

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Aftermarkets - Note from Turkey

21-23 June 2017

This document reproduces a written contribution from Turkey submitted for Item 4 of the 127th OECD Competition committee on 21-23 June 2017.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/aftermarkets-competition-issues.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org].

JT03415497

Turkey

1. Turkish Competition Authority (TCA) has many decisions concerning system markets, which consist of primary and secondary markets. These cases are mainly “anti-competitive conduct” cases, in which “abuse of dominance” allegations come to the fore. The prominent alleged infringements in these cases are excessive pricing for after-sales and/or exclusion of rivals from the aftermarket either by obliging the consumers either contractually or technically to obtain after-sales from a specific firm, usually supplier or its authorized distributors. Contracts usually contain these after-sales provisions and consumers, in order to benefit from guarantee provided by the manufacturer, need to comply with these contracts. Technical restrictions, on the other hand, are generally in the form of not enabling compatibility either by encryption or other technical specifications which are often linked to proprietary rights. The main discussions in these cases are related to relevant market definition and dominance. It is worth mentioning that, since Turkish Competition Act and regulations are in line with EU law and regulations, TCA’s enforcements regarding aftermarket are also in line with its EU counterparts.

2. With regards to market definition issues in TCA’s decisions, the case scope (for which product under consideration, theory of harm and case facts play a prominent role) appears as the main determinant of whether the relevant market for competitive analysis should consist of separate markets for before and aftermarket, or a single market for the system including both primary and secondary products and services (“system market”). In case of separate market definitions, the discussions center upon whether the secondary market should consist of all suppliers of the primary goods (“dual markets”) or be brand-specific (“multiple markets”). It is observed that most of the time competitive concerns arise in cases consisting of “multiple markets”, where there appears a market for primary products and separate markets for the secondary products that are only compatible with each supplier’s primary product.

3. The assessment of the relevant market mainly relies on the principles set in the EU Discussion Paper on Modernization of Article 82, TCA’s Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings and also has gained ground in TCA case law. In this respect, if it is possible to switch to the secondary products of other producers or in case there are no alternative secondary product suppliers but still it is possible to switch to other primary products and thus avoid higher prices in the aftermarket, a brand-specific aftermarket may not be the relevant product market. So, compatibility and switching costs are of main concerns for defining brand-specific aftermarket as a separate relevant market.

4. In *SMD decision*¹ where SMD is the only authorized distributor in Turkey for the sale of *Instrumentarium* dental imaging and diagnostic devices and is also sole provider of after-sales for this products during the guarantee term, the relevant product market is defined as “*the technical service and spare parts market for Instrumentarium brand dental imaging and diagnostic devices*”. This market definition is based on the advanced technological nature of the products under consideration, high acquisition costs when compared to after-sales costs (which together led to high switching costs for consumers),

¹ SMD Decision (Date: 21.12.2011, Number: 11-62/1646-582)

exclusivity of the after-sales in terms of spare parts supply, repair and maintenance services for *Instrumentarium* dental imaging and diagnostic devices. Likewise in *Döküm Makine decision*² where Döküm Makine is the sole supplier of *Bruner* spectrometers and places encryption for technical service part on the devices, the relevant markets are defined as the “*spectrometers market (primary market)*” and “*technical service market for Bruner brand spectrometers (secondary market)*”. The decision justified the multiple relevant market definition on grounds such as the product being hi-tech, expensive and consumer-specific, after-sales training being product-specific provided by the manufacturer in its headquarters located in Germany. The encryption for technical service is considered as a factor that eliminates the possibility for alternative service providers to enter this secondary market. There are many other decisions such as *Toros Dental decision*³, *Philips decision*⁴ and *Optik Medikal decision*⁵, for which multiple market definitions consisting of separate primary markets and brand-specific secondary markets are employed.

5. On the other hand, there are decisions such as *Carrier decision*⁶, *Toshiba decision*⁷ and *AMO decision*⁸, where conclusive market definitions were not made because it deemed not necessary and also to assess the conduct and its potential effects in the possible narrowest market, the relevant market is presumed to be brand-specific for secondary products. These decisions are without exception preliminary inquiries that Turkish Competition Board⁹ (the Board) did not find an infringement. Therefore inconclusive market definitions are principally employed when conduct under consideration does obviously not constitute an abuse.

6. With regards to dominance in brand-specific aftermarkets, there are cases where the Board found dominance but there are also cases where dominance was not found. The finding of a dominant position is based on the link between primary market competition and the aftermarket. Thereby, the dominance assessment in aftermarkets requires an analysis of whether the manufacturer’s primary market conduct and position are affected by its conducts in aftermarkets. That is whether aftermarkets create a competitive constraint for the manufacturer in the primary market. If so, it is likely that unless the manufacturer has a dominant position in the primary market it would not have dominance in the brand-specific aftermarket. However, this may not be the case if the manufacturer can price discriminate between its current/old and potential consumers. This kind of price-discrimination ease the possible negative effect of aftermarket conduct for the producer on the primary market, so eases the competitive constraint that would repress the producer’s market power. Thereof, finding of dominance is more likely in cases where producers could price discriminate and a sufficient proportion of customers could

² Döküm Makine Decision (Date: 10.02.2016, Number: 16-04/67-25)

³ Toros Dental Decision (Date: 27.09.2012, Number: 12-46/1392-465)

⁴ Philips Decision (Date: 27.09.2013, Number: 13-55/762-321)

⁵ Optik Medikal Decision (Date: 03.11.2015, Number: 15-39/643-223)

⁶ Carrier Decision (Date: 14.07.2011, Number: 11-43/934-301)

⁷ Toshiba Decision (Date: 10.06.2010, Number: 10-42/756-243)

⁸ AMO Decision (Date: 05.08.2010, Number: 10-52/981-348)

⁹ Turkish Competition Board is the decision-making body of the TCA.

not make informed choices, including accurate whole life cost calculations and were locked-in due to high switching costs afterwards. It is observed that for the assessment of dominance TCA mainly takes into account the following factors in its decisions:

- The acquisition cost of the primary product and its economic life,
- The share of after-sales cost in the life cycle cost of the product,
- The transparency of prices for after-sales products and services
- Life cycle cost (whole life costing) calculation accuracy at primary product purchase decision phase
- The switching cost to an alternative primary product
- The possibility of price discrimination between future and locked-in consumers

7. In *AMO decision*, where the allegation towards AMO, which is the sole distributor and after-sales provider of *Otto* brand devices, was excessive pricing in the aftermarkets, the Board analyzed the competition on both the aftermarket and primary market and assessed whether the undertaking has market power that would enable it to increase the prices in the secondary market independently of the primary market and concluded that the undertaking did not have a market power amounting to dominance in the aftermarkets. Whereas in recent *Siemens decision*¹⁰, TCA analyzed the abovementioned factors and due to the existence of locked-in customers in a relatively nontransparent aftermarket and the possibility of price discrimination for the producer concluded that Siemens is holding dominance in the aftermarket.

8. TCA's decisions regarding aftermarkets are, by a large extent, dealing with hi-tech medical devices. Due to high technicality of these products under consideration in relevant markets where brand-specific separate market definitions were employed and dominance was found, the existence of proprietary rights and the need for brand image protection were often raised by the producers to justify the provision of after-sales exclusively or by firms that it authorizes. The encryption that blocks after-sale repair and maintenance service by and the limitations on spare parts supply to alternative service providers are the common claims for abuse.

9. A significant case of TCA in this regard is *Medical Devices decision*¹¹ where, medical device suppliers were investigated ex-officio for excessive pricing and refusal to deal allegations in aftermarkets. The Board concluded that brand-specific aftermarkets constituted the relevant markets in the case and each supplier was dominant in its aftermarket by the regular analysis that explained above. The suppliers were found to use encryptions and not supply the spare parts to independent service providers, which had become an industry norm widely used by suppliers in the market. The Board with an interim decision relied on the provision number 9/3 of the Competition Act, in order to inject competition in the secondary markets, obliged the suppliers (i) to provide the encryption key (the key to first level technical service, not ones that could contradict proprietary rights) for after-sale repair and maintenance for free after the guarantee term ends and upon the written request of the customer in 24 hours (ii) to supply or rent the equipment or devices necessary to provide after-sales services to customer or the service provider upon the written request/consent of the customer on nondiscriminatory and cost pricing basis (iii) to inform customers about the above conditions at product purchase phase on written notice (iv) to respond customers' and service providers' price requests

¹⁰ Siemens Decision (Date: 24.10.2016, Number: 2010-2-151)

¹¹ Medical Devices Decision (Date: 18.2.2009, Number: 09-07/128-39)

for original spare parts within 3 working days (v) to act in a nondiscriminatory manner to customers and service providers on supply of spare parts. (vi) to publicly announce the price list for the top 100 commonly used spare parts (based on the sales for the last three years) on its website.

10. It is important to note that the decision took into account the nature of these products, which are directly linked to human health and mainly used by hospitals, therefore the importance of their well-functioning and also producers' concerns regarding brand-image destruction due to improper technical service by ineligible service providers when forming the abovementioned obligations. For these reasons, the encryption key for alternative service request could only be possible upon written request of the hospitals/customers (who could make informed decisions regarding after-sales service) after the guarantee term. So, these so-called sophisticated customers should take the responsibility and thereby the possible conflict that could rise against the producer afterwards would be removed. The decision also made a need for a regulation concerning independent service providers' training and certification for adequate provision of after-sales explicit by obliging the producers to deal with its rivals on a selective basis as stated in the conditions.

11. TCA has also been articulating its views for medical devices sector on many platforms as a part of its competition advocacy efforts. The impact of this decision in the sector has turned out to be positive and it was observed in the *Siemens decision* dated 2016 that the number of independent service providers have been rising in the sector and primary product suppliers or their distributors have begun to provide after-sales service to rival products in the secondary market. It was also observed that the transparency level of prices in aftermarkets has also been rising which facilitates the accuracy of life cycle cost calculations, which enable customers to make informed purchase decisions. Furthermore, a hospital which has many brands of medical devices in its portfolio could get the after-sales service from a limited -even one- service provider, which led to savings for customers on many aspects.