AN ANALYSIS OF THE TURKISH COMPETITION AUTHORITY DECISIONS THROUGH THE GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY

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Submitted to the Graduate School of Arts and Social Sciences
in partial fulfillment of
the requirements for the degree of
Master of Arts

Sabancı University
September 2013

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DATE OF APPROVAL: 13.08.2013

"Güneş ışığı sıcacıktı. Küçük Kara Balık güneşin yakıcı sıcağını sırtında hissediyor, bundan zevk alıyordu. Usul usul ve keyifle deniz yüzeyinde yüzerken ….Balıkçıl geldi, onu yakalayıp götürdü. Küçük Balık balıkçılın uzun gagasında çırpınıyor ama kurtaramıyordu kendini. Balıkçıl onu belinden öyle sıkı kavramıştı ki çok canı yanıyordu. Küçük bir balık suyun dışında ne kadar yaşayabilirdi ki! "

Samed Behrengi, *Küçük Kara Balık*

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Abstract

Thanks to the reforms within the last 15 years, the forms-based approach of the European Union Competition Policy has evolved into an effects-based approach which gives importance to consumer welfare and economic analysis. One of the most important developments in this reform process is the publication of the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings at the end of 2008.

The main goal of the study is to discover how the transformation from forms-based approach into effects-based approach has reflected on Turkish Competition Authority decisions about predatory pricing, rebates, refusal to supply, margin squeeze and exclusive dealing agreements. In the name of these effects, relevant Turkish Competition Authority decisions on the abuse of dominant position in exclusionary practices between 2009 and 2013 have been evaluated under the light of European Union decisions and the Guidance.

Consequently, it has been argued that after 2009, European Union is more consistent to adopt an effect-based approach. On the other hand, Turkish Competition Authority decisions do not show a consistent and clear tendency towards effects-based approach. However, Turkey takes European Union Competition Policy as a model to itself and the publication of The Draft for Guidance on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings may show Turkey will follow more effects-based approach in the future. In such a case Turkish Competition Authority may be required to evaluate positive and negative sides of the guidance and whether Turkey really needs it.

Özet

Son 15 yılda yapılan reformlar sayesinde Avrupa Birliği Rekabet Politikası'ndaki şekilci yaklaşım ekonomik analize ve tüketici refahına önem veren etki temelli bir yaklaşıma dönüşmüştür. Bu reform sürecindeki en önemli gelişmelerden biri 2008 yılının sonunca yayınlanan, Komisyon'un AT Anlaşması'nın 82. Maddesinin Uygulanmasına İlişkin Hâkim Durumdaki Teşebbüslerin Dışlayıcı Uygulamalarına Yönelik Öncelikleri Rehberi'dir.

Bu çalışmanın temel amacı Avrupa Birliği Rekabet Politikası'nın şekilci yaklaşımdan etki temelli yaklaşıma geçmesinin Türk Rekabet Kurumu'nun yıkıcı fiyatlama, indirim sistemleri, mal vermeyi reddetme, fiyat sıkıştırması ve münhasırlık anlaşmaları ile ilgili kararlarına nasıl yansıdığının ortaya çıkarılmasıdır. Sözü edilen etkilerin açığa çıkarılması amacıyla Türk Rekabet Kurumu'nun 2009-2013 yılları arasında çıkarmış olduğu hâkim durumun kötüye kullanımında dışlayıcı uygulamalar üzerine olan seçilmiş kararları Avrupa Birliği kararları ve Rehber ışığında analiz edilmiştir.

Sonuç olarak, Avrupa Birliği'nin özellikle 2009 sonrasında etki bazlı yaklaşımı benimsemede daha tutarlı olduğu görülmüştür. Türkiye Rekabet Kurumu kararlarında ise etki bazlı yaklaşım konusunda açık ve tutarlı bir eğilim görülmemiştir. Ancak Rekabet Politikası konusunda Avrupa Birliği'ni kendisine model alan Türkiye'nin, Hâkim Durumdaki Teşebbüslerin Dışlayıcı Kötüye Kullanma Niteliğindeki Davranışlarının Değerlendirilmesine İlişkin Kılavuz Taslağı hazırlamış olması, bir rehber çıkararak gelecekte daha etki bazlı bir yaklaşım benimseyeceğini gösterebilir. Böyle bir durumda Türk Rekabet Kurumu'nun bu rehberin olumlu ve olumsuz yanlarını ve bu konuda gerçekten bir rehbere ihtiyacı olup olmadığını değerlendirmesi gerekmektedir.

ACKNOWLEDGEMENTS

First of all, I want to thank my supervisor, Professor İzak Atiyas to whom I owe a large debt of gratitude for sharing me his wealth of knowledge about the Competition Policy. It is only with his support and guidance that I have been able to complete this process. I am also thankful to Professor Fırat İnceoğlu who first time introduced the economic concepts and the Turkish Competition Authority decisions in Industrial Organization course. I would like to express my special thanks to Professor Virginia Brown Keyder who inspired me with her knowledge and made me really understand how European Union law works.

I would like to thank Professor Kerem Cem Sanlı as he read this work in a detailed manner and added his criticisms and suggestions. I am also thankful to Professor Ahmet Evin for his academic guidance as a member of my thesis committee and for his invaluable comments for the final version of my thesis. I am also thankful to Professor Meltem Müftüler Baç for her advice on my studies.

I would like to thank to my roommate from A4 305 to make Sabancı University more enjoyable and emotionally encouraged me, but also simplified my life while writing this work. I am also thankful to my class mates in ES for their friendship.

I am deeply grateful to my parents, Fatma and İbrahim Kıbrıs, who have supported and encouraged me throughout my studies. Lastly, I am thankful to my sister, Güldeniz Kıbrıs for being very patient, cooking delicious meals and sharing her experiences with me. This thesis is dedicated to my family.

INTRODUCTION:

Abuse of dominant position through exclusionary practices such as predatory pricing, loyalty rebates, refusal to supply, margin squeeze and exclusive dealing agreements hinders the growth of competition in the market and reduces welfare. To ensure functioning of the market, practices which are detrimental to competition should be analyzed. There are two approaches through which a competition authority decides on whether the practice destroys competition or not. The first approach is forms-based or per se approach in which engaging in abusive practice is considered per se illegal due to the fact that it is written in the law. The plaintiff is punished because anti-competitive effect of a practice is theoretically proven. The second approach is effects-based approach through which the competition authority examines justifications and specific consequences of anti-competitive behaviors. Here, all relevant competitive market structure is taken into account. Efficiencies such as economies of scale and cost efficiencies and effects on consumer welfare are investigated unlike the forms-based approach which does not require a detailed assessment of the behavior.[1]

In the last 15 years, the EU Competition Policy has been evolving from a predominantly forms-based approach to effects-based approach. A reform process has been initiated in the EU Law with regard to the abuse of the dominant position and exclusionary conduct.[2] The Discussion Paper[3] published in 2005 was followed by the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Guidance) in 2009.[4] The goal of these reforms is to evaluate abusive practices through a detailed and

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[1] Federico Etro and Ioannis Kokkoris, "Chapter 1: Toward an Economic Approach to Article 102" in *Competition Law and the Enforcement of Art. 102*, Etro and Kokkoris (eds.), (Oxford Univ. Press, 2010), p.1, Yannis Katsoulacos and David Ulph, "Chapter 4: Optimal Enforcement and Decision Structures for Competition Policy: Economic Considerations" in in *Competition Law and the Enforcement of Art. 102*, Etro and Kokkoris (eds.), (Oxford Univ. Press, 2010), p. 89-91.

[2] Abuse of dominant position (Article 102 TFEU), http://ec.europa.eu/competition/antitrust/art82/

[3] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Discussion Paper), http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

[4] "Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by

clear approach. In order to keep up with these developments, the Turkish Competition Law broadly follows the EU example and makes some adjustments built upon Article 6 of the Act No 4054 of Turkish Competition Law[5] and EU Competition Law consisting of the decisions of Court of Justice of the European Union (CJEU) and the European Commission.

Thus, this study aims at analyzing the abuse of the dominant position decisions on exclusionary practices in Turkey between 2009 and 2013 in relation to EU decisions that were made after the publication of Guidance in 2009. The impacts of the EU reform process on the Commission, CJEU and Turkish Competition Authority (CA), the compatibility of the decisions with the Guidance and the evolution of the approach from a forms-based to effects-based are examined.

For analyzing this issue, I divided the thesis into 4 parts. The first chapter presents an overview and analysis of Article 102, the Discussion Paper and the Guidance. Chapter 2 analyzes relevant EU cases chosen from the period between 2009 and 2013 under five subheadings each of which representing a type of exclusionary behavior. For predatory pricing, Post Danmark; for rebates, Tomra and Intel decisions; for refusal to supply, Telekomunikacja Polska decision; for margin squeeze, Telia Sonaria decision; and finally for exclusive dealing, EDF and Soda ash decisions are examined.

The third chapter is concentrated on relevant cases from Turkey between 2009 and 2013. The subtitles are again the same. For predatory pricing, Knauf, THY, TDI decisions; for rebates, DMG, Kalekim and Kale Kilit decisions; for refusal to supply, Sanofi Aventis, Türk Telekom and CNR decisions; for margin squeeze, TTNET I, TTNET II decision, Turkcell's 2010 decision and finally for exclusive dealing Mey İçki and Turkcell's 2011 decisions are examined.

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dominant undertakings", http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF

[5] The Act No 4054, Abuse of Dominant Position, Article 6, http://www.rekabet.gov.tr/default.aspx?nsw=j6VYScQKgFG/oIWFwqUaBQ==-SgKWD+pQItw=

The cases in Chapter 2 and Chapter 3 are chosen because they either the most debated or the most relevant cases. As for the subtitles for both Chapter 2 and Chapter 3, I did not include tying and bundling, which is mentioned in the Guidance, since the amount of tying and bundling cases is very low both Turkey and EU during the period examined in this study. Here I should emphasize that I am not doing a one-to-one systematic comparison between EU and Turkish cases. What I am not doing is to evaluate at Turkish cases through EU lenses. The fourth part presents a summary and conclusions.

CHAPTER 1: GUIDANCE ON ARTICLE 102 (EX. ARTICLE 82) ENFORCEMENT PRIORITIES[6]

Being published 3 December 2008, the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty (TEC) to Abusive Exclusionary Conduct by Dominant Undertakings has 14 pages and 4 chapters; Introduction, Purpose of the Document, General Approach to Exclusionary Conduct, and Specific Forms of Abuse. It reveals the changing approach in the abuse of dominant position cases in the EU from forms-based approach to an effects-based approach. The document itself is the product of EU reforms on the abuse of dominant position cases. The main goal of the reforms is to have an effects-based approach instead of forms-based one for analyzing the abuse of dominant position cases in general.

Article 82 of the TEC has been in force since the Treaty of Rome that was signed in 1957. The content has not changed since then. However, the number of the article has become 102 with the Treaty of Lisbon in 2009, when the EC Treaty and the Rome Treaty were transformed into the Treaty on the Functioning of the European Union (TFEU). Very basically, the article prohibits the abuse of the dominant position. Reform of the article was initiated through the publication of the DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses that was published in 2005.[7] The Discussion Paper is about the exclusionary conduct of the abuse of the dominant position and the scope of the reforms related to Article 82. It was widely circulated and was subject to intense public consultation. Thus, the Guidance, which builds on the Discussion Paper, was not an immediate transformation; it was the result of a review and reform process[8].

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[6] Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF

[7] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Discussion Paper), http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

[8] Abuse of dominant position (Article 102 TFEU), http://ec.europa.eu/competition/antitrust/art82/

1.1.Article 102 (ex. Article 82 TEC):[9]

The full Article 102 states:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Article 102 of TFEU says that abuse of the dominant position is prohibited. It includes both single dominance and the collective dominance. The types of the abuse of dominant position are exploitative and exclusionary practices. Exploitative practices are related to the exploitation of market power to harm customers directly. Price discrimination and excessive pricing can be considered as exploitative practices.[10] On the other hand, exclusionary practices aim to maintain the market power by harming rivals. The practices include exclusive dealing, predatory pricing, loyalty rebates, tying and bundling, refusal to supply and margin squeeze.[11]

[9] Article 102 (ex Article 82 TEC), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:NOT

[10] Pınar Akman, "Exploitative Abuse in Article 82EC: Back to Basics?" CCP Working Paper 09-1, 2008, p. 4.

[11] Massimo Motta M. and Alexandre de Streel. "Exploitative and Exclusionary Excessive Prices in EU Law," the paper presented in 8th Annual European Union Competition Workshop, Florence, June 2003, p. 1.

Article 102 is the backbone of the EU Competition Policy. According to Lowe, approximately one quarter of the investigations of the Commission is about Article 102. There are also cases involving both Article 101[12] & 102. At the end, it can be said that almost half of the cases involve Article 102[13] since the formation of EU. Besides, the highest fine imposed since the very beginning is the one for the infringement of Article 102[14]. Therefore, the way the Commission interprets Article 102 is highly essential. In fact, there have been changes in Article 101, which is related to restrictive agreements and acquisitions and many documents and guidelines have been published since in the 1990s. All these developments in Article 101 aimed at adopting an effects-based approach.[15]

On the other hand, Article 102 is still the same since 1957. Despite that, the Commission's interpretation of the articles has changed through time. The first and foremost reason for this transformation in the way Article 102 was analyzed is the increasing economic integration of the EU. Through time, the trade barriers were lifted; the internal market of the EU became a single market that guarantees four freedoms that are free movement of good, capital, services and people. In that kind of an environment, an effective Competition Policy can help to have a free and fair trade and the EU single

[12] Article 101(ex Article 81) is the another Competiton Rule of the EU applying to the undertakings, in case of restrictive agreements, See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:en:NOT for further details.

[13] European Competition Network Statistics, http://ec.europa.eu/competition/ecn/statistics.html#3, Lowe, Philip, 11 February 2009, "The European Commission Formulates its Enforcement Priorities as Regards Exclusionary Conduct by Dominant Undertakings", Global Competition Policy, https://www.competitionpolicyinternational.com/the-european-commission-formulates-its-enforcement-priorities-as-regards-exclusionary-conduct-by-dominant-undertakings/

[14] In COMP/37.990 Intel, Commission Decision of 13 May 2009, the Commission imposed a record fine which is EUR 1.06 billion., Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 69-70.

[15] Press Release: "Antitrust: Guidance on Commission Enformcement Priorities in Applying Article 82 to Exclusionary Conduct by Dominant Firms-frequently asked questions," MEMO/08/761, 03.12.2008. http://europa.eu/rapid/press-release_MEMO-08-761_en.htm

market to reach its full potential.[16] The second reason for the change in the analysis is stated by Lowe. According to him, economic evidence and theory have gained importance for being able to understand how the markets work.[17] In fact, Article has been considered as 'not-modern' and outdated. Marden and Gormsen argue that Article 102 was affected from "Ordoliberalism" that aims to protect the competitors rather than the competition itself. [18]

Furthermore, through time, mostly forms-based approach of the Commission has become insufficient for some cases.[19] For instance, in Michelin II decision in 2001,[20] the Commission stated that Michelin abused its dominant position by practicing loyalty rebates. This decision was heavily criticized because of its forms-based approach. Some scholars argue that if the Commission had adopted an effects-based approach, the outcome of decision would not find the practices abusive.[21] The other example can be

[16] "Competition: Annual report shows how competition policy helps unlock potential of EU Single Market"
"EU Competition Policy", http://europa.eu/rapid/press-release_IP-13-472_en.htm, http://europedia.moussis.eu/books/Book_2/5/15/,
Speech of Neelie Kroes, "Competition policy as a promoter of the Single Market", http://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Feuropa.eu%2Frapid%2Fpress-release_SPEECH-06-245_en.pdf&ei=cF0GUsm4GobFtAap7oGoCg&usg=AFQjCNHsikFBq8xfy4LW74up50o72O5U9g&sig2=THnC0Zdlv2_LvfyPzRAbDA&bvm=bv.50500085,d.Yms
[17]Lowe, Philip, op. cit.
[18] Ordoliberalism defined as "an ideology dedicated to achieving a competitive order that is able to control private economic and political power in order to ensure a properous and humane society, which quarantees individual economic freedom and price stability" (p. 881), Marsden and Gormsen says that protecting the competitive structure together with competitors rather than the competition's actual results goes back to Ordoliberal thought (p.882) See Philip Marsden and Liza Lovdahl Gormsen,"Guidance on abuse in Europe: The continued concern for rivalry and competitve structure", The Anti Trust Bulletin, Vol.55, No.4/Winter 2010, pp. 875-914 for further information.
[19] Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 70, Lowe, Philip, op.cit.
[20] Case T-203/01, *Michelin v. Commission,* 20 June 2001
[21] See Massimo Motta, Michelin II-The treatment of rebates in Cases in European Competition Policy-The Economic Analysis edt. Bruce Lyons, p.29-49, Denis Waelbroeck, The Assessment of Efficiencies under Article 102 and the Commission's Guidance Paper, p. 2

the British Airways Case.[22] The CJEU argued that proof of consumer harm is not necessary for the evaluation of abuse of the dominant position. It means the CJEU did not require analyzing anti-competitive effects on consumers. The CJEU made the same argument in Continental Can Case in 1973.[23] This decision was found formalistic and suggests a much more economic analysis.[24] As the examples show, the economic analysis was missing even in some significant cases mentioned above.

The other criticism about Article 102 focuses on its ambiguous nature that stems from the forms-based approach of the Commission. According to Art and Colomo, Article is not clear and coherent "both internally and in relation to other provisions of EU competition law". [25] As Akman states the criteria of 'abusiveness' and the standard of harm are not clearly stated. Businesses cannot be sure if their practices are abusive or not at the first glance. This lack of clarity leads to uncertainties of how and when to apply. Because of this problem of its implementation and interpretation, one could say that the application of Article becomes less legitimate. Indeed, the clarity of Article 102 is important not only for the businesses but also for member states and candidates like Turkey which take EU Competition Law as a model[26] as a member of Customs Union.[27]

Thus, considering all these points related to Article 102, the Commission initiated a review process. To clarify Article 102 by adopting an effects-based approach, it published DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses in 2005. This was the second source; but the first towards the Guidance.

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[22] Case T-219/99 P *British Airways v. Commission* [2003].
[23] Case C-6/72 Continental Can v. Commission Case [1973].
[24] Ariel Ezrachi, *EU Competition Law*, (Hart Publishing:Oxford, 2012), p. 88.
[25] Jean-Yves Art and Pablo Ibáñez Colomo, "Judicial Review in Article 102 TFEU, 2005, p. 16-17. http://www.intertic.org/BookPapers/Art.pdf
[26] Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları: İstanbul, 2010), pp. 69-91, p. 70.
[27]"AB ile İlişkiler,"
http://www.rekabet.gov.tr/default.aspx?nsw=EE+M7vEMd61mHuetzOK/MQ==-H7deC+LxBI8=

1.2.Discussion Paper of 2005:[28]

The Discussion Paper is not guidance for the enforcement priorities of Article 82, but a revealing of possible principles which could be transformed into a guideline later[29]. It presents market definition, dominance, framework for analysis of exclusionary abuses, exclusionary practices and possible defenses meaning objective justifications and efficiencies in a detailed way. The Paper enlists these exclusionary practices as predatory pricing, single branding and rebates, tying and bundling and refusal to supply. The paper aims to have to economic analysis and a more effects-based approach when enforcing Article 82. In order to make economic analysis as efficient competitor test was introduced for price-based practices as the fundamental tool for understanding abusive practices. Within the context of effects-based approach, whether an anti-competitive practice causes consumer harm or not was emphasized. In fact, the Commission states that the objective of Article 82 is to enhance consumer welfare and ensure efficient allocation of resources.[30] Besides, the paper states that efficiencies should be also taken into account for deciding whether a practice is abusive or not. To clarify, if there are efficiencies that outweigh anti-competitive effects, these practices may be not abusive.[31]

The actual aim of the Discussion Paper is literally "to discuss". Therefore, the Commission asked for comments on its website and received more than one hundred comments in return. It also organized a public hearing and a public debate on in June 2006 participated by scholars and experts in the field including Elhauge, Neven and Geradin. Then, the Commission evaluated the comments and all the findings of debate. More than three years later, based on the debates, the Guidance was published by the Commission in December 2008.[32]

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[28] Discussion Paper, http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf
[29] ibid., para 7
[30] ibid.,para 4.
[31] Press Release: "Competition: Commission publishes discussion paper on abuse of dominance," IP/05/1626, 19.12.2005. http://europa.eu/rapid/press-release_IP-05-1626_en.htm
[32]Abuse of dominant position (Article 102 TFEU), http://ec.europa.eu/competition/antitrust/art82/

1.3. An Overview of the Guidance:

The Guidance is not a statement of law, but the enforcement priorities of the DG Competition. It does not bind the European Courts, the National Competition Authorities and Member State Courts. However, these institutions are expected to use it as a framework for their enforcement of Article 82.[33] The Guidance was designed to have a more effects-based approach in the implementation of Article 82. The Commission argued that the Guidance "provided a comprehensive guidance to business community and competition law enforcers at national level on how the Commission uses an economic and effects-based approach to establish its enforcement priorities under Article 102 TFEU in relation to exclusionary conduct"[34] in order to "provide greater clarity and predictability" as a "general framework".[35]

The main focus of the Guidance is the protection of consumer welfare. The Commission states that dominant firms have "special responsibility" to "compete on merits" and not to infringe Article 82. The effective enforcement of Article 82 helps markets and it is beneficial for businesses, consumers and integrated internal market. [36] The Guidance states that there are two forms of abuse of the dominant position; exploitative and exclusionary conducts. What the Guidance solely takes into account is the exclusionary practices of the single dominant firms.[37]

Then, the Guidance presents a general approach to exclusionary conduct. It states that the first step in the assessment of dominant position is the degree of market power.[38] Here, the dominance is defined as position of the economic strength of an undertaking that can use this to prevent effective competition and behave independently

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[33] "EU Competition Law Update", p. 4, http://www.cgsh.com/files/News/b9e60ba9-937c-4493-9d61-7f0a058c8748/Presentation/NewsAttachment/a4a825a7-a7dd-425a-b254-8040bb135e30/CGSH%20Alert%20-%20Guidance%20on%20the%20Commission%20Enforcement%20Priorities%20in%20Applying%20Article%2082.pdf,

[34] Abuse of dominant position (Article 102 TFEU), http://ec.europa.eu/competition/antitrust/art82/

[35] Guidance, para 2.

[36] ibid., para 1.

[37] ibid., paras 4 and 7.

[38] ibid., para 9.

from competitors, customers and consumers.[39] The Commission argues that an undertaking which can increase prices profitably in a significant period of time can be regarded as a dominant power.[40]

The assessment of dominance firstly includes the market position of the dominant undertaking, entry of potential competitors and countervailing buyer power.[41] For the market position; the Commission states that the lower market shares are good proxy for the absence of substantial market power. The dominance is not likely to be under 40 % of market share. Also, holding the higher the market share for a longer the period of time can be a preliminary sign of the existence of dominant position.[42] Secondly, the assessment looks at entry and expansion barriers. Actual or potential competitors can deter a company from raising prices if expansion or entry would be likely, timely and sufficient. Here, barriers to entry can include not only legal barriers, but also advantages of the dominant company; such as economies of scale and scope; privileged access to essential inputs, resources, or technologies; or an established distribution or sales network, even where these barriers are created by the company with the investments or long-term customer contracts that have appreciable foreclosure effects.[43] Thirdly, competitive constraints can be exercised by the consumers if the bargaining powers of the consumers are high. This may deter an attempt by the undertaking to profitably increase prices.[44]

In the next part, the Guidance explains foreclosure leading consumer harm as anti-competitive foreclosure. The Guidance used the term to define a situation where effective access of actual or potential competitors to market is eliminated as a result of the conduct of the dominant undertaking is likely to be in a position to profitably increase the price to detriment of consumers.[45]

The relevant factors for anti-competitive foreclosure are: the position of the dominant undertaking, the conditions on the relevant market, the position of the

[39] ibid., para 10.
[40] ibid., para 11.
[41] ibid., para 13.
[42] ibid., paras 14-15.
[43] ibid, paras 16-17.
[44] ibid., para 18.
[45] ibid., para 19.

dominant undertaking's competitors, the position of the customers and input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure and direct evidence of any exclusionary strategy.[46]

For a price-based exclusionary conduct, the Commission makes as efficient competitor test and uses economic data of cost and sales prices and looks at whether the dominant undertaking charges prices below cost.[47] This means the main focus of the exclusionary practices is the elimination of efficient competitor. However, the Guidance states that in some cases less efficient competitors can be taken into account for anti-competitive foreclosure.[48] There are certain cost benchmarks for this test; average avoidable cost (AAC)[49] and long-run average incremental cost (LRAIC).[50] If an undertaking cannot cover AAC, it sacrifices profits. As a result, an equally efficient competitor cannot get consumers without making loss. LRAIC is usually above AAC and it consists includes product specific fixed costs that were made before the abusive conduct. The failing to cover LRAIC for dominant undertaking means that it cannot recover fixed costs of producing goods or service. This may lead to foreclosure of an equally efficient competitor from the market.[51] In addition, Guidance states to apply the cost benchmarks also it is necessary look at revenues and costs of the dominant company and its competitors. It may be not enough to assess whether the price or revenue covers the costs for the production in question but it may be necessary to look at the incremental revenues of the competitors if they affected the competitors' negatively. For two-sided markets it can be necessary to look at the revenues and the costs of both dominant firm and its competitors at the same time.[52]

The next point that the Guidance deals with is objective necessity and efficiencies. It states that the dominant undertaking can show if its conduct is objectively necessary, indispensable or if it creates efficiencies that outweigh anti-

[46] ibid., para 20.
[47] ibid., paras 23-25.
[48] ibid., para 24.
[49] ibid ., para 26, footnote2, Guidance states that AAC is average of the costs that could have been avoided if the company had not produced a discrete amount (extra) output and in most cases AAC equals to AVC. The circumstances where AAC and AVC differ can show sacrifice.
[50] ibid ., para 26, footnote2, Guidance states that LRAIC is usually above AAC, the average of all costs (variable and fixed costs), that a company incurs to produce a particular product, for single product undertakings LRAIC is equal to ATC.
[51] ibid ., para 26.
[52] ibid., para 26, footnote3.

competitive effects on consumers and that can justify the abusive practice. Health and safety reasons can be considered as an example to objective necessity for an exclusionary conduct. The efficiencies are the following: -the efficiencies have been realized as a result of the conduct such as technical improvements, in quality of goods or reduction in cost of production, -the conduct becomes indispensable if there are no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies, -the likely efficiencies brought about the conduct that outweigh any negative effects on competition and consumer welfare, -the conduct does not eliminate effective competition by removing all or most existing resources of actual or potential competition, where there is no competition or no threat of entry, competitive process outweighs possible efficiency gains[53].

In the next part, the Guidance lists the specific forms of abuse and when the Commission can intervene them. These are exclusive dealing, tying and bundling, predation, refusal to supply and margin squeeze.

1. Exclusive dealing

The Guidance defines exclusive dealing as the practices that a dominant undertaking forecloses its competitors by preventing them from selling to customers. The Commission divides the exclusive dealing practices into two:[54]

a. Exclusive purchasing

The Guidance states that an exclusive purchasing obligation is an agreement between the undertaking and consumer that requires consumer to purchase largely or exclusively only from the undertaking. The dominant undertaking may have to compensate the customers if they have loss because of the exclusive purchasing. This

[53] ibid., paras 28-31.
[54] ibid., para 32.

situation can prevent the entry and expansion of the competitors and then the Commission will intervene.[55]

The anti-competitive foreclosure of exclusive purchasing obligations takes place if:

- competitors are not able to compete for the demand of the individual customers since the dominant undertaking is unavoidable trading partner or the brand of the dominant undertaking is a must-stock item.
- the duration of the obligation is long since longer duration has greater possibility to foreclose the market.[56]

b. Conditional Rebates:

The Guidance defines conditional rebates as granted rewards to customers for a particular form of purchasing behavior in cases in which they exceeded a certain threshold. The rebates given for all purchases are called retroactive rebates. If the rebates is only on those made in excess of those required to achieve the threshold it is called as incremental rebates. The aim of the conditional rebates is to increase demand. However, those rebates have actual and potential effects that are similar those of exclusive purchasing obligations. The dominant undertaking does not have to make sacrifice for those effects to occur.[57]

The Commission indicates that the likelihood of anti-competitive foreclosure is higher, if the competitors cannot compete on the each individual customer's entire demand. The Guidance says that where competitors cannot compete customer's entire demand, a dominant firm can use the non-contestable part of the demand as a leverage to decrease prices in the contestable part of the demand.[58]

The Guidance says that the retroactive rebates can foreclose the market significantly. If there is higher rebate as a percentage of the total price, higher threshold and greater inducement below the threshold, the possibility of foreclosure of actual or

[55] ibid., paras 34-35.
[56] ibid., para 36.
[57] ibid., para 37.
[58] ibid., para 39.

potential competitors increases.[59] To understand whether the rebate scheme is capable of preventing entry and expansion of the equally efficient competitors, the Commission proposes effective price test. Here effective price is the price that competitor has to match the loss of the costumer from switching to the conditional rebate of dominant undertaking but the normal (list) price less the rebate the customer losses by switching, calculated over the relevant range of sales and in the relevant period of time.[60] The effective price is at least as high as the LRAIC of the dominant undertaking.[61] For the calculation of the effective price, if the rebate is incremental the incremental purchases are taken into account. For the retroactive rebates, it is relevant to look at how much of a customer's demand can be switched to a competitor, which is the contestable share of the market. If the customers can switch of large amounts quickly to competitors, means that the relevant range is large.[62] In addition, the lower effective price than the average price of the dominant undertaking means that there is higher loyalty inducing effect. On the other hand, if the effective price is higher than LRAIC, the rebate does not create anti-competitive foreclosure effect. Where the effective price is below AAC, it can create foreclosing effect even for equally efficient competitors. Moreover, if the effective price is between AAC and LRAIC, the Commission will look at the other factors such as the realistic and effective counterstrategies of the competitors.[63]

The Guidance also indicates that rebates with individualized threshold can create more loyalty inducing effect than that of the standardized threshold. The dominant undertakings may defend that their rebates create benefits to customers. The cost related efficiencies are more likely to be seen in standardized volume targets than in individualized volume targets. Then the Commission considers claims by dominant undertakings which say that the rebates systems achieve cost or other advantages to customers. The cost advantages are more likely to have with standardized volume targets than with individualized volume targets. In the same vein, incremental rebate schemes are more likely to give incentives to resellers to sell more units than retroactive rebates[64].

[59] ibid., para 40.
[60] ibid., para 41
[61] ibid., para 42, footnote1.
[62] ibid., para 42.
[63] ibid., para 43-44
[64] ibid., para 45-46.

2. Predation

The Guidance intervene the cases if the undertakings engage in predatory pricing, deliberately sacrifice their profits and likely to have anti-competitive foreclosure that can foreclose actual or potential competitors and harm the consumers.[65] In the analysis of the predation what the Guidance analyzes are sacrifice, existence of anti-competitive foreclosure, and efficiencies.

According to the Guidance, sacrifice is the practice of selling at lower prices that lead to losses in a short period of time. The pricing below AAC is seen as a clear indication of sacrifice in most cases. In addition, the Commission may also investigate short term net revenues lower than expected from a reasonable alternative practice. The predatory strategy can also be shown with direct evidences, such as detailed plans of sacrifice to exclude a competitor, to prevent the entry or to pre-empt the emergence of a market or evidence of concrete threats of predation.[66]

For the anti-competitive foreclosure, the Guidance requires to make equally efficient competitor analysis in which pricing below LRAIC can have foreclosure effect. In addition, the Guidance argues that, if the dominant undertaking is informed about the cost of the rivals, has reputation about predatory pricing, can distort market signals about the profitability, it may engage in predatory conduct. Moreover, it is easier for the dominant undertaking to engage in predatory conduct if it selectively targets customers with low prices, and so this limits the loss incurred by the dominant undertaking. Charging low prices for a long period of time is less likely to produce predation.[67] Additionally, Guidance argues that no need to look at the recoupment of losses for the analysis of the predatory pricing.[68] On the efficiencies, the Guidance argues that it is unlikely for predatory pricing to create efficiencies but the Commission will consider the claims related to economies of scale and expand the market.[69]

[65] ibid., para 63.
[66] ibid., para 64-66.
[67] ibid., paras 68-70,72,73.
[68] ibid., para 71, footnote6
[69] ibid., para 74.

The Commission does not find it necessary to demonstrate that the competitors have exited the market to show there has been an anti-competitive foreclosure. There is also the possibility that the dominant undertaking may prefer to hinder the competitor from competing in a vigorous way. It can also make the competitor follow the pricing strategy of the dominant undertaking rather than eliminating the competitor from the market. This kind of disciplining avoids elimination of competition, but it creates the risk of low cost entrants and the sale of the assets of the competitors at lower prices. [70]

Furthermore, the Guidance states that identifying consumer harm is not a mechanical calculation of profits and losses. The proof of overall profits is not required. Likely consumer harm may be shown by assessing likely foreclosure effect of the conduct, together with the other factors like entry barriers.[71]

3. Refusal to supply and Margin Squeeze

The Guidance declares that refusal to supply and margin squeeze usually arise when the dominant undertaking competes downstream market and refuses to give input to the manufacturers that they need for manufacturing products or providing services.[72] This means refusal to supply and margin squeeze occur if the dominant undertaking is vertically integrated.

The Commission does not view it relevant for the refused product to have been traded before. Similarly, an actual refusal by the dominant undertaking is not required. Constructive refusals such as unduly delaying, reducing the supply of the product and imposition of unreasonable conditions are sufficient for the assessment of refusal to supply.[73]

Margin squeeze occurs when a dominant undertaking changes a price for the product on the upstream market and does not allow even an equally efficient competitor

[70] ibid., para 69.
[71] ibid., para 71.
[72] ibid., para76.
[73] ibid., para 79.

to make profits in downstream market. The cost benchmark is stated as LRAIC of the downstream part of the vertically integrated dominant undertaking.[74]

The Commission regards the following priorities as for the input in refusal to supply and margin squeeze cases:

-objective necessity: An input is considered objectively necessary if there is no actual or potential substitute that competitors can use in downstream market at least in the long term. At that point, the Commission does not take into account if the product that is not supplied has been supplied before. However, if the input was previously supplied and the buyer made investments to use that input, the Commission can regard this input as indispensable. Likewise since it was in the interest of the owner of the input to supply the essential input, it does not show that owner receives inadequate compensation for the original investment. Thus, it is up to dominant firm to explain why the circumstances have changed and makes it not to supply.[75]

-elimination of effective competition in downstream market: The Commission argues that high market share of the dominant undertaking in the downstream market indicates greater possibility for elimination of effective competition. Moreover, if there is closer substitutability of the products between the competitors in downstream market and if the dominant undertaking is less capacity-constrained than the competitors in the downstream market, more competitors will be affected from the practice.[76]

-consumer harm: The Commission states that consumer harm happens if the refusal is "prevented from bringing innovative goods or services to the market and/or where follow-on innovation is likely to be stifled."[77] Besides, if the price in upstream market is regulated whereas the price in the downstream market is not regulated and if the dominant undertaking excludes the competitors on the downstream market through a

[74] ibid., para 80.
[75] ibid., para 84.
[76] ibid., para 85.
[77] ibid., para 87.

refusal to supply, consumers are harmed and upstream undertaking can get more profits.[78]

Finally, the Guidance states that there can be efficiency arguments for refusal to supply cases. For example a refusal to supply may be necessary to allow the dominant undertaking to realize an adequate return on the investments required to develop its input business. It may also be necessary if the dominant undertaking's innovation will be affected negatively by the obligation to supply. Here, it is dominant undertaking's burden to show the negative impact. These claims are relevant efficiency grounds for refusal to supply for cases in which the dominant firm has previously supplied the input.[79]

1.4. An Analysis of the Guidance:

The Guidance includes topics less than expected.[80] For example, it does not include exploitative abuses and collective dominance. Also, it does not have some topics that exist in the Discussion Paper such as unconditional rebates. Furthermore, refusal to license intellectual property rights and refusal to supply information needed for interoperability are analyzed as separate forms of abuse in the Discussion Paper.[81] Whereas in the Guidance Paper, there are no separate headings for these practices but they are under the refusal to supply and objective necessity of input cases.[82] The Discussion Paper and the Guidance both emphasize the economic assessment, effect-based approach and consumer welfare.

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[78] ibid., para 88.
[79] ibid., para 89-90.
[80] "EU Competition Law Update", p. 20
http://www.cgsh.com/files/News/b9e60ba9-937c-4493-9d61-7f0a058c8748/Presentation/NewsAttachment/a4a825a7-a7dd-425a-b254-8040bb135e30/CGSH%20Alert%20-%20Guidance%20on%20the%20Commission%20Enforcement%20Priorities%20in%20Applying%20Article%2082.pdf.
[81] Discussion Paper, para 237-242.
[82] Guidance, para 83, footnote1,2,4: Case T-201/04 *Microsoft* v *Commission* [2007], Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP)* v *Commission (Magill)* [1995] ; Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998], Case C-418/01 *IMS Health* v *NDCHealth* [2004].

The cases that the Guidance deals with are all exclusionary practices, exclusive dealing; exclusive purchasing and conditional rebates, tying and bundling, predation, refusal to supply and margins squeeze. However, just having exclusionary practices is not enough. For instance, Akman thinks that it would be a better clarification of the enforcement priorities of Article 82, if the Guidance included the exploitative forms of abuse.[83] This means, for a much more comprehensive analysis for the abuse of dominant position, exploitative practices should be taken into account as well.

In relation to that, what I find interesting is that the Commission reconciles exclusion of the rivals with consumer harm. My point here is that since the aim of an exclusionary practice is to exclude a rival from the market, it does not seem directly related to consumer harm. However if one pushes what the Guidance states, can reach to this conclusion: as efficient competitor test protects effective competitive process, which at the end leads to innovation, decreasing costs and decreasing prices. This situation ideally increases consumer welfare. The Commission may have this idea in the background although the Guidance does not state this directly. Therefore, consumer harm and exclusion of rivals are all indirectly related. Besides, there should be better ways to establish much more concrete and direct links. At that point, an analysis of exploitative abuses occupies an essential place. If the Guidance had included these other practices, it would become a much more thorough document presenting more directly related links between consumer harm and abusive practices.

The Guidance's emphasis on consumer welfare is criticized by some scholars. One of these scholars is Chiriţă who claims that there are consumer protection laws and regulations that are more inclusive in the EU law. Therefore, what the Guidance is doing is particularly unnecessary. Besides, she states that the efficiency-based health and safety reasons in paragraph 29 of the Guidance must not the concerns of EU competition law.[84] Thus one can say that the Commission spends too much time on consumer welfare. I believe this may be a strategy to overemphasize the effects-based

[83] Pınar Akman, "EC discussion paper on the Application of Article 82", p. 20, http://ec.europa.eu/competition/antitrust/art82/004.pdf.

[84] Anca Daniela Chiriţă, "Undistorted, Unfair Competition, Consumer Welfare and The Interpreation of the Article 102 TFEU", *World Competition Law and Economics Review*, 33 (2010) 3. p. 18-21.

approach adopted in the Guidance, but this is of course debatable, hard to explain and needs a much more sophisticated analysis.

Furthermore, it is important to note that the Guidance can bring legal certainty to Article 102. It can also help the businesses to analyze their behaviors by showing whether they are infringements for Article 102 or not. Also, countries like Turkey can use the Guidance as a model for their competition policies. On the other hand Whish argues that the Guidance has more lenient or less interventionist approach than Article 102. This may give birth to legal uncertainty. For example it may lead to tensions and inconsistencies between the Court and the Commission as it happened in Telia Soneria case in which the approach of the CJEU was stricter than the evaluation of the margin squeeze of the Commission.[85]

As for the content, it can be seen that the Guidance aimed at more economic analysis and therefore it includes many tests and calculations. For example, there are calculations of effective price, as efficient competitor test, actual and likely effects, the efficiencies and objective necessity. This situation can be considered as a sign of the presence of more effects-based approach than before. However, the extent to which these tests and calculations are effects-based rather than forms-based is also debatable.

Firstly, for a firm to be a dominant undertaking, the market share alone is not a sufficient indicator as it is stated in the Guidance. The duration of the market power and the ability to control prices are the other important factors which should be taken into account. The duration of the market power is stated as two years in the Guidance.[86] Motta argues that the duration in the Guidance is rather short and can be 5-10 years depending on the firm to indicate dominance.[87] Actually, this point made by the Commission is an example of forms-based approach, since it fails to consider market-specific and firm-specific conditions. The Guidance states that the dominance comes from being able to increase prices profitably than the competitive level. However it is

[85] Richard Whish, *Competition Law* (Oxford University Press:London, 2012), p. 176.
[86]Guidance, para 11, footnote 6.
[87]Massimo Motta, *Competition Policy,* (Oxford University Press:London,2004), p. 120.

not that easy to calculate the competitive price since the end result of calculation will become hypothetical in any case.[88]

For market share, the Guidance states that the dominant undertakings whose market share is less than 40 % are less likely to be dominant. This clear and certain declaration of the market share excludes undertakings with market shares between 35-40 %. This is an effects-based approach[89] since economic analysis was made to calculate market share. However, the Commission is not saying that they will not be investigating those undertakings with market share less than 40 % for abusive conduct according to Motta. Therefore, there emerges a new uncertainty since the Commission takes the burden of proving the dominance of the firm that has less than 40 % market share and uses its scarce resources for additional investigations. As Motta states, the Discussion Paper mentions 25 % threshold for dominance whereas the Commission increased it in the Guidance. This is a positive development[90] since it contributes to competition. Furthermore, the Guidance states that having high market share and spending long period of time in the market with substantial market share can be a more likely cause of the abuse of the dominance. This situation may require the Commission to intervene the practices of the dominant undertaking just by looking at the market share without looking at the actual effects of the abusive practice.[91]

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[88]Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 77.

[89]Philip Marsden and Liza Lovdahl Gormsen,"Guidance on abuse in Europe: The continued concern for rivalry and competitve structure", The Anti Trust Bulletin, Vol.55, No.4/Winter 2010, pp. 875-914, p. 890., Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 78., Giorgio Monti, "Article 82: What the Future for the Effects-Based Approach", Journal of European Competition Law & Practice, 2010, Vol. 1, No. 1, p. 5-6.

[90] Massimo Motta, "The European Commission's Guidance Communication on Article 82," http://www.barcelonagse.eu/tmp/pdf/motta_ecguidance82.pdf,. p. 7,

[91]Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 79.

For the anti-competitive foreclosure part, the Commission argues that it aims not to exclude the efficient competitors. However it does not count all exclusions as anti-competitive. An anti-competitive foreclosure can be the result of the actual or likely effects of the consumer harm and at the same time it could be the expected result of the exclusion of the competitors. This situation brings uncertainty since the Guidance does not explain the relationship between exclusion of rivals and consumer harm in a clear and distinct way. By doing this, the Commission might have wanted to open up a space for itself for the assessment of the cases, so that it could gain more flexibility as Akman claims[92]. Here, why the Commission needs that space deserves further analysis which is not in the scope of this thesis.

In the Guidance, the Commission does not require a detailed assessment before concluding that the conduct is likely to result in consumer harm. Within that context, if a practice does not create efficiencies, it can be counted as anti-competitive. This approach here is problematic because it may lead to infer an undertaking as anti-competitive because it was not efficient. Here, the Guidance does not take consumer welfare into account. This becomes a forms-based approach rather than an effects-based one at the end unlike the Guidance states for itself.[93]

Moreover, the Guidance defines as efficient competitor test which aims to find out the LRAIC and AAC as a general test for the price-based anti-competitive practices. As the result of this test, prices below cost are punished.[94] Three points should be addressed here. First of all, it is hard to calculate prices and sometimes the practices with prices below cost can be beneficial for consumers.[95] Secondly, the Guidance states that if the Commission does not find information from the dominant undertaking reliable, it can use the cost data of the other competing firms.[96] This is also controversial

[92]Guidance, para 19.
[93]Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Öneriler", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 80.
[94] Guidance, para 26.
[95] Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Önerileri", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 82.
[96] Guidance, para 25.

and debatable in terms of legitimacy and legal certainty of the Commission.[97] The third point is that sometimes less efficient competitors can be protected according to the Guidance.[98] However the Guidance does not clarify under which circumstances, it is necessary to protect the less efficient competitors. Therefore, one can say that the Guidance again adopts a forms-based approach.

Furthermore, in the Guidance there is nothing directly stated about the intent of predatory pricing. However, it states sacrifice can be understood from the documents that show predatory strategy.[99] Therefore one can say that documentary evidence can be used as proof of sacrifice instead of the economic calculations such as cost/price analysis. Rosenblatt *et. al*., argue that this method is the same with the idea of "showing anti-competitive object and anti-competitive effect" sometimes as the same[100]. They also interpret this idea as a proof of intent which is relevant but not required for evaluating all predatory pricing cases. Besides, in the Guidance it is hard to find anything related to the recoupment of losses. It just states that showing calculations of profits and losses and proof of overall profits are not required. For a further explanation, the reader should read footnotes. In footnote 6 for paragraph 71, the Wanadoo and Tetra Pak II cases in which the CJEU states that the proof of actual recoupment was not required are mentioned.[101] Rosenblatt *et. al.*, find the Commission's evaluation about recoupment ambiguous since the Guidance Paper states that the Commission does not need to intervene if the dominant undertaking is likely to involve in recoupment, that is to increase its prices at exploitative levels after the predation period. What the Commission needs to show is that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred."[102]

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[97] Pınar Akman, "AB Komisyonu 102. Madde Kılavızu Işığında Hakim Durumun Kötüye Kullanılması Reformuna Dair Eleştiriler ve Önerileri", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 69-91, p. 83.
[98] Guidance, para 24.
[99] ibid., para 66.
[100]Howard Rosenblatt, Héctor Armengod and Andreas Scordamaglia-Tousis, "Post Danmark: predatory pricing in the European Union", The European Antitrust Review 2013, p. 22.
[101] Guidance, para 71, footnote 6.
[102] Howard Rosenblatt, Héctor Armengod and Andreas Scordamaglia-Tousis, Post Danmark: predatory pricing in the European Union, The European Antitrust Review 2013, p. 23.

According to the Guidance, in case of a refusal to supply of an objectively necessary input if there are efficiencies that outweigh the negative effects of the practice, there may not emerge an anti-competitive foreclosure. For this case, the burden of proof is on the dominant undertaking.[103] Here Motta argues that the burden to prove efficiencies should not be on the defendant, but should be on the Commission.[104]

As the last point, it is true that the Guidance provides a much more effects-based approach and economic analysis then before, although it may have forms-based sides. Here to what extent the Commission makes its decisions depending on the Guidance is very important. If it is not applied by the Commission, inconsistencies between the case-law and the Guidance may arise.

[103] Guidance, para 28.
[104] Massimo Motta, "The European Commission's Guidance Communication on Article 82", p. 10-11, Giorgio Monti, "Article 82: What the Future for the Effects-Based Approach", Journal of European Competition Law & Practice, 2010, Vol. 1, No. 1, p. 5.

CHAPTER 2: RECENT EU DECISIONS BETWEEN 2009-2013 ON EXCLUSIONARY CONDUCT

2.1. EU Decisions on Predatory Pricing:

2.1.1. Post Danmark Decision:[105]

Post Danmark is an undertaking in unaddressed mail sector such as brochures, telephone directories, guides, local and regional newspapers in Denmark. Although the postal sector was liberalized in Denmark, Post Danmark was the monopoly in the delivery of addressed letters and parcels not exceeding a certain level of weight and it owned universal service obligation to deliver addressed mails in Denmark from 2003 to 2004.

The other firm active in unaddressed mail market is Forbruger-Kontakt (FK). FK complained Post Denmark to Konkurrencerådet, Danish Competition Council, by arguing that it abused its dominant position by making price discrimination and predatory pricing. According to allegations, there were three supermarket customers; the SuperBest, Spar and Coop. They were consumers of FK but later Post Danmark made contracts with them for very low and different prices. The prices to the SuperBest and Spar were higher than ATC. However, the prices that were imposed on Coop were below average incremental costs (AIC), but below average total costs (ATC). At the end, Konkurrencerådet fined Post Denmark for price discrimination but not for predatory pricing. Later, Post Denmark went on appeal to the Danish Competition Appeals Tribunal, Konkurrenceankenævnet, which upheld the decision that there was price discrimination and no proof for predatory pricing. Then, Post Danmark brought an appeal to Østre Landsret, Eastern Regional Court. Here again it was accepted that there was abuse of dominant position. After that, Post Danmark appealed to Højesteret, the Supreme Court of Denmark. Since there were no documents found that show the intent of the pricing practices made by Post Danmark, Højesteret asked the CJEU questions for preliminary ruling. The first question was asking if a price lower than ATC but higher than AIC could be taken into account as an exclusionary abuse. Secondly, under what circumstances the national court decides on exclusionary abuse.

[105] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, 27 March 2012

For answering those questions CJEU looked at the prices of Post Danmark and also mentioned AKZO decision.[106] In AKZO decision, there was Areeda Turner Test, which suggests that for an undertaking, price below AVC is abusive, price between AVC and ATC can be abusive if it is proved that the practice is part of a plan to eliminate competition and price above ATC is considered as not anti-competitive. In Post Danmark case, there was no proof of intent to eliminate competition. For application of this test to Post Danmark, CJEU argued that AIC and ATC were appropriate cost benchmarks. As Advocate General suggested in his Opinion, incremental costs can be better benchmarks than the variable costs for an undertaking entrusted with a task of general economic interest that is universal service since Post Danmark already had the distribution network for universal postal services.[107] Then, since the prices to the SuperBest and Spar were higher than ATC, CJEU concluded that there were no anti-competitive effects. The prices that were imposed on Coop were above AIC, but below ATC. Therefore, the national court must make as efficient competitor test and look at the effects of the practice.

Thus, CJEU concluded it had objective justifications for the pricing policies made by Post Danmark. Therefore, CJEU answered the above-mentioned questions by stating that a pricing policy below ATC but above AIC is not enough to understand whether the practice is exclusionary or not. The national court must look at the actual and likely effects of the practice and if there are objective justifications for the practice such as efficiency gains or economies of scale or not.

Additionally, Advocate General Mengozzi, considered the possibility of cross-subsidization since Post Danmark has dominant position in the addressed mail services and has networks in the addressed mail delivery that it used in the unaddressed mail delivery services. He offered a stand alone cost test to evaluate effects of cross subsidization. However, the situation of the "common distribution network resources" considered by Mengozzi as a source of economies of scale between unaddressed and

[106] Case 62/86 *AKZO Chemie v. Commission* [1991]
[107] Opinon of Advocate General Mengozzi, para 34-35.

addressed mail services. Here there could be efficiency gains which did not eliminate the competition and not harm consumer welfare.[108]

The decision of the court was interpreted as an effects-based decision. Rousseva and Marquis argue that Post Danmark decision is in line with the effects-based approach and the Guidance. This situation increased the legal certainty.[109] There are four reasons for this. Firstly, as it happens in AKZO case, the Guidance suggests cost benchmarks defined as AAC and LRAIC. The prices below AAC[110] were counted as anti-competitive since these prices could be indication of sacrifice of profits and so eliminate as efficient competitor. The reason is that an equally efficient competitor cannot serve the targeted consumers without incurring a loss.[111] Also, it is not possible to say that pricing above LRAIC can exclude efficient competitors. For Post Danmark case, AIC is more suitable than AVC since the industry is characterized by high fixed costs and very low variable costs.[112] In addition to that, LRAIC is equal to ATC for single product undertakings.[113] As a result, the cost benchmarks are consistent with the Guidance. Secondly, in the Post Danmark decision it is stated that for the prices between AIC and ATC, the national court must look at the effects. Because it is not enough to look at cost concepts and/or the intent for understanding if there exists predatory pricing or not in such cases. Thirdly, the decision emphasized competition on merits and explained that not every exclusionary effect is detrimental to competition. For example, if an effect causes the exit of less efficient competitors as it is the case in the Guidance, it does not become exclusionary. Lastly, for the assessment of anti-competitive effects; efficiency gains, consumer welfare concepts and the objective justification must be taken into account to decide on predatory pricing.

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[108] Opinon of Advocate General Mengozzi, para 82.
[109] Rousseva and Marquis, "Hell Freezes Over: A Climate Change for Assesing Exclusionary Conduct under Article 102 TFEU, Journal of European Competition Law & Practice, 2012, pp. 1-19, p.1.
[110] Guidance states that in most cases AAC and AVC will be the same because of then the variable costs can be avoided. See Guidance para 64, footnote 3.
[111] Guidance, para 26.
[112] Rousseva and Marquis, "Hell Freezes Over: A Climate Change for Assesing Exclusionary Conduct under Article 102 TFEU", Journal of European Competition Law & Practice, 2012, pp. 1-19, p.19.
[113] Guidance, para 26, footnote 2.

On the other hand, Barazza argues that although Post Danmark took effects rather than the intent for the case when the prices are between AIC and ATC and in that sense it presents a different standard than that in the AKZO decision. In forms-based approach, if the price is between AVC and ATC, intent is examined. The effects-based approach however considers the LRAIC. If the price is between LRAIC and AAC, then for effects-based analysis, the effects are analyzed. Rousseva and Marquis argue that the intent and effects can be the same in some cases. The reason for this similarity is that if there is an abusive intent, its effect will be probably abusive as well. Although it is debatable, there seems to be a relation between effects and intent, but it will be wrong to say that these are always directly linked to one another. Thus, sometimes the proof of anti-competitive effects can be the same with the proof of anti-competitive intent.[114] In addition, Krah and Bien believe that, with Post Danmark decision, CJEU closed a legal gap for understanding if the prices above ATC were anti-competitive or not. This situation however gave birth to another legal gap. The decision did not say anything about the prices between ATC and AIC in a clear way. These prices are not per se abusive and there is no assumption that they create foreclosure effect.[115]

[114] Barazza, Stefano, "Post Danmark; The CJEU Calls for an Effect-Based Assessment of Pricing Policies", Journal of European Competition Law & Practice 2012 Vol.3, No. 5, pp.466-468, p. 468.

[115] Florian Bien and Matthias Krah, "The Ruling of the CJEU in Post Danmark: Putting an End to Selective Price Cuts as an Abuse Under TFEU Article 102 and Turning Towards a More Economic Approach", European Competition Law Review; ECLR. Volume: 33 Issue: 10 Month/Year: 2012, p.482-487

2.2. EU Decisions on Rebates[116]

2.2.1. Tomra Decision:[117]

Tomra is a group of firms originated from Norway. The main geographical area that it operated was Netherlands, Germany, Norway, Austria and Sweden. It collects used beverage containers that were called Reverse Vending Machines (RVMs). These machines identify beverage containers by using certain information such as barcode, and shape and as a result calculate the amount of deposit that will be repaid to the consumers.[118] Prokent is another firm produces RVMs, operated in Germany until its bankruptcy. It made a complaint to the Commission and argued that Tomra made loyalty rebates and agreements that had the effect of exclusive dealing.

In its analysis, the Commission calculated Tomra's market share in high ending and low ending machines and defined two different relevant markets as "high ending RVMs" and "low ending RVMs". High ending machines are bigger RVMs with bigger capacity that can be used in supermarkets. Low ending RVMs are smaller machines that can be used in canteens and schools. According to the Commission, Tomra had market share of 70 % before 1997 and that share increased to 95 % after 1997 in high ending RVMs.

Then, the Commission calculated market shares of Tomra in all five countries. It was found out that the market shares were in between 60- 95 % in different countries from 1998 to 2002. Here, the market shares were calculated by the percentage of the number of units sold per year. The other suppliers' market shares were calculated as

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[116] There is another interesting case; Velux COMP/39.451 *Velux*, where the Commission's investigation showed that *Velux* had designed a conditional rebate system without any anti-competitive foreclosure effects, that is, competitors were not foreclosed in a way that could cause likely harm to consumers Velux is a firm operates in roof window sector. The rebates schemes done by Velux were found to be legal. There was no evidence of strategy for exclusionary intent. The Commission made an analysis based on the Guidance and found out that the prices are below LRAIC, but there were no consumer harm and the rebates were not individualized. For more look at: http://ec.europa.eu/competition/publications/cpn/2009_2_10.pdf and Hazemi Jebelli and Bill Batchelor, Rebates in a State of Velux: Filling the Gaps in the Article 102 TFEU Enforcement Guidelines, European Competition Law Review, Vol. 32 Issue 11, 2011: http://www.acc.com/chapters/euro/upload/eclr_issue_11_batchelor-jebelli-rebates.pdf

[117] Case C-549/10 P- *Tomra and Others v Commission*, 19 April 2012, COMP/E-1/38.113, Prokent-Tomra Commission Decision of Commission, 29 March 2006.

[118] Opinion of Advocate General Mazak, para. 2.

well. So, the Commission concluded that Tomra has factual monopoly in the high RVMs market.

The rebates by Tomra were exclusivity agreements, de facto exclusivity agreements and loyalty building rebates such as individualized quantity commitments and retroactive rebates. The Commission looked at the all 49 rebate schemes in all 5 countries and found that there was no standard for the rebates and exclusivity agreements; they were different for the each customer and they were individualized.

For the economic analysis, the Commission looked at the relation between the contestable and non-contestable markets and contestable volume proportions of the markets for each country. Then, the Commission found out that there was negative correlation between the changes in Tomra's market share and the size of foreclosed market. Apart from that, EC looked at the price that a competitor would have to offer to make the customers switch from Tomra to other companies for each country. It found that, competitors may need to offer very low and even negative prices to make Tomra's customers to switch to them.

According to on-site investigations in Tomra decision, the Commission found internal documents and e-mails that show the intent of Tomra. The documents showed that Tomra made strategies related to exclusion of the small competitors from the market before they get bigger.

Tomra made a defense with economic analysis. However, the Commission found its defense irrational and did not accept its economic analysis. According to the Commission the economic analysis made by Tomra was not based on assumptions of rationality and did not assume that aim of the firms is to maximize profits. Therefore the Commission found this approaches ill-founded and unnecessarily complex.

For the effects-based approach, likely effects of the rebates schemes were shown. The analysis of the Commission included the contestable market shares and situation of the other competitors. The only part for the actual effects can be Repant from Norway and Eleiko from Sweden which had small market shares and exited market. Also, Prokent from Germany tried to enter market and got some market share

but it failed to sustain this market share due to the practices of the undertaking. Tomra made abusive conduct during the "key years"[119]; as a result firms could not enter and expand their positions in the market. The decision examined the likely and actual effects of the rebate scheme. Nevertheless, it did not use the concepts in the Guidance; the Commission did not examine the consumer harm, there was no as efficient competitor test, no calculation of LRAIC and below cost pricing tests, and no discussions related to efficiencies of rebates. The structure of the rebates and the exclusivity clauses were enough for the assessment of the Commission whether there is abuse of the dominant position. Thus, it can be said that Tomra decision of the Commision had a per se approach.

As a result, Tomra was fined with EUR 24 million and appealed to the CJEU. In the pleas of Tomra, they argued that it is not an effects-based approach and did not confirm with the Guidance. This could be a reasonable plea, but CJEU said that the Guidance was made in 2009, but the decision of Commission was made in 2006. So, both CJEU and the Commission cannot consider the Guidance and the effects-based approach.[120] At the end the fine was not reduced and it was accepted by the Commission as a severe infringement of Article 102.

Subiotto QC *et al.* indicate that some observers hoped that CJEU use an effects-based approach as presented in the Guidance. However the Commission's decision was given in 2006 whereas the Guidance was published in 2009. Therefore the CJEU did not use the Guidance. As a result, although the decision by CJEU was given in 2012; it does not have an effects-based approach and did not comply with the Guidance. What CJEU used was a traditional forms-based approach and it confirmed the decision of the Commission.[121] At that point, Bacthelor and Jebelli discuss that Tomra decision was the first case after the new economic approach of the Commission. Despite that it was far

[119] COMP/E-1/38.113, Prokent-Tomra C(2006)734, Commission Decision of Commission, 29 March 2006 para, 56.
[120] Case C-549/10 P- *Tomra and Others v Commission*, para 112.
[121] Subiotto QC et al, Recent EU Case Law Developments: Article 10 , *Journal of European Competition Law & Practice*, 2011, Vol. 2, No.2, p. 144.

from the perspective of the Guidance[122]. Thus, one could say that there is a significant divergence between CJEU and the Guidance in Tomra case.[123]

In the available literature,[124] Tomra case is interpreted as a disappointment, since the CJEU failed to make an effects-based analysis. There is only Madan who finds this case effects-based. She argues that it was an important case because of the reform of Article 82, the amount of the economic analysis it included and its compliance with the Discussion Paper. Moreover Madan tells that with Tomra decision, the Commission gave up the forms-based approach that it had in Michelin II[125] and Hoffman La Roche[126] cases. What the Commission adopted is an effects-based approach according to Madan. By looking at the changes in the market shares of Tomra and other firms during the practices and showing whether there were entry and exit to the market, the Commission leaves traditional forms-based analysis.[127] I believe, in her article, she misses the point that the existence of likely effects and some economic analysis does not make a case effects-based. Besides, Madan uses Competition Policy Newsletter as her only reference. The newsletter is actually a summary of the case prepared by DG-Competition experts. This means its aim is to outline main points of the case, not to

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[122] H. Jebelli and B. Batchelor, "Rebates in a State of Velux: Filling the Gaps in the Article 102 TFEU Enforcement Guidelines", *European Competition Law Review*, Vol. 32 Issue 11, 2011, pp. 545-549, p. 545

[123] Rebate Schemes and Discount Practices by Dominant Companies Under EU Competition Law: Tomra Appeal Decision, p. 5, Dechert LLP. http://www.dechert.com/files/Publication/e1ec1ac2-4bd2-4352-b4b5-629bc0f7a72f/Presentation/PublicationAttachment/449e79a8-4dd5-46b5-92ac-630b69c9f828/Antitrust_06-12_SA_Rebate_Schemes_and_Discount_Practices.pdf

[124] H. Jebelli, and B. Batchelor, op. cit, p. 545, Subiotto QC et al, "Recent EU Case Law Developments: Article 102", *Journal of European Competition Law & Practice*, 2011, Vol. 2, No.2, p. 144., "Rebate Schemes and Discount Practices by Dominant Companies Under EU Competition Law: Tomra Appeal Decision", Dechert LLP, p. 5. http://www.dechert.com/files/Publication/e1ec1ac2-4bd2-4352-b4b5-629bc0f7a72f/Presentation/PublicationAttachment/449e79a8-4dd5-46b5-92ac-630b69c9f828/Antitrust_06-12_SA_Rebate_Schemes_and_Discount_Practices.pdf, Guilio Federico, "Tomra v Commission of the European Communities: reversing progress on rebates?", *European Competition Law Review*, Issue 03, 2011, p. 139, Rousseva and Marquis, "Hell Freezes Over: A Climate Change for Assesing Exclusionary Conduct under Article 102 TFEU", *Journal of European Competition Law & Practic*e, 2012, pp. 1-19.

[125] Case T-203/01, *Michelin v. Commission*, 20 June 2001.

[126] Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461.

[127] Zeynep Madan, Roma Antlaşması'nın 82. Maddesindeki Reform Çalışmaları ve Eşit Etkinlikteki Firma Testi ,Rekabet Dergisi, Sayı 31,pp. 3-31., p.9-11.

analyze them. Besides, since the authors are experts of the Commission what they wrote can be a little bit narrow. In fact, these experts do not declare that Tomra case is effects-based; they just state that Tomra decision has economic analysis. This, again, does not mean the decision was effects-based.[128]

2.2.2. Intel Decision[129]

Intel is the producer of micro-chips and it operates all over the world. According to allegations of AMD, another micro-chip producer, Intel abused its dominant position in x86 Central processing Units (CPUs) by making rebates to computer manufacturers (Original Equipment manufacturers-OEMs). In addition, Intel made direct payments to OEMs, if they delay the launch of the x86 CPU computers by AMD.

According to the Commission, x86 CPU is a key component for all computers. CPU production requires high technology and investments. Therefore x86 CPU market has barriers to entry due to high costs. Within that context, Intel had dominant position in x86 CPU market with 70 % market share in the early 2000s. AMD is the other company that operates in the x86 CPU market. Therefore, in the market, there are only two firms with substantial market shares, since most of the small producers exited the market after 2000s.

The investigation of the Commission showed that, Intel made conditional rebates to OEMs. The condition was that OEMs purchase all or almost all of CPUs from Intel. The Commission inspected all rebates to the Dell, HP, NEC, Lenovo and Media Saturn Holding, and found out that Intel made different loyalty rebates arrangements that could cause the effect of exclusive dealing agreements. To clarify, Intel made hidden rebates; did not want to make written agreements, but instead made verbal commitments with the OEMs. There were other internal documents and e-mails that showed the conditional arrangements as well. Moreover, there were naked restrictions by Intel to

[128] Frank Maier and Dovile Vaigauskaite, "Prokent/Tomra, a Textbook Case? Abuse of Dominance Under Perfect Information", *EC Competition Policy Newsletter*, Summer 2006, No. 2, pp. 19-24, p. 24.
[129] Case T-286/09 *Intel v Commission*, not yet decided., COMP/37.990 Intel,13 May 2009.

the OEMs. Intel made direct payments to the OEMs if they delayed the launch of the new AMD x86 CPU based computers.

For the evaluation of the conditional rebates, EC made an as efficient competitor test, looked at the contestable market shares and found that an efficient competitor would have to offer prices lower than the AAC of Intel. In other words, the rebates scheme of Intel could foreclose the market and had exclusionary effects. In addition, the Commission argued that the rebates, exclusionary agreements and naked restrictions harm competition and limit consumer choices since Intel restricted the commercialization of the AMD products and reduced the demand of x86 CPUs from the other manufacturers. The Commission argued that Intel sought to exclude AMD from the market. As a result, what Intel did was not competition on merits; it had negative impact on the competition and caused lower incentives to innovate for the firm.

On the pleas, Intel argued that their practices caused efficiencies such as; lower prices, economies of scale, cost savings and product efficiencies. It declared that the practices had no effect in the market since AMD gained market share during the practice and the low market shares of AMD was its own failure since AMD did not offer as competitive and high quality as products like Intel. The Commission did not find those arguments valid, because AMD had improved its product offerings and besides, the documents from Intel showed that, Intel had started to see AMD as a "growing threat". In the end, the Commission decided that Intel abused its dominant position and now it had to a fine of EUR 1.06 billion that was highest fine given to a single undertaking until now.[130] After that, Intel went to appeal to CJEU, but the case is not yet decided.[131]

At the first sight, it looks like the Commission made an effects-based decision which is compatible with the Guidance. There were cost/price analysis with LRAIC, as efficient competitor test, calculation of the effective price and the contestable share of the market to see the effects on the rivals, likely effects on consumer welfare, efficiencies and objective justification. However Rousseva and Marquis argue that, Intel

[130] **"**Antitrust: Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers" http://europa.eu/rapid/press-release_MEMO-09-235_en.htm.

[131] Case T-286/09 *Intel v Commission*, not yet decided.

decision was the first decision related to rebates after the publication of the Guidance. Since the inquiry of Intel was taking place during the adaption of the Guidance, the Commission argued that the document did not bind Intel. Despite that but the Commission voluntarily showed as efficient competitor analysis in the decision[132]. Geradin believes that the Commission did this to avoid criticism. He also argues that although the Commission spent a lot of time, energy and resources to Intel case[133], there are many "flaws" in the Intel decision. Firstly, the approach of the Commission had per se characteristic and the Commission proposed that it is not necessary for Commission to show the actual effects. Secondly, the Commission said that the Guidance paper will be used in future decisions. So the Intel case has a formalistic approach. Thirdly, the contestable share analysis of the Commission is wrong, since the Commission used the documents of the other firms but not the documents of Intel. This point, however, is debatable because the documents from the other firms cannot always trustable. The usage of the other firm's documents might have led to a legal uncertainty for the Intel case. In order to solve, legal uncertainty, Geradin[134] and Arıtürk[135] suggest cross-examination methods. These alternative ways are important however they are not in the scope of this study. Also, the rebates are bargained with the OEMs so consumers have bargaining power and their welfare would not be effected. Lastly, if the rebates of the Intel have the capacity to exclude rivals from the market, it means that Intel's rebates limit the consumer choices and innovation. However, Geradin argues that AMD was still in the market, produce new products and can compete with Intel.[136]

As a result, although the Intel decision had some deficits, it was still very significant for understanding the transition from forms-based approach to effects-based approach. It is because the Commission made as efficient competitor test, calculated the

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[132] Rousseva Marquis, "Hell Freezes Over: A Climate Change for Assesing Exclusionary Conduct under Article 102 TFEU", *Journal of European Competition Law & Practice*, 2012, pp. 1-19, p.15.
[133] The Commission decision is 517 pages and the complaint was submitted in 2000.
[134] Damien Geradin, The Decision of the Commission of 13 May 2009 in the Intel case: Where is the Foreclosure and Consumer Harm, p. 13.
[135] Remzi Özge Arıtürk, "İndirim Sistemleri: AB ve ABD Uygulamaları Işığında Test Önerileri ve AB Uygulamasındaki Son Gelişmeler, "*Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), pp. 390-369, p. 363.
[136] Damien Geradin, The Decision of the Commission of 13 May 2009 in the Intel case: Where is the Foreclosure and Consumer Harm, p. 19-20.

contestable market shares and the effective price, the actual and likely effects on the consumers were analyzed and the decision becomes more compatible with the Guidance.[137]

2.3. EU Decisions on Refusal to Supply:[138]

2.3.1. Telekomunikacja Polska Decision:[139]

Telekomunikacja Polska (TP) is a Polish telecommunications company. It was the state monopoly, but later liberalized. Then the sector was under the regulation of Polish regulator, despite that TP had the dominant position in the market. According to the Commission, the relevant markets for this case are the market for wholesale broadband access (bit stream access-BSA), the market for wholesale infrastructure access (local loop unbundling-LLU) and the retail mass market. The Commission argued that TP abused its dominant position in the Polish broadband access market by refusal to supply of giving access to its network and supply BSA and LLU wholesale products to alternative operators.

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[137] R.Ö., Arıtürk, op.cit. p. 363.

[138] I found Telekomunikacja Polska Decision more relevant with the Guidance and the Turkish cases. Other recent decisions of the Commission related to refusal to supply are; Case T-301/04 *Clear Stream v. Commission* [2009] that is related to refusal to supply of the cross border securities and objective neccessity. EON, Commission decision of 4 May 2010 and ENI, Commission decision of 29 September 2010: they are Gas suppliers of France and Italy. The Commission gave commitment decisions to change the contracts the Regulation with Article 9 of 1/2003. IBM Case COMP/39.692 — IBM Maintenance Services and Case T-167/08 - *Microsoft v Commission*, 27 June 2012 cases; related to intellectual property rights (IPRs) and patents. IBM related to the the refusal to supply of the Spare parts but again Regulation with Article 9 of 1/2003 to change the contracts. Microsoft case: refusal to supply of the interoperability information In the Guidance, the cases were related to the objective necessity of the products. The Guidance referred those cases such as Oscar Bronner, IMS and Magill which are related to the patents and IPRs under the objective necessity part.For more look at Guidance, para 83, footnote1,2,4and Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP)* v *Commission (Magill)* [1995] ; Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998], Case C-418/01 *IMS Health* v *NDCHealth* [2004] and Richard Whish, Competition Law, (Oxford University Press:London, 2012), p. 697-711.

[139] Case T-486/11, *Telekomunikacja Polska v Commission*,not yet decided, COMP/39.525, Telekomunikacja Polska, 22 June 2011.

The Commission used the Guidance that whether TP met the conditions for refusal to supply and looked at the following points: -the refusal relates to a product or service which is objectively necessary to be able to compete effectively on downstream market, -the refusal is likely to lead to the elimination of effective competition on the downstream market, and -the refusal leads to consumer harm.

The analysis of the Commission showed that TP is the only firm in Poland that can provide the infrastructure of the internet connection to the alternative operators (AOs). It had 100 % market share for the wholesale market. In the retailers market, TP has the firm called PTK, which is the subsidiary firm to the TP. PTK gives the internet service in the market as well. For the retailers market, it has the market shares between 46 % and 57 %. There are barriers to entry to the market. The infrastructure is costly and there are high sunk costs. Also the competitors of TP have low market powers.

The Commission argued that the practices made by the TP were; proposing unreasonable conditions, delaying regulation process, limiting access to networks, limiting access to the subscribers, refusing to provide general information. According to the findings by the Commission; TP offered unreasonable conditions to the AOs to access the wholesale broadband products; unnecessary formal requirements, technical rejections, going late to fix the broken lines; delaying negotiation process: TP did not meet the 90 day regulatory deadline for 70 % of the negotiations; limiting access to network; rejecting orders with unreasonable grounds; limiting access to subscriber lines, refusal to supply the General Information (GI) which is indispensable for AOs. Moreover, TP applied better conditions and the GI were easily accessible, quicker and cheaper for PTK as the evidences showed. Also the rejection rates of PTK were lower than those of the other AOs. The Commission found the internal documents and e-mails for intent that showed the plans of the TP.

Then, the Commission looked at the likely effects on the market. The refusal to supply made by TP reduced the rate of entry to the retail market for the broadband internet services. The use of BSA and LLU services was low. In addition, the Commission claimed that TP practices were detrimental to the consumers because it caused low broadband penetration, high broadband prices, and low average broadband connection speeds. In January 2010, the broadband penetration in Poland was 13.5 %

and one of the lowest in Europe; average 24.88 %. Moreover, Poland had the lowest internet speeds in Europe by the fact that 66 % of the internet connection not exceeding the speed 2mbit/s but this was just 15 % in Europe. Lastly, the retail broadband prices in Poland are the second highest in OECD countries.

Considering the objective justifications, TP said that it did not have enough time to conform the situation after the new regulatory environment and it had difficulties in developing IT systems and finding human resources for perform these projects. However, the Commission argued that TP was an operator with significant market power and it affected negatively the development of broadband services in Poland by abusing its dominant position. Thus the Commission imposed a fine of EUR 127.5 million. The fine was decided according to duration of the infringement which is 4 year and 2 months. TP was also fined by the National Competition Authority of Poland for margin squeeze. As a result, TP had been fined two times but this situation did not make the Commission not impose fine to it.

This was the first abuse of dominant position case of the Commission for a company of a country that joined the EU in 2004. TP appealed to CJEU but is not yet decided.[140] The Commission referred to Deutsche Telekom decision and said that the specific sector regulations did not exclude the application of EU competition rules.[141] In this case, the Commission used the refusal to supply definition and the objective necessity in the Guidance. In addition to that, the Commission looked at the likely effects on the competition. Consumer harm was investigated and there were statistics which show that consumers had been negatively affected from the situation. According to their analysis, the entry and expansion looked hard and there were barriers to entry to the market. Since the duration of the exclusionary practice was 4 years, the effects were more than expected according to the Commission.

[140] "Commission decision against Telekomunikacja Polska - frequently asked questions", http://europa.eu/rapid/press-release_MEMO-11-444_en.htm.
[141] Krzysztof Kuik and Anna Mościbroda (2012): *2010 and 2011 EU Competition Law and Sector-specific Regulatory Jurisprudence and Case Law Developments with a Nexus to Poland.* Published in: Yearbook of Antitrust and Regulatory Studies , Vol. 5(7), No. 2012 (2012), pp. 157-190.

As a result, the approach of the Commission in TP decision was in line with the Guidance and had effects based approach because of the analysis of objective necessity of input, likely effects on competitors and consumers, objective justifications and efficiencies. However, how the CJEU will evaluate the decision is very significant to determine whether the decision will be effects-base and compatible with the Guidance.

2.4. EU Decisions on Margin Squeeze:

2.4.1. Telia Soneria Decision:[142]

Telia Soneria Sverige is a Swedish fixed line phone company and the network operator in Sweden. It is the owner of infrastructure that is the local metallic access network, local loops and copper wires that are needed for broadband internet connection. Telia Soneria offered internet in two ways; first was unbundled access to local loop and the other one was offered to ADSL products for wholesale users that they can supply broadband internet service to the end users.

Konkurrensverket, Swedish Competition Authority, argued that Telia Soneria abused its dominant position by making margin squeeze in the sale of prices to ADSL products for wholesale users and the prices that offered to the end users. The prices in the end users market cannot cover the costs of the firm. Then Konkurrensverket brought issue to Stockholms tingsratt, the Stockholm District Court, and requested to fine Telia Soneria. Stockholms tingsratt asked several questions to CJEU about the condition for infringement of Article 102, the relevant market, anti-competitive effects, recoupment of losses and the establishment of the cost concepts, indispensability, whether it is possible to sell at a loss during the establishment of new technology or not.

CJEU argued that on pricing practices, National Competition Authority (NCA) must look at the potential effects of the margin squeeze for competitors who are at least as efficient as dominant undertakings. There is no need to look at actual effects. Thus, according to CJEU, NCA must look at as efficient competitor test in addition to cost/price analysis which will analyze if wholesale and retail prices are abusive or not.

[142] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, 17 February 2011,

According to CJEU, the product is indispensable for the retailers. This may cause case to have anti-competitive effects. There can be cases in which input is not indispensable, but has anti-competitive effects. Therefore the firm should make an objective justification or economic justification, if the practice did not constitute an exclusionary effect. There is no need for the recoupment of loses for the case of margin squeeze, because sometimes prices are too high in wholesale market but not low in retail market. Firms do not necessarily have the possibility to recoup losses.

In this decision, CJEU has similar points with Deutsche Telekom decision,[143] since it is asked to make as efficient competitor test. However, the decision states that looking at actual effects is unnecessary. This does not comply with what is stated in the Guidance. According to Krah and Bien, in Telia Soneria decision the CJEU has a vague approach.[144] They find some aspects of the Telia Soneria effects-based, but some aspects as forms-based. In fact, there are three points of this decision that can be traced in the Guidance. The first point is that CJEU takes the margin squeeze as a separate form of infringement, not a form of refusal to supply as it can be seen in the Guidance. The second point is that the decision stated that recoupment of losses is not necessary. This also complies with the Guidance. Thirdly, the Court recognizes that exclusionary effects of margin squeeze can be outweighing consumer harm. This view also exists in the Guidance. Thus, the Telia Soneria decision has adopted effects-based approach although it has forms-based approach tendencies as well.

Thus, although Telia Soneria decision includes as efficient competitor test and includes the requirement of the economic analysis, it is not possible to say that the case was effects-based and compatible with the Guidance because it said that the actual effects on the consumers are not necessary to be analyzed in margin squeeze cases.

[143] Case COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, Commission decision, 21 May 2003.
[144] Florian Bien and Matthias Krah, The Ruling of the CJEU in Post Danmark: Putting an End to Selective Price Cuts as an Abuse Under TFEU Article 102 and Turning Towards a More Economic Approach, European competition law review; ECLR. Volume: 33, Issue: 10, 2012, pp. 482-487.

2.5. EU Decisions on Exclusive Dealing:

2.5.1. EDF Decision:[145]

EDF is a French energy company that has dominant position in the market for electricity supply to the large industrial customers. Before the liberalization of the electricity market, EDF had near monopoly position in the market and still has dominant position in the industry after the liberalization. The French state is the major holder of the most (70 %) of the EDF share. It operates on the distribution, supply and trade of the electricity. There is also Electricite Strasbourg, subsidiary company of EDF, active in the electricity supply market in France and to large industrial customers.

The Commission argued that the relevant product market for this case is the "supply of electricity to large industrial customers". EDF made contracts with the large electricity customers. The contracts that were made between EDF and the large industrial customers for almost all electricity volumes are exclusive and explicit clauses of the supply contracts (de jure exclusivity) that give customers strong incentives to use electricity exclusively form EDF (de facto exclusivity). Therefore, the Commission argued that the scope, duration and the exclusive nature of the contracts can have anti-competitive effects. Then, these agreements can cause foreclosure effect and hinder new entries to the French market for supply of electricity to large industrial customers in France. Also, it can limit consumer choices. As a result, the Commission proposed commitments to limit the duration of the long term supply contracts not to exceed 5 years and the market share of EDF will be reduced to 40 % until 2020. As a result, the Commission modified the conditions of the contracts by accepting the commitments by Article 9 of Regulation 1/2003.

In this case the potential effects of competition were considered by the Commission. The likely effects of the abusive practices on consumer welfare are emphasized. These points are also raised by the Guidance. Therefore one can say that this decision confirms with the Guidance in terms of its approach. The other issue is that in the decision, the Commission proposed change in the terms of the contract. This means, the Commission has this power of interfering and regulating the market. In

[145] Case COMP/39.386-*Long Term contractsFrance*, 17 March 2010.

addition, Guidance states that the longer the duration of the exclusive dealing agreement, the grater possibility of foreclosure effect.[146] Therefore the decision of the Commission that required reducing the duration of the contracts could be compatible with the Guidance.

2.5.2. Soda ash Decision:[147]

Solvay is a company operates in nine European national markets; Austria, Belgium, France, Germany, Italy, Spain, Portugal, Switzerland and Luxembourg. It produces soda ash (sodium carbonate), an alkaline chemical commodity that is used to make glass and can be also used chemical industry for detergents and metallurgy. The relevant market for this case is soda ash. Solvay has the dominant position in soda ash market with 60 % market share in Europe.

According to the Commission, Solvay abused its dominant position with rebates, exclusive dealing agreements, and contractual agreements in the EU countries. In the decision, there were other exclusivity clauses related to the tonnage of the soda ash, glass maker contracts. There were also competition clauses, which were the supply agreements that tie the consumer to Solvay. Besides, safeguard clauses in which Solvay and the companies will maintain long-term relations in case of the other firms offer better economic conditions to the firm were also mentioned.

In the on-site investigations, the Commission found documents that showed the objectives of the rebates system. Also, according to the Commission, the rebates system of Solvay could create loyalty effect on consumers and limit the competition. Here Commission states that "tying of consumers to Solvay products showed an exclusionary purpose." In the end, the Commission concluded that the practice made by Solvay was exclusionary conduct. As a result, Solvay was punished by EUR 20 million. Then Solvay went on appeal. Then CJEU uphold the appeal and reduced the fine to EUR 19 million.

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[146] Guidance, para 36.

[147] COMP/33.133-C:Soda ash-Solvay, 15 January 2003, Case T-57/01 *Solvay SA v European Commission*, 17 December 2009.

The effects of the exclusive clauses and the rebates were not evaluated by the Commission. Whish argues that Solvay case is a per se decision both by the Commission and the CJEU, and any exclusive purchasing agreement of a dominant undertaking could be abusive regardless of the potential or the actual effect on the competition.[148]

The point is that the decision of the Commission was made in 2003, before the publication of the Guidance in 2009. It has less effects-based approach. Of course, the conduct of the CJEU did not consider the Guidance or more effects-based approach in the decision. The decision could be different and might have been a more effects-based approach, if it had been evaluated after the Guidance. Thus, the Commission and CJEU looked at the per se illegality of the exclusive dealing agreements. It did not mention effects of the schemes and did not present cost/price analysis or economic analysis.

[148] Richard Whish, Competition Law, (Oxford University Press:London, 2012), p. 684.

CHAPTER 3: TURKISH COMPETITION AUTHORITY DECISIONS BETWEEN 2009-2013 ON EXCLUSIONARY CONDUCT

3.1. Turkish Competition Authority Decisions on Predatory Pricing:

3.1.1. Knauf Decision:[149]

Knauf is a producer of building materials and construction systems. According to the allegations, Knauf has dominant position in the plasterboard market[150] and it abused its dominant position in the plasterboard and the plaster powder[151]markets by implementing predatory pricing and cross-subsidization according to the decision.

In the decision, the CA states that plasterboard and plaster powder are in separate markets. In fact, the two materials have the same raw material; gypsum that is calcium sulfate dehydrate (CaSO4 2H2O) and can both be used in the construction sector. However, they are not the substitutes of each other since their areas of usage are different; the plasterboard can be used to construct walls and the ceilings whereas plaster powder can be used to stick and coat the walls. Thus, the relevant markets for this case were divided into two; "plasterboard market" and "plaster powder market".

In the analysis of the dominant position, CA looked at the market shares, the production capacities of the firms in the market and the barriers to entry to the market. Then, CA argued that the market share of the Knauf was not high enough to say that it had dominant position in the market or not, and plasterboard market had increasing capacity but the market shares of Knauf have decreased after 2012. In addition to that, there were not any legal barriers to entry to the market but the sunk costs are high since the cost investment and starting production is high and hard to recover in case of exit from the market. However, there were new entries to the market in 2009. Moreover, CA evaluated that Knauf has high brand reputation and financial strength but did not have advantage to reach raw materials and there were no exclusive dealing agreements between the retailers and Knauf in the sector. Thus, after looking at the conditions of the Knauf and the market, CA could not decide whether Knauf had dominant position.

[149] Knauf Kararı, 09-59/1441-376, 16.12.2009.
[150] *alçı levha pazarı* in Turkish.
[151] *toz alçı pazarı* in Turkish.

Nevertheless, CA assumed that Knauf had dominant position in the plasterboard market and then made analysis of predatory pricing.

CA made cost/price, intent and recoupment analysis to investigate on the predatory pricing. For the cost/price analysis, CA looked at Average Variable Cost (AVC) and Average Total Cost (ATC) that are the cost concepts in AKZO decision[152]and Areeda-Turner Test[153] that says prices below AVC is predatory; selling at a price between AVC and ATC is predatory, if there is intent and; the prices equal to and above ATC is competitive. CA referred to the Guidance with as efficient competitor test by saying that prices that are above the total cost cannot be evaluated as predatory since the these prices can only cause exclusion of a less efficient competitor. Then, CA calculated the costs of Knauf plasterboards and took into account the total effective cost (TEC) that is equal to or higher than the ATC. CA argued that it is viable to use TEC since it is most extensive one among the other cost concepts. In addition to that, CA made the cost/price analysis only for the product of Knauf with the highest sales rates. CA looked at the share of sales in the total plasterboard market, price, cost and profit rates of Knauf in 2008-2009.

Then, CA found out that Knauf implemented prices below cost only for one month in 2008. Apart from that, there were fluctuations in the amount of the sales of Knauf in the beginning of 2009. CA concluded that, there was a decrease in the amount of the sales by Knauf. As a result of this situation, Knauf reduced the prices and the costs of stocks to meet the need of liquidity of the firm during the global economic crisis in 2009. That is to say, there was an objective justification of the practices done by Knauf.

In addition to that, CA checked that whether there were actual and likely effects due to predatory pricing. At the time when Knauf was selling at prices below costs, there were two new entries and none of the firms have left the market. Also the duration of the practice was one month which is not enough to evaluate whether it is a predatory

[152] Case C-62/86, *AKZO Chemie BV v Commission* [1991].
[153] Phil Areeda, and D.Turner, D.; Predatory pricing and related practices under Section 2 of the Sherman Act. *Harvard Law Review* 88(4), 697–733. (1975).

behavior or not. Additionally, no evidences or information of predatory pricing have found during the inspection. Therefore, the CA decision concluded that, pricing practices of Knauf cannot be an exclusionary practice.

Apart from that, CA examined the cross-subsidization allegations. According to the complaint, Knauf has made cross-subsidization by making predatory pricing in the plaster powder market and recovered the losses of this market with the profits from the plaster board market. Then, CA analyzed the prices, costs and profits of the plaster powder between 2007- 2009 and found out that the prices of Knauf were below costs. Also, CA looked at the market shares and total capacities of the undertakings in the plaster powder market. The decision showed that Knauf can only be the sixth firm among the firms in the market and it was not possible to be a dominant firm for Knauf. Apart from that, since the prices in the plasterboard and the plaster powder markets had tendency to decrease and the profits in the plasterboard market were decreasing, it was not possible to recover losses of the pricing below cost practices in the plaster powder market with the profits from the plasterboard market. As a result, CA decision concluded that Knauf did not make predatory pricing and cross subsidization in the plasterboard and the plaster powder markets.

Thus, in Knauf decision, CA made extensive economic analysis and adapted more effects-based approach. CA evaluated the cost/price analysis, the conditions in the market, the duration, actual and likely effects on competition, objective justification and the macroeconomic conditions at that time. Then CA argued that the reason of the pricing practices of Knauf is the economic crisis in 2008 and 2009 when all firms in the plaster sector and construction sector lost their revenues. In addition to that, the pricing below cost was only for a month, CA could not decide that was enough time for predatory pricing. If the duration was longer, the decision of CA could be changed. Besides, there was no documentary evidence on the predatory strategy that can show the intent. It can be argued that since there was no proof of intent, CA had tendency to analyze this case more with the effects-based approach. There can be a different way to evaluate this case if CA believed that it is a part of an exclusionary strategy.

The analysis of CA is consistent with the approach of the Guidance since it included market structure, cost/price, intent analysis, effects of the pricing schemes and

whether there were objective justification. CA analyzed the market positions; relevant market conditions and the market shares of the Knauf and the competitors, the capacities, the expansion and entry and the countervailing buyer power in the assessment of the dominance. However, there was no evaluation of the consumer harm. In addition, CA argued that to show the possibility of recoupment of losses is an essential condition for evaluation of the predatory pricing.[154] Whereas, there is no requirement for recoupment of losses in the EU, that can be seen from the Guidance[155] and the case-law.[156] Additionally, Uzunallı argues that CA followed the per se exclusionary approach of the EU that says prices below AVC are predatory and prices between AVC and ATC are predatory if there is intent. On the other hand, in the Guidance, the LRAIC and AAC are the criteria to determine predatory pricing cases[157]. Therefore, CA has not adapted the cost approach in the Guidance in Knauf case.[158]

3.1.2. Türk Hava Yolları (THY) THY Decision[159]

THY, Turkish Airlines, is the flag carrier air-lines company, headquartered in Istanbul and operates in domestic and international flights in carrying passengers and cargo. It currently became a joint stock company after the initial public offering. This means the shares of THY are both publicly traded and owned by Republic of Turkey Prime Ministry Privatization Administration.[160] There is also Anadolu-Jet that operates in domestic flights as a low-cost branch of THY.

Pegasus Airlines, the privately-owned low-cost airlines company headquartered in Istanbul, made a complaint, alleging that THY was implementing predatory pricing

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[154] Uzunallı, S. Avrupa Birliği Rekabet Hukuğu Işığında Yıkıcı Fiyat Uygulamalrı ile Hakim Durumun Kötüye Kullanılması, Rekabet Dergisi 2010, 11(4):59-109, p. 103-104.
[155] Guidance, para 71.
[156] See COMP/38.233 *Wanadoo Interactive*, Commission Decision of 16 July 2003, para. 332 to 367, Compagnie Maritime Belge v. Commission, T-24/93, T-26/93, T-28/93, 1996, para. 149, Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak International* v *Commission* [1996] ECR I-5951, para. 150.
[157] Guidance, paras 64-68.
[158] Uzunallı, S.,op. cit., p.103.
159 THY Kararı 11-65/1692-599, 30.12.2011
160 *Başbakanlık Özelliştirme İdaresi* in Turkish

in domestic and international flights departing from Istanbul. Pegasus argued that THY was aiming to exclude Pegasus and the other rivals from the market. During the on-site investigations, CA found e-mails and notes about the pricing strategies of THY. Those documents show that THY deliberately reduced prices in some of domestic and international flights to be able to compete with the low cost carriers such as Pegasus Airlines. For example; according to e-mails by THY managers, Dusseldorf and Sabiha Gökçen (SAW) were the airports that THY have lost the market shares. For those airports, THY managers decided to stay in the market by reducing prices even it caused THY to lose profits. THY did not want rivals to exit from the market, but wanted to discipline Pegasus and the other rival firms with its low prices. As it can be understood from the internal e-mails were sent by the managers of THY, they closely followed which airports Pegasus would operate. Then, THY took precautions by lowering their prices in flights to those airports. Apart from that, the documents from the "Turkish Airlines 2015 Strategy Meeting: Work Models" meeting show that THY planned strategies against the low-cost airlines. For instance, their strategies were not to leave Esenboğa Airport and SAW Airport although it caused losses. Also THY increased the number of flights from SAW with Atlas Jet; because THY flights caused higher cost in some destinations, and for not giving the opportunity to low cost carriers of thinking that THY was eliminated from the market. THY believed that, if it would leave certain airports and would not make flights in certain routes, the market power of Pegasus would increase. Also, the same documents showed that in 2010, THY made losses in domestic flights due to the fact that it increased the number of flights from the other airports in Turkey rather than Ataturk Airport (AHL).

Then, CA interpreted those documents and e-mails as a part of the competitive concerns rather than a predatory pricing strategy. Thus, those documents were not counted as proofs of an abuse of the dominant position or the intent. As a result, CA decision concluded that the pricing practices of THY were not in the scope of abuse of dominant position and so it did not impose a fine to THY.

However, CA decided that the slot rights that THY owned in the AHL and the bilateral agreements cause THY to be the sole carrier.[161] This situation affected

[161] *tek taşıyıcı* in Turkish.

competition in Turkish civil aviation sector negatively according to CA. It made THY advantageous in competition and disturbed the fair competition in the market. Besides, THY had privileges in its allocation of slots by Ministry of Transport, Maritime Affairs and Communications. CA decided that to maintain competition in the Turkish civil aviation sector, the allocation of the slots must be transparent, fair and non-discriminatory and; the Ministry, Directorate General of Civil Aviation and the General Directorate of State Airports Authority must regulate the sector accordingly. Then, CA sent an opinion about the slot allocations and conformity with international bilateral aviation conventions to the related state bodies.

This decision caused disagreement between the members of Competition Board (CB). According to different justification[162] of CB members Reşit Gürpınar, İsmail Hakkı Karakelle and Murat Çetinkaya, the investigation made by the reporters of the CA was not detailed enough. There were missing parts in the investigation; reporters did not analyze whether SAW and AHL were substitutes for each other, there was no analysis and tests on the prices of THY, Atlas Jet and Pegasus, flight routes, flight times, capacity of the airplanes, whether there was a cross-subsidization between Atlas Jet and THY, cost/price analysis and profit/loss analysis of the three airlines companies. Additionally, Gürpınar argues that the analysis and the tests made by the reporters of CA were not enough to give a fair decision about the issue. He believes that there were sufficient tools and evidence that CA could investigate, despite that the test and analysis of reporters were inadequate. In addition, he declares that Turkish laws make CB members determine on the cases by depending on the economic analysis and evaluations made by the reporters. He thought that Turkish laws were insufficient and did not give CA members the right to abstain or sent the reports back and require more detailed analysis on the issues. Additionally, Karakelle and Çetinkaya believe that the information in the inspection was not enough to determine whether THY abused its dominant position or not.

THY decision had an opposite approach to the Knauf decision in terms of economic analysis. In THY decision, CA failed to make almost any economic analysis. Interestingly, CA did not even make the geographical and relevant market definitions,

[162] *farklı gerekçe* in Turkish.

the assessment of the market power and the dominant position that are essential and fundamental parts of the determination of dominant position, as it is stated in the Guidance.[163] To determine whether prices in the market were below costs, total revenue and profitability, ticket prices, number of flights and occupancy rate of a certain route should be calculated.[164] However, in the decision, there were no cost/price analysis, no calculation of the cost concepts, no analysis of cross-subsidization, barriers to entry or exit to the market, likely and actual effects on consumers of the practice in the analysis of CA. Also in contrast to Knauf decision there was no evaluation of sacrifice or recoupment of losses.

In addition to that, there were many documents and e-mails of THY through which pricing policies that can be proof of intent for predatory pricing. However, CA reporters argued that these documents could only represent competitive concerns without analyzing the effects of those pricing strategies to the market. Thus, THY was a controversial decision because of the weakness of the proofs and the lack of economic analysis. Besides, there are no calculations of sacrifice of profits or whether the duration of the practice is enough for the predation or not. In fact, there are some other decisions of CA in which there were proofs of intent and undertakings were fined. For example in Doğan Medya Group[165], Solmaz Mercan[166] and Türk Telekom[167] cases there were evidences which show the intent of the firms as it is the case in THY decision. However, CA fined Solmaz Mercan, Doğan Medya Group and Türk Telekom because the evidences showed that the undertakings had intents to make exclusionary practices. On the other hand, despite the fact that it had already sent two separate opinions about the slot issue in two different cases, CA once again found sufficient to send a third one on the same topic.[168]

[163] Guidance in states in para 9 that: "The assesment of whether an undertaking is in a dominant position and the degree of market power it holds is a first step in the application of Article 82".
[164] Özgökçen, Gürkaynak, Global Competition Law Review, Turkey: Dominance, http://globalcompetitionreview.com/reviews/47/sections/164/chapters/1853/
[165] Doğan Medya Grubu Kararı 11-18/341-103, 30.03.2011.
[166] Solmaz Mercan Kararı, 09-39/949-236, 26.8.2009.
[167] Türk Telekom Kararı, 08-65/1055-411, 19.11.2008.
[168] THY Kararları: 06-63/863-253,14.09.2006; 11-47/1163-409, 14.09.2011.

Additionally, just by looking at the page amount, one could say that THY case does not include extensive analysis. It has only 24 pages. There are more than 500 pages decisions in the aviation sector in the EU such as Ryan Air/Aer Lingus merger decision[169] with extensive economic analysis. This point does not seem to be highly relevant, but on the other hand it still reveals a small clue about the lack of analysis. In addition to that, THY decision was far away from the Guidance. It did not have extensive economic analysis and calculations of cost concepts. There were not enough economic analysis and tests for objective justifications of the pricing practices. This means that the approach in THY decision is much more forms-based or per se illegal approach. CA only looked at the documents and the e-mails in the THY on-site inspections for finding out predatory pricing. However, the objective justifications CA found for the pricing practices of THY made me think that there was intent of predatory pricing rather than an aim to have competitive pricing strategies.

Finally, in both Knauf and THY decisions, CA did not impose fine to undertakings. The Knauf decision was closer to the criteria in the Guidance and had more effects-based analysis than the THY decision. This situation illustrates that CA does not have a clear and distinct assessment of the predatory pricing and so, CA demonstrated a contradictory approach by choosing different tools for evaluating predatory pricing.

3.1.3. Türkiye Denizcilik İşletmeleri (TDI) Decision:[170]

Türkiye Denizcilik İşletmeleri (TDI), Turkey Maritime Facilities Incorporation, is a public undertaking. The firm carries passengers and vehicles with the ferries and ferryboats in Turkey. According to the allegations, TDI abused its dominant position that it had in Eskihisar-Topçular route by using technological, financial and commercial advantages of this route on other Çanakkale Strait routes through charging prices below the costs.

[169] Ryanair/Aer Lingus Case, COMP/M.4439, Commission Decision of 27 June 2007.
[170] Türkiye Denizcilik İşletmeleri Kararı, 10-45/801-264, 24.06.2010.

The relevant market in this decision was "passenger and vehicle carrying service with ferries and ferryboats market".[171] The relevant geographical market was Çanakkale Strait which included Çanakkale-Eceabat and Gelibolu-Lapseki ferries and ferryboats. The Eskihisar-Topçular route was defined as another geographical market. In the analysis of the dominant position, CA argued that TDI was the only company that operated in the Eskihisar-Topçular route at that time. The route covered 80 % of the total vehicles which were carried by TDI. Additionally, in Çanakkale Strait, there were no other ways of transportation except the existing sea routes. The only way to carry passengers and the vehicles were to use ferries and ferryboats in the market. However, TDI was not the only undertaking operated in that route; there were private sector undertakings in Kilitbahir-Çanakkale route. Besides, Çanakkale and Gelibolu routes could be substitutes of each other thanks to land roads between them. Thus, TDI was monopoly in Eshisar-Topçular route, but did not have the dominant position in Çanakkale Strait routes.

CA explained that in addition the high market shares, TDI had some advantages in the market. For instance, the ferryboats of TDI had better qualities and in other routes TDI worked with more profits. Besides, the competitors of the TDI were smaller local firms with inactive capacity resulting from high sunk costs which made the entries and exits to the market harder. Harbors and ports, absolutely essential for carrying passengers were not sufficient for the new entries. This means despite the nonexistence of legal barriers for the entry to the market, there were economic and physical barriers. Some allegations also claimed that TDI did not allow the private undertakings to enter the market in Çanakkale Strait by asking them to pay high prices for harbors and ports.

CA made predatory pricing analysis for Çanakkale Strait routes in ferryboat services. It stated that prices did not have to be under the costs for considering a practice as predatory; but they were important indicators of predatory pricing. Then, CA made cost-price analysis on Çanakkale Straits and Eskihisar-Topçular routes. It was found out that the prices of Çanakkale Straits routes were under the costs for three years. On the other hand, there was excessive profitability in the Eskihisar-Topçular routes in which TDI did not have any other competitors. CA stated that, there were sudden changes in

[171] *feribot ve arabalı vapurıyla yolcu ve araç taşımacılığı hizmetleri pazarı* in Turkish

prices in Çanakkale Straits because of the new entrants and the loss of the market shares by TDI. Then, TDI reduced prices below 30 % of the costs and made losses in Çanakkale Strait routes. CA looked at the cost items of the TDI such as the prices of diesel to understand whether there were any reasons for decreasing prices. However, it was not possible to explain the reasons of the decrease in the prices with the diesel prices. There were no other efficiency reasons found by the CA which could cause a reduction in the prices. In addition, the policy statements of TDI showed that, it compensated the losses of Çanakkale Strait routes from the Eskihisar-Topçular route. CA thought that, by making cross-subsidization between the two routes, TDI aimed to exclude rivals from the market. CA also analyzed whether the practices of TDI caused the exclusion of the competitors from the market. The decision said that, because there were high exit costs, the small firms could not exit from the market. Therefore, small firms, too, lowered their prices and this situation turned out to be price wars between them and TDI. As a result, CA decided that TDI abused its dominant position and then imposed fine to TDI.

In this decision, CA made economic analysis by looking at the costs and prices and by evaluating if prices were below the costs or not. However, CA did not use the cost concepts in the Guidance; LRAIC and AAC, and did not make as efficient competitor test. There was an analysis of the sacrifice which revealed that TDI made losses in the routes. In addition to that, CA looked at the foreclosure effects by analyzing whether the rivals were excluded from the market. CA explored the documents of the TDI showing that TDI made cross-subsidization. Moreover, the efficiency reasons were evaluated. Despite all these, CA did not look at consumer welfare, which was an essential focus of the Guidance. It just looked at whether the practice had really happened and the competitors had been affected negatively rather than mentioning actual or likely effects on the consumers. Finally, one could state that TDI decision was not compatible with the Guidance. It did not have effects-based analysis although it had some economic analysis in accordance with the Guidance.

3.2. Turkish Competition Authority Decisions on Rebates:

3.2.1. Doğan Medya Grubu (DMG) Decision:[172]

Doğan Media Grubu (DMG) was accused of the abuse of dominant position in the daily newspapers advertisement spaces market by inducing loyalty rebates and premiums by Habetürk Media which was a new entrant to the newspaper market. DMG consists of group of companies active in newspaper, magazine and book publishing, television and radio broadcasting and production, internet, printing and distribution.[173] DMG also owns the newspaper companies of Hürriyet Gazetecilik ve Matbaacılık, Doğan Gazetecilik, Bağımsız Gazeteciler Yayıncılık and Doğan Daily News Gazetecilik ve Yayıncılık.

For this case the relevant market was "the daily newspaper advertisement spaces market." In this market, the actors were the companies that want to give advertisements to the newspapers , the advertising agencies, the media planning and acquisition agencies (MPAA) that work as intermediaries between the firms that want to make advertisements, and the media companies; the newspapers.[174] The companies go to advertising agencies and want them to prepare advertisements about their products. After that, they go to MPAAs to be able to reach their target group effectively and then choose the media companies most suitable for their products. For doing this, MPAAs make polls about the target groups of the newspaper, calculate the target group index and find out which target group fits which newspapers. Then, they try to match the products that wanted to be advertised with the newspapers. The companies that want to have advertisements in the newspapers tell the MPAAs the target group that they want to reach, then they choose the newspaper that offers the cheapest prices for per relevant target group.[175]

Therefore, the market of newspaper advertising spaces is a two-sided market because newspaper companies compete for both the circulation and the advertisement revenues. CA stated that newspapers are not the substitutes of each other; buying one

[172] Doğan Medya Grubu Kararı 11-18/341-103, 30.03.2011.
[173] Doğan Medya Grubu, http://www.dmg.com.tr/Eng/Default.aspx
[174] *mecra sahibi kuruluş; gazete, dergi, televizyon* in Turkish.
[175] *ilgili hedef kitle başına erişim ücreti en düşük gazete* in Turkish.

newspaper does not keep consumers from buying a different one. Similarly, companies that want to publish their advertisements can give their advertisements to more than one newspaper at the same time. Thus, in case of the analysis of the dominant position, CA took into account both the circulation and the advertisement revenues and found out that DMG had stable market shares in terms of these measures. Additionally, CA looked at the newspaper preferences of the companies and showed that DMG newspapers have been chosen by the most of the companies when they gave advertisements to more than one newspaper. Especially Hürriyet, a DMG newspaper, is a must-stock item in the newspapers advertisement spaces market. This means that publishing advertisements in Hürriyet is necessary for the companies which want to reach their target group. This makes DMG an unavoidable trading partner for companies. Thus, CA argued that DMG has dominant position in the daily newspapers advertisement spaces market.

In DMG case, during the advertisement process, MPAAs asked for price for the advertisements of the companies to the newspapers, or directly to the newspapers on their own. Then, DMG newspapers gave them prices for the advertisement spaces in per column centimeter. The prices changed according to the frequency of the advertisement; how many times it would be published, the place in the newspaper, the sections of the newspaper such as economy and sports, page number, whether the page was colored or black and white, the day of the week such as weekdays, Saturdays and Sundays. The DMG newspapers could offer discount schemes according to some conditions. So, it is not possible to say that there was only one standard pricing tariff for the advertisements on DMG newspapers. Hence, the MPAAs, DMG newspapers and the firms, which wanted to publish their advertisements, bargained on the prices.

During the on-site investigations, CA found many internal documents and e-mails between MPAAs and DMG newspapers. Those evidences showed that there were many discount schemes offered by the different newspapers owned by DMG. All different newspapers in DMG had their own rebates schemes with many different names; *budget discount*; was made according to the amount of the budget for advertisement given by the companies and the time period, *weighted column/cm discount*; was given if the newspaper is the most used newspaper in terms of column/cm, *seasonal discounts*; in some months and seasons prices were cheaper than the others, *first time advertisement discount and launch discount*; was given to the

companies which gave their advertisements for the first time to a DMG newspaper, *back-up advertisement discount*; was made only for the advertisements that would be published within 7 days but one of the weekdays, *area discount*; given for the firms that want full-page advertisements, *seasonal support discount*; practiced due to the global economic crisis in 2008, *budget growth discount*; a kind of quantity discount was given if the firm increases the budget of advertising, *DMG discount*; was made if the advertisements were published only in the DMG newspapers, *early contract discount*; was given for the early annual contracts, *block reservation discount*; was given to the monthly advertisements according to their frequency.

There were also conditional rebates that could cause exclusive dealing such as: *100 % column/cm Hürriyet discount;* which was 41 % discount from the total price, *50 % column/cm Hürriyet discount*; that was 29 % discount from the total price. In addition to that, DMG newspapers also reduced prices for the firms that want to make their advertisements for the first time and made *reference pricing practice;* the pricing scheme of the last year could be practiced for the next year to the same companies or different companies. Thus, DMG newspapers had extensive and highly individualized rebates schemes, and did not offer a standard price for each company. CA also looked at the loyalty rebates of Habertürk that were growth and target rebates called as *budget commitment discount, insert distribution discount, frequency discount.* Apart from that, DMG had *return and premium agreements* with MPAAs that were the incentives given to the MPAAs if they were able to find more companies to newspapers for the advertisements in terms of the amounts of the total turnover.

Then, CA evaluated the rebates schemes of the DMG newspapers. CA found out many documents and e-mails related to the rebate schemes. There were also documents that showed the prices of the rivals and the advertisement budgets of the other firms. According to CA, rebate schemes of DMG newspapers had loyalty inducing effects. There were rebates like 100 % usage of DMG newspapers caused the same effect with the exclusive dealing agreements. DMG aimed to stabilize its dominant position and high market shares and exclude rivals from the market at the same time. Thus, CA thought that rebates schemes obviously show that there was intent to abuse of dominant position.

CA also looked at the potential effects of the rebates rather than the actual effects. CA argued that the rebates schemes of DMG newspapers could cause loyalty inducing effects among the companies and had foreclosure effect in the market. Also, CA looked at the premium agreements with the MPAAs, found out that total number sales through MPAAs in the market were 40 %, 50 % , 55 %, 60 % from 2006-2009. The share of the DMG newspapers sales in the budgets of MPAAs was the highest. Therefore the premiums could cause potential foreclosure effects in the market. CA also argued that the premium agreements can lead to information asymmetries between the firms and MPAAs and could hinder the optimal distribution of the advertisement investments by causing the companies not giving their advertisements to the most convenient newspapers in terms of the target group that could be reached. Thus, CA decision concluded that this situation could reduce welfare of consumers and companies.

For the actual effects, CA argued that at the time when the DMG newspapers were applying the rebates schemes, there was a significant entry to the market by Habertürk newspaper. According to CA, DMG rebates did not cause exclusionary effect since Habetürk could successfully enter the market and got a considerable amount of market share. CA also evaluated the premium agreements between the MPAAs, looked at the shares of the newspapers sales in the budgets of MPAAs at the time of the premium practices, the correlation between premium per advertisement and the shares of the DMG newspapers in the budgets of MPAAs and whether MPAAs could able to reach the targets that were set by the DMG premium agreements. As a result, CA found that after Habertürk entered the market, the advertising shares in the budgets of MPAAs decreased, and therefore there was no correlation between the premium per advertisement and the shares of the DMG newspapers in the budgets of MPAAs and there were some MPAAs that could not meet the targets of the rebates.

At the end, the decision concluded that DMG abused its dominate position and DMG newspapers imposed fine 0.75 of the total turnover. However, CB member Gürpınar argued in his different justification that, there is increasing tendency towards effects-based approach for the rebates in the EU seen by the Discussion Paper,

Guidance and the Intel[176] and British Airways[177] decisions. Also in Turkish case-law; Kalekim[178], Frito Lay[179] and Coca Cola[180] decisions stated that the effects of the rebates must be evaluated for the decision of exclusionary rebates schemes. Nevertheless, according to Gürpınar, DMG decision was unclear in terms of the effects of the rebates whether they were competitive or anti-competitive. He argued that, the foreclosure effect by the DMG rebates and MPSAs premium agreements was not proven in the report. After the entry of Habertürk, DMG could not keep the market shares and Habertürk got considerable amount of market share. It could be a result of the competitive strategies of Habertürk. Another possibility is that the rebates did not have the effect on the market and then Habertürk was able to get considerable market shares in short time. There were potential anti-competitive effects of the rebates but the actual effects were unclear. Thus, it is not possible to say that the rebates were anti-competitive only by looking at the potential effects according to Gürpınar.

One could say that the availability of many evidences of intent might have led the CB to consider the situation as exclusionary behavior. It is also clear that there were potential effects in the decision whereas the actual effects were ambiguous. The entry of Habertürk to the market shows that there were no barriers to entry to the market. Also, the market share of the DMG newspapers has declined in the years of in which the rebates have been done. On the other hand, it is possible to say that, although Habertürk had some considerable amount of the market share, it could have gained larger market share if there were no DMG rebate schemes. Thus, economic analysis made in the decision is not sufficient to determine exclusionary behavior.

Although the effects of the practices were analyzed in DMG case, it is not possible to say that the decision has an effects-based approach that is completely compatible with the EU law and the Guidance. Firstly, CA did not make as efficient competitor analysis that includes cost/price analysis with LRAIC and AAC. There was also no calculation of the effective price. In addition to that the Guidance states that in

[176] Case T-286/09 *Intel v Commission*, not yet decided, COMP/37.990 Intel, Commission Decision of 13 May 2009.
[177] Case C-95/04 P British Airways v. Commission [2007].
[178] Kalekim Kararı, 11-03/42-14, 12.01.2011.
[179] Frito Lay Kararı, 06-24/304-71, 06.04.2006.
[180] Coca Cola Kararı, 10-65/1363, 14.10.2010.

two-sided markets also the costs and the revenues of the competitors may be analyzed[181]. However, in DMG cases there were no evaluation of the costs and revenues of the competitors. Secondly, no objective justifications or efficiencies were analyzed for the rebates. There was the analysis of the likely effects on consumer welfare. However these effects were hypothetical, they did not show actual effects. Therefore, they did not show if the rebates could cause consumer harm or not. Besides, the decision mentioned the special responsibility of the dominant undertaking. This responsibility was for protecting consumer welfare and refraining from abuse of the dominance. This point is very much similar to the Guidance states that the dominant firms have special responsibility to compete on merits and not to allow its practices to harm the competition.[182] Therefore one could say that CA borrowed some points from the Guidance.

Finally, the DMG decision is one of the longest decisions made by the CA. Despite that it was not that detailed. CA spent too much time to understand the nature of the rebate schemes of DMG. I believe it could be useful for CA to show the rebates were individualized and complicated. Also, it could be easier for CA to determine that the rebates could be exclusionary and have loyalty inducing effects. However I think, CA could be used the time that it spent to understand the structure of the rebates on the analysis of the effects of these practices in a much more detailed way. Apart from that CA only tried to understand the nature of the rebates and did not analyze actual effects of the rebates in the decision. Therefore economic analysis made here is insufficient to evaluate the effects of the rebates. It could be said that since there were many evidences for intent, CA did not include the economic analysis that much.

[181] Guidance, para 26, footnote 3.
[182] Guidance, para 1.

3.2.2. Kalekim Decision:[183]

Kalekim is a company that operates in ceramic adhesive and joint sealants market, alleged that it abused its dominant position with premiums, coupons and the other practices. In this case, CA defined the relevant markets as 'ceramic adhesive market' and 'joint sealants market' and then investigated on the dominant position. It looked at the market shares, the amount of sales, revenues, and the production capacities of for both ceramic adhesives and joint sealants markets. In the ceramic adhesives market, Kalekim had 42.6 % - 47 % market shares, and did not have dominant position in the joint sealants market. However, since the market shares of Kalekim were not stable and changing through years between 2008 and 2010, CA took into account some other factors and analyzed the situation of the market. It finally could not reach a conclusion that whether Kalekim has dominant position in the ceramic adhesives market or not. Therefore, CA assumed that Kalekim had dominant position and investigated on the rebates and abuse of dominant position.

The rebate systems made by Kalekim called as Kalekim Constructors Club[184] (KCC) and Kalekim Constructors Point System (KCPS)[185]. The aims of the KCC program were giving seminars and educations to constructors and enhancing their vocational knowledge, making them aware of the newest issues in the sector, and making the constructors to choose Kalekim's ceramic, paint, water and heat insulation materials. According to CA, KCPS was a loyalty inducing program and by adapting it Kalekim aimed to reach consumers through loyalty inducing program rather than technological investments. The services of KCC also included call center services, individual accident insurance plans, vocational training, seminars, courses and special promotions like machines and suits that constructors can use during their construction activities, journals and information services. Apart from that, Kalekim gave prizes to the constructors such as building materials and kits according to the points that they earned during the year. CA argued that in this system, there were no discounts on the final selling prices. Thus, it was independent of the prices of the products. KCPS can be seen as a retroactive, increasing rate, standard targeted and growth premium system, but in

[183] Kalekim Kararı, 11-03/42-14, 12.01.2011.
[184] *Kalekim Ustalar Kulübü* in Turkish.
[185] *Kalekim Ustalar Puan Sistemi* in Turkish.

the decision, it was evaluated as a quantity discount rather than a loyalty rebate since it did not include exclusive dealing agreements and a constructor could benefit from more than one premium scheme at the same time. Also, the system was not individualized but it was standardized and quantity targeted. This means, the potential loyalty inducing effect of the rebate system was very low.

In addition, CA could not find any documents or e-mails which showed that Kalekim had intent to make loyalty rebates and exclude rivals from the market. Then, it analyzed the effects of KCC and KCPS rebate schemes. Firstly, CA looked at market shares of Kalekim in ceramic adhesive market in terms of capacity, quantity and revenue. It found out that the average market shares of Kalekim is 18.7 % in capacity, 37.9 % in quantity and 44.7 % in revenue from 2008 to 2010. Secondly, CA calculated the share of KCPS sales in Kalekim sales and in total sales in the ceramic adhesive market. They found out that the share of KPBS to Kalekim sales and total sales were 26.2 % and 11.7 % in 2008, 11.8 % and 5.5 % in 2009, 1.9 % and 0.8 % in 2010, respectively. Thus, the budgets for the rebate scheme were decreasing. After that, CA looked at the share of the KCPS and KCC budget of Kalekim in ceramic adhesive and joint sealants markets and found out that, the cost of the rebates had very low share in the budget.

CA also argued that, there was no time limit for the rebate schemes and they were very transparent and simple systems that only covered the constructors. The number of constructors that used these rebates was around 44.000. So, the exclusionary effect with this number could be very small. On the other hand, the effects of these rebates system were very little since there were many constructors in the sector that did not benefit from the rebates. There was also the fact that constructors are not the final consumers and decision makers of the constructions. They are just intermediaries that could give advice about the products and consumers do not have to consider what constructors have said for the product choices. Additionally, the rival firms were, too, making the rebate systems like KCPS and KCC. Also it is very important that, KCC and KCPS rebate schemes did not exclude the rivals from the market; yet there were new entries to the ceramic adhesive markets locally.

Besides, there was no proof of intent for the aim to exclude rivals from the market by practicing reward distributing system with premiums and prizes in the ceramic adhesive market. CA states that KCC and KCPS rebate systems had low potential to have loyalty inducing effect on the constructors and could not affect the market significantly. Therefore, the decision concluded that Kalekim's practices could not be considered as abuse of dominant position and exclusionary practices.

The approach of CA in Kalekim case is closer to the effects-based approach. CA evaluated the actual effects of the rebates system, found out that the effects are too little to harm competition and did not conclude by declaring that the practices were exclusionary. Since no evidences related to the intent were found, CA inspected by adopting an effects-based approach. In Kalekim decision, CA used more effects-based approach than in it did in the DMG case. In DMG case, only the potential effects are mentioned, but the actual effects were unclear whereas in Kalekim decision, actual effects were more visible on competitors. In this case, CA did not analyze whether there is likely or actual effects on consumers. Therefore, the decision is not compatible with the Guidance. On the other hand, for the evaluation of the dominance, CA did not only observed the situation of the market but also it looked at the market shares, market position of the dominant undertaking and its competitors, expansion or entry and countervailing buyer power, as it was stated in the Guidance. However, there were no calculations of the effective price, contestable market shares and there was no as efficient competitor test with LRAIC and AAC. This shows CA again is selectively borrowing some points from the Guidance.

3.2.3. Kale Kilit Decision:[186]

Kale Kilit is the lock company operates in Turkey. According the decision, it had 60 % market share. The relevant markets that it operated were steel door locks market, wooden door locks market, iron door locks market, PVC door locks market and cylinders market. The geographic market was Turkey.

The dealers that Kale Kilit made rebates were not the last sellers of the products but they were the wholesalers. Apart from that, Kale Kilit did not require the wholesalers not to sell the products of the other producers. The other lock companies; ITO Kilit and DAF Kilit, too, made rebates to their wholesalers. Kale Kilit did not make

[186] Kale Kilit Kararı, 12-62/1633-598, 06.12.2012.

exclusive dealing agreements. CA decided that the rebates schemes of Kale Kilit did not have intent to exclude the rivals. No documents had been found showing the intent of Kale Kilit.

In the decision, CA did not mention the practices of the rebates in a detailed way. There were also allegations of the predatory pricing. CA made cost price analysis of the rebates and premium system of Kale Kilit. It analyzed four components; dominant position, extremely low prices[187], intent and the recoupment of losses. Then, CA made as efficient competitor test by calculating the LRAIC and AAC. CA stated that the prices below LRAIC were not enough to determine if the dominant firm abused its dominant position or not. There must be also the intent of the dominant firm about the exclusion of the rivals. At the end of the cost-price analysis, CA found out that the prices of Kale Kilit were not below the costs. CA decided that Kale Kilit did not abuse its dominant position.

In this decision, CA analyzed the dominant position of Kale Kilit and the market conditions, the costs and prices and made as efficient competitor test. CA took into account the LRAIC and AAC. As a result, the decision included economic analysis as it was stated in the Guidance. Besides, CA looked at the intent of Kale Kilit and could not find any documents which revealed the intent of the firm. Looking at the intent was compatible with the Guidance which says that the documents about the plan of the firm could be used in the analysis of the exclusionary practices. Another important point is that, the decision stated that prices below LRAIC could be abusive if there was the abusive intent of the dominant company. This statement was not included in the Guidance whereas in the Post-Danmark decision of 2012 it was stated that prices below LRAIC could be abusive if there were anti-competitive effects of the practice.[188] Decision, the Court shared the same idea about the intent. In addition, the Guidance states that it is not necessary to look at the recoupment of losses. However in Kale Kilit decision, CA analyzed the recoupment of the losses despite the fact that it did not analyze the consumer welfare. There was no analysis of whether the practices of Kale Kilit caused consumer harm or not. It also did not analyze the harm on the competitors, the presence of objective justifications and efficiency reasons for the practices of Kale Kilit. The effects of the practice on the consumers and the market were missing too. Thus, although there was economic analysis in the decision, the approach of the CA was

[187] *Olağandışı düşük fiyat* in Turkish.
[188] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, 27 March 2012.

not effects-based. In conclusion, Kale Kilit decision was not a forms-based decision. However, one could not argue that it adopted an entirely effects-based approach. The point is that the CA had economic analysis, which was consistent with the Guidance; but not completely sufficient for considering the decision as effects-based.

Finally, DMG, Kalekim and Kale Kilit decisions show that while there is more effects-based trend in Turkish Competition Law for evaluating rebates; there are still some misfits and inconsistencies between the decisions and the Guidance. For example, in DMG and Kalekim decision the likely effects on the consumers were analyzed but there were no calculations of the cost concepts and no as efficient competitor test. On the contrary in Kale Kilit decision, CA made as efficient competitor test by using LRAIC and AAC but did not mention the actual or likely effects on the consumers. Thus, what CA usually has tried to understand is the conduct more than the potential or actual effects of the competition.

3.3. Turkish Competition Authority Decision on Refusal to Supply:[189]

3.3.1. Sanofi Aventis Decision:[190]

Sanofi Aventis is a pharmaceutical company active Turkey which was accused of refusal to supply in drug distribution market and abuse of its dominant position. Sanofi Aventis changed the sales conditions and gave short maturity periods to the pharmaceutical distributors below a certain purchase threshold, but long maturity periods to the pharmaceutical distributors above a certain purchase threshold.

In Turkey, the actors of drug distribution sector are pharmaceutical companies, pharmaceutical distributors and pharmacies.[191] Pharmaceutical companies send their products to pharmaceutical distributors and pharmacies procure from the distributor according to their needs. This happens because the pharmaceutical distributors can have more space to stock medicines and can create special conditions to keep medicines such as cold chain system. It is hard for the pharmacies to maintain the necessary conditions to keep medicines.

In the pharmaceutical sector, there are large-scale pharmaceutical distributors that operate all over Turkey and also small-scale pharmaceutical distributors that operate locally. The pharmacies can procure from one or more pharmaceutical distributors depending on their needs. The preferences of pharmacies depend on the

[189] I choose Sanofi Aventis, Türk Telekom and CNR decisions but there is also Buga Otis Case: 10-24/330-18, 18.3.2010 which is relevant with the effects-based approach. In this decision, Buga Otis elevator firm refused to supply spare parts to the downstream market. CA looked at the effects of the refusal to supply in downstream market. CA decision included convinient components with the Guidance. CA referred to the Guidance and listed that consumer harm, objective necessity and distortion of the competition in downstream market. CA found out documents and e-mails showed that there was refusal to supply however stated that intent alone was not enough for decision to be a refusal to supply. CA put the same conditions for refusal to supply as it is in the Solmaz Mercan III Case, 09-39/949-236, 26.8.2009. However, this time CA debated whether there was objective neccessity; which was missing in the Solmaz Mercan III case. CA also decided that there was an objective justification for Buga Otis; legal justification and also there were other suppliers that firms can supply spare parts. Additionally, CA concluded that there was no consumer harm. I found this decision is compatible with the Guidance and had an effects-based approach. However, I belive it does not still show that CA started to adapt more effects-based approach in the refusal to supply cases or exclusionary practices in general.The reason is that; a similar kind of effect-based approach could not be seen in Sanofi Aventis, TTNET and CNR decisions

[190] Sanofi Aventis Kararı 09-16/374-88, 20.04.2009.

[191] *İlaç Firmaları, Ecza Depoları ve Eczaneler* in Turkish.

speed of the pharmaceutical distributors to bring them the medicines and the variety of the types of medicines that pharmaceuticals distributors sell. Apart from that, the pharmacies take into account the maturity and the quantity that they can agree with the pharmaceutical distributors. In Turkish healthcare system, the pharmaceutical sector is regulated by the state and the rates of profits were predetermined by the Social Security Institution (SSI). SSI pays some of the medicines completely, some of them partly and does not pay for some of them at all. Thus, for certain medicines, pharmacies get payments from the SSI completely or partly. However, these payments from SSI take time and the average maturity period of SSI to make payments to the pharmacies reaches up to 60 days. In this context, the maturity becomes very important for the pharmacies. Since pharmacies do not get the money at the time they sell the medicine, it is not possible for them to make the entire payment of pharmaceutical distributors immediately. Besides, the discount rates and volume discounts given by pharmaceutical distributors are also important for the pharmacies in choosing the pharmaceutical distributors. The bargaining goes on between the pharmaceutical distributors and pharmacies on the maturity periods and on the discount rates and volume discounts. Thus, the competition between the pharmaceutical and distributors depends on the speed, the variety of the medicines they sell, the maturity, the discount rates and volume discounts. As for pharmacies, CA argued that individuals choose the pharmacies that are closer to the healthcare organizations that their medicines had been prescribed. Thus, since the products and prices are the same, the competition between the pharmacies depends on the location of pharmacies as it is the case in Hotelling's model.[192]

As it has been mentioned above, there are some medicines that the SSI pays and some that it does not pay. When the state does not pay for a certain medicine or pharmacies do not have these medicines in their stocks, they can give the generic medicines[193] to patients. The patients do not have to buy these generic medicines which are not prescribed by doctors; but on the other hand they have to pay money if they want to but for the prescribed medicines. Here CA made two points. First, it argues that pharmacies can direct consumers to buy the generic medicines. Secondly, CA concludes

[192] See Luis M. B. Cabral, *Introduction to Industrial Organization* (The MIT Press: Massachutsetts, 2000), p. 212.
[193] *Muadil ilaçlar* in Turkish.

that the generic medicines are not the substitutes of the original medicines. They are just the therapeutic equivalents of the original medicines that include the same active ingredient with the same amount and the same dose. The generic medicines are usually produced by the small-scale firms pharmaceutical companies with lower costs after the patent of the original medicines ended. They usually do not spend money on innovation and research for the new medicines, but produce existing medicines with lower costs and sell with lower prices. Here, CA used the ATC-3 level to define to group pharmaceutical products as it can be seen also in the Astra Zeneca Case.[194] As CA states, the pharmacists cannot give patients other medicines with different active ingredients other than the ones prescribed by the doctors. This means after its prescription by a doctor, a medicine can no longer have a substitute that is in the same ATC-3 level with it. Therefore, the demand for a medicine is determined when the doctor prescribes it. After the medicine is prescribed, the only way to change the medicine is to buy a generic one.

Under the light of all these, in order to define the relevant market, CA made analysis of the medicines produced and sold by Sanofi Aventis in Turkey. There were 64 medicines that Sanofi Aventis produced. Then, CA decided that there were 64 relevant markets in the medicine sector that Sanofi Aventis produced according to the active ingredients. CA found out that there were 28 different medicines with 27 different active ingredients without generics. This means Sanofi Aventis had 100 % market shares in 27 different markets.

In addition, Sanofi Aventis changed the sales conditions. It put a threshold amount of 250.000 YTL per month and reduced the maturity period from 60-180 days to 15 days for the pharmaceutical distributors that buy less than the threshold. Then, CA consulted with the pharmaceutical companies, pharmaceutical distributors and pharmacists about the new selling conditions presented by Sanofi Aventis. Almost all pharmaceutical distributors told that they were in disadvantaged situation due the practices of Sanofi Aventis. The first reason for this was that threshold could make pharmaceutical distributors buy more than their needs, make excess and bear extra stock costs. Secondly, since the threshold was too high for small-scale distributors, they

[194] Case C-457/10 *Astra Zeneca v Commission*, 6 December 2012.

cannot buy in that amount and it can cause them to stop to get medicines from Sanofi Aventis. Therefore, pharmacies would not prefer to work with Sanofi Aventis if pharmaceutical distributers could not supply the medicines of it. As a result, pharmacies may prefer to work with large-scale pharmaceutical distributors with more variety of medicines. This situation would of course destroy the competition and make small-scale pharmaceutical distributors exit the market.

Additionally, CA argued that, in future, there would be less pharmaceutical distributors. This would increase the concentration level in the market. If this happens, the bargaining opportunities between pharmacies and large-scale pharmaceutical distributors could decrease and distributors use this for their advantage, by decreasing the discounts. In addition, generic producer companies would need to pay more distribution costs since they could not bargain with the pharmaceutical distributors. The end result would be the increase of public spending on medicines. Besides, the concentration level in the market would create barriers to entry and hinder new entries to the market. Here what Sanofi Aventis was doing in general will cause negative effects on the market according to CA. Additionally, CA found out that after those abusive practices, 24 out of 55 pharmaceutical distributors did not buy from Sanofi Aventis and only 9 of them bought less than the amount of threshold. Distributors had to sell the medicines that they bought for 15 days of maturity with 60 days of maturity; so they lost 3 % of their profits.

At the end, no objective justifications or efficiency gains were found by CA in Sanofi Aventis case. Then, the decision concluded that, Sanofi Aventis abused its dominant position and as a result, CA imposed fine. However, CA did not say anything about the type of the abuse and further debates arouse. It was only Süreyya Çakın, one of the CB members, raising the point that what Sanofi Aventis doing was refusal to supply in his Opposite Vote. Nurettin Kaldırımcı makes a different judgment and argues that the sector is already regulated and therefore CA should not intervene with the sector.

Sanlı, on the other hand, does not think that Sanofi Aventis made refusal to supply. His first point is that for a practice to be considered as refusal to supply there must be vertically integrated firms. Sanofi Aventis, however, is a not vertically

integrated pharmaceutical company with a pharmaceutical distributor. Secondly, Sanofi Aventis did not refuse to give medicines but just changed the selling conditions.[195] Aslan makes another point and argues that Sanofi Aventis is an atypical decision of CA and it was the first time that an undertaking, which was not vertically integrated, was fined in relation to refusal to supply. Aslan states that CA did not evaluate whether there were objective justification for the refusal or whether the input was essential. Besides, Sanofi Aventis decision has the aim to protect small-scale firms, although the protection of the small-scale firms was not the aim of CA.[196]

Both Aslan and Sanlı argue that it is possible to evaluate this decision not under the refusal to supply, but under the price discrimination.[197] If one considers this decision as a refusal to supply case, it is not compatible with the Guidance and effects-based approach. However, if one considers this decision as a price discrimination case, it can be counted as more effects-based. The reason is that because the effects of the discriminatory practice can be evaluated as the effects on the small-distributors. However, it is hard to explain and price discrimination is not something analyzed in this study.

The above-mentioned scholars state that if the small-scale firms were excluded from the market, the market will be less concentrated. However the increasing level of concentration could have positive effects on the market such as economies of scale or reducing the costs. The reason is that it could be cost efficient to procure large-scale distributors with large amount of orders, rather than many small-scale distributors with little amount of orders. Here CA investigates the potential effects of the case on the competitors rather than the actual effects. Besides, the Guidance states that, typically in refusal to supply cases the firms are vertically integrated. However in the decision, there is no objective justification answering the question that why a firm that is not vertically integrated involve in refusal to supply.[198] The decision also lacks of efficiency reasons.

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[195]Kerem Cem Sanlı, Rekabet Kurulu'nun İki Kararı hakkında Değerlendirme: Sağlayıcının Dağıtım Seviyesindeki Rekabetçi Yapıyı Muhafaza Yükümlülüğü Var mı?, Prof. Dr. Rona Serozan'a Armağan, 2010, İstanbul, p. 6.

[196] Ece Aslan, "Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması Doktrininde Ayrımcılık Eylemlerinin Sınıflandırılması Sorunu", *Hakim Durumun Kötüye Kullanılması: Sorunlar ve Çözüm Önerileri,* edt. Kerem Cem Sanlı, (On İki Levha Yayınları:İstanbul, 2010), p. 291.

[197] ibid., p.291-292, Sanlı, K.. C., op. cit.

[198] Sanlı, K. C.,op. cit, p. 26,27.

Thus, on the one hand CA makes economic analysis and refers to the Guidance. On the other hand and actual effects and the analysis of consumer welfare were missing. Therefore it is hard to say that this decision had a thorough effects-based approach.

3.3.2. Türk Telekom Decision:[199]

Türk Telekom is Turkish Telecommunications Company that was accused of abusing its dominant position by refusal to supply of the infrastructure to internet service providers (ISP) companies. Türk Telekom also had TTNET as its subsidiary in downstream market. Türk Telekom was a state monopoly. After privatization, CA argued that Türk Telekom had legal rights to be a monopoly until its market share decreases under 50 %. According to CA, Türk Telekom has the right to be a legal monopoly and absolute dominant position in the "infrastructure for corporate users broadband internet services market", "infrastructure for local users narrowband internet services market", "infrastructure for local users broadband internet services market" and "royalty related long distance data transfer including market".

In telecommunications sector, building a new infrastructure is costly. There are economies of scale if the infrastructure has already built because marginal costs are low but there are high sunk costs. Also, the same infrastructure can be used for the voice and broadband data transformation. As a result, marginal cost is low for the firms who had infrastructure. However, the situation is not like that for the new entrants. For them, these costs are high and require building new infrastructure. For this case, Türk Telekom is the only firm that can provide the infrastructure for broadband and narrowband internet services to ISPs. The ISP firms paid royalty rents to Türk Telekom in this process.

Because of the fact that Türk Telekom is the only supplier of the infrastructure of the internet services, the infrastructure of Türk Telekom is an essential facility for ISP firms. According to CA there is a test with four conditions for essential facility doctrines. These are: -the essential facility has to be controlled by a monopoly undertaking, -as a new entrant it is not possible to build a new infrastructure, -monopoly

[199] Türk Telekom Kararı, 12-10/328-98, 08.03.2012.

undertaking refuses to the demands of the new entrant and, -the use of the essential facility is feasible.

To evaluate an input as an essential facility CA argued that it is enough to have at least two of the conditions above. Then CA found out that the input and the rent and the supply of the inputs controlled by the Türk Telekom. It was a natural monopoly and continued to be a legal monopoly and then it was not possible for a competitor to build the infrastructure. Türk Telekom is the single provider in the internet infrastructures market in Turkey. Then CA evaluated the practices of Türk Telekom in four different markets.

According to the complaints, Türk Telekom did not supply the infrastructure in the ISPs in narrowband internet services market, delayed service for the network demands, restricted the usage of some internet services, refused to supply Cable TV and telephone networks for internet services and degraded the supply of the numbers of lines that in royalty including market. Additionally, the ISPs argued that Türk Telekom supplied TTNET more quickly. There were also other types of abuse of dominance in Türk Telekom decision such as predatory pricing.

In addition to complaints of the predatory pricing, CA evaluated the refusal to supply. It found out that Türk Telekom degraded the supply of the numbers of lines that in royalty including market and also made predatory pricing in the internet services market. As a result, CA imposed a fine to Türk Telekom. This case is important since CA adapted a similar view by defining essential facility within the context of the Guidance. On the other hand, CA did not look at the actual or likely effects on consumers and competitors. For example the way new entries or exits were influenced from the practice was of Türk Telekom was missing. There may be negative effects of competition on the welfare of consumer. However this information again was not evaluated. Besides, CA did not mention whether the practice create efficiencies or have any objective justification. However, the Guidance evaluates the efficiencies. If there are efficiencies and the practice was objectively necessary it may not be taken as the abuse of the dominant position. Besides, in the Guidance it is stated that to name a case as refusal to supply, one must look at whether the elimination of the rivals in downstream market is possible.

This decision was given after Council of State returns it. The first case of TTNET in 2006 included the definition of the essential facility. After the Council of State overturned the decision, in the first decision, the definition of objective necessity was added. This definition is similar to the 83rd paragraph of the Guidance[200].

As a result, TTNET decision analyzed the objective necessity of the input and whether the input is objectively necessary in line with the Guidance. However, the Guidance lists three enforcement priorities on refusal to supply and margin squeeze cases which are; refusal relates to the objectively necessary input or service, refusal likely have elimination of the effective competition on the downstream market, refusal is likely to cause consumer harm[201]. The difference between the approach of CA and the Guidance is that the Guidance includes the evaluation of the consumer harm and efficiencies of the practice. On the other hand, CA analyzed practice analyzed whether the practice was happened and foreclosed the competitors. Therefore the decision did not include sufficient economic analysis and effects-based approach.

3.3.3. CNR Decision:[202]

CNR is a fair organization company operates in Turkey. It organizes fairs, and also provides services for security, catering and setting up the stands of the fairs. According to the allegations by the NTSR, another fair organization company, CNR abused its dominant position in yachting and water sports fairs organization market. In this decision, the relevant market was yachting and water sports fairgrounds management market[203]. The geographic market was defined as Istanbul.

As it was stated in the decision, the trade fairs are very important, since they bring producers, distributors and importers together. Through fairs, producers can make advertisements of their products. Thus, the fair organization is a two-sided market with fairgrounds management firms, fair organizers and exhibitor firms. The fair organizers

[200] Guidance, para. 83
[201] ibid., para 81
[202] CNR Kararı, 09-46/1154-290, 13.10.2009.
[203] *yatçılık ve su sporları fuarının düzenlenmesine uygun fuar alanları işletmeciliği pazarı* in Turkish.

rent fairgrounds by signing contracts with the firms that want to get involved in the fairs. It is very important to find appropriate areas for fairs especially for products like machines and automobiles, which need large spaces. The fairs of yacht and the boats also need large spaces. Besides, large fairs with many exhibitors can only be made in the large fairgrounds. However, the number of large fairgrounds with sufficient infrastructure and equipment is limited. Therefore, large fairs can only be made in specific fairgrounds. The largest of these fairgrounds in Turkey was the Istanbul Fuar Merkezi (IFM). It had ten halls; eight of which run by the CNR and the other 2 were run by the IDTM.[204] The halls of the CNR were larger than the halls of the IDTM. Then, it could be said that the halls of the CNR were more suitable for the large fairs. NTSR applied to CNR for fair organization in yacht and water sports. However, CNR refused to rent the fairgrounds to the NTSR for the yacht and water sports fairs. It argued that the fairgrounds were not available during the dates that NTSR wanted to organize the fairs. Then, NTSR agreed to organize its fairs in other halls that were run by the IDTM. However, since the fairgrounds run by the IDTM were smaller than the fairgrounds of CNR, NTSR could not exhibit their products efficiently.

Then CA analyzed the market conditions. Until 2007, NTSR made fairs in the CNR halls. However, in 2009 NTSR could not organize fairs and as a result the market share of the CNR became 100 %. CA also looked at the other fairgrounds such as Zeytinburnu Marina, Pendik Marina, Kazlıçeşme and Feshane. However, at the end, CA decided that the other fairgrounds were not the substitutes of the CNR halls at that time except Pendik Marina. However, the construction of the Pendik Marina was not finished at that time. Furthermore, in the analysis of the dominant position, CA compared the IDTM and the CNR fair areas by looking at the total sales and the size of the fairgrounds in terms of square meters. In this decision, the upstream market was the fairgrounds organization for yachting and the water sports and the downstream market was yachting and water sports organization market. CA looked at the presence of the dominant position of the CNR in the upstream market. In addition to that, CA analyzed the situation of the market after the CNR refused to rent the fairgrounds to the NTSR. As mentioned above, until 2007 NTSR made yachting and water sports fairs in the CNR fairgrounds. In 2006, CNR did not explicitly refuse NTSR but argued that its halls were

[204]IDTM: İstanbul Dünya Ticaret Merkezi

filled up by the other firms. Then, NTSR organized fairs in 2007 and 2008 IDTM halls, in 2009 NTSR wanted to made fair in Pendik Marina but the construction of it was not finished. As a result, NTSR did not make the yachting and water sports fairs in 2009.

CA argued that for trade of the products the fairs are very important and even one year can cause losses. As a result, CA argued that if NTSR could not organize fairs, it means that the NTSR would leave the market and cannot be an efficient competitor. On the other hand, CNR continued to organize fairs. If NTSR leaves the market, the competition of the market would be affected negatively. The concentration would increase and the number of the competitors in the market would decrease. It would not necessarily mean that CNR was more efficient firm and because of that it continued to be in the market while the less efficient competitor had to leave the market.

Apart from that, CNR started to make yachting fair called as Eurasia Boatshow Fair since 2007. It made CNR a vertically integrated firm in yacht and water sports fairs market. For this fair, CNR used seven halls of IFM although it gave three halls to NTSR fairs in the past. CA argued that CNR doubled the size of the yachting fair in square meters. Then CA looked at the number of exhibitors, visitors the area of the fairs, total sales of the fairs that Eurasia Boatshow and the NTSR made. Also, CNR did not change its pricing policies for exhibitors between 2007 and 2010. Even though, in 2009, NTSR did not organize a fair and the CNR Eurasia Boatshow did not have any alternatives, CNR did not increase prices. According to CA, those prices can be a reason of the abuse of the dominant position. On the other hand, CNR replied to NTSR, that it can arrange the fairgrounds if NTSR changes the dates. CA argued that, this situation showed that CNR did not have the intent for the abuse of the dominant position. However, NTSR did not ask CNR for the new dates but asked Pendik Marina for the fair. This situation showed that there were alternatives for the CNR halls. At the end, CA decided that, CNR did not abuse its dominant position in the yachting and waters ports fairs organization market. CA argued that CNR was more efficient than the NTSR by organizing a larger fair. NTSR should make changes and renewals to compete with the CNR. On the other hand, CA argued that although the fairgrounds were empty for the time period that, CNR showed them full to NTSR by making simulated contracts[205]

[205] *Muvaazalı sözleşme* in Turkish.

with the firms of CNR undertakings. CA found out that CNR made tricks not to meet the demand of the NTSR. Then, CA imposed fine to the CNR because of the false and misleading information.

Furthermore, CNR decision caused debates between the CB members. In the opposite vote by Cevdet İlhan Günay and Murat Çetinkaya argued that, CNR was a more efficient firm than the others in the yacht and water sports fairs market. However, CNR abused its dominant position because the practices such as simulated contracts were abusive, since, there were no objective justifications. In addition to that, the other two CB members Mustafa Ateş and Mehmet Akif Ersin thought that the geographic market definition of the decision was too narrow. Not only Istanbul but also other cities like Antalya, İzmir and Bodrum should be included in the relevant market definition. They also add that, yachts and boats were luxury goods which appeal the rich part of the consumers with the high welfare levels. These types of consumers could bear the costs which were needed to reach the products. As a result, consumer welfare would not be harmed depending on the where the fairs has done. Thus, CNR fairgrounds were not essential facility for the yachting and water sports fairs market. According to Ateş and Ersin, this situation showed that CNR did not have dominant position in the market since it had substitutes if the market definition was expanded.

As it was seen, CNR decision was very controversial. The CB members cannot decide on whether the CNR fairgrounds were essential facility or not. This analysis of the essential facility was compatible with the Guidance, although it caused debates between the CB members. For the market definition, CA made SSNIP test for the other fairgrounds in Istanbul, Antalya, Izmir and Bodrum. It was found out that other fairgrounds for yachting and water sports in Istanbul and other cities cannot be substitutes of the CNR fairgrounds. This analysis of the market by using the SSNIP test was also compatible with the Guidance. Furthermore, I believe this decision had some other points convenient with the Guidance. CA looked at the efficiencies that were created by the CNR after the Eurasia Boatshow Fairs, analyzed the economic data of the fairs. In this decision the refusal to supply must have an objective justification for not to be considered as the abuse of the dominant position. CA looked at the objective justification, although some of the CB members did not think that there were objective justifications of the CNR. Also, the decision argued that because of the efficiency

reasons CNR did not abuse its dominant position. Looking at the efficiency reasons was compatible with the Guidance. In addition, the Guidance says that it may be necessary to analyzed the revenues and the costs of the both sides.[206] CA analyzed the costs and the revenues of both CNR and NTSR which could be in line with the Guidance.

On the other hand, CA did not analyze consumer welfare which was very significant and essential for the Guidance. The CA looked at whether the practice will cause NTSR to be excluded from the market or not. It analyzed effects on competitors rather than the effects on the consumers. In addition to that, CA fined CNR because of showing fairgrounds as full with the simulated contracts and false information given to NTSR. I think, giving the false information could be a part of the exclusionary practices. As the Guidance suggests, there must be objective justifications of the refusal to supply and the efficiencies. However, simulated contracts cannot be an objective justification of the refusal to supply. Thus the decision cannot be considered entirely consistent with the Guidance. It is true that CA analyzed objective necessity, elimination of the effective competition and efficiencies. However the consumer welfare was not analyzed. Therefore, the decision does not have an effects-based approach although it makes some economic analysis.

3.4. Turkish Competition Authority Decisions on Margin Squeeze:

3.4.1. TTNET I Decision: [207]

According to the allegations, Türk Telekom and TTNET abused their dominant positions with the pricing policies in broadband internet access services market. The relevant market of the decision were "wholesale broad band internet access market" and "retail broadband internet access market," where the Türk Telekom gave wholesale services to ISP firms and TTNET gave retail broadband internet accesses services. The relevant geographical market was Turkey. In this decision, Türk Telekom was the wholesaler of the broadband internet access service, and TTNET and other ISP firms were the retailers.

[206] Guidance, para 26, footnote 3.
[207] TTNET I Kararı 08-65/1055-411, 19.11.2008The decision was made in 19.11.2008 which was before 2009. However I wrote about this decison because it was a relevant example with margin squeeze. The decision also included the debates related to what is margin squeeze.

In the analysis of the dominant position, CA looked at the market conditions, market shares and the number of subscribers in the broadband internet access services market. CA stated that although ICTA did not declare TTNET as significant market power, it claimed that TTNET had 97 % market share. Therefore CA decided that TTNET had dominant position in the retail broadband internet access service market.

Then, CA made cost-price analysis for both wholesale and retail markets to analyze the pricing policies and the margin squeeze. CA evaluated the ADSL prices in wholesale market, which were decided by ICTA from 2004 to 2007. It also analyzed the retail prices of TTNET, decided without the approval of ICTA within the same time period. In addition to that, CA looked at the campaigns of TTNET and the effect of the campaigns on the number of subscribers. In wholesale market, CA evaluated the profits, tariffs of TTNET, the wholesale prices and campaigns of Türk Telekom. It was found out that, the number of TTNET subscribers increased thanks to the campaigns of TTNET. Then, CA evaluated the market conditions and the market shares of the ISP firms. It looked at the number of subscribers of ISP firms and Türk Telekom, the average subscriber gain costs of Türk Telekom, costs, profits and total turnover of TTNET, profits and the cost of the gaining subscribers of the ISP firms. Then, CA analyzed the retail prices by looking at the retail market shares, and the number of subscribers of the retailers. In the analysis of the pricing policies, CA explored whether the prices of Türk Telekom and TTNET were below the costs or not. CA looked at the average acquisition costs and said that the average period of recovery for TTNET consumers can be 24 moths. However, CA looked at 36 months consumer data. The reason for using 36 months is to make it in favor of Türk Telekom and TTNET. Then CA found out that the prices of TTNET were below the costs and therefore TTNET had losses. After that, CA also analyzed the costs and prices of the ISP firms and found out that they could not make profits.

In addition, CA mad investigations of the documents and e-mails of Türk Telekom and TTNET for being able to evaluate their general strategy. This process showed that Türk Telekom and TTNET had combined strategies that aimed to increase the number of subscribers. However, no documents revealing that Türk Telekom and TTNET aimed to abuse their dominant position by excluding the rivals from the market were found.

Then, CA imposed fine to TTNET. However, the definition of the margin squeeze was highly debated by the CB members. Tuncay Songör, Sıraç Aslan and

Süreyya Çakın raised four main points about the decision in their opposite votes. According to their first point, if the wholesale prices were regulated, but the retail prices were not; this practice was called margin squeeze under partial regulation. If both wholesale and retail market prices were regulated, it was defined as margin squeeze under full regulation. Lastly, if the sector was not regulated, it was called as independent margin squeeze. At that time, both wholesale and the retail prices of Türk Telekom were determined by the ICTA, so the telecommunications sector was fully regulated. In relation to that, they argued that margin squeeze occurred in one of those following three conditions; increase in wholesale prices while retail prices are constant, increase in wholesale prices while retail prices decreased and when the wholesale prices are constant but the retail prices are decreased. According to them, at that time, Türk Telekom's wholesale prices and how Türk Telekom applied those prices were controlled by Information and Communication Technologies Authority (ICTA). Therefore, it was not possible to change the wholesale prices by Türk Telekom. They added that, the decision must be analyzed under the full regulation because both wholesale and retail prices of Türk Telekom and TTNET were under the regulation of ICTA. However, CA analyzed the decision under partial regulation. Moreover, they added that because the sector was fully regulated, the pricing practices of TTNET could not be defined as margin squeeze. Then, they defined the conditions that can cause predatory margin squeeze were charging prices below the costs, existence of intent, exclusion of the competitors, possibility of recoupment of the losses and non-existence of the objective justifications. Also, ICTA could declare TTNET as significant market power (SMP) if TTNET had dominant position. However, ICTA did not define TTNET as such. According to CB members, this showed that margin squeeze was not possible since TTNET did not have dominant position and could not control the prices in the market. The lack of SMP also made recoupment of losses impossible for TTNET, because TTNET did not have the power to control the prices.

The second point of CB members was that, TTNET was established in 2006 and the decision was investigated just one year after the foundation of TTNET. They argued that, it could not be possible to make a healthy cost-price analysis with the data of one year. Also, they argued that the cost advantages of the vertical integration of Türk Telekom and TTNET were missing in the analysis of CA. The third point was they mentioned was that the competitors of TTNET did not leave the market. This situation showed that the other ISP firms were, too, made tariffs as advantageous as those of

TTNET and therefore the practices of TTNET could not be considered exclusionary. In their fourth point, the CB members declared that the campaigns and promotions of TTNET tariffs could increase the number of subscribers to the Internet and the competition in the sector. Therefore, it could not be considered as an abusive practice.

As a result, this decision is relevant because of the definitions and the discussions related to the margin squeeze in a regulated market. In the decision, CA analyzed the market conditions, positions of the competitors and the market shares. This analysis could be compatible with the Guidance. Also, CA analyzed the cost and prices of Türk Telekom and TTNET but without using the LRAIC and AAC cost concepts and making as efficient competitor test. CA did not analyze the effects on the competitors? There was no analysis of the actual and likely effects on the consumers. CA evaluated the definition of the margin squeeze and whether it was the practice by the TTNET or not. CA analyzed the recoupment of losses, but the Guidance does not require the analysis of recoupment. There was no analysis of efficiency reasons, objective justification and whether the services of Türk Telekom were essential facilities or not. Therefore, this decision was not an effects-based decision and did not have sufficient economic analysis. It looks like CA aimed to protect the competitors rather than the competition and consumers. Also CA made the calculations of the customer acquisition costs from 36 months. However, it should analyze whether 36 months was enough and it should look at profits of each campaigns of TTNET separately or the overall profits. For example in Wanadoo case the period of spreading acquisition costs were adjusted to 48 months.[208]

3.4.2. TTNET II Decision:[209]

Türk Telekom and its subsidiary TTNET have been accused of making margin squeeze with the pricing strategies in metro ethernet internet services. In Turkish ISP market, TTNET is one of the internet service providers; it is vertically integrated with Türk Telekom that supplies the infrastructure for ISP firms. TTNET and the other ISP firms can give the metro ethernet service to their end users through the infrastructure of Türk Telekom, which is the single provider of the infrastructure to access to fixed line phone network.

[208] COMP/38.233 -Wanadoo Interactive, Commission decision of 16 July 2003.
[209] TTNET II 10-44/761-245, 17.6.2010.

CA made an assumption that Türk Telekom was a dominant firm as wholesaler and TTNET was a dominant firm as a retailer. The internet access service is provided by the Türk Telekom and ISPs usually pay rent for the infrastructure. Besides, there are different types of broadband internet access technologies in Turkey; such as copper wired networks; ADSL, fiber optic platforms; fiber internet, cable TV internet, Wi-Fi, ATM, broadband transmitter access and metro ethernet. However, ISP firms prefer metro ethernet service since it is a new technology which is easy to use as well. It is also cost efficient because it can provide flexible access to broadband internet services. Here, CA did not analyze whether the other broadband internet access technologies are substitutes to each other and then assumed that the relevant market for this case was "metro ethernet services" market. It also assumed that metro ethernet service was indispensable for ISPs to give broadband internet service access.

CA mentioned that the telecommunications sector is regulated and the prices of the infrastructures are determined by the ICTA . According CA, prices of Türk Telekom were determined by adding 25 % margin to the prices of ICTA. However, Türk Telekom and TTNET were accused of making margin squeeze because TTNET did not charge prices by adding 25% margin, it did not even charge any connection fee and as a result provided internet services with low or negative profit margins.

CA, then, examined if TTNET was able to meet its costs or not. It at the TTNET metro ethernet income and expenses, TTNET metro ethernet average income and expenses per subscriber, TTNET weighted of the average cost of subscriber[210] gaining in 2009. In this income and expenses tables, there are cost concepts; that can show average cost concepts. CA found out that net profit and profit margins of TTNET metro ethernet services were positive. Therefore, the case could not be a margin squeeze practice since TTNET had positive profits.

Besides, CA compared prices that TTNET charged from the firms for metro ethernet services and the amount that TTNET paid to Türk Telekom for metro ethernet and found out that there was only one firm that TTNET had negative profits. CA argued

[210] *ağırlıklandırılmış ortalama abone kazanma maliyet* in Turkish.

that this negative profit from one firm represented only 5% of the demand of the customers which means that it could not possible to exclude an as efficient competitor from the market. As a result Türk Telekom's practice could not have foreclosure effects. Therefore CA did not think Türk Telekom made an infringement.

In this decision CA had many assumptions. For example it assumed that as Türk Telekom and TTNET had dominant positions in the market without making a dominance test. It also assumed that Türk Telekom and TTNET are in the same economic unity and can be considered as the same undertaking. After assuming that Türk Telekom and TTNET constitute the same undertaking, I think it is not necessary to assume TTNET as a dominant firm. As CA also stated in the decision, for the case of margin squeeze it is not necessary for the downstream firm to be in the dominant position. Additionally, CA made an assumption that metro ethernet was indispensable technology for the ISPs without analyzing whether the other broadband internet technologies could be the substitutes.

For this decision, CA made an effects-based analysis by looking at the profits of Türk Telekom and TTNET and the number of subscribers that TTNET can gain at the time of these pricing practices. From the Guidance perspective, CA analyzed at the cost concepts and prices, and found out that there was no equally efficient competitor. However, these cost concepts used are not the LRAIC unlike the concepts used in the Guidance and Telia Soneria Decision[211]. Besides, there is no analysis of consumer harm or efficiencies. Also the services cannot be a necessary input for the market. It can be said that like EU, CA also accepts margin squeeze as a form of abuse of the dominant position. In addition to that, in this decision there was nothing related to the intent of firm for an exclusionary strategy. CA did not mention that whether they found documents related to intent or not.

[211] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, 17 February 2011

3.4.3. Turkcell Decision[212]

Turkcell is a GSM-based mobile communications company operating in Turkey. It was accused of margin squeeze because of the prices it offered in the internal market. These prices were lower than the prices that were gives as inputs to the other GSM operators.

Vodafone, another GSM-based mobile communications company, complained that Turkcell was using its significant market power in the market of the calls that terminates in Turkcell's network with its tariff called as "Bizbize Kamu Her Yöne 1200 Dakika" (BBK-1200).

For the evaluation of the margin squeeze, CA listed five conditions by referring the Discussion Paper and the EU case-law:

-the dominance of a vertically integrated firm in upstream market,

-the indispensability of the input in downstream market for the firm itself and its rivals in order to be able to compete and stay in the market,

-the determination of the margin between upstream and the downstream market so low as to hinder profits of the dominant firm and/or as efficient competitor,

-the presence of the possibility of giving rise to anti-competitive effects that will harm consumer welfare as the result of margin squeeze through excluding the rivals in the downstream market, hindrance of new entries to the market and/or limiting the activities of the rivals.

-the non-existence of objective justifications about the dominant firm's pricing policies that lead to margin squeeze.

Thus, CA uses the same points with the EU. It argued that the input that Turkcell provides to the rival GSM-based mobile network operators is an essential facility[213].

[212] Turkcell Kararı, 10-21/271-100, 04.03.2010.

[213] In this decision, "call termination" refers to the wholesale service that a network terminates the call made to one of its subscribers by a subscriber on another telephone network. All mobile phone companies hold monopoly power in the market of the calls that terminates in their networks. That's because it is not possible making calls between two mobile operators without using each other's infrastructure. Thus, the internal network is an essential facility for the rival firms. The wholesale price that the

Also Turkcell holds the monopoly power in the market of the calls that terminates in its network.

Then CA looked at the on-net call revenue created by BBK 1200 and by the other tariffs, the share of BBK tariff in total calls, the average on-net call time of BBK 1200 subscribers. The changes in the number of subscribers in Turkcell's subscribers are examined. As a result CA argued that Turkcell lost subscribers through number portability[214] and made the above-mentioned tariff to attract more subscribers. Therefore CA decided that Turkcell's practice is not for excluding rivals from the market, but not to lose subscribers. CA concluded that, there was an objective justification and it was a rational practice.

CA made the same analysis for Vodafone as well. It analyzed the number of new subscribers of Vodafone, the number of total subscribers of Vodafone, the number of new subscribers that ported from Turkcell to Vodafone and from Vodafone to Turkcell, the total number of subscribers that ported to Vodafone and the total turnover of Vodafone in 2009. The conclusions drawn from this analysis as such: At the time of the practices made by Turkcell,

-The rate of new subscribers of Vodafone has increased.

-During BBK 1200 tariff, Vodafone continued to gain subscribers.

-Turkcell lost subscribers during the tariff through number portability to Vodafone.

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originating network pays to the terminating network for completing calls can be named as "call termination charge". Also, a call to the subscriber on a rival mobile network refers to "off-net call", and the call between two subscribers on the same network refers to "on-net call". In the mobile telephone networks, call termination charges are one of the most significant incomes for the operators. They determine their prices for the subscribers according to the call termination prices in upstream market. For the economic analysis of a UK case related to mobile call termination, look at: Mark Armstrong and Julian Wright, Mobile call termination in the UK: a competitive bottleneck? in Cases in European Competition Policy: The Economic Analysis, pp. 75-100, edt. Bruce Lyons, Cambridge, 2009.

[214] Number portability defined by ICTA as "the ability of a subscriber to change the serving operator, the physical location of his/her own and/or the type of service without altering the number assigned for." It was entered in force Official Gazzete No:26421 dated 01/02/2007, http://eng.btk.gov.tr/elektronik_haberlesme_sektoru/yetkilendirme/numaralandirma/numaraTasimaSureci.pdf

-Vodafone gained new subscribers through number portability although number of subscribers that carried their numbers to Vodafone was less than the number of subscribers that carried their number to Turkcell.

As a result, CA concluded that since Turkcell lost its subscribers to Vodafone and it did not lose profits, it is not possible to say that there is an exclusionary practice. Also the number of subscribers to BBK 1200 decreased when Vodafone gained new subscribers. Therefore, there is no possibility of recoupment of losses since Vodafone is not excluded from the market.

As the other analysis, CA looked at the consumer welfare side. It found out that

-the amount of traffic created by GSM operators increased from 23 billion minutes to 29 billion minutes; 89 % of the traffic was from on-net calls, 8 % was from off-net calls.

-the average talking duration in minutes per subscriber increased.

-the traffics created by Turkcell, Vodafone and Avea were increased.

Therefore it is not possible to say that the BBK 1200 tariff caused consumer harm and decreased welfare. Instead, it must have increased consumer welfare. The number portability and those kinds of tariffs must have increased the competition as well according to CA. Therefore the decision concluded that there was no abuse of dominant position through margin squeeze in Turkcell case.

CA analyzed the effects of the BBK 1200 tariff. According to the decision, since this tariff had a small amount in Turkcell's turnover, Vodafone was not excluded from the market and Consumer welfare increased as it can be seen from the increasing traffic. It is competition on merits, rather than an exclusionary practice.

In its analysis CA could not find any documents about the exclusive strategy that shows the intent of Turkcell. According to Yavuz, the behavior of the dominant undertaking limiting competition is still essential even if there is no intent as it was

stated in the decision.[215] The decision, therefore, had an effects-based approach despite the presence of some slight changes. In its analysis, CA used the patterns in the case-law and Discussion Paper. One could say that it had similar approach to determine the essential facility and find an objective justification for the practice. Also as in the Guidance, the CA mentioned the dominant undertaking have a special responsibility to protect the competition. On the other hand, it did not refer to the Guidance. There were no as efficient competitor test through a cost/price analysis. The decision had a part about predatory pricing in which CA considered the recoupment of the losses, price-cost analysis. Here, it did not look at the LRAIC. CA analyzed the situation of the market and the competitors, actual and likely effects on the consumers but CA did not use same cost benchmarks in the Guidance. Thus decision was not compatible with the Guidance.

Another point that could be raised here is that the telecommunications sector is regulated by ICTA in Turkey. However the presence of regulation did not preclude anti-competitive margin squeeze. Besides, despite the regulation, Turkcell can still decide on its retail prices on its own. This means that retail prices might have been lightly regulated. Although the sector is regulated, CA made investigation on Turkcell. It is true that Turkcell was not fined in this case, but this does not mean that CA cannot intervene if the sector is regulated. An example to that can be the Deutsche Telekom (DT) case [216] of the Commission. Despite the regulation, DT was found guilty by the Commission and fined.

Finally, TTNET II and Turkcell decisions of CA had tendency to the effects-based approach. In TTNET II case the consumer harm was not analyzed. However, in Turkcell decision CA evaluated the consumer harm but the cost concepts that Turkcell used were not completely similar with the Guidance.

[215]Hatice Yavuz., "Tek Taraflı Davranışların Değerlendirilmesinde Niyet Unsuru" Uzmanlık Tezi, Rekabet Kurumu, Ankara, 2012.
http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Uzmanl%C4%B1k+Tezi/3haticeyavuzmiz.pdf

[216] Case COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, Commission decision, 21 May 2003.

3.5. Turkish Competition Authority Decisions on Exclusive Dealing:

3.5.1. Mey İçki Decision:[217]

Mey İçki is a firm that is active in alcoholic beverages sector in Turkey. It was accused of abusing its dominant position through exclusive dealing agreements. This firm was established in 2004 to privatize the state monopoly, TEKEL, on the alcoholic beverages. Most of the turnover of the Mey İçki came from rakı. In this case, CA analyzed the market shares of Mey İçki and defined the relevant market as "rakı market". CA argued that Yeni Rakı was a must-stock item and Mey İçki had a strong portfolio power. This situation made Mey İçki powerful in terms of economies of scale and scope. Thus, CA considered Mey İçki as dominant in the rakı market.

In Mey İçki case, CA could not find any proof of anti-competitive intent. However, CA found out that Mey İçki made exclusivity agreements with the retailers in the downstream market. The incentives that were given by Mey İçki to the dealers were free products, target rebates and discounts. A retailer could get one or more than one incentives at a time depending on the on-trade and off-trade stores.[218] Off-trade stores could only get free products, but on-trade stores could get all incentives. Firstly, in the agreements with off-trade stores there were a certain level of discount, target rebates for different product groups such as rakı, wine and beer in terms of litters. There were also incentives according to the amount of sales. For example, free products were given to the firms that could reach certain targets. However no extra incentives were given if a store goes beyond the target.

CA looked at the number of the on-trade and off-trade stores that Mey İçki made exclusive dealing agreements and the sales of those stores between 2008 and 2010. It found out that the shares of these stores and the number of stores that made agreements had decreased. Then CA calculated that the correlation rate between the discount rate

[217] Mey İçki Kararı, 11-12/215-69, 3.3.2011

[218] In Mey İçki Kararı 11-57/14-76-532, 17.11.2011, p. 5, f.t. 5
On-trade stores (açık satış noktası): where the product presented to end user as opened and consumed in the store; restaurants, pubs, bars.
Off-trade stores (kapalı satış noktası): the product is not consumed in the store, and sold to consumers closed; kiosques and markets.

with total turnover and the total target was (-0, 05) for off-trade stores. This means there was no connection between discount rate, target amounts and the turnover of the off-trade stores.

Then, CA found that Mey İçki made exclusive dealing agreements with on-trade stores and the rate of incentives were determined according to total turnovers of the stores. Mey İçki defined target sale amounts for the products according to market activities of the store. On-trade-stores could get more than one incentive at the same time. Mey İçki gave volume rebate according to litters. For example for each 100 litter of vodka, Mey İçki gave 10 bottles more. Another rebate was given for seasonal performance of the store in reaching the target. If the store reached to the targeted litters within 3 months, it received incentive payment.

Besides, CA calculated incentive rates and then calculated two correlations. The first correlation was between the rate of incentive and average target of the specified product in litters. It was found as (-0.02). The second correlation was between incentive rate and total turnover. Here, the correlation was 0.06. This means incentive rates and total targets and total turnover were unrelated in on-trade-stores.

After that, CA evaluated the incentive schemes under the target rebates and loyalty rebates. CA argued that there were absolute conditions for an incentive scheme to be defined as loyalty rebate and to create de facto exclusivity. In incentive system, Mey İçki did not require stores to reach target amount as an absolute condition. CA stores that could not reach the target amount as an example. It is also added that the stores that could not reach the targets could still get seasonal incentives after making exclusivity agreements.

It is the performance of the sellers determining volume discounts that the seller received. Depending on this point, CA argued that the practice created cost efficiencies through economies of scale. Furthermore, a seller could not get additional discounts, when it exceeded the threshold. There were no conditions exist in the exclusivity agreements between the stores and Mey İçki, which stated that the stores had to supply all their needs from Mey İçki. As a result, the agreements did not have a loyalty inducing effect and did not deter stores buying from other beverage companies.

When Tobacco and Alcohol Market Regulatory Authority (TAMRA) banned all exclusive dealing agreements and the practices that could create the exclusive dealing effect in alcoholic beverages market in 2010[219], Mey İçki had to give up its incentive schemes and rebates in the market. Therefore, CA concluded that Mey İçki did not exclude its rivals by making exclusive dealing agreements.

In this decision, CA did not look at the actual effects of the exclusive dealing agreements on the competitors. It calculated the correlations between the sales and the incentives and could not find any relations. However, the analysis would be more extensive, if CA had looked at the effects on the rivals through sales. Besides, the duration of the practice was not considered as significant, since the number of the stores and the sale made in the scope of the agreements declined during the practice. CA linked the reduction in the sales with non-existence of exclusive purchasing obligation and the regulation made by TAMRA that banned the exclusive dealing agreements.

In this decision, CA argued that since there was no exclusive dealing obligation, the incentive schemes by Mey İçki were not anti-competitive. It is because of the fact that Mey İçki did not hinder stores to buy from the other undertakings and therefore loyalty inducing effects of the practice were low. CA continued that the rebate schemes could lead to efficiencies by creating economies of scale and reducing the costs. I think, this approach to the rebates is in the same line with the Guidance which states that exclusive supply obligations can foreclose the market. The Guidance also claims that sometimes the rebates schemes can create efficiencies. If there are efficiencies there are no anti-competitive effects. This is true; however, CA did not clearly show how it reached to the conclusion that the exclusive dealing agreements of Mey İçki did not create loyalty effects. To conclude only by saying that if there is no exclusive dealing obligation there is no anti-competitive effect, is not sufficient. There should be more analysis of the rebates schemes, since there is also the other side related to loyalty inducing. The rebates of Mey İçki were retroactive and individualized. The Guidance

[219] Tütün Mamülleri ve Alkollü İçkilerin Satışına Yönelik Usül ve Esaslar Hakkında Yönetmelik, 22/1, 7.11.2010

says that, these types of rebates are more likely to create loyalty effects. This means loyalty effect may lead to anti-competitive effects. This is not included in CA's analysis.
Therefore, CA should analyze more carefully if exclusive dealing agreements and rebate schemes create efficiencies to the market or not.

As the last point, one could say that CA ignores consumer harm. There is mention of how all these excluding practices affect consumers. In fact, these practices could limit consumer choices and this might have led to consumer harm. If the decision had included these factors, deciding on the effects of rebates would be easier.

3.5.2. Turkcell Decision:[220]

Turkcell is a firm that is active in GSM-based mobile services sector. In Turkey, there are three firms, Turkcell, Vodafone and Avea, in this sector. It is a highly concentrated market. CA defined the relevant markets as "GSM services market" and "SIM cards, top-up cards, digital top up, activation and whole and retail selling of the other subscription services market".

For the evaluation of the dominant position in the market, CA evaluated the number of subscribers, total turnovers, sales of top-up cards and the sales of SIM cards of three companies. It calculated that the market share of Turkcell was 56 % according to number of subscribers and 62 % according to total turnover. The market share of Vodafone was 25 % according to number of subscribers and 20 % according to total turnover. Avea had 19 % market share according to number of subscribers and 19 % market share according total turnover. CA also argued that there were high barriers to entry to GSM services market, because of laws that require companies to make license contracts with the state and there are high costs of infrastructure investments. By

[220] Turkcell Kararı 11-34/742-230, 06.06.2011; There is also another Turkcell decision No. 12-33/922-281, 14.06.2012 related to exclusive dealing agreements. One year after Turkcell was fined with 2011 decision, another investigation on Turkcell was made because it did not conform with the warnings of the CA given by 2011 decision. There was no fine on the 2012 decision. I took this decision since it is the first one and there were debates on the intent, effects-based and forms-based approaches, and the competition on merits.

considering of these conditions of the market, CA decided that Turkcell had dominant position.

In this decision, there were two issues related to exclusive dealing agreements; Mavi Nokta and Smile. Mavi Nokta was a project to make exclusive dealing agreements with dealers.[221] Turkcell offered special advantages to the dealers, which were financially strong and which had a large sale volume and located in a critical place. These special dealers were called as Mavi Nokta, which constituted a step towards becoming distributers[222] in future. So that these special dealers would have advantages such as be collecting invoices, and selling telephones with contracts and campaigns. These stores were redecorated and technical commitments were provided by Turkcell. Besides, Turkcell did not allow these Mavi Noktas to sell products of Avea and Vodafone apart from their top-up cards. At that point, Avea and Vodafone claimed that Turkcell had a hindered purpose. That was; it allowed its special dealers to sell top-up cards not for the sake of Avea and Vodafone but to inculcate people's minds the possibility of number portability. In addition, Turkcell made agreements to give incentives and premiums to the Mavi Noktas depending on to the amount of Turkcell top-up cards they sold. Turkcell did not want Mavi Noktas to put advertisements and signs of Avea and Vodafone on their shops.

Then CA looked at the number of lines activated by Turkcell Authorized dealers, the number of lines activated by Vodafone, and finally the number of lines activated by Avea. Then it found out that the number of Turkcell authorized dealers and shares of authorized dealers in activated lines of Turkcell increased whereas the activated lines of Vodafone and Avea decreased. In addition to that, CA looked at the number portability rates at the time of the Mavi Nokta practice. It found out that Vodafone had net subscriber loss, but Avea had net subscriber gain except two months.

The other allegation was about Smile which was the dealer that sold GSM and internet services of all three GSM operators. Turkcell did not want its distributors to supply Turkcell products to Smile. However, it was not possible to make exclusive dealing agreements with the Smile stores, since they had established the idea to sell the

[221] *alt bayi* in Turkish.
[222] *üst bayi* in Turkish.

products of all three GSM operators. Turkcell, then, refused to supply to Smile distributors by controlling all distribution system of distributors and threatening the distributors for not providing Turkcell products. According to the decision, distributors argued if they sold the products of Smile, Vodafone or Avea, Turkcell punished them by taking their POS machines, computers, furniture back; ending the agreements of campaigns; or closing the stores. CA also found reports about the strategies of Turkcell to keep the demand of the distributors under control by prohibiting those buying wholesale products of the other GSM companies.

As a result of those claims, CA decided that Turkcell abused its dominant position by making exclusive dealing agreements that limited competition. Then, CA imposed a 91.1 million TL fine, which was % 1.125 of its turnover of Turkcell. It also required Turkcell to stop the anti-competitive practices and amend its vertical agreements. This decision was hotly debated by the CB members. Among them, Murat Çetinkaya and İsmail Hakkı Karakelle argued that there was no extensive analysis of the intent in this decision. If there is no intent, then the presence of competition on merits should be evaluated. They thought that it could be enough to change the conditions in the exclusivity agreements; therefore CA should analyze the effects of the practices by taking into account the duration. As a result, since exclusivity agreements like those of Turkcell's could be also made by the rival companies, the stores did not have be an exclusive dealer of Turkcell. In fact, the number of exclusive dealers of Avea and Vodafone was higher than that of Turkcell and the number of exclusive dealers of all 3 firms was very low than the other end-dealers.[223] Besides, market shares of Turkcell had decreasing whereas market shares of Vodafone and Avea had increased. The other point is that the subscribers made their subscription choices before they go to the end-dealers and therefore the role of end-dealers is very low in this sector. Finally Karakelle and Çetinkaya argue that more than 30 million people ported their numbers and as a result Turkcell had more subscriber loss than Avea and Vodafone had. Therefore it is not possible to say that practices of Turkcell had anti-competitive effects.

In this decision, CA did not analyze the intent of Turkcell. There were many documents and e-mails about Turkcell's strategies on the dealers, but CA did not

[223] *Nihai satış noktası* in Turkish.

analyze if these documents represent anti-competitive intent or not. I agree with points of Karakelle and Çetinkaya. In the decision, there was the analysis of effects on the market. However, this analysis was incomplete as the aforementioned CB members argue. It is not possible to evaluate the case as exclusion of rivals if there was a loss in the number of Turkcell subscribers. As the last point, there was no analysis of the effects on the consumers or whether the practices limiting consumer choices. If CB members are right, consumer welfare might have been increased as the number of subscribers who ported their numbers from Turkcell to other operators show. Consumers could choose a much more viable option for themselves, so that one could say that exclusive dealing agreements of Turkcell did not probably affect consumer welfare. As a result, although there was analysis of the market conditions, there were no analysis on the consumers, no cost/price tests were made and the analysis on the competitor was not enough. It could not be concluded that neither CA decided accordingly with the Guidance and nor the decision were effect-based.

Finally, in both Mey İçki and Turkcell decisions CA analyzed the market conditions and the situation of the competitors as it is stated in the Guidance. However, they did not include the analysis of the consumer welfare. Also the effects on the competitors were not completely analyzed. There were no calculations of the cost concepts defined in the Guidance so the economic analyses in the decisions were not sufficient. Therefore it is not possible to state that Mey İçki and Turkcell decisions are in the line with the Guidance and had effects-based approach.

3.6 An Overview of Turkish Competition Authority Decisions through EU Case Law Lenses:

In general, Turkish decisions examined in this study are inconsistent in the extent to which they adopt the effects-based approach. For example in THY decision, the only thing that exists is the evaluation of the practice whereas in Turkcell decision of CA in 2010 about margin squeeze; likely and actual effects on consumers and competitors are considered in a very detailed way. In fact even in the context of same exclusionary practices such as rebates; there are different amounts of analysis. While THY decision fails to provide economic analysis, Knauf decision again presents a more effects-based approach. The recent EU decisions, on the other hand, are more consistent

with the Guidance although to what extent they have effects-based approach is controversial. In Intel decision for example, as efficient competitor test is made and likely effects of consumers are analyzed. However the hypothetical nature of the likely effects can make the decision less effects-based. Despite that debate, one should say that the EU decisions are more effects-based that Turkish decisions in any decision

The first exclusionary practice that is examined in this study is predatory pricing. The Turkish decisions are Knauf, THY and TDI, and the EU decision I analyze is Post Danmark. The CJEU looks at the likely effects on consumers in terms of efficiencies and objective justification in Post Danmark decision. Here, there is economic analysis with as efficient competitor test, ATC and AIC cost benchmark. As a result, it is decided that the practices by Post Denmark can create economies of scale and therefore they do not cause consumer harm. In Knauf decision from Turkey, there are calculations to some extent and also recoupment of losses; which is not considered necessary by the Commission. For example, CA calculated total effective cost (TEC). However the contribution of this calculation is not clear in the decision. The CA, then, justified the effects with macroeconomic conditions. There is more effects-based approach here compared to the THY decision. In the THY decision, the CA does not even look at the market share; no calculations are made. Additionally, in TDI decision, CA analyzes the possibility of cross-subsidization. CA evaluates the effects on the competitors but there were no analysis of the consumer welfare and the efficiencies. Thus, there was no consistent approach in those three decisions. Maybe in THY decision there were other reasons that CA could not punish and analyzes the decision in a detailed way. As an exception there may be political reasons behind THY decision.

The second exclusionary practice is rebates. In this study, DMG, Kalekim and Kale Kilit decisions from Turkey are examined in addition to Tomra and Intel decisions from EU. The Guidance did not exist at the time when Tomra decision was decided on. Therefore, there actually happened a transformation in the approach from Tomra to Intel decision into a more effects-based approach. Since it is consistent with the Guidance thanks to tests and cost analysis, the Intel decision presents more economic analysis compared to the Tomra decision. Besides, although Tomra presented economic analysis in its defense, the Commission did not find it economically rational since it thought that the main aim of the firms, which is profit-maximizing, did not exist in Tomra's

calculations. Intel's defense was similar to Tomra, it also included economic analysis. The Commission, however, used different data for calculating costs; therefore annulled Intel's plea. In Turkish Decisions, it is not possible to say that there is more effects-based approach. The rebates still have per se illegal sides. The CA's approach depends on decisions in rebates. The consumer welfare was not taken into account whereas in Intel decision likely effects on consumers were largely analyzed. In DMG, Kalekim decisions and Kale Kilit, there are calculations related to the effects of rebates on competitors and whether there are new entries to the market or not. The aim of the Turkish decisions here seems to protect the competitor since there is no emphasis on the protection of the consumer welfare. However in Kale Kilit decision there are calculations of the costs LRAIC and AAC, as efficient competitor test. However, still the approach of CA is inconsistent.

The third exclusionary practice is refusal to supply. Telekomunikaja Polska (TP) decision is analyzed from the EU, whereas Sanofi Aventis and Türk Telekom and CNR decisions are chosen from Turkey. In TP decision, as efficient competitor test is made and likely effects on the consumers are evaluated. It has effects-based approach which is consistent with the Guidance. Sanofi Aventis from Turkey includes likely effects on consumers as well. These effects, however, are not stated clearly in the decision and they are considered as negatively despite the fact that they can produce positive outcomes in some decisions. Besides, the Sanofi Aventis decision seems to protect small distributors instead of protecting competition. This is not consistent with the Guidance. Additionally, in both CNR and TTNET, effects on the consumer welfare are not evaluated by the CA, which is again something not conforms to the effects-based approach and the Guidance. In CNR decision, the definition of refusal to supply is debated but only the effects of the practices of CNR on competitors are analyzed.

The fourth exclusionary practice is margin squeeze. Telia Soneria decision is chosen from the EU and TTNET I, TTNET II and Turkcell decisions are chosen from Turkey. In Telia Soneria decision, the CJEU demands as efficient competitor decision which means CJEU required economic analysis. However, on the other hand, it states that it was not necessary to evaluate actual effects on consumers. This is a forms-based and more moderate approach since it has the way the effects are analyzed and economic calculations are conflicting with one another. In the TTNET I decision, consumer

welfare is not evaluated. TTNET II decision the definition and the requirements of the margin squeeze was discussed by the CB members. It was not an effects-based decision because the analysis of the effects of the practice on the consumers is missing. The duration of the subscriber gains was discussed in this case. In the Turkcell decision, however, the actual and likely effects on consumers were analyzed. Within that context, one should say that Turkcell decision is more effects-based than any other decision mentioned here. It includes more consistent economic analysis than the EU and Turkish decisions mentioned within the scope of this study.

Interestingly, Telekomunikaja Polska (TP), Telia Soneria, and Türk Telekom decisions are all related to refusal to supply and margin squeeze on the supply of the infrastructure of broadband Internet services. Despite that similarity, the views of CA, CJEU and the Commission are different. Among these decisions, TP is the most consistent one with Guidance and effects-based approach. Telia Soneria is the second one, whereas Türk Telekom is the one which considers effects-based approach less. For example, the Turkish decision here does not mention anything about the consumer welfare.

The last exclusionary practice mentioned in this study is exclusive dealing. For EU, there are Soda ash and EDF decisions and for Turkey there are Mey İçki and Turkcell decisions in the study. In Soda ash, no effects were calculated by the Commission, so it is a per se decision. In EDF, the Commission made a commitment decision and changed conditions of the exclusivity agreements by reducing the duration of the obligation since it thinks that the long-term contracts in the EDF have likely anti-competitive effects. The first EU decision here does not have economic analysis most probably because the Commission made these decisions before the publication of the Guidance. Also, although the decision of CJEU was given after the Guidance, CJEU did not take in to account the Guidance since it was published after the decisions of the Commission.

In Mey İçki decision from Turkey, the CA decided that the practices of Mey İçki are not exclusionary since they do not include exclusive dealing obligation and single branding agreement. Besides, for Mey İçki, the Commission also looks at the correlations between the rebates and the total turnover of the distributors. Although it

does not consider this as a major factor in its analysis, here one can say that the CA makes a more economic analysis. On the other hand, the CA does not look at the effects on consumers. Thus, the amount of economic analysis and effects-based approach changes decision by decision in both EU and Turkey decisions. However, in EU decisions there is much more effects-based tendency especially for the decisions after 2009. The evaluation of the consumer welfare and the anti-competitive foreclosure exist in all EU decisions after in 2009. In Turkcell decision of 2011, the likely effects on the consumers were not evaluated, but the effects on the competitors were evaluated. The CA made calculations about the situation of the competitors and the market shares after the practices of Turkcell. However the amount of economic analysis is very little and unsatisfactory since it fails to adopt a broader perspective by looking at some other factors such as other subscriber gain of the competitors and the effect on the consumers.

Finally there are some differences between the EU and Turkish decisions. Almost all EU decisions are longer than any decision from Turkey, just because of the fact that they have more detailed analysis. The amount of the confidential information is more in Turkish decisions. For example, just the three of CA cases in this study included market shares, they are usually confidential information. Furthermore, it can be said that EU cases are more clear and consistent with the Guidance. Especially after 2009, there is more analysis on consumer welfare in the EU. Considering the decisions from Turkey, it could not be concluded that there is a clear and consistent tendency towards an effects-based analysis. Besides, the evaluation of the consumer harm and likely effects on consumers do not exist in all decisions. As a result, Turkish decisions are decided in the direction to protect competitors, but not consumer welfare. This means the effects on the competitors such as barriers to entry and exit are more likely to be evaluated. Whether the effects on the competitors have a direct impact on consumer welfare is not mentioned except several decisions.

CONCLUSION:

This study has made an analysis of the most debated and relevant decisions from Turkey and the EU about exclusionary practices between 2009 and 2013. The ongoing reform process in EU Competition Law is mainly emphasizing an effects-based approach rather than a forms-based approach. The Discussion Paper and the Guidance are both focusing on the importance of adopting a new and modern approach for grasping a much more thorough analysis. The situation is the same for Turkey. CA is trying to employ more economic analysis and effects-based approach which looks at effects on consumer, efficiencies and objective justifications.

However, it is not easy to say that both EU and Turkey are successful and consistent in implementing effects-based approach. In all decisions I have covered, EU seems to be more consistent compared to Turkey. But this does not mean that they have a thorough effects-based approach. In some decisions, the Commission and CJEU omit actual effects of exclusionary practices. The other point that should be emphasized is the applicability of the Guidance. Mestmacker argues some of the member states such as Germany have stricter competition laws. Here the author makes the following comment: It is true that the Guidance is not binding; but what is the point of considering the Guidance as the fundamental reference point if it says anything that is not mentioned in your national competition law?[224]

The CA's approach to exclusionary practices is not consistent either. There is more variance in the enforcement of the laws in CA cases. In some decisions CA adopts an effects-based approach and makes economic analysis. However, there are decisions that include these effects vaguely. Interestingly, almost all EU decisions are longer than any decision from Turkey, just because of the fact that they have more detailed analysis. On the other hand, it is also true that there is a tendency towards effects-based approach; one could not say that all decisions are compatible with the effects-based approach of the Guidance. In fact, one could even argue that CA has its own way to

[224] Mestmacker, "The Development of German and European Competition Law with special reference to the EU Commission's Article 82 Guidance of 2008," European Competition Law: The Impact of the Commission's Guidance on Article 102" (Ed.) Pace, 2011.

make effects-based approach and economic analysis. It may be because CA also tries to be compatible with US Competition Law, as it can be seen from the CA decisions. In US competition law, the emphasis is effects-based approach but it has some differences than the EU[225]. For example; recoupment of losses is required for US[226] but not need to be proven for EU decisions as the Guidance states. On the one hand, CA uses recoupment of losses concept as a benchmark for its decisions. It can be seen in predatory pricing, rebates and margin squeeze and predatory pricing decisions; Knauf, DMG, Kalekim, Kale Kilit, TTNET I, TTNET II and Turkcell 2010 decisions. On the other hand, in some cases CA did not look at the recoupment of losses was not analyzed such as THY decision. Although it could be said that THY decision is exceptional because CA did not make any economic analysis and there may be political concerns behind it. and the decision had a forms-based approach. However, in the US there are not almost any decisions that resulted with punishment due to predatory pricing. Per se illegality was EU approach and there are decisions in the EU punished because of the predatory pricing and rebates. CA also punished predatory practicing practices. As a result, CA approach is more of a mixture between the EU and US approaches. I think it is not easy to use both in a compatible way.

Besides, there have been some attempts to bring clarity to Act 4054 Article 4 about restrictive agreements and acquisitions, which is Article 4 of Turkish Competition Law. Like in the EU, Turkey reforms the competition policy toward more effects-based approach both in Article 4 and Article 6. Similarly, EU reformed Article 101 and Article 102. There is also a new development in Article 6 in the abuse of dominant position which is the latest document published by CA in June 18, 2013: The Draft for "Guidance on the Assessment of Abusive Exclusionary Conduct by Dominant

[225] Federico Etro and Ioannis Kokkoris, "Chapter 1: Toward an Economic Approach to Article 102" in *Competition Law and the Enforcement of Art. 102*, Etro and Kokkoris (eds.), (Oxford Univ. Press, 2010), p.1, Yannis Katsoulacos and David Ulph, "Chapter 4: Optimal Enforcement and Decision Structures for Competition Policy: Economic Considerations" in in *Competition Law and the Enforcement of Art. 102*, Etro and Kokkoris (eds.), (Oxford Univ. Press, 2010), p. 91.

[226] Recoupment in predatory pricing: France Telecom v Commission, 14 April 2009, http://www.allenovery.com/publications/en-gb/Pages/Recoupment-in-predatory-pricing--France-Telecom-v-Commission.aspx; Fatma Ataç, "Hakim Durum Kavramı ve Hakim Durumun Kötüye Kullanılması", Rekabet Kurumu Staj Programı Sunumu, Rekabet Kurumu, Ankara, 25.06.2013.

Undertakings"[227] (Draft). The document was published on the website of Turkish Competition Authority, and CA will be collecting suggestions until September 8th 2013. The CA will probably produce the actual document after that time. This is actually what EU did with the Discussion Paper. It was published in 2005, and the EU had collected comments for a period of time, and then as a result the Guidance was published within the last month of 2008.

Before I read the document, I expected to see the Draft would be similar with the Discussion paper since both of them are the documents that were made during the preparation of guidelines. However, the structure, content and the general approach of the Draft is very much the same with the Guidance. These similarities include; the objectives of the documents are the same: decreasing uncertainties and increasing transparency, guiding competitors and consumers.[228] Secondly, both the Guidance and the Draft look at the abuse of dominant position single dominance and not include exploitative practices.[229]Thirdly, they both state that the dominant firm has special responsibility not to distort the competition in the market. Fourthly, they both require analyzing the market conditions, situation of the dominant undertaking and its competitors, expansion and entry and countervailing buyer power in the assessment of the dominance. The market share for a firm to be considered dominant is taken as 40 % and two year is enough for assessing dominance in both documents. Fifthly, both documents emphasize protection of the consumer welfare and the analysis effects of the practice and objective justifications by dominant undertakings. Sixthly, they both states the duration of the practice and possible or actual evidences of exclusionary strategy will be evaluated. Seventhly, both mentions as efficient competitor test, effective price with the same cost concepts; LRAIC and AAC. Lastly, they both have exclusionary practices refusal to supply, predatory pricing, margin squeeze, exclusive dealing agreements, rebates and, tying and bundling. In addition, the things the Commission and CA evaluate for the assessment of these practices specifically are very similar in both the Draft and the Guidance.

[227] "Hâkim Durumdaki Teşebbüslerin Dışlayıcı Kötüye Kullanma Niteliğindeki Davranışlarının Değerlendirilmesine İlişkin Kılavuz Taslağı", http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fG%C3%BCncel%2fk%C4%B1lavuzlar%2fHDDK+KILAVUZU.pdf

On the other hand, there some slight differences between the Guidance and the Draft. The relationship between exclusionary conduct and consumer welfare is stated directly in the Draft[230] but the Guidance does not. The rebates and margin squeeze are in explained in separate chapters in the Draft. The other titles are the same but sometimes in different order. Another difference is that the Draft is not clear in recoupment of losses which the Guidance does not require to analyze in the decisions. The Draft does not mention whether analyzing the recoupment of losses is necessary. In the CA decisions sometimes the recoupment of losses is evaluated for predatory pricing, margin squeeze and rebates, as it was the case aforementioned decisions. I think it is important for CA to explain its approach on the recoupment in the actual Guidance. Furthermore, although it can be understood from the Draft, CA did not say explicitly said that their approach will be more effects-based in their web site. However, the EU made press releases and speeches that explicitly revealed that the EU would make effects-based approach.

These similarities and slight differences may show that CA has been trying to adopt effects-based approach as EU does. The documents are almost the same. Does that mean CA is leaving US aside? Does the Draft mean CA will adopt effects-based approach? All answers will be hypothetical now since the document is very recent. But it is a sign of a tendency towards effects-based approach.

The document may be beneficial for the firms to evaluate their behaviors are abusive or not and can eliminate inconsistencies of the enforcement of the laws. This can also bring CA decisions more economic analysis and standardization in the analysis of the exclusionary practices.

On the other hand, the document which will be produced out of the Draft may limit CA. Also CA should truly evaluate whether there is a need for such Guidance in the market in Turkey. There must be enough cases in Turkey which allow CA to analyze and make its guidance accordingly. Also, CA should analyze the criticisms to the Guidance and create its enforcement priorities by looking at the experience of the

[230] Kılavuz Taslağı, para. 22.

Commission. I believe CA should not adapt the Guidance but constitute another one which reflects its own experience of abuse of dominance. Besides, there are always the risks of false positives and negatives. CA can make wrong decisions. This means all Guidance-related problems in the EU may arise in Turkey as well such as legitimacy of the CA may be questioned if it will not give decisions that conforms their guidance and CA may limit itself and give mistaken decisions. Also, it can be hard to calculate the cost benchmarks and may get increase the decision-making period of CA that may make CA cannot use its resources efficiently.

To conclude, one thing that is clear for me that, more economic analysis is needed for all decisions in the market. Ideally case by case decision could provide more thorough decisions. But one should not ignore the fact that a rule of reason or case by case approach could be time consuming and needs human resources because it requires analysis many different things and it may creates uncertainties since it may lift the standards of the application of the laws it may end up with wrong decisions.

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