sector inquiry[1].

3. Some of the potential competition concerns between platforms are reported as below:

- It is considered that new market entries, which are significantly restricted due to structurally high entry barriers, can also be limited by killer acquisitions.
- A legal assumption that the acquisition of a nascent company will cause harm can encourage new entrants to enter the market by targeting these killing zones and gain market power through organic growth or mergers. According to this assumption the acquisition of operating undertakings to eliminate innovation competition can be prevented. However, acting with such an assumption might have negative consequences. The main reason for this is that the theories explaining the relationship between acquisitions and innovation have not yet become comprehensive and widely accepted. In addition, unconscious interferences can lead to false positives, as the distinction between mergers that increase and decrease innovation is not yet fully established. On the other hand, such an assumption also has the risk of impeding innovation by discouraging innovative companies. Since the social costs and benefits of such an intervention need to be taken into account, a case-by-case approach may produce results that are more accurate.
- The e-marketplace platforms market differs significantly from the traditional markets on which the existing competition rules are built. The fast concentration tendency in these markets gives the operating undertakings a market power and position that is difficult to catch by other actual or potential competitors. Accordingly, there is a need to apply competition rules more conservatively and strictly in these markets. Thus, it is considered that the secondary legislation regulating the implementation of competition law rules should be strengthened in a way to eliminate the uncertainties observed in the platform economy.

[1] The sector inquiry was initiated on 11 June 2020 with the Turkish Competition Board's decision number 20-28/353-M. The competition concerns are depicted in 3 main pillars: the concerns for inter-platforms, intra-platforms, and for consumers. The policy recommendations are stated under 3 main headings: recruitment of secondary legislation, regulation of code of conduct for platforms, and lastly regulation for gatekeeper companies.

- It is considered that the anti-competitive practices of gatekeeper companies might completely eliminate the limited competitiveness of their rivals since the basic characteristics of these markets such as high scale returns and network effects, already work in favor of gatekeeper companies.
- The gatekeepers must notify the Competition Board of all acquisitions, regardless of the notification thresholds specified in the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4)

4. As it is stated in the aforementioned report, legislative study for digital markets is being carried out by the TCA at the moment. The study aims to pinpoint the gatekeepers in digital markets which provide basic platform services, identify the practices they are obliged to avoid and implement a preliminary legal regulation regarding these practices.

5. With this report, the TCA proposes to review and strengthen existing competition rules to tackle potential competition concerns arising from the practices of online platforms as a policy recommendation. The listed code of conduct for the platforms gives hints about the legislation of digital markets If enacted, the newly proposed ex-ante regulatory instrument will broadly affect both actual and potential competition in the Turkish e-marketplace sector.

3. Anti-competitive Agreements

3.1. Pay-for-Delay Agreements[2]

6. Pay-for-delay agreements have emerged as an agreement type that has been frequently investigated in both the EU competition and the US antitrust law in recent years and they mostly arise within the scope of patent settlement agreements, especially in the pharmaceutical industry[3]. However, in Turkey, there is no patent settlement agreement subjected to the TCA's scrutiny because it aims to delay the entry of a generic pharmaceutical company[4].

7. Before starting with the related cases, it is thought to be useful to give brief information about the drug pricing system in Turkey, The drug prices are regulated by the government based on a reference system. Euro is converted to Turkish Liras by taking 70% of the previous year's average Euro/TL exchange rate. The price in the country where the warehouse sales price is the lowest from the selected EU member countries is taken as the reference price. Moreover, since the government is the biggest buyer of pharmaceuticals, it receives a large number of discounts. For these reasons, the prices are lower than in most of the EU countries and the market is ripe for parallel trade. The maximum profit rates of pharmacy warehouses and pharmacy shops are all pre-determined.

[2] An unpublished thesis of the TCA is referred/used to give brief information of pay for delay agreements in Turkey, Pay For Delay Agreements in the Light of the EU and US Practices, Unpublished Thesis, Ebru Özaktaş, Competition Expert in the TCA, May 2021.

[3] A group of writers from/representing Yale University approximate that at least %6 of the pharmaceutical acquisitions are likely to be killer acquisitions (Cunningham et al. 2018)

[4] As stated in the Competition Authority's Pharmaceuticals Sector Report (2013, p. 226-27), there is not enough information on how often patent settlement agreements are applied in Turkey since there is no information pool on original drugs and patents valid in Turkey, and this situation creates some difficulties in accessing information for generic manufacturers.

8. The objective of pay for delay agreements can be achieved by such types of agreements in which an originator might give a license to the generics manufacturer in one market so that it does not enter another one. In another example, a marketing/distribution agreement might prevent generics manufacturers from entering the market. Therefore, it is important to evaluate the contract terms carefully to understand the intention kept in the background.

9. Although there is no anti-competitive patent settlement agreement that the Board examined yet, there are still hints of pay for delay agreement analysis within the Board's exemption cases in which non-compete clauses are carefully examined.

10. In the first ***Abbot/Eczacıbaşı*** case[5], it is foreseen in the agreement that a product, which is produced by Abbot and contains an active substance (Sibutramine) will be marketed by local company Eczacıbaşı. According to the non-compete clause in the contract, Eczacıbaşı is under the obligation not to manufacture, sell or resell products with sibutramine active substance. It is stipulated that this clause will be valid for at least five years if the contract ends before it expires. The main purpose of this clause is stated as to prevent Eczacıbaşı from producing the generic version of the molecule in a short time by working with other companies in case the agreement is annulled before its term ends. Although the application is also valid for other generic producers, Eczacıbaşı will have learned important information about the product through the contract. According to the decision, this aforementioned purpose cannot be accepted as an explanation to the conditions listed in Article 5 of the Law No. 4054, corresponding to Treaty of the Functioning of the European Union Article 101(3). As a result, it has been concluded that the duration of non-compete clause stipulated in the contract is not limited to the duration of the contract and that gives the originator the possibility of eliminating generics competition.

11. In ***Allergan/Abdi Ibrahim*** decision[6], the Logistics Distribution Agreement contracted between Allergan group and the local pharmaceutical company Abdi İbrahim is examined. With this contract, it is planned that the promotion and marketing activities of the products will be carried out by Allergan and the logistics distribution will be carried out by A. İbrahim although Abdi İbrahim has been carrying out the sales, marketing and, distribution activities of Allergan products since 1993. With the new contract, Abdi İbrahim is appointed as the exclusive distributor of the products and is prohibited from competing with these products for five years. The relevant non-compete clause covers not only drugs with the same active ingredients as Allergan products but also their generic versions. As Abdi İbrahim has all kinds of information about Allergan products and is the closest potential competitor to produce generic versions of these products, it is questioned why Allergan, which undertook sales and marketing activities with the contract and even transferred personnel for this, left the physical distribution business to A. İbrahim. In the decision, it is stated that although it is not as easy as Abdi İbrahim, other generic producers may enter the market with competing products and that potential competition will not be completely eliminated. However, it is stated in the decision that Abdi İbrahim will not have an incentive to produce generics with the new contract. So, the non-compete clause prevents the introduction of generics that can compete with Allergan products by Abdi İbrahim. Therefore, it has been decided that individual exemption can be granted to the relevant contract provided that the non-compete clause is removed.

[5] The Board decision No: 07-23/227-75, 15 March 2007.

[6] The Board decision No: 10-44/784-261, 17 June 2010.

12. In brief, the main question explored in the decision was "why Abdi İbrahim is needed only for the physical distribution of the products". At this point, it can be said that the Board questioned whether the contract has any purpose other than what is stated in the agreement. It is understood from the decision that the concerns regarding the issue remain at a low level and it is sufficient to remove the non-compete clause.

13. In ***GlaxoSmithKline(GSK)/Bilim İlaç*** decision[7], the Co-operation Agreement signed by the local manufacturer Bilim İlaç for the exclusive promotion of the drug, Seretide is examined. With the relevant contract, Bilim İlaç is obliged not to compete with products containing the same active substance as Seretide. On the other hand, the generic drug named Ventofor Combi, which belongs to Bilim İlaç is in the same ATC-3, drug classification category. Therefore, the parties are competitors of each other. In this context, after confirming that Bilim İlaç did not develop a new product in the relevant ATC-3 category, and did not apply for a new license, including the withdrawn one, the agreement is granted an individual exemption. Although it is clearly stated that there might be another purpose or motivation to make such agreements in the decision, the decision, the number of competitors in the market, and the Bilim İlaç's lack of intention to produce the drug are all found convincing to grant an individual exemption.

14. In the recent **Sanofi / Abdi İbrahim** decision[8], a certain subcontracting agreement between Sanofi and the local manufacturer Abdi İbrahim is examined. Within the scope of the agreement, some products are planned to be manufactured by Abdi İbrahim. According to the non-compete clause, Abdi İbrahim is prohibited from producing insulin products with the active ingredient of the contractual products. It is stated in the decision that Abdi İbrahim did not produce or sell insulin products, but applied for a license for the product named Basalog One, which contains the substance of Insulin Glargine. Abdi İbrahim will not produce this product but will import it from abroad. Therefore, if the license application is accepted, Abdi İbrahim and Sanofi will be competitors at the distribution level. On the condition that Abdi İbrahim will not withdraw the license application for the product named Basalog One, the agreement is granted an individual exemption.

15. In the decisions such as ***Merck / Bilim İlaç***[9], ***Bayer / Zentiva***[10] and ***Celgene / Er-Kim***[11], matters such as whether the production capacity of the undertaking, which is imposed non-compete clauses, is restricted, or whether there is an ongoing study or license application is all taken into account in the analysis.

16. To sum up, in terms of pay-for-delay agreements, in the applications/notifications of negative clearance/block exemptions, the TCA questions the restrictive effects of contracts on generic drug competition and whether there is an implicit agreement behind the notified agreements to eliminate potential competition within the scope of Article 5 of the Law No. 4054, corresponding to Treaty of the Functioning of the European Union Article 101(3).

[7] The Board decision No: 17-10/119-54, 13 March 2017.

[8] The Board decision No: 18-17/299-149, 31 May 2018.

[9] The Board decision No: 12-38/1086-345, 18 July 2012, para. 20.

[10] The Board decision No: 15-32/460-142, 28 July 2015, para. 21.

[11] The Board decision No: 18-41/657-321, 01 November 2018, para. 35.

4. Mergers and Acquisitions

17. With the amendment made in Article 7 of Act no.4054 which took place in June 2020, the SIEC test has been adopted by the Turkish competition law system. It is understood from the new wording of the article that the dominance test can be still used to determine the reducing competition. However, mergers and acquisitions, which have the potential to create a significant impediment to effective competition, will also be prohibited.

18. With the law reform in 2020, the Significant Impediment of Effective Competition (SIEC) test replaces the dominance test in Turkey for the assessment of the notifiable concentrations. As it is stated in the preliminary findings report on its e-marketplace sector inquiry,

19. Although there is some criticism on the SIEC test in the literature[12], the current law permits the consideration of potential competition in innovation competition cases. As it is stated in the preliminary findings report on its e-marketplace sector inquiry, a case-by-case approach with alert enforcement is thought to be the best strategy for the moment.

5. Conclusion

20. Potential competition concept has not been a frequently referred term in the global competition/antitrust case law until the acquisitions of nascent technological companies became a current issue of antitrust authorities. The TCA was also one of those authorities which take into consideration both actual and potential competition factors in the ordinary way. However, the recent global developments make the concept of potential competition come to the fore. Within that scope, the treatment of potential competition may require using different analytical tools and the basic factors affecting potential competition such as timeliness of market entries may need to be reconsidered. Even though there is no case law on killer acquisitions, kill zones or pay for delay agreements in Turkish competition case law yet, it is clear that the TCA is determined to improve its point of view with its sector inquiries and initiated legislative studies for digital markets.

[12] In the study of Baker, it is argued that the European Union (EU) merger regulation does not offer guidance for innovation competition analysis for different industry settings or different behaviors. Therefore, it calls for the revision of both horizontal and vertical merger guidelines (2007, p. 587). Moreover, Petit also asserts that the SIEC test does not take intrafirm innovation competition and counter-balancing of intra-firm cooperation across innovation spaces into account (2018, p. 32).

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