

Kluwer Competition Law Blog

Abuse of dominance by medical institutions in Bulgaria

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In 2021 the Bulgarian Competition Protection Commission (“**BCPC**”) was focused on investigations for abuse of dominance in the medical sector. The centre of CPC’s attention were some medical institutions that refused to provide access to equipment, facilities, and specialists for performing medical services/treatments subject to reimbursement by the National Health Insurance Fund (“**NHIF**”).

The investigated infringements are qualified under Art. 21 of the Bulgarian Competition Protection Act (corresponding to Art. 102 of the TFEU), which prohibits undertakings with dominant or monopolistic positions from preventing, limiting or distorting competition and affecting consumers’ interests’ *inter alia* by refusing, without a valid reason, to deliver any goods or provide any services to an existing or potential customer, with the purpose of hindering the business operation of such a customer.

In order to understand the arguments of the BCPC, some characteristics of the Bulgarian national health care system need to be outlined.

Generally, under Bulgarian law, there is mandatory health insurance for the citizens and each person above the age of 18 (by himself/herself, through state institution, through his/her employer as the case may be) pays monthly health insurance contributions depending on the insured person incomes. These contributions are paid directly to the NHIF – a state institution. Against these contributions, each citizen has the right to use medical services listed in a document called the national framework agreement – an agreement signed between the NHIF and the Bulgarian Medical Association – the professional association of the medical doctors in Bulgaria. Membership in this association is *conditio sine qua non* for exercising the medical profession.

The expenses that the health insured persons make for the medical services covered by the national framework agreement are subject to reimbursement by the NHIF and ultimately are free of charge for the health insured patients. The various medical services reimbursed by the NHIF are grouped in the so-called “clinical pathways” (hereunder “**CP**”). Each pathway has an individual identification number and contains a volume of medical services paid by the NHIF, e.g., the conduct of examinations by a health service provider, CT scan, hospital stay, medical consumables, post-surgery examinations, etc.

Having outlined the structure of the health services paid by the NHIF, we would like to briefly discuss Decision No. 1204/09.12.2021 of the BCPC, which could serve as a guideline for the commission’s approach when it comes to abuse of dominance on the market of medical services

reimbursed by the NHIF. For the purposes of its analysis, the BCPC defined the medical services reimbursed by NHIF and medical services not subject to reimbursement by NHIF as separate markets. This finding is reasonable since the services covered by the NHIF are not in competition with the services paid directly to the medical institution, the clinic, the health care provider, etc. As an example, the regulatory framework stipulates those medical institutions can provide medical services/treatment reimbursed by the NHIF only if these medical institutions have in place a valid and effective individual contract with the NHIF, no such requirement exists for the privately paid health services. In general, the sector of the private healthcare services is not subject to so many restrictions as the sector of the health care services paid by the state.

With the discussed decision, BCPC establishes that University Hospital “Dr. Georgi Stranski”, Pleven (Northwest Bulgaria) (hereinafter “**UMHAT Dr. G. Stranski**”) has a dominant position and has abused its dominant position by refusing to enter a contract for the provision of medical services by a nuclear medical laboratory with the Specialized Hospital for Active Treatment in Cardiology, Pleven (hereinafter “**SHATC Pleven**”). Pleven is major economic centre of the Bulgarian Northwest and Central North and the third largest city of Northern Bulgaria with a district population of about 102 955 persons (potential patients).

This behaviour of the hospital is treated as abuse because pursuant to the regulatory framework the existence of a Radioisotope Laboratory/Nuclear Medical Laboratory or such a unit in the hospitals is mandatory for the effective implementation of two clinical pathways (CP 36 and 37), i.e., otherwise, the service cannot be provided to the patient and the latter will remain without any proper treatment. CP 36 covers diagnosis and treatment of pulmonary thromboembolism without fibrinolytics and CP 37 covers diagnosis and treatment of pulmonary thromboembolism with fibrinolytic. According to the law and in order the NHIF to pay for these two CPs, if a hospital does not have such laboratory or unit itself (which is the case of SBALK Pleven), it must ensure that these medical services are provided by another medical institution situated on the same territory of its settlement (in this case – the district of Pleven). This other medical institution must also have a contract with the NHIF for reimbursement of the provided health services.

SBALK Pleven lacks its own Radioisotope Laboratory/Nuclear Medical Laboratory or such a unit, given that establishing of such laboratory/unit is not economically feasible and given that UMHAT Dr. G. Stranski is the only medical institution in the district of Pleven, which has the equipment, facilities, and specialists for performing medical services by a nuclear medical laboratory under CP 36 and 37, led the BCPC to the conclusion that UMHAT Dr. Georgi Stranski has a dominant position on the market of providing access of hospitals to medical services rendered by nuclear medical laboratories on the territory of Pleven district. Concerning the affected markets, the BCPC sticks to the clinical pathways, i.e., 1) the market for diagnosis and treatment of pulmonary thromboembolism without fibrinolytics – CP 36 under the contract with the NHIF on the territory of district Pleven; and 2) the market for diagnosis and treatment of pulmonary thromboembolism with fibrinolytic – CP 37 under the contract with the NHIF on the territory of district Pleven.

BCPC finds that UMHAT Dr. Georgi Stranski has abused its dominant position by refusing to conclude a contract with SBALK Pleven for the provision of services from the nuclear medical laboratory under CP 36 and 37 without an objective reason. UMHAT Dr. Georgi Stranski’s behaviour regarding the provision of services by a nuclear medical laboratory leads not only to the exclusion of competitors from the affected markets but could seriously affect the consumers’ interests to the extent of endangering their health and life by not receiving adequate treatment and medical care. The latter is an important factor when considering the gravity of the violation and the

amount of the sanction.

Decision No.1204/09.12.2021 of BCPC is important in terms of the defining of the relevant markets. It becomes evident thereof and from other similar decisions of BCPC (such as Decision No.1205/09.12.2021 of BCPC regarding medical imaging services) that the affected markets are largely determined by the national regulatory requirements for concluding contracts with the NHIF, as **the separate clinical pathways are defined as separate product markets and the territory where an alternative medical institution having the required unit could be used defines the geographical market, usually regional – the territory of the respective district.**

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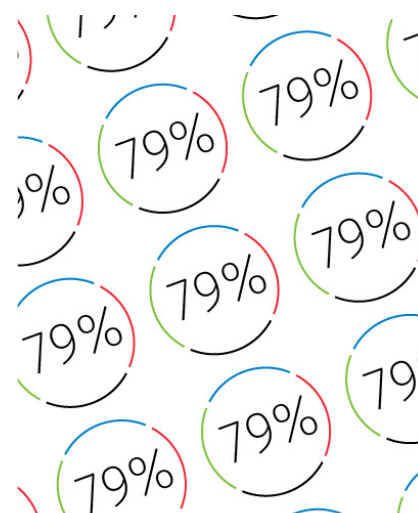
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