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The Turkish Competition Authority rejects the suggestion that a manufacturer of medical imaging and diagnostic devices abused its dominance but imposes a sector specific code of conduct on the industry related to access codes and activation tools (*Türk Philips Ticaret*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DOMINANCE (NOTION), ACCESS TO FACILITIES, HEALTHCARE, BARRIERS TO ENTRY, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT

Turkish Competition Authority, *Türk Philips Ticaret*, Case No. 21-40/589-286, Decision, 26 August 2021 (Turkish)

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This case summary includes an analysis of the Turkish Competition Board's ("**Board**") Philips decision (26.08.2021, 21-40/589-286) in which the Board determined that Türk Philips Ticaret A.Ş. ("**Philips Turkey**") did not abuse its dominant position through denying or delaying access to codes and activation tools required for the maintenance and repair of medical imaging devices. After a lengthy investigation process of 17 months, including the rejections of Philips Turkey's commitment proposals, the Board decided not to impose an administrative monetary fine against Philips Turkey.

Background

The Board initiated a preliminary investigation against Philips Turkey in order to determine whether Philips Turkey has violated Articles 4 and 6 of the Law No. 4054 on the Protection of the Competition ("**Law No. 4054**") based upon the complaint petition of Foton Sağlık Çözümleri A.Ş. ("**Foton**"). Following the preliminary investigation, the Board decided to launch a full-fledged investigation against Philips Turkey to determine whether Philips Turkey violated Article 6 of Law No. 4054 through refusing or delaying to provide the access codes and activation required for the maintenance and repair of medical imaging devices.

The complainant, Foton, is active in the market for technical services of Philips branded medical imaging and

diagnostic devices. Foton alleged that it is necessary to obtain the required passwords, activation or relevant approval process and engineering services from Philips Turkey when providing these services. Foton asserted that Philips Turkey was systematically hindering its activities in the market by not providing the required passwords and activation.

During the investigation phase, Philips Turkey submitted a commitment proposal to the Turkish Competition Authority ("**Authority**") on February 4, 2021. The commitment proposal was focusing on the standard duration of access to passwords and dongles used for the maintenance and repair of Philips-branded medical imaging and diagnostic devices. However, the Board rejected the commitment package by simply stating that they are insufficient to eliminate the competition concerns. Afterwards, Philips Turkey submitted its revised commitment proposal to the Authority on February 23, 2021. The Board once again rejected the revised commitments based on the same reasoning. In spite of all these rejections, the Board concluded the investigation by finding no violation of competition law.

The Board's Assessment on the Usage of Passwords in the Medical Imaging and Diagnostic Devices Market

The Board first explained its previous decision on Philips Turkey where the Board assessed whether certain undertakings, including Philips Turkey, operating in the medical imaging and diagnostic devices market violated Article 6 of the Law No. 4054 through their conducts of password sharing and supply of spare parts in the market (Board's 2009 Decision, 09-07/128-39, 18.02.2009). In order to increase the competition in the maintenance and repair services market and to ensure that the market is not foreclosed to the Independent Service Operators ("**ISO**") through artificial restrictions, the Board's 2009 Decision imposed certain sector-wide obligations. As the Board's 2009 Decision is closely related to the case discussed here and has brought certain sector-wide obligations, the Board stated that it is necessary to refer to the Board's 2009 Decision.

The Board examined (i) several email correspondences obtained during the dawn raid, (ii) response letters, (iii) opinions received from manufacturing undertakings operating in the market, certain hospitals, ISOs and Turkish Medicines and Medical Devices Agency ("**TMMDA**"), and (iv) the relevant provision of the Medical Device Regulation. Following these examinations, the Board indicated that the maintenance and repair of Philips branded medical imaging and diagnostic devices can also be solely performed by ISOs but ISOs need an authorization and activation code to be provided by Philips Turkey. The Board however did not find correspondence or documents showing that Philips Turkey had an exclusionary strategy towards Foton.

After an in-depth analysis, the Board decided that (i) Philips Turkey shared passwords in accordance with the obligations imposed by the Board's 2009 Decision and (ii) the complaints against Philips Turkey were individual cases. Accordingly, the Board held that Philips Turkey's actions would not lead to a systematic exclusion. The Board also found that it is not a rational strategy for Philips Turkey to hinder the activities of Foton or the other undertaking providing similar medical imaging services since hindering the complainant's activities in the service market would naturally decrease the sales of medical imaging devices, which is the main revenue item for Philips Turkey in the midterm and long term.

The Board referred to the Board's 2009 Decision while analyzing whether passwords should be shared for a limited or unlimited time. According to the Board's 2009 Decision, the requests for passwords must be responded to within 24 hours provided that they are made in working days. The Board found that since there were no criteria set forth in the Board's 2009 Decision regarding the duration of the password, the different password durations envisaged by the undertakings are not against the Board's 2009 Decision. Considering TMMDA's opinion which

indicated that access to software and hardware should be password protected, the Board decided that usage of passwords will not cause any competitive concerns unless it does not prevent the operation of ISO's in the market.

Consequently, the Board decided that there was no finding that would indicate that Philips Turkey has engaged in actions to exclude its competitors through responding to their requests for passwords and dongles with a delay or failed to comply with these requests at all or not providing the required support. The Board found that (i) Foton's complaints were isolated incidents, (ii) there was not enough information demonstrating that these so-called exclusionary practices have been implemented systematically and thus, (ii) Philips Turkey was complying with the obligations imposed by the Board's 2009 Decision. In line with these findings, the Board did not impose an administrative monetary fine against Philips Turkey due to the absence of competition law violation as per Article 6 of Law No.4054.

Although the Board did not find a competition law violation in the case at hand, the Board imposed a set of measures for all players active in the market for medical imaging and diagnosis devices in Turkey. The measures set forth in this decision are same as the obligations imposed by the Board's 2009 Decision apart from one obligation which reads as follows: "Extend the standard duration of access provided to apparatuses/tools that allow the password of the devices or any other built-in system in this sense, or technical services to be performed minimum 30 (thirty) days".

Conclusion

Turkish competition law analyzed allegations of refusal to grant access to codes and activation tools in many cases. This decision would be a landmark precedent for the Board's approach on the usage of password mechanisms in the market. The Board imposed industry-wide obligations on all players active in the market for medical imaging and diagnosis devices in Turkey. The Board stated in its decision that if the undertakings operating in the medical imaging and diagnosis devices market do not comply with these obligations, proceedings would be initiated against them as per Law No. 4054. Thus, the decision reads that the Board could take certain enforcement actions due to failure to comply with these obligations.