T.C.
MARMARA ÜNİVERSİTESİ
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AB HUKUKU ANA BİLİM DALI

APPROACHES OF EUROPEAN UNION AND TURKEY TO ABUSE OF DOMINANT POSITION THROUGH THE METHODS OTHER THAN PRICING

YÜKSEK LİSANS TEZİ

Selen EGELİ SEMİZ

İSTANBUL 2008

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ONAY SAYFASI

Ensitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Selen EGELİ SEMİZ'in "APPROACHES OF EUROPEAN UNION AND TURKEY TO ABUSE OF DOMINANT POSITION THROUGH THE METHODS OTHER THAN PRICING" konulu tez çalışması 26 Aralık 2008 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/[redacted] ile başarılı bulunmuştur.

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ABSTRACT

The final aim of the undertakings operating in the commercial life is to gain profit more than their competitors, to have a specific economical power and to be in dominant position in the market. To be in a dominant position, without any doubt, is an indication that the commercial undertaking is successful. Of course, the competition rules do not prohibit being in a dominant position. However, nevertheless, to abuse the dominant position by the undertaking as to cause damage to its competitors, customers, consumers and in general the market is prohibited through competition rules regulated both in European Union and in Turkey. Abusing can be seen as different forms. The types and consequences of abuse of dominant position are regulated in the framework of the Article 82 of EC Treaty and the Article 6 of the Act on Protection of Competition numbered 4054 currently being applied in Turkey and is developed under the court decisions. The subject of this study covers the analysis in European Union and in Turkey, the aspects of abuse of dominant positions through the methods other than pricing.

ÖZ

Ticari hayatta faaliyette bulunan teşebbüslerin nihai hedefi, rakiplerine göre daha fazla kâr elde etmek, belirli bir ekonomik güce sahip olmak ve piyasada hakim konuma gelmektir. Hakim durumda olmak, hiç şüphesiz, ticari teşebbüsün başarılı olduğunun bir göstergesidir. Rekabet kuralları da elbette hakim durumda bulunmayı yasaklamamaktadır. Ancak, bununla birlikte, teşebbüsün bu hakim durumunu rakiplerinin, müşterilerinin, tüketicilerin ve genel olarak piyasanın zararına yol açacak şekilde kötüye kullanması, gerek Avrupa Birliği'nde gerekse Türkiye'de düzenlenen rekabet kuraları ile yasaklanmıştır. Kötüye kullanma, değişik şekillerde görülebilmektedir. Avrupa Birliği ve Türkiye'de hakim durumun kötüye kullanılma şekilleri ve bunun sonuçları, Avrupa Topluluğu Antlaşması'nın 82. maddesi ve Türkiye'de halihazırda uygulanmakta olan 4054 sayılı Rekabetin Korunması Hakkında Kanun'un 6. maddesi çerçevesinde düzenlenmiş ve mahkeme kararları nezdinde geliştirilmiştir. Bu çalışmanın konusu, Avrupa Birliği ve Türkiye'de, hakim durumun fiyatlama dışındaki yöntemlerle kötüye kullanılması hallerinin incelenmesini kapsamaktadır.

LIST OF ABBREVIATIONS

Act	**:**	The Act on Protection of Competition no. 4054
CFI	**:**	The Court of First Instance
CMLR	**:**	Common Market Law Review
EC	**:**	European Community
ECJ	**:**	The European Court of Justice
ECLR	**:**	European Competition Law Reviews
EC Treaty	**:**	The Treaty Establishing the European Community
Etc.	**:**	Etcetera (and so on)
EU	**:**	European Union
Ibid	**:**	Ibidem (The same source)
Loc. cit.	**:**	Loco Citato (Above mentioned section)
OJ	**:**	Official Journal
Op. cit.	**:**	Opere citation (Above mentioned work)
p.	:	Page
par.	**:**	Paragraph

INTRODUCTION

The concept of competition, in the global world, is a core for free market economies. In free market economies, prices are set freely according to the requests of consumers and production status. In free economies, consumers can consume according to their free decisions.

Abusive actions in competitive areas can cause to discrimination, changes in market structure and exploitation in the market which would negatively affect the competitive system. Undertakings with dominant positions can easily affect markets by using their powers. These undertakings can harm free market, as well as consumers and customers with their actions giving damage to competition. These actions are called as "*anti competitive*" actions.

The main aim of the Community competition law system is to prevent such kind of effects and to protect the competition in European common market. In same parallel, the main purpose of Turkish competition law is to protect the economical life in Turkey by preventing such kind of anti competitive actions.

Therefore, the main purpose of this study is to analyze dominant position and abuse of dominant position through anti competitive activities by undertakings. However, I would like to draw kind attention of readers that this study does not include several "pricing activities" using by dominant undertakings in order to exploit competitors or to create barriers to entry to the market for them or to get them out of the market. This study analyzes the abusive activities of the dominant undertakings other than pricing.

In the first part of this thesis, the general principles of competition law in European Union, the effect of principles of EU competition law on Member States, application of competition law through institutions of EU are analyzed and tried to be explained by giving basic information. General principles of EU competition system are important to understand the resource of operation and application of EU competition law in Member States, in other words, in common market.

In the second part of this study, the wording and spirit of Article 82, undertakings, definition on related market, dominant position, abuse of dominant position and abusive practices other

than pricing activities are analyzed in detail. Abusive practices are studied by considering Article 82 of EC Treaty. However, abusive practices laid down in this study, should not be deemed as limited. Abuse of dominant position can show its face to us with different types and forms, according to the future developments on economical, commercial and technical areas and possible changes at the expectations of consumers and customers.

In the third part of the thesis, competition law and system in Turkey, the Turkish legislation, establishment and definition of dominant position under Turkish legislation, abuse of dominant position under Turkish competition law and legal consequences in administrational and in private laws of abusing are studied. The Article 6 which regulates the abuse of dominant position under the Act on Protection of Competition and several types of abuses is analyzed from the Turkish competition law point of view.

I. COMPETITION LAW IN EU

1. GENERAL

Competition is a struggle between undertakings for the custom and business of people in the commercial area. It is a basic mechanism of the market economy and encourages undertakings to provide consumers products that consumers want.[1]

Competition policy is relevant not only for those in business and their advisers, but also for the citizens of Europe, who need to have an overall view of how competition policy is implemented and its relevance to improving their daily lives. One of the essential roles of competition is to promote innovation and ensure that goods and services are produced as efficiently as possible and that these efficiencies are benefiting consumers in the form of lower prices or improvements in quality, choice and services. Another role is to ensure that markets are sufficiently competitive in order to keep up with globalization, and to support employment. Without competition, the driving force behind growth and employment would be lost.[2]

The aims of competition rules on EC Treaty are politic and economical. The purposes of these rules are to maintain integration through removing commercial barriers between member states, to protect consumers, to gain productivity and to create honest and equitable competition market. Barriers occurred from the agreements, decisions by associations of undertakings and concerted practices or abuse of dominant position by dominant undertakings negatively affect the competition between member states.[3]

The general competition principles of the Treaty are laid down in the Article 2 and Article 3 of EC Treaty. Article 2 provides that;

" *The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Article*

[1] Overview on Antıtrust, available at http://ec.europa.eu/comm/competition/antitrust/overview_en.html (03.08.2008)
[2] Mathijsen P.S.R.F, A Guide To European Union Law, Sweet&Maxwell, 2004, p.227
[3] Tekinalp Ü., (Tekinalp/Tekinalp) Avrupa Birliği Hukuku, Beta Yayınevi, 2000, p. 382

3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

The competition rules in EU are the legal provisions establishing and protecting competition and providing the function of the market economy.[4] Therefore, the Article 3 of EC Treaty provides activities of the Community intended to help the achievement of the task mentioned above. Paragraph (g) of Article 3(1) refers to:

"*a system ensuring that competition in the internal market is not distorted*".

Furthermore, in the Article 4 of the EC Treaty it is provided that the Member States and the Community shall be conducted in accordance with the principle of an open market economy with free competition. These references have a significant effect on the decisions and judgments of the Commission, ECJ and CFI which interpreted the competition rules from the starting point of Articles 2 and 3 of EC Treaty[5].

Rules on competition have been regulated in the Articles 81-89 in Chapter 1 of Part III of EC Treaty[6]. Apart from the general system of the EC Treaty, in the Articles 81 and 82, undertakings are subject to the responsibilities, not the Member States. Article 81 of EC Treaty prohibits agreements, decisions by associations of undertakings and concerted practices that restrict the competition and Article 82 prohibits the abuse by an undertaking or undertakings of a dominant position. Articles 83-85 generally provide the duties given to the Commission regarding with the regulation and application of the Articles 81 and 82 and legal measures to be taken by the Member States. Articles 86 provide that the Member States can neither enact nor maintain in force any measure contrary to the rules contained in the Treaty. Articles 87-89 include aids granted by states. State aids to undertakings by Member States which might distort competition in the common market, are prohibited by these Articles.

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[4] Tekinalp Ü., (Tekinalp/Tekinalp), Op. Cit. p.382
[5] Whish R., Competition Law, Fifth Edition, Lexis Nexis UK, 2003, p.50-51
[6] Treaty on European Community (consolidated version) *Official Journal C 325 of 24 December 2002*, available at http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/12002E.html (09.08.2008**).**

Other than the provisions stated in the Treaty which can be interpreted as primary sources, the Regulation No 1/2003[7] "EC Modernization Regulation" is adopted by the Council on 16 December 2002 as a secondary source. This regulation replaced the Regulation No 17/62 with effect of May 2004. Replaced Regulation No 17/62[8] established a centralized monitoring system provided that agreements liable to restrict and affect trade between Member States must be notified to the Commission. The Commission has an exclusive power to authorize agreements which restrict competition. This centralization brings a control for Commission, increases the role of national authorities and courts. The Regulation No 1/2003 implemented the rules relating to application of Articles 81 and Article 82. The regulations and directives can be counted as secondary sources in competition law.

Another source of competition law is the decisions taken at the ECJ and CFI cases. In this respect, EU competition law can be evaluated as a well developed case law.

The competition is very important and meaningful to reach to the aims laid down in Articles 3 and 2. The main aim of the Community is to create common (internal) market where all boundaries and limitations are removed and based on free competition principles. Competition law is one of the most important policies to serve to this main aim of the Community.[9] Therefore competition rules in the EC Treaty can not be deemed as the rules implemented only to prevent the acts in contrary to competition.[10]

Competition law in EU serves to three main purposes; single market opened to all undertakings, competitiveness in this single common market and necessary organization from which the consumers can benefit. In general meaning, state aids and special policies for the undertakings covered by EU competition law seem as serving for these basic purposes.[11]

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[7] Regulation No 1/2003 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (10.08.2008)
[8] Regulation No 17/62, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:NOT (10.08.2008)

[9] Aşçıoğlu Öz, Gamze, Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması, Ankara 2000, Rekabet Kurumu, p.36
[10] Tekinalp Ü., (Tekinalp/Tekinalp), Op. Cit. p.382
[11] Aşçıoğlu Öz, Gamze, Op. Cit, p.37

The function of competition law generally is to provide consumer welfare by achieving the efficient allocation of resources and by reducing costs. Therefore consumer protection is one of the most important functions of competition law.

It is important to stress that EU competition law is applied with the issue of single market integration in mind. Agreements and conduct which might have the effect of dividing the territory of member states are prohibited and may be punished. Single market competition rules and conventional competition rules are key features of Community competition law.

2. NATURE AND EFFECT OF COMMUNITY LAW

Community legal rules are the rules with direct effect on the Member States. Member States can not regulate their internal rules against fundamental objectives of the Community law as states at the Article 5 of EC Treaty. This principle highlights the primacy of Community law on the internal legal systems of the Member States. According to the primacy principle of Community law in case of any conflict, Community law rules shall be applied rather than the internal rules of Member States. This principle is related to the supremacy principle of Community law. [12]

It is clear that, in case of any conflict on competition rules and regulations between Member States and Community, Community rules shall prevail according to the mentioned supremacy principle of Community law. Nevertheless, if the breach on competition is at the national degree, national competition authority shall have the right to apply national rules. It is agreed by the ECJ that the Commission and national competition authorities have concurrent jurisdictions, and the authorities of national competition institutions have been developed by "Modernization on Community Competition Law". [13]

The principle of "Direct Effect" of Community law broadly means that provisions of binding EC law which are clear, precise and unconditional enough to be considered justifiable can be invoked and relied on by individuals before national courts. There is also classical concept of

[12] See also Case 6/64, Costa v. Enel, 15.07.1964, ECR [1964] 585, Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA., ECR [1978] 629 for direct applicability and direct effect of community law.
[13] Aşçıoğlu Öz, Gamze, Op. Cit. p40, see also Commission programme no. 99/027 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:051:0055:0066:EN:PDF (15.08.2008), White paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty available at http://aei.pitt.edu/1175/01/implement_85_86_wp_paper.pdf (15.08.2008)

direct effect which is defined as capacity of a provision of EC law to confer rights on individuals.[14]

In the light of foregoing, direct effect can be defined briefly as the capacity of a norm of Community law to be applied in domestic court proceedings. Nevertheless, supremacy denotes the capacity of that norm to overrule inconsistent norms of national law in domestic court proceedings. Direct effect and supremacy are the general principles to define characteristics of EC law.[15]

From the aspect of competition law, the direct effect of the Articles 81 and 82 of EC Treaty on competition breaches was discussed firstly in the case of Bosch[16]. However, the direct effect of the mentioned articles was actually accepted after the effective date of first Commission Regulation no. 17/62[17].

3. APPLICATION THROUGH INSTITUTIONS

3.1 Council of Ministers

The Council of Ministers is the supreme legislative organ in the Community. The Council of Ministers acts under the powers given by the articles 83 and 308 EC Treaty. By using these powers, the Council regulated several legislation, in particular the Regulation 17/62[18], replaced with the Modernization Regulation no 1/2003[19] effecting from 01 May 2004.

3.2 European Commission

European Commission is the key institution in the operation and development of Community competition policy. The Commissions responsibilities are finding facts, taking actions against

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[14] Craig P., De Burca G., EU Law, Text, Cases and Materials, Third Edition, Oxford University Press 2003, p.178
[15] Craig P., De Burca G., The Evolution of EU Law, Oxford University Press 1999, p. 177
[16] Case 13/61 Bosch v. Commission [1962] ECR 45
[17] Regulation No 17/62, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:NOT (15.08.2008)
[18] Regulation No 17/62, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:NOT (15.08.2008)
[19] Regulation No 1/2003 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (15.08.2008)

infringements of the competition law and imposing penalties. In order to perform such duties, the Commission makes economical analyses, market researches, sector investigations and cooperate with the competition authorities of the Member States.

Other than mentioned responsibilities, the Commission can contribute to legislative actions by making proposals to the Council for new regulations or directives.

One of the commissioners is responsible for competition matters. There are two Hearing Officers directly responsible to the Commissioner; their mission is to ensure due process, to safeguard the parties, procedural rights, and to contribute to the quality of the decision-making in EC Antitrust and Merger proceedings.[20]

The Directorate General IV of the Commission is specifically responsible for competition policy. The website of the Directorate General IV provides important and detailed information on related competition legislation, investigations and cases, Press Releases, speeches of Commissioner and officials, annual reports, newsletters and publications on competition.[21]

The Commission issues Annual Report on Competition Policy which is a rich source of information on matters of both policy and enforcement as well as statistical review of the Directorate General IV.[22]

3.3 Court of First Instance

The Court of First Instance was established on 1989 with the purpose of reducing the workload of the Court of Justice. Court of First Instance exercises at the first instance many jurisdictions such as reviewing the legality of the acts adopted by the institutions, actions for failure to act, actions for compensations for damages, appellate jurisdiction for decisions given by judicial panels, jurisdiction to hear and determine questions referred for preliminary ruling in specific areas etc.

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[20] Whish R., Op. Cit., p. 53
[21] The website is available at http://ec.europa.eu/comm/competition/index_en.html (16.08.2008)
[22] The website is available at http://ec.europa.eu/comm/competition/annual_reports/ (16.08.2008)

From the aspect of competition law, in general, actions against the Commission in competition cases are brought in the first instance before the Court of First Instance. The CFI has the obligation to review the annulment an action regarding with the mergers and acquisitions, the decisions of CFI is subject to appeal before the Court of Justice.[23]

The website of CFI is a source for finding out the members, the composition of the chambers, recent judgments of the Courts, opinions of Advocate Generals of the ECJ and information about pending cases and case-law literature.[24]

3.4 European Court of Justice

Authorizations of the European Court of Justice can be separated as four titles. One of them is actions of annulments regarding with the regulations and decisions of Commissions or Council. Furthermore, action of annulment can be brought before the Court of Justice, against Member States who failed to perform their obligations. Other type of action is to failure to act to be brought before the Court of Justice, because of the failure of institutions to take necessary decisions or measures or to make regulations under the rights and authorizations given by the Community law.[25]

The last authorization title of the Court of Justice can be explained as the procedure of preliminary ruling. According to the EC Treaty, the Court of First Instance has the jurisdiction to hear and determine questions referred for a preliminary ruling, in specific areas. Where the CFI considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer to the case to the Court of Justice for a ruling.[26]

Decisions given by the CFI on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, where there is a serious risk of the unity or consistency of Community law being affected.[27]

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[23] Aşçıoğlu Öz, Gamze, Op. Cit. p44
[24] The website of Court of First Instance is available at http://curia.europa.eu/en/instit/presentationfr/index_tpi.htm (23.08.2008)
[25] Aşçıoğlu Öz, Gamze, Op. Cit. p43
[26] Article 225 of the EC Treaty, available at http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html (23.08.2008)

[27] Article 225 of the EC Treaty, available at http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html (23.08.2008)

Court of Justice Instance hears appeals from the CFI. Therefore ECJ does not get into factual disputes. Court of Justice is assisted by an Advocate General drawn from a panel of six, who delivers an opinion in each case that comes before it. The opinion of the Advocate General is generally followed by the Court. The opinions of Advocate General in competition cases are important sources because of their valuable contains.[28]

3.5 Advisory Committee on Restrictive Practices and Dominant Positions

Advisory committee is provided by the Article 14 of the Regulation 1/2003[29].
The Committee is consists of the representatives from the competition authorities of Member States. The general duty of this Advisory Committee is to give opinions to Commission, on policies to be applied, regulations to be made, decisions to be taken. According to the Article 14, the Commission takes utmost account of the opinion delivered by the Advisory Committee. Therefore, opinions given by the Advisory Committee on the draft regulation, decision or policies create a significant effect on the competition policies and competition applications of EU.

3.6 National Courts and Competition Authorities

The Regulation 1/2003 provides the cooperation with national courts in the Article 15.[30] The cooperation is between the national courts and the Commission. In accordance with the Article 15, national court may request information or opinion from the Commission concerning the application of Community competition law. The Commission endeavor to reply information or opinion requests within a limited time period. Article 15 also requires national courts to submit written judgments on the Article 81 and 82, to the Commission after the written judgment is notified to the parties. Article provides an observation by national competition authorities and Commission, on national courts. National competition authorities and the Commission may request the relevant court to give them necessary documents in order to assess the case.

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[28] Whish R., Op. Cit., p. 56
[29] Regulation No 1/2003 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (15.08.2008)
[30] Regulation No 1/2003 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (15.08.2008)

Under the Regulation 1/2003, the Commission shares competence to apply Articles 81 and 82 with national competition authorities and national courts, but of course national authorities and courts are also authorized to apply domestic law. According to the Regulation, in order to ensure the effectiveness of Community competition law, it is necessary to oblige national competition authorities and courts, where they apply national competition law to agreements or practices, to also apply Articles 81 and 82 where those provisions are applicable.[31]

Therefore, Article 3 of the Regulation provides that where national competition authorities or courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices that may affect trade between Member States, they shall also apply Article 81, and similarly they must apply Article 82 to any abuse prohibited by that provision.[32]

[31]Recital 8 of the Regulation No 1/2003 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (15.08.2008)

[32] Article 3 reads as "*Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.*" Regulation No 1/2003 available at

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF (15.08.2008)

II. ABUSE OF DOMINANT POSITION UNDER THE ARTICLE 82 OF EC TREATY

1. ARTICLE 82 OF EC TREATY

The text of Article 82 of EC Treaty provides that:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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.

The essence of Article 82 is the control of power in the market. [33] The article has been designed to deal with the activities of undertakings which have a powerful market position similar to the concept of monopoly. The article is directed at the activities of a powerful undertaking which is not subject to effective competition.

Article 82 is one of the pillars of the system ensuring that competition in the internal market is not distorted as set forth in the Article 3 of EC Treaty. The objective of Article 82 is to maintain effective, undistorted competition by concerning unilateral activities. Its purpose is

[33] Craig P., De Burca G., EU Law, Text, Cases and Materials, Third Edition, Oxford University Press 2003, p.992

also to ensure that the exercise of market power does not impair competitors' possibilities to succeed or prevail on the market on the basis of business performance. [34]

Article 82 requires that one or more undertakings have a dominant position and such dominant position should be subject to abusive practices adopted by dominant undertaking (or a group of undertakings holding "collective dominance"). An undertaking may use its market power in several ways. For instance, the undertaking may exploit consumers by increasing prices, perpetuate its own position through unfair discounting, and extend its position into another market by tying the sale of one product to another. The content of second paraghraph of the Article 82 is not exhaustive. [35]

The important note is, although Article 82 prohibits any abuse of a dominant position within the European Union that may affect the trade between Member States, the article does not prohibit the existence of "market power" or "monopoly". [36] The existence of dominant position does not prohibited in Article 82, but, dominant position is a pre-condition in order to apply Article 82. [37]

In order to apply article 82;

a) An undertaking(s) should be exist, and
b) The undertaking(s) should be acting at the relevant market, and
c) The undertaking(s) should be at dominant position at the relevant market, and
d) Dominant position should be abused by the undertaking, and
e) Abusing practice should affect the trade between Member States.[38]

[34] Eilmansberger T., How o distinguish good from bad competition under Article 2 EC: In search of clearer and more coherent standards for anti-competitive abuses, CMLR, Vol. 42, No: 1, Kluwer Law International, 2005, p.132-133
[35] Van Bael I., Bellis JF., Competition Law of The European Community, Fourth edition, Kluwer Law International 2005, p. 116
[36] Rodger J. B., MacCulloch A., Competition Law and Policy In The EC and UK, Cavendish Publishing Limited, 2004, p. 79
[37] Ibid
[38] Tekinalp Ü., (Tekinalp/Tekinalp) Avrupa Birliği Hukuku, Beta Yayınevi, 2000, p.436

2. UNDERTAKING(S)

The Treaty does not define undertaking(s). In Höfner [39] the ECJ held that, "*the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed*".

According to the definition stated in Höfner, the entity engaged in an economic activity, regardless of legal status can be deemed as an undertaking. Companies and partnerships can be also deemed as undertakings, as agricultural cooperatives, P and I clubs. Trade association that carries out economic activities is also undertaking.[40]

The ECJ in Höfner stated that the legal status of an entity does not determine the existence of an "undertaking". For instance, stated owned entities may be undertakings if they engage in economic activities through offering goods or services in a market. In Aereports de Paris[41], Aereport de Paris was responsible for the planning, administration and development of civil air transport installations in Paris is found by the Commission as an undertaking.

The other formula in Höfner was that an entity may act as an undertaking when carrying out its certain functions but not acting as an undertaking when carrying out others. For instance, a local entity may act sometimes as public authority under its public law powers but may act other times as a commercial entity. Therefore a functional approach should also be adopted while determining the qualification of an undertaking.[42]

In some circumstances, different firms may be deemed as single unit because of close economic relation between them. For instance, agreements concluded between main company and its subsidiaries can be regarded as one economic unit (undertaking). The important issue is whether the subsidiary has its own autonomy or not. In other words, the crucial question is whether parties to an agreement are independent in their decision making or not. This examination can be also applicable to determine the qualification of an undertaking under Article 82.[43]

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[39] Case C-41/90, Höfner and Elser v. Macrotron GmbH, [1991] ECR I - 1979
[40] Whish R., Op. Cit., p.81
[41] OJ [1998] L 230/10, [1998] 5 CMLR 611
[42] Whish R., Op. Cit., p.82-83
[43] Case C-73/95P, Viho Europe BV v. Commission [1996] ECR I-5457, paragraph 15

3. MARKET DEFINITION

Market definition plays a fundamental role in competition analysis under EU law. One of the main sources of information on how to define markets is the European Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law.[44]

Paragraph 2 of the Commission's Notice explains why market definition is important:

"*Market definition is a tool to identify and define the boundaries of competition between firms. It allows to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behavior and of preventing them from behaving independently of an effective competitive pressure. It is from this perspective, that the market definition makes it possible, inter alia, to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.*"

According to above mentioned paragraph;
- the market definition is an analytical tool that assists in determining the competitive constraints on the undertakings, market definition provides a framework to find out whether an undertaking has market power or not.
- the product and geographic dimensions of markets must be analyzed.
- market definition enables the competitive constraints from actual competitors.

According to the paragraph 13 of the Commission's Notice, there are three main sources of competitive constraint upon undertakings: demand substitutability, supply substitutability and potential competition. Of these three constraints, only demand side and supply side

[44] OJ [1997] C 372/5, Commission Notice on the definition of the relevant market for the purposes of Community Competition Law, [1998] 4 CMLR 177, available at http://ec.europa.eu/comm/competition/index_en.html

substitutability play a role in assessing the boundaries of relevant market. The third constraint potential competition is generally not taken into account while defining the relevant market. Because the effectiveness of the potential competition as a constraint depends on the analysis of specific factors and circumstances regarding with the conditions of entry.[45]

The Commission Notice makes two-stage analysis of each market, the relevant product market and the relevant geographical market. According to some authors, other than these two stages, the relevant temporal market which is important for seasonal products or services, should be analyzed while defining the market.[46] Therefore, the relevant market can be assessed in three essential parts: *product market*, *geographical market* and *temporal factor*.

3.1 Product Market

The determination of the relevant product market is crucial and first important step to determine the relevant market. It should be noted that, the product market should be the market where the competition is constrained.[47]

The importance of product market definition is emphasized in *Continental Can*[48] where the Commission's decision was annulled by the ECJ because of its failure to demarcate the market. The Commission held that Continental Can and its subsidiary SLW had a dominant position in three different product markets; (a) cans for meat, (b) cans for fish and (c) metal tops. However, the Commission did not give proper explanation of why these markets were separate from one another or from the market for cans and containers generally. The ECJ insisted that the Commission should define the relevant product market by giving the reason.

The definition of the relevant market can be very controversial. If the product market is drawn narrowly, the undertaking would be found dominant, because in the market there would be few competing products.[49] The narrower the definition of the product market the

[45] Van Bael I., Bellis JF., Op. Cit, p. 134-135
[46] See, Rodger J. B., MacCulloch A. Op. Cit., p.81; Whish R., Competition Law, Fifth Edition, Lexis Nexis UK, 2003, p.42; Craig P., De Burca G. Op. Cit, p.998; Tekinalp Ü., (Tekinalp/Tekinalp) Op. Cit, p.437.
[47] Sanlı K.C., Rekabetin Korunması Hakkındaki Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği, Rekabet Kurumu Yayınları, 2000, p. 247
[48] Case 6/72, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] ECR 215
[49] Rodger J. B., MacCulloch A, Op. Cit., p.82

easier it is to conclude that an undertaking is dominant for the purposes of Article 82.[50] Therefore, in many cases the Commission has adopted a narrow and inaccurate definition of the relevant product market.

In case law of EU, the general approach of ECJ to the definition of the product market is focused upon interchangeability. Where goods or services can be regarded as interchangeable, they are within the same product market. In Continental Can, the ECJ investigated:

"*[those] characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.*"[51]

Also in *United Brands*[52], the applicant argued that the bananas were in the same market with other fruits. However, the ECJ stated that this issue depended on whether the banana could be:

"*singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.*"

In Commission's Notice, a market definition has been also provided. In accordance with the Commission's Notice, "a *relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*."[53] Commission's Notice treats "demand-side substitutability" (the degree of substitutability between products from a customers perspective) as the starting point for the definition of relevant product markets.[54] Additionally, the Commission's Notice also takes into account "supply side substitutability" (which is the degree of substitutability between products from a supplier's perspective) between products while defining the relevant product market. However the demand side substitutability is the primary test under the Commission's Notice, the supply side substitutability should be considered only where its impact is effective.

[50] Craig P., De Burca G.,, Op. Cit. p. 994
[51] Case 6/72 [1973] ECR 215 (paragraph 32)
[52] Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities [1978] ECR 207
[53] Commission Notice, Op. Cit., par. 7.
[54] Commission Notice, Ibid., par. 15-19.

(a) Demand side substitutability

In order to discover the demand side substitutability of a product an economic test which examine the cross elasticity of demand should be performed. Cross elasiticty is high where an increase in the price of one product causes a significant shift by consumers to another product. For instance, the increase in the price of beef will lead consumers to switch the beef with lamb or maybe with chicken. The existence of high cross-elacticities of indicates that the products are in the same market.

However, in some cases, it may be difficult to obtain reliable data on the relative cross-elasticity of different products. In such circumstances, it should be focused to related factors to determine whether the products are really interchangeable. Such factors include the prices of the two products and their physical characteristics.[55]

The price of a product can affect the relevant market. If a large percentage of consumers shift their preference relating with relatively small percentage price change, it should be considered that the other product is interchangeable with the original. If there is little or no shift in consumer preference it would be concluded that the products are not interchangeable.[56] For example, an increase in the price of a top-quality wine may not lead the consumers to switch to a low-priced, less-quality wine; however it may lead such consumers to buy an other high-quality wine which has not increased in price.

The physical characteristic of a product is vital in deciding the interchangeability. If products are physically similar and have similar functions the consumer would see them as interchangeable. It may also be possible to place the products in separate markets, even the products have particular characteristics. An example of such distinction was seen in *United Brands*[57]. It was argued in the case that the market for bananas was separate from the market of fresh fruit generally. The ECJ took into account the taste and softness of bananas to determine whether they constituted a separate market from other fruits. ECJ accepted that bananas should be differentiated from other fresh fruit.

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[55] Craig P., De Burca G.,, Op.Cit, p.994
[56] Rodger J. B., MacCulloch A, Op. Cit., p.82
[57] Case 27/76, [1978] ECR 207

(b) Supply side substitutability

The degree of interchangeability between products can also be affected by supply side. If other suppliers, currently manufacturing other products, can quickly and without making major expenses, begin producing an interchangeable product, these should also be considered at the same market.

In other words, even if firms are producing different products it may be relatively simple for one firm to adapt its machinery to make the goods produced by a competitor. In such circumstances the two products may be considered as in the same market.

Such possible alternative supplies create a competitive pressure on the current suppliers. It is known as potential competition. In *Continental Can*[58], ECJ indicates that the supply side of the market should be considered for the purpose of defining the market. The ECJ annulled the Commission's decision that it should have made clear why the producers of other types of containers would not be able to adapt their production to compete with Continental Can.

(c) Intended use

It is also relevant to look at the use for which a purchaser requires a product, to determine substitutability. If a person needs a product for a specific purpose, that product will be within the same market as only as other products which satisfy the same need.[59]

In *Michelin*[60], ECJ examined the market of car tyres. ECJ found that, because the different nature of demand, the car tyres fitted during manufacture (market for original equipment tyres) and the car tyres fitted during repair (market for replacement tyres) were in separate markets.

[58] Case 6/72 [1973] ECR 215
[59] Whish R., Op. Cit., p.36
[60] Case 322/81 NV Michelin v Commission of the European Communities [1983] ECR 3461

In *Commercial Solvents*[61], Commercial Solvents (CSC) produced nitro propane and supplied to it to Zoja, an Italian Company. Zoja processed it into ethambutol, a drug used for the treatment of tuberculosis. CSC decided that it would no longer supply to Zoja. Zoja claimed that CSC was in dominant position and the attitude of CSC constituted an abuse under Article 82. CSC argued that other chemicals could be used to produce the drug and that those chemicals should be considered as part of the overall market of materials for producing the drug. ECJ disagreed and focused on the fact that the process in Zoja's plant relied on supplies of nitro propane, no other raw material could be used. The way in which Zoja utilized the product, limited the market.

(d) Evidences: It is understood from the Commission's Notice that the Commission rely on some evidences in the assessment of the relevant product market[62]:

- *Evidence of substitution in the past*: Past sources of product substitutions, price changes and customers' reactions can be useful information in defining the product market. Additionally, economists design some quantitative tests to define the relevant market. This includes some tests to estimate price elasticity for the demand of a product and price movements over time.
- *Views of customers and competitors:* Research on the views of customers and competitors would be helpful in determining of the relevant product market.
- *Customer preferences:* Direct views of customers about substitutes of products may be useful information on determining of relevant product market.
- *Barriers and costs on switching demand to potential substitutes:* There may be number of barriers and/or costs that results in two *prima facie* demand substitutes not belonging to one single product market. According to the Commission's Notice, barriers can be regulatory barriers, state interventions, constraints occurring in downstream markets, the need to incur capital investment etc.
- *Different categories of customers and price discrimination:* Commission states in the Notice that the extent of the product market might be narrowed where there exist distinct groups of customers for a particular product. This may be the case when (a) it

[61] Cases 6 and 7/73 Istituto Chemioterapico Italiano S.p.A. et Commercial Solvents Corporation v Commission of the European Communities [1973] ECR 357
[62] Whish R., Op. Cit., p.34, see also Van Bael I., Bellis JF., Op. Cit. p. 136-140

is possible to identify to which group an individual customer belongs at the moment of selling the relevant products, and (b) trade among customers is not possible.

3.2 Geographical Market

The relevant geographical market should be defined, when determining whether an undertaking or undertakings have market power. The geographical extent of the relevant market is important. For instance some products can be supplied without difficulty throughout the European Union or even the world. However in some cases, there may be legal, technical or practical reasons why a product can be supplied only within a narrower area.

According to the Commission's Notice,

"*The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished form neighboring areas because the conditions of competition are appreciably different in those areas.*"[63]

In *United Brands*[64], the definition of the relevant geographic market was laid made as the area where the objective conditions of competition applying to the product in question are similar for all traders. In that case, since special arrangements existed in UK, France and Italy as to importing and marketing of bananas, the Commission executed those countries from the geographic market.

The process of defining the relevant geographic market is conducted parallel as the delineation of the relevant product market, considering the demand side and supply side substitutability in accordance with the SSNIP test.

In demand side substitutability, SSNIP test was focused on the question of whether businesses established elsewhere constitute "a real alternative source of supply for consumers". In other words, the test was focused whether a relative price increase on the product causes customers

[63] Commission Notice, Op. Cit., par 8.
[64] Case 27/76, [1978] ECR 207

to switch the purchase the product from elsewhere to such an extent as to render the price increase unprofitable.[65]

The assessment of supply-side substitutability in the context of geographical market definition focuses on whether a relative increase in the price of a product for instance in Area X, causes a switch on suppliers and suppliers based in Area Y supply customers in Area X to such an extent to render the price increase unprofitable.[66]

(a) **Evidences:** It is understood from the Commission's Notice that the Commission rely on some evidences in the assessment of the relevant geographic market:

- *Past evidence of diversion of orders to other areas:* Examination on the reactions of customers and competitors (whether customers sources elsewhere or whether suppliers based elsewhere entered the area) to price increases by a supplier applied in the past.
- *Basic demand characteristics:* The nature of demand for the relevant product may determine the geographic area. For example, the product may be produced for national preferences, national brands, language, culture etc.
- *Views of customers and competitors:* Research on the views of customers and competitors would be helpful in determining of the geographical market.
- *Current geographic pattern of purchases:* Examination of the geographic pattern of customers' purchases may provide evidence as to the scope of the geographic market. If customers purchase goods or supplies from companies located anywhere in EU, the geographic market can be considered EU-wide.
- *Barriers and switching costs in diverting orders to companies located in other areas:* Transport costs, import restrictions, duties, quotas and tariffs limiting trade or production may all contribute isolation of national markets. For instance, if the transport cost of the product is high it is more likely that the product has a narrower market. This is particularly important for products which are difficult to transport over long distances, such as fresh food.

[65] Van Bael I., Bellis JF., Op. Cit. p. 141
[66] Van Bael I., Bellis JF., Ibid p. 142

In *Napier Brown-British Sugar*[67], the Commission held that in determining whether a United Kingdom company had a dominant position in the production and sale of sugar the relevant market was Great Britain, since imports were very limited and acted as a complement to British Sugar, rather than alternative.

3.3 Temporal Market

The temporal quality of the market should also be considered. Competitive conditions may vary from season to season. For instance weather conditions may be an effective reason for competition during a specific part of the year.

The seasonal nature of fruit production was raised in *United Brands*[68]. When other fruits were plentiful in summer, demand for bananas was dropped. It was alleged that there were two separate seasonal markets, and United Brands had no market power over the summer months. However the Commission identified only one temporal market and held that United Brands was dominant within it. ECJ declined to deal with such issue.

One the other hand, in ABG[69], the Commission defined the temporal market of oil narrowly, through limiting the market to the period of crisis fallowed by the OPEC action in 1970's. It was held by the Commission that the companies had a special responsibility to supply existing customers on a fair and equitable basis, during the crisis. Therefore, the market was determined narrowly because of different conditions of the period of crisis.

4. DOMINANT POSITION

4.1 Definition

The concept of "dominance" has not been defined in Article 82 of EC Treaty. However, such concept has been constituted by the case law of European Courts.

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[67] 88/518/EEC (Case No IV/30.178 Napier Brown - British Sugar*),* OJ L 284 [1988] p 41-59
[68] Case 27/76, [1978] ECR 207
[69] ABG Oil Companies Operating in the Netherlands, OJ L 117/1, 1977

In *United Brands* [70], the ECJ laid down the following paragraph:

The dominant position referred to in article 86 [Article 82 of EC Treaty] *relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors , customers and ultimately of its consumers . In general a dominant position derives from a combination of several factors which, taken separately , are not necessarily determinative.*

The definition provided in United Brands has become the standard legal test in subsequent applications of Article 82.[71]

This definition contains two elements; the ability to behave independently and the ability to prevent competition.

The ability to behave independently on the market is the essential one. If the undertaking can decide its market activities and perform them without being affected from any "competitive constraint", such undertaking should be deemed as dominant in the market. [72]

The ability to prevent competition refers to a dominant undertaking's ability to prevent potential competitors from entering the market. This allows an undertaking to protect its dominant position.

Since the economic power is generally taken into consideration based on relevant market, the market share (market power) should be evaluated firstly. However, market power is not the sole factor in order to determine the dominance. Because the evaluation only based on market power would be insufficient to assess potential competition on the market and the quality of

[70] Case 27/76, [1978] ECR 207
[71] Case 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 461 (paragraph 38), Case 322/81 NV Michelin v Commission of the European Communities [1983] ECR 3461 (paragraph 30), Case 311/84 Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1985] ECR 3261 (paragraph 16), Case T 228/97 Irish Sugar plc v Commission of the European Communities [1999] ECR II-2969 (paragraph 70), Case T 128/98 Aéroports de Paris v Commission of the European Communities [2000] ECR II-3929 (paragraph 147).
[72] Sanlı K.C., Op Cit, p. 246

economic power which may be sourced by several different causes.[73] Therefore, the concept of market power and barriers to entry should be taken into account while explaining the dominant position.

4.2 Market power

One of the first steps in investigating dominance is to establish the market share held by the undertaking in question. The market share is not the sole evidence to show the dominance, but it is a very strong criterion for evaluating dominance. The market share is important because it has been held that an undertaking can only be deemed to be in a dominant position on a market if it has succeeded in winning a large part of that market.[74]

The ECJ has relied heavily on market shares. Market shares nearing 100% are very rare in practice.[75] For example in Tetra Pak 1(BTG License)[76] Tetra Pak's market share in the market for machines capable of filling cartoons by an aseptic process was 91,8%; and in BPB industries plc[77] BPB was found to have a market share in plasterboard of 96 – 98% in Great Britain and of 92 – 100% in Ireland, although the Commission excluded wet plastering from the definition of market.

In Hoffmann-La Roche[78], the ECJ considered market shares of approximately 93%, 84%, 75% and 65% as evidence of the existence of a dominant position. The ECJ said in Hoffmann-La Roche:

"*41 ... Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time ... is by virtue of that share in a position of strength ...*"

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[73] Sanlı K.C., Ibid, p. 246
[74] Case 27/76, [1978] ECR 207
[75] Rodger J. B., MacCulloch A, Op. Cit., p.86
[76] OJ [1988] L 272/27, [1988] 4 CMLR 881
[77] OJ [1989] L 10/50, [1990] 4 CMLR 464
[78] Case 85/76 [1979] ECR 461

ECJ took the view that very large market shares will give rise to a presumption of dominance, unless there were exceptional circumstances. This means that large market shares in exceptional circumstances may not mean that a firm is dominant. Additionally, large market share must exist for some time.

In Akzo case[79], ECJ referred to the passage from Hoffmann La Roche mentioned above. ECJ held that 50% can be considered large, in the absence of exceptional circumstances, an undertaking with such a market share will be presumed dominant. This resolution was repeating in Irish Sugar.[80]

Market shares below 50% can still be indicators of market power. When shares are between 30-50%, the market proportions of nearest competitor's should be compared with market share of the undertaking which is in question. In United Brands[81], the ECJ held that a firm with a market share in the 40-45% range was dominant. In the case, the closest competitor of UBC held only 16% of the market. When there is an important different between the market share of the undertaking in question and the market shares of its closest competitor this element may be considered as confirmation of the dominance. Accordingly, UBC held as dominant.

When market shares are small, other factors should be taken into consideration while determining the dominant position. In United Brands[82] the ECJ not relied only on the company's market share, but also on other factors in order to conclude that the undertaking had a dominant position. Also on Hoffmann-La Roche[83], the ECJ found that a market share varying between 20 and 50% in the period from 1972 to 1974 did not constitute a factor sufficient to establish the existence of dominant position on the market for B3 vitamins in the absence of other indicative factors.

[79] Case C-62/86 AKZO Chemie BV v Commission [1991] ECR I-3359; [1993] 5 CMLR 215
[80] Case T-228/97, Irish Sugar plc. v. Commission [1999] ECR II- 2969, upheld on appeal C-497/1999P, Irish Sugar plc v. Commission, 2001.
[81] Case 27/76, [1978] ECR 207
[82] Case 27/76, [1978] ECR 207
[83] Case 85/76 [1979] ECR 461

4.3 Barriers to Entry

The market proportion is not the sole issue to determine the market power of an undertaking. It should consider some other factors indicating dominance. The common point of such other factors is constituting barriers to entry to market. Barrier to entry is commonly defined as any cost which is higher for a new entrant to the market than for an existing market player.[84]

Barriers to entry can not be listed exhaustively. However, in accordance with the practices of EU law, the following titles can be listed.

- *Legal Provisions:* Statutory and regulatory provisions can be barriers. For instance, intellectual property rights protecting the exclusive right of holder is an example which protected by courts. In Tetra Pak 1, the acquisition of a company by Tetra Pak was deemed as a factor of dominance, because it prevented the entry to the market by other companies that are unable to gain access to the licensed technology. Government licensing protection is another example of statutory and regulatory provision.

- *Technological Advantage:* Superior technology may be strategic advantage for a firm, over potential competitors. The ECJ has relied on technology as an indicator of dominance in several cases, including United Brands[85], Hoffmann La Roche[86], Michelin[87] has adopted technological advantage as a barrier.

- *Financial Resources:* Access to a capital is a major barrier for specially small and medium sized companies. In Continental Can[88] and United Brands[89], this was considered as barrier to entry.

- *Economies of Scale:* Economies of scale can be a barrier to entry to a market, for instance which require complex manufacturing process. Such scale can be a huge

[84] Rodger J. B., MacCulloch A, Op. Cit., p.87
[85] Case 27/76, [1978] ECR 207
[86] Case 85/76 [1979] ECR 461
[87] Case 322/81 [1983] ECR 3461
[88] Case 6/72 [1973] ECR 215
[89] Case 27/76, [1978] ECR 207

difficulty for new entrants. The ECJ in United Brands[90], considered scale to be a factor indicating dominance.

- *Vertical Integration:* A good example of vertical integration was seen in United Brands[91]. UBC was highly vertically integrated in the production process of banana: growing, shipping, ripening and distribution. Therefore, UBC had a commercial stability which was a significant advantage over its competitors. The ECJ considered vertical integration as a factor of dominance since this could prevent the competitors to entry to the market.

- *Product Differentiation:* Product differentiation occurs when consumers choose the products same as quality but different due to advertising and brand loyalty. In United Brands[92], some of UBC's bananas were marketed with the brand of "Chiquita" which was well protected by trade marks. The advertising campaigns and brand image were factors indicating dominance. A new entrant would compete against the product and also against the consumers.

- *Conduct:* Conduct of an undertaking can be considered as a factor of dominance when an undertaking has a history of reacting to the new entrants with exclusionary conduct (for instance price discrimination), such discourages potential entrants from entrance to the market. In Akzo[93], the ECJ found that the ability of an undertaken to weaken or eliminate competitors was an indicator of dominance.

4.4 Collective Dominance

Article 82 prohibits abusing a dominant position for "one or more undertakings". Article 82 applies not only a situation of single firms but also to a situation where two or more undertakings jointly dominant.[94] Collective dominance can be explained as "joint dominance" where two or more independent firms enjoy power over the market.

[90] Case 27/76, [1978] ECR 207
[91] Case 27/76, [1978] ECR 207
[92] Case 27/76, [1978] ECR 207
[93] Case C-62/86 [1991] ECR I-3359
[94] Van Bael I., Bellis JF., Op. Cit. p. 119

In Flat Glass case[95], the Commission found that three companies had a collective dominant position. On appeal, the ECJ stated that "*...there is nothing in principle to prevent independent economic entities from being, on a specific market, united by such economic links that by virtue of that fact together they hold a dominant position vis-a-vis the other operators on the same market*".[96]

Other definition offered by the ECJ is in Cewal[97];

"two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity"

In accordance with the ECJ, the collective dominance can be understood by examining the economic links or factors which give rise to a connection between the undertakings concerned and whether these allow the undertakings to act independently of their competitors, their customers or their consumers. Using such definition it can be interpreted that a collective position is established by a connecting factor which causes the undertakings to either present themselves on the market as a collective entity or behave on the market as collective entity.[98]

As mentioned above, it is necessary to examine the factors that give rise to a connection between the undertakings concerned, in order to establish the existence of collective entity on the market. For instance, if undertakings have concluded cooperation agreements that lead them to coordinate their conduct on the market, such constitutes a connection between them. However, the existence of an agreement is not indispensable to a finding of a collective dominant position. Such a finding may be based on other connecting factors and depends on an economic assessment and structural assessment of the market in question. It follows that the structure of the market and the way in which undertakings interact on the market may give rise to a finding of collective dominance.[99]

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[95] OJ [1989] L 33/44, [1990] 4 CMLR 535
[96] Van Bael I., Bellis JF., Op. Cit. p. 120
[97] Joined Cases C-395&396/96P, Compagnie Maritime Belge Transports SA v. Commission, [2000] ECR I-1365, paragraph 36.
[98] Monti G., The Scope of Collective Dominance under Article 82 EC, CMLR Vol. 38, No:1 February 2001, p. 133
[99] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, public consultation, available at: http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf

In oligopolistic markets, undertakings may be able to adopt a common strategy that allows them to present themselves or act together as a collective entity. Coordination may take various forms. Such as coordination on prices, limiting production, dividing of market for instance by geographic area or other customer characteristics. The ability to sustain such co-ordination must be carefully examined in each case. [100]

5. ABUSE

Article 82 does not prohibit the existence of "market power" or "monopoly", however the abuse of dominant position is prohibited. Article 82 does not provide the definition of abusing. In the article, abusing is explained by giving examples. However, such is a non-exhaustive list.

In Hoffmann La Roche, the ECJ provided following definition for the concept of abuse:

"*The concept of an abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*"[101]

The examples of an abuse listed under Article 82 are limited to cases where the abuse directly exploits suppliers or customers ("exploitative abuses"). Exploitative abuse can be defined as an activity which able the undertaking in dominant position to gain interests that can not be achieved in a competitive market, by exploiting its suppliers and customers.[102]

However, Article 82 also applies to cases where the abuse does not directly harm the dominant firm's trading partners or customers, but results in a lessening of competition ("anti-

[100] Ibid, available at http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf

[101] Case 85/76 [1979] ECR 461, paraghraph 91
[102] Sanlı K.C., Op Cit, p. 246

competitive practices"). In Continental Can[103], the question before the ECJ was whether mergers could be prohibited under Article 82. One argument against this was that Article 82 was designed to prevent the direct exploitation of consumers and not to deal with the more indirect adverse effects that might be produced by harming the competitive process. The ECJ rejected this. It was not possible to draw a distinction between direct and indirect effects on the market; instead it was necessary to interpret Article 82 in the light of the spirit of the EC Treaty. Continental Can confirmed that the Article 82 can be applied to anti-competitive abuses as well as to exploitative ones.[104]

5.1 Abusive Practices (other than pricing activities)

The concept of an abuse prohibited by Article 82 can take many forms. We will analyze the types of abuse, but other than pricing practices according to the main subject of this thesis.

Types of abuse to be reviewed in this thesis include:

- Refusals to deal
- Discrimination
- Tying
- Unfair terms and conditions
- Other Types of Abuse
  - Exclusive Dealing Arrangements
  - Abusive Licensing Practices
  - Market sharing
  - Limiting production, markets and technical development
  - Mergers and Acquisitions

5.1.1 Refusals to Deal

Dominant undertakings are generally free to choose the parties with whom they wish to enter into contract. However, sometimes, refusal to deal with a third party may constitute an abuse within the meaning of Article 82.

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[103] Case 6/72, [1973] ECR 215
[104] Whish R., Op Cit, p.197

It is clear that in the absence of an objective justification, a refusal to supply an existing customer or a refusal to grant access to "essential facilities" will constitute an abuse.

(a) Refusal to Supply Customers:

In Commercial Solvents[105], the Commerical Solvents Corporation ("CSC") was the only producer of raw materials for the industrial production of ethambutol, a product that is used in drugs for treating tuberculosis. An Italian company, the Istituto Chemioterapico Italiana ("Istituto") acted as reseller of these raw materials produced by CSC and supplier of Zoja, an Italian producer of ethambutol. CSC group decided to stop supplying raw materials within the Community and it started itself to manufacture ethambutol.

The ECJ indicates in this case that a dominant undertaking's refusal to supply can constitute an abuse and a risk of eliminating the competition, when the dominant undertaking ceases to supply materials to an existing customer and its own entry into the market of customer.

In Hugin case[106], it was considered to abusive practice for Hugin, a Sweedish manufacturer of cash registers, to stop supplying spare parts to a UK company, Liptons which was in repair and maintenance market of cash registers. Hugin was dominant in the market for its own spare parts. It was held that Hugin abused its dominant position by refusing to supply its product to customers, without an objective reason. Because, this refusal prevented the customer to continue to its services and businesses in the market. Therefore, such refusal eliminated all competitors from the market for that service and business.

In Telemarketing[107] case, Centre-Belge had been engaged in "Telemarketing" advertisements that include a telephone number which the viewer can call to obtain information about the advertised product in RTL television station under an agreement with Information Publicite the advertising agent of Compagnie Luxembourgeoise de Telediffusion ("CLT"). Centre Belge made available its telephone lines and team of telephonists to advertisers and television station. On the expiry of the agreement between Centre Belge and Information Publicite, CLT

[105] Case 6/72, [1973] ECR 215
[106] Case 22/78 Hugin v Commission [1979] ECR 1869, [1979] 3 CMLR 345
[107] Case 311/84 [1985] ECR 3261

refused to accept further advertisements of tele-marketing unless the telephone number shown was that of Information Publicite. This constituted exclusion of Centre Belge.

The ECJ stated that:

"... an abuse within the meaning of Article [82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities upon a neighboring but separate market, with the possibility of eliminating all competition from such undertaking."

In this case, the ECJ held that it would be an abuse for a television station to refuse without objective justification to supply its services to any tele-marketing undertaking other than a member of its own group.

In United Brand[108], United Brand refused to supply bananas to Olesen, a Danish distributor, because Olesen had taken a part in advertising campaign by one of United Brand's competitors. United Brand's refusal to supply involved a measure to punish a customer for selling competing products. The ECJ stated that an undertaking in a dominant position cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.

(b) Refusal to Access to "Essential Facilities":

"Essential Facilities" has been defined as a facility or infrastructure, without access to which competitors cannot provide services to their customers.[109] According to the case law, refusal to give access to essential facilities may constitute an abuse for a dominant undertaking. Essential facilities depend upon the presence of "technical, legal or even economic obstacles" preventing competition on the relevant market.[110] Such obstacles may be, for example, the exercise of an intellectual property right, an exclusive license, investment costs or natural advantages which can not be obtained. In Bronner, Advocate General Jacops stated:

[108] Case 27/76, [1978] ECR 207
[109] Bellamy C., Child G., European Community Law of Competition, Fifth Edition, Sweet&Maxwell, 2001, p.738
[110] Case C-7/97, Oscar Bronner v. Mediaprint [1998] ECR I - 07791

"*An essential facility can be product such as a raw material or a service, including provision of access to a place such as a harbour or airport or to a distribution system such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favor of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct products or services*."[111]

In Bronner, the ECJ was about refusal to access to a new customer. The issue was whether it was an abuse for a newspaper publisher to refuse a competitor access to the only nationwide home delivery service. The ECJ considered the "essential facility" for the first time in such case.

Bronner was seeking access to Mediaprint's home delivery services for its newspapers. Bronner argued that Mediaprint obliged to allow access on market conditions and prices since Mediaprint operated the only economically viable home-delivery scheme existing in Austria on a national scale. The ECJ noted that in previous cases such as Commercial Solvents and Telemarketing it had concluded that the refusal to access could constitute an abuse to the extent that the conduct in question was likely to eliminate all competition on the part where the undertaking trying to access. The ECJ added that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme. Applying such principles, the ECJ concluded that by withholding access to its home delivery service the newspaper publisher was not acting abusively even if in a dominant position. There were no legal, technical or economical obstacles that made impossible or difficult to establish a competing delivery system.

In many cases of "essential facilities" the market has been defined as where accessing to the facilities in question is necessarily "indispensable" for the customers to be competed in the market.

[111] Case C-7/97 [1998] ECR I - 07791

For instance, in IMS Health[112], IMS Health abused its dominant position by refusing to license to two German competitor, the "1860 brick structure" which was an essential facility of between pharmaceutical companies. The Commission concluded that use of the "1860 brick structure" was indispensable to compete on the relevant market. However, the ECJ held that a refusal to grant a license cannot in itself constitute an abuse, but that the exercise of an exclusive right may, in exceptional circumstances, involve abusive conduct.[113]

In Magill[114], three television broadcasting companies refused to license the Magill TV guide to reprint their weekly programme listings. Because of this refusal of three television broadcasting companies, viewers who wished to obtain advance weekly programme information were forced to buy three separate guides published by the three companies respectively. The Commission held that the companies abused their dominant positions and prevented the introduction of a new product (i.e. weekly planner) to the market. The ECJ found that refusal to grant a license cannot in itself abusive practice. However, the ECJ held that there were exceptional circumstances justfying a finding of abuse:

a) there was consumer demand for a weekly television guide, the refusal to license of three broadcasting companies prevented appearance of a new product in the market;

b) no objective justification existed for the refusal; and

c) since three companies denied access to the indispensable material for the completion of the guide, they excluded all competition on the market.[115]

Therefore, the ECJ found that the conduct of such broadcasting companies fell within the categories of conduct which could be abusive.

In Sealink/B&I-Holyhead[116], Sealink operated a port at Holyhead in Wales and it operated a ferry service from Holyhead to Ireland. A company, B&I argued that Sealink organised its sailing schedules in order to cause disruption of B&I's services and inconvenience to its

[112] Case C-418/01, IMS Health Inc. v. Commission [2004] ECR I - 05039
[113] Case C-418/01, [2004] ECR I – 05039, paraghraph 34-35
[114] Case C-241&242/91/P, RTE and ITP v. Commission and Magill TV Guide Ltd., [1995] ECR I - 743
[115] Bellamy C., Child G, Op. Cit., p.745
[116] OJ [1989] L 43/27, [1992] 5 CMLR 255

passengers. In such case the Commission ordered interim measures requiring Sealink to change its schedules, because the behaviour of Sealing was constituting abuse.

In such case the Commission stated that;

"*A dominant undertaking which both owns or controls and itself uses an essential facility [...] and which refuses its competitors access to that facility or grants access to competitors only on terms less favorable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 82, if the other conditions of that Article are met.*"[117]

In the second case of Sea Containers v. Stena Sealink, the Commission concluded that Sealink abused its dominant position on the market of port services by refusing to give access to the port on reasonable conditions to a potential competitor. The court followed its first decision in Sealink – Holyhead, however it added the principle of essential facility applies "when the competitor seeking access to the essential facility is a new entrant into the relevant market". In two cases (Sea Container - Stena Sealink and Sealink – Holyhead) , the Commission ruled out that essential facility doctrine is applicable when the foreclosed competitor is unable to duplicate practically o reasonably the facility or its economic function. The duplicability of the facility must not be economically or physically realistic.[118]

Conclusions on abusive action occurred from refusal to access to an essential facilities[119] can be defined as follows:

- the owner of the facility should be dominant,
- there should be a barrier to entry for competitors of the dominant undertaking or competitors without access should be subject to a serious competitive handicap
- refusal to access essential facility should significantly effect on competition in the market,
- the facility should be "essential",

[117] OJ [1989] L 43/27, [1992] 5 CMLR 255
[118] Capobianco A. , The essential facility doctrine: similarities and differences between the American and European approaches, European Law Review, Sweet & Maxwell, December 2001
[119] Willis P., Introduction To EU Competition Law, LLP, 2005, p.145, 146

- the refusal should not be objectively justifiable.

5.1.2 Discrimination

Apart from price discriminations (which is not the subject of this thesis), particularly significant aspects of discrimination under the EC Treaty are discrimination on grounds of nationality means that discrimination based on nationality between customers or suppliers or persons. Additionally, Article 82 (c) identifies as an abuse in the sense of applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(a) Discrimination between Nationals or Residents of Different Member States

Discrimination between nationals or residents of different Member States is contrary to Article 82 (c).

In Sacchi[120], the ECJ stated that discrimination between undertakings or products of a given Member State and those of other Member States regarding with the access to television advertising is no doubt an abuse if practicing by a dominant undertaking.

Case law confirmed that not to treat nationals of different Member States in a discriminatory manner is a duty of dominant undertakings.[121] In GVL[122], GVL was a German society engaging in the exploitation of performer's rights. GVL refused to conclude management agreements with foreign artists who had no residence in Germany. GVL argued that the extent of copyright protection may be differ from other Member States and the rights of foreign artists in respect of the exploitation of copyright can not be recognized by GVL. GVL also alleged that the differential treatment was not based on nationality or residence, but on the nature of the rights of the artist. The ECJ rejected such arguments.

[120] Case 155/73, Italy v. Sacchi, (1974) ECR 409, (1974) 2 CMLR 177
[121] Van Bael I., Bellis JF., Op. Cit. p. 959
[122] Case 7/82 GVL v Commission 1983 ECR 483

In Football World Cup, it was concluded that the Comité Francais D'Organisation de la Coupe du Monde de Football 1998 abused its dominant position since they favored consumers who provide address in France, in the ticket arrangements[123].

(b) Application of Dissimilar Conditions to Equivalent Transactions

In accordance with the Article 82(c), application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, may consist of an abuse.

In BPB Industries[124], the Commission concluded that favoring certain customers through giving priority to their orders in times of temporary shortages can be an abuse of a dominant position. BPB gave priority to orders from customers who were not also trading in plasterboard. Since BPB was the only manufacturer of plasterboard in UK, the only competition is the imported plasterboard. The Commission stated that;

"*The adoption and implementation of a policy of reserving priority orders of plaster for customers who were not stockists of imported plasterboard was an abuse of [BPB's] dominant position in the supply of plasterboard, for the criterion for the selection of those merchants who were eligible for priority supplies of plaster was not objectively justified, but designed only to reward merchants dealing exclusively in [BPB] plasterboard while treating less favorably those dealing in imports. Consequently, the arrangements were liable to affect the future behavior of [BPB] customers by encouraging them to sell only [BPB] plasterboard*."[125]

In Hilti, Hilti made a selection of the most important customers of its competitors and offered them especially favorable conditions such as prices. Since other customers of Hilti did not receive such favorable conditions, the conditions were found by the Commission to be selective and discriminatory.[126]

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[123] Football World Cup, OJ 2000 L5/55, [2000] 4 CMLR 963
[124] OJ 1989 L10/50, Case C-310/93 P. BPB Industries plc v. Commission [1995] ECR I-896.
[125] C-310/93 P [1995] ECR I-896, on appeal to Court of First Instance: BPB Industries plc and British Gypsum Limited v. Commission [1993] ECR II-389, paragraph 94
[126] OJ [1988] L65/19, [1989] 4 CMLR 667

5.1.3 Tying

In Article 82, the type of abuse of dominant position called "tying" is defined as "*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*."

Tying is concluding an agreement including supplementary obligations that by their nature or commercial usage have no connection with the subject matter of the agreement. In order to establish the abuse type of tying, there must be a compulsory term and there must no objective justification for the tying of the two products.[127] And also, two separate product markets should appear for tying (a) the "tying" product market, and (b) the "tied" product market.[128]

An important decision on tying was held in Microsoft[129], in which the Commission decided that Microsoft had illegally tied its Windows Media Player ("WMP") into its Windows operating system and such decreasing competition for other versions of media player software and reducing consumer choice. The Commission imposed a fine of €497 million and adopted a number of remedial measures.

In Microsoft, the Commission set forth a test for tying under Article 82 as follows:

"*Tying prohibited under Article 82 of the Treaty requires the presence of the following elements (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition.*"

According to this test, the following elements need to be fulfilled for an infringement of Article 82;

(i) dominance of the seller in the market for the tying product,

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[127] Willis P., Op. Cit., p.145, 146
[128] Van Bael I., Bellis JF., Op. Cit. p. 962
[129] Case COMP/C-3/37.792 Microsoft v. Commission, Commission Press Release of 24.03.2004, IP/04/382

(ii) existence of a tied product that is separate from the tying product,

(iii) coercion (forcing customers to buy the tied product together with the tying product)

(iv) a restrictive effect on competition for the tied product, and

(v) absence of an objective and proportionate justification for the coercion.

Dominance is a pre-condition for abusing under Article 82, the supplier must have power in the market for the tying product. Tying also requires that the tied products should be distinct products and not parts of the same product. If a dominant undertaking promotes or advertises a tied product as a distinct product or if it applies different commercial conditions for the tying and tied product, this would constitute strong evidence that the tied and the tying product are indeed separate. Additionally, coercion should be exists in order to have an impact on competition. If a dominant undertaking denies customers the realistic choice of buying the tying product without the tied product, coercion would arises. Coercion may appear as a contractual term[130], a refusal to supply the tying product separately[131], technical difficulty (preventing the user from using the dominant product without the tied product), a financial tying (a package discount that makes it commercially meaningless to buy the tied product separately), an elimination of guarantees[132] or combination of these practices. Further, tying by a dominant undertaking should distort competition, tying should have an actual or potential adverse effect on the market. An evidence of an appreciable negative effect on competition is generally sufficient in order make a decision on tying. Finally, the dominant undertaking should not be able to objectively justify its tying behavior. Otherwise, justification of tying must be genuine and must be made by providing specific evidences.[133]

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[130] Case T-83/91 Tetra Pak v. Commission [1994] ECR II-755 [1997] 4 CMLR 726 (Tetra Pak II) , paraghraph 137, in Tetra Pak II, the Commission stated that "*The Court of Justice has in particular ruled that where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market.*"

[131] Case T-30/89 Hilti AG v. Commission [1990] ECR II-163, on appeal Case C-53/92 Hilti AG v. Commission, [1994] ECR I-667, in Hilti the Commission stated that, "*These [tying] policies leave the consumer with no choice over the source of his nails and as such abusively exploit him*"

[132] In Hilti, Hilti refused to give guarantee on its nail guns, if used with non Hilti nails.

[133] Dolmans M., Graf T., Analysis of Tying Under Article 82 EC (*The European Commission's Microsoft Decision in Perspective*) , World Competition, 27 (2), Kluwer Law International, 2004

(a) Case Law on Tying:

In Hilti[134], Hilti was dominant in the supply of nail guns and in the cartridge strips and nails. There were a number of nail producers who were able to produce nails which were usable in Hilti machines but who could not produce cartridge strips. Hilti tied the supply of nails into the supply of cartridge strips in order guarantee that customers purchased cartridge strips from Hilti also bought nails from Hilti for use with those cartridges.

The Commission held that the conduct of Hilti was abusive and the decision was upheld by the Court of First Instance. In the case, Hilti argued that nail guns, cartridge strips and nails formed a single relevant product market. The Court rejected the argument. It is stated by the Court that Hilti's contention that guns, cartridge strips and nails should be regarded as forming an indivisible whole, "a powder-actuated fastening system" is in practice tantamount to permitted producers of nail guns to exclude the use of consumables other than their own branded products in their tools.

It was made clear in Hilti that if there is demand to acquire the tied product from a different source than the tying product then the dominant company must give consumers a realistic choice to do so, irrespective of whether these products constitute complements or are otherwise connected by "natural links" or "commercial usage".[135]

In Tetra Pak II[136], Tetra Pak tied the sale of carton packaging materials to the sale of its filling machines by requiring the purchasers of the machines to agree to purchase from Tetra Pak all their supplies of cartoons. The argument of Tetra Pak was that a natural link between cartons and filling machines were exists and that tied sales of two were normal commercial usage.

The Court of First Instance rejected the argument. The ECJ upheld the rejection of the Court of First Instance and stated that:

"*It must moreover, be stressed that the list of abusive practices set out in the second paragraph of Article [82] of the Treaty is not exhaustive. Consequently, even where tied sales*

[134] Case T-30/89 [1990] ECR II-163
[135] Dolmans M., Graf T., Op. Cit., p.225
[136] OJ 1992 L 72/1 [1992] 4 CMLR 551, on appeal Case T-83/91 Tetra Pak v. Commission [1994] ECR II-755 [1997] 4 CMLR 726, Case C-333/94P Tetra Pak v. Commission [1996] ECR I-5951 [1997] 4 CMLR 662

of two products are in accordance with commercial usage or there is natural link between the two products in question, such sales may still constitute abuse within the meaning of Article [82] unless they are objectively justified."[137]

With Hilti and Tetra Pak II, the ECJ established that a tying abuse may arise even in cases where the two products in question are linked by nature or commercial usage.[138]

A tying obligation regarding with the services which are ancillary to the supply of the principal product may also infringe Article 82. It was held in Tetra Pak II that the clauses requiring the customer to obtain its maintenance and repair services (including supplies of any spare parts) for the machine from Tetra Pak was abusive.[139] The clauses relating to obtaining services and maintenance were applied for the entire life of machine not just for the guarantee period; therefore the clauses were not justified with the guarantee purposes. Since the object and effect of the clauses were to make the purchase of the machine subject to the acceptance of additional services of a different type, the tying act of Tetra Pak was abusive. The ECJ also held that the overall strategy of Tetra Pak aimed at making the customer totally dependent on Tetra Pak for the entire life of the machine, thereby excluding competition on the markets of both cartons and machines.[140]

In IBM, the Commission considered that IBM abused its dominant position by offering its most powerful range of computers (the system 370) together with a capacity of main memory ("memory bundling") and the basic software ("software bundling") included in the price. After the Commission initiated a proceeding, IBM undertook to offer its System 370 in European Community either without main memory or with only such capacity as was strictly required for testing. IBM also undertook to take some measures to enable other undertakings to attach both hardware and software products of their design to the System 370. Therefore, the Commission terminated its proceeding without a formal decision.[141]

[137] Case C-333/94P [1996] ECR I-5951 [1997] 4 CMLR 662, paragraph 37
[138] Dolmans M., Graf T., Op. Cit., p. 229
[139] Case T-83/91 [1994] ECR II-755 [1997] 4 CMLR 726, paragraph 135
[140] Bellamy C., Child G, Op. Cit., p.749
[141] Van Bael I., Bellis JF., Op. Cit. p. 967

In Digital[142], according to the Commission, Digital had tied the supply of hardware services and software services by making the prices more attractive when included in a hardware and software service package than when sold on a stand alone basis. After the undertaking of Digital on permissible discount scheme, the Commission decided not to pursue its case.

As mentioned above, Microsoft[143] case established a test for tying. The Commission demonstrated that all elements necessary for a finding of a tying were present in this case. Microsoft was dominant, near monopoly, over PC operating systems, controlling a market share of around 95 per cent worldwide. Media players provided to access point for users to digital content and were distinct products from PC operating systems. A number of independent developers that do not produce operating systems were active in media players. By denying customers the choice to acquire Windows without WMP, customers were forced to also acquire WMP. The coercion exercised by Microsoft had a contractual and technical nature since WMP was included in the license for Windows and Microsoft had the possibility to remove WMP before the acquisition. Microsoft tying did not constitute genuine integration. The Windows/WMP bundle could be substituted using third party's media player. Microsoft could not explain why it was necessary to deny customers the choice of acquiring only the operating system without the tied products. The Commission required Microsoft to offer PC manufacturers within 90 days an unbundled version of Windows not containing WMP. [144]

In 2005, the Commission appointed technical advisers in order to monitor the compliance of Microsoft with the decision of the Commission. However, the Commission concluded in a decision that Microsoft was not complying with its obligations to (a) supply complete and accurate interoperability information; and (b) make that information available on reasonable terms. The Commission warned that should Microsoft not be in compliance with this obligation, it would face a daily penalty payment of up to €2 million[145].

However, the Commission's conclusion was that as of June 2006, Microsoft has still not complied with its obligation pursuant to the Decision to supply complete and accurate interoperability information. Therefore, the Commission adopted a decision imposing on

[142] Digital, Report on Competition Policy 1997, (Vol. XXVII) p.153 available at; http://ec.europa.eu/comm/competition/annual_reports/rap97_en.html
[143] Case COMP/C-3/37.792 Microsoft v. Commission, Commission Press Release of 24.03.2004, IP/04/382
[144] Dolmans M., Graf T., Op. Cit., p. 229
[145] Case COMP/C-3/37.792 Microsoft v. Commission, Commission Decision of 10.11.2005, available at; http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/art24_1_decision.pdf

Microsoft a penalty payment of €280.5 million for non-compliance with its obligations. This decision also warns that should Microsoft not be in compliance with its obligations from 31 July 2006, it is liable to face a daily penalty payment of up to €3 million from that date[146].

On the basis of an analysis of all the relevant evidence on the file, the Commission's conclusion was that up until 21 October 2007 Microsoft had not complied with its obligation pursuant to the decision to give access to the interoperability information on reasonable and non-discriminatory terms. Therefore, on 27 February 2008, the Commission adopted a decision imposing on Microsoft a penalty payment of €899 million for non-compliance with its obligations[147].

5.1.4 Unfair Terms and Conditions

In Tetra Pak II[148], the Commission found that Tetra Pak had abused its dominant position through imposition on Tetra Pak users of some contractual clauses in Member States. Particularly, Tetra Pak was abusing its dominance by governing the sale and leasing of Tetra Pak equipment and cartons which were found to have no link with the purpose of the contracts.

Other than the tying mentioned above, Tetra Pak also prohibited using of accessory equipment to Tetra Pak equipment or any modification on the Tetra Pak equipment, adding or removing parts from the machine. The Commission found that such prohibition deprived of the property rights of purchasers.

There was also a requirement regarding with the approval of Tetra Pak for the resale or transfer of use of equipment. It was also found abusive by the Commission.

Furthermore, Tetra Pak had an exclusive right to maintain and repair equipment beyond the guarantee period for the entire life of the equipment. This term was also found abusive. The Commission concluded that such term gave Tetra Pak an indirect control over the purchaser to ensure that he complied with the contractual conditions. The linkage between the guarantee

[146] Commission Press Release of 12.07.2006, IP/06/979
[147] Commission Press Release of 27.08.2008, IP/08/318, further information on the case is available at; http://ec.europa.eu/comm/competition/antitrust/cases/microsoft/index.html
[148] Case T-83/91 [1994] ECR II-755, [1997] 4 CMLR 726

and fulfillment of all contractual conditions, including the exclusive use of Tetra Pak cartoons was condemned by the Commission.

The issue of unfair trading and conditions was also addressed in case BRT v. SABAM[149], by the ECJ, in the context of copyrights. SABAM was a Belgian copyright collection society which was required its members to assign all their present and future copyrights to SABAM and to allow SABAM to exercise these rights for five years after their withdrawal from the association. The ECJ noted that the association should operate in order to protect the rights and interests of individual members against major exploiters and distributors and stated that any appraisal must balance the requirement of maximum freedom for authors to dispose of their works with the goal of effective management of their rights. The ECJ also noted that the practices of the associations should not exceed the limit absolutely necessary for the attainment of its object. The ECJ concluded that the compulsory assignment of all copyrights (both present and future) can constitute an unfair condition, especially if such assignment is required for an extended period after the withdrawal of members.

5.1.5 Other Types of Abuse

(a) Exclusive Dealing Arrangements

In Tetra Pak II again, Tetra Pak obliged its customers to use only Tetra Pak cartons on Tetra Pak equipments and to obtain supplies exclusively from Tetra Pak by contractual terms. The Commission stated that through such contractual system, the customers of Tetra Pak can not use any packaging other than Tetra Pak and also they can not obtain supplies of packaging from any source other than Tetra Pak. According to the Commission, the contractual system ruled out both inter-brand competition and intra-brand competition.[150]

In Hoffmann-La Roche, it is stated by the ECJ that:

"*An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of*

[149] Case 127/73 Belgische Radio en Televisie v. SV SABAM and NV Fonior [1974] ECR 313
[150] Case T-83/91 [1994] ECR II-755, [1997] 4 CMLR 726, on appeal to the ECJ [1996] ECR I-5951

their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [82] of the treaty ...."[151]

In such case, it was held by the ECJ that dominant firms abuse their dominant positions by entering into exclusive dealing obligations.

Sometimes de facto exclusivity may be prohibited under Article 82. In Van den Bergh foods[152], it was held that a provision in a contract providing that the freezers supplied by dominant undertaking could only be used for the dominant ice-cream products meant that outlets became exclusive sellers of the dominant undertaking's product. Therefore, installing of more than one freezer on the premises of retailers was not applicable because of such de facto exclusivity.

(b) Abusive Licensing Practices

One of the abusive licensing practices is abusive licensing policy adopted by dominant undertakings. For instance the license agreements of Microsoft required PC manufacturers to pay royalties to Microsoft on the basis of the number of computers shipped, regardless of whether such computers contained Microsoft's software.

In Microsoft[153], the Commission found these agreements effective on impeding the market for other producers of software. The Commission ended the case after accepting an undertaking from Microsoft.

In Carlsberg/Interbrew[154], Carlsberg gave an exclusive right of license regarding with selling Carlsberg beers in Belgium and Luxembourg, to Interbrew which is a dominant undertaking in Belgium. The Commission found that the exclusive license was an abusive licensing in the market. The parties agreed on deletion of exclusivity from the contract and Carlsberg established a joint venture to compete with Interbrew in various markets. Consequently, the Commission terminated the case. With such case, the Commission gave Belgium consumers

[151] Case 85/76 [1979] ECR 461, paraghraph 89
[152] Case T-65/98 Van den Bergh Foods Ltd v Commission [1998] ECR II-02641
[153] Case COMP/C-3/37.792 Commission Press Release of 24.03.2004, IP/04/382
[154] Twenty-fourth report on competition policy, points 209- 213, available at http://ec.europa.eu/comm/competition/annual_reports/ (01.08.2008)

the right of choose between beer producers, provided lower price for beer and effective competition on the sale of such products.

In Swedish Match Sverige / Skandinavisk Tobakscompagni[155], the Commission considered the relationship between two cigarette producers who are in dominant positions in Sweden and Denmark, an abuse of dominant position contrary to Article 82. Swedish Match which was dominant in the Swedish cigarette market, had an exclusive license to manufacture and distribute the Danish company's brand there, Swedish Match was also responsible for setting prices and brand management. The Commission approved the arrangement after the parties agreed to modify the agreement. Under the modified agreement, the Swedish Match would continue to manufacture the cigarettes at issue in the Swedish market and would continue to handle the physical distribution of the cigarettes on a non-exclusive basis.
The Danish company would however, become solely responsible for all sales, marketing and pricing of the cigarettes in Sweden with immediate effect.

In Tetra Pak II[156], Tetra Pak violated the Article 82 (b) by imposing a compulsory grant-back clause on its customers. Such clause had discouraged the customers from developing technical improvements.

A refusal to license may also constitute an abuse. In Tetra Pak case, Tetra Pak was dominant in the market of machines which sterilizing milk cartons and in the market of supplying of such cartons. Tetra Pak acquired Liquipak in 1986, which had an exclusive license from British Technology Group (BTG) on a technology that adapted cartons to aseptic filling for UHT treated liquids. This acquisition provided an advantage to Tetra Pak that its competitors did not have. As in Continental Can[157], the ECJ stated that there may be an abuse if a dominant firm strengthens its position and the resultant degree of such dominance substantially fetters competition. The Commission found that the advantage of Tetra Pak prevented or at least delayed the entry of a new competitor into the market and reduced the possibility of any effective competition. Elopak, was a new competitor and had co-operated with Liquipak in developing an aseptic packaging machine. However, since Tetra Pak acquired Liquipak, Tetra Pak obtained exclusive access to the BTG technology. The

[155] Twenty-seventh report on competition policy, point 66, available at http://ec.europa.eu/comm/competition/annual_reports/ (01.08.2008)
[156] Case T-83/91 [1994] ECR II-755, [1997] 4 CMLR 726, on appeal to the ECJ [1996] ECR I-5951
[157] Case 6/72 [1973] ECR 215

technology was the most important element to enter to the market. Therefore, it was concluded that Tetra Pak had significantly raised the barriers to entry to the market. As long as Tetra Pak had the exclusivity to the license of BTG technology, this constituted a continued abuse.

In Renault case[158], a third party wished to be granted licensed in order to produce spare parts and claimed that a refusal to grant such license was an abuse of dominant position under Article 82. The ECJ held that in the absence of Community harmonization of laws on designs and models, it was a matter for national law to determine the nature and extent of protection for such matters.

In Magill[159], Magill wished to publish the listings of three television companies broadcasting in the UK and Ireland in a single weekly publication. At that time, there was no publication containing the details of all three companies' programmes for a week in advance. Since there was a copyrights protection for TV listings in UK and Ireland, Magill wished to have license for TV listings. The Commission concluded that the three television companies had abused their individual dominant positions in relation their own listings through refusing to give them to Magill. The Commission decision was appealed. The ECJ held that the refusal of license constituted an abuse which prevented the appearance of a new product while there was a potential consumer demand. The ECJ also noted that there was no objective justification for the refusal.

In IMS Health[160], the Commission granted an interim measure against IMS Health which was the leader in the world in data collection on pharmaceutical sales and prescriptions, because of its refusal to grant a license to competitors to enable them to have access to its copyrighted format for processing regional sales data (1,860 brick structure). According to the Commission, 1,860 brick structure of IMS Health was an industry standard and pharmaceutical companies were dependent upon receiving sales data in this format. The Commission ordered IMS Health to give its competitors access to the market by licensing to use of its brick structure.

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[158] Case 53/87 Conzorzio Italiano della Componentistica di Ricambio per Autovericoli and Maxicar v Regie National des Usines Renault [1998] ECR 6039, [1990] 4 CMLR 265
[159] Case C-241&242/91/P, [1995] ECR I - 743
[160] Case 418/01 [2004] ECR I-5039

The ECJ agreed with the complainants in the IMS Health case that the participation in the elaboration of IMS's brick structure and the costs to be incurred in switching to an alternative structure are relevant for the analysis under the Article 82 insofar as they affect the ability of complainants to offer a competitive product with IMS.[161]

(c) Market Sharing

Market sharing agreements to be concluded between dominant undertakings or between a dominant undertaking and its competitor(s) may be deemed as abusive practices.

In Flat Glass case[162], it was found out by the Commission that three Italian manufacturers of flat glass abused their collective dominant positions through restricting the consumer's ability to choose their sources of supply and limited the market outlets of other manufacturers. This limitation of other manufacturers may be interpreted as a kind of market sharing. However, in the case, the ECJ decided that the undertakings practices were not abusive.

In Decca Navigator System case[163], Racal Decca was a dominant undertaking in the market for commercial receivers of DNS signals. It concluded some agreements with other undertakings and it reserved the market for commercial receivers for itself left the market of pleasure-boat receivers to the other companies. This was market sharing preventing competitors to enter to the market. According to the Commission, Decca abused its dominant position by these actions, however did not impose any fine since the action of Decca was not intentional.

(d) Limiting Production, Markets and Technical Development

According to the Article 82(b) of the EC Treaty, limiting production, markets or technical development to the prejudice of consumers are abusive practices.

For instance, quotas on production, sell and distribution on products or spare parts, prohibition on using of data or similar technical transactions which cause to damage to

[161] Völcker SB., Developments in EC Competition Law in 2004: An overview, Common Market Law Review, Vol. 41 No. 4, Kluwer Law International, 2004, p.1710
[162] OJ [1989] L 33/44, [1990] 4 CMLR 535
[163] OJ [1989] L43/27, see also Van Bael I., Bellis JF., Op. Cit. p. 977

consumers can be deemed as abusive practices.[164] Such kind of limitations of market can arise out of horizontal or vertical agreements or through actions of dominant undertakings.

Prohibition of exportation-importation provided for dealers in Eurofix-Hilti case, prohibition of using television on advertisements in Telemarketing case, prevention of an airway company regarding with entering to the ticket reservations by another airway company in London-European Sabena case can be counted as other examples on the abusive practices under the Article 82(b).[165]

(e) Mergers and Acquisitions

The ECJ in Continental Can[166] case interpreted that the Article 82 can be applied in mergers of undertakings. This decision is also important on the interpretation of abusing. In that case, the ECJ assessed that the merger of the undertaking which is in dominant position with a purpose of strengthens its current situation and thereby alter the competition in the market. In that case, Continental Can purchased the majority of the shares of Thomassen Drijver NV which is another undertaking operating in the same field with Continental Can. After the merger, the dominance of the merged undertaking reached to a high degree that would prevent the proper competition. The Commission interpreted that the purpose of Continental Can was to take hold of the market and the merger has an altering effect on the competition.

In 1989, the regulation numbered 4064/89 was enacted regarding with control of concentrations in Community. In 20 January 2004, Regulation with number 139/2004 is entered into force in lieu of Regulation 4064/89. Concentrations between undertakings and the impacts of such concentrations on competition law are currently subject to provisions of the Regulation 139/2004.[167]

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[164] Tekinalp Ü., Op. Cit., p.457
[165] Tekinalp Ü., Ibid., p.457, see cases ; Eurofix v. Hilti OJ L65, [1989] 4 CMLR 677, Case 311/84 Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1985] ECR 3261, London European-Sabena OJ L317, [1989] 4 CMLR 662
[166] Case 6/72 [1973] ECR 215
[167] Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT

III. ABUSE OF DOMINANT POSITION UNDER THE ACT ON THE PROTECTION OF COMPETITION NUMBERED 4054 DATED 13.12.1994

1. COMPETITION LAW IN TURKEY

1.1 General

There was not a legislation regarding with the Competition which protect free competition system in the market of Turkey before the Act on the Protection of Competition (the "Act") numbered 4054[168], dated 13.12.1994. This situation forced to make an effective legal legislation protecting the competition in the market in order to able the function of the economic system, specially based on the liberalism after 1980. Apart from this, the provision preventing cartelization and monopolization of the Constitutional Law of Turkey and the undertakings of Turkey in the framework of relations existing between Turkey and European Union created a physical necessity as well as a legal duty on preparing a special legislation.[169]

In accordance with the first paragraph of the Article 167 of the Constitutional Law of Turkey dated 1982, "*Government shall take measures developing and providing regular and healthy function of money, credit, capital, good and service markets; prevents monopolization and cartelization arising out of acts or agreements in the markets*" This provision necessitated a legislation securing free competition. The provision covers, not only good or service markets, but also other factor markets. It also focuses on cartelization and monopolization. Similarly, as to be explained in the following, the Act on the Protection of Competition prohibits the abuse of monopoly and/or dominant position.

Apart from the Constitutional necessity the relation between Turkey and European Union also required a law on protection of competition. The relationship between Turkey and European

[168] The Act on the Protection of Competition numbered 4054, available at http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerik&icId=165 (05.09.2008)
[169] Sanlı K.C., Op Cit, p. 18

Union based on three basic agreements; Ankara Agreement[170] dated 1963, Additional Protocol[171] acted for the application of Ankara Agreement on 1970 and Decision 1/95 of Association Council[172].

Turkey committed to enact a law on protection of competition, in Ankara Agreement and the Additional Protocol. It was also provided in the decision of 1/95 of Association Council that the Turkish legislation should be in line with and similar to EU law.[173]

When we consider the economical position of Turkey especially after application of liberalism as of 1980, the economical situation also necessitated to order, even re-establish the competition in the country. Until 1980, Turkish economy has not owned a free competitive market or any culture on competition. However, the period of liberalism applied after 1980 could not succeed in making good anti-competitor structure of Turkish economy. Therefore, there was a necessity of a legislation regulating competition rules in the country, in order to fix the actual position of Turkish economy. With such purpose, the Act numbered 4054, includes effective measures against economical concentration in the market.[174]

1.2 The Act of 4054

The purpose of the Act is defined at the Article 1. The Article 1 reads as:

"*The purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end.*"

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[170] Agreement establishing an Association between the European Economic Community and Turkey (signed in Ankara, 12 September 1963), available at http://www.mfa.gov.tr/turkiye-ile-avrupa-ekonomik-toplulugu-arasinda-bir-ortaklik-yaratan-anlasma-_ankara-anlasmasi_-12-eylul-1963-.tr.mfa (22.06.2008)

[171] Additional Protocol of Ankara Agreement (signed in Brussels, 23 November 1970) available at http://www.mfa.gov.tr/avrupa-ekonomik-toplulugu-ile-turkiye-arasinda-ortaklik-iliskisi-kurulmasina-dair-anlasmaya-katma-protokol---23-kasim-1970.tr.mfa (22.06.2008)

[172] Decision of 1/95 of Association Council, available at http://www.mfa.gov.tr/1-95-sayili-ortaklik-konseyi-karari-gumruk-birligi-karari.tr.mfa (22.06.2008)

[173] Şiramun Serpil, Avrupa Birliği Rekabet Hukuku'nda Kötüye Kullanma Kriterleri, İstanbul 2005, Vedat Kitapçılık, p. 79

[174] Sanlı K.C., Op Cit, p. 21

In the Article 2 of the Act, the scope is defined;

"*Agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey, and the abuse of dominance by the undertakings dominant in the market, and any kind of legal transactions and behaviour having the nature of mergers and acquisitions which shall decrease competition to a significant extent, and transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition fall under this Act.*"

When an evaluation is made under the Articles 1 and 2 of the Act, it can be concluded that three main behaviors are prohibited under the Act: (a) Agreements, decisions and practices restricting competition, (b) abusing of dominant position and (c) mergers and acquisitions which shall decrease competition.

The concept of competition is defined in the Article 3 of the Act; "*The contest between undertakings in markets for goods and services, which enables them to take economic decisions freely*". In this respect, in the paragraph 1 of the Article 6 of the Act it is provided that, "*The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited."*

The types of abusing dominant position explained in the second paragraph of the Article 6 as;

a) *Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,*

b) *Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,*

c) *Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard*

to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d) *Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,*

e) *Restricting production, marketing or technical development to the prejudice of consumers.*"[175]

Article 6 of the Act corresponds to Article 82 of the Treaty. Two articles are generally similar. However, the part of "*...agreement with others or through concerted practices....*" laid down in the above paragraph is different from the Article 82 of the Treaty.[176] The list of examples abuses of dominant position stated in the second paragraph of Article 6 includes also some differences form the list in the Article 82.

In order to evaluate a behavior as in coverage of the Article 6, such behavior should be performed by a dominant undertaking. Behaviors of non-dominant undertakings can not be evaluated as abuses under the Article 6. Therefore, the concept of dominant position should be determined properly.

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[175] Grounds of the Article 6 is explained by the legislative authority as; "*In terms of competition law, an undertaking's growth through its own internal dynamics and obtaining a dominant position in various sectors is not an objectionable situation. On the contrary, the concentration of capital and increase of capital accumulation and investments in our country are desired. This is because, in the developing world, foreign trade is increasing day by day, customs barriers are being lowered or totally removed by various agreements. Besides, our country has applied for full membership to the European Union. Under these circumstances, it is necessary for undertakings to grow and become powerful enough to compete within the Union and the world.*
On the other hand, it is prohibited for the undertakings that obtain dominant position in the market to abuse their position to restrict, prevent or distort competition in our country or use their position in a way which would cause these effects. In some cases the undertaking may gain a dominant position because of the protections provided by law. Especially industrial and trade property rights grant such a protection. The use of these rights must in no way serve the purpose of eliminating competition. Also, the most commonly encountered abuse cases in practice are listed as examples in the second paragraph and the cases are not limited to these examples." available at http://www.rekabet.gov.tr/esayfa.html (22.06.2008)

[176] Şiramun S. Op. Cit. P.80, "With the part of ""*...agreement with others or through concerted practices....*", the Act draws attention again to the concept of dominant position as in the Article 82 of Treaty."

2. DOMINANT POSITION UNDER THE ACT OF 4054

In the Act, the concept of dominant position is defined in the Article 3 as "*The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*".

It is possible to say that the legislation authority prepared the definition of dominant position in the Article 3, based on the case law of European Union. The Commission and the ECJ actually defined the concept to serve to main purposes of the union.[177]

As in the Article 82, the Act defined the dominant position as to own the economic power to determine market conditions by acting independently of the competitors and customers without indicating any market shares. Dominant position should be analyzed by considering the undertaking, the product market, market power, dominance.

2.1 Market

Market is a subject that should be analyzed firstly, in order to find the dominance of the undertaking in which product and geographical area.

Related product market would introduce which undertaking has dominant position on which product. Geographical market should also be ascertained to find the area where the undertaking has the dominant position. Article 6 of the Act indicates that the dominance should be at the whole or a part of the country and in a particular market of good or service.

(a) Geographical Market

The Article 2 of the Act uses the phrase of the boundaries of Republic of Turkey. The article 6 also provides the concept of the whole or part of the country. Therefore, there is no doubt that the geographical market may be either a part or the whole of the country. If a part of the

[177] Aşçıoğlu Öz, Gamze, Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması, Ankara 2000, Rekabet Kurumu, p.151

country has homogeny market conditions apart from the other parts of the country, such part can be considered as geographical market related to the product.[178]

While in European Union system referenced to the dominant position in the whole or part of the common market, the Act numbered 4054 referenced to the dominant position in the whole or part of the country and the part of the country does not need to be a significant part.[179]

In a decision of the Turkish Competition Board, Manisa city Salihli village was decided as the geographical market apart from the whole country[180]. The Board stated in the decision that the geographical area was very small and limited. The Board decided not to open a case based on the small geographical area as well as other reasons.[181]

Again, in the decision of LPG of the Board, the city of Adıyaman was accepted as the geographical market related to the product.[182] In the decision it was provided that;

"*The related geographical market is defined as geographical boundaries where the undertakings submit their goods and services and where the competition conditions are similar in reasonable dimensions. The territorial border of a specific market is based on some factors such as carriage costs (shipment, packing etc), endurance of the good, the area and effectiveness of the distribution system, consumer preferences on specific vendors, traditional behaviors, tastes and purchasing specifications of the customers.*

Even the geographical market appears as the whole country since the firms operating in the LPG filling and distribution market which are subjects of the investigation, deal with distributions at the whole of Turkey and have huge market share like 80% in the market, the geographical market has been contemplated as Adıyaman, since the distribution of the market shares is different within the boundaries of the city of Adıyaman from the whole of Turkey and

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[178] Aslan Yılmaz, Rekabet Hukuku, Bursa 2001, Ekin Kitabevi, p. 220
[179] Aşçıoğlu Öz G., Op. Cit. p.153
[180] Case 53/384-44 dated 19.02.1998 of the Competition Board, available at http://www.rekabet.gov.tr/pdf/53-384-44.pdf (22.06.2008)
[181] Aslan, Y. Op. Cit. p.221, "*Unfortunately since there are other reasons in the subject matter, it can not be clearly understood the attitude of the Authority whether the act of competition shall be applied to breach of competition in a small place like Salihli or not. According to our opinion, a breach of competition to be occured at our city that is important in terms of economy and potential of population should be in the application area of the Act of Competition.*"
[182] Case 93/750-159 dated 26.11.1998 of the Competition Board, available at http://www.rekabet.gov.tr/pdf/93-750-159.pdf (22.06.2008)

such firms have approximately 20% market shares in the city of Adıyaman and more important, the effect of price changes in such geographical area has not been felt in other regions of the country."

(b) Product Market

Product market would introduce in which product market the undertaking is in dominant position. The interchangeability of the product with other products in the meaning of supply side and demand side should be analyzed.

In the decision of LPG[183], the Competition Board defined its understanding regarding with the product market. According to the Board, the interchangeability is important when the definition of the product market is made. The interchangeability of the product should be specified by comparing similar or same products. The products which are similar in the meaning of specification, prices, usage area can be counted as in the same market. Supply side substitutability is also important. Producers may submit a new product to the market which has not been already produced by other competitors, by making some modifications in their existing product. Therefore, products which are similar as production technique and raw materials have high supply substitutability and place in the same market.

The Board found in the same decision that LPG is a product with many purpose of use, the industrial, heating and lightening purposes of the product could be substituted by other products, however the using purpose of the product in the ovens and cookers could not be substitutable with for instance natural gas since at the time of the decision the using of natural gas was not common in the country, besides, natural gas was not be provided in the city of Adıyaman. Therefore, the product market was defined as filling and distribution market of LPG using for ovens and cookers.

Market analyzing made by the Board in a decision regarding with non-alcoholic beverages[184] as "carbonated non-alcoholic beverages". The board interpreted that the market could not be defined as commercial beverage market because carbonated non-alcoholic beverages are

[183] Case 93/750-159 dated 26.11.1998, available at http://www.rekabet.gov.tr/pdf/93-750-159.pdf (22.06.2008)
[184] Case 99-12/93-35 dated 03.03.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-12-93-35.pdf (22.06.2008)

different commercial beverages since carbonated non-alcoholic beverages necessitated expansive distribution system and sales percentages of carbonated non-alcoholic beverages were vary depending on the product especially the brand. Creation of a special brand and to advertise this brand necessitate huge marketing expenses, therefore the Board found that carbonated non-alcoholic beverages should be defined separetly because of these marketing requirements.[185]

Product market necessitates detailed economical analyses. Because products may seem as in the same market at first appearance, however, after making proper analyze it can be understood that they actually belong to separate markets.[186] For instance in the Board decision[187] regarding with the acquisition of 51 % of Tansaş İzmir Büyükşehir Belediyesi İç ve Dış Tic. A.Ş. by T. Garanti Bank and Doğuş Holding A.Ş., it was founded that the related product market was the supermarkets which have the places of at least 400 m2. In other decision of board, the market was determined as the market of hypermarkets which have the places of at least 2500 m2.[188]

The Board decided that the market was the commercial banking sector in the case of acquisition of Etibank by Medya İpek Holding A.Ş.[189] In the decision of Mc Donald's, since special meat were permitted for using in Mc Donald's restaurants and only Pınar A.Ş. was granted to produce such meats, the Board decided that the market was "*meat productions using in the Mc Donald's restaurants*".[190]

In another decision regarding with the newspaper market, the Board separated the market of newspaper and limited the market as "*national daily political newspaper with market sensitive to price movements and with low adherence of readers*".[191]

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[185] Aslan Y., Op. Cit. p.224
[186] Güven Pelin, Rekabet Hukuku, Yetkin Yayınları, Ankara 2005, p. 221
[187] Case 99-21/166-85 dated 28.04.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-21-166-85.pdf (24.06.2008)
[188] Case 00-11/119-58 dated 23.03.2000 of Competition Board, available at http://www.rekabet.gov.tr/pdf/00-11-119-58.pdf (24.06.2008)
[189] Case 57/426-54 dated 19.03.1998 of Competition Board, available at http://www.rekabet.gov.tr/pdf/57-426-54.pdf (24.06.2008)
[190] Case 99-41/435-274(a) dated 06.09.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-41-435-274(a).pdf (24.06.2008)
[191] Case 99-12/93-35 dated 03.03.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-12-93-35.pdf (25.06.2008)

Demand side and supply side substitutability are taken into account by the Board, while drawing the limits of product markets.

The Board has various decisions on demand side substitutability. For instance, in the case regarding with Kurul Kalıp/Reks[192], the Board found that cutter and driller equipments had separate using areas and they can not be substituted instead of each other. Consequently, the Board made two separate market definitions for the cutter and driller products.
Again, in the decision of newspaper market[193], the newspaper market was divided into sub-markets. The newspapers subject to the investigation were in the market of national daily political newspapers. However, it was not possible to substitute 27 newspapers with each others, for instance when the price of Cumhuriyet decrease, customers could not substitute it with any other newspaper such as Star or Fanatik. The factors such as type of consuming, publishing policy of the newspaper or the price causes to be occurred sub-markets. In the case the market was divided into two sub-markets as *1. national daily political newspaper with market sensitive to price movements and with low adherence of readers and 2. national daily newspaper with coherent sales and with high adherence of readers.*

In the decision of LPG in Adıyaman, supply side substitutability was taken into consideration. As mentioned in second Part[194], supply side substitutability was important. Producers might submit a new product to the market which has not been already produced by other competitors, by making some modifications in their existing product. The Board finally concluded that LPG is a product with many purpose of use, the industrial, heating and lightening purposes of the product could be substituted by other products, and however the using purpose of the product in the ovens and cookers could not be substitutable with for instance natural gas. The Board limited the market as "*LPG using in the kitchen loading and distributing market*".

Many goods that can not be substitutable by demanding side can be easily substitutable by supply side. Therefore, the subject should be handled in terms of demand and supply.

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[192] Case 78/604-114 dated 13.08.1998 of Competition Board, available at http://www.rekabet.gov.tr/pdf/78-604-114.pdf (25.06.2008)
[193] Case 99-56/599-381 dated 08.12.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-56-599-381.pdf (25.06.2008)
[194] Reference no. 139

The product market should be investigated either by demand and supply and depending on the case related product or service markets should be evaluated.[195]

2.2 Determination of Dominant Position

Dominant position is defined as "…*the power ... to determine economic parameters"* in the Article 3 of the Competition Act. However no any regulation exists in the Act on how to determine this power. Criteria on determination of dominant position applied in European Union Law guided also Turkish competition system. The Commission and the ECJ made a wide investigation on dominant position and they considered market share percentages as well as monopolisation, technological advantage, economies of scale, operational policies, vertical integration and developed distribution network, existence of intellectual property rights, wide range of products etc. which may appeared as barriers to entry into the market. In this respect, the detailed analysing of the market is also necessary for Competition Law in order to determine the dominant position.[196]

(a) Market Share

Market share is one of the criteria that help to evaluate dominance. However, sometimes, market share may not reflect the actual market power of the subject undertaking. For example, if an undertaking is powerful in the meaning of technology, distribution network or financially, such undertaking can have dominance even it has low market share.

Market share is significant to determine dominant position. Very high market share can be considered as dominance, however low market share necessitates making additional investigation on the market power of the undertaking.

While investigating the market power of the subject undertaking, market shares of competitors should also be considered. In case the market share appear as low, distribution system, marketing system kept by the undertaking and the product and service quality,

[195] Güven P., Op. Cit., p. 231
[196] Aşçıoğlu Öz G., Op. Cit. p.154

technological development, financial power, brand image, after sale services of the undertaking should be assessed.[197]

There is no any market proportion existing in the Act or in any regulation of Competition Board. It is not clear in the decisions of the Board that which market proportion is accepted as dominance. In a decision regarding with bread market, ten bread factory owners came together in Afyon city and they established a an undertaking called as "*Afyon Ekmek, Un Mamulleri, Gıda San ve Tic. Ltd. Şti.*". The market share of the undertaking was 22%. The Board decided that such percentage could not create a dominant position. It is stated in the decision that the undertaking had not any power to determine economical parameters such as cost, price, and total production amount and to act independent from its customers.[198]
In other case of the Board, although the market share appeared as 60%, the Board did not accept the dominance of the subject undertaking. The Board decided to permit the merger with a reason that the competition was not affected contrarily. The Board, consequently, did not consider the market share of 60% as indication of dominance.[199]

The circumstances of the present case should be evaluated while making determination of the dominant position. Therefore, determination of market share such as 50% or 80% and considering of market shares exceeding such percentages as dominant positions would not every time create a healthy solution.

(b) Barriers to Entry

Barriers to entry can be considered as barriers for new competitors who intend to enter the subject market. Barrier to entry is accepted as one of the important criteria by investigating the dominant position. Barriers existing in a market can be assessed as an indication to determine the dominant position in such market. Especially, if the market shares in the subject market are doubtful to determine the dominant position.

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[197] Güven P., Op. Cit., p. 237
[198] Case 00-29/314-181 dated 03.08.2000 of Competition Board, available at http://www.rekabet.gov.tr/pdf/00-29-314-181.pdf (02.07.2008)
[199] Case 54/394-46 dated 26.02.1998 of Competition Board, available at http://www.rekabet.gov.tr/pdf/54-394-46.pdf (02.07.2008)

If there is no barrier existing in a market, the undertakings operating in such market would follow a market policy far from the competition pressure. Existence of the undertakings which are not actually compete with the undertakings operating in the market, but which can compete when the conditions of the market would be appropriate, creates a non direct pressure on the undertakings operating in the market.[200]

In the European Union system, the Commission and the ECJ make broad definition for the barriers to entry and in this respect, some criteria such as vertical integrity, excess capacity, financial power, product differentiation and intellectual property rights are generally counted as barriers to entry. Barriers to entry can be analyses as two folds; "natural" and "artificial" barriers to entry.[201]

"Natural" barriers to entry mean that the structural qualifications of the market constitute barriers for new comers. Such barriers can appear as, for instance, high investment costs for the operation in the market or the low quality of the market structure that much undertakings can not be operated with profit.[202] For example a market may be inadequate for more than one undertaking and natural economical conditions may create an obligation for only one undertaking to operate in such market. Such circumstances can be called as natural monopoly. Second undertaking would destroy the optimum production-distribution in the market. In such cases, it can be decided that the subject undertaking is in dominant position. Natural monopolies occur in generally public services such as water, natural gas, electric, phone operations.[203]

"Artificial" barriers generally appear as depending on the financial situation of the undertakings existing in the market. Vertical integrity, technological advantage, financial power, excess capacities are general artificial barriers.

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[200] Gül İbrahim, Teşebbüsün Alıcılarına Ayrımcılık Yaparak Hakim Durumunu Kötüye Kullanması, Rekabet Kurumu Yayınları, Ankara 2000, p.13
[201] Sanlı K.C., Op Cit, p. 253
[202] Sanlı KC., Op Cit, p.253
[203] Yanık, Mehmet, Rekabet Hukukunun Hakim Durum ve Hakim Durumun Kötüye Kullanılması Uygulamalarında Piyasaya Giriş Engelleri, Rekabet Kurumu Yayınları, Ankara 2003, p.26

If an undertaking create a vertical integrity in the chain from the production phase to distribution phase, such undertaking can be deemed as reached integration. Such integrity would create an important artificial barrier to entry.[204]

Technological power (advantage) in a market also creates an important barrier to entry. Especially technological discoveries are the conclusions of the competition.[205] If a technological production necessitates high investments for research, such would increase the importance of technological advantage in the determination of the dominant position.

Excess capacity of an undertaking would create a barrier to entry for new comers, since there is no increasing in customer demands regarding with the product. Because, the undertaking can provide products in every demand increase and the investment of new comers falls through.

Financial power of an undertaking can be another criterion for dominant position. The capital, sources, credits of the undertaking can be considered as power in the meaning of finance and such power cause the undertaking to act independently in the market and to make new investments.

Barriers to entry generally cause to insufficient competition and insufficient competition may create an appropriate area to constrain the competition for the undertakings. In this respect, for instance, market sharing between the competitors, refusal to deal and discrimination appear as some of the methods in constraining of the competition.[206]

2.3 Collective Dominance

Article 6 of the Act provided that "*The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.*"

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[204] Aslan Y., Op. Cit. p.216
[205] Aslan Y., Op. Cit. p.216
[206] Ulaş Kısa, Seda, Avrupa Topluluğu Rekabet Hukukunda Hakim Durumun Rekabet Karşıtı Eylem ve İşlemlerle Kötüye Kullanılması, Banka ve Ticaret Hukuku Araştırma Enstitüsü, İstanbul 2004

The Article 6 referred to one or more undertakings and also the way of abuse to be performed by more undertakings. According to the article, an undertaking can either abuse its dominant position by itself and together with other undertakings by making agreements and concerted practices. The article covers the abuse to be performed by one or more undertakings.

Actually, in the Article 4 of the Act, the agreements between the undertakings against competition are already prohibited. Because of this article, the limitation in the Article 6 as mentioned above seems unnecessary. Some writers[207] are adverse to punish the undertakings two times because of the similarity between the Article 4 and Article 6.

By saying the concept of collective dominance, it is intended to mean the togetherness established by independent undertakings and the dominance of this togetherness in the market. In this respect, in each case, the togetherness of the undertakings and relations between them should be evaluated by considering that if the actions of the undertakings are in contrary with the competition rules or not. Also, the ability of acting independently of each undertaking should be evaluated in the meaning of Article 4.[208]

In European Union law, the application of collective dominance occurred differently. According to some writers, who interpreted the concept narrowly, this concept covered only the relation between mother companies and their subsidiaries. However according to other writers who interpreted the concept broadly, the concept covered the undertakings acted independently in the markets.[209]

Collective dominance can appear with an agreement, concerted practice or due to the specifications of the market. The collective dominance that appeared due to the specifications of the market causes to oligopoly. In the oligopoly markets, the production seems as low, the undertakings with similar power seems as close to each other and any price activity of these undertakings seems as effective on the other undertakings in the market. In such markets, any activity of an undertaking would cause decreasing of its market share. Therefore, in such kind of markets parallel behaviors of same undertakings generally appear in the market without any intention. In such kind of market, if the undertakings follow the anti-competitive behavior

[207] Aslan Y., Op. Cit. p.230
[208] Sanlı KC., Op Cit, p.257
[209] Sanlı KC., Op Cit, p.257

of a specific undertaking in the market, such would be accepted as concerted practice and the problem should be solved according to the articles prohibited the concerted practices.[210]

In a decision of the Competition Board, the collective dominance was analyzed in the press market and found out that two groups were in collectively dominant in the market.[211]

In the case of Turkcell-Telsim[212], the Competition Board found that two leading operators in Turkey were collectively dominant in the GSM market of infrastructure in Turkey. The Board held that refusal to supply (roaming) with the third GSM operator, Avea, for the usage of GSM infrastructure constituted an abuse under the Act. In the decision, the Competition Board referenced to "essential facilities" doctrine stating that two dominant undertakings abused their dominant position through refusing to supply roaming services to the third operator, which was assessed as essential facility.

3. ABUSE UNDER THE ACT OF 4054

3.1 General

Undertakings in dominant position can abuse their powers and infringe the competition in order to gain benefits that can not be obtained by operating in normal market conditions. Undertakings can have dominance in the market by acting in line with normal market conditions but due to some special reasons. If to be in dominant position would be subject any sanction in the competition law, the undertakings would not want to be dominant, consequently such would adversely affect the competition.

Therefore, in order to create competitive markets, the Act does not prohibit being in dominant position, but abusing of dominant position.

The undertaking accepted as in dominant position would be careful while acting in the market. It would be under the risk and its behaviors would be assessed as abusing. Therefore,

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[210] Aslan Y., Op. Cit. p.231
[211] Case 99-56/599-381 dated 08.12.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-56-599-381.pdf (06.07.2008)
[212] Case 05-24/281-76 dated 14.04.2005 of Competition Board, available at http://www.rekabet.gov.tr/dosyalar/kararlar/karar1144.pdf (13.09.2008)

the undertaking should care the "proportionality principle" while acting. The proportionality means that an undertaking in dominant position can not take measures stronger than necessary in order to reach its purposes. The measures taken by the undertaking should be reasonable and proportional.[213]

In the abusing of dominant position, the undertakings can have various interests by acting in contrary to the conditions of competition. Therefore, after the determination of dominant position in the market, the abusing of such dominant position must be found out. The abusing is subject to sanctions.

The definition of abuse of dominant position does not exist in the Article 6 and the abusive practices are given in the Article as examples and as "numerus clausus".

3.2 Abusive Practices (other than pricing activities)

The examples given in the Article 82 of the Treaty and the Article 6 of the Act are completely different from each other. The situations laid down in the Article 6 are just examples; other situations can also be covered by the Article 6. It is understood from the wording of the Article. It is stated in the first sentence of the second paragraph of the Article 6 that the abusing practices can be occurred "*particularly*" as follows.

(a) Preventing another Undertaking from Entering Into the Market and Complicating the Activities of Competitors [Article 6 (a)]

In the paragraph (a) of the Article 6, it is provided that "*Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market"* is prohibited.

Preventing or excluding of competitors is defined as the abusing of dominant position by an undertaking through using its power unfairly and causes to prevent entering or staying other undertakings in the market or related markets or to weaken the possibility of such undertakings.[214]

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[213] Ulaş Kısa, S., Op. Cit., p.18
[214] Tekinalp Ü., Op. Cit., p.450

The abusing of dominant position of an undertaking may appear as various types. Apart from pricing practices which is not the subject of this thesis and which should be analyzed separately and in detailed, abusing practices preventing competitors may appear as refusal to deal (refusal to provide goods and/or services, refusal to purchase goods and/or services), using the rights of intellectual properties, the condition of providing of goods/services form one source[215] etc.

In European Union law, refusal to deal is also considered as abusing of dominant position. In the decisions of European Union law, refusal to deal with actual customers as well as potential customers deemed as abusing, providing that such goods/services are essential facilities for the subject customers and such customers are depends on the undertaking to provide the goods/services.

In Turkish Competition law, refusal to deal can be easily considered as abusing practices in the market. Refusal to deal may appear either barrier to entry or excluding activity for competitors. Especially, refusal to provide goods for new comers to the market would constitute a typical barrier to entry.

In a decision regarding with Tüpraş, the Board assessed if the dominant position was abused or not.[216] In the case, it was alleged that Tüpraş which was in dominant position, abused its position by terminating the purchasing agreement of raw petroleum concluded with Aladdin and it complicated the operation of Aladdin. The Board stated that the undertaking in dominant position is responsible from maintaining upper and sub markets. In this respect, the Board decided and concluded that, the termination of the agreement based on maintaining security of refinery and did not constitute abusing practice because controlling-discharging-delivering transactions were performed by motor vehicles and were therefore risky.

[215] Aslan Y., Op. Cit. p.238
[216] Case 02-24/243-98 dated 16.04.2002 of Competition Board, available at http://www.rekabet.gov.tr/pdf/02-24-243-98.pdf (06.07.2008)

(b) Discrimination [Article 6(b)]

According to the Article 6(b), "*Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts"* is prohibited.

Discrimination can be defined as different behavior of an undertaking to its purchasers. Undertaking's behavior appears as non equal. However, it should be noted that the Article 6(b) prohibits non equal behaviors to purchasers with equal status and equal rights. The Article does not prohibit different behavior to the purchasers who have not equal status.

The discrimination by an undertaking against its purchasers has two main specifications; exclusion and dependency. Exclusion occurs in excluding of purchaser(s) out of the market by the undertaking. The undertaking may exclude some of its purchasers or prevent their entrance to market through refusing to provide products. Dependency is to make purchasers dependent on to the undertaking. The undertaking may give some special advantages to only its purchasers and this may cause the purchasers not to act independently.[217]

Discrimination between purchasers in equal status would occur in various types; different price applications, refusal to provide goods, refusal to access to essential facility, offering different terms etc.

Refusal to provide goods or services of an undertaking with a dominant position to a purchaser without having objective and fair reasons or refusal to access to an essential facility by the undertaking in dominant position or discrimination between purchasers by making payments with a purpose of incentive (for instance payments of advertisement and marketing costs) are included in abusive practices.[218]

In a case regarding with Ceytaş Madencilik A.Ş. (Ceytaş) and Eti Holding A.Ş. (Eti), it was alleged that Ceytaş and Eti abused their dominant position. Eti was the only establishment which has a permission regarding with mining, processing and distribution of Boron in Turkey. The Board analyzed the case from the aspect of providing essential facility. In the

[217] Yanık, M., Op. Cit., p.44
[218] Güven P., Op. Cit., p. 277

case, the Board interpreted that discrimination between the purchasers who have equal rights and status would constitute an abuse, however discrimination between the purchasers who do not have equal status would not constitute abusing practice. In the case there were two different types of customers; domestic customer and foreign customer. The Board concluded that since the types and status of customers were not equal, the behavior of the undertakings can not be deemed as abusive. Therefore, it was decided by the Board that the behavior of the undertakings were not abusive under the Article 6(b) of the Act.[219]

In the same case, the Board developed criteria on equality of the purchasers. According to the Board, the different behavior was applied between domestic and foreign markets. Therefore, the equality between foreign and domestic purchasers should be evaluated. Domestic and foreign markets are not the same. The Board developed the criteria on the case that the purchasers who are substitutable for each other can be deemed as equal. It means that the domestic and foreign purchasers who can change places with each other in the meaning of relation with the undertaking in dominant position should be deemed as in equal status. The Board found out that domestic and foreign customers could not change places easily and therefore they can not have equal rights and status.[220]

In the determination of the substitutability, the equal degree of competition between the purchasers should be considered. It means the purchasers should be in the same line of the production chain. It also means that the purchasers should perform as same function in the market. Further, the substitutability should be evaluated from the aspect of purchasers; the evaluation made from the aspect of the undertaking may cause wrong interpretations. However in the determination of substitutability, the undertaking in dominant position should be starting point. In other words, being wholesale dealer of a purchaser from the aspect of a competitor would not cause also to be the wholesale dealer in the relationship with the dominant undertaking.[221]

In abusing dominant position by refusing to deal with purchasers, discrimination generally made between current (actual) customers and other (potential) customers. The refuse of

[219] Case 00-50/533-295 dated 21.12.2000 of Competition Board, available at http://www.rekabet.gov.tr/pdf/00-50-533-295.pdf (06.07.2008)
[220] Case 00-50/533-295 dated 21.12.2000 of Competition Board, available at http://www.rekabet.gov.tr/pdf/00-50-533-295.pdf (07.07.2008)
[221] Gül, İ., Op. Cit, p.47

undertaking without having objective reason to its customer, who has been the purchaser of the undertaking for a long time, can be assessed as an abusive practice.

The Board in a case interpreted that refusal to deal with a customer who has long commercial relationship with the undertaking, should be based on objective reasons. In such case, the Board decided that the refusal of the undertaking did not constitute abusive practice, since the refusal to provide goods was based on objective reasons.[222]

(c) Tying and Additional Limitations on Resale [Article 6(c)]

The Article 6(c) provides that, "*Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price"* is not acceptable under the Act.

The wording of Article covers two separate situations. One is providing condition of purchasing the goods or services together with other goods or services, this is also called as tying.[223] The other is providing conditions for resale in the agreements concluded with intermediate establishments. The second situation covers a broad area of interpretation, and generally pricing limitations can be showed as example for this situation.[224]

Providing of additional conditions which are not related to the subject of the agreement by means of commercial usages or nature of the agreement by an undertaking in dominant position constitutes an abuse. In such case, the undertaking in dominant position excludes competitors in the market by having the opportunity to sell other products apart from its dominant products. However, in order to sell two products together, there should be an objective relation between them.[225]

[222] Case 01-56/554-130 dated 20.11.2001 of Competition Board, available at http://www.rekabet.gov.tr/pdf/01-56-554-130.pdf (07.08.2008)
[223] For more information on "tying" please refer to above explanations on page 38 et seq.
[224] Sanlı, K.C., Op. Cit., p.269
[225] Aslan Y., Op. Cit. p.241

Tying agreements may appear as providing condition on purchasing all or specific products by the purchaser. Products can be offered as package or individually. The significant think is two separate products should be confirmed in order to include the case under the tying title.[226]

Tying agreements negatively affect the developments of economical power and competition in the market. The agreements also affect the right to choose of customers and create obligations on purchasing unrelated goods for them.

In a case of the Competition Board, a complaint was made to the Board regarding with an undertaking that complicated and prevented the operations of its competitors in the water market. The Board analyzed the case also in the aspect of tying agreements. It was stated by the Board that;

"…Alleging of being tying of an agreement, is actually subject to prove that the purchaser has been obliged in written or verbally to purchase an unwanted product…"

The Board decided to reject the complaint based on the reason that the obligation of purchasing unwanted products could not be proved in written or verbally and the evidences did not support the alleged tying activity.[227]

(d) Abusing of Financial, Technological and Commercial Advantages Created by Dominant Position, in another Market [Article 6 (d)]

According to Article 6 (d), "*Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market"* are prohibited under the Act.

This paragraph regulates a situation that does not exist in the Article 82 of the Treaty. The paragraph is probably regulated according to the application of ECJ. The purpose of this paragraph is to prevent abusing of dominant position in a market other than the market where the dominance is gained. For instance, an undertaking operating in raw material market can

[226] Ünlüsoy, Kürşat, Rekabet Hukukunda Bağlama Anlaşmaları, Rekabet Kurumu Yayınları, Ankara 2003, p. 20-21

[227] Case 03-06/59-21 dated 23.01.2003 of Competition Board, available at http://www.rekabet.gov.tr/pdf/03-06-59-21.pdf (22.07.2008)

abuse its dominant position in the finished product market in order to enter to finished product market or to increase its market share.[228]

In the doctrine, there is an opinion that this paragraph is unnecessary and can not provide any benefit in the application. Because, the term of abusing of the dominant position should be interpreted broadly as abusing of economical power of an undertaking to destroy the competition in markets. The significant subject is the limitation of the competition in the markets.

Therefore, according to such opinion which is accepted to us, if any market is affected negatively because of the behavior of an undertaking in dominant position, this should already be accepted as abusing practice.[229]

In a case of the Board, an application was made based on abusing of dominant position in the newspaper market of Bursa city by Hürriyet Gazetecilik A.Ş. and it is decided to reject the application because the behavior of Hürriyet did not constitute an abuse of dominance in another market, but it was a strategy in order to take place in newly entered market. Therefore the Board decided not to file an investigation.[230]

(e) Restriction of Production, Marketing or Development [Article 6(e)]

It is provided by the Article 6(e) that the acts "*Restricting production, marketing or technical development to the prejudice of consumers"* are in contrary with the Act.

The scope of the paragraph is very wide. In this paragraph the interests of the consumers are specially and clearly considered. With the wording of "*the prejudice of consumers*" the importance of consumers is clearly stated. It can be interpreted that the abusing of dominant position is also important from the aspect of relation between the dominant undertaking and the consumers.

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[228] Aslan Y., Op. Cit. p.243
[229] Sanlı, K.C., Op. Cit., p.270
[230] Case 04-66/955-231 dated 19.10.2004 of Competition Board available at http://www.rekabet.gov.tr/pdf/04-66-955-231.pdf (22.07.2008)

Nevertheless, it is not possible to accept every situation that the consumers are incurred damages and loss as abusing practice. The objective reason between the damage to and loss of the consumers and the act of the undertaking in dominant position should be established.[231]

In order to accept the restrictions on production, marketing or development as abusive practices, such restrictions should not be based on objective economical reasons.

In a case, a complaint on abusing of dominance by IBM was made. The assertion was that IBM abused its dominant position by applying different prices to equal purchasers and by restricting production, marketing and technical development. In the case the Board decided not to file an investigation against IBM.[232]

(f) Abuse in Mergers and Acquisitions

Article 7 of the Act provides as follows:

"*Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.*

The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid."

In accordance with the second paragraph of the Article 7 of the Act, the Competition Board enacted the Communiqué on the Mergers and Acquisitions numbered 1997/1[233] . The purpose of the Communiqué of 1997/1 is stated as to determine and announce the mergers and

[231] Aşçıoğlu Öz G., Op. Cit. p.166
[232] Case 99-39/411-263 dated 24.08.1999 of Competition Board, available at http://www.rekabet.gov.tr/pdf/99-39-411-263.pdf (06.09.2008)
[233] Communiqué on the Mergers and Acquisitions numbered 1997/1, available at, http://www.rekabet.gov.tr/index.php?Sayfa=tebliglerliste (07.09.2008)

acquisitions calling for authorization by notifying to the Competition Board. The scope of the Communiqué is explained as cases which are or are not deemed as a merger or an acquisition under Article 7 of the Act, mergers or acquisitions which call for the authorization of the Competition Board in order to be legally valid, and the procedures and principles relating to their notification to the Competition Board.

The competition legislation on mergers and acquisition generally prohibits to create dominant position or to strengthen dominant position in the market through mergers and acquisitions and consequently to affect negatively the competition in part or in total of the country. The Competition Board at this phase would assess especially "the structure of the relevant market, the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country" and "the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors". Therefore, the legislation aims to prevent the abuse of dominant position by the undertaking which gained the position through concentration.[234]

4. LEGAL CONSEQUENCES OF ABUSE UNDER THE ACT OF 4054

4.1 Consequences in Administrational Law

The Act provides in the Article 20 that the Competition Board has a public legal personality and an administrative and financial autonomy in order to ensure the formation and development of markets for goods and services in a free and competitive environment.

Article 27 of the Act regulates duties and powers of the Competition Board. According to the Article 27 (a) of the Act, the Board has the duties of carry out, upon application or on its own initiative, examination, inquiry and investigation about the activities and legal transactions

[234] Şiramun S. Op. Cit. p. 95; Akyüz B. Helin, Türk Rekabet Hukuku Kapsamında Birleşme ve Devralmalar, Adalet Yayınevi, Ankara 2007, p.28-32.; Sanlı, K.C., Op. Cit., p.341-348

prohibited in the Act; to take the necessary measures for terminating infringements upon establishing that the provisions provided in the Act are infringed, and to impose administrative fines on those responsible for them.

There are two kinds of measures provided in the Article. One of them is establishment of the provisions provided in the Act to terminate infringements, the other one is administarive fines. Both of the measures are very deterrent and parallel with Community competition legislation.[235]

Article 16 of the Act provides that the Competition Board shall impose administrative fines on "... ***a)****false or misleading information or document is provided in exemption and negative clearance applications and in authorization applications for mergers and acquisitions,*
b)*mergers and acquisitions that are subject to authorization are realized without the authorization of the Board,*
c)*in implementation of articles 14 and 15 of the Act, incomplete, false or misleading information or document is provided, or information or document is not provided within the determined duration or at all,*
d)*on-the-spot inspection is hindered or complicated ...*" .

As applied in Community competition law similarly, Article 17 of the Act provides administrative fines with time-bound. Administrative fines with time-bound regulate fines with different proportion, in order to terminate the infringement as soon as possible.

Undertakings may apply to administrative judgement against the decisions on charging administrative fines. The Act also grants to the undertakings a right to take legal action before Council of State in order to cancel the decisions on administrative fines.[236]

4.2 Consequences in Private Law

It is possible to assess the consequences of infringements in private law as two folds. One of them is "*invalidity*" and the other is "*indemnity*" because of tortious acts.

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[235] Sanlı, K.C., Op. Cit., p.385
[236] Şiramun S. Op. Cit. p. 98-102

Article 56 of the Act provides that any agreements and decisions of associations of undertakings contrary to article 4 of the Act are invalid.

Article 56 covers only agreements and decisions of associations which are contrary to Article 4, however there is no any provision regarding with the consequences of abuse of dominant position. Nevertheless, the consequences of agreements and decisions which are contrary to Article 4 and the consequences of abuse of dominant position should be the same from the private law point of view. Therefore, change on the wording of the Article 56 accordingly, would be an option. [237]

Indemnity rights because of abusing dominant position are regulated in the Articles 57-59 of the Act.

Article 57 reads as; "*Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly*." Article 57 attributes an obligation of compensation to anyone who negatively effect the competition by acting against the Act.

According to Article 58, those who suffer as a result of negative effects on competition due to the actions against the Act, have the right to claim the difference between the cost they paid and the cost they would have paid if competition had not been limited. The Article 58 clearly grants a right to claim compensation to persons/undertakings againts the losses incurred due to the anti competitive actions against the Act. Consequently, the persons/undertakings who suffered from activites which abuse dominant position shall have the right to claim compensation.

Article 58 provides the determination criteria for damage of undertakings. According to this, in determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

[237] Aşçıoğlu Öz G., Op. Cit. p.178

Article 58 also provides the possible amount of indemnification, if the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, award compensation can be decided by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

IV. CONCLUSION

The aim of this thesis is to analyze the principles of dominant position and abuse of dominant position other than pricing practices under the EC Competition Law and to compare such principles by analyzing Turkish Competition Law and its application.

Under this thesis, abusive activities for dominant position are studied from the aspects of both EC Treaty and the Act on the Protection of Competition numbered 4054 currently being applied in Turkey. The difference and similarities between two competition areas can be followed in the discussions of this thesis.

The purpose of the wording and spirit of this study is to introduce the problems in monitoring dominant position of undertakings under the general rules of competition law, both in EU and Turkey side.

In order to create effective competitive market in EU, competitive structure should be protected. Competitive market is also a significant criteria for establishment of proper common market in EU. Competitive structure would help technological development, distribution of resources in equal manner, protection of consumers and also increase on productivity. These developments would also bring political and economical benefits which would be basics of the common market.

The system of EU Competition Law basically relies on the Articles 81 and 82. Article 81 prohibits agreements, decisions by associations of undertakings and concerted practices that restrict the competition. Article 82 prohibits the abuse of dominant position of one or more undertakings, in all or in part of the common market. These two articles basically regulate different competition rules. Nevertheless, they serve to the main purpose of protecting competition in the market and they are related to each other in terms of creating competitive structure in EU.

Article 82, in principle, protects the market against the negative actions of the undertakings through using their dominant positions. As explained in this study, to be in a dominant

position is not prohibited, but abuse of such dominant position is prohibited under the Article 82.

The concept of dominant position has been interpreted broadly in the case law and dominant position has been defined as having market power significantly high to affect the market negatively, making its own decision by the undertaking in dominance. In order to talk about abuse of dominant position, the abusive action should be made by an undertaking with a dominant position in the related market, there should be an action which may be deemed as abuse and consequently the competition in the related market should be affected negatively.

Abusive practices under the Article 82 are counted as four types. However, these should not be applied as limited. Further, abusive practices counted in the article should be analyzed with the dominant position of the subject undertaking. Practices without undertaking in the meaning of the Article or without having dominant position would not be actually abusive.

Abuse (other than pricing activities) under EC applications, can be seen in several forms; discrimination, refusal to deal, tying, creating barriers to enter to the market, application of unfair terms and conditions etc. In my opinion, types of abusive practices should not be limited. More than one form of abuse that is explained in this thesis can be seen together in one case. Further, the forms of abuse can change according to requests of consumers, market, technical developments and different economical situations in the future.

When we look at to the applications of Turkey, the Act on Protection of Competition Law was enacted in 1994. The Act was a kind of precondition of establishment competitive commercial market in Turkey. Since 1994, competition law and system has been significantly developed both with regulations enacted by Competition Board and applications of the Competition Board in competition cases.

Abuse of dominant position is regulated in the Article 6 of the Act. Dominant position should exists under the Article 6 of the Act, which is parallel to the spirit and logic of the Article 82 of EC Treaty. The analyze of the dominant position should be done properly by investigating the product and geographical market, related period, substitutability of such product, barriers to entry and other important situations in the market. For each case, the mentioned topics should be analyzed together.

Article 6 of the Act provides the activities which may be deemed as abusive, but not in "numerus clausus" manner, which is in line with the Article 82 of EC Treaty. ECJ case law and the opinions of Commissions establish example interpretations in analyzing abusive practices laid down in the Article 6. In this study, several types of abuse under the Article 6 are analyzed by considering the cases of Turkish Competition Board which lead the interpretation of the Act in Turkey and establish the application of competition law system.

The consequences of breaches against the Article 6 are also analyzed in this study. Article 56 of the Act provides invalidity of the agreements and decisions which are against the Article 4 of the Act. However, this consequence should be clearly regulated also for abuse of dominant position.

Other than the invalidity, compensation right of the persons who suffered from the actions against competition regulated in the Articles 57 – 59 of the Act. This consequence is important as granting compensation right to commercial persons as well as consumers who are suffered, for instance in restriction of production.

When we compare Turkish Competition law system with European Union competition law system, it can be clearly seen that the basic principles of Turkish Competition Law and application of these principles are in harmonization with the European Union competition system. Consequently, the interpretation of the abusive practices in Turkish competition application is also in line with the decisions given by the European Court of Justice and the European Commission.

The case law of European competition system has a significant importance in interpreting the Article 6 of the Act that regulate abuse of dominant position in Turkey, as well as the activities of dominant undertakings which affect the Turkish commercial market. In the mean time, Turkish Competition Board has also significant positive effect in creating competitive markets on Turkish commercial life and protecting consumers against powerful dominant undertakings with important case decisions and applications which have been performing since 1994.

As a final interpretation, I may say that although necessary provisions have been established regarding with the aspects of abuse of dominant position in EU and Turkish competition law systems, applications, practices and continuous developments in commercial life show us the types of abuse should not be limited in general and each case should be analyzed in its own terms and conditions.

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