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Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority re-examines allegations on exclusionary practises in the healthcare sector (*Siemens*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, RELEVANT MARKET, HEALTHCARE, SERVICES, JUDICIAL REVIEW, TURKEY, ANNULMENT, CONSUMER PROTECTION

Turkish Competition Authority, *Siemens*, Case 20-50/695-306, 19 November 2020 (Turkish)

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Upon the Ankara 7 th Administrative Court's annulment [1] its 2016 decision [2], the Competition Board ("**Board**") re-examined the allegations against Siemens Healthcare Sağlık A.Ş. ("**Siemens**") concerning abuse of dominance by way of excluding the competitors, engaging in discriminatory practices, and violating the obligations which had been stipulated in previous Board decisions against Siemens [3]. In conclusion, the Board found that Siemens did not abuse its dominant position in the markets for services and spare parts for the Siemens brand medical diagnostic and imaging devices; thus, did not violate Article 6 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**").

Background

The applicant, Siemed Tıbbi Sistemleri Elektrik Elektronik İletişim Sağlık Hizmetleri Danışmanlık Bilgisayar ve San. Tic. Ltd. Şti. ("**Siemed**") lodged a complaint to the Competition Authority ("**Authority**") and indicated that Siemens (i) engages in discriminatory practices by offering different prices in tenders to buyers with equal status, (ii) supplies products at lower prices than the list prices in tenders for certain private hospitals, (iii) publishes price lists for only 100 spare parts, which is in breach of the relevant regulation, since considering all the various models of Siemens devices, it is required to publish prices for thousands of spare parts, (iv) requests the serial number of the device to which the spare part will be installed, as a condition to indicate the price for the requested spare part; thus, excludes Siemed by determining the need for the relevant hospital / institution, and (v) responds late to Siemed's requests for spare part prices, alleging that Siemens had thus acted in violation of previous decisions and Law No. 4054.

The Board decided not to take any action against the aforementioned complaints as per the Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition, in 2016. However, the Ankara 7 th Administrative Court annulled the Board's decision due to incomplete review. Upon the annulment decision, the Board launched a full-fledged investigation [4] to determine whether Siemens violated Article 6 of Law No. 4054.

The Assessment on Primary and Secondary Markets The decision includes detailed explanations with regard to the definition of primary and secondary markets. Products that are subject to long-term use, such as medical devices, may require by-products and services such as maintenance and repair as well as spare parts and/or consumables, within their service life. In cases where this type of after-sale product/service is required, the very first product purchased is called the "primary" product; the products like spare parts that are needed in after-sales and services (like maintenance and repair) are defined as "secondary product." The Board indicated that the markets comprising the products and services used with the primary product such as spare parts, consumables, maintenance and repair services, and which are needed after a certain period of time once the primary product is purchased, are defined as "secondary" markets. The Board further explained that within the meaning of competition law, when defining the markets for the primary and secondary products and services, it should be examined (i) whether the relevant products and services can be included in the same market, and (ii) if not, whether the markets in which the secondary products and services are included can be defined in a brand-specific manner.

Against this background, the Board defined the primary market in the case at hand, as the market for the sale of medical diagnostic and imaging devices. With regard to the "secondary markets," the Board conducted detailed analyses and significant evaluations considering the scope of these markets. Once the secondary markets have been defined as brand-specific, the Board further added that Siemens is in dominant position in these markets, considering that Siemens has the power to determine the economic parameters in these secondary markets.

Within this context, the Board examined six different parameters for assessing Siemens' market power in the after-sales markets and accordingly noted that: (i) the price of the medical diagnostic and imaging devices was high and their lifespan was long, (ii) the share of spare parts, consumables and maintenance and repair services costs within the total ownerships costs was relatively low, (iii) the prices in the after-sales markets were not transparent, (iv) calculability of total ownership cost of the devices during sales is still under development, (v) the switching costs were quite high due to the absence of a regulated active secondary market and in case of an increase in the prices of secondary products, and (vi) manufacturers have the ability to offer different prices to new consumers and locked-in consumers. In light of these findings, Siemens was found to be in a dominant position.

The Assessment on Siemens' Unilateral Conducts

Once dominance was determined, the Board analyzed Siemens' various unilateral conducts. The Board examined the prices applied by Siemens to public hospitals and Siemed and found that Siemens did not exclude Siemed as a result of pricing behaviors in the public procurements. In terms of allegations that Siemens applied lower prices than the list prices in tenders for certain private hospitals, the Board indicated that offering different prices to customers is not a violation on its own, but a natural consequence and an ordinary element of commercial negotiations. The Board determined that Siemens' discount system is based on customers' annual purchase quantities, position, and payment terms; thus, price differences based on such commercial terms cannot be considered as discrimination. The Board further added that even if Siemens applies different prices to Siemed and public hospitals, Siemed and the public hospitals are not in equal positions, as Siemed is active in maintenance services; hospitals, on the other hand, are the end users for Siemens' spare parts as well as buyers of their

devices. Thus, the different prices do not lead to discriminatory practices. Against this background, Siemens does not systematically apply high prices to Siemed, and the price differences applied to Siemed and public hospitals do not lead to exclusion of Siemed from the market.

In terms of the allegation regarding the purpose of tracking the serial number of the device, it is claimed that if spare parts are requested from Siemens, the serial number of the device to which the spare part will be installed is requested and the price offer is not provided if the serial number of the device is not specified. Siemed complained that once it determined which institution requires spare parts, Siemens contacted them in order to offer lower prices than Siemed. The Board underlined that the relevant practices may lead to exclusionary practices; however, in light of the information obtained during the investigation including the information from third parties, it is understood that there is no evidence proving that Siemens contacted device owners after tracking the serial number. Furthermore, the relevant practice was noted to be a global policy which was implemented for reasons such as the manufacturer's continued warranty liability, avoidance of any breach of export prohibitions and providing security updates to the devices; thus, the relevant practices do not lead the exclusion of competitors.

Finally, with respect to the allegations stating that Siemens does not publish price lists for certain products and responds late to Siemed's requests for spare part prices, the Board also indicated that these acts do not violate the obligations determined in the Board's decision in 2009 [5] and there has not been any finding that would support these allegations.

Conclusion

The Board concluded that Siemens did not violate Article 6 of Law No. 4054. The decision is noteworthy as it includes comprehensive assessments on competition law concerns in the after-sales market. Besides, the decision sets forth that the Board's approach regarding the after-sales markets is based on detailed economic analysis in defining the market and the undertakings' market power.

[1] The Ankara 7th Administrative Court's decision dated 26.12.2018 and numbered E: 2017/203, K: 2018/2471.

[2] The Board's decision dated 03.11.2016 and numbered 16-36/620-M.

[3] Particularly, the Board's decision dated 18.02.2009 and numbered 09-07/128-39 and decision dated 20.08.2014 and numbered 14-29/613-266.

[4] The Board's decision dated 31.10.2019 and numbered 19-37/553-M.

[5] The Board's decision dated 18.02.2009 and numbered 09-07/128-39.