A New Sector for Price Squeeze Analysis: Medical Device Secondary Markets

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1. Introduction

Turkish competition law addresses the issue of "price squeeze" (or margin squeeze) under Article 6 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") which prohibits the abuse of dominant position. So far, the Turkish Competition Board ("**Board**") has assessed only a very limited number of cases that dealt with the price squeeze.

The Board`s *SIEMENS* decision[1] published in March 2021 was an unexpected contribution to the Board's limited precedents on price squeeze. The decision is important mainly for two reasons. First, *SIEMENS* is the Board's first decision dealing with the price squeeze in the medical devices sector. Secondly, although the Board had previously looked into very similar allegations in the medical devices sector, it had never considered that the allegations might constitute a violation stemming from the price squeeze in those instances.

In this article, we will first briefly explain the issue of price squeeze. We will then move onto the background of *SIEMENS* decision and explain how the Board dealt with price squeeze in the medical devices sector.

2. Price Squeeze in General

Article 6 of the Law No. 4054 titled "*Abuse of Dominant Position*" contains a general prohibition on abuse and a non-exhaustive list of examples. Although these examples do not specifically include price squeeze as a form of abuse of dominant position, price (margin) squeeze is listed as a form of exclusionary abuse under the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines**"), which is based on principals similar to the Guidance on the European Commission's Enforcement Priorities in Applying Article 82 of the

[1] *SIEMENS* (November 19, 2020, 20-50/695-306).

European Commission Treaty to Abusive Exclusionary Conduct by Dominant Undertakings ("**EU Guidance**"). According to paragraph 61 of the Guidelines, price squeeze occurs *"when an undertaking active in a vertically related market that is dominant in the upstream market sets the margin between the prices of the upstream and downstream inputs at a level which does not allow even an equally efficient competitor in the downstream market to profitably trade on a lasting basis."*

In determining the likelihood of the conduct under examination leading to anticompetitive foreclosure by price squeeze, the Board takes the following factors into account:[2] (i) the undertaking must be active in upstream and downstream markets that are connected to each other in a production chain; *i.e.*, it must have an integrated structure and form a single economic entity, (ii) the upstream product must be indispensable for operating in the downstream market, (iii) the undertaking must hold the dominant position in the upstream market, (iv) the margin between the upstream and downstream products must be so low as to preclude a competitor that is as efficient as the undertaking dominant in the upstream market from profiting and operating in the downstream market on a lasting basis, (v) there should not be any justification.

Furthermore, according to the Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, 98/C 262/02, "*equally efficient competitor test*" and "*reasonably-efficient competitor test*" are applied when assessing the price squeeze.[3]

According to the Board's case law the telecommunications sector has garnered most of the price squeeze cases, however there are limited number of decisions in other sectors as well.

[2] *Turk Telekom Student-Teacher Campaign* (September 8, 2005, 05-55/833-226); *Turkcell Corporate Tariffs* (June 04, 2007, 07-56/634-216); *Turk Telekom Summer Storm Campaign* (19.11.2008 and numbered 08-65/1055-411; *Turkcell GSM Tariffs* decision dated 27.01.2011 and 11-06/90-32.

[3] Official Journal of the European Communities, C 262, 19 August 1998, Common Position (EC) No 42/98 of 29 June 1998 adopted by the Council, acting in accordance with the procedure referred to in Article 189b of the Treaty establishing the European Community, with a view to adopting a European Parliament and Council Directive establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications.

There are two decisions concerning the ready-mixed concrete sectors: *Nuh Çimento Price Squeeze I*[4] and *Nuh Çimento Price Squeeze II.*[5] These decisions deal with the allegations that Nuh Çimento Sanayi A.Ş. ("**Nuh Çimento**") has abused its dominant position in the ready-mixed concrete market through price squeeze and predatory pricing in the cement market. The Board in both of those cases assessed whether Nuh Çimento was in a dominant position in the cement market (in the relevant geographical territory), which is a pre-condition of any abuse falling under Article 6 of the Law No. 4054, and after finding out that it is not in a dominant position in the relevant market, the Board did not assess further as to whether Nuh Çimento's activities may constitute a price squeeze.

The other decision of the Board dealing with the price squeeze was in the fast moving consumer goods sector: *Frito Lay.*[6] Here, the Board analyzed Kraft Gıda San.Tic.A.Ş.'s allegations against Frito Lay Gıda San.Tic. A.Ş. ("**Frito Lay**") claiming that Frito Lay had not increased its prices despite increases in costs and that this constituted margin squeeze. The Board first set the record straight by underlining that margin squeeze and predatory pricing were different types of abuse, and that for margin squeeze to occur, the undertaking in question must be vertically integrated. Accordingly, the Board assessed whether Frito Lay committed predatory pricing, but eventually dismissed this claim.

Nevertheless, it is important to note that the number of price squeeze cases outside the telecommunications sector is limited, and in many of these cases, the Board dismissed the allegations during the preliminary investigation process or after having found out that the undertaking subject to the complaint was not in a dominant position, or alternatively, considered these allegations under "refusal to supply."

However, in the *SIEMENS* decision, the Board refers to price squeeze in its assessment of the "price discrimination" allegation put forward by Siemed Tıbbi Sistemleri Elektrik Elektronik İletişim Sağlık Hizmetleri Danışmanlık Bilgisayar ve San. Tic. Ltd. Şti. ("**Siemed**") and analyzes

[4] *Nuh Çimento I* (October 7, 2010, 10-63/1317-494).
[5] *Nuh Çimento II* (February 18, 2016, 16-05/118-53).
[6] *Frito Lay* (July 7, 2015, 15-28/345-115).

the conditions mentioned above to find an infringement in this regard. The Board has grounded its findings on its comparisons of the prices applied to Siemed and public hospitals, as well as its assessments on the information provided by the public hospitals. The background of the *SIEMENS* decision and how the Board dealt with the issue of price squeeze in the medical devices sector are explained below.

3. Background of the SIEMENS Decision

The price-related allegations set forth in *SIEMENS* have been scrutinized by the Board many times within the scope of different pre-investigations or investigations, some of which were also subject to further judicial reviews. As such, the very same practices of the investigated undertaking (*i.e.*, Siemens Healthcare Sağlık A.Ş. ("**Siemens**")) have been assessed by the Authority from different perspectives of the competition law, which led to various decisions by the Board or the Courts over the last 12 years.

The first decision was the Board's decision dated 18.02.2009 and numbered 09-07/128-39[7] (*Medical Device Obligations*). The Board had *ex officio* initiated a preliminary investigation against Siemens to review the allegations that Siemens had engaged in exclusionary practices in the "spare parts for medical devices and related services" markets, by not providing the necessary tools required to carry out the relevant service (such as passwords) to its competitors. After carefully examining the allegations, the Board decided not to initiate a full-fledged investigation against Siemens but laid down certain obligations which Siemens (and also undertakings operating as medical imaging device suppliers) should abide by, such as (i) providing the necessary tools to the competitors within 24 hours upon request, and (ii) publishing the most up-to-date spare parts' price lists, among other requirements.

Several months after the *Medical Device Obligations*, Siemed Tıbbi Sistemleri Elektrik Elektronik İletişim Sağlık Hizmetleri Danışmanlık Bilgisayar ve San. Tic. Ltd. Şti. ("**Siemed**") –

[7] *Medical Device Obligations* (February 18, 2009, 09-07/128-39)

a competitor of Siemens in the spare parts for medical devices and related services markets – filed a complaint against Siemens alleging, among others, that Siemens was not abiding by the obligations laid down in the *Medical Device Obligations* and that it was applying higher prices to Siemed compared to prices offered to Siemed's competitors. The Board initiated a full-fledged investigation and mainly considered the allegations within the scope of "price discrimination." The Board did not establish sufficient evidence to find that Siemens was discriminating against Siemed by applying higher prices and closed the case without imposing any fine on Siemens (*Siemed Complaint I*).[8]

Just a few months later, Siemed filed another complaint and alleged the same: Siemens was applying higher prices to Siemed. The Board considered these allegations again within the scope of "price discrimination." After examining the facts of the case, the Board decided that Siemens was not applying dissimilar conditions to equivalent transactions, thereby Siemed was not put at a competitive disadvantage (*Siemed Complaint II*).[9]

Siemed brought each of the *Siemed Complaint I* and *Siemed Complaint II* decisions before the Council of State, the highest administrative court in Turkey, which was acting as a court of first instance for the judicial review of the Board's decisions at the time.

The Council of State examined the *Siemed Complaint I* and *Siemed Complaint II* separately and decided that (i) within the scope of the former, the Board should have imposed an administrative fine on Siemens on the ground, among others, that Siemens was treating Siemed differently vis-à-vis its competitors and that (ii) within the scope of the latter, the case should have been examined within the scope of a full-fledged investigation instead of a preliminary investigation and therefore, annulled the said decisions on the ground of lack of proper examination.[10]

[8] *Siemed Complaint I* (March 16, 2010; 10-23/326-114)
[9] *Siemed Complaint II* (October 21, 2010; 10-66/1408-527)
[10] The 13th Chamber of the Council of State (January 28, 2014, 2010/3851 E., 2014/146 K.; April 14, 2015, 2011/317 E., 2015/1454 K.)

As such, the Board initiated two full-fledged investigations against Siemens in accordance with the Council of State's decisions (*Siemed Complaint I Re-examined* and *Siemed Complaint II Re-examined*). [11]

Within the scope of *Siemed Complaint I Re-examined*, the Board compared the price offers made by Siemens to the players in the secondary markets and its customers, and this time found that Siemens did provide different prices for the same devices. Furthermore, there was no objective reasoning behind these different pricing methods. Therefore, it was decided that Siemens violated Article 6 of Law No. 4054. It is important to highlight that the Board, again, considered the price-related allegations within the scope of price discrimination.

Within the scope of *Siemed Complaint II Re-examined*, the Board initiated a full-fledged investigation and evaluated Siemed's price-related allegations under price discrimination. As such, the Board established that Siemens is in dominant position in the relevant market and applies different prices to different customers (such as hospitals as opposed to Siemed). Although it acknowledged that Siemed and hospitals are not in equal positions, the Board still compared the prices Siemens applied to Siemed and other customers on the axis of whether there is a systematic exclusion policy. As a result of this evaluation, Board found that there was no systematic exclusion policy implemented by Siemens and thus, did not establish any violation.

In 2016, Siemed filed another complaint claiming that Siemens abused its dominant position by excluding competitor undertakings, discriminating and acting contrary to the obligations stipulated under *Medical Device Obligations* (*Siemed Complaint III).* [12] Subsequently, the Board dismissed the claims without much consideration, deeming that there was no need to take any action within the framework of the Law No. 4054 pursuant to the fourth paragraph of Article 5[13]

[11] Siemed Complaint I Re-examined (August 20, 2014; 14-29/613-266); Siemed Complaint II Re-examined (October 24, 2016; 16-34/589-259)
[12] *Siemed Complaint III* (November 13, 2016, 16-36/620-M).
[13] Article 5 Para.4 of the Communique numbered 2012/2 states that no action shall be taken in relation to applications which consist purely of abstract statements suggesting the existence of an infringement, which do not include concrete information and/or documents concerning the form, place and time of the infringement or the undertaking or association of undertakings for which an examination is requested, and which are found to have failed to establish its claims in a serious and sufficient manner.

of the Communiqué on the Application Procedure for Infringements of Competition numbered 2012/2.

However, as a result of Siemed`s appeal requesting the annulment of *Siemed Complaint III*, the Ankara 7th Administrative Court decided[14] that the Board's decision not to take action in relation to Siemed's complaint had been based on incomplete examination and research since the last complaint was filed 6 years ago (in 2010); and annulled *Siemed Complaint III*. Upon the annulment, the Board initiated a preliminary investigation which turned into a full-fletched investigation to determine whether Siemens violated Article 6 of the Law No. 4054; and issued the subject *SIEMENS* decision as a result.

Within the scope of the *SIEMENS*, the Board, in line with its previous precedent, defined relevant product markets as "*medical imaging and diagnostic devices market*" (primary market), "*Siemens-branded spare parts and consumables market for medical imaging and diagnostic devices*" and "*service market for Siemens-branded medical imaging and diagnostic devices*" (secondary markets). Siemens was also found to be in a dominant position in parallel to the Board's previous decisions.

On the other hand, even though the Siemed`s claims were of similar nature (price discrimination due to Siemens offering Siemed higher prices compared to those offered to hospitals in tenders), instead of following the same path as the previous decisions, this time the Board evaluated the allegations within the scope of price squeeze. By referring to case-law, the Board has indicated that in order for a behavior to constitute price squeeze, the following elements should be established: (i) the undertaking must be active in upstream and downstream markets that are connected to each other in a production chain; i.e., it must have an integrated structure and form a single economic entity, (ii) the upstream product must be indispensable for operating in the downstream market, (iii) the undertaking must hold dominant position in the upstream market, (iv) the margin between the upstream and downstream products must be so low as to ensure that a competitor that is as efficient as the undertaking dominant in the upstream market would be

[14] Ankara 7th Administrative Court (December 26, 2018, 2017/203E, 2018/2471K)

unable to profit and operate in the downstream market on a lasting basis, (v) there should not be any justification.

As for assessment, the Board first referred to the "*upstream product must be indispensable for operating in the downstream market*" element of the price squeeze and stated that since Siemed has sources abroad other than Siemens to purchase the products, and it was not dependent on just one supplier/Siemens. Subsequently, the prices offered by Siemens to public hospitals/institutions in the downstream market and Siemed were evaluated and compared by adopting the price squeeze test on the sample, upon which the Board determined that Siemens in fact did not exclude Siemed.

These assessments separated this decision from the earlier decisions on Siemens because previously the Board had evaluated this allegation under price discrimination and stated that Siemed and the hospitals were not in equal positions. However, this time, the Board evaluated these allegations via price squeeze to determine whether Siemens' acts obstructed Siemed's operations in the *Siemens-branded spare parts and consumables market for medical imaging and diagnostic devices market* and *Siemens-branded medical imaging and diagnostic devices service market* and foreclosed these markets to Siemed.

In light of the evaluations and findings, the Board decided that Siemens did not violate Article 6 of Law No. 4054. However, *SIEMENS* made it clear that if Siemed did not have an alternative source of supply and Siemens' price for Siemed and end-users (public hospitals/institutions in the case) did not leave a margin for Siemed to compete with Siemens for these end-users, the conduct would be considered as a price squeeze.

4. Conclusion

Over the last decade, the Board's analysis and evaluation on price squeeze has evolved, with a particular focus on the telecommunications sector. The number of price squeeze cases is very limited in other sectors and thus precludes a more detailed assessment on the merits.

This decision is a step forward for price squeeze, which is used in a very limited manner in other sectors and generally applied in infrastructure sectors such as telecommunications due to the conditions previously sought, showing that it can be employed in terms of secondary markets. Even though the Board had evaluated Siemens`s pricing activities in a number of its decisions, price squeeze was not examined until this particular case.

SIEMENS is therefore crucial in signifying that the Board may put the medical devices sector and the secondary markets under more scrutiny and producers/suppliers in these markets may face price squeeze allegations.

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