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Competition board approves Siemens' acquisition of Varian following commitments submitted in European Union

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The Turkish Competition Board has published its decision[(1)] concerning the acquisition of sole control over Varian Medical Systems (Varian) by Siemens AG through its subsidiary Siemens Healthineers Holding I GmbH (Siemens).

Background

The Board first evaluated Varian and Siemens' business activities and assessed whether there were any horizontal or vertical overlaps arising out of their respective activities in Turkey. With regard to the parties' Turkey-related activities, the Board noted in its analysis that Siemens is active in Turkey in the production and supply of medical imaging devices (with various technologies, such as x-rays, ultrasound, magnetic resonance, nuclear imaging or computerised tomography), while Varian is active in the production of medical devices for radiation oncology treatments and relevant software. Accordingly, the Board found no overlap between the parties' activities in Turkey, stating that while Siemens engages in the provision of diagnosis products and services, Varian supplies devices for radiation oncology treatments.

Even though the Board did not find an overlap between the activities of Siemens and Varian, and thereby no concentration in Turkey, it specifically pointed out the complementary nature of the products and services offered by both parties (ie, diagnosis and treatment) and evaluated the nature of competition on a national level. On that front, the Board reiterated that since both parties offer different but related products and services in the healthcare sector, it is necessary to consider the complementary relationship between Siemens' cancer treatment products and Varian's diagnosis solutions.

Assessment on conglomerate mergers

The Board classified the transaction as a conglomerate merger and therefore, assessed the application in terms of the relevant principles set out in the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions (the Guidelines). The Board defined the conglomerate transactions as concentrations between undertakings which offer products that are weak substitutes for each other or in the same product series. On that front, the Board noted that even though there is no genuine horizontal or vertical relationship between the parties' products, it is necessary to evaluate how the complementary nature between such products may affect competition. To that end, it stated that the main concern in conglomerate transactions is the likelihood of market foreclosure stemming from the combined entity's sales by way of tying or bundling complementary products; implying that this may be problematic in terms of competition in case of high market shares. It then proceeded to analyse whether it would be feasible for Siemens to engage in tying or bundling sales for these products after the transaction, in light of the parties' market shares and the existing market conditions in Turkey.

Reviewing the parties' and their competitors' market shares in Turkey, the Board stated that Siemens competes with a strong global player (ie, GE Healthcare) that has been consistently enjoying high market shares in the national diagnosis imaging market, in which there are also other players which may reach high market shares through occasional sales in high volumes (such as Philips and Esaote), together with numerous small-scale producers.

The Board noted that even though Varian may be considered as the leading player in the markets where it is active, market shares tend to be volatile since every sale of a single device is capable of significantly affecting the market shares of undertakings. The Board also pointed out the existence of other significant players in this market, such as Elekta and Accuray. Consequently, the Board concluded that the radiation oncology devices market is relatively small and that the market size has been volatile throughout the year, inferring that it did not find Varian's considerable market presence problematic in terms of its assessment.

In terms of buying power, the Board noted that the buyers of the products offered by the parties are public authorities, public and university hospitals, together with private hospitals. The Board also emphasied that the parties' products are sold through tendering. On that front, it stated that under the public tender procedures, buyers (ie, state-run hospitals) have the right to cancel the tender and initiate a new one, in cases where the submitted tender offers diverge from the scope of the tender (by bundling, etc), or where prices are set above the expected costs; which has been considered as a factor that may disincentive Siemens to engage in tying or bundling.

On the other hand, the Board also considered the parties and their customers' explanations obtained throughout the review process. Evaluating these explanations, the Board concluded that it is not common for undertakings to sell these medical diagnosis imaging devices and radiation oncology devices together, particularly because of the differences in their usage lifespans. This is supported with the fact that there have been very few tenders on the collective procurement of these products. Consequently, the Board found that after the transaction, it would not be feasible for Siemens to engage in practices such as tying or bundling of these two categories of devices, due to the above-mentioned considerations.

In line with the Guidelines, the Board also assessed whether the products offered by the parties are significant for the customers, and if there are viable alternatives in the market. By referring to the market structure summarised above, it stated that the combined entity will not be the sole supplier as there are alternative players in the market. On the other hand, in terms of the market barriers, it is considered that there is no significant market barrier in terms of entries into the Turkish market by considering the market structure and the number of players active in this area, despite highlighting the considerable costs required for new entries.

Finally, the Board noted with regard to efficiency gains that conglomerate mergers may lead to certain benefits for the customers, such as creating one-stop shopping opportunities which may decrease transaction costs. Moreover, the fact that Siemens will be able to offer a broad range of products from diagnosis to treatment of cancer has been considered as an efficiency factor in terms of sale and after-sale services.

In light of the above considerations, the Board concluded that the transaction is not likely to lead to a significant impediment of competition.

Commitments submitted in European Union and Board's final assessment

While the transaction had been deemed unproblematic in terms of the Turkish market, the Board also evaluated the scope of the commitments submitted to the European Commission for the same transaction and their potential impacts on the Turkish markets, by analysing the parties' global market presence. In that respect, it stated that the undertakings' market shares globally are generally similar to the Turkish market, except there are more players and certain competitors have higher shares in the global markets than they do in Turkey.

As for the commitments submitted in the European Union, the Board stated that the relevant commitments relate to the interoperability between imaging and treatment devices, where Siemens committed to maintain adherence to the de facto industry-wide interoperability standard (DICOM) and to ensure interoperability between:

- its medical imaging solutions and competitors' radiotherapy solutions; and
- its radiotherapy solutions and competitors' imaging solutions, by providing the relevant information and technical assistance to third parties and customers.[(2)]

The Board stated that the geographic scope of the commitments covers the European Economic Area. On the other hand, it noted that the commitments also encompass Turkey through the CE (European conformity) certification of the devices, which is also a requirement for the products to be sold into Turkey and relates to the interoperability obligation. The Board stated that the commitments submitted in the European Union eliminate the concerns brought up by certain players during its review process with respect to the potential interoperability problems. It highlighted that as Siemens` commitments also cover Turkey due to the identical (CE) certification requirements as in the European Union, this would eliminate the concerns expressed by certain undertakings.

In terms of the likelihood of impediment of competition by way of tying or bundling practices, the Board added that the prices of products in question are considerably high, rendering the bundling of these products impractical. It also emphasised that the combined entity will not have a significant market power and thus will not have an incentive to engage in tying and bundling. Moreover, the existence of strong players has been considered as a factor that may eliminate such practices.

As a result of its assessments and the review of the commitments submitted to the European Commission, the Board found that the transaction would not lead to competition concerns in Turkey.

Comment

The *Siemens/Varian* decision once again shows that the Board is keen to make detailed evaluations of conglomerate transactions involving related products, even though such transactions are generally considered to be relatively less risky in terms of restriction of competition. The decision also highlights that the health services market is a top priority for the Board and demonstrates the Board's increasing tendency to closely monitor EU practices in its decision-making process.

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Endnotes

(1) 21-11/145-60; 4.3.2021.

(2) Further details are available here.