

## **DOMINANT POSITION AND ITS ABUSE: THE PRACTICE IN TURKEY**

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### **ÖZET**

*Bilindiği üzere, rekabet hukuku rekabeti bozucu anlaşmalar ve hakim durumun kötüye kullanılması olmak üzere iki temel üzerine oturmaktadır. Bu bağlamda bu çalışma, henüz başlangıç aşamasında sayılabilecek olan Türk rekabet hukukunda bu temellerden birisi olan hakim durum kavramını ve 4054 sayılı Kanun'da düzenlendiği haliyle kötüye kullanılmasını Kurul kararları çerçevesinde incelemektedir. Makalede öncelikle Avrupa Komisyonu-Adalet Divanı'nun hakim duruma yaklaşımı Rekabet Kurulu'nun yaklaşımıyla mukayeseli olarak ele alınmıştır. Ardından hakim durum için Kurul'un göz önüne aldığı kriterler ve birleşme/devralma yoluyla hakim durumun oluşması irdelenmiştir. Hakim durumun kötüye kullanılması ise; rakip firmanın girişinin engellenmesi/zorlaştırılması, haksız fiyatlandırma, ayrımcılık yapılması, iki ürün/hizmetin bağlanması ve pazar gücünün başka pazarda kullanılmasını içerecek şekilde, Kurul'un önde gelen bütün kararları analiz edilerek ve gerekli yerlerde eleştiride bulunularak ele alınmıştır.*

***Anahtar Kelimeler:** Rekabet Politikası, Hakim Durum, Hakim Durumun Kötüye Kullanılması, Birleşme ve Devralmalar.*

***Keywords:** Competition Policy, Dominant Position, Abuse of Dominant Position, Merges and Acquisitions.*

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## INTRODUCTION

This article analyses the Turkish Competition Board's decisions and aims to criticize the final decisions of the Board in the light of the European Competition rules. Although the Turkish Grand National Assembly adopted the Act on the Protection of Competition ("the Act") on December 7, 1994, the Turkish Competition Board (the "Board") could only be appointed on February 27, 1997 with the Turkish Competition Authority completing the establishment of its organizational structure on November 5, 1997. In this context, this survey includes cases within the last six years.

Like the laws of competition in other Eastern European Countries, the Act is modelled on, although not identical to, the relevant provisions of Community competition law<sup>1</sup>. Articles of the Act preventing the disturbance of competition by agreements or concerted practices<sup>2</sup> and abuse of dominance are parallel to Article 81 and 82 of the Rome Treaty, which is the source of the legislation. The Act also includes provisions which are similar to those found in the EEC Regulation 17/62 and Merger Regulation 4064/89<sup>3</sup>.

The third and sixth articles of the Act include respectively the definition of dominant position and conditions of abuse by giving examples. In this context, the Board's approach to the dominant position and the criteria considered are first addressed followed by the abuse conditions –giving examples of each condition. Attempt has been made to reveal the possible differences in the approaches between the Board's and that of the EU practices.

### Dominant Position

#### Definition of Dominant Position (Article 3)

Two primary criteria are seen to be the basis in the definition of the dominant position by the European Court of Justice ("ECJ"): the ability of the firm to make independent moves and to prevent effective competition<sup>4</sup>. The paragraph on 'definitions' in Article 3 of the Act however, defines the dominant position with emphasis on economic criteria in addition to the ability to make independent moves:

"Dominant Position : shall mean any position enjoyed in a certain market by one or more undertakings by virtue of which, those undertakings have the

<sup>1</sup> For an overview of the Turkish Competition Act, see G. Anik, "Competition Rules of Turkey", [1997] E.C.L.R. 311; G. Aşçıoğlu Öz, "Competition Law and Practice in Turkey", [1999] E.C.L.R. 149.

<sup>2</sup> See K. Doğan Yenisey, "Prohibition of Cartels in Turkey", [2002] E.C.L.R. 26.

<sup>3</sup> [1989] O.J. L395/1.

<sup>4</sup> The Court defined the dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers." (see Case 27/76 United Brands v. Commission [1978] ECR 207, Case 85/76 Hoffmann-La Roche v. Commission [1979] ECR 461)

power to act independently of their competitors and purchasers in determining economic parameters such as the amount of production or distribution, price and supply.”

The above definition resembles the approach of the Commission on the Continental Can<sup>5</sup> case. However, together with the United Brands case, in the definition of dominant position by ECJ, prevention of effective competition is seen to form the basis<sup>6</sup>. In the Board’s decisions, however, economic parameters that are in harmony with the Act occupy the forefront. In the decision of BİMAŞ, it has been confirmed that the undertakings in question or those undertakings in equal competitive position in the event of their “ability to influence economic parameters like price, supply, production and quantity of distribution” is enough to be considered as being in the dominant position<sup>7</sup>. In a later decision, however, “monopoly (or dominant position), in the general context of competition law, has been defined as the power to externalize the competition in the market or to control prices”<sup>8</sup>. This definition gives room to both the monopoly power, i.e. power over price, and a criterion similar to the ECJ’s approach.

Also, according to Article 3 of the Act, the ability of ‘one or more’ undertakings to have a dominant position, i.e. collective dominance has been recognized. In the BİRİYAY I and II decisions, it was ruled that the firms YAYSAT, BBD and BİRİYAY had a collective dominant position in the distribution of newspapers and magazines<sup>9</sup>. In the newspapers case, however, it was explained that the collective dominant position could be acquired “by agreement, by acting in concert or as a necessity of the market properties”<sup>10</sup>.

### Relevant Market

The Board, after identifying the relevant market, examined the presence of the dominant position<sup>11</sup>. Though not stated in the Act, adjustment was made to

<sup>5</sup> The Commission defined the dominant position as ‘the power to determine prices or to control production or distribution for a significant part of the products in question’ [1972] CMLR D11 para. II.3.

<sup>6</sup> V.Korah, **An Introductory Guide to EC Competition Law and Practice**, Hart Publishing, 1997, p.78

<sup>7</sup> See **AKS Televizyon Reklamcılık Filmcilik San. ve Tic. A.Ş., Birleşik Medya Paz. A.Ş. v. DTV Haber ve Görsel Yay. A.Ş., MEPAŞ, Prime Medya Filmcilik ve Reklamcılık San. A.Ş., SATEL, BİMAŞ** (cited below as **BİMAŞ**) decision, No. 24582, 13.11.2001, **Official Gazette**, p. 212.

<sup>8</sup> See **İsmet Ayaz v. Belko Ankara Kömür ve Asfalt İşletmeleri San. ve Tic. Ltd. Şti.** (cited below as **BELKO**) decision, No. 24619, 23.12.2001, **Official Gazette**, p. 58.

<sup>9</sup> See **Ulusal Basın Gazetecilik Matbaacılık ve Yayıncılık San. A.Ş. v. BBD, BİRİYAY, YAYSAT** (cited below as **BİRİYAY I**) decision, No. 24375, 16.04.2001, **Official Gazette**, p.26; **Multimedya Basım ve Yayıncılık Tic. A.Ş. v. BBD, BİRİYAY, YAYSAT** (cited below as **BİRİYAY II**) decision, No. 24384, 26.04.2001, **Official Gazette**, p. 58.

<sup>10</sup> See **Ekohaber Gazetesi- Prestij Ltd. Şti. v. Hürriyet Gazetecilik ve Matbaacılık A.Ş., Sabah Yayıncılık A.Ş., Bursa Gazetecilik ve Yayın A.Ş., Olay Basın Yayıncılık A.Ş.** (cited below as **Newspapers**) decision, No. 24374, 15.04.2001, **Official Gazette**, p.13.

<sup>11</sup> Some exceptional decisions are seen. For example, in the decision of **Uzay Gıda**, the market shares of the firm was considered and concluded to be in dominant position without defining the

accommodate the definition of the relevant market and the necessary criteria to be considered in the various decisions. For example, in the Microsoft case<sup>12</sup>, the Board considered substitutes on the demand side and defined the relevant market as “a market made up of a specific product with several alternatives in combination with products similar in terms of quality in the eyes of the consumer, the aims of usage and price”. Though similar definitions are available from various decisions, the definition of the market was also seen to have been made with consideration to the supply substitutions. For example, in the decision of Hewlett Packard (HP)<sup>13</sup>, due to difficulties in the “production of spare parts by undertakings other than HP that fit HP products”, the market has been restructured to contain HP brand printers. Two basic criteria form the basis of the Board’s definition of the market<sup>14</sup>:

- Substitution of the product in the view of the consumer<sup>15</sup>
- The supply substitution of the product<sup>16</sup>

Although economic analyses have not been taken into account in the definitions of the market, in general, some exceptions do exist. For example, in the Arçelik case, to determine whether the firm was in the dominant position or not, after stating that the geographic market occupies a critical place, the Elzinga-Hogarty test<sup>17</sup> was employed and the boundaries of the market determined accordingly<sup>18</sup>.

### Criteria of Dominant Position

When the various decisions of the Board are taken into consideration, it becomes obvious that the criteria examined in the determination of dominant

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relevant product and geographic market (see Kar Gıda San. ve Tic. A.Ş., Pers Gıda San. Tic. A.Ş. v. Uzay Gıda San. ve Tic. A.Ş. (cited below as Uzay Gıda) decision, No. 24866, 04.09.2002, **Official Gazette**, p. 180-181)

<sup>12</sup> See decision AMD Elektronik Bilgisayar San. ve Tic. A.Ş. v. Microsoft Corporation, No. 24824, 23.07.2002, **Official Gazette**, p.8.

<sup>13</sup> See decision Yalova Yalılığı San. ve Tic. Müdürlüğü, CONTIMED Shipping & Trading Co. Ltd. Şti., B. Melih DAĞ v. Hewlett Packard Bilgisayar ve Ölçüm Sistemleri A.Ş., No. 24948, 26.11.2002, **Official Gazette**.

<sup>14</sup> In the Arçelik decision the Board made a similar definition of the relevant product market like that of the Microsoft case and stated that “to define the relevant product market two basic variables have to be considered. They are demand substitution and supply substitution.” ( See Farplas Oto Yedek Parça ve İmalat A.Ş. v. Arçelik A.Ş. (cited below as Arçelik) decision, No. 25218, 03.09.2003, **Official Gazette**, p.28)

<sup>15</sup> See BİMAŞ Birleşik Medya Pazarlama A.Ş. v. CINE 5 Filmcilik ve Yapımcılık A.Ş., Türkiye Futbol Federasyonu (cited below as CINE 5) decision, No. 24362, 03.04.2001, **Official Gazette**, p.24; Newspapers decision, p.12; Başarı Elektronik San. ve Tic. A.Ş., Telsim Mobil Telekomünikasyon Hizmetleri A.Ş. v. Turkcell İletişim Hizmetleri A.Ş. (cited below as Turkcell) decision, No. 25176, 22.07.2003, **Official Gazette**, p. 45-46; Arçelik decision, p.28; BELKO decision, p. 10; Permak Makina San. A.Ş. v. TSE decision, No. 25240, 25.09.2003, **Official Gazette**, p.36.

<sup>16</sup> See HP decision; Arçelik decision, p.29-30.

<sup>17</sup> See K.G. Elzinga and T.F. Hogarty, “The Problem of Geographic Market Delineation in Antimerger Suits”, (1973) 18 **Antitrust Bulletin** 45.

<sup>18</sup> See Arçelik decision, p.31.

position are seen to vary according to the case under consideration. In the BİRİYAY I and II decisions<sup>19</sup> determination of dominant position was made under the following headings: 1-the market share, 2- market structure, 3- history of the market, 4-degree of concentration, 5-low probability of new rivals, 6-demand elasticity, 7- buying power of the customers, 8-economic barriers to market entry. In the Turkcell case<sup>20</sup>, however, the market shares of the firm and its rivals, structure of the demand and barriers to market entry (legal entry barriers, sunk costs, product dependence and network externalities, vertical integrity, the synergy provided by the size of the firm and its extensiveness) were considered in making a detailed examination. In the Uzay Gıda decision<sup>21</sup>, by considering the “qualitative and quantitative components”, Uzay Gıda was found to be in a dominant position. For the quantitative criteria, the characteristics of the sector was numerically considered by taking into account the market shares of both the concerned firm and that of its rivals. In the qualitative analyses, however, examination was done to include barriers in the general sense as follows; high and sophisticated technology, high cost, lack of consumer demand, intellectual property rights, vertical integration and number of firms entering this sector within the last 15 years. In the Mepa case<sup>22</sup>; popularity of the brand, brand image and consumer dependence were also given consideration. In general terms, it can be seen that the Board attach importance to the market shares of the firm in question and those of its rivals first and foremost, as well as entry barriers, structure/history of the market and the buying power of customers.

Of these criteria market share occupies the most important place. In the Samarco Samitri case<sup>23</sup> the Board ruled that “market share is the most important criterion in the determination of dominant position. If the concerned firm owns high enough share in the market, then there leaves no doubt as to its dominant position”. Despite the fact that in all the other dominant position analyses the market share has been considered the first criterion; it was not taken as a sole indicator undoubtedly. In the Turkcell decision, the Board, by changing the approach in the Samarco Samitri case, accepted the importance of the market share but rejected it as being enough on its own: “The market share alone is not enough in the determination of the dominant position, but it is always a marker with prime importance. However, high market share is a strong indicator of the presence of dominant position.”<sup>24</sup> The fact that the Board, in accepting this approach gave reference to the case of Hoffmann-La Roche v. Commission,

<sup>19</sup> See BİRİYAY I decision, p.9-10; BİRİYAY II decision, p.33-34.

<sup>20</sup> See Turkcell decision, p. 47-59.

<sup>21</sup> See Uzay Gıda decision, p. 181

<sup>22</sup> See decision Yurdatap Meşrubat San. ve Tic. Ltd. Şti v. MEPA Meşrubat Pazarlama Dağıtım ve Tic. A.Ş., No. 24866, 04.09.2002, **Official Gazette**, p. 189-190.

<sup>23</sup> See decision Zihni Gemi İşletmeleri ve Tic. A.Ş. v. Samarco Mineração SA, Mineração Da Trindade-Samitri, Samarco/Samitri, No. 24874, 12.09.2002, **Official Gazette**, p.10.

<sup>24</sup> See Turkcell decision, p.47.

demonstrates how keen the Board is in following the steps of the EU competition law.

However, there is no clarity in the definition of ‘high market share’. In the BİMAŞ case, because the total market share of the firms remained in the range of 40%, numerically this ratio per se was not found to be enough to accept a dominant position for the firms together. In a similar manner, in the Arçelik case, the 54% market share was not accepted as being enough to assess a dominant position on the firm. In the Uzay Gıda decision, however, the market share of 62% was considered sufficient, and thus with the other criteria the firm was seen to be in the dominant position. In the Microsoft case, a 95% market share was considered enough evidence for the dominant position without regard for further examination<sup>25</sup>. In a general perspective, it is clear that the Board takes into account other criteria in addition to the 60% and above market shares in arriving at a decision on the dominant position.

The dominant position though defined in Article 3 of the Act as the power to act independently of its “competitors and purchasers”, the Board included “the providers” also in this context, and in some decisions considered their buying power too. In the Arçelik case, the buying power of Arçelik, a manufacturer of household goods, in the plastic injection parts market, was thoroughly investigated. Taking into consideration the buying power of Bosch, a rival firm, Arçelik was ruled as not having a dominant position in the buying market<sup>26</sup>.

### **Mergers and acquisitions**

In Article 7 of the Act, “merger of two or more undertakings, or acquisition of another undertaking ... which would create or strengthen the dominant position of one or more undertakings as a result of which, competition would be significantly impeded in a market for goods and services in the whole territory of State or in a substantial part of it, is prohibited.”

With this article, growth of firms outside their own internal dynamics is kept in check. It is clear from the statement of reason of the Act that, concerns over the highly negative impact that companies attaining dominant position by merger or acquisition will have on the competitive system has been the main reasoning. However, the provision in question neither prevents undertakings in dominant position from merging up nor does it prevent them from acquisition, and whether or not it actually leads to a significant fall in competitiveness remains to be elucidated.

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<sup>25</sup> See BİMAŞ decision, p.236; Arçelik decision, p.32; Uzay Gıda decision, p.181; Microsoft decision, p.11.

<sup>26</sup> See Arçelik decision, p.32.

The Act mandates notification for mergers and acquisition and leaves the Authority to decide which type of merger or acquisition to be subjected to permission by the Board itself. The Board, in this direction, adopted and identified the type of mergers and acquisitions that should be subjected to permission and to give it validity came out with the official communiqué no 1997/1 "Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board"<sup>27</sup>. According to Article 4 of the Communiqué, it states that as a result of the merger or acquisition if the total market share of the concerned undertakings nationwide or in one part of it will exceed 25% or, if below this ratio but their combined turnovers will exceed 25 trillion TL, permission must be obtained.<sup>28</sup>

To date, the Board has also tried to consider whether the competition is significantly impeded in the market in addition to strengthening or creating dominant position as described earlier, in arriving at its decisions. Only in one of the acquisition transactions was the permission withheld for the reason of dominant position<sup>29</sup>. In some cases, despite the significantly high market shares that permitted creation or the strengthening of the dominant position, permission was still given after consideration of other criteria. In some cases however, the Board through the obligations on undertakings prevented the establishment of dominant positions.

The first example of provisional permission given to mergers that creates or strengthens an already existing dominant position is seen in the Trakmak Traktör ve Ziraat Makinaları Ticaret A.Ş. case<sup>30</sup>. In this case, though it was stated that *"if allowed to materialize in its present state, the acquisition transaction will further strengthen the dominant position of the providers whilst creating a dominant position for the distributor in the combined harvester market"*, no analysis of the relevant market or dominant position was made. All the same, permission was granted to this transaction which led to both the creation and strengthening of the dominant position, *"on the condition that equal opportunity and assistance in establishment of distribution facilities would be granted to other firms that meet these same basic requirements in the combined harvester market"*.

In the Ülker decision, however, acquisition of Karsa, with a market share of 0.5%, by Ülker which dominates the biscuit market with a 59.5% share was cleared on the grounds that this transaction will not change the differences between it and its rivals significantly in view of the large number of

<sup>27</sup> Official Gazette, No. 23078, 12.08.1997.

<sup>28</sup> For an overview of the Communiqué, see F.R. Crotti and M. Kasman, "Turkey's New Merger Control Legislation", [1998] E.C.L.R. 370.

<sup>29</sup> See Toros Gübre ve Kimya Endüstrisi A.Ş./İstanbul Gübre San. A.Ş. (cited below as İGSAŞ) decision, No. 24318, 14.02.2001, Official Gazette.

<sup>30</sup> See decision Trakmak Traktör ve Ziraat Makinaları Tic. A.Ş./New Holland N.V./ Koç Grubu, No. 23601, 04.02.1999, Official Gazette, p.42-43.

undertakings in this market, access to raw materials, and the absence of barriers to production and entry into this market.<sup>31</sup>

In the acquisition of copyrights to some of the data network products of IBM by Cisco Systems Inc, approval was given to the transaction with over 70% market shares. Two different markets, routers and switches, were identified in this case. It was stated that after the transaction process, the market shares of Cisco would reach 26.6% in the switch market which is not a concern for dominant position but, with the withdrawal of IBM from the router market the market share of Cisco, which is already the leader in this market, would increase to about 70.5%, a situation that will further strengthen its position in the market. In spite of this, emphasis has been placed on the necessity of considering all the characteristics of the market as a whole in determining the dominant position instead of considering solely the market share, an important determinant, though not enough alone. In this context, after analysis of the characteristics of the network sector, it was concluded that it was not likely to prevent competition to any significant degree because of the potential competition and the absence of a barrier to entry into the market though acquisition would lead to an increase in Cisco's router market share.<sup>32</sup>

In the merger deal between Glaxo Wellcome plc and SmithKline Beecham plc pharmaceutical firms, the conditional permission the Board gave makes it possible to interpret the transaction as one not leading to the establishment of dominant position.<sup>33</sup> Though 51 different relevant product markets were defined in the merger transaction, it was only for one product a dominant position in the market was established by the parties involved. However, establishment of a dominant position was prevented by a statement made by the Board emphasizing that the licence of the firm with the highest market share in the product in which the dominant position is so created, would have to transfer its licence for the drug concerned to another firm.

However, the only merger or acquisition in which the Board didn't permit for the reason of dominant position is that of İGSAŞ decision. İGSAŞ, which operates in the fertilizer market, is a firm in the context of privatization. In a privatization bid, the highest offer for İGSAŞ was that given by Toros Gübre ve Kimya Endüstrisi A.Ş which is also in the fertilizer market and the issue was brought before the Board for the acquisition. Due to the very strong position of İGSAŞ in the nitrogenous fertilizer market, focus was placed on the "concentration at the provider level, the market structure and the effects of acquisition on the distribution system" in this market. After the acquisition, the market share of Toros Gübre in the nitrogenous fertilizer market as reflected in

<sup>31</sup> See decision Ülker Gıda San. ve Tic A.Ş./Karsa Bisküvi Gıda San. ve Tic. Ltd. Şti., No. 24671, 14.02.2002, **Official Gazette**, p. 43.

<sup>32</sup> See decision Cisco Systems Inc. / IBM Corporation, No. 24226, 10.11.2000, **Official Gazette**, pp. 66-76.

<sup>33</sup> See decision Glaxo Wellcome plc. / SmithKline Beecham plc., No. 24718, 06.04.2002, **Official Gazette**, p.28.



sales, production, processing capacity and import rose to between 45% and 50%. However, the Board, unlike in the Ülker and Cisco cases and the other decisions in which determination of the dominant position was made, decided that a lower market share will lead to establishment of a dominant position and so declined to clear the acquisition. The Board stated that Toros Gübre shall transmit to dominant position in the nitrogenous fertilisers market due to:

- its becoming market leader as to sales, production, processing capacity and import,
- on the grounds that it shall be performing a significant part of the sales of AN (33 percent N) and urea (46 percent N) whose part in the sales of total nitrogenous fertilisers have been increasing, that it shall take the opportunity to improve its impact in the market,
- the oligopolistic structure of the market with high entry barriers will significantly be empowered, and thus, entry to market will become harder<sup>34</sup>.

### **Abuse of Dominant Position (Article 6)**

Article 6 of the Act, prohibits 'abuse' in general terms: "any abuse, by one or more undertakings acting alone or by means of agreements or practices, of a dominant position in a market for goods and services within the whole or part of the territory of the State is unlawful." The article also enumerates certain types of abuses, examined below, without being exhaustive.

### **Preventing Entry or Impeding Activities of Competitors**

In paragraph (a) of Article 6 of the Act, "to prevent, directly or indirectly, other undertakings in its area of commercial activities or practices which aim to impede the activities of the competitors in the market" has been considered among states of abuse of the dominant position.

In the BIRYAY II decision<sup>35</sup>, the activities of BBD and YAYSAT against their rival group Dost Basın Dağıtım A.Ş. (DBD) was considered as one with the aim of impeding the activities of rival firms in the market due to the following observations;

- Attempting to eliminate DBD subsidiary dealers by turning them into "BBD and YAYSAT group" subsidiary dealer,
- Pushing new DBD subsidiary dealers towards the outskirts,

<sup>34</sup> See İGSAŞ decision, p. 58; Annual Report on Competition Policy Developments in Turkey, 20.04.2001, p.19.

<sup>35</sup> See BIRYAY II decision, p. 59; Annual Report on Competition Policy Developments in Turkey, 20.04.2001, p.9.

- Offering dealership to DBD dealers in return for not selling publications distributed by Dost Basın Dağıtım,

- Preventing DBD from using the existing points of sale for newspapers and magazines by signing backdated contracts with subsidiary dealers.

In the Eti Holding decision, however, it was stated that dominant position could also be abused by refusing to supply in an attempt to prevent other firms from entering its field of activity. According to the Board, the firm in the dominant position can only be compelled to make sales under two conditions:

- In the event the customer who makes a request for goods to the firm in dominant position is a permanent buyer,

- In the event an undertaking has its activities maintained by essential facilities under the control of the undertaking in the dominant position<sup>36</sup>.

### Unfair Pricing

Article 6 does not clearly prohibit predatory pricing. However, as stated by the Board, “application of predatory pricing ... if it will prevent the entry of a specific product or if in part it aims to make the activities of an undertaking difficult or if it results in such” can be considered in paragraph (a) of Article 6.<sup>37</sup> From a review of the Uzay Gıda decision, it is clear that for the predatory pricing three basic criteria were considered:

- Presence of the firm in the dominant position

- The pricing below the average variable cost and the long duration of the condition

- The intention of the firm to force rivals out of the market or make their activities difficult

The board also accepted two exceptional conditions which cannot be taken as predatory pricing under sales below the cost: promotional activities and monitoring of the rival: “The pricing policy where sale prices are placed below the average variable cost under promotional activities for a limited period is considered acceptable.”<sup>38</sup>

Although excessive pricing, an exact opposite of predatory pricing, has not been described in the Act, in a similar manner in the BELKO decision, abuse of the excessive pricing was considered under Article 6 of the Act<sup>39</sup>. In the ASKİ case, excessive pricing was defined as “the presence of an unreasonable

<sup>36</sup> See decision Ceytaş Madencilik Tekstil San. ve Tic. A.Ş. v. Eti Holding A.Ş., No. 24524, 15.09.2001, *Official Gazette*, p.24.

<sup>37</sup> See Uzay Gıda decision, p. 180

<sup>38</sup> See Uzay Gıda decision, p.184

<sup>39</sup> See BELKO decision, p.60

difference between the economic value of an item and its price”, and for its determination three primary criteria have been suggested:

- Comparison of the total costs of production with price
- Comparing the prices of the same or similar products in the relevant market
- Comparison of the prices of the same or similar goods from neighboring markets<sup>40</sup>

Review of the BELKO decision reveals that the sale of the product at a price 46%-57% higher than that of neighboring markets was considered an excessive pricing case<sup>41</sup>. However, the Board stated that “there is no yardstick to measure what ratio of the pricing constitutes excessive pricing”, and as such every case should be considered in its own merits<sup>42</sup>. In the ASKİ decision, despite the 29% to 66% price difference relative to other regions, it was not considered a case of excessive pricing<sup>43</sup>. However, not considering a difference as high as 66% as an excessive pricing without any explanations represents a contradiction in Board’s approach to this issue.

### **Imposing Dissimilar Conditions**

In paragraph (b) of Article 6 of the act, “to discriminate, directly or indirectly, by way of imposing dissimilar conditions for equivalent and same rights and obligations to the purchasers of equivalent position” has been considered abuse and so prohibited. A concrete example of discrimination has been provided by the Cine-5 decision. The Board stated that Cine-5, holder of the broadcasting rights to the Turkish Professional Premier League matches, abused its dominant position, because it “applied different prices to its customers of equivalent status” in selling scenes from the matches to other television channels. Examination of the price differences included; whether the videotapes sold to channels contained different scenes or time durations or not, whether the price differences originated from costs or not, payment conditions (cash/installment) and the delivery times of the tapes; in short, the product structure and whether the recipients were in equivalent conditions or not were examined. The Board stated three conditions to be considered for discrimination in the same case as follows:

- The undertakings involved in discriminative application should be rivals.
- The application should put one of the rival recipients at a disadvantage.

<sup>40</sup> See Muzaffer Saraç v. Ankara Su ve Kanalizasyon İdaresi Genel Müdürlüğü (cited below as ASKİ) decision, No. 24630, 04.01.2002, *Official Gazette*, p.37.

<sup>41</sup> See BELKO decision, p.56

<sup>42</sup> See BELKO decision, p.61

<sup>43</sup> See ASKİ decision, p.38

- Offer of different prices to unequivalent commercial transactions is not price discrimination according to the Competition Law<sup>44</sup>.

### Tying Practices

In paragraph (c) of Article 6, “making the conclusion of contracts subject to the acceptance of restrictions concerning resale conditions such as the purchase of other goods and services or acceptance by the intermediary purchasers to display other goods and services” situation considered to be applications known as tying practices has been prohibited.

The Board in its decision on Teleon, the owner of the broadcasting rights to the Turkish Professional Premier League, investigated the probability of a tying condition regarding the application of discount charges to subscribers or potential subscribers of Telsim, another firm belonging to the same group which operates in the GSM market. The Board by defining the "tying product" as one which the customer has demanded primarily and the "tied product" as the second product which the supplier wants to sell, stated that for the tying practice to be classified as abuse of the dominant position, the elements listed below needs to be ascertained;

- Whether the undertaking involved is in a dominant position or not,
- Whether the tying and the tied products form a single product or not (whether the products are independent of each other or not),
- Whether or not customers are forced to buy a product and whether this application gives the upper hand in the relevant market to the firms with which it has been in economic unit or not<sup>45</sup>.

### Leveraging Practices

In paragraph (d) of Article 6 of the Act, “practices which aim to distort competition in a market for goods and services by means of taking financial, technological and commercial advantages created by the dominant position in another market” has been prohibited. In the BİRİYAY I and II decisions, the Board stated that BBD, BİRİYAY and YAYSAT with the collective dominant position in the distribution of newspaper and magazines market have violated the rules in paragraph (d) of Article 6 of the Act “by carrying out activities that distort conditions for competition in the newspaper and magazines *publication* market, making use of financial, technological and commercial advantages in the newspaper and magazines *distribution* market”.<sup>46</sup> In another case, it was

<sup>44</sup> See CINE 5 decision, p.37

<sup>45</sup> See Aks Televizyon Reklamcılık ve Filmcilik San. ve Tic. A.Ş., Turkcell İletişim Hizmetleri A.Ş. v. Türkiye Futbol Federasyonu, Teleon Reklamcılık ve Filmcilik San. ve Tic. A.Ş. (cited below as Teleon) decision, No. 25168, 14.07.2003, **Official Gazette**, p.44.

<sup>46</sup> See BİRİYAY I decision, p. 32; BİRİYAY II decision, p. 70.

decided that Turkcell, a partner of KVK which is a distributor for Ericsson, violated the Act in a similar manner by making the sale of Ericsson appliances compulsorily tied to that of the Turkcell line by means of its dominant position in the GSM service market to further strengthen its situation in the cellular phone market<sup>47</sup>. However, the Board in another decision, in a rather contradictory manner, stated that a discount charge by Teleon, a dominant firm in the market of “scenes from the Turkish Professional Premier League matches recorded on tape”, to subscribers of Telsim, a member from the same group which operates in the GSM market, is not within the scope of paragraph (d) but merely a case of tying as described in paragraph (c)<sup>48</sup>. In general, the Board found the firm in dominant position to have used this power,

- To sell its products together with those from other markets,
- To prevent the sale of products belonging to its rivals in another market,

as a violation of the Act.

## CONCLUSION

Article 6 of the Act number 4054 has a lot in common with Article 82 of the Rome Treaty. A reflection of this condition is seen in the decisions of the Board on the dominant position utilizing the interpretation of ECJ and the Commission. In the six-year period, the Board examined several cases relating to dominant position. In addition to the examples of abuse mentioned in the Act, situations like excessive and predatory pricing and refusal to supply are observed to be interpreted as abuse. The elements to be considered in determining the dominant position has been provided by the cases made, and through that transparency in terms of undertakings has been ensured. A look at events chronologically reveals the fact that the Board in the early cases gave decisions without much analysis. With time, however, in line with the Community’s practice it is seen that decisions were drawn based on thorough examinations. Considering the fact that the competition law is still new in Turkey, the point reached thus far gives the hope that it will soon catch up with Western European countries on this issue.

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<sup>47</sup> See Turkcell decision, p.98.

<sup>48</sup> See Teleon decision, p.44-45.