

## The Competition Board decided not to initiate an investigation concerning the Complaint of Emek Ecza Deposu for Abuse of Dominance by 15 Pharmaceutical Companies through Price Discrimination

**Update:** The Competition Board concluded the preliminary investigation initiated after annulment of its decision dated 21.04.2011 and numbered 11-25 / 470-141 by the 13th Chamber of Council of State and decided that the companies subject of the complaint did not conducted any abusive behaviour.

### Background

Emek Ecza Deposu İlaç ve Kimyevi Maddeler İtiryat İth. İhr. ve Tic. A.Ş. ("Emek Warehouse") filed a complaint on 29.12.2010 against 15 different pharmaceutical companies alleging that those companies did not provide the same opportunities such as discounts, surplus goods, exit premiums and periodical premiums to Emek Warehouse and other warehouses, in other words they made a discrimination between Emek Warehouse and other warehouses and thus abused their dominant positions; these discriminatory behaviours caused problems in supply of goods by Emek Warehouse as well as led to financial crises and finally Emek Warehouse had to cease its activities.

As a result of the preliminary investigation conducted following the complaint of Emek Warehouse, the Competition Board decided not to initiate an investigation about the companies subject of the complaint and rejected the complaint of Emek Warehouse on 21.04.2011. In its decision, the Competition Board evaluated the amount and volume of sales made by those companies to other warehouses such as Dilek, Galenos, Hedef, Nevzat, Selçuk and noted that the amount of the purchases made by the Emek Warehouse from those 15 companies were significantly lower than the purchases of other warehouses; those pharmaceutical companies applied general sales terms to all warehouses and enabled all warehouses to benefit from their campaigns and provision of better turnover premiums and discounts to the warehouses with high purchasing volumes from time to time can be acceptable considering the conditions of the commercial life and the dynamics of the sector.

13th Chamber of Council of State annulled the mentioned decision of the Competition Board as a result of the application of Emek Warehouse for the annulment of the decision. As the reasoning behind the annulment, the Council of State noted that the Competition Board's examination concerning the years 2005-2009 was not sufficient since the allegations of Emek Warehouse covered the years 2003-2009; therefore the Competition Board shall make a more detailed examination by including the years 2003-2004 in the scope of its examination.

### Decision on Preliminary Investigation

Following the annulment decision of the Council of State, the Competition Board decided to expand the scope of its examination by including the years 2003-2004. Accordingly, the Competition Board requested information from the companies subject of the complaint concerning the years 2003-2004. However, since the statutory retention periods for trade books and records from the years 2003-2004 have expired, difficulties were encountered by the relevant companies in the access to these information and documents and sufficient information could not be provided to the Competition Board for specified years. The Competition Board has noted in its decision that they made their evaluation without any quantitative data concerning the years 2003-2004 since the legal retention obligations of the relevant companies ended.

As sufficient information could not be provided for the years 2003-2004, the Competition Board has benefitted from its assessment in its decision dated 2011 for the new decision in 2017. In parallel to the previous decision, the Competition Board has pointed out that the amount of the purchases made by other warehouses from the relevant companies was significantly higher than the purchases made by Emek Warehouse. Furthermore in its decision dated 2017, the Competition Board estimated the data for 2003-2004 with moving average method by using the data for the years 2005-2009 retrospectively.

As a result of its assessment based on these estimations, the Competition Board has stated that the purchases made by Emek Warehouse between 2003-2009 were significantly below the purchases of other warehouses and therefore Emek Warehouse did not have equivalent position with other warehouses. Accordingly, without evaluating whether the companies subject of the complaint have dominant position or not, the Competition Board have unanimously concluded that those companies did not abuse their dominant position since they did not conduct any abusive behaviour; rejected the complaint of Emek Warehouse and decided not to initiate an investigation. The Competition Board's decision is open for judicial review.

### Assessment of the Competition Board's Decision

Although a detailed examination could not be made due to difficulties in reaching the data from previous years, above stated decision is still important as the Competition Board confirms that application of different commercial terms to purchasers who do not have equivalent position can be acceptable in the pharmaceutical sector considering the conditions of the commercial life and the dynamics of the sector.



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