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APPROACH TO ABUSIVE TYING PRACTICE OF DOMINANT UNDERTAKING UNDER TURKISH COMPETITION LAW

“Farewell to Exploitative Tying?”

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CONTENTS

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ABBREVIATIONS

AMKD: Anayasa Mahkemesi Kararlari Dergisi [Constitutional Court Journal]

Art.: Article

E.: Esas No [Case No]

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

ECJ: European Court of Justice

ECtHR: European Court of Human Rights

EMRA: Energy Market Regulatory Authority

EU: European Union

ICN: The International Competition Network

K.: Karar No [Judgement No]

OECD: Organization for Economic Co-operation and Development

SCR: Specialization Commission Report on Competition Law and Policies

SPO: State Planning Organization

TCA: Turkish Competition Act

TFEU: Treaty on the Functioning of the European Union

TGNA: Turkish Grand National Assembly

US: United States

ABSTRACT

The purpose of this thesis is to analyze tying practice through the lens of Turkish competition law and its implementation. In this context, we identified that the Turkish Competition Act (the Act) states that tying practice can violate competition law if it is conducted by a dominant firm and if it is found to be abusive, without defining an abuse. We also determined that the Turkish Competition Board decisions do not provide a systematic framework to determine the abusive character of tying and do not clarify the concerned competitive harm in tying cases. We recognized that the Board has followed an approach that stipulates tying practice can only be anticompetitive if it is exclusionary.

To understand the validity of the current legal approach to tying practice, we raised two questions: what is exploitative tying and should tying be exclusionary to be deemed anticompetitive? The first two chapters set out the Turkish competition policy objectives and approach to exploitative abuse under Turkish competition law. The third chapter suggests that the exploitative tying practice is the conduct that restrains consumer freedom of choice. The fourth chapter addresses the second question, recognizing that theoretical conditions for the exploitative effect (consumer surplus extraction) of tying are unlikely to occur in the real world, where restraint in consumer choice is applicable in all concrete cases. The fifth chapter determines the minimum legal conditions for the anticompetitive effects of tying, and concludes that aftermarket tying practice need not be exclusionary to be deemed exploitative, thus anticompetitive. In other tying practices, tying should at least affect the tied percentage of total market sales of the tied product to restrain consumer choice to be deemed exploitative.

Overall, our thesis concludes that the current approach to tying practice is not accurate due to its emphasis on exclusionary abuse. To determine the inclusive anticompetitive harm, it should focus on determining consumer exploitation.

INTRODUCTION

Free market economy suggests that the states are obligated to provide a competitive environment in which all market actors have “freedom of choice”. In this system, instead of intervening directly with the economy, the state intervenes with legal and administrative regulations called “competition law”[1]. Competition policy refers to the entire set of means of state intervention in the market structure, while competition law refers to the set of rules designed to prevent the distortion of competition by undertakings in order to protect and develop competition in the market[2].

The tying arrangement of undertakings is one of the practices that has been addressed by competition authorities, and it can be defined as a stipulation by a party who sells a product (tying product) on the condition that the buyer also purchases a different (or tied) product, or at least agrees to not purchase that product from another supplier[3]. Tying practice is common and can contribute to economic growth. However, choice restraint is inherent in this practice. Therefore, competition authorities have been tasked with separating the good from the bad.

Under Turkish competition law, tying practices can be subject to antitrust inquiry if they are conducted by dominant firms and are found to be abusive pursuant to Article 6 of the Turkish Competition Act No. 4054 (TCA). However, the objective of Article 6 of the TCA is not placed and when tying practice should be found abusive under Article 6 of the TCA is not determined in the Act itself. This lack of clarity creates uncertainty for firms and requires questioning of legitimate application.

[1] ATEŞ, Mustafa, Rekabet Hukukuna Giris [Introduction to Competition Law], Adalet Yayinevi, Ankara 2013, p.31.
[2] Republic of Turkey Prime Ministery State Planning Organization (SPO), The Ninth Development Plan (2007-2013), Competition Law and Policies, Specialization Commission Report: 676, SPO Publication No 2723, Ankara 2007, p. 3.
[3] Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958), at 5, 6.

This shortcoming could be overcome by Turkish Competition Board (Board) by establishing a systematic framework for the necessary legal conditions for tying antitrust analysis. However, the Board's approach does not provide this. We detect that the underlying reason behind this is the Board's failure to determine a comprehensive theory of anticompetitive harm in tying cases. Therefore, with this thesis, we attempted to specify an overarching theory of harm that tying can cause to competition in order to establish minimum necessary legal conditions for tying antitrust analysis.

At this point, it is worth mentioning that one of the factors that undermine the Board examination of tying cases is its underestimation of the exploitative effect of tying. The Board recognized that exploitative tying practice can raise antitrust concerns but, without any justification, it disregarded the question of whether tying can be exploitative and has consistently reiterated that the tying practice can only be anticompetitive if it is exclusionary. Likewise, Turkish literature only mentions the possible exploitative aspect of tying, but it does not suggest a framework for treatment of exploitative tying practice under Turkish competition law. Instead, it focuses on exclusionary tying.

Therefore, we aim to examine the validity of the current legal approach to the tying practice, or whether it cannot be exploitative unless it is exclusionary. Our purpose is to understand the circumstances in which pure exploitative tying practice can and should raise antitrust concerns, the possible merits for competition authorities ignoring pure exploitative effects, and whether this approach can be considered consistent with Turkish competition policy.

The first chapter will provide insight into Turkish competition law and policy by examining the motivation and purposes of the adoption of the Turkish Competition Act. The same chapter also analyzes possible competition law and policy goals. It demonstrates that promoting consumer welfare and efficiency were the main objectives of Turkish competition policy. However, "consumer welfare" is a vague term, and efficiencies are varied. Therefore, it questions which aspects of these concepts should and can be implemented in Turkish competition policy and law, and which we should consider while identifying the factors to determine the anticompetitive harm resulting from tying cases.

The second chapter focuses on unilaterally imposed tying conduct, the most common form practiced. It explains relevant concepts of unilaterally imposed exploitative tying and examines legal frameworks for assessing tying practice under different competition laws in order to recognize the antitrust concerns addressed in tying cases. The chapter also discusses the appropriate approach to determining why and when exploitative practice may require intervention by competition authorities, and whether tying practice can raise these concerns and, if so, to what extent.

The third chapter deals with the components of the tying arrangement, i.e., separate product requirement, market definition and determination of dominant position, and abuse. They are the legal conditions for the assessment of tying practice under competition law. It detects possible difficulties and alternatives for the necessary determinations and indicates specific issues for the tying cases to be considered in antitrust analysis.

The purpose of the fourth Chapter is to examine the competitive effect of tying practice, to conclude whether the common understanding – including the Turkish perspective – that tying conduct is exploitative only where it is exclusionary has merits. To reach a conclusion, we will analyze whether theoretical conditions to establish the exploitative effect of tying is applicable in concrete cases. We will also verify whether our suggested theory of harm (restraining freedom of consumer choice) is applicable to concrete cases.

In the fifth chapter, we attempt to provide minimum legal conditions to determine the anticompetitive effects of tying. Lastly, the fifth chapter suggests possible remedies for violation of Article 6 of the TCA, and proposes possible difficulties and shortcomings for successful implementation of these remedies.

CHAPTER ONE

UNDERSTANDING OF TURKISH COMPETITION LAW

This chapter introduces the purposes of the adoption of the Turkish Competition Act and asserts that the Turkish Competition Authority embraces an objective that aims to increase consumer welfare through increased efficiency via competition protection. However, this chapter demonstrates the lack of consensus on the definition of consumer welfare, and efficiencies are varied. In this context, it also indicates that increasing consumer welfare and promoting efficiency might not occur concurrently, thus it might be necessary to accept a trade-off between these two objectives, as well as between different types of efficiency. Thus, this chapter discusses which aspects of these concepts should be considered relevant for determining the anticompetitive harm.

1. TURKISH COMPETITION LAW AND POLICY

1.1. Overview of Turkish Competition Policy and Adoption of Turkish Competition Law

Competition refers to rivalry or a race between at least two people who fight for a particular purpose[4]. Competition in the economic sense may be defined as the race between the firms in the market that struggle for economic purposes, such as acquiring more customers, thereby increasing their sales of goods and services and, consequently, their profits[5].

In the legal sense, competition is defined as "the contest between undertakings in markets for goods and services, which enables them to take economic decisions freely"[6]. Although this definition refers to rivalry, the concept of competition refers to the market structure. This market structure foresees an

[4] http://dictionary.cambridge.org/dictionary/english/competition.
[5] http://www.businessdictionary.com/definition/competition.html. See AKINCI, ateş, Rekabetin Yatay Kısıtlanması [Horizontal Restrain in Competition], Rekabet Kurumu yayını, Ankara, p. 3-6; SANLI, K. Cem, Rekabetin korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı hükümler ve Bu Hükmlere aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği [Prohibition Proscribed by the Law on the Protection of Competition and the Invalidity of the Decisions and Practices of Associations of Undertakings], Rekabet Kurumu Yayını, Ankara 2000, p. 3-5.
[6] See Article 3 of The Act on the Protection of Competition No. 4054 (Official Gazette dated 13.12.1994 and numbered 22140).

economic system that operates according to its own dynamics, emerging without any interference to the market conditions of supply and demand, which is a free market economy that places competition at the center. It is believed that this system protects the independence of the decisions of market actors and their actions in the pursuit of their own interests. It is in fact the way to distribute and use the scarce resources of society in the most efficient way and to provide goods and services to consumers at the lowest price and highest quality[7].

Therefore, the expected benefits from the market economy system can only be realized by creating and protecting the competitive environment in the markets. Thus, competition policy is a means used by the state to compete and to form a well-functioning market economy.

1.1.1. Constitutional framework of economic order and substructure of free market economy

It is known that the social and economic structure also orient political and legal institutions. Thus, the constitutions that determine the political and legal fundamental order of a society also guarantee economic rights and freedoms as well as other fundamental rights and freedoms. Consequently, the economic predictability, which is essential for people who face economic activities, can be guided by the constitutions. Therefore, it is necessary to assess the economic structure predicted by the constitutions and the scope and consequences of the constitutional arrangements that are relevant to the economic field.

Since competition is central to free market economy, we should first examine the Turkish Constitution[8] and whether it envisages an economic order. We should also investigate whether intervention in economic life is necessary; if it is necessary, what purpose and means of intervention are suitable? Furthermore,

[7] See General Preamble of the Act (The Act on the Protection of Competition No. 4054).
[8] The Constitution was adopted by the Constituent Assembly on October 18, 1982 to be submitted to referendum and published in the Official Gazette dated October 20, 1982 and numbered 17844; republished in the repeating Official Gazette dated November 9, 1982 and numbered 17863 in the aftermath of its submission to referendum on November 7, 1982 (Act No. 2709). (hereinafter the 1982 Constitution or the Constitution).

it can also be questioned whether the 1982 Constitution[9] imposes any economic policy model on political power.

In the 1982 Constitution, there is no clear principle established by the State regarding the grounds of existence and functioning of the economy. The 1982 Constitution regulated the "Financial and Economic Provisions" separately. However, to determine the economic order envisaged by the Constitution, it is not sufficient to examine only the provisions of this section. They should be assessed along with the principles that set economic policy and general principles.

The social state embraced by the 1982 Constitution is a fundamental element that shapes the economic order and restraining economic policy. In Article 2 of the "Characteristic of the Republic" of the 1982 Constitution, it is stated that the Republic of Turkey is "... a democratic, secular and social state governed by rule of law [...] based on the fundamental tenets set forth in the preamble". The preamble to the Constitution states that "[e]ach Turkish citizen will benefit from basic rights and freedoms in this Constitution in terms of equality and social justice"[10].

The function of the state, which is an extension of the understanding of the social state, is mentioned in Article 5. According to this article, the main aims and tasks of the State are "to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence".

[9] It has adopted by the 1961 Constitution (Article 2).
[10] In the 1982 Constitution, the Article 176 states that " The preamble, which states the basic views and principles the Constitution is based on, shall form an integral part of the Constitution". Therefore, validity of any legal norm depends on the Constitutional Court's interpretation of the principles which contained in the preamble.

According to the Constitutional Court, a "[s]ocial state [is] governed by rule of law, respects human rights and freedoms, establishes a balance between person and society, realizes peace and prosperity of the individual, establishes balance between labor and capital relations, endures private enterprise to exercise in security and determination, commits to the protection of the workers and the fair distribution of the national income by taking social, economic and financial precautions, takes measures for the prevent unemployment and development of the working life in a stable way , and founds a just legal system and assuming responsibility for sustaining this, and constitutes a state that exercises a liberty regime"[11].

The 1982 Constitution regulates the right to property (which is also an economic right) as an individual right (Article 35). Social and economic rights and duties have a broad scope in the 1982 Constitution (Articles 41-65). It states that everyone has the freedom to work and conclude contracts, to establish private enterprises, and the state will take measures to ensure that private enterprises operate in accordance with the national economic requirements and social objectives (Article 48). Expropriation (Article 46), nationalization, and privatization (Article 47) are also regulated by the Constitution.

The 1982 Constitution envisages a planned development principle[12] under the financial and economic provisions in the Article 166:

> Planning the economic, social, and cultural development, in particular the rapid, balanced, and harmonious development of industry and agriculture throughout the country and the efficient use

[11] The Constitutional Court decision, dated 18.2.1985, E. 1984/9, K. 1985/4 [1 ANAYASA MAHKEMESİ KARARLARİ DERGİSİ (AMKD) 21, p. 59].

[12] After unplanned and unsustainable growth during the 1950s and 1960s, there is a general acceptance that Turkish economy should be planned. This idea entered the 1961 Turkish Constitution and it stipulated the preparation of Development Plans to carry out economic, social and cultural development in a democratic way. For this purpose, the State Planning Organization affiliated to the Prime Ministry was established on September 30, 1960. It has been aimed that the economy and the private sector would run in the form of a mixed economic system, in a way that complement each other. The main goal of all development plans is to reach the specified growth rates of gross national product (GNP) and to grow the income at a high and stable rate.

of national resources by taking inventory of and evaluating them, and the establishment of the necessary organization[13] for this purpose are the duties of the State.

Measures to increase national savings and production, to ensure stability in prices and balance in external payments, to promote investment and employment shall be included in the plan; in investments, public interests and necessities shall be taken into account and the efficient use of resources shall be. Development activities shall be realized according to this plan".

It should be noted that there is a difference between the planning envisaged in the 1961 Constitution and the nature of the planning foreseen in the 1982 Constitution. The former contains the provision of Articles 41 and 129 regarding planning. In these provisions, planning is organized according to economic and social life, justice, and full employment principle, and aims to ensure human dignity for all. Such an arrangement is not included in the 1982 Constitution. While the social state is pivotal in the planning of the 1961 Constitution, the 1982 Constitution aims to ensure growth and economic development, especially in the second paragraph of Article 166, within the framework of a free market economy[14].

Furthermore, the 1982 Constitution imposes the duty of "Supervision of the Markets" to the State, by including a provision that was absent in the 1961 Constitution. According to the first paragraph of Article 167, "[t]he State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services; and shall prevent the

[13] Article 166 states that planning is to be carried out, but it does not indicate which organization to carry out this planning. The State Planning Organization (SPO) was abolished from the enforcement in 2011 by Statutory Decree No. 641 (The Statutory Decree on the Organization and Duties of the Ministry of Development, published in the Official Gazette dated 08.06.2011 and numbered 27958). Within same Statutory Decree, the Ministry of Development established and it is stated that the Ministry of Development will fulfills the planning task instead of SPO (Article 43).
[14] KORUCU, Serdar, 1982 Anayasasina Göre Ekonomik Düzenin Anayasal Çerçevesi [Constitutional Framework of Economic Order According to 1982 Constitution], Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Yüksek Lisans Tezi, Ankara 2005, p. 212.

formation of monopolies and cartels in the markets, emerged in practice or by agreement". Therefore, the State is not only the provider of a sound and orderly functioning market, but also has the duty to take measures to improve functioning of the markets. Because of the adoption of this new provision, it has been suggested that the deterministic effect of the social state principle in the economic order foreseen by the 1982 Constitution is less than that of the 1961 Constitution[15].

The second paragraph of Article 167 states: "In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce additional financial impositions on imports, exports and other foreign trade transactions, except taxes and similar impositions, or to lift them".

Exploration and exploitation of natural resources (Article 168), Forests and the forest villagers (Articles 169-170), Developing cooperatives (Article 171), Protection of consumers (Article 172), and Protection of craftsmen and artisans (Article 173) are also regulated by economic provisions.

According to Article 172 of the 1982 Constitution, "[t]he State shall take measures to protect and inform consumers; shall encourage their initiatives to protect themselves". In the grounds of the same article further is stated that:

[T]he protection of consumers is a social problem and the precautions to be taken in this regard should protect consumers on the one side, but at the same time these measures should be able to encourage the competition between producers and sellers. The protection of the consumer is a measure of a free market economy… Consumer protection is possible, first, by creating 'consumer consciousness' in consumers. Protection of consumer, in terms of price and

[15] KORUCU, p. 212.

quality, can be assured by ensuring free competition conditions, prevention of monopolies and cartels.

As demonstrated in the article, the idea of consumer protection is based on competition law and is possible only in the presence of free market economics.

In fact, in a decision taken by the Constitutional Court, attention was drawn to the close relation between Articles 167 and 172 of the Constitution. Furthermore, the duty of the State to prevent monopolization and cartelization is to protect consumers and this duty, imposed on the State by Article 172, is secured only by free competition conditions through preventing monopolization and cartelization[16].

The 1982 Constitution aims to establish the legal substructure of a sound market economy, and it also expects the social state to prevent "unfair" situations that may arise from the operation of the market economy. To prevent "unfair" situations, it can be considered that economic processes may have the function of "reducing social inequalities". Regarding the function of "reducing social inequalities", the social state represents an interventionist state[17]. When examining the provisions of the extension of the understanding of the social state, it is clear that the 1982 Constitution has many provisions to authorize the State to intervene in the economy in order to realize the "social" aims.

Therefore, the concept of "social market economy" has been used as a pragmatic approach that reconciles market economy and social state requirements. In this approach, the social market economy is regarded as a model to provide

[16] The Constitutional Court decision, dated 09.12.1994, E.1994/43, K.1994/42-2 (1 AMKD 31, p. 295, 296).
[17] See TAN, Turgut. "Anayasal Ekonomik Düzen" [Constitutional Economic Order], Anayasa Yargısı, Cilt 7 (1997), p. 166, available at http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/anyarg7/tan.pdf (last visited 24.07.2017); Korucu, p. 246.

social state requirements by pointing out the necessity of taking some measures and regulating the state to solve the problems in the economic system[18].

The social market economy is based on the principle that the market economy should maintain the institutions and rules that can produce the desired results, but it assumes that the market economy has some shortcomings. Thus, it tasks the state with minimizing these inadequacies. Nonetheless, while the social state interventionist from an economic perspective, it does not mean that this intervention is an economic order in which all decisions are taken by a centralized mechanism instead of a market economy[19]. Therefore, adoption of social state principles is not an obstacle to free market economy.

The main problem of state intervention in economic life is essentially concerned with the state theories. In terms of state-economy relations, economists have foreseen three state models, which are generally referred to as "liberal state", "social state" or "welfare state" and "neoliberal state" respectively[20]. However, beyond these theories of economic-constitutional relations, when we examine implementation, the generally accepted attitude and approach in the current democratic liberal constitutions is that the "economic neutrality of the constitution" is considered a precondition of pluralist democracy[21].

The Constitutional Court has stated that the 1982 Constitution adopts a democratic regime and there is no obstacle to the pursuit of an interventionist or liberal policy in the economics field[22]. In a sense, the Constitution can follow a

[18] TAN, p. 166; KORUCU, p. 247; AKTAN, Can Coşkun, "Ekonomik Düzen Teorisi, Ekonomik Anayasa Hukuku Ve Sosyal Piyasa Ekonomisi [Theory of Economic Order, Economic Constitution and Social Market Economy]", available at http://www.canaktan.org/felsefe-sosyo/ordo-liberalizm/sosyal-piyasa.htm (last visited 24.07.2017).
[19] TAN, p. 166.
[20] YÜZBAŞIOĞLU, Necmi, Anayasa ve Ekonomi [Constitution and Economy], Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 2009/1, p. 13-15, available at http://dosya.gsu.edu.tr/Docs/HukukFakultesi/TR/FakulteDergisi/fakulte-dergisi-2009-1-hukuk-fakultesi.pdf (last visited 24.07.2017).
[21] YÜZBAŞIOĞLU, p. 15.
[22] The Constitutional Court decision, dated 18.02.1985, E. 1984/9, K. 1985/4 (1 AMKD 21, p. 59).

mixed economic policy in preference to a liberal economic policy[23], and Articles 5, 35, 48, and 167 are available to pursue under a mixed economic system[24].

The decisions of the Constitutional Court and the doctrinal studies concur that the 1982 Constitution does not foresee any model of economic policy and does not impose any kind of economic policy that political powers should implement[25]. Therefore, it reflects the economic neutrality of the constitution[26]. The nature of the economic policies to be implemented is left to the preferences of political power. According to the 1982 Constitution, political powers can apply their own economic policies, provided they remain within the frame drawn by the Constitutional provisions[27].

The freedom of movement granted to political powers in this respect is entrenched through Article 65 of the Constitution. Within the provision, the State is allowed to act in accordance with the "priorities appropriate with the aims of these duties" and to act with "the capacity of the financial resources". This provision has been criticized as it can provide a basis for selecting loose policies relating to social rights[28]. However, The Constitutional Court adjudged that the provision of Article 65 does not relieve the state of its social and economic duties and it does not undermine the meaning and intention of social rights[29].

In summary, the Turkish Constitution establishes a social state in Articles 2, 5, and the resulting social and economic responsibilities of the State. However, this character is not an obstacle to opting for a free market economy. Articles 35, 48, 166, and 167 are suitable provisions to form the substructure for this. Whether it is called a social market economy due to emphasis on the social state character,

[23] The Constitutional Court decision, dated 27.09.1985, E. 1985/2, K. 1985/16 (1 AMKD 21, p. 222).
[24] The Constitutional Court decision, dated 5.5.1987, E. 1986/1, K. 1987/10 (1 AMKD 23, p.196).
[25] TAN, p. 165, 166; GÖZLER, Kemal, Türk Anayasa Hukuku [Turkish Constitutional Law], Ekin Kitabevi Yayınları, Bursa 2000, s.154-168 (www.anayasa.gen.tr/sosyaldevlet.htm); KORUCU, p. 248.
[26] TAN, 165, 166; GÖZLER, p. 154-168; KORUCU, p. 240, 241; YÜZBASIOGLU, p. 15, 16.
[27] Therefore, it has been stated that in liberal democratic constitutional regimes, "conditional economic neutrality" is valid. See YÜZBASIOGLU, p.15
[28] AZRAK, Ülkü, "Sosyal Devlet ve 1961 Anayasasının Sistemi [Social State and 1961 Constitution System]", 27 ISTANBUL ÜNİVERSİTESİ HUKUK FAKÜLTESİ MECMUASİ 1-4 (1962), p. 222.
[29] See the Constitutional Court decision, dated 21.10.1963, E.1963/172, K.1963/244 (1 AMKD 1, s.439-455).

or by omitting the adjective "free" in front of it, social market economy is not a new economic order or different from a market economy[30]. The implementation of the political power (since 2002 under the same government) is clear that Turkish economic system is a market economy given its basic structure and components[31].

However, the lack of similar provision to Articles 41 and 129 in the 1961 Constitution (which envisages a connection between social state principles and planned development) in the 1982 Constitution cannot be interpreted to mean that the State's duty to strengthen the market economy is merely enhancing economic growth (or increasing production and efficiency). Enhancing economic growth should be concurrent to augmenting "fairness" (fair distribution of the national income).

Furthermore, competition is central to a free market economy. The concept of competition refers a market structure that has two dimensions, i.e., supply (producers) and demand (consumers). This market structure also requires that all market actors are able to make decisions independently. Therefore, the duty of State is, on the one hand, to take measures to increase production (Art. 166) by ensuring freedom of enterprise (Art. 48) while, on the other hand, adopting measures that protect and inform consumers (Art. 172), thus ensuring "consumer consciousness".

Hence, under the 1982 Constitution, the proper synthesis of social market economy and free market economy suggests that the State is obligated to provide a competitive environment in which all market actors have "freedom of choice" that enhances economic growth by reallocating resources in the most efficient way. However, enhancement of economic growth is not an end in itself. The State

[30] See AKTAN.
[31]See Eight Five-Year Development Plan (2001-2005), Ninth Development Plan (2007-2013), Tenth Development Plan (2014-2018). The Development Plans are available at ttp://www.kalkinma.gov.tr/Pages/KalkinmaPlanlari.aspx. (last visited 12.08.2017).

must ensure that each Turkish citizen receives an equal and fair share from this economic growth.

1.1.2. Adoption of competition law

In Turkey, since the early 1980s, reforms have been put into place to ensure that the market economy is fully alive. However, the enforcement of rules to protect market competition did not take place in the mid-1990s, despite the availability of various preparations and drafts.

The primary legal basis of the Turkish competition policy is Article 167 of the 1982 Constitution. The provision stipulates that “[t]he state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets”. Therefore, the main factor in drafting the Act on the Protection of Competition No. 4054 was the need to fulfill this obligation in the provision.

The first act aimed at protecting competition in Turkey was a symposium in 1971, spearheaded by the Ministry of Commerce, which mainly addressed consumer protection. Following this symposium, a study by the Ministry of Commerce resulted in the “Draft Law on the Regulation of Activities Related to Commercial Goods and Services for the Protection of Consumers”. This draft law mainly included provisions on consumer protection and regulation of the internal market.

The second draft prepared by the Ministry of Commerce on the subject was the “Draft Law on the Regulation of Trade and Protection of Consumers” dated 1975. This draft law included the first provisions introducing regulation on competition law in Turkey. Another draft law prepared by the Ministry in 1980 was titled “Draft Law on the Protection of Honesty in Commerce”.

“Draft Law on the Regulation of Commercial Activities and Protection of Consumers”, prepared in 1981 by the Ministry of Commerce, essentially includes provisions in parallel to those in the previous draft, despite the different title. Two versions of the “Draft Law on Consumer Protection” dated October 1983 and March 1984, addressed regulations related to cartels and monopolies in separate sections for the first time.

In the environment created by the new economic model adopted in Turkey in the 1980s, in addition to the explicit duty placed on the State by Article 167 of the 1982 Constitution to prevent monopolization and cartel formation in the markets, the Ministry of Industry and Commerce separated problems related to competition restriction from provisions concerning consumer protection. Therefore, the “Draft Law on Agreements and Practices Restricting Competition” was created in November 1984, which was the first independent text on competition.

In addition to Article 167 of the 1982 Constitution, Turkish relations with the European Union played an important role in the formation and shaping of Turkish competition rules. According to the agreement[32] signed within the scope of relations with the European Union and the decision[33] taken in accordance with the protocol[34], Turkey has been under obligation to harmonize its legislation on competition rules with the Community legislation, and to implement these rules in an effective manner.

The Turkish Competition Act (hereafter TCA) is based primarily on Articles 81 and 82 of the Treaty of Rome[35]. The studies on competition protection started

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[32] Assosciation Agrement (Ankara Treaty) signed in 1963 for association relationship with the European Economic Community (EEC) (Article 16).

[33] Decision No 1/95 of the EC-Turkey Association Council of March 6 1995 that created Customs Union between European Union and Turkey, available at http://www.mfa.gov.tr/1-95-sayili-ortaklik-konseyi-karari-gumruk-birligi-karari.tr.mfa (last visited 12.08.2017) (hereinafter Decision No 1/95).

[34] The Additional Protocol (Article 43), which was adopted in favor of the AnkaraTreaty, and the implementation of the necessary measures for the implementation of the competition rules envisaged in the Rome treaty in the context of the convergence of the parties' economic policies.

[35] The revised Treaty on the Functioning of the European Union (TFEU) then renumbered as the Articles 101 and 102. Hereinafter we will use the new numbering of the TFEU when quating any opion related to old numbering of the

in the 1970s, and could be transformed into a concrete text in 1992 within the scope of partnership with the EC. After finally being accepted by the Turkish Grand National Assembly (hereafter TGNA) on 7 December 1994, it was promulgated under the name of “The Act on the Protection of Competition No. 4054 (TCA)”. However, the act was implemented only after the appointment of the Competition Board (hereafter Board) and the establishment of the Competition Authority (hereafter Authority) in 1997.

The brief history of the adoption of Turkish competition law demonstrates that drafters have regarded competition policy as a part of consumer protection policy, especially in respect to prevention of monopolies and cartels. The later drastic changes to this approach should not do away with the necessary connection between consumer protection and competition policy. This link is inherent in Article 172 of the 1982 Constitution, and it is a necessary condition for free market economy.

1.1.3. Overview of competition policy

In market economies, instead of intervening directly in the economy, the state intervenes with legal and administrative regulations called “competition law”[36]. Competition policy refers to the entire range of state interventions in the market structure, while competition law means the set of rules designed to prevent competition distortion by undertakings so as to protect and develop competition in general and in the market[37].

Treaty establishing the European Community which are respectively Article 81EC and Article 82EC. We will keep the old numbering only if it is on the title of the reference or the document.

[36] ATEŞ, Mustafa, “AB’ye Uyum Bağlamında Türk Rekabet Hukuku ve Politikasına Genel Bir Bakış [An Overview of Turkish Competition Law and Policy in the Context of EU Adaptation]”, 9 ANKARA BAROSU FİKRİ MÜLKİYET VE REKABET HUKUKU DERGİSİ 1 (2009), p. 59, available at http://www.ankarabarosu.org.tr/siteler/ankarabarosu/frmmakale/2009-1/3.pdf (last visited 20.07.2017) [hereinafter Ateş (2009)]; ATEŞ, Mustafa, Rekabet Hukukuna Giris [Introduction to Competition Law], Adalet Yayinevi, Ankara 2013, p.31.

[37] Republic of Turkey Prime Ministery State Planning Organization (SPO), The Ninth Development Plan (2007-2013), Competition Law and Policies, Specialization Commission Report: 676, SPO Publication No 2723, Ankara 2007, p. 3.

Competition policy is important in relation to other policies and regulations that affect competition in general, as well as guiding competition law practice. The government has policies that directly affect the markets such as foreign trade, state aid, privatization, tax, and foreign investment. In addition to this policy, the state must reach beyond competition law to address market disruptions resulting from the economic characteristics of such markets (such as natural monopolies, network externalities) or to achieve various public policy purposes (such as protection of consumers due to asymmetric information on financial markets). There are ongoing regulations and competition is not fully established in these markets. For the economic well-being and the interest of the country, it is necessary to consider competition policy in the formation of such economic policies.

Competition policy, in the narrow sense, and competition law consist of prohibition of agreements, decisions and concerted practices restricting competition between undertakings as well as abuse of dominant positions by undertakings holding such positions in their markets, control mergers, and acquisitions over certain thresholds.

At the same time, they are intervention instruments for competition law. In addition to the enforcement of competition rules, Competition Authority uses the competition advocacy as a means within the scope of competition law applications. Competition advocacy refers to the initiatives by competition authorities in relation to establishing and fostering a competitive environment mainly through their relations with other public organizations, but also through raising public awareness of the benefits of competition[38].

Several activities have been considered as competition advocacy. These include market inquiries, discoursing on legislations currently in force or on draft legislations, advising on state interventions that are likely to encourage practices liable to restrict competition, organizing seminars or publishing bulletins aimed

[38] Competition Terms Dictionary, Turkish Competition Authority Publication, Fifth Edition, Ankara 2014, p. 167.

at enlightening public opinion directly, using media to enlighten public opinion indirectly, to inform the members of the judiciary and the regulatory agencies on matters related to competition policy, and to take actions on actual or potential state interventions that are likely to affect competition. Competition advocacy is an important means, especially in developing countries, for the effectiveness of competition law and policy[39].

To work on and study competition law and to approach certain issues in this field, one must first ascertain the aims in this field of law and which benefits can be expected. The first Article of the TCA does not mention another ultimate purpose beside competition protection [40].

In the General Preamble of the TCA, the main aim is stated as “protection of competition process or free competition” or “protection of efficient competition” and the aims pursued by the competition law are the following:

> *Protecting the competitive process ensures the allocation of a country's sources according to public demand* (1) *and contributes to general welfare with increasing economic efficiency* (2). *Competition among actors involved in commercial activities leads to a more efficient production and business management, and promotes using fewer sources to lower costs* (3*), technological innovations and developments* (4). *Because of this, it will be possible to buy products with better quality at lower prices, and thus the consumer and social welfare will increase* (5). *Beside the abovementioned aims, the competition system also has secondary aims. First, a competition system helps to protect smaller undertakings by eliminating entry barriers* (6) *On the other hand, competition system*

[39] GAL, Michal S., “The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries”, COMPETITION, COMPETITIVENESS AND DEVELOPMENT, New York University Law and Economics Research Paper Series Working Paper No. 02-03, 2004, p. 20-38, available at https://ssrn.com/abstract=665181 (last visited 20.07.2017).

[40] “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.” (The TCA Art. 1).

contributes to the integrity and honesty of the market (7) [and] *...to decreasing inflation. Another benefit expected from competition law is strengthening entrepreneurship* (8)[41].

It demonstrates that ensuring an effective competitive process is itself an objective. It is not clear from the language, though, whether this objective is both a goal and a means to achieve other desirable goals such as (1) ensuring allocative efficiency, (2) promoting general (social) welfare, (3) enhancing productive efficiency, (4) augmenting dynamic efficiency, (5) promoting consumer and social welfare, (6) protecting of small and medium-sized enterprises, (7) fostering fairness and equality in the market, (8) fighting inflation, (9) and encouraging entrepreneurship. In other words, the General Preamble of the TCA is not clear on whether these "objectives" are expected effects or benefits of the primary goal referred to as "protection of competitive process" or whether it refers to more than one objective.

The Seventh Five-Year Development Plan emphasized the competition policies and their contributions to efficiency and welfare, and promised to avoid market sharing, to keep the market open, and to reduce market uncertainties. The Eighth Five-Year Development Plan makes similar long-term promises. The Ninth Development Plan (2007-2013) includes a Specialization Commission Report on Competition Law and Policies (SCR)[42]. The SCR states that the goal of competition law and policy is not the competition itself, but promoting economic efficiency[43].

SCR criticized many of the objectives stated in the General Preamble of the TCA, because they may conflict with each other to ensure economic efficiency, which is the main objective of competition law enforcement[44]. Therefore, it has

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[41] General Preamble of the Act (numbered references added).
[42] The Ninth Development Plan (2007-2013),Specialization Commission Report on Competition Law and Policies, available at http://www.kalkinma.gov.tr/Pages/OzelIhtisasKomisyonuRaporlari.aspx (last visited 20.07.3017).
[43] SCR, p. 23.
[44] SCR, p. 23.

been suggested that the implications of competition law should aim to increase consumer welfare or total welfare through promoting economic efficiency[45]. Even though the commission has noted that the Competition Authority favors consumer welfare over total welfare, it has warned that "competition law enforcement may also produce results that sometimes serve other purposes, such as protection of consumers or small and medium-sized enterprises, but these objectives should not be decisive for competition policy"[46].

SCR also stated that the type of economic efficiency (allocative, productive, or dynamic) to be chosen should be determined by the Competition Board, who may make a more accurate evaluation while considering the needs of the country and the economic and social conditions in practice[47].

The international documents regarding Turkish Competition Policy and Law mention that "protect[ing] the competitive process" is the goal, and the promotion of consumer welfare and efficiency is considered as a possible outcome of competition law enforcement[48]. However, when the OECD Report was translated into Turkish, the Competition Authority *added* that "the ultimate goal of the Act is to maintain the competition process (not just competition between firms) in order to create efficient market and increase consumer welfare". The Authority considered this approach as consistent, not only with Art. 167 of the 1982

[45] SCR, p. 24.
[46] SCR, p. 24.
[47] SCR, p. 24.
[48] See The International Competition Network (ICN), "Competition Enforcement and Consumer Welfare- Setting the Agenda", 10th Annual Conference 2011, p. 13, 20, 45, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf (last visited 14.02.2017) [hereinafter ICN (Consumer Welfare)]. ICN, "Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies", 6th Annual Conference 2007, p. 79, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf (last visited 14.02.2017) [hereinafter ICN (Unilateral Conduct)]. Organization for Economic Co-operation and Development (OECD) Reviews of Regulatory Reform, "Regulatory Reform in Turkey", 2002, p. 8, available at https://www.oecd.org/turkey/1840741.pdf (hereinafter OECD Report).

Constitution, but also with Art. 172, which requires the State to "take measures to protect and inform consumers"[49].

In the TCA, consumer welfare and efficiency objectives can be found in Article 5, which regulates exemption for agreements, concerted practices and decisions limiting competition (Art. 4). Article 5 sets cumulative conditions that make a practice that infringes Art. 4 exempt from the prohibition. Restrictive practice that contributes to improving the production or distribution of goods or to promoting technical or economic process *and* benefitting consumers[50] are two of these conditions.

The Guidelines on the Application of Articles 4 and 5 of the Act No 4054 on the Protection of Competition to Technology Transfer Agreements[51] also state that promoting consumer welfare, efficient allocation of resources, and promoting innovation are competition law objectives.

We regard the SCR's suggestion that efficiency as an overarching goal of competition policy as unfortunate. Furthermore, the statement that "protection of consumer or small and medium-sized enterprises objective should not be decisive for competition policy"[52] contradicts Articles 172, 5, and 48 of the 1982 Constitution. In fact, the policy statement of the Competition Authority grants equal importance to efficiency and consumer welfare, as well as emphasizing the interaction between consumer protection policy and competition policy.

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[49] OECD Report in Turkish, 2005, p. 12, available at http://www.rekabet.gov.tr/tr-TR/Sayfalar/OECD-Ile-Iliskiler (last visited 20.07.2017).

[50] Article 101(3) TFEU has similiar regulation, but there it is stated as "allowing consumers a *fair share* of the resulting benefit". "Fair share" concept is not included in Article 5 of TCA, but in the grounds of the article stated that "[i]n case these positive effects are not reflected on the consumer and stay as firm profits, the exemption will not be implemented. The fact that the consumer receives a just share of the benefit created also reveals the social side of the competition law".

[51] No: 09-22/ 486, dated 5.13.2009 [hereinafter the Guidelines (Technology Transfer Agreements)].

[52] SCR, p. 24.

1.2. Difference between Turkish Competition Law and Turkish Consumer Protection Law

In recent years, the application of competition law emphasizes consumer welfare. Therefore, it requires a closer examination of the relationship between consumer protection and competition policies.

Consumer welfare as a focus of competition law has existed in US practice and is stated as an objective with the reform efforts of the European Union in the competition law regimes[53].

In Turkish competition law, as a reflection of the reform efforts in the European Union, an increasing number of references are made to consumer welfare in secondary legislation and in Board decisions. In this context, the definition of the relationship between the two policies, the concept of consumer welfare in terms of both policies, and the extent to which competition policy can serve to increase consumer welfare is being debated.

In general, the relationship between these two policies is explained by the interaction of supply and demand, which plays a decisive role in efficient market operation, i.e., the functioning of an effective market is shaped by consumer preferences (demand side) and firm behavior (supply side)[54]. Competition rules

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[53] Starting late 1990s the early 2000s, the European Commission has been modernising its approach to EU Competition rules with a more economic approach that embraces a consumer welfare standard as its objective. See White paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf; Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty", http://europa.eu/legislation_summaries/competition/fi rms/l26092_en.htm; DG Competition Discussion Paper on the Application of the Treaty to Exclusionary Abuses, http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf; Guidelines on the Application of Article 81(3) of the Treaty (2004), http://europa.eu/legislation_summaries/competition/fi rms/l26114_en.htm; Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2008), http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html [hereinafter Guidance (2009)]. See also speeach of Mario MONTI, "Competition for Consumer's Benefits", http://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf; and Philip Lowe, "Preserving and Promoting Competition: A European Response", http://eu/competition/speeches/text/sp2006_018_en.pdf (last visited 16.07.2017).

[54] TOPALÖMER, Serap, Tüketici Refahinin Arttirilmasinda İki Farkli Araç: Tüketici Politikasi Ve Rekabet Politikasi [Two Different Tools in Increasing Consumer Welfare: Consumer Policy and Competition Policy], Rekabet Kurumu Uzmanlik Tezleri Serisi No: 138, Ankara 2015, p. 1,2.

serve to preserve and enhance the competitive environment, thus enhancing the supply direction of the market by providing quality and diversity in the goods and services market. Consumer protection rules have been introduced to protect consumers from unfair commercial practices, unfair contract conditions, information asymmetries, and problems caused by cognitive bias within the scope of protection of consumers' economic interests, and they strengthen the demand side of the market[55]. The disruptions that may arise on one side of this two-way relationship may prevent the formation of a sound competition environment. Thus, the convergence between the two policies is gaining more importance in the presence of market failures that require the combination of supply- and demand-side approaches[56].

Consumer protection policy consists of regulations and practices related to informing, educating, and protecting consumers in general, while competition policy refers to the protection and development of the competitive process. In Turkish law, both policies have a constitutional legal basis (the 1982 Constitution Articles 167 and 172) and the intentions of consumer protection and competition are considered to be closely related to each other.

The main approach shaping the consumer protection policy is that consumers are weak in terms of bargaining power and knowledge level against providers or sellers. Especially in the post industrialization period, the belief that consumers who can be protected freely within the market mechanism in the liberal economy has been shaken[57]. Thus, it has been recognized that the government needs to take protective measures for consumers. Provisions for this purpose are

[55] See ARMSTRONG, Mark, "Interactions Between Competition and Consumer Policy: A Report Prepared for the OFT", OFT Economic Discussion Paper (2008), available at https://mpra.ub.uni-muenchen.de/7258/1/ (last visited 20.07.2017).
[56] See KOVACIC, William "Competition Policy, Consumer Protection, and Economic Disadvantage", WASHİNGTON UNİVERSİTY JOURNAL OF LAW & POLİCY (2007), available at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1204&context=law_journal_law_policy (last visited 20.07.2017).
[57] KOCA, Güneş, Tüketicinin Korunması Açısından Abonelik Sözleşmeleri [Subscription Agreements in Terms of Consumer Protection], Yüksek Lisans Tezi, Ankara 2004, p. 12, 13; TOPALÖMER, p. 5.

regulated in the Law on the Protection of Consumer No 6502[58] (hereinafter Consumer Law).

The first article of Consumer Law titled "Purpose of Law" states that "[i]t is necessary to arrange for consumers to take measures to protect their health, safety, and economic interests, to compensate their losses, to protect them from environmental hazards, to provide consumers with enlightening and conscious measures, to encourage consumer self-protection initiatives, and to encourage voluntary organizations in policy formulation". In other words, the consumer protection policy seeks protection of consumers in economic and social areas.

At the point of increasing consumer welfare, in terms of understanding the relationship between consumer and competition policies, which are considered to have a common goal, it is useful to understand first what these two policies refer to with the concept of "consumer". This will help us draw the line between the policy practices.

In Article 3 (k) of the Consumer Law, the consumer is defined as "a natural or legal person acting for commercial or non-professional purposes". The final consumers (end-users) are referred to here, and this definition is based on the purpose of use.

In competition law, the concept of "consumer", which is used in the analyses of competitive process violation and efficiency assessment, is not limited to the end user[59]. Although the definition of consumer is not in the TCA, it is evident in the secondary legislation. In the Guidelines on The General Principles of Exemption[60] (n. 43):

[58] Law No. 6502 on the Protection of the Consumer, adopted on 7.11.2013 , was published in the Official Gazette on 28.11.2013.
[59] Consumer is defined as the ultimate user of a product in the Competition Terms Dictionary which is published by the Turkish Competition Authority. See Competition Terms Dictionary, Ankara 2010, Turkish Competition Authority, Publication Number 0236.
[60] No 13- 66 / 923- RM(10), dated 11.28.2013 [hereinafter the Guidelines (Exemption)].

With respect to the assessment of exemption, the concept of ‘consumer’ should be read as encompassing all direct or indirect users of the products or services in the relevant market covered by the agreement. Producers that use the products in question as an input, wholesalers, retailers and dealers that make resales can be defined as consumer. The concept of consumer covers not only end users but also those who purchase the products for resale purposes. Consumers can be real persons or legal entities.

The Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings[61] (n. 22), regarding evaluation of consumer welfare, states that “*reduction in consumer welfare may emerge at the resale level or at the final consumer level*”, which indicates intermediate level buyers are also regarded as consumers.

CSERES points out the importance of consumers in terms of consumer policy by stating that the consumer is at the center; his interests, needs, and economic role define the content and orientation of consumer law[62]. Furthermore, consumer policy addresses not only economic, but also non-economic (social) aspects of market transactions[63]. Therefore, it can be said that consumer law has foreseen a direct protection for consumers.

In Turkish literature, ASLAN suggests that “consumer protection” is the main goal underlying competition law and its social aspect should not be ignored[64]. GÜRKAYNAK contends that while any social or non-economic aspect can be an objective of competition policy, consumer welfare can be only included as its economic concept, which is directly related to “economic efficiency” as the

[61] No 14-05/97-RM (1), dated 01.29.2014 [hereinafter the Guidelines (Dominant Position)].
[62] CSERES, Kati J., “The Controversies of the Consumer Welfare Standard”, 3 EUROPEAN COMPETİTİON LAW REVİEW 2 (2007), p. 129, 130, available at https://ssrn.com/abstract=1015292 (last visited 05.07.2017) [hereinafter Cseres (2007)].
[63] CSERES, Kati J., “Competition and Consumer Policies: Starting Points for Better Convergence”, AMSTERDAM CENTER FOR LAW & ECONOMİCS, Working Paper No. 2009-06 (2009), p. 6, available at https://ssrn.com/abstract=1379322 (last visited 05.07.2017) [hereinafter Cseres (2009)].
[64] YILMAZ, Ejder, “Rekabet Kanunu Uygulamasında Usul ve Ispat Sorunları [Procedural and Proof Issues in the Application of the Competition Law]”, Persembe Konferansları 2, Rekabet Kurumu Yayını, Ankara (1999). [hereinafter YILMAZ (1999)]; YILMAZ, Ejder, Rekabet Hukuku [Competition Law], Ekin Yayin Evi, Bursa (2017), p. 9-11.

main antitrust goal[65]. According to this view, competition policy can serve only indirect protection by protecting the competitive process that provides low price and product quality[66]. AŞÇIOĞLU ÖZ proposes that in the case of competition policy, protection of the competition process is an end in itself, and the efficiency and consumer welfare have emerged consequent to this process[67]. This belief follows that undistorted competitive process will ultimately tend to maximize wealth and benefit consumer welfare.

The first obvious difference is the concept of “consumer”. In consumer law, its scope is the end-user, while the competition law contains customers (parties on the buyer side at any level) and end users. The view which claims that competition policy indirectly protects consumers ignores the situation wherein profit increases (efficiency) merely occur from consumer surplus extraction. If the protection of competitive process draws the distinction, how does one interpret the competition law provisions that envisage direct harm to consumers. For instance, TCA Article 6 condemns “abusive” practice, and consumer harm is used for the determination of “abuse” [The Guidelines (Dominant Position) n. 22].

It can be said that under competition law, “protection of consumer” is limited to protection “from the negative consequences of the restriction of competition”. It is generally accepted that increased price, reduced output, and decreased quality are negative effects[68]. These are accepted as an indicator to consumer detriment and are generally regarded as having emerged from distortion of the competition. Thus, competition law enforcement implies an effect based approach, does not intervene specific contract between seller and consumer, but has an indirect way to enforce consumer interest. At the same time, it uses

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[65] GÜRKAYNAK, Gönenç, Türk Rekabet Uygulaması İçin “Hukuk ve İktisat” Perspektifinden “Amaç” Tartışması[Debate on "Objective" from the Perspective of "Law and Economics" for Turkish Competition Practice], Rekabet Kurumu Yayınları, Ankara 2003, p. 25 [hereinafter GÜRKAYNAK (2003)].
[66] GÜRKAYNAK (2003), p. 25.
[67] AŞÇIOĞLU ÖZ, Gamze, Avrupa Topluluğu Ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması[Abuse of the dominant position in European Community and Turkish Competition Law], Rekabet Kurumu Yayınları (No 0051), Ankara 2000.p. 15, 22.
[68] See Guidelines (Dominant Position), n. 22.

consumer harm as an indicator to determine whether the practice is anti-competitive or pro-competitive. Nevertheless, consumer law aims to prevent consumer harm. In other words, the intervention of competition law can result in direct protection of consumers (regarding condemning practice that increase price and reduce output) or indirect protection of consumers (condemning practice that creates barrier to entry or prevent expansion of rivals' sale to increase consumer choice).

In this context, because of the tools competition law has, consumer interest has an economic concept. Depending on the policy choice (selecting consumer/total welfare, or focusing on short-term/long-term interest), the scope of the interest can extend or shrink, or it may be included in the social aspect. However, consumer law is not only based on economic efficiency, but also on equity, and it always is also a social justice component[69]. The creation of "consumer consciousness" is the primary goal of consumer law. For competition law, it has been suggested that market imperfections (information failures) can distort competitive markets[70]. In this respect, consumer interest can include a social aspect, if competition authority opts to introduce remedies for this issue.

Our understanding suggests that "harm to competition" or the "distorted competition" as a prerequisite for competition rules to intervene for consumer protection draws the line between competition and consumer protection policy. While it is found in most of the cases, the goal of "protection competition" itself requires ensuring functioning of the demand-side, which can only occur when the consumer makes an informed choice. Therefore, consumer protection and competition policies' primary goal are common. However, achievement of this goal under these policies will be through different paths due to different tools provided under related regulations. Nonetheless, consumer protection from the

[69] CSERES (2009), p. 130.

[70] See GRIMES, Warren S., "Antitrust Tie-In Analysis After "Kodak": Understanding the Role of Market imperfections", 62 ANTITRUST LAW JOURNAL 2 (Winter 1994), available at http://www.jstor.org/stable/40844119 (last visited 17.06.2017).

negative consequences of competition restriction is just one aspect of the competition policy goal.

1.3. Difference between Turkish Competition Law and Turkish Unfair Trade Rules

Competition law prevents the violation of the competitive order in the market, *ex ante* (mergers and acquisitions), and *ex post* (with cartel agreements and abuse of dominant position), or has a preventative role such as sector inquiry. Unfair competition law, on the other hand, provides freedom of economic activity through the protection of fair competition.

First, the relationship must be determined by an accurate perspective through the goal of both fields. INAN states that they serve for opposite purposes, i.e., unfair competition rules intend to limit competition, and even if it is unfairly abusive, it establishes the boundaries of competition rights, while competition law aims to expand competition as much as possible[71]. According to AŞÇIOĞLU ÖZ, competition law is different in terms of its purpose, scope, and protected legal interest from unfair competition rules. Unfair competition rules are the application of the honesty rule as envisaged in the Turkish Civil Code[72] (Article 2) to a specific area, namely abuse of right to compete freely. They foresee protecting those injured by the practice, and who are rivals or customers[73]. However, the protected interest is competition itself as an institution by competition rules, and not the interests of the people or the competitors are intended to be protected directly[74]. PINAR questions these views by proposing that competition law and unfair competition law are not contradictory or from different fields. Rather, they should be complementary and have coherent objectives, which is the aim of protection of competition, but from a different

[71] İNAN, Nurkut, Rekabet Hukukunun Diğer Disiplinlerle İlişkisi [The Relationship between Competition Law and Other Diciplines], Rekabet Kurumu Perşembe Konferansları-1, Rekabet Kurumu Yayını, Yayın No. 0039, Ekim 1999 Ankara, p. 10.
[72] Law No 4721, adopted on 22.11.2001, in Official Gazette dated 7.8.2003 and numbered No. 25192
[73] AŞÇIOĞLU ÖZ, p. 18.
[74] AŞÇIOĞLU ÖZ, p. 19.

perspective. While competition law protects freedom of competition from violations, unfair competition law protects fair competition from unfair commercial practices[75]. In other words, competition law serves to control market structure and unfair competition law serves to control market behaviors, that is, unfair commercial practices in the market[76].

In Turkish Commercial Code Law No. 6102[77], Article 54 (1), the purpose of the unfair competition rules is clearly stated as "ensuring the honest and undistorted competition in the interests of all participants". According to preamble of the article, there are three reasons to favor the concept of "honest and undistorted competition" instead of the concept of "economic competition": First, the latter is vague; second, it can be understood as "competition between rivalries"; and third, to facilitate harmonization with the language of Turkish Competition Act. For the last reason, also the concept of "all participants" refers to "the famous trio of competition law are meant: Economy, consumer and public".

We agree that both regulations are not contrary, but they are complementary to each other. However, the triggering of the legal enforcement is different, as are the tools for competition protection. Competition distortion in violation of honesty rules or by means of deceptive behavior triggers the unfair competition enforcement. Furthermore, agreements between undertakings or decisions that aim to affect markets and restrict competition in respect of goods and services as well as market concentration, and which lead to abuse of dominant position, monopolization, or distortion of competition can trigger enforcement of competition law.

We should mention that ASÇIOGLU's opinion was partly valid at the time of her writing, however consequent to adoption of the New Turkish Commercial

[75] PINAR, Hamdi, "Rekabet Hukuku İle Haksiz Rekabet Hukuku İlişkisi [The Relationship Between Competition Law and Unfair Competition Law]", 15 REKABET DERGİSİ 2 (2014), p. 66.
[76] PINAR, p. 69-72.
[77] Official Gazette dated 14.02.2011 and numbered 27846.

Code, interest of consumers and public are included into the objective of the prevention of unfair competition rules. Therefore, the general saying that "competition rules protects competition, while unfair trade rules protects competitors" is no longer valid. The modern approach clarifies that unfair trade rules also protect the competitive process.

Nonetheless, these improvements in the unfair trade rules are positive and complement the competition advocacy activities carried out by the Turkish Competition Authority in establishing and promoting a competition culture in Turkey.

2. DEBATE ON GOAL OF COMPETITION LAW: WELFARE AND OBJECTIVES

Consumer welfare is a stated objective of competition policy alongside increasing efficiency. However, there is no consensus on the meaning of consumer welfare. Therefore, enforcement of the competition rules must be questioned under these objectives, which can be legitimate and provide legal certainty. Since the current emphasis is on "consumer welfare" through "economic efficiency", this section addresses the understanding of welfare and the potential conflicts between different welfare concepts, and then explains the trade-offs between different types of efficiency.

2.1. Welfare Economics, Different Understanding of Welfare and Efficiency

2.1.1. Welfare economics

"Welfare" can be defined as the "well-being" of an individual or a society[78]. Welfare economics refers to the analysis of the effect of economic policies on the welfare of an individual or society, i.e., to compare the relative merits of the two situations[79]. While welfare economics aims to use resources optimally to reach

[78] ORBACH, Barak Y., "The Antitrust Consumer Welfare Paradox", 7 JOURNAL OF COMPETITION LAW & ECONOMICS 1 (December 2010), p. 140, available at http://jcle.oxfordjournals.org/ (last visited 26.10.2016).
[79] AKMAN, Pinar, The Concept of Abuse in EU Competition Law, Hart Publishing, Oxford (2012), p. 13,14 [hereinafter AKMAN (2012)].

the maximum well-being of the individual and society, economic welfare is not measurable, as the economic welfare of the individual is defined by the "utility" level of the individual, which refers to happiness or satisfaction[80]. Even if the utility of one individual can be measured, the welfare of society requires the utility total of all. This calculation requires calculating interpersonal utility (a unit of subjective value) between individuals, which is impossible. Since each individual has his/her own goals in life, one cannot compare the well-being of the one individual against the harm caused to another[81]. One might suggest that distributional judgments can determine which individual should compromise for the sake of social welfare, but it still requires the policy consensus on income distribution[82].

The Pareto principle suggests that distributional concern should be avoided and improvement in social welfare is possible if it increases the utility of at least one individual and decreases the utility of none. However, welfare here refers to "efficiency", and efficiency is maximized where no individual would be better off without someone becoming worse off[83]. The Pareto principle does not require compensation, since it proposes that everyone would be better off or at least no one would be worse off.

Contrary to this, the Kaldor-Hicks criterion suggests that if in society some individuals are better off and some worse off, the gainers could compensate the losers in such way that, overall, everyone was better off, in which case welfare would then be increased[84]. However, this criterion for the maximization of efficiency cannot be regarded as compensation, but as a trade-off that requires gains in terms of money being greater than losses[85]. The perspective of assuming

[80] ORBACH, p. 140, 141.
[81] De LEON, Ignacio: An Institutional Assessment of Antitrust Policy – The Latin American Experience, Netherland: Kluwer Law International (2009), p. 206.
[82] AKMAN (2012), p. 13.
[83] HOVENKAMP, Herbert, "Antitrust Policy After Chicago", 84 Michigan Law Review 2 (1985), p. 239, available at http://www.jstor.org/stable/1289065 (last visited 10.02.2017) [hereinafter HOVENKAMP (After Chicago)].
[84] HOVENKAMP (After Chicago), p. 239, 240; GÜRKAYNAK (2003), p. 64, 65.
[85] GÜRKAYNAK (2003), p. 65, 66; AKMAN (2012), p. 13,14.

that some would be worse off is more realistic than the Pareto principle, but it is flawed in that it allows the imposition of losses on individuals and suggests the trade-off in terms of money[86]. However, this trade-off is only workable if the unit of currency has the same value to everyone to overcome distributional judgments[87].

2.1.2. The Concepts borrowed from welfare economic: welfare and surplus

Welfare has been used to refer to surplus in antitrust legal literature[88]. Even though economists use the term interchangeably, the nuance between them is mentioned[89]: Surplus is defined in terms of supply and demand curves in a single market and such curves can in principle be estimated from observations of supplier and consumer behavior, without reference to utility. Although surplus can be related to utility via marginal utility theory[90], utility is not needed in its definition, and surplus should be measured in monetary units, not in units of utility. Furthermore, welfare is often related to utility at a theoretical level, but it is frequently estimated without reference to utility and is measured in monetary units.

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86 AKMAN (2012), p. 14.

87 AKMAN (2012), p. 14.

88 ORBACH, p. 136 (stating that courts should inform "…about the meanings and limitations of the term consumer welfare in antitrust law. It is a poor term that inconsistent with antitrust methodology"). See OECD Glossary of Industrial Organisation Economics and Competition Law, p. 29, available at http://www.oecd.org/regreform/sectors/2376087.pdf (last visited 23.03.2017) [hereinafter OECD (Glossary)] ("Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences. In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers' surplus is a measure of aggregate consumer welfare.").

89 See for the discussion (http://economics.stackexchange.com/questions/1903/difference-between-surplus-and-welfare, last visited: 03.10.2016).

90 Economics concept that although it is impossible to measure the utility derived from a good or service, it is usually possible to rank the alternatives in their order of preference to the consumer. Since this choice is constrained by the price and the income of the consumer, the rational consumer will not spend money on an additional unit of good or service unless its marginal utility is at least equal to or greater than that of a unit of another good or service. Therefore, the price of a good or service is related to its marginal utility and the consumer will rank his or preferences accordingly (www.businessdictionary.com).

Moreover, common sense dictates that welfare is good, something policy should aim to increase and, in this respect, there is an important difference between surplus and welfare: "Surplus" is a purely descriptive concept (a term of positive economics), whereas "welfare" is descriptive and evaluative[91].

For instance, in the case of a product that is deemed bad for health, lowering the price of the product will enhance consumer surplus, which is a supposed antitrust goal[92]. Further, it can be stated that it will also enhance consumer welfare (if consumers are aware of the harm and act rationally, and their pleasure from consumption outweighs the harm). However, it is impossible to maximize consumer welfare, unless the state can perfect each individual's welfare (and it is not possible when individual tastes differ or are in conflict). Therefore, promoting one dimension of welfare does not necessarily mean maximization of welfare, when other individuals place greater value on other dimensions[93]. Thus, the welfare needs to be appraised by *value* or *quality*, not solely by price[94]. In addition, to maximize welfare, one should solve the problem of interpersonal comparisons.

The two most used concepts in antitrust analysis are consumer surplus and total surplus. Consumer surplus is the difference between the highest price a consumer is willing to pay and the actual market price of the product in a particular market. On the other hand, the producer surplus is the difference between the market price and the lowest price a producer would be willing to accept, i.e., in the case of producers, surplus can be regarded as profit (the

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[91] See for the discussion (http://economics.stackexchange.com/questions/1903/difference-between-surplus-and-welfare, last visited: 03.10.2016).

[92] See ORBACH, p. 153 ("…for goods or bads, antitrust laws appear to welcome low prices regardless of actual impact on consumer welfare. Because antitrust laws are blind to the possibility that high prices for bads may enhance consumer welfare…").

[93] See STUCKE, Maurice E., "Should Competition Law Promote Happiness?" 81 FORDHAM L. REV. 2575 (2013), p. 2596, available at: http://ssrn.com/abstract=2203533 (last visited 19.10.2016) [hereinafter STUCKE (Promote Happiness).

[94] See de la MANO, Miguel, "For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control", Enterprise Papers No 11 (2002), p. 18, available at http://www.uni-mannheim.de/edz/pdf/entpap/ep-11-2002.pdf (09.02.2017) ["…consumer welfare (both when considered alone and as a part of total welfare) is a multi-dimensional concept including, together with prices, other aspects such as the quality of the product, the speed and security of the supply, etc."].

difference between the amount a buyer is paid for a product and the seller's cost of providing it)[95]. The two in combination create total surplus [the sum of consumer surplus and producer surplus (producer's profit)].

2.1.3 Different Types of Efficiency and Efficiency Trade-Offs in Competition Law

2.1.3.1. Different types of efficiency

Three main types of efficiency are addressed in economic welfare analysis. These efficiencies can be categorized under two concepts: static efficiency and dynamic efficiency. The distinction between these two concepts is the relevant time horizon over which these efficiencies present their effects. While static efficiency is concerned with efficiency at a particular point in time, dynamic efficiency is related to the ability of a firm and its incentives to introduce new products or new processes of production over a period[96].

Static efficiency is concerned with the optimization of existing products, processes, and capabilities within present technology and levels of existing knowledge to minimize deadweight loss[97]. There are two forms of static efficiency: allocative efficiency and productive efficiency.

Allocative efficiency considers the preferences of the consumers, i.e., the consumer's willingness to pay. Allocative efficiency is achieved when the cost of resources used in production is equal to the consumer's willingness to pay. In other words, allocation of resources (quantity) is efficient (and aggregate welfare is maximized) when each consumer is willing to pay a price that is at least equal

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[95] http://www.investopedia.com.

[96] OECD (Efficiency Claims), p. 12-14. See also KATHURİA, Vikas, "A Conceptual Framework to Identify Dynamic Eefficiency", European Competition Journal (2015), 11:2-3, p. 319, available at http://dx.doi.org/10.1080/17441056.2015.1060006 (last visited 12.11.2016)(pointing out that time factor may not be enough to distinguish especially productive efficiency from dynamic efficiency therefore emphasizing on innovation concern of dynamic efficiency, and distinguishing dynamic efficiency from static efficiency based on preferred concern: "Dynamic efficiency in general is concern with innovation whereas static efficiency is concerned with reduction in cost."). See also BRODLEY, p. 1027 (claiming that both productive and dynamic efficiencies are recurring and enhancing social wealth over the time) See for further distinguishing criteria such as recurring and synergetic character of dynamic efficiency, KATHURİA, p. 328-338.

[97] See de la MANO, p. 9; ORBACH, p. 141.

to marginal cost[98]. This can occur within two different market scenarios: perfect competition or perfectly discriminating monopolist.

Under perfect competition, a firm's conduct does not affect the price. All consumers pay a price equal to the marginal cost, thus consumer surplus is equal to social welfare[99]. That also means producer surplus is equal to zero. On the other hand, a perfectly discriminating monopolist will charge each consumer exactly the amount he/she is willing to pay. Therefore, the monopolist extracts all consumer surplus, and it becomes producer surplus, which is also equal to maximized social welfare within this scenario[100].

Even though the same quantity of goods are produced in both scenarios, wealth distribution occurs in a opposing way. Therefore, a monopolist who is unable to discriminate (who charges the same price to all consumers) would create allocative inefficiency, because some consumers will have a reservation price below the price set by monopolist, yet still above the marginal cost of the product. Since it is socially efficient to produce an additional unit, this outcome is counted as allocative inefficiency, because a monopolist chooses to withold surplus from all other consumers who are supplied instead of reducing the price to serve the marginal consumers who are not supplied[101]. In this scenario, even though the consumer and the monopolist gain a surplus, the social welfare is not maximized and there is a welfare loss, which is known as a "deadweight loss"[102].

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[98] See BRODLEY, p. 1025; OECD (Efficiency Claims), p. 12; KATHURİA, p. 321. See ORBACH, p. 141 (fn.:30) ("Another common definition of allocative efficiency is Pareto optimality, which is a resource distribution in which no voluntary exchange could make a person better off without making someone else worse off."). See also Brodley, p. 1025 (fn.: 19) ("Allocative efficiency in the broad sense encompasses efficient pricing on both the input and output side, but antitrust focuses mainly on seller behavior in output markets. Therefore, allocative efficiency as used … pricing efficiency (or marginal cost pricing) in output markets."). See also de la Mano ("…competiton policy is primarily designed to deal with the impact of business conduct on allocative efficiency. This approach reflects the relative simplicity of focusing on price effects, as well as on the robust and direct relationship that exists between price increases and dead-weight welfare losses.").

[99] OECD (2012), "The Role of Efficiency Claims in Antitrust Proceedings", p.12, available at http://www.oecd.org/competition/EfficiencyClaims2012.pdf (last visited 20.07.2016) [hereinafter OECD (Efficiency Claims)].

[100] OECD (Efficiency Claims), p. 12, 13. See also, BRODLEY, p. 1035-1036.

[101] OECD (Efficiency Claims), p. 12, 13.

[102] OECD (Efficiency Claims), p. 13.

Productive efficiency (or technical efficiency) alludes to the level of utilization of resources in the economy. It implies that a firm is using the least costly inputs (labor, capital, etc.) with the best available technology and the most efficient production process, while minimizing the resource wastage in the production process[103]. Therefore, productive efficiency is achieved when goods and services are produced with an optimal combination of inputs, resulting in the maximum output at the lowest cost[104].

A broad and well refined definition of dynamic efficiency[105] is given by KATHURIA:

> "Dynamic efficiencies are related to the ability of a firm and its incentives to introduce new products or processes of production (or to improve existing ones) by adopting new technology or enhancing knowledge endogenously, i.e.,to move the efficient frontier of production faster or further forward. Dynamic efficiencies are therefore linked to innovation, learning by doing and research and development activities; contrary to static efficiencies, then, they display their effects generally over time"[106].

A close relationship exists between productive efficiency and dynamic efficiency. The first enables the firm to maximize the output at a particular cost, whereas the second, through the introduction of new processes or tools, reduces the production cost[107]. Furthermore, it has also been that dynamic efficiency, concerning introduction of better products, increases consumer surplus, since consumers are willing to pay more for the same product[108].

It is clear that from a consumer welfare perspective, static efficiency will suggest a price close to marginal cost, which will increase output and consumer surplus. Productive efficiency offers direct benefits for producers by reducing

[103] De la MANO, p. 8, 9; OECD (Efficiency Claims), p. 13; KATHURIA, p. 321.
[104] See BRODLEY, p. 1025; de la MANO, p.8,9; ORBACH, p. 141; OECD (Efficiency Claims), p. 13.
[105] It is also called "innovation efficiency", see BRODLEY, p. 1025.
[106]This definition is from OECD (Efficiency Claims) paper that is modified by author. See KATHURIA, p. 338. See also de la MANO, p. 9.
[107] KATHURIA, p. 326.
[108] KATHURIA, p. 326.

their costs, and provided these cost benefits are reflected in the price of the product, consumers will also benefit. However, dynamic efficiency directly benefits producers and consumers. On the one hand, it introduces new, cheaper or better products for consumers, and not merely increase consumer surplus but also consumers' utility and choice. On the other hand, producers benefit from improved production processes or products that encourage them to be more competitive. However, dynamic efficiency comes at a price; it requires investment. Therefore, "price equal to marginal cost" to maximize allocative efficiency does trigger dynamic efficiency. Thus, the concept of consumer welfare equals consumer surplus impedes increased consumer utility and choice while thwarting a possible and sustainable increase in consumer surplus.

2.1.3.2. Efficiency trade-offs in competition law

Efficiency trade-offs occur in competition policy when a practice does not increase or decrease all types of efficiencies simultaneously. There are two situations that efficiency outcomes are not aligned but in tension: allocative vs. productive efficiency, and static vs. dynamic efficiency.

The trade-off between allocative and productive efficiency occurs when a firm reduces its costs, increases its productive efficiency and its market power, which may lead to decreased allocative efficiency because of reduced output and increased prices. This trade-off was suggested for merger cases by Williamson. Williamson's trade-off model demonsrates that a merger that increases prices and results in a loss in allocative efficiency through increasing in market power, may nevertheless increase productive efficiency due to cost savings[109]. In the model, it is assumed that a relatively modest cost reduction is usually sufficient to offset

[109] Williamson had offered his trade-off model for merger-based efficiency, yet later his model be founded wider application, as well as he realized. See WILLIAMSON, Oliver E., "Economics as Antitrust Defense: The Welfare Tradeoffs" (1968) 58(1) 58 AMERICAN ECONOMIC REV 1 (March 1968), p.32, available at http://www.jstor.org/stable/1831653, (last visited: 06.02.2017) [hereinafter WILLIAMSON (Antitrust Defense)]. See BORK, p. 108 [indicating that "(Williamson's) diagram can be used to illustrate all antitrust problem, since it shows the relationship of the only two factors involved, allocative efficiency and productive efficiency…They are what we have to estimate-whether the case is about the dissolution of a monopolistic firm, a conglomerate merger, a requirements contract, or a price-fixing agreement"].

relatively large price increases, even if the elasticity of demand is quite high[110]. However, this model does not consider wealth transfer from consumers to producers[111].

The second efficiency trade-off occurs between dynamic and static efficiency. Static models focus on price competition between firms, merely considering price and output effects. Dynamic efficiency occurs not from price competition, but from competition on innovation. It has been remarked that dynamic efficiency is the major source of economic growth and leads to raised living standards[112]. It has been also contended that innovative activity is a safeguard for long-term consumer interest and it garners higher consumer satisfaction via cheaper, better, or new goods[113]. Therefore, dynamic efficiency creates more social welfare than static efficiency does[114].

The preference for dynamic efficiency over static efficiency is predominantly associated with Schumpeter, who suggests that the short-term costs related to allocative and productive inefficiencies stemming from market power can comfortably be offset by benefits derived from encouraging dynamic efficiencies through "creative destruction"[115]. Further, SCHUMPETER proposes that large-scale establishments have become the most powerful engine of economic progress and the long-term expansion of total output, thus, perfect competition, is not only unlikely, but also inferior[116]. Firms invest in the research

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110 WILLIAMSON (Antitrust Defense), p. 22, 23.

111 WILLIAMSON (Antitrust Defense)], p. 26,27. See for the model that includes distribution of surplus FARRELL, Joseph/ SHAPIRO, Carl, "Horizontal Mergers: An Equilibrium Analysis", 80 THE AMERICAN ECONOMIC REVIEW 1 (March 1990), pp. 107-126, available at http://www.jstor.org/stable/2006737 (last visited 16.07.2017).

112 BRODLEY, Joseph F., "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, And Technological Progress", 62 N.Y.U LAW REVIEW (1987), p. 1026, available at http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/nylr62&id=1036 (last visited 09.02.2016); ORBACH, p. 141; KATHURIA, p. 323.

113 BRODLEY, p. 1037; de la MANO, p. 9.

114 See BRODLEY, p. 1026; KATHURIA, p. 323.

115 KOLASKY, William J. / ANDREW, R. Dick, "The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers", available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11254.pdf (last visited 20.05.2017).

116 See SCHERER,"Antitrust, Efficiency, and Progress" , 62 NEW YORK UNIVERSITY LAW REVIEW (1987), p. 1010, available at

and development in order to become the first to innovate and be rewarded with earning monopoly profits. Thus, a monopoly can be regarded as a necessary market structure (rather than an inefficient one) in which consumers benefit from firms' risky innovative activities[117].

BRODLEY argues that competition law concentrates mostly on promoting allocative efficiency. However, dynamic efficiency provides the greatest enhancement of social wealth, followed by productive efficiency, and then allocative efficiency[118]. Further, he contends that the only efficiency that is reasonably measurable is productive efficiency and, prior to a transaction, none of the three types of efficiencies appears measurable[119]. Eliminating the allocative inefficiency while still achieving the productive and dynamic efficiencies is the ideal. Nevertheless, whether and under what circumstances the realization of productive and dynamic efficiencies justifies a loss of allocative efficiency would be difficult to answer under competition law[120].

In competition law and policy, different types of efficiency inevitably require trade-offs. Ultimately, policy choice will determine the preference between lower prices in the short-term and relatively higher prices that are likely to boost innovation and result in better and new products in the long-term. The difficulty is to decide the weight attributable to each type of efficiency.

Therefore, policy statements that increase consumer welfare through efficiency or increasing consumer welfare and efficiency concurrently is not conflict free. Consumer welfare can guide the competition authority in respect of attributable weight for each type of efficiency. However, this requires a determined concept of "consumer welfare". Equation of consumer welfare to consumer surplus will suggest greater weight on static efficiency over the

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http://heinonline.org/HOL/Page?handle=hein.journals/nylr62&div=38&g_sent=1&collection=journals last visited (20.05.2017).

[117] SCHERER, p. 1010.

[118] See BRODLEY, p. 1028- 1037.

[119] BRODLEY, p. 1028-1032.

[120] BRODLEY, p. 1032.

productive and dynamic efficiency, while understanding of multi-dimension of consumer welfare that includes utility, choice, satisfaction etc. will have preference for dynamic efficiency over allocative efficiency.

2.2. Objectives Of Competition Law And Policy

The concept of "standard" is not peculiar to Turkish law. The rules and standards feature in common law. The distinction between "rules" and "standards" can be briefly explained.[121] In common law, "rules" are evident and clear. For example, "young people under 18 cannot drive cars". Standards are less precise and interpretable: "Slow car down in front of the school". For this standard, it is necessary to interpret how slow (50 km/h, 60 km/h) and where the "in front of school" begins and ends. When this discrimination is adapted to civil law (such as in Turkey), it is met with the concept of "discretionary power". In this legal system, there are rules that recognize and disregard discretionary powers in the judiciary. Appreciation of the judicial authority is sometimes stated in the legislation, and sometimes it is understood that the concepts used in the judiciary need to be filled in[122].

Thus, the concept of "consumer welfare standard" applies to the goal or objective of the antitrust law in US literature, while in EU and Turkish literature, the "consumer welfare objective" is applied. The propositions and arguments regarding the objectives stemming from the US may not always serve the needs of Turkey or Europe due to political, economic, and cultural differences[123]. However, explaining these concepts will aid our later discussions.

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[121] ODMAN BOZTOSUN, Ayse, "Tek Yanli Davranislara Nasil Yaklasalim? [How Shall We Approach Unilateral Conduct?]", 11 REKABET DERGISI 3 (2010), p. 143, 144.

[122] See Turkish Civil Code (Art. 4): "Whereas has granted discretion power or has ordered to consider the necessities or justifiable reasons, the judge will decide according to law and equity".

[123] We use the term of "antitrust" while referring to US legislation, because Sherman Act (dates from 1890) was initially addressed to only cartels and monopolies, then merger control was introduced with the Clayton Act (from 1914). But both cartels, monopolies and merger controls are regulated under same act, therefore the term "competition" has been used in EU and Turkey.

The US Antitrust law is based on the Sherman Act, which has vague language. Therefore, it was necessary to understand the *ratio legis* of the act to establish legitimate enforcement of it. The debate surrounding the goal of antitrust law is based on legislative history. There are two main streams regarding the objective; both camps base their argument on their interpretation of the legislative history of the Sherman Act[124].

However, borders between these two camps are not always clear. We can briefly explain this situation by offering two main reasons. First, this confusion is generally granted to Bork he famously stated, "consumer welfare prescription" is the only legitimate goal of antitrust, based on his own interpretation of legislative intent of the Sherman Act. Subsequently, US courts borrowed his terminology (consumer welfare prescription). However, it has been noted that Bork's consumer welfare prescription coincides with total welfare. Thus, it became difficult to distinguish the sense in which consumer welfare is used, as some scholars borrow the Borkean term of consumer welfare, while others do not. Second, starting with Bork and strengthened by the Chicago School, economic efficiency justification came into question under the rule of reason approach. Even so, some consumer welfare supporters left their concern about price increases to consumers, and aimed for a net gain to the consumer via economic

[124] Meanwhile, some authors stay out this stereotyped legal analysis and follow different approaches. Such as seeking non-economic (or non-efficiency) goal of antitrust law, see ELZİNGA, Kenneth G., "The Goals of Antitrust: Other Than Competition And Efficiency, What Else Counts?", 125 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1977), p. 1191-1213, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4964&context=penn_law_review (last visited 03.02.2016) or instead of examination of the legislative history, attempting to determine which approach would lead a stable political support by consumers and producers, see BAKER, Jonathan B., "Economics and Politics: Perspectives on the Goals and Future of Antitrust", 81 FORDHAM L. REV. 2175 (2013), available at http://ir.lawnet.fordham.edu/flr/vol81/iss5/4 (last visited 03.02.2016) [hereinafter BAKER (Future of Antitrust)]. See STUCKE (Promote Happiness), p. 2602-2612 (contending that competition policy never looked for promote only one economic objective, such as consumer surplus, rather it sought to promote political, social, and moral values of fair competition, individual autonomy, and dispersal of economic power). For a correlative approach, *see generally* BRODLEY (developing an antitrust welfare -as ignoring solely consumer welfare or economic efficiency approach-using a long-run perspective as stating that dynamic efficiencies (technological progresses) is the largest single source of social wealth enhancement and, combining economic efficiencies, consumer welfare and interfirm rivalry into single working principle).

efficiencies created by market power. Therefore, we will explain the suggested standards under our own categorization.

2.2.1. Welfare standard in competition law and policy

2.2.1.1. Borkean consumer welfare standard

Bork has been criticized[125] for misleading the legislative intent of the Sherman Act when he claimed the Sherman Act was a "consumer welfare prescription", while equating it to "efficiency" and "social welfare"[126] and stating that for the implementation of this goal "law must be drawn to serve as mesh that stops output-restricting behavior and permits efficiency-creating activity to pass through"[127]. In other words, he claimed that "*…the policy the courts were intended to apply [was] the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output*"[128]. His critics argued that when Bork stated efficiency was necessary for maximizing consumer welfare, the term consumer welfare actually meant allocative efficiency in his mind[129].

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[125] See *generally* KIRKWOOD/ LANDE; ORBACH. For a modest defense of Bork, *see generally* CRANE, Daniel A., "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy." 79 ANTITRUST L. J. 3 (2014), pp. 835-853, available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2549&context=articles (last visited 19.10.2016) [hereinafter CRANE (The Tempting of Antitrust)]. Crane concludes that "…Bork made a tremendously important contribution by crystallizing antitrust law as the application of objective economic analysis to advance a cluster of efficiency interests centered on the consumer. Bork sought to demystify the aspects of antitrust jurisprudence that opposed bigness, concentration, and economic power without linking those qualities to demonstrable economic harms to concrete interests." (*id.,* p. 852)].

[126] ORBACH, p. 11. Orbach interprets the term "the wealth of nation"- which Bork use- as "social welfare" in economic language (ORBACH, p. 16).

[127] BORK, Robert H., The Antitrust Paradox- A policy at War with Itself, The Free Press, New York (1978) [hereinafter BORK (The Antitrust Paradox)], p. 70. See also BORK (The Goals of Antitrust Policy), p. 242 ("My thesis is that existing statutes can be legitimately interpreted only according to the canons of consumer welfare, *defined as* minimizing restrictions of output and permitting, efficiency, however gained, to have its way.") (emphasis added).

[128] BORK, Robert H., "Legislative Intent and the Policy of the Sherman Act", 9 THE JOURNAL OF LAW & ECONOMICS, (October 1966), p.7, 36, 39, available at http://www.jstor.org/stable/724991 (last visited: 03.11.2016) [hereinafter BORK (Legislative Intent)].

[129] ORBACH, p. 11. Bork assumed that this interpretation was the only way consistent with legislative intent and consumer-oriented ["*Though an economist of our day would describe the problem to Sherman differently, as a misallocation of resources restriction of output rather than one of high prices, there Sherman and he would be talking about the same thing. Demonstrated more than once that he understood that brought about by a restriction of output. … This and other remarks Sherman and his colleagues identified the phrase "restraint "restraint of trade" with "restriction of output*". See, BORK (Legislative Intent), p. 16, 39, 46]. However, many assign this equation of

Bork has also received criticism[130] for his equating of the term "consumer welfare" with "total welfare", because of his reference to welfare of all individuals in society (considering monopolists as consumers) and rejecting income distribution effect[131]. Under his consumer welfare model, owners of the monopoly are also consumers, and a shift in income between the two classes of consumers does not affect the antitrust inquiry, because a loss of consumer surplus turns into a gain in monopoly profits, and thus it remains in society[132]. In other words, reduction of consumer surplus is not a dead-weight loss, therefore it should not be considered. Bork understands that not only higher prices are an antitrust concern, but decreased output leading to higher prices are too[133]. Moreover, Bork assumes that the choice between the two consumer groups should be made by the legislature rather than by the judiciary[134].

Briefly, Bork contended that allocative and productive efficiencies and their relationship is necessary for determining which consumer welfare model Court should hold, because in his representation, provided the cost savings are larger than the dead-weight loss (the amount above costs that consumers would be willing to pay for the lost output), the practice represents a net gain to *all consumers*[135]. Furthermore, Bork claims that "antitrust should concern itself *solely*

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consumer welfare with total welfare (while referring to allocative efficiency) to Bork, Meese remarks that Bork was not the first one to define the consumer welfare in this manner. See MEESE, Alan J., "Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare", 81 FORDHAM LAW REVIEW (2013), p. 2205,2205, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4882&context=flr (last visited 15.03.2016) [hereinafter MEESE (Reframing the Choice)] (observing that Alan Harberger who is an economist had used the term consumer welfare in the same manner in his work [quoting to "Monopoly and Resource Allocation", 44 AM. ECON. REV. 77 (1954)] that he had written a decade before Bork's major work on the subject).

130 It has been widely assumed that Bork argued for a total welfare standard. SEE KIRKWOOD/ LANDE, p. 199; KIRKWOOD, John B. The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct, 81 FORDHAM L. REVIEW (2013), p. 2436, available at http://ssrn.com/abstract=2201053 (last visited 19.10.2016) [hereinafter Kirkwood (The Essence of Antitrust)]; STUCKE (Promote Happiness), p. 2603 fn.: 171.

131 See BORK (The Antitrust Paradox), p. 110-112.

132 In Bork's word: "...does not lessen total wealth…" [BORK (The Antitrust Paradox), p. 110-111].

133 But *cf.* see FİSHER, Alan A. and LANDE, Robert H., "Efficiency Considerations in Merger Enforcement", 71 CALIFORNIA LAW REVIEW (1983), p. 1592, available at http://scholarship.law.berkeley.edu/californialawreview/vol71/iss6/1 (last visited 13.05.2016) (contending that "Congress' goal was competitive pricing, which it defined primarily in distributive rather than in efficiency terms.").

134 BORK (The Antitrust Paradox), p. 80, 111.

135 BORK (The Antitrust Paradox), p. 108-109 (emphasis added).

with allocative and productive efficiency"[136] and "income distribution effects of economic activity should be completely excluded from the determination of antitrust legality of the activity"[137]. This concept was the most important contribution of Bork to antitrust enforcement, representing the rejections of the alternatives to efficiency or consumer welfare-oriented approaches. Bork also rejects the second-best theory, the cost of gaining and maintaining monopoly and externalities under his "consumer" welfare model[138], and finds that technical progress is irrelevant to efficiency evaluation[139].

Indeed, Bork's consumer welfare calculus does not account for today's consumer welfare standard, which considers consumer surplus and wealth transfer from consumers to monopolies as a main concern of antitrust law[140]. It is now widely accepted that efficiency and consumer welfare are not necessarily aligned. Several studies claim that such conduct may lead to efficiencies and (at the same time) increased prices[141]. However, as the US Supreme Court promoted Bork's

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136 Bork's productive efficiency consideration was important to creation of consumer welfare, but this task of antitrust was limited in the scope of that "…the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare", otherwise, he has not purposed and supported a tradeoff between productive efficiency versus allocative efficiency in the cases where two were in conflict, on contrary he has rejected regarding its unmeasurable character (and unforeseeable factor especially in horizontal merger cases), and concluded that it is not proper for case-by-case analysis, and more importantly these efficiency defenses cannot measure the factors relevant to consumer welfare [See BORK (The Antitrust Paradox), p. 91, 124-129]. See also CRANE (The Tempting of Antitrust), p. 850, 851 (devoting the suggestion that courts should weigh the competing interests of consumer welfare and productive efficiency to Bork is inaccurate).

137 BORK (The Antitrust Paradox), p. 108-111. The school follows Borkean welfare calculus endorses a Kaldor-Hicks efficiency standard as ignoring distributional effects of a challenged practice. See EASTERBROOK (Workable Antitrust Policy), p. 1703, 1704 [stating that "The dominant theme is the protection of consumers from overcharges. This turns out to be the same program as one based "efficiency". In the long run consumers gain the most from a policy that emphasizes allocative and productive efficiency" and "Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income"]. See POSNER, Richard, Antitrust Law: An Economic Perspective, Chicago: The University of Chicago Press, 1976, p. 22 [hereinafter POSNER (Antitrust Law)] (contending society's economic welfare would be greater whenever competition promotes efficiency).

138 See BORK (The Antitrust Paradox), p.109-115.

139 See BORK (The Goals of Antitrust), p. 251 (regarding "Progress … is obviously not costless to consumers" and "Courts have no criteria for establishing compromise deviations from consumer welfare here either").

140 Bork's approach or his equation to efficiency reflect a Kaldor-Hicks standard. See MEESE (Reframing the Choice), p. 2204.

141 ORBACH, p. 16. See WILLIAMSON, Oliver E., "Allocative Efficiency and the Limits of Antitrust", 59 THE AMERICAN ECONOMIC REVIEW 2, Papers and Proceedings of the Eighty-First Annual Meeting of the American Economic Association (May, 1969), p. 106, available at http://www.jstor.org/stable/1823660 (last visited 03.11.2016) [hereinafter WILLIAMSON (Allocative Efficiency)] (stating that Bork has recognized that mixed cases are exists, but Bork mainly prefers to divide the activities into those that have efficiency or market power consequences).

consumer welfare prescription, the Court did not propose the Borkean meaning of the term[142].

2.2.1.2. Consumer welfare standards

2.2.1.2.1. Purchaser welfare standard

This approach proposes that courts would ban any restraint that reduces the "consumer surplus" of purchasers in the relevant market, even though the restraint increases the welfare of producers by a greater amount[143].

The proponents of this approach maintain that Congress wanted to protect consumers from exploitation while providing the benefits of competition to consumers with lower price, better quality, and a greater choice[144]. Thus, this approach suggests that when an action presents a conflict between protecting consumers and promoting efficiencies (for instance, a merger increases prices but reduces costs), the courts would always choose consumer protection over efficiency[145]. In other words, the fundamental goal of antitrust law is competitive prices for all[146]. More importantly, even though this school of thought points out consumer interest in quality, it equates consumer welfare (also referring to

[142] ORBACH, p. 17. See also KIRKWOOD/LANDE, p.194-196. But cf. MEESE (Reframing the Choice), p. 2216, fn.: 76 (claiming that when Court cited to Bork's consumer welfare prescription used the term referring to total welfare, at least until Lande published his work). *Compare* CRANE (The Tempting of Antitrust), p. 848 (finding that even though the distinction is unimportant, only e few courts have explicitly tied the consumer welfare to allocative efficiency, yet in none of the cases the possible distinction has mattered). However, this debate should be out dated since today both courts and scholars are aware of the terminology. See also OECD (Efficiency Claims), p. 26, 27 and fn.: 33 [(asserting that -with some hesitation- the U.S. competition authorities rely on consumer welfare, as citing to Judge Easterbrook (Workable Antitrust Policy)]. But it worth to point out that, Easterbrook obviously used the term consumer welfare align with Bork. See EASTERBROOK, Frank H., "Workable Antitrust Policy", 84 MICHIGAN LAW REVIEW 8 (August 1986), p. 1703, available at http://www.jstor.org/stable/1288943 (last visited 10.02.2017) [hereinafter EASTERBROOK (Workable Antitrust Policy)] ("…the legislative history, the dominant theme is the protection of consumers from overcharges. This turns out to be the same program as one based on "efficiency."… the long run consumers gain the most from a policy that emphasizes allocative and productive efficiency.").

[143] See MEESE (Reframing the Choice), p. 2199—2219. This approach is also called "price standard" for merger case, or even more specifically "*pure* price standard" to distinguish it from "*modified* price standard" that concerns wealth transfer from consumers to producers but allows efficiencies to offset a price increase. See EOCD (Efficiency Claims), p. 26.

[144] KIRKWOOD/LANDE, p. 191-193.

[145] KIRKWOOD/LANDE, p. 192.

[146] KIRKWOOD/LANDE, p. 196 (fn: 14), 203 (For "all", they refer to purchasers, buyer, customers -not just consumer, regardless whether they are the ultimate end users).

consumer wealth and property rights[147]) with consumer surplus under antitrust law[148].

Moreover, these proponents claim that Bork's allocative (in)efficiency is worrisome due to increased prices to consumers, and they furthermore state that Congress was concerned with the unfair transfer of wealth from consumers to monopolies and cartels[149]. Furthermore, this camp was also aware that Congress recognized productive efficiencies, yet aimed to ban such combinations (increase productive efficiency by reducing cost) because they believed that firms tend to reap the fruits of such efficiency and do not pass these cost savings to consumers[150].

Furthermore, the proponents of this approach endorse their argument with case law which adopted the view that antitrust law's ultimate (overarching) goal is to protect consumers and not to increase efficiency; they state that "...they

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147 See LANDE, Robert H., "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 HASTINGS LAW JOURNAL (1982), p.70, available at http://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1362&context=all_fac (last visited 3.11.2016) [hereinafter LANDE (1982)] ("Congress implicitly declared that consumers' surplus was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers.").

148 See KIRKWOOD/LANDE, p. 196 ("The antitrust laws, in other words, can be explained as a congressional declaration that the property right we today call "consumers' surplus" belongs to consumers, not to cartels. While this certainly does involve the use of economic analysis, it is not efficiency analysis"). See also BRODLEY, p. 1033 ("However, if consumer welfare is to serve as an operational principle of antitrust law, it must refer to the direct and explicit economic benefits received by the consumers of a particular product as measured by its price and quality. Using the more precise language of economics, consumer welfare can be defined as consumer surplus, which is that part of the total surplus that accrues to consumers"). See also HOVENKAMP, Erik and HOVENKAMP, Herbert, "Tying Arrangements and Antitrust Harm", 52 ARIZONA LAW REVIEW (2010), p. 929, available at http://heinonline.org/HOL/Page?handle=hein.journals/arz52&div=39&g_sent=1&collection=journals (last visited 15.08.2016) [hereinafter HOVENKAMP/ HOVENKAMP (2010)] (*"The term 'welfare' has a relatively fixed meaning in economics. It equals the sum of consumer and producer surplus, assuming no one else is affected.*"); MEESE (Reframing the Choice), p. 2202; Orbach, p. 137.

149 KIRKWOOD/LANDE, p. 202. Beside unfair transfer of wealth explanation, these proponents also challenge the concept of the allocative efficiency could be in the mind of Congressmen, regarding that this concept was making only the first appearance in economics literature when the Sherman Act was passed. See KIRKWOOD/LANDE, p. 203,204; LANDE (1982), p. 88-90. Contrary to their argument, it has been stated that Adam Smith understood allocative (in)efficiency as one burden of monopoly. See MEESE (Reframing the Choice), p. 2214, fn.:64 (citations omitted).

150 KIRKWOOD/LANDE, p. 205, 206 (Refering to Senator Sherman speech: "[i]t is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer", see KIRKWOOD/LANDE, p. 201 (fn: 34). See also LANDE (1982), p. 90-93.

[judges] never say that conduct that harms consumers in the relevant market may be justified if it increases the efficiency of the economy"[151].

2.2.1.2.2. Consumer surplus standard

According to this concept, the distributional effects of allged restraints in competition are taken into account, while consumer welfare is equated with consumer surplus in the relevant market and surplus of the same market's producers are neglected.

Supporters of this camp allow efficiency justifications under the consumer welfare balancing (net efficiency) test and suggest that the court weighs the harm to purchasers against the benefits of the challenged practice[152].

However, unlike purchaser welfare approach, under this approach the practice should be valid, even if it raises the prices to consumers, provided it adds other benefits to the consumer that exceed its negative effects on consumers[153].

[151] KIRKWOOD/LANDE, p. 212 (In other words, they claimed that "They (courts) do not suggest that increases in allocative efficiency may outweigh harm to consumers, *id.* p. 216). The only additional goal as a limited exception to this view (meaning considered the statutes to design to protect competition - therefore the Robinson-Patman Act was out of the scope since its protectionist feature of secondary-line purchasers) was the courts' concern for supplier welfare in certain buy-side cases (See KIRKWOOD/LANDE, p. 233-237).

[152] OECD, "What is the Competiton on the Merits?", Policy Brief (June 2006), p. 6, available at http://www.oecd.org/competition/mergers/37082099.pdf (last visited 09.02.2017); See BRODLEY, p. 1042 ("Consumer welfare becomes the exclusive or dominant factor in antitrust, however, when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate, or when allocative pricing efficiencies alone are involved."). See also BAKER (Future of Antitrust), p. 2186 (suggesting a qualified consumer welfare standard that antitrust law should ban all practices that injure consumers in the relevant market unless doing so would sacrifice very large efficiencies in a particular case, but he also considers lawful alternatives that if efficiencies could practically be obtained in some other way that results less harm to consumers, very large efficiency justification would not be valid).

[153] This concept is also called as "consumer surplus welfare standard" and it is indicated that this approach is used interchangeably with "modified price standard". Furthermore, under a broad definition it concerns not only efficiencies but also non-price considerations (such as product quality, choice and innovation) to dissipate ex-post price increase. See OECD (Efficiency Claims), p. 26. See also BRODLEY, p. 1032-1034, 1037-1039 (allowing that production or innovation efficiencies justify a loss of allocative efficiency (or immediate consumer interest), but requiring that "pass on" the benefit from productive or innovation efficiencies to consumers in the long run. Providing that lack of less harmful alternatives to achieve such efficiencies and not result in permanent market structure change that will exclude rival firms. Last condition is necessary for returning the consumer surplus, which sustains during the conduct, to consumers).

2.2.1.3. Total welfare (surplus) standard

Bork's approach has been followed by many scholars who endorse efficiency promotion in antitrust inquiry. However, they did not refer to their approach as consumer welfare but, more properly, as a "total welfare"[154] approach or even more correctly, "total surplus standard"[155].

This school of thought grants equal weight to consumer and producer surplus by neglecting wealth transfer between them, and they contend that competition authorities would ban restraints in competition that reduce society's overall welfare as resulting output reduction and misallocation of resources and deadweight loss[156].

However, unlike purchaser welfare school of thought, they endorse that courts should approve the practice, even if it raises prices, provided it produces efficiencies that exceed deadweight allocative losses resulting from enhanced market power[157]. Furthermore, in contradistinction to purchaser or consumer welfare, price increase or wealth transfer is not their concern. Therefore, this approach does not require transferability of the efficiency gains from producers to consumers[158].

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[154] It is also called interchangeably "aggregate welfare". See SALOP, Steven C., "Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard", 22 LOYOLA CONSUMER LAW REVIEW 3 (2010), pp. 336- 353 available at https://pdfs.semanticscholar.org/445f/a73f90bf1fff03546ec93f90de9d06d22075.pdf [hereinafter SALOP (Welfare Standard)] (last visited 26.10.2016); Orbach, p. 137-139.

[155] See *generally* FARRELL, Joseph & KATZ, Michael L., "The Economics of Welfare Standards in Antitrust", 2 COMPETITION POL'Y INT'L 3 (2006), available at http://escholarship.org/uc/item/1tw2d426*;* ORBACH, p. 137-139.

[156] See OECD (Efficiency Claims), p. 27; MEESE (Reframing the Choice), p. 2199, 2205, 2206.

[157] MEESE (Reframing the Choice), p. 2199. See also BAKER (Future of Antitrust), p. 2186 (adopting a Canadian weighted and total surplus approach that total surplus standard can be preferable over the consumer surplus standard where *very large* efficiency justification is at the issue). For "Weighted and total surplus in Canada", see OECD (Efficiency Claims), p. 28.

[158] See de la MANO, Miguel, "For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control", Enterprise Papers No 11 (2002), p. 19, available at http://www.uni-mannheim.de/edz/pdf/entpap/ep-11-2002.pdf (09.02.2017); OECD (Efficiency Claims), p. 27. *But cf.* See BRODLEY, p. 1037 (contending that short-run (immediate) consumer interests are subordinated to economic welfare of whole society, but on the condition that consumers eventually will get significant benefit from via better or new products). In this point, Brodley distanced himself from total welfare invokers.

This camp distances itself from the Borkean approach that suggests a trade-off between allocative efficiencies and productive efficiencies (or even further dynamic efficiencies), because Bork rejects Williamson's productive efficiency defenses regarding the quantification of the productive efficiency problem, which renders a case-by-case analysis unworkable and, more importantly, these defenses cannot measure the factors relevant to consumer welfare[159].

Bork also disagrees with dynamic efficiency consideration as a goal independent of consumer welfare. He questions its cost to consumers and the competence of the courts to determine the degree of the progressiveness[160].

In summary, the consumer welfare standard suggests triggering antitrust inquiry when a restraint on trade harms the relevant welfare, while total surplus standard would allow this restraint provided the practice increases the firm's profit by more than it harms consumer welfare.

Both Borkean consumer welfare and the purchaser welfare standard can be criticized due to their static nature which ignore the benefits that may occur from dynamic efficiency for consumers *and* society. The consumer surplus standard recognizes that in addition to allocative efficiency, productive and dynamic efficiency can benefit consumers. It also requires that created benefits should offset consumer harm to not be deemed anticompetitive. While the total surplus standard does not have this concern, increasing efficiency is the overarching goal, and whether gained benefits will pass on to consumers is not an antitrust concern but should be achieved through other policies. Therefore, what determines the stated concept of "welfare" refers to whether "consumer welfare" or "total welfare" is "distributional concerns" or "pass-on requirement".

We do not criticize favoring the consumer surplus standard over total surplus standard, or *vice versa*, but there is an underlying risk to choosing either

[159] See BORK (The Antitrust Paradox), p. 124-129.
[160] BORK (The Goals of Antitrust Policy), p. 251; BORK (The Antitrust Paradox), p. 132.

of them as a predominant goal for competition policy. Both standards misjudge that competition policy is not only about the consequences of the conduct, but also about competitive process[161]. Thus, distinguishing good from bad directly via the “welfarist” point will not serve to establish a fully competitive market environment.

2.2.2. Objective of Turkish competition law and policy

As mentioned above, The Competition Authority defines its ultimate policy goal as protection of the competitive process in order to create an efficient market and increase consumer welfare. However, they do not define “competitive process”, “consumer welfare”, or which type of efficiency is referred to.

Turkish literature indicates different opinions regarding the ultimate goal of competition policy. AŞÇIOĞLU ÖZ claims that protection of the competition process is an end in itself, and that efficiency and consumer welfare have emerged because of this process[162]. TOPALÖMER shares this view and explicitly states that consumer harm cannot be the ultimate test of anticompetitive conduct, because competition rules are designed to protect the “institution” of competition[163]. Thus, this approach suggests that in the event of injury to competition, even if the practice does not cause consumer harm, the competition authority should intervene[164].

However, ODMAN BOZTOSUN proposes that competition protection is subjective and unmeasurable; therefore, it should be understood that competition rules serve and should serve *only* for consumer welfare through increasing

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[161] FARRELL/ KATZ, p. 7.
[162] AŞÇIOĞLU ÖZ, p. 15.
[163] TOPALÖMER, p. 28, 29.
[164] TOPALÖMER, p. 29. This is grounded in the belief that the undistorted competitive process will generally tend to maximize wealth and consumer welfar and EU competition rules do not require a finding of direct consumer harm. See EİLMANSBERGEr, Thomas, “How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anticompetitive Abuses”, 42 COMMON MARKET LAW REVİEW 2005, p. 133; available at https://www.biicl.org/files/1403_eilmansberger_on_82.pdf (last visited 16.06.2017); SCHWEİTZER, Heike, “The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC”, EUROPEAN UNIVERSITY INSTITUTE, Working Paper 2007/32 (2007), p. 21, available at http://cadmus.eui.eu/bitstream/handle/1814/7626/?sequence=3.

efficiency[165]. Consumer harm should function as a final test of anticompetitive conduct, i.e., even if the practice restricts competition, if there is no consumer harm, the competition authority should not intervene[166].

GÜRKAYNAK shares this opinion, and considers protection of the competitive process as a means, not a goal. However, he states that competition law and policy cannot have more than one objective, such as protection of small- and medium-sized enterprises, fairness, or fighting inflation. There should be only one goal, "an overarching objective", which should be social welfare[167]. He recognizes, though, that this goal cannot be a direct goal, because it is not measurable. Thus, he suggests setting a target with an observable and measurable concept to achieve this end, namely "promoting economic efficiency". He regards other objectives that are beyond the scope of economic efficiency as "functions" of competition law. Therefore, he contends that "consumer protection" cannot be an objective of competition law, but can be a positive external outcome that occurs in the social area, as a result of reaching the antitrust goal[168]. In summary, he agrees that total welfare should be the ultimate goal through increasing economic efficiency.

Before expounding our opinion, we would like to present several policy declarations of the Competition Authority. From our statement above, it is not clear whether "protection of competitive process" is a means or an end, or whether the role of "consumer welfare" is a "standard" that distinguishes anticompetitive practice from pro-competitive practice. Furthermore, clarity is needed on whether promoting efficiency and consumer welfare are two different objectives to be achieved, or whether the objective is "promoting consumer welfare *through* increasing efficiency". If it is the latter, should distributional concerns be

[165] ODMAN BOZTOSUN, Ayse, "Tek Yanli Davranislara Nasil Yaklasalim? [How Shall We Approach Unilateral Conduct?]", 11 REKABET DERGISI 3 (2010), p. 134, 135, 159,160.
[166] ODMAN BOZTOSUN, p. 135. See also CSERES (2009) suggesting that in collusive and unilateral trade practices competition authorities and courts should require explicit proof of consumer harm in the relevant output market (p. 8, 9).
[167] GÜRKAYNAK (2003), p. 65, 66.
[168] GÜRKAYNAK (2003), p.26-28.

considered? Moreover, is there any preference between dynamic and static efficiencies? In other words, does competition policy favor consumer interest in the long-term over the short-term, and whether political powers' attitudes regarding "economic efficiency is the only matter"[169] can influence the Competition Authority.

We will recall several policy declarations given by The Competition Authority to answer our questions:

> *As the Competition Authority, our vision is…(to) increase consumer welfare through the formation and protection of efficient competitive markets*"[170]; "*competition authorities which have an obligation to enforce competition laws are charged with taking the necessary measures and implementing the necessary regulations in order to prevent practices and operations of undertakings which distort efficient competitive conditions, with a view to increase social welfare by safeguarding the freedom of enterprise and ensuring efficiency in resource allocation*"[171]; "*Consumer sovereignty means that consumers decide how much goods should be produced in a country, that is, the consumers direct the allocation of resources. The dominance of the market economy is that this demand and the tendency to respond better than other systems. Raising the welfare of the societies depends on the most efficient establishment of consumer sovereignty. In this way, the economic resources of the society can be used for the purpose of consumer needs. In such a system, the products that the consumers want to buy will be produced in the quantity and quality that the consumers want, so that the needs will be satisfied and the economic resources will not be wasted… The most important of the economic development and expected practical outcomes that are to be achieved is the prosperity, standard of living or quality of life of the consumers. In another respect, the ultimate*

[169] SCR, p. 23, 24.
[170] http://www.rekabet.gov.tr/en-US/Pages/Our-Vision-Mission.
[171] http://www.rekabet.gov.tr/en-US/Pages/Turkish-Competition-Authority.

goal of the competition rules is to increase the welfare level of the consumer and to use any kind of utility that can be provided to consumers through the application of these rules[172].

Our first determination is that even though social welfare is stated as an objective, it does not refer to total welfare, but to consumer welfare. Second, “protection of competitive process” may be understood as prevention of “restraint on the competition”. The Turkish Competition Authority does not interpret that restrain on trade is illegal whenever it harms consume welfare. However, its understanding suggests that an undistorted competitive market is established when “freedom of enterprise” is provided while, at the same time, “allocation of resources” is ensured. The Authority explicitly denotes that the consumers should direct the resource allocation, which means thatconsumers should be free to buy the product in the quantity and quality they “want”.

Third, consumer welfare is stated as an “expected outcome” and “the ultimate goal” of the competition rules. Thus, “protection of competitive process” is a *means* to increase consumer welfare. The consequences of determining this as a *means* is: the objective “increase consumer welfare” has a different implementation from the consumer protection policy, because, application of competition rules requires “injury to competition”. Consumer harm without injury to competition is beyond the scope of competition rules, which is appropriate for two reasons: First, consumer law has more efficient tools for this situation (shorter process, burden of proof, and costs). Second, the competition authority should not intervene in an *efficient* market. However, the competition rules will define injury to competition. Furthermore, the competition authority does not reduce consumer welfare to consumer surplus, but also considers its social aspects.

[172] “The Fifth Competition Letter” issued by the President of Turkish Competition Authority (2013), available at http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/G%c3%bcncel/Rekabet20Mektubu.pdf (last visited 11.07.2017).

Concerning whether enhancing efficiency and consumer welfare can be selected as separates objectives, we conclude this as a no. Otherwise, if efficiency defenses merely benefit producers or sellers,, then neither social nor consumer welfare can be stated as competition policy objective. If the practice increase efficiency by merely exploitation of consumer, this practice should not be considered efficient. Thus, it should be understood that the objective is to "promote consumer welfare through efficiency". This indicates that efficiency gains should pass on to the consumer, whether in the short-term or the long-term.

The Turkish Competition Authority emphasizes quality of life and innovation[173] and gives priority to the long-term interest of consumers. This understanding is explicitly placed in the Guidelines (Technology Transfer Agreements) in no. 6[174] and 128.

However, the most important question may be whether distributional judgements will be considered. There is no explicit policy declaration regarding this. Nonetheless, the practices that do not provide any efficiency – but merely cause wealth transfer from producers to consumers – are not welcome. Furthermore, when the 1982 Constitution authorized ensuring a free competitive market, it drew the boundaries of this authority with the principles of social state governance by rule.

It is unfortunate that the development plan suggests that a competition policy should merely concern itself with economic efficiency. Political powers

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173 See the "Fifth Competition Letter".

174 Guidelines (Technology Transfer Agreements) n.6: "In the assessment of license agreements under articles 4 and 5 of the Act, it must be kept in mind that the process of creating intellectual property rights often entails substantial investment and that this is often a risky activity. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights. For these reasons, it is important that the innovator should be free to determine the remuneration for the exploitation of intellectual property rights taking failed projects into account for maintaining their investment incentives. On the other hand, technology rights licensing may also require the licensee to make significant sunk investments. Articles 4 and 5 must be applied by considering such ex ante investments made and the risks taken by the parties. Therefore, the risk facing the parties and the sunk investment that must be committed may thus constitute a reason for the relevant agreement to fall outside the prohibition in article 4 of the Act or benefit from the exemption in article 5 for the period of time required to recoup the investment".

hold that income distribution should be targeted by other policies (education, employment, tax etc.)[175], but Turkey is situated between countries that have established income equality and those that have income inequality[176]. Thus, competition policy as a part of economic policy should have its role in solving this problem.

The independence of the the Turkish Competition Authority from political power is a key element of an effective competition regime. Regarding this, the Turkish Competition Authority has some safeguards that prevent undue political interference:

TCA Article 20 states the following:

> The Competition Authority having a public legal personality, and an administrative and financial autonomy is established to ensure the formation and development of markets for goods and services in a free and sound competitive environment, to observe the implementation of this Act, and to fulfill the duties assigned to it by the Act. The Authority is independent in fulfilling its duties. No organ, authority and person may give commands and orders to influence the final decision of the Authority.

Furthermore, Article 22 regulates appointment of the Competition Board as:

> The Competition Board is the decision-making body of the Authority and is composed of a total of seven members, one being the Chairman and the other being the Deputy Chairman. The Council of Ministers appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: three members from the Ministry, one member from the Ministry of Development, one member from Turkish Union of Chambers and Commodity Exchanges, and one member from among the two candidates apiece, to be nominated from inside the Supreme Court of Appeals and Council of State. One of the members to be recruited from the quota of the Ministry of Customs and Trade is appointed from among the personnel of the Authority.

[175] See the Ninth Development Plan.
[176] See OECD data, available at https://data.oecd.org/turkey.htm.

The Authority has financial autonomy and to prevent its subordination to political repression, the political authority can propose only two members for the establishment of the Board. Although these legal and structural provisions do not automatically lead to an independent agency, they are nevertheless important determinants for independence.

The Competition Authority does not have the status of an independent autonomous authority, because of the strict formal rules of Turkish Administrative Law. However, it is generally accepted that the Competition Authority has a *sui-generis* structure, whose foundation of formation is based in the constitution[177].

Moreover, wording of the TCA does not have as its objective the implementation of "fairness". However, the objective of increasing consumer welfare cannot be achieved if the enforcement thereof does not require at least a fair share of the efficiency gains to pass on to consumers. Even if one of the secondary legislations have this requirement, they are not binding rules but mere guidelines[178].

In summary, our reading suggests that Turkish competition policy aims to increase consumer welfare through efficiency. Therefore, merely increasing efficiency will not serve this objective. The conduct that restrains competition, while creating efficiencies will be allowed, but only if consumers receive benefits from these. Then, it requires a further measure, namely to "pass on to consumer". Thus, protection of competition cannot be an end in itself, because efficiencies and consumer welfare do not always occur simultaneously. It requires

[177] AKINCI, Müslüm, "Ekonomik Kamu Düzeni ve Rekabet Kurumu", [Economic Public Order and Competition Authority], REKABET DERGİSİ 5 (2001), pp. 6-10.

[178] Guidelines (Technology Transfer Agreements) in no. 128: "Within the framework of the second condition of article 5 of the Act, the condition that consumers must receive a fair share of the benefits, implies that consumers of the products produced under the license must at least be compensated for the negative effects of the agreement. This means that the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement. This may be possible by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products and thus any likely price increase could be compensated".

determination of “consumer welfare” and preference between types of efficiency. In this context, consumer welfare is not equal to consumer surplus; it indicates consumer preference. Within this framework, consumer preference also identifies which type of efficiency is given weight in each case. At the same time, increasing consumer welfare or promoting efficiency objectives should not be considered stand-alone to determine competitive harm, or they cannot provide an overarching theory of competitive harm, because they focus on the outcome of the conduct, not the competitive process itself. Our thesis suggests inclusion of the “competitive process” in the determination of competitive harm, therefore determination of “abuse”. With “competitive process”, we refer to “competitive environment”, which is the desired market structure in which all market actors make their decisions independently, freely.

CHAPTER TWO

CONCEPT OF UNILATERALLY IMPOSED EXPLOITATIVE TYING

The second chapter clarifies the necessary terminology for the analysis of unilaterally imposed tying conduct and reviews the legal framework for assessing tying practice under different competition laws to understand the addressed anticompetitive harm and antitrust concerns about the outcome of the tying cases. This chapter primarily aims to combine the understanding that we presented in the first chapter, interpret competition policy objective as "maintain competitive process" or "protection of competition" as an end in itself with the understanding that the competition policy objective embraces consumer welfare. To answer whether the pure exploitative effect of a behavior cannot be addressed by competition law because such a practice does not cause "injury to competition", we will review the excessive-pricing analysis under Turkish competition law. In this regard, this chapter will determine what the concerned competitive harm in this exploitative practice is, when pure exploitative practice requires the competition authority's intervention, and what represents the "injury to competition".

1. TYING ARRANGEMENTS AND PRICE DISCRIMINATION

1.1. Tying Arrangement

The classic definition of tying comes from the case Northern Pacific R. Co. v. United States[179], in which the Court defined a tying arrangement as "[1] an agreement by a party [who] sell one product [tying product], but only on the condition that the buyer also purchases a different (or tied) product, or [2] at least agrees that he will not purchase that product from any other supplier".

The first part of the definition refers to the most traditional form of a tying arrangement, where a seller requires a buyer to purchase two products. In general, tying occurs when a consumer who wants to buy a product (product A) is also

[179] 356 U.S. 1 (1958), at 5, 6.

required to buy another product (product B). Product A cannot be bought without product B; on the contrary, product B can be purchased individually. Product A is called the "tying product", while product B is the "tied product".

The second part of the given definition refers to another form of tying that occurs when seller X announces that he/she will only sell item A (tying product) to consumers who agree not to purchase item B (tied product) from seller Y. Here, seller X does not demand that consumers purchase the tied product from seller X, but consumers simply cannot purchase it from seller Y. This form of tying is called "conditional tying"[180].

The terms "tying", "tying arrangement" and "tie-in" are used interchangeably, and they do not have conceptual differences. However, tying can take several formats. We suggest a categorization based on 1) form of integration of tied product 2) purchasing time of the products 3) availability of components separately (bundling).

The integration form of the tied product refers to the distinction between technological tying and contractual tying. Technological tying occurs when one product is integrated into another and cannot easily be removed without harming the whole product itself, or the tying product is designed in a way that only functions with the specific tied product[181]. For example, the video game Halo is exclusive to the Xbox format, thus a consumer who wants to buy Halo must also buy the Xbox hardware.

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[180] See KLEİN, Benjamin and WILEY JR., John S., "Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal", 70 ANTITRUST LAW JOURNALS 3 (2003), p. 601, available at http://www.jstor.org/stable/40843568 (last visited 10.02.2017); LESLIE, Christopher R., "Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement", 60 OHIO STATE LAW JOURNAL 5 (1999), p. 1780 (fn.:21), available at http://hdl.handle.net/1811/65031 (last visited 22.03.2017) [hereinafter LESLIE (1999)].
[181] NALEBUFF, Barry, "Bundling, Tying, and Portfolio Effects", DTI ECONOMICS PAPER NO. 1 (February 2003), p. 14, available at http://faculty.som.yale.edu/barrynalebuff/BundlingTyingPortfolio_Conceptual_DTI2003.pdf (last visited 03.05.2017) [hereinafter NALEBUFF (Bundling)].

Contractual tying, on the other hand, occurs when the purchase of one product involves a contractual obligation to also purchase another; there is no technical or physical obstacle to separating one product from the other[182].

Tying based on purchasing time of the products occurs in two forms: Static tying and dynamic tying. In static tying, a consumer who wants to buy A must also buy B at the time of purchase[183]. In dynamic tying, in order to purchase item A, the consumer is also required to purchase item B. However, the difference from the static form is that the quantity of item B may vary from consumer to consumer and the amount of the tied goods to purchase is not determined at the time of the initial purchase[184]. For example, a seller of printers requires the purchaser also to buy ink. The consumer does not need to determine how much ink to buy at the time of purchasing the printer and will buy the amount of ink depending on his/her product usage. Another difference is that the goods involved in the dynamic tie products are complementary, i.e., to use printer, ink is necessary[185].

The basic economic motivation behind dynamic tying is to engage in price discrimination by charging different prices to different consumers, based on their valuation of the product. Such ties are typically called "metering ties", because they use the demand for the tied product to measure differences in consumer values for tying product, which are presumed to vary with intensity of use[186].

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[182] NALEBUFF (Bundling), p. 14.

[183] EKDİ, Baris, "Ürün Baglama ve Paket Satislar Yoluyla Hakim Durumun Kötüye Kullanilmasi" [Abuse of Dominant Position Through Product Bundling and Package Sales], p. 455, 446, in Abuse of Dominant Position: Problems and Solution Suggestion Symposium, 22.06.2010), On Iki Levha Yayincilik, Istanbul 2011.

[184] KARAKILINÇ, Hasan, Rekabet Hukukunda Baglama Uygulamalari [Tying Practices in Competition Law], On Iki Levha Yayincilik, Istanbul 2013, p. 21.

[185] NALEBUFF (Bundling), p. 16.

[186] KLEIN/ WILEY, p. 601, 602; LAMBERT, Thomas A., "Appropriate Liability Rules for Tying and Bundled Discounting" (July 9, 2011), Ohio State Law Journal, Forthcoming; University of Missouri School of Law Legal Studies Research Paper No. 2011-04, p. 8, available at: http://ssrn.com/abstract=1781130 (last visited 16.07.2016) [hereinafter Lambert (2011)]. See BOWMAN, Ward S. Jr., "Tying Arrangements and the Leverage Problem", 67 YALE LAW JOURNAL (1957), p. 23, available at http://digitalcommons.law.yale.edu/fss_papers/4246 (last visited 10.03.2016) [hereinafter BOWMAN (Leverage Problem)] (explaining that when different buyers use different quantities of tied product with one unit of the tying product, if the tying product is worth more to the intensive users than to the less intensive users, tying can achieve the goal of discriminatory pricing for the tying product, and in this situation, the tied product serves as a counting device to measure how intensively the tying product is being used). See also BURSTEIN, M. L., "A Theory of Full-Line Forcing", 8 J. REPRINTS ANTITRUST L. & ECON. (1977), p.

Tying is also used interchangeably with "bundling". However, bundling can be formed in two types: Pure bundling and mixed bundling. Pure bundling occurs when two products A and B are sold together and they are not available for individual purchase[187]. Furthermore, they are sold only in fixed proportions, meaning consumers can only purchase the entire bundle. Bundles can include more than two products, in which case it is referred to as a "package tie-in"[188]. Thus, general tying differs from pure bundling, because in the former, the tied product is available for individual purchase.

In mixed bundling, products A and B are sold together and each of them is also available individually[189]. The package should sell at a discount compared to the individual price. If the sum of the price of A and B is equal to the A and B package, then it is not classified as mixed bundling[190]. Tying is a special case of mixed bundling.

Tying and bundling are common practices, and they encompass costs and benefits from an efficiency perspective. At the same time, the main antitrust concern against tying and bundling is that they inevitably restrain consumer choice, and choice is the core element for a fully competitive environment. Therefore, the difficulty from an antitrust perspective is to separate good from bad, as is determining the factors of efficiency and restriction in competition, and the trade-off between them.

1.2. Price Discrimination

Price discrimination generally is defined as the situation in which the same product is sold to different buyers at different prices. However, these differences

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613, 614 available at: http://heinonline.org/HOL/Page?handle=hein.journals/illlr55&div=13&g_sent=1&collection=journals, (last visited 09.08.2017) [hereinafter BURSTEIN (Full-line Forcing)].

187 KARAKILINÇ, p. 17.

188 NALEBUFF (Bundling), p. 13, 14.

189 EKDİ, p. 81; KARAKILINÇ, p. 18.

190 NALEBUFF (Bundling), p. 14.

in price do not necessarily reflect the differences in the cost of supply[191]. If the same price is charged to all the consumers while the costs of supplying them are considerably different, it is also regarded as price discrimination. In other words, different prices for the same product do not necessarily amount to price discrimination, as such difference may be justified by cost variations[192].

Therefore, more technically and accurately, price discrimination is defined as "sales at differing ratios of price to marginal cost, or as prices that have different percentage markups in relation to cost"[193].

It is generally remarked that in the absence of one or several conditions below, price discrimination is impossible or at least unlikely to succeed[194]:

1) A firm must have some market power (the ability of set supra-competitive prices) to be able to price discriminate. Monopoly or dominance position is not essential for price discrimination to occur; thus, price discrimination can be observed even in highly competitive markets.

2) The firm must have the ability to categorize consumers according to their willingness to pay for each unit.

3) The firm must be able to prevent or limit the arbitrage between consumers, i.e., resale of goods or services from consumers paying the lower price to those who pay the higher price.

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[191] BISHOP, Simon, "Delivering Benefits To Consumers Or Per Se Illegal? Assessing The Competitive Effects Of Loyalty Rebates", in The Pros and Cons of Price Discrimination, Swedish Competition Authority, Stockholm 2005, p. 65, 66 [hereinafter BISHOP (Royalty Rebates)].

[192] GERADIN, Damien and PETIT, Nicolas, "Price Discrimination Under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?", 2 JOURNAL OF COMPETITION LAW AND ECONOMICS 3 (2006), p. 482, available at doi:10.1093/joclec/nhl013 (last visited 04.04.2017) [hereinafter GERADIN/ PETIT (2006)].

[193] See HOVENKAMP, Erik & HOVENKAMP, Herbert, "Tying Arrangements and Antitrust Harm", 52 ARIZONA LAW REVIEW (2010), p. 938, available at http://heinonline.org/HOL/Page?handle=hein.journals/arz52&div=39&g_sent=1&collection=journals (last visited 15.08.2016) [hereinafter HOVENKAMP/ HOVENKAMP (2010)]. See also KLEIN/ WILEY, p. 603 ("…economic definition of price discrimination, whereby a firm takes advantage of differing elasticities of demand for similar goods by charging different profit-maximizing prices relative to cost").

[194] GERADIN/ PETIT (2006), p. 482.

It is generally stated that price discrimination strategy serves to extract surplus from consumers as far as possible[195]. However, price discrimination is a very common practice and has different forms.

First, categorization of price discrimination is based on work of Pigou[196], which proposes categorization of price discrimination depending on the way in which the seller segments consumers: first-, second- and third-degree price discrimination.

First-degree price discrimination is referred to as perfect price discrimination, because it occurs when the firm is able to charge the exact valuation (willingness to pay) of each consumer for each unit of a given product or service[197]. However, most economists indicate that this scenario is extremely rare in practice, since it requires that the firm has perfect knowledge of its customers' willingness to pay.

Firms select second-degree price discrimination when they know that there are different types of consumers in the market, but unlike first-degree price discrimination, the seller is not able to sort consumers individually to distinguish among them[198]. Thus, in second-degree price discrimination, the seller offers products or services under a single price scheme, but the price differs related to consumer consumption patterns[199]. In other words, second-degree price discrimination occurs when certain selling practices are used to induce consumers to self-select according to willingness to pay[200]. The quantity discounts or prices for first- and second-class travels are regarded as second-degree price discrimination.

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[195] V. PERES, Catarina/ LEİTÃO, Morais/ TELES, Galvão, "Price Dsicrimination- AirportsCase", p. 292, 293, available at http://www.mlgts.pt/xms/files/Publicacoes/Artigos/561.pdf (last visited 20.04.2017) (hereinafter V. PERES et al.).
[196] PIGOU, Arthur Cecil, The Economics Of Welfare, Fourth Edition, McMillian, London (1932).
[197] GERADIN/ PETIT, p. 483; V. Peres et al., p. 287.
[198] V. PERES et al., p. 289.
[199] HOVENKAMP/ HOVENKAMP (2010), p. 933-936.
[200] BISHOP (Royalty Rebates), p. 68.

Third-degree price discrimination occurs when a firm charges different prices to different consumer groups depending on their elasticity of demand[201]. Consumers with high elasticity of demand will be charged higher prices than those with low elasticity of demand. Unlike second-degree price discrimination, seller does not need to rely on consumer self-selecting mechanism. Under third-degree price discrimination, the seller divides consumers into groups before the sale and charges different prices for each group[202]. For example, a movie theater that offers a discount to children, students, and senior citizens falls under third-degree price discrimination.

The welfare effects of first-degree price discrimination are not discussed extensively, since it does not occur in reality, but it is observed that since every individual buyer is charged his/her reservation price, the output resorts to the competitive level[203]. Therefore total welfare would be higher than monopoly pricing, yet charging the maximum from each consumer (who is willing to pay for a given product or service), perfect price discrimination would extract all consumer surpluses[204].

However, contrary to first-degree discrimination, second- and third-degree price discrimination are common and their welfare effect draws attention. Second- and third-degree price discrimination are considered that they *may* increase welfare when they allow a firm to supply a group of consumers that would not be supplied in the absence of price discrimination[205].

In general, second-degree price discrimination is competitive and welfare augmenting in that its effects are similar to perfect price discrimination. In second-degree price discrimination, everyone is offered the same price schedule with different unit prices corresponding to different quantities or product

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[201] GERADIN/ PETIT, p. 483.
[202] See HOVENKAMP/ HOVENKAMP (2010), p. 934-937.
[203] HOVENKAMP/ HOVENKAMP (2010), p. 935; GERADIN/ PETIT, p. 484.
[204] HOVENKAMP/ HOVENKAMP (2010), p. 935; GERADIN/ PETIT, p. 484.
[205] GERADIN/ PETIT, p. 484.

varieties. Therefore, as the number of classifications in the scheme increases, the scheme nears approximating first-degree or perfect price discrimination[206].

This analogy indicates that under second-degree price discrimination, each individual purchaser pays his or her reservation price and output increases toward the competitive level. Even though the price scheme is offered to everyone, different purchasers make different choices based on their willingness to pay, thus profitability is higher for some classifications than for others[207]. In summary, in second-degree price discrimination, it is assumed that output increases, total welfare enhances, and consumer welfare varies depending on the reservation price and consumption patterns.

Welfare effects are different under third-degree price discrimination, because the seller divides purchasers into separate groups based on observations about their willingness to pay. Each group is charged a unique price and prices offered to one group are not made available to the other group. For instance, a concert ticket is sold to students at 20 liras, and at 36 liras for non-students. This type of discrimination is profitable only when the consumers’ reservation price is concentrated into two or more distinct price intervals[208]. If the seller charges a unique price for all purchasers, it would in all likelihood be set at somewhere between the high and low price (in the case of 20 to 36 liras, the resultant price would be 28 liras).

Furthermore, the discrimination scheme excludes consumers whose valuations is below the price (20 liras), but includes consumers whose reservation price is lower than the non-discriminatory price (28 liras) but higher than the low price (20 liras). The seller selects discrimination as offering lower prices for consumers who have low valuations, hoping to recover this loss (8 liras) from consumers who have relatively higher valuations.

[206] HOVENKAMP/ HOVENKAMP (2010), p. 934, 935.
[207] HOVENKAMP/ HOVENKAMP (2010), p. 935; GERADIN/ PETIT, p. 484, 485.
[208] HOVENKAMP/ HOVENKAMP (2010), p. 934.

Moreover, third-degree price discrimination excludes those consumers whose reservation price is higher than the non-discriminatory pricing (28 liras) but lower than the discriminatory pricing (36 liras). For instance, a non-student whose reservation price is 29 liras would be able to buy ticket under non-discriminatory pricing, but would not be able to under discriminatory pricing. Therefore, third-degree price discrimination redirects output from consumers with relatively high valuations to those with relatively low ones, and consumer welfare will be jeopordized even if output levels are maintained but do not increase[209].

Continuing with the same example, the seller identifies two groups of consumers and offers the tickets to first group at 20 liras and to second group at 36 liras. Consumers in the second groups (non-students) will purchase if their reservation price ia equal to 36 liras or more, but a consumer (X) cannot purchase even if his/her reservation price is 35 liras, which is still profitable for the seller, yet the seller will sell the tickets to a student (Y) whose reservation price is 25 liras. In this instance, consumer X would have 7 liras' (35-28) consumer surplus loss under discriminatory pricing, while student Y would not have 5 liras (25-20) consumer surplus loss under non-discriminatory pricing. Therefore, the discrimination scheme removes the sale from a consumer whose reservation price is relatively higher, and shifts it to a consumer whose reservation price is relatively lower. Hence, it requires that the seller should sell more tickets under discriminatory pricing to not reduce consumer welfare.

Another categorization suggested for price discrimination based on to whom the discrimination is directed: Primary line injury and secondary line injury to competition.

Primary-line discrimination is the practice that damages competition between the undertaking and its rivals by causing the exclusion of its rivals[210]. In

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[209] HOVENKAMP/ HOVENKAMP, (2010), p. 934.

[210] TUNÇEL, Çigdem, "Secondary-Line Price Discrimination Under European Competition Law – An Assessment From An Effects-Based Perspective", 15 REKABET DERGISI 3 (2014), p. 49, 50.

this case, price discrimination directly harms a rival, and this may cause an injury to competition and thereby generate indirect harm to customers.

Secondary-line discrimination is the practice that distorts competition in the downstream amongst the customers or third parties of the discriminating undertaking[211]. This results in a practice that directly harms the customers of the firm.

The incentives, the ability, and the welfare effects of price discrimination are significantly varied based on the type of discriminating practice, therefore it requires accurate categorization of the alleged practice and applies different economic and legal principles.

It should be noted that for the antitrust concern, welfare effects of price discrimination should not play a decisive role, not only because they are ambiguous, but also because those determinations are based on "perfect price discrimination' as a benchmark. An antitrust analysis that is only based on welfare effects of price discrimination will imply that competition policy maximizes surplus or efficiency, because any deviation from "perfect price discrimination" will be deemed anticompetitive.

2. TYPE OF CONDUCT AND ABUSE

2.1. Type of Conduct: Unilateral Conduct and Agreement (Concerted Action)

Competition laws generally establish a dual approach to anticompetitive conduct: Agreement by at least two undertakings and unilaterally behavior by one undertaking.

The term agreement is used to refer to all forms of compromise or accords to which the parties feel bound, even if these do not meet the conditions for validity as regards the civil law. It is not important whether the agreement is written or oral. Even if the existence of an agreement between the parties cannot

[211] TUNÇEL, p. 49.

be established, direct or indirect relations between the undertakings that replace their own independent activities and ensure a coordination and practical cooperation are prohibited if they lead to restriction on competition.

Agreements restricting competition may be in the form of vertical or horizontal agreements. Horizontal restrictions are the agreements between actual or potential competitors operating at the same level of production and distribution process. On the other hand, vertical restriction agreements occur for the purchase, sale, or resale of certain goods or services between two or more undertakings operating at different levels of the production or distribution chain (e.g. manufacturer, wholesaler, supplier, customer, and licensee).

Competition authorities are usually more concerned with concerted practice to restrain competition. Unilateral conduct of a single undertaking is subject to antitrust scrutiny only when it has a dominant position or monopoly. There are practical consequences to make this distinction upfront because threshold for liability differs.

It is not always easy to distinguish the concept of agreement from unilateral practices that do not require the express or implied participation of another undertaking. EU courts apply the criterion of "a concurrence of wills between at least two parties" to make this distinction[212].

2.2. Type of Abuse: Exploitative and Exclusionary

In competition laws, generally it is not inherently illegal for an undertaking to hold a dominant position or for a firm to hold monopoly power, provided these

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[212] European Court of Justice decision,06.01.2004, BAI and Commission of the European Communities v Bayer AG, Cases C-2/01 and C-3/01 para. 97, 100-103, 141 (... it is true that the existence of an agreement within the meaning of [Article 81] can be deduced from the conduct of the parties concerned. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by [Article 81(1)] of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of [Article 82] of the Treaty…The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision).

powers result from their internal efficiencies[213]. However, dominant undertakings and monopolies are considered to have a "special responsibility" to avoid their conduct from restricting competition[214].

The main objection to an undertaking with market power is its ability to abuse its position in a way that would not be possible for an undertaking on a competitive market. In this respect, there has traditionally been a division of antitrust enforcement of unilateral conduct into behavior that exploits market power, and behavior that helps to acquire, strengthen or protect market power[215]. The former is called "exploitative abuse", while the latter is "exclusionary abuse".

The further distinction between exclusionary and exploitative abuse is[216]: Exclusionary abuses are the practices of a dominant undertaking which seek to harm the competitive position of its competitors or to exclude them from the market, and therefore may harm consumers *indirectly*. Exploitative abuses can be defined as attempts by a dominant undertaking to use the opportunities provided by its market power to harm consumers *directly*.

In practice, it is not possible always to categorize a practice as purely exclusionary or exploitative. Usually exclusionary practices are assumed to also be exploitative, since they harm consumers indirectly. Furthermore, they are condemned not because of their effects on competitors, but because of their effect on market structure. Consideration of consumer harm that results from exclusionary conduct and pure exploitative behavior (that does not affect market structure) are assumed illegal depending on the chosen competition policy.

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213 United States v. Grinnell Corporation, 384 U.S. 563, 570–571 (1966) ("the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident").

214 "Special responsibility" was first expressed in Case 322/81, Michelin v Commission [1983] ECR 3461, para. 57.

215 OECD, "Price Discrimination", Background note by the Secretariat, OECD Roundtables on Competition Policy Working Paper No. 56 (2016), n. 58, available at https://ssrn.com/abstract=875360 (last visited 13.05.2017) [hereinafter OECD (Price Discrimination)].

216 AKMAN, Pinar, "Exploitative Abuse in Article 82EC: Back to Basics?", CCP Working Paper 09-1 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328316 (last visited 15.07.2017) [hereinafter AKMAN (2009)].

The competitive effects of tying can be either exclusionary or exploitative. Historically, exclusionary tying was explained with “leverage theory”. According to it, a firm with market power (usually a monopoly) in one market could use this market power to extend its power into a second (tied) market and thereby extract higher prices from consumers[217]. In this case, the exclusionary effect is extension of the market power via tying; this extension affects the number of tied sales in the relevant market, yet it does not necessarily lead to the exclusion of any rival (foreclosure).

Another exclusionary effect of tying is anticompetitive foreclosure, which is the most stated antitrust concern with tying practices. Foreclosure refers to the situation where a firm with market power eliminates or impedes actual or potential competitors’ access to sources of supply or markets, to the detriment of the consumers[218]. Harm to consumers may occur in the form of increased prices, decreased product quality and level of innovation, and reduced variety of goods and services[219]. Thus, those exclusionary effects are deemed also exploitative since they harm consumers indirectly.

Exploitative effects of tying occur when tying facilitates price discrimination. For instance, if the tied product (e.g. ink) is a complement for the tying product (e.g. printer) that is used in varying amounts by different consumers, a firm may be able to price discriminate between heavy and low-intensity users of the tying product by pricing the tied product above the competitive level and lowering the price of the tying product[220]. Thus, the overall

[217] HOVENKAMP, Erik and HOVENKAMP, Herbert, “Tying Arrangements” University of Iowa Legal Studies Research Paper, Number 12-28 (October 2012), p. 5, available at http://www.academia.edu/21042922/Tying_Arrangements (last visited 15.08.2016) [hereinafter HOVENKAMP/ HOVENKAMP (2012)]; SAGI, Guy, “A Comprehensive Economic and Legal Analysis of Tying Arrangements”, 38 Seattle University Law Review 1 (2014), p. 4, available at http://digitalcommons.law.seattleu.edu/sulr/vol38/iss1/2/ (last visited 13.06.2017).
[218] See Guidance (2009), n. 19; Guidelines (Dominant Postion), n. 25.
[219] See Guidance (2009), n. 19; Guidelines (Dominant Postion), n. 25.
[220] See HOVENKAMP/ HOVENKAMP (2012), p. 6-8.

effect of the tying pricing will result in the heavy users paying more for the tying product.

There is also a third type of conduct that is called “discriminatory”. Discriminatory abuses can be exclusionary or exploitative.

Primary-line injury cases that cause injury to a rival while harming consumers are considered exclusionary abuses.

Regarding secondary-line discrimination, the type of abuse depends on whether the dominant firm is vertically integrated. If the firm exploits its market power in upstream market and thus damages or distorts competition amongst its vertically integrated undertaking(s) and other customers in a downstream market, it will be called “distortionary price discrimination”[221]. It involves a leverage strategy that may lead to exclusion of rivals of dominant undertaking’s downstream operations[222].

If the non-vertically integrated firm exploits its market power to discriminate amongst its customer or consumer, it will be called “exploitative price discrimination”[223].

This classifying matter, since exclusionary and exploitative abuses are addressed by different legal and economic understandings, and relative competition laws may also require different remedies.

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[221] OECD (Price Discrimination), n. 24.

[222] GERADIN/ PETIT (2006), p. 517; TUNÇEL, p. 49. *Compare* OECD (Price Discrimination), n. 24 (classifying it as non-exclusionary practice due to being secondary line injury that directly harm the customer, but does not require harm to a competitor).

[223] OECD (Price Discrimination), n. 25; LANG, John Temple/ O’DONOGHUE, Robert, “Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC”, 26 FORDHAM INT’L LAW JOURNAL 1 (2002), p.86, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1866&context=ilj (last visited 14.07.2017); GERARD, Damien, “Price Discrimination under Article 82(2)(c) EC: Clearing up the Ambiguities”, Global Competition Law Centre Research Papers (2005), p. 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113354 (last visited 20.04.2017) [hereinafter GERARD (2005)].

3. LEGAL FRAMEWORK FOR ASSESSING TYING AND PRICE DISCRIMINATION

3.1. US Antitrust Law

Tying arrangements can be subject to antitrust liability assessment under Section 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, or Section 5 of the Federal Trade Commission Act.

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal". Even though this norm literally forbids every contract or agreement, since all contracts or agreement unavoidably would restrain trade on some level, in an early case the Supreme Court declared that Section 1 aims to deter only "unreasonable" restraint[224].

However, this limitation does not clarify its scope, and it remains to the courts' interpretation to establish the criteria for each type of conduct or for each case. Therefore, it is the tying case law that indicates antitrust liability of tying.

Section 2 of the Sherman Act proscribes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations". This norm does not prohibit the legally obtained monopoly itself, but circumscribes the firm to enjoy its monopoly power by not allowing conduct that only intends to obtain, maintain, or extend monopoly power.

Section 3 of the Clayton Act declares the following:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use,

[224] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

> consumption, or resale ... or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

This is the only norm that specifically bans tying arrangements if the single-firm conduct or the agreement "substantially lessens competition" or "tends to create a monopoly". Even though it deals with specifically tying arrangement, tying can be still challenged under Section 1 or Section 2 of the Sherman Act[225].

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce", and "unfair or deceptive acts or practices in or affecting commerce". Its scope is wider than the Sherman Act in a sense that all violations of the Sherman Act also violate the FTC Act[226], and it can also address the other practices that harm competition by not complying with the Sherman Act[227].

[225] See United Shoe Machinery Corp. v. United States, 258 U.S. 451(1922), at 459,460 ("The Sherman Act and the Clayton Act provide different tests of liability…[W]e pointed out that the Clayton Act was intended to supplement the Sherman Act, and, within its limited sphere, established its own rule…The cause of action is therefore not the same."). See International Salt Co., Inc. v. United States, 332 U.S. 392 (1947), at 394-296 (hereinafter Int. Salt) (the tying arrangement challenged under both section 1 of the Sherman Act and section 3 of the Clayton Act).

[226] Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), at 609 (hereinafter Times-Picayune).

[227] Baker and Salop express that merely by exploiting that market power to charge supra-competitive prices generally does not violate the Sherman Act, and they purpose a change in policy which might require legislative action to condemn monopolistic "exploitative" conduct, but this policy might be implemented by Federal Trade Commission under its existing statute, if the FTC concludes that monopoly pricing or price discrimination targeted at less advantaged consumers can be an unfair practice in violation of Section 5 of the Federal Trade Commission Act (BAKER, Jonathan B. and SALOP, Steven C., "Antitrust, Competition Policy, and Inequality", 104 THE GEORGETOWN LAW JOURNAL ONLINE (2015), p. 22, 23, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1294&context=facsch_lawrev (last visited 19.04.2017). *Cf*. CARLTON, Dennis W. and HEYER, Ken, "Appropriate Antitrust Policy Towards Single-Firm Conduct", ECONOMIC ANALYSIS GROUP DISCUSSION PAPER No. EAG 08-2 (March 2008), p. 3, available at https://ssrn.com/abstract=1111665 (last visited 10.04.2017). [hereinafter CARLTON/ HEYER (Appropriate Antitrust Policy)] (claiming it has been accepted that high profits are a deserved reward for success, thus denying a firm the opportunity to benefit from lawfully obtained market power would be unfair).

A Tying arrangement can be challenged under those four provisions of the antitrust law, but each of them provides different tests of liability. One can see that among the provisions, the highest threshold is brought by Section 2 of the Sherman Act, because it deals with single-firm conduct (therefore concerted action is beyond its scope) and it requires exclusionary effects such as obtaining, maintaining, or extending of market power.

Nonetheless, tying practice by a monopolist can still be challenged under Section 3 of the Clayton Act, which sets lower thresholds for tying monopoly power by not requiring a foreclosure effect, but requiring that actions "substantially lessen competition".

On the other hand, the same provision foresees higher thresholds for the tying practice by not requiring a monopolistic power on the tying product, but is able to condemn tying market power if it substantially lessens competition[228].

Section 1 of the Sherman Act sets the lowest threshold to trigger the antitrust liability in a sense that its scope is wider than Section 2 of the Sherman Act and Section 3 of the Clayton Act. It does not require "substantially lessen competition", but "unreasonable restraint on trade". Since all tying arrangements have this character that affects the sale of tied products, they are all considered a restraint.

Moreover, Section 1 of the Sherman Act does not demand obtain, maintain, or extend tying monopoly power or single firm conduct, but literally includes single firm conducts and concerted agreements. Therefore, the structure of this section provides antitrust liability for all tying arrangements.

The 1984 Jefferson Parish Hosp. Dist. v. Hyde[229] is one of the cornerstone cases in tying case law. The Court noted that even though the *per se* rule

[228] *Cf.* Times-Picayune, at 608-609 (The Court distinguished between the Clayton Act and the Sherman Act regarding monopoly requirement for tying inquiry and imposed that monopoly requirement is necessary just in the latter). However, this approach had never been embraced by the courts.
[229] 466 U.S. 2 (1984).

automatically condemns any conduct that fell into a certain category, which was the rule endorsed since International Business Machines Corp. v. U.S. (1936) for tying arrangement, the court found that this rule should be discriminated for tying and at least a threshold should be required[230]. Therefore, the Court established a threshold requirement to condemn tying illegal *per se*.

The Court contended that at least these three questions should be asked before condemning tying *per se* illegal: 1) whether the tying and tied product are separate[231]; 2) whether tying affects a "not insubstantial foreclosure of commerce" in tied product market[232]; and 3) whether there is "sufficient market power" in the tying product market[233].

Requirement of the last two together were called "forcing" and the Court determined that "forcing" is the main reason to condemn tying and it exists when "*the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms*"[234].

The "Forcing" test requires an independent evidence of "market power" and the ability to use this power to compel consumers to purchase the tied product, which it assumes is only possible when consumers have price consciousness and awareness of the quality of the tied product[235].

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[230] *id*., at 9-18.

[231] It must be the first question, because unless there are spate product, tying cannot exist. See Jefferson Parish, 19-21.

[232] This question was part of the tying case law since Int. Salt, at 394-396 See SLAWSON, David W., "Excluding Competition Without Monopoly Power: The Use Of Tying Arrangements To Exploit Market Failure", 36 ANTITRUST BULLETIN (Summer 1991), p. 464, 465, available at http://heinonline.org/HOL/Page?handle=hein.journals/antibull36&div=20&g_sent=1&collection=journals (last visited 10.31.2015) [hereinafter SLAWSON (1991)].

[233] Until United States Steel Corp. v. Fortner Enterprises, 429 U. S. 610 (1977), at 619–621 (hereinafter Fortner II), the courts did not require expressly independent proof of the possession of the market power, but either request a monopoly power (see Times-Picayune, at 605-609), or just assumed it when tying product is patented or copyrighted [see Int. Salt, at 395, 396; International Business Machines Corp. (IBM) v. United States, 298 U.S. 131 (1936), at 132, 132-136 (hereinafter IBM); United States v. Loew's Inc.,371 U. S. 38 (1962), at 45-48 (hereinafter Loew's)].

[234] Jefferson Parish, at 12.

[235] Jefferson Parish, at 26-29.

The Court concluded that "[a] lack of price or quality competition does not create this type of forcing", because the consumers will not be willing to purchase the tied product or service somewhere else or on different terms, thus it follows that "such an agreement [lack of "forcing"] cannot be said to have foreclosed a *choice* that would have otherwise been made "on merits"[236].

Therefore, this threshold is the legal framework for condemning anticompetitive tying. It does not require a dominant position or monopoly power, but the required "sufficient market power" will be evaluated on case-by-case basis.

One may ponder the harm to competition under US tying case law: Is it harm to the consumer (reduction in choice, output limitation), is it the increased price of tied product (where tying facilitates price discrimination), or is it harm to competitors ("not insubstantial foreclosure of commerce" in tied product market)? Does this threshold require that exclusionary tying practice *also* be exploitative to be illegal, or *vice versa*: exploitative tying should *also* be exclusionary to be deemed anticompetitive? Through the literal reading of the "forcing test", it seems that tying should be exclusionary (as foreclosing a substantial amount of commerce in a tied product market) to be deemed anticompetitive. However, our reading suggests that *intent* to exclusion was sufficient condition for harm to competition.

The Court does not explicitly state this, but determination of "sufficient economic power" while using perfect competition as a benchmark, implies this outcome. We have two premises for this conclusion:

First, the Supreme Court failed to supply the independent proof required for market power. In very early tying cases, tying arrangements were condemned on the ground that they enable a firm which has monopoly power over the tying product to obtain a monopoly into a tied product. It was the leverage theory of

[236] Jefferson Parish, at 28 (emphasis added).

tie-ins that the courts applied, when they were in fact patent misuse cases that were concerned about the patentee who had extended (levered) the patent monopoly (on the tying product) via tying into an unpatented (tied) product market[237].

This earliest approach informed later decisions for condemnation of a tying arrangement, i.e.,it requires a monopoly power or some proxy such as a patent[238]. The courts adopted the traditional leverage theory without questioning whether the tied product market can be monopolized (or foreclosed) because of its staple character of the tied such as ink, paper, or salt[239]. Furthermore, the Court did not question whether the tying product(s) was priced at or above a competitive level or the tying firm had derived its profits from unpatented supplies (tied products) was not part of the inquiry[240].

The Supreme Court did not need to mention market power issue especially in the early tying cases, since there was no request for independent proof of

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237 See Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502 (1917). See Jefferson Parish, at 9 (fn.: 13) [(stating roots of the per se rule for tying analysis can be traced at least until Motion Picture decision, and even further to Henry v. Dick Co, 224 U.S. 1 (1912)].

238 POSNER (Antitrust Law), p. 172.

239 International Salt Co., Inc. v. United States, 332 U.S. 392 (1947); International Business Machines Corp. (IBM) v. United States, 298 U.S. 131 (1936) [In the instances either a patented or unpatented durable goods (tying products) sold or leased in the condition that buyer also purchases the consumable (functionally linked) goods (tied products) from the seller. The tied products were staple items such as ink, salt etc. that have largely used in the industry, thus it was impossible for the seller to attempt to become dominant position in these markets. However, the courts did not raise the concern about foreclosure share effect but merely applied so called "pure" leveraging theory that based on tying arrangement could harm consumers by forcing them to pay a monopoly price for a tied product]. See HOVENKAMP, Herbert J., "Tying and the Rule of Reason: Understanding Leverage, Foreclosure, and Price Discrimination" (March 2011), p. 6,7, available at https://ssrn.com/abstract=1759552, last visited 06.02.2017 [hereinafter HOVENKAMP (Tying and the Rule of Reason)]. See also POSNER (Antitrust Law), p. 172-175.

240 See United Shoe Machinery Corp. v. United States, 258 U.S. 451(1922), at 456-458 (United Shoe leased its patented machines tied to use of unpatented additional machines for certain kinds of work and purchase of supplies exclusively and its conduct found violation of the section 3 of the Clayton Act); International Business Machines Corp. (IBM) v. United States, 298 U.S. 136, 139 (The Court looked at the average of the gross receipt of the machines and the average sales of the cards per year , and convinced that IBM's leases "may be to substantially lessen competition"). However, the Court did not compare the profits from leasing of the machines and from sales of cards, or offer to look whether the profits from the patented machines were reduced to induce the tie. Even though it has been noted that the government's payment of a 15% increase in rental to secure the privilege of making its own cards was profitable, only if it produced the cards at a cost less than 55% of the price charged by IBM. See BURCHFIEL, Kenneth J., "Patent Misuse And Antitrust Reform: Blessed Be The Tie?", 4 HARVARD JOURNAL OF LAW & TECHNOLOGY (Spring 1991), p. 34 and fn.: 170, available at http://jolt.law.harvard.edu/articles/pdf/v04/04HarvJLTech001.pdf (last visited 04.04.2017) [hereinafter BURCHFIEL (Patent Misuse)].

market power, but even later referred to it briefly and defined market power as the ability to "raise prices above the levels that would be charged in the competitive market"[241].

To understand what the courts meant with "market power", it depends on what "competitive market price" benchmark refers to. We conclude that it refers to perfectly competitive equilibrium of price equal to marginal cost[242]; rather than market power that firm's ability to influence overall market conditions (whether tying creates barrier to entry, or prevents the ability of competitors to expand sales easily)[243]. Even though courts occasionally assessed the market share of the tying firm, when exploitation of power is found, the relevant parameters were price, quality, or consumer choice[244].

Second, whereas tying firms without monopoly power cannot cause a substantial tied foreclosure share, the Court did not require independent proof whether tying forecloses competitors from a substantial market, but the courts merely infer it from market power that is presumed from the firm's ability to increase prices[245].

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[241] See Jefferson Parish, at 27, fn.: 46; Fortner II, at 620; Fortner I, at 503-504.

[242] This approach follows a direct measure of market power that based on firm's ability to control its own price and output (firm's own -price elasticity of demand), not the firm's ability to influence market conditions (rival's output and price). See LANDES, William M./ POSNER, Richard A., "Market Power in Antitrust Cases", 94 HARVARD LAW REVIEW 5 (March 1981), p. 962, 963, available at http://www.jstor.org/stable/1340687 (last visited 02.07.2017); WERDEN, Gregory J., "Demand Elasticities In Antitrust Analysis", 66 ANTITRUST LAW JOURNAL 2 (1998), p. 377, available at http://www.jstor.org/stable/40843402 (last visited 02.07.2017) [hereinafter WERDEN (Demand Elasticities)].

[243] See KLEIN/ WILEY, p. 631, 632.

[244] Times-Picayune Pub. Co. v. United States 345 U.S. 594 (1953), at 605; Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958), at 5,6; Loew's, at 45; Fortner II, at 610-612; Kodak, p. 464, 465-478.

[245] Times-Picayune, at 11; Int. Salt, at 395-396. See also BLAIR, Roger D./ FINCI, Jeffrey, "The Individual Coercion Doctrine and Tying Agreements: An Economic Analysis", 10 FLORIDA STATE UNIVERSITY LAW REVIEW 4 (1983), pp. 537, available at http://ir.law.fsu.edu/lr/vol10/iss4/2 (last visited 20.06.2017) ("Section 3 of the Clayton Act only forbids conditional sales when they result in a substantial lessening of competition or tend to create a monopoly. It is from this statute that the Court developed the "not insubstantial" amount of commerce prong of the per se test. The Supreme Court addressed this issue in a somewhat casual fashion. It observed that International Salt sold about 119,000 tons of salt in 1944 for approximately $500,000.6 Without regard to the size of the total market, the Court held that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial.").

Therefore, *formal* tying is deemed anticompetitive when it is exclusionary. However, failing in the assessment of actual market conditions for determination of tying market power and the lack of independent proof of insubstantial foreclosure of commerce in tied product market, the forcing test created a loop. Thus, forcing is presumed because of tying market power and tying market power is inferred because of its exploitative effect, and when tying market power is established, foreclosure of tied product market is assumed.

Moreover, efficiencies were not part of antitrust inquiry. It has been expressed that the Supreme Court left behind the *per se* rule for tying, and so-called the "*quasi-per se rule*" approach is embraced by *Jefferson Parish*. Indeed, the Court brought a threshold for triggering the *per se* rule. However, the court held that the *per se* rule does not allow defenses: "Per se condemnation - *condemnation without inquiry into actual market conditions* – is only appropriate if the existence of forcing is probable"[246]. The court assumed that when the plaintiff proved the presence of forcing as part of his *prima facie* case, it was the end of the question, and then tying would be *per se* illegal and the court would not need to allow defenses[247]. This approach has been construed to mean that the Supreme Court eased antitrust liability for tying arrangements as bringing burden of proof "forcing" onto plaintiff for triggering the *per se* rule, but actually, defenses had been heard in the previous tying cases[248].

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[246] 466 U.S. 15 (emphasis added). See also the Court similarly repeated this view "forcing is present …the Sherman Act is violated" (*id.*, at 12); "[when] forcing occurs, our cases have found that the ting arrangement to be unlawful" (*id.*, at 14). See also Kodak, p. 479 ("We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact.").

[247] See SLAWSON (1991), p. 465, 466.

[248] See IBM, at 139–140 (rejecting IBM's claim that it had to control the cards used in its machines to avoid "injury to the reputation of the machines and the good will of" IBM in the absence of proof that other companies could not make quality cards); Int. Salt, at 397–398 (rejecting International Salt's claim that it had to control the supply of salt to protect its leased machines in the absence of proof that competitors could not supply salt of equal quality). See also Slawson (1991), p.466 ("...prior to 1977 [Fortner II] makes clear that defenses were permitted, the justices who decided Hyde [Jefferson Parish] were not aware of it"). He also criticizes the government's conduct (Brief for the United States as Amicus Curiae in Support of Reversal, Jefferson Parish Hospital District No. 2 v. Edwin G. Hyde) regarding they ignored and did not correct the court decision that held "per se rule does not allow defenses" (*id.*, p. 470-471).

The Court showed its tendency to apply the rule of reason approach limited to determination of market power, but since market power was not measured correctly, thebexclusionary effect was not proved.

Furthermore, Microsoft's decision[249] demonstrated that, even though the Court opted for the rule of reason approach due to the special characteristics of the relevant market, consumer harm was not a necessary condition for characterization of the conduct as anticompetitive, and the exclusion for the sake of exclusion was deemed anticompetitive[250].

Nonetheless, exploitative tying practice raises concerns in that it facilitates price discrimination[251], increasing the tied product's price higher than single-monopoly profit maximizing pricing can do[252]. In this case, the concern was that allowing a monopoly to charge higher prices than non-tying pricing would be a social waste. Since a monopolist does not have competitive pressure, it will have little incentive to minimize its production costs[253].

It is worth clarifying that The Supreme Court did not mean that only "high prices (charging supra-competitive prices for tying or tied products)" or "monopoly pricing" is anticompetitive[254], but using tying practice to increase

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[249] United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000), *rev'd in part, aff'd in part*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001).

[250] See FOX, Eleanor M., "What Is Harm To Competition? Exclusionary Practices And Anticompetitive Effect", 70 ANTITRUST LAW JOURNAL 2 (2002), p. 383, 387-390, available at http://www.jstor.org/stable/40843559 (last visited 29.07.2017) (determining that US antitrust laws protect competition, not efficiency, and the absence of consumer harm is no obstacle to judgement for plaintiff).

[251] Even though, there is no specific ban on exploitative price discrimination. Only exclusionary price discrimination is banned under the Robinson-Patman Act that prohibits sellers from offering different prices to different purchasers of "commodities of like grade and quality" when the "effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

[252] See Fortner I, at 512-514 (in dissenting opinion); Fortner II, at 617, Jefferson Parish, at 9-11, 14,15; Kodak, p. 487, 499, 500.

[253] This is the concept known as "X-inefficiency" that it occurs when technical efficiency is not being achieved due to lack of competition pressure, and this lead welfare losses. This concept first introduced by Leibenstein [LEIBENSTEİN, H., "Allocative Efficiency vs, X-Efficiency", 56 American Economic Review 3 (1966) pp. 392-415].

[254] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), p. 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, it is an

monopoly profits over the levels that the defendant could have obtained through simple monopoly pricing without tying is deemed anticompetitive[255].

However, this approach so far stayed as a raw dictum, because judges express this concern in the cases where tying facilitates price discrimination practice was not involved[256]; therefore, there is no holding[257].

In summary, tying case law does not require consumer harm when the alleged practice is exclusionary. At the same time, when a monopoly leads to exploitative tying via price discrimination, it does not require the exclusionary effect to deem the practice as anticompetitive. One may challenge it while still requiring that the tying affect a substantial volume of interstate in tied product market, yet this condition is usually satisfied whenever separate products and tying market power conditions are met.

3.2. EU Competition Law

EU competition rules are regulated under Treaty on the Functioning of the European Union (TFEU). There are two main provisions that states tying and price discrimination shall be prohibited:

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important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth").

[255] See ELHAUGE, Einer, "Rehabilitating Jefferson Parish: "Why Ties Without A Substantial Foreclosure Share Should Not Be Per Se Legal", 80 ANTITRUST LAW JOURNAL (2016), pp. 463-520 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528605 (last visited 15.02.2106) [hereinafter ELHAUGE (Rehabilitating Jefferson Parish)] (calling this effect of tying as "expropriate *further* consumer surplus"). *Compare* CARLTON, Dennis W. and HEYER, Ken, "Extraction vs. Extension: The Basis For Formulating Antitrust Policy Towards Single-Firm Conduct", 4 COMPETITITON POLICY INTERNATIONAL 2 (Autumn 2008), pp. 285- 305, available at http://economics.mit.edu/files/4058 (last visited 10.04.2017). [hereinafter CARLTON/ HEYER (Extraction vs. Extension)]; CRANE, Daniel A., "Tying and Consumer Harm", 8 COMPETITION POLICY INTERNATIONAL 2 (2012), pp. 27-33, available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2373&context=articles (last visited 05.04.2017)[hereinafter CRANE (Tying)]; LAMBERT, Thomas A., "Appropriate Liability Rules for Tying and Bundled Discounting" (July 9, 2011), Ohio State Law Journal, Forthcoming; University of Missouri School of Law Legal Studies Research Paper No. 2011-04, p. 7, 25, available at: http://ssrn.com/abstract=1781130 (last visited 16.07.2016) [hereinafter LAMBERT (2011)] (contending that US antitrust law allows firms to maximize their profit, and it should allow firms also extract remaining consume surplus).

[256] One may challenge that this approach became a holding with Kodak case. However, it was not the tying facilitates price discrimination there, the concern was the market imperfections abled the Kodak price discriminate between informed and uninformed customers.

[257] *Cf.* ELHAUGE (Rehabilitating Jefferson Parish), p. 496-498.

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

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

(e) make 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Under this article, price discrimination and tying can be condemned if they are practiced as a result of a decision between at least two undertaking. Price discrimination is considered under paragraph 1 (d), and tying under paragraph 1 (e). However, they are not *per se* illegal. They are subject to effect-based approach. If tying or price discrimination practice provides the conditions that listed cumulatively under paragraph 3, they will not be prohibited.

Article 102

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

Such abuse may, in particular, consist in:

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

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

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

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

Article 102 (c) addresses a dominant firm's ability to sell to buyers at different prices or with different terms. It does not exclusively refer to customers but states "trading parties", thus it can be construed to also include "rivals" or "final consumers"[258]. Nonetheless, the requirement of placing a "competitive disadvantage" may narrow its applicability for exploitative practice that harms final consumers[259], since they are not in competition.

However, the European Commission (hereafter the Commission) and the European Courts (the General Court and Court of Justice of the European Union) have the tendency to include discrimination imposed on consumers regarding the existence or non-existence of an incentive to create competitive disadvantage,

[258] See GERADIN, Damien/ PETIT, Nicolas, "Price Discrimination Under EC Competition Law: Another Antitrust Theory in Search of Limiting Principles", Global Competition Law Centre Working Paper Series No. 07/05 (July 2005), p. 9, available at https://ssrn.com/abstract=763484p. 9 (claiming that art. 102 (c) aims to protect customers not the competitors of the dominant undertaking).

[259] However, EU Commission interprets "trading parties" in broad sense and does not limited to "contracting parties" but merely "business contact" is considered as sufficient. See Commission Decision *Deutsche Post AG* –Interception of cross-border mail, COMP/C-1/36.915 (2001/892/EC) OJ 2001 L 331/40, at 130.

which is irrelevant[260]. For example, discrimination that directly affect final consumers is explicitly discussed in the Commission's France 1998 World Cup decision. The Commission assessed the practice of French organizer CFO's requirement that the purchaser should be a French resident to be able to buy individual entry tickets and held that[261]:

> *[w]hile the application of Article 82 [102] often requires an assessment of the effect of an undertaking's behavior on the structure of competition in a given market, its application in the absence of such an effect cannot be excluded. Consumers' interests are protected by Article 82 [102], such protection being achieved either by prohibiting conduct by dominant undertakings which impairs free and undistorted competition, or which is direct prejudicial to consumers. Accordingly, and as has been expressly recognized by the Court of Justice (citing Continental Can), Article 82[102] can properly be applied, where appropriate, to situations in which a dominant undertaking's behavior direct prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition.*

Article 102 has the potential to apply in exploitative price discrimination practices, but so far it has been used to address price discrimination based directly or indirectly on the nationality or residence of the customer/consumer[262]. Moreover, the Commission also refers to subparagraph (a) as finding CFO's behavior abusive on the grounds that imposing unfair trading conditions on residents outside France resulted in a limitation of the market to the prejudice of those consumers[263].

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[260] Deutsche Post – Interception of Cross-border Mail; Case 85/76 Hoffmann-La Roche & Co AG v EC Commission [1979] ECR 461, [122]-[123]; Case T-83/91 Tetra Pak International SA v EC Commission [1994] ECR II-755.
[261] Commission Decision 1998 Football World Cup (Case No IV/36.888) (2001/12/EC) OJ 2000 L 5/55, at 102. L5/55, para. 102.
[262] TUNÇEL, p. 50. See Deutsche Post – Interception of Cross-border Mail and Case 27/76 United Brands Co. See also United Brands Continental BV v EC Commission [1978] ECR 207 (condemned practice that involve upstream geographic discrimination between customers that do not compete each other, but where partitioning practice also existed).
[263] 1998 Football World Cup, at 88.

Furthermore, there is no guidance from the Commission that addresses non-exclusionary (either exploitative or distortionary) abuses. Therefore, in the light of the Court's decision as to whether exploitative price discrimination is deemed illegal can be answered in three ways:

1) Exploitative discrimination that harms consumer is illegal if it distorts market integration. Hence, it is not clear whether only the single market objective is implied or whether it includes consumer welfare objective. If it is the latter, exploitative price discrimination might constitute an abuse under Article 102 (c), even without a distortion of competition, since there is no requirement for this, as in Art. 101(1)[264].

2) Exploitative discrimination is not anticompetitive unless coupled with another abusive practice that either facilitates or partitions it[265].

3) Since lists of the practice placed in the articles are extensive, exploitative price discrimination can indicate a firm's liability[266].

In addition, the approach to exploitative price discrimination is uncertain in case law, as there is no Commission or court decision regarding exploitative tying. Tying case law is somewhat limited, even though in the decisions consumer welfare stated, where tying practices were condemned, exploitation was inseparably linked to exclusion[267].

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[264] GERARD (2005) p. 3, 4 (suggesting that the Commission should make clear that price discrimination might constitute an abuse under Article 102(c) only to the extent that it results in a distortion of competition among the dominant firm's trading parties).

[265] See United Brands Company and United Brands Continental BV v Commission [1978] ECR 207.

[266] Case 6/72, Europemballage Corporation and Continental Can Company, Inc. v Commission [1973] ECR 215, para. 26. See Tunçel, p. 66 (contending that Art. 102 (c) should be applied only whereas discriminatory abuse of a dominant undertaking non-vertically integrated in the downstream market).

[267] Commission Decision 88/138 EEC, Eurofix-Bauro v. Hilti, O.J. 1988, L 65/19, confirmed by C-53/92 P, Hilti v. Commission, [1994] ECR I-667; Case T-83/91, Commission Decision 92/163/EEC, Tetra Pak II, O.J. 1992, L 72/1; Commission decision, of 24.04.2004, Case COMP/C-3/37.792 – Microsoft, OJ L 32. See also Commission decision, Case No COMP/M.2220- General Electric/Honeywell, OJ L 395, 30.12.1989 (There was not a tying practice, but the Commission was concern that merger GE/Honeywell would probably engage in product bundling, due to having large line of complementary products. It was likely to lower price of bundle in the short-run, then competitors would not be

Interestingly, in the early days of European competition policy, from a legal viewpoint, it is suggested that the wording of Article 102 was exclusively concerned with exploitative abuses[268]. However, literature and the attention of the enforcement authority remained limited to excessive pricing in this sense. However, the above-mentioned judgements on abuse of dominance are not of recent origin, and one may expect that with the modern approach to the concept of “abuse” and the so-called “more economic effects-based approach” with its clear emphasis on “consumer welfare”, there would be greater concern regarding exploitative abuse.

A brief overview of the development of the modern process demonstrates that at the beginning of the process, according to the EAGCP Report[269], the main concern should be the improvement of “consumer welfare” and the assessment of the abuse should be derived from the effects on consumers[270]. Thus, it has been interpreted that the aim is the prevention of anticompetitive effects that harm consumers, not the “protection of competition”, and the implementation of this

able to lower the prices of their product to the same extent, and they would be forced to exit. Thus, merged firm would be able to increase prices in the long-run).

[268] LYONS, Bruce, “The Paradox of the Exclusion of Exploitative Abuse”, in Fredenberg and Strand (eds) (2007) The Pros and Cons of High Prices, Swedish Competition Authority, p. 65; FOX, p.393; PAULIS, Emil, “Article 82 and Exploitative Conduct”, in Ehlermann and Marquis (eds), European Competition Annual 2007: A reformed Approach to Article 82, forthcoming, available at https://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Paulis.pdf (last visited 01.08.2017). See Also AKMAN, Pinar, “Searching for the long-lost soul of Article 82EC”, Centre for Competition Policy Working Paper 07-5 (March 2007), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=977221 (last visited 01.08.2017). [suggesting this as examining the travaux préparatoires (preparatory documents)]. The European Court of Justice (ECJ) in Continental Can clarified that Article 82 also covers exclusionary abuses: "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure" (Case 6/72, Europemballage Corporation and Continental Can Company, Inc. v Commission [1973] ECR 215, para. 26).

[269] Report by the Economic Advisory Group for Competition Policy (EAGCP) ‘An Economic Approach to Article 82’ (July 2005) available at ec.europa.eu/ dgs/ competition/ economist/ eagcp_july_21_05. pdf 2(The EAGCP Report commissioned by EU DG Competition addressees an effects-based approach focuses on the presence of anticompetitive effects that harm consumers and is based on the examination of each specific case, based on sound economics and grounded on facts. An economics-based approach purposes an examination of specific undertaking strategies in each particular market and its effect) (hereinafter EAGCP Report).

[270] “An economic approach to Article 82 focuses on improved consumer welfare. In so doing, it avoids confusing the protection of competition with the protection of competitors and it stresses that the ultimate yardstick of competition policy is in the satisfaction of consumer needs. Competition is a process that forces firms to be responsive to consumers’ needs with respect to price, quality, variety, etc.; over time it also acts as a selection mechanism, with more efficient firms replacing less efficient ones” (EAGCP Report, p. 2).

requires the competition authority to explain in each case consumer harm from the conduct[271].

However, the EAGCP Report also that approach would mainly focus on entry barriers and competitive harm arising from exclusionary behavior[272]. It concluded that an exclusionary practice, in which a dominant firm harms rivals, is only an abuse when the exclusion is also expected to harm consumers[273].

The explanation of the former Commissioner Kroes for focusing on exclusionary practices was that "it is sound for our enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers"[274]. From Kroes' speech it was clear that that undistorted competition in the common market would ultimately benefit consumers.

On the other hand, as LYONS correctly asserts, it is paradoxical since if exclusionary abuses are problematic because they ultimately exploit consumers, why should the policy emphasis not be on exploitative practices that directly harm customers of a dominant undertaking[275].

However, the proposition of the "competitive harm" equal to "harm to consumer" in the EAGCP Report was not followed by the DG Competition

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[271] See EAGCP Report, p. 8-10.

[272] "Whenever possible, competition is to be preferred to detailed regulation as the best mechanism to avoid inefficiencies and foster productivity and growth; this calls for a 'non-dirigiste' approach to competition policy that focuses in most cases on entry barriers; in the context of Article 82, it is then natural to focus on competitive harm that arises from exclusionary strategies. Possible exceptions concern some natural monopoly industries which may require ongoing supervision of access prices and conditions by regulatory agencies." (EAGCP Report, p.3).

[273] LYONS, p. 69.

[274] KROES, Neelie, "Tackling Exclusionary Practices To Avoid Exploitation Of Market Power: Some Preliminary Thoughts On The Policy Review Of Article 82", 29 FORDHAM INT'L L.J. (2005-2006), p. 595, available at http://heinonline.org/HOL/Page?handle=hein.journals/frdint29&div=26&g_sent=1&collection=journals (last visited 22.07.2017).

[275] LYONS, p. 65.

Discussion Paper[276] and the Commission Guidance[277]. Neither the Discussion Paper nor the Commission Guidance on enforcement priorities in applying Article 102 to exclusionary conduct sought proof of any actual or possible harm to consumers, but suggests a test for the prohibition of exclusionary abuses based on actual or likely anticompetitive effects on the market and implicitly assumes that exclusionary behavior harms consumers directly or indirectly[278].

Even from the Guidance (2009) writing, it is clear that exploitation as a "direct harm to the customer" is a necessary element of Art. 102 infringement. The literature is divided between those that claim that explicit harm to consumers under Art. 102 (exclusionary) abuses is necessary in order to protect not only competitors[279], and the proponents that Art. 102 cannot harm consumers as an ultimate test of anticompetitive conduct, because Art. 102 protects the competitive process itself, therefore consumer welfare is merely an expected benefit from undistorted competition[280].

[276] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) available at: ec.europa.eu/ competition/ antitrust/ art82/ discpaper2005. Pdf (hereinafter Discussion Paper).

[277] 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/ 7 [hereinafter Guidance (2009)] See Akman (2012), p. 134-136.

[278] See Discussion Paper, n. 4, 54, 55, 88; the Guidance (2009), n. 5, 19, 22.

[279] LYONS, p. 70; LANG, John Temple, "The Use Of Competition Law Powers For Regulatory Purposes", in Annual Competition Policy Conference, Regulatory Policy Institute Oxford (July 2007), p. 6, available at http://pascal.iseg.utl.pt/~carlosfr/ses/Lang%20T.J.%20(2207).pdf (last visited 01.08.2017); AKMAN, Pinar, "Exploitative Abuse in Article 82EC: Back to Basics?", CCP Working Paper 09-1 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328316 (last visited 15.07.2017) [hereinafter AKMAN (2009)]; EVANS, David and PADILLA, Jorge, "Excessive Prices: Using Economics to Define Administrable Legal Rules", 1 JOURNAL OF COMPETITION LAW AND ECONOMICS (2005) Journal of Competition Law and Economics, pp. 97–122 (doi: 10.1093/joclec/nhi002) (last visited 01.08.2017).

[280] EILMANSBERGER, Thomas, "How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anticompetitive Abuses", 42 COMMON MARKET LAW REVIEW 2005, p. 133-135; available at https://www.biicl.org/files/1403_eilmansberger_on_82.pdf (last visited 16.06.2017) [hereinafter EILMANSBERGER (2005)]; SCHWEITZER, Heike, "The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC", EUROPEAN UNIVERSITY INSTITUTE, Working Paper 2007/32 (2007), available at http://cadmus.eui.eu/bitstream/handle/1814/7626/?sequence=3 (last visited 22.07.2017); MARTÍN-LABORDA, Antonio Robles, "Exploitative Prices in European Competition Law", Abuse Regulation in Competition Law, Proceedings of the 10th ASCOLA Conference Tokyo 2015, forthcoming, available at https://ssrn.com/abstract=2660956 (last visited 01.08.2017).

The apparent tendency is not to grant a decisive role in consumer harm in the case of abuse control, and suggests a combined reading of Articles 102 and 3 TFEU, which follows that distortion of competition should be established on the basis of harm to the protected values. Here, the Commission emphasises the openness of the market rather than consumer welfare[281]. In addition, the ECJ decision on GlaxoSmithKline consolidates the Commission's understanding that consumer welfare is not a single objective for European competition law, and it states:

> *…like other competition rules laid down in the Treaty, Article [101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price*[282].

To us, European authorities do not show the tendency to be concerned about exploitative practice unless it endangers the objective of single market integration. It was clear from the GlaxoSmithKline decision that consumer harm cannot be the final test for determining anti-competitiveness, nor can consumer welfare can be an ultimate objective for European competition law. It is understandable, since it is a difficult task to determine the effect on consumer welfare, it is far more complex to assess consumer welfare effects at a multi-national level; it may even be impossible.

Nonetheless, this approach does not explicitly abandon the concern for exploitative conduct[283], but the Commission is silent on the subject, and literature

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[281] AKMAN (2012), p.110.

[282] Case T-168/01 GlaxoSmithKline Service v Commission [2006] ECR II-2969, para. 63.

[283] See Discussion paper, n. 179 ("However, tying and bundling can lead to the following possible anticompetitive effects: foreclosure, price discrimination and higher prices. The present section deals only with the foreclosure effects of tying and bundling"); Guidance (2009), n. 7 ("Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behavior that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage

proposes that intervention for exploitative conduct should be under very limited circumstances, and perhaps only as a last resort[284].

3.3. Turkish Competition Law

In the Turkish Competition Act, three main articles should be taken into account for the assessment of price discrimination and tying practices:

Agreements, Concerted Practices and Decisions Limiting Competition

Article 4- Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,

b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,

c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,

d) Complicating and restricting the activities of competing undertakings, or excluding undertakings operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,

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limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common").

284 See LYONS, p. 83, 84; RÖLLER, Lars-Hendrik, "Exploitative Abuses", in Ehlermann and Marquis (eds), European Competition Annual 2007: A reformed Approach to Article 82, forthcoming, available at https://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Roeller.pd (last visited 01.08.2017); PAULİS, p. 5; MOTTA, Massimo/ de STREEL, Alexandre, "Exploitative and Exclusionary Excessive Prices in EU Law" available at http://professorgeradin.blogs.com/professor_geradins_weblog/files/ExcessivePrices18122003.pdf (last visited 01.08.2017).

e) Accept exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,

f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services 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 putting forward terms as to the resupply of a good or service supplied.

In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.

Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

Exemption

Article 5- The Board, in case all the terms listed below exist, may decide (Annulled: 02.07.2005-Article 5388/Article 1) (...) to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions of article 4:

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefitting the consumer from the above-mentioned,

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

(Amended: 02.07.2005-Article 5388/Article 1) Exemption may be granted for a definite period, just as the granting of exemption may be subjected to the fulfillment of particular terms and/or particular obligations. Exemption decisions are valid as of the date of concluding an agreement or committing a concerted practice or taking a decision of an association of undertakings, or fulfilling a condition if it has been tied to a condition.

In case the terms mentioned in the first paragraph are fulfilled, the Board may issue communiqués which ensure block exemptions for the types of agreements in specific subject-matters and which indicate their terms.

Abuse of Dominant Position

Article 6- 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. Abusive cases are, in particular, as follows:

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 product or service together with a product or service, or tying a product or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another product 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 product 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.

Tying is listed under Article 4/II (f) and 6/II (c), and discrimination (includes price and non-price based) under Article 4/II (e) and article 6/II (b).

The provisions are badly written, though. The language ("Abusive cases are, *in particular*, as follows") creates an understanding that abusive or illegal practices are limited to those listed cases. However, the Board explicitly stated that this list is non-exhaustive[285].

Another poorly chosen word is in the discrimination provision. Article 4/II (e) refers to "person", while article 6/II (b) places "purchaser". These terms are vague and are inconsistent within the terminology of the remaining provisions. Instead of the word "person", the legislator could opt to use "trading parties", or "competitor/customer/consumer". It would be more explicit whether the provision addresses primary line injury, or secondary line injury. Nonetheless, Art. 4/II (e) does not mention "indirect" discrimination. However, it can be construed as such since it refers to "person" instead of "purchaser", and the provision does not require a "contracting party", thus indirect discrimination is included.

Furthermore, the provisions, unlike Art 101 (d) and 102 (c) of TFEU, do not include the condition "competitive disadvantage". However, in its decisions, the Board sought for the conditions of discriminatory abuse by dominant undertaking to "place customer at competitive disadvantage"[286].

The Board consistently requires the exclusionary effect for primary line injury, yet states it is not *per se* illegal[287]. However, it fails to distinguish between

[285] See BELKO decision dated 06.04.2001 and numbered 01-17 / 150-39. See also grounds for the Article 6 (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).

[286] Coca Cola / TAB Food Decision dated 26.05.2005 and numbered 05-36 / 453-106 (The Board stated that there are three conditions to meet for discriminatory abuse under Art. 6/ II (b): 1- Discriminatory practice is applied to undertakings that are *competitors* 2- Offering different prices for equal business transactions 3- Creating a competitive disadvantage among customers). See also Cine 5 decision dated 11.10.1999 and numbered 99-46/500-316 (The cancellation decision of the Council of Sate on 1.11.2007 and renumbered 07-83/1009-393); Bayek decision dated 18.7.2002 and numbered 02-44/518-213; Roche decision, dated 30.10.2008 and numbered 08-61/996-388. *Compare* Istanbul Otobüs Isletmeleri [Istanbul Bus Operations] decision dated 06.07.2001 and numbered 01-33/313-91 (The cancellation decision of the Council of Sate on 23.05.2005 and renumbered 05-60/983-242) [The Board stated that discriminatory practice (offering different conditions) is sufficient for the condemnation, it is not considered necessary to apply these conditions or to have an effect on the competitiveness of the business parties]. Nonetheless, in the decision, the Board found that alleged practice place competitive disadvantage among the customers.

[287] Board *Frito Lay* decision dated 06.04.2006 and numbered 06-24/ 04-71.

primary line injury and secondary line injury. In the Gillette decision[288] in which a dominant undertaking that does not operate in the downstream market terminated the contracts of some of its distributor/customers, the Board concluded that there was no violation of Article 6 because there was no competition between the dominant undertaking and its customers. On the other hand, in the Sanofi-Aventis decision[289], it was decided that the dominant undertaking, which does not operate in the downstream market, had violated Article 6, due to applying different tariffs (conditions of sale) to its customers[290]. However, there is no judgement that the Board considers a discriminatory abuse by dominant undertaking directly to final consumer as a violation of Art. 6.

Tying provisions, furthermore, are worded differently. Art. 6/ II (c) does not include "the nature of the agreement or commercial usages" as a justification for unilaterally imposed tying conduct. In addition it is important, since a practice that falls under Art. 4 can be exempt regarding Art. 5. However, the TCA does not regulate exemptions for the practice that fall within the scope of Art. 6[291]. Even though above shortcomings can be overcome by interpretation of the Board, it is technically improper.

Examination of twenty years enforcement of the Board indicates that few tying cases were condemned. The Board states that tying practice can be subject to either Art. 4 or Art. 6, but the latter "dominant position" is considered as a pre-condition.

[288] Board decision dated 20.03.2008 and number 08-25 / 261-88.
[289] Board dated 20.04.2009 and numbered 09-16 / 374-88.
[290] See also the decision of Cevahir AVM dated 15.06.2006 and numbered 06-44 / 540-142 and Reckitt Benckiser / Akyüz Gıda dated 07.10.2010 and numbered 10-63 / 1320-496 (The Board stated that the dominant undertaking which does not operate in the downstream market cannot have the intention to disrupt the competition in the downstream market or to put a customer in this market in a disadvantageous position because the competitive structure in the market itself would grant an additional benefit to the dominant undertaking).
[291] In this situation, dominant firm may ask for negative clearance. See TCA Article 8: "Upon the application by the undertaking or associations of undertakings concerned, the Board may, on the basis of information in hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of this Act".

In all those cases, the Board only once mentioned in an early decision that tying can also have “exploitative effect”, but in the decision, due to lack of dominant position, concluded that tying could not reduce consumer welfare[292]. In another early decision, the Board assessed consumer harm under tying practice, but due to lack of exclusionary effect, the tying practice was allowed[293].

At the end of 2008, the Board started including efficiency defenses in its tying inquiry[294]. Since then, the Board evaluates tying as an exclusionary practice and assumes that it can harm consumers indirectly. However, in the decisions, consumers are not always the end users. Furthermore, the Board has been trying to ascertain whether efficiency gains pass on to consumers, but does not explain on which grounds or what amount of efficiency is considered for the pass-on requirement.

It can be said that the process of modernization of Art. 102 TFEU affected the Board’s approach, even before the adaptation of the Guidelines (Dominant Position) in 2014. Since the Commission Guidance (2009) established the priorities for exclusionary practice, the Board embraced this concern and abandoned assessment of exploitative tying that can harm consumers directly.

For exclusionary tying assessment, the Guidelines (Dominant Position) suggests that the Board determine the presence of two factors: 1) the tying product and the tied product should be distinct, and 2) it should be likely that the tying practice will to lead to anti-competitive foreclosure[295].

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[292] Board *Garanti Bank* decision dated 5.8.2009 and numbered 09-34/ 787-192.
[293] Board *DIPOS* decision dated 11.9.2008 and numbered 08-52 / 791-320.
[294] Board TTNET/Avea decision dated 09.10.2008 and numbered 08-57/ 912-363; Yandex/ Google decision dated 28.12.2015, numbered 15-46/766-281. See also Competition Authority’s Sector Inquiry Report dated 25.11.2009.
[295] Guidelines (Dominant Position), n. 86. See the Board decisions were already looking for these two conditions (TÜVTÜRK decision dated 09.12.2009 and numbered 09-58/ 1405-367; TTNET/Avea decision dated 09.10.2008 and numbered 08-57/ 912-363; Garanti Bank decision dated 05.08.2009 and numbered 09-34/ 787-192; TFF/ Digiturk decision dated 07.09.2006 and numbered 06-61/ 822-237; Yandex/ Google decision dated 28.12.2015, numbered 15-46/766-281).

Furthermore, the Guidelines (Dominant Position) also recommend to the Board to include in its analysis, that the

> *arguments of the dominant undertaking engaging in the tying conduct, which claim that the practice ensures production and distribution savings to the benefit of customers, that it reduces transaction costs for customers who otherwise would have to buy the bundled products separately, and that it allows the supplier to pass on to the [customers]*[296] *any efficiencies stemming from the production or purchase of the tied products in large numbers*[297].

The problem is that when it comes to speech, the Authority and the language of the guidelines emphasize "consumer", but consumer merely means "customer", and is not limited to final consumers. It is already a failing to omit exploitative and discriminatory practices from the Guidelines (Dominant Position). However, the presumption that harm to intermediate customers creates harm to consumers and where intermediate customers are not competitors of the dominant undertaking raises the question of whether competition rules can protect consumers even indirectly, since there is no consensus where an increase in customer welfare leads to an increase in "consumer welfare".

Regarding exploitative abuse while the guideline is still in draft, it is stated that exploitative abuses are actions that could have adverse effects on consumer welfare when the undertaking has a monopoly or near monopoly due to there being

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[296] It is worth to note that in original language of the Guideline (Dominant Position) here the term of "müsteri" (customer) is used, while in the English version of the Guideline (Dominant Position) published by the Authority, for the pass-on requirement the term "consumer" has been used. It may be done inadvertently, yet the implementation of this would be challenging for the efficiency defense for the dominant undertaking. In this instance, it would not be sufficient for dominant undertaking to prove that it reduces cost for its customers, but also final consumer receive benefit from this reduction should be shown.

[297] Guidelines (Dominant Position), n. 94.

no regulations on the relevant market[298]. However, these concerns are excluded from the published Guideline (Dominant Position).

One may wonder whether any exploitative practice has been challenged before the Board. Especially excessive pricing is often claimed in Board decisions. However, only two violations have been found[299].

We aware that it is difficult task for competition authorities to intervene in the market when a practice merely harms consumers but does not distorts competition. However, the assessment of exploitative abuse is vital for the application of Art. 6. Whether the objective of competition law is “consumer welfare”, or it at least an expected benefit from undistorted competition, it requires the question of whether the wording of the TCA is the means to this end, or even whether the implementation of the TCA is consistent with this approach.

The discussion of under which circumstance exploitation should be found “abusive” has not been carried out sufficiently, because of the emphasis on “exclusionary” abuses. Even though Art. 6 prohibits exploitative abuse, case law does not suggest a definition or analytic framework for exploitative abuse. In addition the literature only deals with excessive pricing.

Thus, our challenge is, first, to determine how to approach exploitative conducts. While doing so, we can understand underlying reasons for the intervention for exploitative practice, which will help us to determine when exploitative tying practice should raise antitrust concerns under Article 6 of the TCA.

[298] ÖZKAN, Ahmet Fatih, “Hakim Durumun Kötüye Kullanilmasi Kilavuzu’nun Kapsamli Bir İncelemesi” [A Comprehensive Analysis of Guidelines on The Assessment of Exclusionary Abusive Conduct By Dominant Undertakings], REKABET FORUMU 85 (2014), p. 32 [hereinafter ÖZKAN (2014)].
[299] BELKO decision dated 06.04.2001and numbered 01-17/ 150-39; TÜPRAŞ decision dated 17.01.2014 and numbered 14-03/ 60-24.

4. UNILATERALLY IMPOSED EXPLOITATIVE TYING

4.1. Framework of Intervention for the Unilaterally Imposed Exploitative Conduct

Although exploitative abuses are explicitly prohibited in many competition law systems, they are discussed in a limited number of decisions, and the scope of exploitative abuses is one of the most controversial areas of competition law. Regarding the scope of the exploitative abuses, there is a two-dimensional discussion, i.e.,first conceptual, second practical.

The conceptual dimension of the discussion is related to the definition of exploitative abuses. In the given definitions of exploitative abuse, "competitive market conditions" are used as a benchmark. However, it is overlooked that behaving differently from competitive market conditions is inevitable when it comes to dominance position (due to the market power they possess)[300].Thus, this raises the question of where to draw the line between the usual behaviors in the dominant position and the forms of behavior in the exploitative nature[301].

Once it is assumed that the conceptual dimension of exploitative abuses can be overcome, as adopting merely a general premise that the direct harm to consumers without strengthening market power or other structural infringement to market conditions is exploitative, then application-oriented questions arise. Should there be an intervention in the exploitative abuse by competition law that does not affect the competitive structure of the market, and if the answer is affirmative, what should be the conditions (why and when) and methods of intervention and which markets are candidates for intervention?

These questions are answered in the case where excessive pricing is the abuse:

[300] ÜNAL, p. 156.
[301] ÜNAL, p. 156.

Whether competition authorities should intervene is answered affirmatively, since many competition authorities believe that competition policy is ultimately about protecting consumer welfare. Nonetheless, two main hesitations remain in the background: First, it is difficult to measure when prices are “high” or “excessive” in order to compare them with an appropriate benchmark[302]; second, it is unpredictable that the results of intervention with market dynamic due to the risk of impair investment incentive to innovate[303].

Due to these drawbacks, there is a consensus in the literature that the area of intervention should be limited to certain conditions for exploitative abuse. Basically, it can be said that intervention should be limited to where markets are characterized by significantly high and long-lasting barriers to entry. Nevertheless, the proposals concerning what these cumulative conditions should be, vary according to the understanding of how competition law should be intrusive.

MOTTA and DE STREEL propose that intervention should be limited to industries where there are: 1) High and non-transitory barriers to entry; and 2) monopoly or near-monopoly situations due to current or past exclusive or special rights 3) unless there is an effective way for the competition authority to eliminate the entry barriers 4) where there is not a sector-specific regulator[304].

EVANS and PADILLA suggest the necessary circumstances are as follows: 1) Where the firm has a (near) monopoly position in the market; 2) the prices charged by the firm widely exceed its average total costs; and 3) there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets[305].

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[302] LYONS, p. 67; EVANS/ PADILLA, p. 99; Paulis, p. 2.
[303] See LYONS, p. 73-77 (considering the role of high prices in the investment incentive for a dominant firm); Röller, p. 3 (indicating that in industries where innovation or large upfront investments play a major role, consumers ultimately do not benefit from excessive pricing interventions). *Cf.* PAULIS, p. 4, 7.
[304] MOTTA/ de STREEL, p. 16-17.
[305] EVANS/ PADILLA, p. 119-122.

O'DONOGHUE and PADILLA contend that there should not be intervention, unless 1) the market is protected by high barriers to entry; 2) consumers have no credible alternatives to the products of the dominant firm; and 3) firms compete in a mature environment, where investment and innovation play little or no role[306].

RÖLLER argues that intervention based on exploitative abuse is necessary in order to fulfill “gap cases” or correct “mistakes[307]: In this way, enforcement against exploitative abuses can be used to close the gap under Article 102 TFEU, which does not address an anticompetitive conduct below the level of dominance, or anticompetitive behavior by an oligopoly. Moreover, action against exploitative abuses due to the mistakes (anticompetitive behaviours that escaped from antitrust scrunity), will grant a second “shot” for the enforcement, whether the dominant position is acquired through exclusionary conduct[308]. His answer to the question of “when take to action” for gap or mistake cases under article 102, TFEU is limited to special circumstances in which 1) significant entry barriers exist 2) the market is unlikely to self-correct 3) no structural remedy is available 4) no regulator exists or there is regulatory failure[309].

ÜNAL also recommends a policy to limit enforcement against exploitative abuses in the markets that are legal or natural monopolies and are not subject to regulation[310]. Moreover ODMAN BOZTOSUN, contrary to those in the mainstream, contends that a competition authority is not authorized to intervene where the market is a natural monopoly and where the market is legal monopoly. The only intervention means can be competition advocacy to remove the legal barriers[311]. Further, she proposes a new provision in the TCA that addresses

[306] O’DONOGHUE, Robert and PADILLA, A. Jorge, The Law and Economics of Article 102 TFEU, Oxford, Hart Publishing, 2013, n. 27103.
[307] RÖLLER, p. 4-6.
[308] *Compare* LYONS, p. 82, 83; MARTÍN-LABORDA, p. 13 (fn.: 46).
[309] RÖLLER, p. 9-10.
[310] ÜNAL, p. 204-206.
[311] ODMAN BOZTOSUN, p. 122.

unilateral conduct, as follows[312]: 1) The conduct of dominant undertaking in the relevant market that harms consumer directly is prohibited; 2) Whereas the direct harm to consumer is undetermined, then the exclusionary practice of dominant undertaking may be allowed due to efficiency justifications; 3) Dominant undertaking is not allowed to charge higher prices than determined price ceiling by the Board; 4) The Board establishes the criteria with respect to determination of dominant position, minimum efficiency measurement, threshold for price ceiling with a communiqué.

Regarding the intervention methods, the majority opinion is that remedies should be directed at the source of the exploitation, namely, the market structure. In this context, efforts should address removing such entry barriers, opening the market, or liberalizing through competition advocacy activities[313].

If the structural remedies are not available, then (especially for excessive pricing) price regulation should be considered where there is no regulatory agency or if the regulator does not operate effectively[314]. Otherwise, it is suggested that leaving price regulation to a sector-specific regulator would be more efficient[315].

In this case, MOTTA and DE STREEL suggest that the authority rather lobby the government to lift the (legal) barriers and effectively liberalize the sector than to open several exploitative abuse cases, which may be more cost-effective[316]. Regarding this consideration, PAULIS states that “generally, such lobbying efforts by competition authorities are more effective at the national level than at the Community level” and “consumers may pay excessive prices for quite some time before Community legislation removes the legal barriers”[317]. Thus, on

[312] ODMAN BOZTOSUN, p. 137.
[313] LYONS, p. 77-79; MOTTA/ de STREEL, p. 15; RÖLLER, p. 9.
[314] Yet, it is noted that price regulation or imposing price ceiling still should be considered as ultimate means for the regulation, it is recommended for the authorities to impose behavioral remedies, or continue to monitor prices over time, therefore converting itself in a regulator. See Lyons, p. 82, 83; Motta/ de Streel, p. 15; Evans/ Padilla; Röller, p. 9,10.
[315] EVANS/ PADILLA, p. 122.
[316] MOTTA/ de STREEL, p. 17.
[317] PAULIS, p. 6.

the one hand, it may require working on both camps at the same time, while, on the other hand lobbying and intervening directly against excessive prices.

From our point of view, intervention against (price based) exploitative abuse should not be restricted to situations of monopoly or near monopoly, due to current or past exclusive or special rights. It is a plausible condition for excessive pricing practice, but we are attempting to determine an answer for all types of (price-based) exploitative practices. In addition, since a dominant position is a pre-requisite condition for "abuse", and competition law suggests using "indirect" structural measures of market power, viz. firm's market share, the presence of barriers to entry and the ability of competitors to expand sales[318], hence "high and long-lasting barriers to entry and expansion", could be recognized[319]. Otherwise, merely looking for monopoly or a proxy for it, will lead to gap cases.

Second, there is a general concern about monopoly induced "high" or excessive" prices, yet this concern occurs in opposite directions. On the one hand, there is resistance to intervention due to concern about impairment of investment incentive for potential innovation[320]; on the other hand, there is support for intervention in this instance due to concerns regarding "quite monopoly life"[321].

Therefore, the Board has two options to follow: The first option embraces the former approach, and determines whether dominant firm might create dynamic efficiency, and finds the practice is abusive due to lack of dynamic efficiency. The second option is adopting quite monopoly life presumption, and assesses the alleged practice without dynamic efficiency, but allows the firm to justify dynamic efficiency. We suggest including dynamic efficiency consideration into

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[318] See Guidance (2009), n. 9-19; Guidelines (Dominant Position), n.10-21.
[319] See PAULIS, p. 5, 6.
[320] EVANS/ PADILLA, 121, 122; Lyons, p. 73, 74; RÖLLER, p. 2,3; CARLTON/ HEYER (Extraction vs. Extension), p. 294.
[321] ELHAUGE (Rehabilitating Jefferson Parish), p. 486-489; BAKER/ SALOP, p. 22, 23.

assessment in either way. However, choosing the first option would ease the burden of proof for the dominant firm.

We agree also that intervention can take place through competition law or competition advocacy. However, the priority should be on structural remedies. When structural remedies are not possible, then it is necessary to distinguish whether the sector is regulated or not in order to determine possible remedies:

If there is no regulation, there are several options. We are listing below these options in the order that application of these remedies in an accretionary way will reflect an enforcement from more lenient to stricter:

1) The Board may merely deliver opinion and opt to challenge the practice through competition advocacy, such as leading a market inquiry before deciding whether the price regulation or fine is necessary. During this time, consumers will remain defenseless (and may be exploited) or protected limited to the scope of consumer- or contract law.

2) The Board shall impose an administrative fine[322]. The fine may be significant for a non-specialist firm, in which case it may have a deterrent effect on high prices to limit future exploitation[323]. However, punishing high prices with a fine would complicate business life, especially if firms must consult competition lawyers every time they raise a price[324].

3) The Board may prefer price regulation without imposing a fine. The price-regulation option is always considered as a last resort, due to the side effects of discouraging entry, cost of establishing a specialist bureaucracy, risk of setting

[322] TCA Art. 16/ IV: "To those who commit behavior prohibited in articles 4, 6 and 7 of this Act, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board".
[323] LYONS, p. 79.
[324] LYONS, p. 79.

inappropriate prices etc.[325]. Price regulation is undesirable, not just as a remedy option, but generally for the market. Nonetheless, price regulation is still deemed as the best option for large industries subject to large economies of scale, such as gas and electricity.

4) The Board may impose fines for infringement of Art. 6 and also opt to regulate prices by imposing a price ceiling. This is not desirable, but in some instances, not imposing a price ceiling and merely ordering to the firm to reestablish its prices may create uncertainty for the firm.

Likewise, the Board in TÜRSAB (the Turkish Travel Agencies Association) decision held that TÜRSAB violated Art. 4 as setting a high entry fees and dues that created entry barrier into the market[326]. However, the Board did not say when the fee would not be considered high or anticompetitive; it just stated that, in accordance with related private act, “it is duty of general assembly of TÜRSAB to determine the entrance fee, but the determined amount should not be high enough to violate Law No. 4054 [TCA]”. Thus, TÜRSAB were fined three times due to failing to determine the “correct” high enough fee each time[327].

If there is a specific sector regulator, it is debatable whether the Board *may* intervene. In this context, the relationship between competition law and sector specific regulation in the application of Article 6 has not been addressed, either in the TCA or in the Guidelines (Dominant Position)

This issue has not been addressed by the Guidance (2009) either, because related regulation has left for the domestic laws of the member states instead of the supra-national authorities. Nonetheless, there is an example of the

[325] LYONS, p. 77-84; RÖLLER, p. 9, 10; PAULIS, p. 3.
[326] TÜRSAB decision dated 17.12.2003 and numbered 03-80/967-397.
[327] See Yilmaz’s criticize of the decision (commenting in Abuse of Dominant Position: Problems and Solution Suggestion Symposium, 22.06.2010), in Abuse of Dominant Position: Problems and Solution Suggestion Symposium, 22.06.2010), On Iki Levha Yayincilik, Istanbul 2011.

Commission intervening even though a national regulator either had decided not to intervene or had positively endorsed the behavior of a dominant company[328].

However, this is not the case in the Turkish legal system. The discussion can be made regarding "general law" and "special law". Due to *lex specialis derogat legi generali* principle, the special regulations relating to the competition will have the application priority in accordance with the TCA (which is general law)[329].

However, this should not automatically prevent the intervention of the Board. If the regulator does not operate effectively, then the Board should enforce TCA rules or intervene through competition advocacy, since it has authority pursuant to Article 2 of the TCA. In this context, the Council of State held that existence of specific arrangements to prevent competitive harm; or the existence of specific sector regulator (in the case Telecommunications Authority); or whether the practice is realized with the approval of specific sector regulator (the Telecommunication Board) are not obstacles for The Competition Board to open an investigation and to enforce sanctions in the event of a precise determination of the violation of TCA Art. 6[330].

4.2. The Board's Approach to Exploitative Conduct under Article 6 of the TCA

TCA Article 6 bans the abuse of dominant position parallel to Article 102 TFEU, yet unlike Article 102 TFEU, there is no clause in Article 6 of the Law that foresees that "*directly or indirectly imposing unfair purchase or selling*

[328] The General Court affirms the Commission decision on the grounds that the undertaking has not resorted, despite the possibility of removing or reducing the contraventions from the competition, and that the Commission is not bound by the decisions of the national regulators [Deutsche Telekom v. Commission, Case T-271/03, Court of First Instance (2008)]. Furthermore, The ECJ also stated that competition law is feasible unless sectoral arrangements prevent undertakings from making free decisions that restrict or distort competition [Case C-280/08, Deutsche Telekom AG v. European Commission (2010)]. See also The General Court decision, Case T-513/93 CNSD v Commission, ECR 2000 II-01807 (expressing that competition rules of the Community are superior than the national laws of member states).
[329] See Ateş, (2013), p. 413-419.
[330] The Council of State Decision, *Borusan Telekom*, dated 13.02.2012 and numbered E. 2008/13184, K. 2012/359.

prices or other unfair trading conditions" may lead to an abuse. This is important since this condition is the basis for the assessment of a significant number of exploitative abuses under European competition case law.

Therefore, it raised the academic dispute, especially in the case of excessive pricing and whether exploitative conduct should be considered an abuse within the framework of Article 6 of the TCA. Turkish literature answers this question affirmatively and it has been found that excessive pricing should be regarded as an abuse under Art. 6[331].

As a matter of fact, the Competition Board clarified in an early decision that the Competition Authority is obliged to take measures against not only exclusionary abuses, but also exploitative abuses[332].

Below, the Board decisions will be examined in terms of exploitative abuses to seek to determine the policy for the Board's intervention[333].

The Belko (Belko Ankara Coal and Asphalt Ltd) decision is important because it contains basic elements that establish the Board's approach to the detection and prevention of excessive pricing. Belko is the municipal enterprise that has the *exclusive right* of import and authority to sell coal for heating purposes in the province of Ankara. It was alleged that it charged excessive prices, which constituted abusive practice in violation of Article 6.

First, The Board determined the monopolistic price as "*the price set above competitive prices as a consequence of the use of one's market power*", yet denoted that determination of "excessive pricing" should be assessed on a case-

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[331] AŞÇIOĞLU ÖZ, p. 171; ASLAN (2017), p. 744, 745; ÜNAL, p. 194, 195; SANLI, Kerem C., Rekabetin Korunmasi Hakkindaki Kanun'da Öngörülen Yasaklayici Hükümler ve Bu Hükümlere Aykiri Sözlesme ve Tesebbüs Birligi Kararlarinin Geçersizligi [Prohibited Provisions in the Law on the Protection of Competition and the Invalidity of the Decision of Associations of Undertakings and Agreements against Those Provisions], Rekabet Kurumu Yayinlari, Ankara 2000, p. 273, 274; Aslan (2017), p. 744, 745.

[332] Board *Belko* decision dated 6.4.2001 and numbered 01-17/ 150-39 (The dismissal decision of the Council of Sate on 08.07.2009 and renumbered 09-32/ 703-161).

[333] *İd.*

by-case basis. For this assessment, the Board considered the characteristics of the market such as the degree of barriers to entry, existence of sector regulation, positions of other enterprises, and prices of relevant products in different geographical markets.

In the decision, The Board gave priority to price comparison in different geographical markets and remarked that cost-price analysis should be invoked only if the cost can be determined precisely. Then, regarding cost-price analysis, held that "*…while, along with high prices, a large margin between the sale price and the total cost (excessive profit) could be considered a sign of excessive pricing, thus, monopolistic pricing is also possible in situations where the profit margin turns out low or even negative due to establishment of real or fictitious costs in excessively large magnitudes (along with prices set at relatively high levels) …*". The Board found Belko prices were 50 to 60 percent higher, on average, than prices for the same or equivalent coal being sold in other geographic markets that were open to competition.

On the other hand, it has been noted that BELKO did not earn excessive profits, yet it was found liable for abusing its dominant position on the ground that its "*failure to exercise maximum care and diligence in protecting the Company's interests in making purchases; overstaffing; incurring costs higher than what they should have been, due to quiet life of monopoly*". The Board dismissed the proposition that inefficient monopolists that set high prices, probably to attract new entrants in the long term, and assumed that a monopolist firm had special responsibilities, especially with regard to being prudent and managing efficiently.

The Belko decision demonstrates that the Board assumed that it is authorized to intervene and impose fine where the undertaking, though publicly owned, was not subject to price control. However, the Board did not opt to establish the price level. Instead it is stated that *"…assessments of price levels will not be judged as at what level the prices are set, but at what level they should* *not",* and confine itself to notify that *"sales prices of coal should be reduced to levels that comparable to those on competitive markets*", yet the Board did not foresee any monitoring mechanism for this.

Nevertheless, the Board decided to inform the relevant public institutions of its opinions and suggestions on how to establish the competition environment in the relevant market and so remove obstacles from the opening of market competition in the framework of the competition advocacy.

Another decision in which the Board considered the productive inefficiency as excessive was TEDAS decision[334]. It had been stated that the excessive pricing behavior, which arises due to cost inefficiency, could be solved only by developing mechanisms to reduce costs. However, it was concluded that there was no need to open an investigation, because this duty belongs to Energy Market Regulatory Authority (EMRA) in terms of the electricity market.

However, in the later decisions of the Board, the required conditions for the intervention regarding the market structure have not been continued on a steady basis. In one decision, the Board concluded that high pricing behavior of a dominant undertaking cannot be found as a violation due to the fact that the relevant market is not a legal or natural monopoly[335]. However, in other decisions, the Board carried out an excessive pricing assessment even in the case of a clear lack of monopoly in the relevant market[336].

Moreover, the ASKI decision (preliminary inquiry) demonstrates that the Board does not limit its authority within unregulated sectors, but opts to intervene in the cases where there is regulatory failure, or the regulator does not operate effectively[337]. In this case, the Board evaluated the misuse of legal monopoly

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[334] Board TEDAS decision dated 30.04.2002 and numbered 02-26/ 262-102 (preliminary inquiry).
[335] Board Çimento decision dated 1.2.2002 and numbered 02-06 / 51-24.
[336] See Board decision dated 1.3.2007 and number 07-18 / 164-54; decision dated 4.12.2008 and numbered 08-69/ 1123-439; decision dated 08.02.2010 and numbered 10-14/175-66.
[337] Compare with the Board decisions in which any inquiry was rejected on the grounds that alleged excessive pricing was in the price regulated. See decision dated 8.3.2002 and number 02-13/ 127-54; decision dated 29.06.2006 and numbered 06-46/ 601-172; decision dated 30.10.2008 and numbered 08-61/ 996-388.

power on city water of Ankara through price tariffs, and remarked that prices could be excessive based on the price comparison and the price-cost analysis[338].

The Board noticed the specific provision in the relevant legislation with respect to price determination that stipulates the profit will be as low as 10%. The Board determined that this arrangement was not proper for natural or legal monopolistic markets. Moreover, it was found that ASKI had not complied with the price determination method that was envisaged in the relevant legislation. However, the Board decided not to open an investigation but only notified that "*the pricing mechanism should be rearrange as preventing excessive pricing and pursuant to consumer benefit by the relevant and authorized institutions*" and recommended to ASKI to determine prices on cost-based pricing and to avoid excessive pricing.

The Board continued this attitude in the Bereket Geothermal[339] and Izmir Geothermal[340] decisions. The Board drew attention to the need for controlling excessive pricing of undertakings in natural monopoly market, but instead of opening an investigation, they concluded that it would be sufficient to forward their opinion to The Prime Ministry, the Ministry of Energy and Natural Resources, and the Energy Market Regulatory Authority.

The only decision in unfair contract conditions evaluated by the Board was in Izmirgaz[341]. The Board assessed the claim that Izmirgaz requested annual purchase commitment from its customers and imposed penalties if the customers carried out more or less than their commitments. In the decision, it was noted that the purchase commitments were not established due to negotiation between the parties, but they were determined unilaterally by Izmirgaz, which was the sole provider in the region.

338 Board ASKI decision dated 20.12.2006 and numbered 06-92/ 1176-354.
339 Bereket Geothermal decision dated 14.02.2008 and numbered 08-15/ 146-49.
340 Izmir Geothermal decision dated 15.7.2009 and numbered 09-33/ 739-176.
341 Izmirgaz decision dated 08.01.2009 and numbered 09-01/ 2-2 (preliminary inquiry).

However, the Board avoided referring to the concept of “applying unfair contract conditions” without categorizing the infringement, stating that there were serious findings for the violation of Article 6[342]. The Board had assessed whether the attempted conduct complied with relevant legislation (the Natural Gas Market Law no. 4646) and decided that it would be appropriate to terminate it by the regulatory authority (EMRA). Since it was noticed that the EMRA had tendency to end this practice, the Board concluded that cooperation with EMRA should be done in order to end the alleged practice.

It is worth mentioning a recent decision of the Board, namely the TÜPRAS decision[343], even though it was not challenged only as exploitative, but also as exclusionary conduct. The Board held that the ex-state-owned oil refinery TÜPRAS abused its dominant position by charging excessive prices contrary to its tariffs for a period of three months (11.10.2008 and 01.01.2009), imposing unfair trading conditions on oil distribution companies that had the effect of preventing oil distribution companies from accessing alternative supplies under more favorable terms. The Board found that TÜPRAS’ conduct was an infringement of Article 6 and imposed a fine (corresponding to one percent of its annual turnover in 2013). The Board decided to send a notice to the EMRA suggesting a rearranging of the pricing mechanism of refineries pursuant to consumer benefit. Like the Belko decision, it was noticed that TÜPRAS was not making profits during the period of infringement[344].

In the light of above-mentioned decision, except the TÜPRAS decision, the Board showed the tendency that tools for intervention is not the competition law but competition advocacy. Even for the non-regulated sector, the Board did not opt to behave as a sector/price regulator, but confined itself to notifying the need for correcting the price mechanism. Nevertheless, the Board was reluctant to open

[342] ÜNAL, p. 201.
[343] TÜPRAS decision dated 17.01.2014 and numbered 14-03/60-24.
[344] See ÖZKAN, Ahmet Fatih, for assessment of TÜPRAS decision, in e-Competition National Competition Law Bulletin, January 2014, available at www.concurrences.com (last visited 01.08.2017) (noting that alleged pricing could not be regarded as excessive since it was neither significant, nor persistent).

an investigation, though several findings showed the undertaking's conduct was inconsistent with relevant sector legislation[345].

Regarding excessive pricing, the concern was not only high prices in terms of high profits or monopoly pricing, but the Board needed to intervene in the cost of inefficiency. More importantly, in examined cases, market products were basic necessities such as gas, electricity, coal, petrol etc. Even though the Board was reluctant to impose structural remedies, they could not remain unresponsive due to the importance of the products for consumers. However, the Board failed to qualify determining which prices are considered appropriate and how they should evolve over the time. In this context, the Board approach does not provide clear guidance, but has merely has stated "competitive price"[346] and "pursuant to consumer benefit"[347] as a proxy. At the same time, the Board stipulated that sector regulation should allow proper monopolistic profits and considered 10% as improper for the relevant market[348].

How we can adopt this approach into exploitative tying cases? In other words, in which circumstances we can expect competition authority intervention for exploitative tying? Tying practice does not necessarily occur only in a monopolistic market, so this is not the only benchmark. The concern for the intervention can be generalized for exploitative practice and whether there is strong evidence that the market will not correct itself over the time. Monopoly pricing is allowed and monopoly profits of around 10% will be considered a non-exploitative level.

There is no finding that dynamic efficiency affects the determination of the remedies. It appears that when a firm is found to be practicing excessive pricing, then the firm should reduce its price to a competitive level. It should no longer

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[345] See ÜNAL, p. 199, 200 (indicating the decisions that shows Board's reluctance to intervene by imposing penalties or price regulation on excessive pricing).
[346] See Belko decision.
[347] See TÜPRAS and ASKI decisions.
[348] See ASKI decision.

be allowed to charge supra-competitive prices, even though, before its price was found to be at an exploitative level, it was allowed to charge the monopoly price. A policy intervention in this respect requires the competition authority to precisely determine what price will be considered appropriate instead of loosely indicating which price will be deemed a non-exploitative level. If the only question is short-term versus long-term effects, granting today's consumer benefit over tomorrow's, it should be realized that this decision may also hinder the future benefits of today's consumers[349]. Moreover, consumer protection policy based on competition should be preferred over the one based on political or administrative price control. This understanding includes not only structural remedies but behavioral remedies that can reach to weight of structural ones, such as compulsory dealing or any remedies that are closely associated to the undertakings' pricing strategy.

4.3. Forms of Exploitative Tying

Exploitative effects of tying can occur in three forms: (1) If buyers use varying amounts of the tied product, tying can profitably allow price discrimination among buyers of the tying products (called intra-product price discrimination). (2) In absent strong positive demand correlation, tying can profitably cause price discrimination across buyers of tying and tied products, which is called inter-product price discrimination. (3) If buyers purchase varying amounts of the tying product, tying can profitably extract consumer surplus from individual buyers.

The first instance, intra-product price discrimination effect, is indicated by BOWMAN[350] who assumed that tying can profitably permit price discrimination among buyers of the tying product if the tied product is a complement to that used

[349] See Report by the Economic Advisory Group on Competition Policy, "An Economic Approach to Article 82", July 2005, available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf (last visited 12.08.2017).
[350] See BOWMAN (Leverage Problem), p. 19, 23,24. See POSNER (Antitrust Law), p. 174] (crediting Aaron Director for originally developing price discrimination via tying).

in varying amounts with tying product[351]. Such ties are typically called “metering ties”, because they use the demand for the tied product to measure differences in consumer values for tying product, presumed to vary with intensity of use[352].

ELHAUGE proposes that as the tied products were complements used with the tying product in Bowman’s theory, they do not need to be limited as complements to allow price discrimination, but it is necessary that the tied product demand is positively correlated to tying product demand[353]. In other words, the existence of complements is just one possible way to assume that there is a positively correlated demand. Therefore, Elhauge proposes that with varying usage of tied product, and if the tied product is positively correlated with demand for tying product, tying would increase monopoly profits, even though this results in no significant foreclosure share in the tied market[354].

The given classic example is the firm with market power over printers (durable product), used with inks (consumable product), and supposing usage of ink varies for buyers in a way that positively correlates to the value of the printer to each buyer, i.e., buyers who use more cartridges (use their printer more often) usually accord more value to their printers. Then, the firm could lower the price of the printer to marginal cost, tying the cartridges to its printers and setting the cartridges’ price well above marginal cost. Buyers (high-value users) who use more cartridges would pay more, thus tying would allow the firm to price discriminate among buyers of printers[355].

For instance, without tying, the printer profit-maximizing price would be 15 liras, and the ink cartridges would be sold at 2 liras, which is a competitive

[351] ELHAUGE, Einer, “Tying, Bundled Discounts, And The Death of The Single Monopoly Profit Theory”, 123 HARVARD LAW REVIEW, Number 2 (December 2009), available at http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj956aL (last visited 16.07.2016) [hereinafter ELHAUGE (2009)].

[352] KLEIN/ WILEY, p. 601, 602,, available at http://www.jstor.org/stable/40843568 (last visited 10.02.2017); LAMBERT (2011), p. 8. See BOWMAN (Leverage Problem), p. 23; BURSTEIN (Full-line Forcing), p. 613, 614.

[353] ELHAUGE (2009), p. 405. Further, he also remarks demand for complements might sometimes be negatively correlated, ELHAUGE (2009), p. 405, footnote 6.

[354] ELHAUGE (2009), p. 405.

[355] ELHAUGE (2009), p. 404.

price. Assuming that there are three buyer groups (who use 1, 2, and 3 cartridges), the first group that uses 1 cartridge ink values the printer at 17 liras, the second group values at 19 liras, and third group values at 22 liras.

With tying (printer plus ink), the seller offers the printer at 10 liras (price equal to marginal cost), and requires the purchase of ink at 4 liras. Therefore, tying has the potential to attract new consumers whose reservation price for printer plus at least one cartridge is less than 17 liras (the price without tying) but more or equal to 14 liras (price with tying). With the tying offer, the first[356] and second[357] groups will receive benefit, but third group pays more for the printer plus three cartridges[358]. If their reservation price is slightly less than 22, they have to forego with one less cartridge. Therefore, the seller may have a loss on the tied product sale to high intensive users, yet may increase tying product sales from new entrants. This illustration is just for simplifying. In reality, the success of tying (profitability) depends on the concentration of user intensity in the market[359] and how accurately the meter is refined[360].

The second instance, the inter-product price discrimination effect, is indicated by Stigler[361], who assumed tying could profitably permit price discrimination across buyers of both products when the firm has market power over each product, even if the products are used or bundled in a fixed ratio[362].

[356] Without tying they would pay 17(15+2), while under tying they would pay 14 (10+4), and receive surplus.
[357] Without tying they would pay 19 (15+2+2), while under tying they would pay 18 (10+4+4), and receive surplus.
[358] Without tying they would pay 21 (15+2+2+2), while under tying they would pay 22 (10+4+4+4), and they do not receive surplus.
[359] See HOVENKAMP/ HOVENKAMP (2010), p. 945-949, 952; LAMBERT (2011), p. 30, 31. See also BURSTEIN (Full-line Forcing), p. 626,627 (noting that under uniform tying requirement only marginal consumer would be fully exploited, supra-marginal consumers would retain consumer surplus from the use of the tying good).
[360] See KLEIN/ WILEY, p. 613. See also HOVENKAMP/ HOVENKAMP (2010), p. 941.
[361] See STIGLER, George J., "United States v. Loew's Inc.: A Note on Block-Booking", THE SUPREME COURT REVIEW (1963), pp. 152-157, available at http://www.jstor.org/stable/3108731 (last visited 07.08.2016) [hereinafter STIGLER (Block-Booking)]. ELHAUGE (2009), p. 405, 406 (noting that even though Stigler assumed that demand for the bundled products was negatively correlated, later work has shown that theory may apply when there is not a strong positively correlation for demand).
[362] ELHAUGE (2009), p. 405, 406. See ELHAUGE (Rehabilitating Jefferson Parish), p. 47-474 (This conclusion has been assumed for normal distributions of buyer values, mainly referring to Schmalensee's seminal articles). See also SCHMALENSEE, Richard, "Gaussian Demand and Commodity Bundling"; 57 THE JOURNAL OF BUSINESS 1, Part 2: Pricing Strategy (January 1984), available at http://www.jstor.org/stable/2352937 (last visited 07.08.2016) [hereinafter SCHMALENSEE (1984)]; SCHMALENSEE, Richard, "Commodity Bundling by Single-Product

Unlike intra-product price discrimination, this effect does not require that the demand for tying and tied products is positively correlated.

To illustrate this, assuming that the seller is the publisher of two magazines, one about fitness (product A) and the other contains cooking recipes (Product B). A seller has the market power in products A and B (assuming each one has a constant marginal cost of zero), and demands for A and B are not positively correlated. Under profit maximize pricing, A would be sold at 7 liras, while B would be sold at 3 liras, and 100 buyers would buy one of each, thus the firm's profits would be 1000, while the aggregate consumer surplus would be 200[363].

	Reservation price of first group	Reservation price of second group
Product A	10	7
Product B	3	4

If the seller offers two magazines as a bundle at 11 liras (7+4), which is equal to each buyer's reservation price for the package, the seller will earn a profit of 1100. Even if consumers are charged the same amount for the bundle, the pricing is discriminatory in the sense that the first group would not purchase product B for 4 liras, while the second group would receive the consumer surplus without tying. When the products are priced separately, the price is suppressed by the buyer who values each one less than the other buyer; thus, the bundling eliminates this effect[364].

Monopolies", 25 THE JOURNAL OF LAW & ECONOMICS 1 (April 1982), pp. 67-71, available at http://www.jstor.org/stable/725225 (last visited 07.08.2016) [hereinafter SCHMALENSEE (Commodity Bundling)].

363 Assume that each group purchases 50 magazines. Without tying first group would receive 150 (3x50), second group would receive 50 (1x50), consumer surplus.

364LAMBERT (2011), p. 919.

The third instance occurs when consumers buy varying amounts of the tying product. This effect is demonstrated by BURSTEIN[365], who assumed that tying can extract individual consumer surplus *i)* by allowing buyers to purchase the tying product at the monopoly price (or supra-competitive price), *ii)* only if buyers agree to purchase their needs of some tied product at supra-competitive price (or even monopoly price), and *iii)* each buyer will accept the tie provided the burden of paying supra-competitive prices on the tied product is less than the consumer surplus that they would lose by being unable to buy the tying product at the monopoly price[366].

The intuition for this theory is based on the buyer's valuation (reservation price) of the product. When the buyer purchases varying amounts of tying products at the same per-unit price, it is assumed that a multi-unit buyer values it more than the monopoly price – especially for the first purchase, which is devoted to the buyer's most pressing need – and values each subsequent purchase at least at the monopoly price[367]. Therefore, the buyer enjoys some consumer surplus. Then, it holds that a seller can effectively expropriate that consumer surplus by selling its monopoly product only on the condition that buyers also purchase another supra-competitively priced product. The buyer will accept the tie if she/he will gain more consumer surplus from purchases of tying products than the surplus she expects to lose from having to buy the tied product from the monopolist.

365 See BURSTEIN, M.L., "The Economics of Tie-In Sales", 42 THE REVIEW OF ECONOMICS AND STATISTICS 1 (Feb., 1960), p. 68-73, retrieved from http://www.jstor.org/stable/1926097_(last visited 06.08.2016) [hereinafter BURSTEIN (Tie-in Sales)] (analyzes the situation that tying requires the purchaser of tying good to purchase also one or more tied goods from seller of the tying product whereas it leads a full-line forcing without causing extension of monopoly or exclusion of entry, and purposes that in this situation tying is used as a means of extracting the profit in an "all or nothing" selling arrangement. Furthermore, he observes that there is no need that tied good is "complimentary" for this result. But it is worth to note that Burstein assumes that tying product is monopolized, while Elhauge suggests that same analysis holds as long as the tying firm has some market power in the tying product). See ELHAUGE (2009), p. 412, 413.

366 ELHAUGE (2009), p. 407. This is also called "intra-consumer price discrimination" because it aims to achieve effects similar to charging each consumer a different price for each unit it buys, depending on the marginal value of that unit. See ELHAUGE (Rehabilitating Jefferson Parish), p. 469.

367 ELHAUGE (Rehabilitating Jefferson Parish), p. 469.

In another example[368], assume that four UEFA Champions League games will occur in Germany, and each ticket will be sold at 100 Euros. The German Football Federation announced that buyers can buy tickets for UEFA game only if they agree to purchase at least one ticket for the national league at 50 Euros. Then, assume that reservation prices for each ticket decline for each subsequent purchase, i.e., for EUFA games reservation prices are respectively, from first purchase to fourth purchase, 150, 140, 130, and 120 Euros. For national league games, the prices are respectively, 20, 15, 10, 5 Euros.

	Total price to pay/Euro	Total Reservation Prices/Euro	Consumer Surplus/Euro
1. Ticket	100+50=150	150+20= 170	20
2. Ticket	200+100=300	290+35=325	25
3. Ticket	300+150=450	420+45=465	15
4. Ticket	400+200=600	540+50=590	-

Therefore, consumers will accept tying until their reservation price for the tying product (UEFA league tickets) exceeds their loss from tied product (national league tickets).

368 This example is taken from the German Competition Authority *Inter-Milan Spiel* decision, OLG Düsseldorf, 22.01.1985, WuW/E OLG.

CHAPTER THREE

COMPONENTS OF UNILATERALLY IMPOSED EXPLOITATIVE TYING

The previous chapters provided an insight into Turkish competition policy and the approach to excessive pricing under Turkish competition law in order to establish parameters for determining competitive harm in exploitative abuse. This chapter thus analyses the legal conditions for the assessment of tying practice under Turkish competition law, which include separate product requirement, market definition, determination of dominant position, and abuse. This chapter follows two purposes: First, detecting possible difficulties and alternatives for the necessary determinations and emphasizing specific issues for the tying cases. Second, it answers how exploitative abuse in tying practice should be consistently determined in the stated competition policy objective and its implementation.

1. SEPARATE PRODUCTS REQUIREMENT

1.1. Separate Consumer Demand and Commercial Usages Tests

In tying inquiry, most jurisdictions require that the tying product and the tied product should be distinct. The assessment of whether separate products exist may differ in the authorities' approach.

Separate consumer demand criterion is widely accepted[369]. It can be tracked to the US Supreme Court decision in the Jefferson Parish case, which grounded the current test for determining whether a combination of goods or services represents one product or two[370]. In that case, consumers who purchased surgery services from a hospital were also required to use the hospital's anesthesiologists. The Court questioned whether surgery and anesthesiology service were two

[369] See Jefferson Parish, at 21-22; Kodak case, p.462 ("There must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts"); Case T-201/04 Microsoft v Commission [2007] ECR II-3601, at 969, 970 ("The distinctness of products for the purpose of an analysis under Article [102 TFEU] has to be assessed by reference to customer demand. In the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying").
[370] 466 U.S. 2 (1984).

products, and held that "not on the functional relation between them, but rather on the character of the demand for the two items" determines the existence of separate products[371].

The implication of this approach is that when there is sufficient demand for the purchase of the tying product separate from the tied product, then there are two distinct products for the purposes of tying analysis[372]. The Court recognized that the fact that patients and doctors often requested their own anesthesiologists rather than the ones provided by the hospital was sufficient to demonstrate that separate demand existed for anesthesiology, and therefore two distinct products existed[373].

Even though tying decisions of the Turkish Board do not furnish details, it can be said that its approach is based on market-oriented determination. In this context, the authority implies a separate consumer demand test that considers whether a significant portion of the consumers would have purchased the tying product without purchasing the tied product.

When determining whether the tied and tying products are distinct, the Board may use direct evidence, showing that consumers buy the products separately when given a choice, or it may use indirect evidence, such as the presence of undertakings in the market specialized in the production or sales of the tied product without the tying product[374].

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[371] *Id.* at 19.
[372] *Id.* at 21.
[373] 466 U.S. at 22-23. *Cf.*, dissenting, at 43 (Justice O'Connor had argued that anesthesia and surgery should not be considered separate products because patients were interested in purchasing anesthesia only in conjunction with hospital services).
[374] Guidelines (Dominant Position), n. 87. See the Board Decision, *Digitürk I*, dated 28.08.2002 and numbered 02-50/636-258 ("The evaluation of whether a product contained in the same package is a single product should be done by considering the demand for products and consumer preferences that products will not be sold solely") (hereinafter Digitürk I decision)

The Board also considers[375] the criteria such as a) the complementary nature of the goods sold[376], b) functionally linked products[377], c) whether the goods are sold separately, either previously or currently in the market, d) how they are used/consumed, e) whether one of the products is an inseparable part of the other. The Board then explained this approach with an example, stating that the sale of a car with tires is not regarded as tying, but the requirement of purchasing the paper in the sale of the copier machine can be regarded as tying[378].

However, the Board example is confusing and does not explain which criteria is used to distinguish the existence of separate product in the given example. Tires to cars and papers to copier are both functionally linked products. They are not inseparable, and both are sold in the market separately. The criterion "how they are used or consumed" only makes sense if it refers to efficiency, i.e., consideration of time and transaction costs of buying proper tires and installing them for consumers. In this sense, it refers to commercial usages proxy. However, the most plausible criterion seems to be the complementary nature of the goods sold. We assume this criterion refers to nature of the agreement or commercial usages.

Commercial usages can be assumed to be a complementary indicator for the applied separate consumer demand test. This test merely focuses on the consumer perspective, but does not include the fact that linking two services may make sense from the producer's point of view or from an efficiency standpoint. The only requirement for determining distinct products is separated demand, when one of the products is useless without the other. This test focuses on consumer choice,

[375] See Digitürk I decision, n. 1320.
[376] *Compare* Case T-201/04 Microsoft v Commission [2007] ECR II-3601, at 969,970 ("Complementary products can constitute separate products for the purpose of Article [102 TFEU]").
[377] *Compare* Jefferson Parish, at 19 ("we have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices"). See also Kodak case, p. 463.
[378] Digitürk I decision, n. 1320.

but it does not include the possibility that efficiency created by tying or bundling can offer more benefit than reducing the choice does[379].

Therefore, commercial usage tests rely on the behavior of market participants to determine whether a tying arrangement is anticompetitive. It indicates that consumers prefer the tying (bundle) rather than to purchase separately. In that sense, tying creates cost savings that benefit the consumers more than it reduces consumers' freedom of choice, or tying (bundle) provides an improvement in quality that outweighs the loss of product choice[380] .

"Contrary to nature of the agreement or commercial usages" is stated as a condition for condemning tying under Art. 4/II (f) of the TCA and repeated in the Guidelines on Vertical Agreements[381]. The mentioned guidelines state that the consideration that products are distinct depends primarily on customer demand, and an example is given that details when a practice is considered as commercial usages[382]:

> *For instance, since customers will want to buy shoes with laces, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice. Where the nature of the product makes it technically difficult to sell one product without the other, this practice becomes acceptable*[383].

The last sentence adds further confusion rather than explanation, especially considering recognized shortcomings of the commercial usages test for evaluating

[379] See United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001).
[380] This test has suggested by Phillip Areeda which has proposed a market-practices test that concentrates on whether bundling is "universal" (Hovenkamp, Herbert/ Areeda, Philipp, Fundamentals of Antitrust Law, Second Edition, New York 2002, p. 835). It is also placed in Articles 101 and 102 of TFEU.
[381] No: 09-26/567-M, dated 06.03.2009.
[382] Guidelines on Vertical Agreements, n. 204.
[383] *Compare* EC Guidelines on Vertical Restraints (2010), n. 215 ("For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice").

technological tying in the innovative markets[384]. This sentence should be omitted from the guidelines.

The "commercial usages" test explicitly stated that tying practices are implied through an agreement or concerted actions, but neither Article 6 nor the Guidelines (Dominant Position) has offered a similar test. Nonetheless, the Board applied this test in the decision where tying practice is assessed *supposedly* under Article 6.

In the Digitürk decision, the Board evaluated the claim that Digital Platform Communication Services Inc. (Digitürk) caused detriment to the consumer and other HD receiver producers and importers by requiring subscription to DigiturkPlus (channel) and the purchase of its own Pace brand decoder in order to be able to watch LigTV (sports channel) HD broadcasts of Digitürk[385]. In the examination, the Board concluded that:

> *The HD broadcast of DigitürkPlus began in early 2008 and enables monitoring a limited number of Digiturk channels (LigTV HD, Movie Max HD, National Geographic Channel HD and Fox Sports HD) in HD technology and includes functions such as recording broadcasts, stop live broadcast, undo, resume etc. It is understood that there is a new product and service package. The difference between this new subscription model and the existing one is that the DigiturkPlus Decoder is purchased by the subscriber and the broadcasting package, which is 9.90 Turkish liras more than the original price. In this regard, it should be remarked firstly that*

[384] See MARIOTTI, Renato, "Rethinking Software Tying", 17 YALE JOURNAL ON REGULATION 2 (2000), pp. 367-406 , available at http://digitalcommons.law.yale.edu/yjreg/vol17/iss2/5 (last visited 24.07.2017); SIDAK, J. Gregory, "An Antitrust Rule for Software Integration", 18 YALE JOURNAL ON REGULATION, 1, pp. 1-83 (2001), available at https://ssrn.com/abstract=268508 or http://dx.doi.org/10.2139/ssrn.268508 (last visited 24.07.2017); WEINSTEIN, Samuel Noah, "Bundles of Trouble: The Possibilities for a New Separate-Product Test in Technology Tying Cases", 90 CALIFORNIA LAW REVIEW 3 (2002), pp. 905-958, available at http://scholarship.law.berkeley.edu/californialawreview/vol90/iss3/9 (last visited 24.07.2017). See Case T-201/04 Microsoft v Commission [2007] ECR II-3601, at 969,970 ("The fact that tying takes the form of the technical integration of one product in another does not have the consequence that, for the purpose of assessing its impact on the market, that integration cannot be qualified as the bundling of two separate products").

[385] Digitürk decision dated 07.02.2008 and numbered 08-12/ 126-43.

the mentioned additional functions of DigiturkPlus can be realized as a DigiturkPlus Decoder and can be accessed through a set-top box which contains technical features and software that differs from existing Digitürk decoders. Currently, consumers in Turkey can usually watch channels broadcast on the platform via a set-top box with decoder application programs installed by the platform operator/publisher. In addition, in the Turkish application, the set-top-boxes are generally sold at a certain price and transferred to the ownership of the consumer… In addition, HD broadcasting in Turkey is a new activity and in no way consitutes a mature market. Therefore, at this stage, the DigiturkPlus set-top box (decoder), which cannot be replaced with other HD receivers that may be freely available on the market due to the abovementioned specifications, should be regarded as a natural part of the desired product/service to be received. Moreover, it would be appropriate to accept the purchase of the DigitürkPlus decoder by subscribing to DigitürkPlus for the viewing of Digitürk HD broadcasts as a marketing and selling method for providing a new product/ service to the new HD broadcasting market in Turkey. For this reason, it has been concluded that it is not possible to consider that the requirement of a product or service on the condition that with another which is prohibited under the Law no. 4054 as an obstructive/ disturbing/ restrictive action against competition[386].

Furthermore, the Board also stated the following:

Under current conditions, Digitürk will operate under the name of DigitürkPlus which is a new product/ service to be utilized, therefore regarding to complained about requirement of the current Digitürk broadcast packages different subscription terms and pricing strategy for

[386] Digitürk decision, n. 90, 100, 120 (emphasis added).

LigTV HD viewing cannot be considered an issue within the scope of Law No. 4054[387].

The Board never stated whether the evaluated tying practice is subject to Article 4 or Article 6. The complaint was made by a final consumer (end user) who was a LigTV subscriber, and it was alleged that tying was detrimental to other HD receiver producers and importers in the market. Our reading suggests that the Board’s conclusion with respect to “no distortion in the competition” may be addressed to detriment of other HD receiver producers and importers. Thus, it could make Digitürk liable under Article 4 if there was an agreement between Digitürk and its own HD receiver producers. Furthermore, the Board’s conclusion regarding the alleged complaint that “cannot be considered an issue within the scope of the TCA” may be addressed to consumer harm. This clarification would help us to understand the Board’s approach, and if it was concluded that there are distinct products, then tying could be an issue under the TCA due to its resultant direct harm to consumers.

It is also debatable how the Board determined the causality between “tied product as natural part of tying product” and “tied product as a new product” in an immature market. Thus, if the tied product emerged in an innovative market, then the Board lacked sufficient information to conclude whether the tied product is a natural part of the tying product.

Moreover, the Board had noted that there were other HD receivers in the market, yet they were not fungible with the Digitürk HD receiver due to the latter having higher quality and a greater number of functions[388]. Therefore, we do not agree that the Board conclusion is accurate regarding the tied product (HD receiver) being a natural part of tying product (LigTV HD broadcast). This approach renders indistinguishable “the usual justification” for alleged different products as a single product – where their combination provides benefits of lower

[387] Digitürk decision, n. 130.
[388] Digitürk decision, n. 70, 80, 120.

costs or higher quality that would not exist if buyers were able to purchase just one of the products – from a "quality-control or goodwill defense"[389].

Rather, the Board should have considered that the alleged products are distinct and that tying exists, and then focused on the effects on the competition and allowed Digitürk to challenge that tying its own receiver because of quality control is an objective business justification[390].

The Board failed in that it did not consider the effects on competition. Even though the Board was aware that it is technically possible to use the same set-top box for more than one broadcaster and forcing to buy a separate set-top box will harm consumer interest.At the same time alleged practise might create an important entry barrier for companies that will enter the cryptographic broadcasting/digital platform market[391].

However, the Board remained pointing that "*in Turkey, ex-ante sector specific legal arrangements have not yet been made for the same set-top box to be co-used by more than one broadcaster*"[392]. However, the Board did not notify the relevant sector's specific regulator of its opinion, or failed to mention whether the relevant regulator intended to deal with the issue. The Board should at least have decided to suggest a monitoring mechanism for a period to check whether a new entrant would offer the same quality HD receiver to consumers.

Nevertheless, if the Board denoted whether tying practiced assessed under Article 6 would clarify the burden of proof issue with respect to nature of the agreement and commercial usages criteria, because Article 6 do not cover this clause unlike Article 4. Furthermore, the Board application of this criterion

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[389] See SLAWSON (1991), p. 464.

[390] Likewise See United States v. Jerrold Electronics Corporation, 365 U.S. 567 (1961) (in the decision, the defendant's community antenna systems, sold only on condition that the defendant sold and installed every part of them, included some parts that were not readily available elsewhere. The Jerrold Electronics was also evidently leading developer and installer of community antenna systems at the time, therefore its services were necessary to ensure consumers' satisfaction with its antenna system).

[391] See Digitürk decision, n. 120, 140.

[392] Digitürk decision, n. 120, 170

extended beyond its purpose, thus we have reservations: First, the Board's intention was only to apply the commercial usage test, thus the lack of a similar clause in Article is not an omission, but the Board will also consider this criterion for tying analysis under Article 6. Second, the Board's implementation was an expansion of the commercial usage test's scope, and it did not consider the practice as an objective necessity justification. Third, the Board *ex officio* considered that alleged tying practice was an objective necessity. If so, it then leaves the question open whether objective necessity justification is a "defense" or is integrated in determination of "abuse"[393].

The Board decision demonstrates the shortcomings of the current tests for technological tying or tying in dynamic markets. It appears that the Board adopted a strained interpretation by including objective necessity/ efficiency considerations into its analysis and by extending the scope of commercial usage test.

The current tests might be sufficient for the determination of existence of distinct products in the static markets, but may not be relevant in technological tying cases. The consumer demand test cannot always secure a pro-competitive outcome, since consumers may not immediately understand the efficiency of a new integrated product. If a new integrated product is sold separately, then the consumer demand test will suggest that two distinct products exist. Thus, commercial usage cannot result in a conclusion, since the potential efficiency of the new integration cannot be recognized at the time[394]. For instance, it is difficult to say today that a consumer sees a camera and internet function as separable from a cellphone. On the other hand, applying only these tests will make it easier for the firm who has the market power for the tying product to drive out competition

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[393] See Guidelines (Dominant Position), n. 30. (When assessing an objective necessity justification, "[t]he burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking.").

[394] See WEINSTEIN, p. 950 (suggesting that evaluation of separate product through consumer's point of view must take into account both demand at the time of the integration *and* demand once the integration has been on the market for a period of time).

in emerging tied markets, or to illegally protect its existing monopoly[395]. At the same time, not recognizing efficiency will hamper innovation, and hinder better product options for consumers.

1.2. Suggested Separate Products Tests in Technological Tying

It is often difficult to determine whether or not offered products under tying or bundling are distinct in technologically dynamic markets. The debate arose in the case where the court analysed Microsoft's package of its operating system Windows and its web browser Internet Explorer (IE). Microsoft has been challenged several times over the years[396], and claimed that by integrating Windows and Internet Explorer, a new product had been created and therefore tying could not be a factor[397]. When the need for the reviewing current separate tests occurred, judges and academics considered alternative tests for technological tying.

1.2.1. Genuine technological integration test

The D.C. Circuit agreed that the combination of Windows and IE was a "genuine technological integration", which means "product that combines functionalities … in a way that offers advantages, unavailable if the functionalities are bought separately and combined by the purchaser" and thus it constituted one product, "regardless of whether elements of the integrated package are marketed separately"[398].

Therefore, genuine technological integration analysis is assumed to better suit dynamic markets, as they do not hamper innovative initiatives[399], yet it has

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[395] WEINSTEIN, p. 909.
[396] Microsoft v. United States, 56 F.3d 1448 (D.C. Cir. 1995) ("Microsoft I"); United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998) ("Microsoft II"); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) ("Microsoft III").
[397] Microsoft II, at 947-48; United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000), at 45; Microsoft III, at 85.
[398] Microsoft II, at 946, 948-952.
[399] LOPATKA, John E. and PAGE, William H., "Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion", 7 Supreme Court Economic Review (1999), p. 200, available at https://ssrn.com/abstract=1413383 (last visited 24.07.2017).

been criticized that it foresees a significantly low threshold with regard to whether the combination “brings some advantage”[400]. Thus, rightly, it has been remarked that merely making claims of some potential benefits that may never occur can survive antitrust scrutiny and it can increase anticompetitive behavior of the monopolist[401].

1.2.2. Rule-of-reason approach in Microsoft III litigation

The D.C. Circuit pointed out that application of a separate consumer demand test (as following the *per se* rule approach established in Jefferson Parish decision) had risk in evaluating the efficiency-enhancing effects of “newly integrated products” (since such tying practice might produce transaction-cost savings and economies of scale or scope), and remained the tying analysis under rule of reason[402].

Thus, the Court proposed skipping the stage of determining whether the Windows and IE are distinct products, and whether the alleged conduct outweighs “benefits against the cost to consumers”[403]. Under suggested approach, Microsoft would offer precompetitive justifications for its product design, and the plaintiffs would have to show that the anticompetitive effects of the arrangement outweighed these justifications[404].

The D.C. Circuit’s approach can be criticized on two premises: First, the Court did not provide proper guideline for determining whether an integration’s efficiencies outweigh the loss of consumer choice[405]; second, based on the presumption that the newly integrated product was likely efficient, they shifted the burden of proof on plaintiffs.

[400] Microsoft II, at 950.
[401] Microsoft II (Justice Wald, dissenting), at 957; Mariotti, p. 387-389.
[402] United States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001), at 92-95.
[403] *Id.*, at 94, 95.
[404] WEINSTEIN, p. 928.
[405] WEINSTEIN, 928, 929.

1.2.3. Balancing costs and benefits tests

Instead of considering consumer preference to buy products separately, an alternative approach suggests to directly evaluate costs and benefits of the tying arrangement. MARIOTTI suggests balancing tests that determine whether the gains in innovation and reduction in transaction costs for consumers, who want the tying and the tied product outweigh the costs to consumers who only want to buy the tying product[406].

SIDAK also proposes a balancing test for tying in dynamic markets, which follows four steps[407]: The first is to determine whether the market is technologically dynamic (if it is not, a separate consumer demand test will be applied). Second, to determine whether consumers will benefit from the integration. In this instance, benefits are measured by increased consumer demand, lowered costs of production, or both; they are not measured in comparison with a hypothetical world in which the products have not been integrated. The question to answer is whether some actual benefits have been created by the integration. In the third step, it should be determined whether the integration will preserve a monopoly over the tying product market. If it is the case, the final and fourth step is to balance the consumer benefit from integration against the losses in consumer welfare caused by any reduction in competition.

Both (Mariotti and Sidak) suggestions are sound, and may be served better than a separate consumer demand test in dynamic markets. However, Mariotti's suggestion requires a trade-off against consumer choice, even if it is possible to balance costs for *one* consumer who prefers the bundle against the costs for *one* consumer who prefers to buy the products separately. To achieve an aggregated consumer benefit, the information of preference dispersion between them is

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406 MARIOTTI, p. 367. See WEINSTEIN, p. 950 (stating a deeper analysis of the strength of the separate markets is necessary. "Courts must first identify the consumers with whom they are concerned. They must also take into account the sophistication of these consumers. The more knowledge consumers have about a product market, the more weight a court must give their opinion. This is because of the increased likelihood that knowledgeable consumers will be able to spot the efficiencies of a new bundle").
407 SIDAK, p. 29-33.

needed, and obtaining this information is costly, if not impossible. Furthermore, this suggestion does not include effects in market structure, such as creating entry barriers for new entrants into tied market or excluding rivals of tied products. Therefore, this approach does not include whether consumer choice potentially reduces in the long-term, incurring costs to consumers.

Side's suggestion is preferable, but we agree only until the fourth step. To balance consumer benefit from integration against the losses in consumer welfare due to reduction in competition is difficult, as measured consumer benefit will have a static nature, while loss in consumer welfare inevitably will require including dynamic concepts. Even if the potential losses could be measured, in practice there is no concrete way to carry out the trade-off between static efficiency and dynamic (in)efficiency.

The Board does not distinguish whether the market is static or dynamic when applying the separate consumer demand test. For instance, in a preliminary investigation it was alleged that GOOGLE violated Act No. 4054 through contracts signed with original equipment manufacturers who want to use the Android operating system on their mobile devices[408].GOOGLE wanted to exclusively pre-install Google Mobile Services (GMS, a bundle of applications, including Google Play, Google Search, and Google Chrome). The Board repeated the separate consumer demand test in the Guidelines (2009), and concluded that mobile devices and the pre-installed applications are separate products, since consumers can install these applications and services separately in smart devices, and there are different specialist undertakings that operate in the application and services software market[409].

We do not see the need for a new test to evaluate separate product requirements for technological tying, at least for the Turkish Competition

[408] The Board decision (Preliminary investigation) dated 28.12.2015 and numbered 15-46/766-281 (hereinafter Google decision).
[409] Google decision, n. 80, 84.

Authority. For US Competition Authorities, it was necessary due to the qualified *per se* standard established in Jefferson Parish[410]. Since the Turkish competition Board opts in favor of the rule of reason approach for any tying inquiry, including efficiency defenses at this stage, will result in overlapped assessment. Further, it is a risk to broaden the scope of the commercial usage test, as the Board did in the Digitürk decision, and overlooked the potential reduction in the competition, causing the potential risk of consumer choice reduction in the long-term. Therefore, the question of whether one or two products are involved should be kept separate from the question of whether tying is permissible on economic grounds. If the Board had difficulty determining the distinction between newly integrated products, it should clarify the matter through assessing objective justifications and efficiency defenses, such as granting an equal opportunity to the parties to present their arguments or evidence.

2. MARKET DEFINITION

Article 6 of the TCA only applies to the conduct of a dominant undertaking that has allegedly committed an abuse. For the purposes of Article 6 of the TCA, the proper definition of the relevant market is a necessary prerequisite to establish the existence of a dominant position in each market. Thus, assessment of dominant position requires whether the firm under examination confronts significant competitive constraints. The goal of defining a market in product and geographic dimensions is to determine which competitors have the power to restrict the

[410] See WEINSTEIN, p. 949- 957 (purposing a combined standard and applying it in Microsoft litigation, as asking in order the following questions: "(1) Was there separate demand for the integrated items at the time of the integration? (2) Does there continue to be separate demand for the stand-alone items after the integration? (3) How do other manufacturers view the product market? (4) What was the intent of the monopolist in combining the products? and (5) Is there substantial evidence that the integration is a genuine technological advance?" And concluding that "If both the consumer and manufacturer elements suggest that the integration is two separate products, only overwhelming evidence that the integration is a genuine technological advance should lead the court to find that it is one product and that there has been no illegal tie-in. This last step is a protective measure; it will ensure that in the rare situation in which neither consumers nor manufacturers believe an integration is more efficient, but evidence from the product itself shows that it is, innovation will not be quashed. Evidence about the functionality of the product can also serve as a tie-breaker if the other four elements point in different directions").

behavior of the undertakings under examination, and to prevent these from acting independently of efficient competitive pressure[411].

The common indicators of the existence of a dominant position are market shares, barriers to entry, and expansion in the market[412]. Market shares can only be calculated once the relevant market has been accurately determined, while to identify the constraints on exercise of market power that stem from potential entry is only possible with correctly a defined market[413]. Market definition is also a decisive factor in the identification and assessment of the actual or likely effects of the alleged abusive conduct. Therein, market definition helps to depict the markets where competition is affected by the behavior of a dominant firm[414]. Therefore, the definition of a relevant market is an essential precondition for the assessment of dominance[415].

2.1. Product Market Definition

A relevant product market under Article 6 involves all the products and services that impose a competitive pressure on the product of the undertakings whose conduct is assessed. Guidelines (Market Definition) grant the most importance to "demand-side substitution". This constraint is enforced by the consumers who can switch their consumption to products that they regard as easily accessible substitutes[416]. Thus, "demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in

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[411] Guidelines on the Definition of Relevant Market dated 01.10.2008 and numbered 08-04/56-M, n. 1 [hereinafter Guidelines (Market Definition)]. See Also Guidelines (Dominant Position), n. 9.
[412] Guidelines (Dominant Position), n. 11
[413] O'DONOGHUE/ PADILLA, n. 5746; ASLAN, p. 148.
[414] O'DONOGHUE/ PADILLA, n. 5746.
[415] See MONTI, Mario, "Policy Market Definition As A Cornerstone of EU Competition Policy", Workshop on Market Definition, Helsinki, 5 October 2001, available at http://epceurope.eu/speech-by-commissioner-mario-monti-policy-market-definition-as-a-cornerstone-of-eu-competition-policy/ (last visited 13.07.2017)(Ex-Commissioner Monti notes that the Commission uses market definition and market shares as an easily available proxy for the measurement of the market power enjoyed by firms, yet market definition is even a cornerstone of competition policy, it cannot be the entire building. It should be considered as a device for the competitive assessment, not a substitute for it. The most important is to understand the nature of the competitive situation facing the firms involved in a certain practice).
[416] Guidelines (Market Definition), n. 8-10. See also Board Decisions, dated 23.8.2007 and numbered 07-67/836-314; dated 11.4.2007 and numbered 07-31/323-119; dated 11.5.2006 and numbered 06-33/411-108.

particular in relationship to their pricing decisions”[417]. Whether the products have similar physical characteristics usually does not matter, as consumers might view products with distinct physical characteristics as close substitutes, thus all products (services) that consumers regard as close substitutes to the product or products of the firm whose behavior is examined should be part of the same relevant market[418].

The Guidelines (Market Definition) also consider “supply-side substitution” as a constraint, which occurs when suppliers are able to switch their production to other products quickly, without incurring significant costs[419]. Such effect is equivalent to demand substitution in terms of efficiency and rapid results. It is likely that supply-side substitutability will be relevant in the situations where firms produce a wide range of different qualities, or different grades of a product that is not seen as substitutable by consumers, but which is produced on similar equipment[420]. For instance, the production of paper includes various types. While consumers do not regard the different paper products as substitutes, manufacturers can easily and at negligible cost adjust production at short notice[421]. Then, such instance of supply-side substitution would suggest including all qualities of paper in the relevant market definition[422].

Furthermore, there is a distinction between supply-side substitution and potential competition. Potential competition concerns the ability of firms outside the relevant product market to enter in the long term, while supply-side substitution relates the ability of firms to switch production in the short term and

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[417] See Commission Notice on the definition of the relevant market for the purpose of Community competition law, OJ 1997 C 372/5, para 13 (hereinafter Market Definition Notice).
[418] O’DONOGHUE/ PADILLA, n. 5880.
[419] Guidelines (Market Definition), n. 13.
[420] O’DONOGHUE/ PADILLA, n. 5913.
[421] Guidelines (Market Definition), n. 14.
[422] See the Board decision dated 3.3.1999 and numbered 99-12/93-35 (recognizing that in beverages market when the suppliers have to make significant changes to their material and non-material properties, make additional investments and spend significant time for all these operations such as advertisement, product tests and distribution, even though bottling facilities have the ability to bottle all kinds of beverages substitution should be taken into consideration for market definition).

without incurring significant sunk costs[423]. Therefore, potential competition is not generally considered in market definition, but is rather assessed under the analysis of dominant position[424].

2.2. Definition of Relevant Market

The relevant market is defined through a product dimension and a geographic dimension.

2.2.1. Relevant product market

The Guidelines (Market Definition) defines the relevant product market as comprising "the goods or services ... which are deemed identical in the eye of consumers in terms of their prices, intended use, and characteristics"[425] . For product dimension, substitution is considered if alternative products that compete with each other to satisfy consumer's preferences do exist[426]. The Board may have considered various criteria to determine substitution, such as findings that indicate the products substituted each other in the recent past; quantitative tests (which include demand elasticity and cross-price elasticity calculations for a certain product, analysis for similarity of price changes in time, causality between price series, and similarity of price levels)[427]; opinions of the customers and competitors; consumer choices[428], costs and barriers related to switching the demand to potential substitute products, different customer categories, and price discrimination[429].

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[423] O'DONOGHUE/ PADILLA, n. 5947.
[424] See Guidelines (Market Definition), n. 16 ("Since it is not equally efficient as demand substitution in terms of fast results, potential competition is not generally taken into consideration for market definition"). See also Market Definition Notice, para. 24 ("potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry.").
[425] Guidelines (Market Definition), n. 3.
[426] Guidelines (Market Definition), n. 17, 18.
[427] The Board Decisions dated 09.06.2003 and numbered 03-40/436-187; dated 23.1.2004 and numbered 04-07/75-18.
[428] The Board Decision dated 10.09.2007 and numbered 07-70/863-326.
[429] Guidelines (Market Definition), n. 23-30.

2.2.2. Relevant geographical market

The Guidelines (Market Definition) state that "the geographical markets are areas in which undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighboring areas, as the conditions of competition are appreciably different from these areas."[430] The Board may consider several factors in the definition of relevant geographical market. These include findings that indicate orders were switched to different regions in the past, quantitative tests[431], basic characteristics of demand (such as regional preferences or loyalty to local brands); opinions of customers and competitors[432], existence of geographical trends of purchases, trade flow information[433], barriers related to shifting orders to undertakings at other regions, and switching costs[434].

In its decisions, depending on the degree of homogeneity of the conditions of competition between different areas, the Board reached different determinations for the relevant geographic market. These include global[435], national[436], a province as relevant geographic market[437], a few provinces together as relevant geographic market[438]; a district as relevant geographic market[439], a neighborhood as relevant geographic market[440], or, in some cases, confined it to a

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[430] Guidelines (Market Definition), n. 3.
[431] The Board Decision dated 01.10.2012 and numbered 12-47/1413-474.
[432] The Board Decision dated 22.03.2007 and numbered 07-27/252-87.
[433] The Board Decision dated 20.12.2005 and numbered 05-86/1192-344.
[434] Guidelines (Market Definition), n. 31-38.
[435] The Board Decision dated 29.12.2011 and numbered 11-64/1656-586 (The Board recognized the suggestion of the parties that relevant geographic market is global, yet conclude that, specific to file, Turkey is the relevant geographic market).
[436] The Board Decisions dated 13.07.2011 and numbered 11-42/911-281; dated 17.11.2011 and numbered 11-57/1477-533.
[437] The Board Decisions dated 04.08.1999 and numbered 99-37/376-241; dated 13.03.2001 and numbered 01-12/114-29; dated 18.07.2002 and numbered 02-44/518-213.
[438] The Board Decision dated 17.10.2000 and numbered 00-39/436-242.
[439] The Board Decisions dated 22.01.2002 and numbered 02-04/39-20; dated 06.07.2011 and numbered 11-41/866-271.
[440] The Board Decision dated 05.05.2005 and numbered 05-30/ 372-91.

facility in a single geographic location (e.g., gulf and ports[441], customs territory[442]).

2.3. Effect of Price Discrimination on Market Definition

Price discrimination is a common practice, and when firms can price discriminate between customers, this may affect the relevant market definition. The Guidelines (Market Definition) remarks that where there are distinctly different customer groups, the borders of the product market may be reduced, i.e., a different group of customers for the relevant product may form a smaller and separate market in case there is price discrimination to its disadvantage[443]. For this to occur, the Guidelines (Market Definition) suggests that two conditions must be met: First, "if it is not possible to determine which group a customer belongs to during the sale of the relevant product", second "if trade between the customers or arbitrage by third parties is not economical or possible"[444].

The effect of price discrimination can occur either on demand-side substitution or on supply-side substitution:

2.3.1. Effect of price discrimination on demand-side substitution

The language of the Guidelines (Market Definition) indicates the third-degree price discrimination, where consumers are grouped based on observable characteristics, each group is charged a different price for the same item, and there is no arbitrage. In this case, each group of consumers constitutes a separate product market.

Nevertheless, second-degree price discrimination, where consumers are sorted by self-selection, may also affect the market definition when they are offered a menu of price/quality combinations and each consumer selects his most

[441] The Board Decisions dated22.08.2001 and numbered 01-40/402-104; dated 25.03.2004 and numbered 04-22/ 233-49; dated 06.07.2001 and numbered 01-31/313-91; dated 01.10.2012 and numbered 12-47/1413-474.
[442] The Board Decision dated 26.04.2001 and numbered 01-21/ 191-49.
[443] Guidelines (Market Definition), n. 30.
[444] Guidelines (Market Definition), n. 30.

preferred combination. By offering different versions of the same product at different prices, firms induce consumers to reveal their preferences by selecting their most desired version[445]. In this case, some consumers will choose a low-quality version due to its low price, whereas others will be willing to pay extra to have a higher quality version. Herein, for each version, a separate group of consumers can be considered. However, unlike under third-degree price discrimination, those self-selected groups do need not establish separate relevant product markets, unless the price differential between the various versions is sufficiently large, i.e., consumers will consider the products as substitutes and may be ready to switch between them in response to changes in their relative prices[446].

For instance, a firm offers two product varieties[447]: Food for pets labeled "economy" and "premium", which are sold at prices P^E and P^P, respectively. The firm may know that some consumers are willing to pay more for quality than others are, but it does not have the knowledge to identify them. The firm will then set prices at P^E and P^P, thus those consumers who are willing to pay more for quality will opt for the high quality/high price combination while those with a lower reservation price for quality will choose the low-quality/low-price combination. However, the choice of P^P will be constrained by the choice of P^E, and if the differential is too large, all consumers, regardless of their preference for quality, will select the low-quality/low-price combination. Thus, the menu

[445] This strategy is called "versioning" (O'DONOGHUE/ PADILLA, n. 6552).
[446] O'DONOGHUE/ PADILLA, n. 6552.
[447] See the Commission decision, Case No COMP/ M. 2337, Nestlé / Ralston Purina (27.07.2001), paras. 11-13 (Commission reached the conclusion that a subdivision of the cat and dog food markets into wet and dry formulations is justified, as wet and dry formulations do not appear to be substitutable on the demand side, therefore dry dog, wet dog, dry cat, wet cat products each constitute a separate product market. Since, wet and dry products normally satisfy different nutritional needs and the wet food for dogs and cats is also generally more expensive than the dry variants, due to the different average nutritional values and to the higher packaging costs for wet pet food, and the market structure for each category is also different in terms of the market position of each supplier. While, Commssion also remarked that to some extent makers of pet food segment their products into "economy," "mainstream" or "premium" categories. However, the commssion concluded that these categories, which do not have a clearly defined scope generally connote quality differences and lower, medium and higher prices and pricing appears to be on a continuum with no clear break points, thus given the full substitutability of these products to serve the nutritional and dietary needs of dogs and cats the parties submit that a further segmentation of the relevant product markets is not justified). See also O'DONOGHUE/ PADILLA, n. 6552-6568.

pricing (viz. second-degree price discrimination) will not be able to establish separate product markets on quality levels.

Furthermore, substitution may be asymmetric or dissimilar[448]: For example, firms offer high-speed internet access and low-speed internet access at different prices that the prevailing price of high-speed access (the high-quality version) may create a considerable competitive constraint on the pricing of low-speed access (the low-quality version). Herein, a price increase for the low-quality version would induce substitution towards the high-quality one, while it does not occur in the opposite way. Therefore, this asymmetry suggests that there is a separate market for high-speed access.

2.3.2. Effect of price discrimination on supply-side substitution

Price discrimination can also be relevant on the supply-side substitution. While, under third-degree price discrimination, the products sold to different groups of consumers are functionally the same, that makes supply-side substitution a convincing constraint, which could cause a broader market definition. In the event of second-degree price discrimination, supply-side substitution might also lead to an effective competition constraint[449]. In doing so,

[448] See the Commission Decision, Case No COMP/ 38.233, Wanadoo Interactive (16.07.2003), paras. 169-204 (The Commission defined the relevant market as high-speed Internet access for residental customers, as considering offerings in the market, price ranges, different in use, technical features and performances. According to technical differences in performance, the Commission noted that it is not necessairly the sole basis of the market definition, but may be a factor in it. In this contect, the Commission remarked that the differences in performance between the two categories of products were clearly percieved by consumers, and the analysis of price differences between low-speed and high-speed offerrings showed that consumers were ready to pay a premium for extra performance and convenience. More importantly, the Commission considered the migrations process under its assessment of the degree of substitutability and questioned whether high-speed users would switch back to low-speed access when the price of high-speed access increased, and found that the rate of switching from high speed to low speed was much less than from low speed to high speed. In this respect, it is concluded that that there was sufficient substitutability between low-speed and high-speed offerings for a significant price change to prompt subscribers to switch in large numbers from high-speed to low-speed. On the contrary, the results showed that high-speed subscribers have a distinct preference for the convenience and performance offered by high-speed access, thus there was no significant interchangeability between the two categories of service suggested that the existence of a separate market for high-speed Internet access).

[449] See HAUSMAN, Jerry A. and LEONARD, Gregory K. and VELLTURO, Christopher A., "Market Definition Under Price Discrimination"., 64 ANTITRUST LAW JOURNAL (1996), p. 368-386, available at https://ssrn.com/abstract=1565843 (last visited 14.07.2017).

a producer of a high-quality version can often reduce the quality to a lower rank at no significant cost and almost instantaneously[450].

2.4. Market Definition in Tying and Bundling Cases

The effect of tying and bundling practices on market definition alters according to the type of bundling at issue.

2.4.1. Effect on market definition: tying and pure bundling

Determination of relevant market in tying and bundling cases is closely associated with separate product test. Tying only exists when two products are distinct, which means there are separate product markets for A and B.

However, whenever a distinct market for the tied item exists, it does not imply the existences of the widespread sales of the tying item in unbundled form[451]. For example, firms sell cars with tires, and tires can be bought separately, but it would be rare to see cars being sold without tires. Thus, two components will constitute one product, unless each could efficiently be sold without the other. Therefore, it can be determined whether the bundle (car + tires) is a single product or the combination of two separate products by considering the demand for tied product (tires). When it is concluded that B is a separate product, the relevant question is whether there is demand for A as a stand-alone product[452]. Provided that consumers have the tendency to obtain product A without product B, then A and B are separate products. Otherwise, there are two products, which are AB and B[453].

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[450] O'DONOGHUE/ PADILLA, n. 6568.
[451] O'DONOGHUE/ PADILLA, n. 6602.
[452] O'DONOGHUE/ PADILLA, n. 6602.
[453] *Compare* The Commission *Microsoft* decision, Case COMP/C-3/37, 792 (24.03.2004) which was upheld by the General Court, Case T-201/04, *Microsoft v. Commission* [2007] ECR-II-3601 (In Microsoft decision, the Commission concluded that operating systems and media players were separate products, since there was separate demand and supply of media players. Yet, the Commission did not consider whether there was separate demand for operating systems without media players). If this question had been included, then it might be concluded that there are two markets, one for operating systems with media players and the other one for media players (O'DONOGHUE/ PADILLA, n. 6619).

Relevant market issues and separate product tests will be challenging for the competition authorities especially in the case of technological tying or bundling. In those cases, due to the novel character of AB products in a way that brought greater functionality, then consumers' purchasing decision will not be based on the individual prices of product.

For instance, The Turkish Competition Board struggled to determine relevant geographical market in its Google decision. The Board stated that "GOOGLE's areas of business covers many areas interacting from different channels from mobile operating system, application development, operating an app store to marketing an internet advertising site"[454]. Thus, it is held that "the fact that changes in the definition of alternative markets will not be achieved in assessing the competitive effects of GOOGLE's action and according to the 20th paragraph of the [Guidelines (Market Definition)][455] there is no definite market definition in terms of areas of activity that are in a complicated interaction with each other"[456].

2.4.2. Effect on market definition: mixed bundling

Like price discrimination, bundling does not change the methodology of the assessment upon which market definition is based. However, it increases the number of products that need to be considered as potential competitive constraints on each other, as substitutability must be assessed between different bundles as well as between bundles and individual components. When firms offer mixed bundles, the possibilities for relevant market definition are 1) the bundle and the

[454] Google decision, n. 34.
[455] See Guidelines (Market Definition), n. 20 (However, in case the transaction under examination does not pose concerns for competition within the framework of potential alternative market definitions in terms of both product and geography, or in case there are competition distorting effects for all alternative definitions, a market definition may not be prepared). See also Board Decisions dated 15.06.2006 and numbered 06-44/551-149; dated 29.03.2007 and numbered 07-29/278-104.
[456] Google decision, n. 35.

single products may all be part of the same relevant market; 2) the bundle and separate products belong to different relevant market[457].

First possibility would be hold whereas at current prices consumers are practically indifferent between buying the bundle and the two products separately. This will occur if a small increase in the price of the bundle induces consumers to purchase the two products separately[458]. Second possibility arises when the price of bundle is significantly less than the price of buying the individual components, or consumers receive large benefits from buying the components jointly, such as considerable quality advantages, thus at current prices no substitution is likely in response to a small increase in the price of the bundle[459]. Then a separate market for supplying the bundle would be appropriate.

2.5. Market Definition in Aftermarkets

A firm may tie a durable product (e.g. camera) with a consumable complementary product (e.g. spare parts or maintenance and repair services). The market for durable goods is called as the "primary market" or the "foremarket", while the markets for the subsequently purchased products are expressed as "secondary markets" or "aftermarkets"[460].

The Guidelines (Market Definition) suggests the same method to define in these instances "assessing the responses of the consumers to the changes in relative prices". However, this time greater attention is required to "limitations on product substitution caused by the conditions in connected markets"[461], in order

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[457] Europe Economics, "Market Definition In Media Sector-Economic Issues", Report for the European Commission, DG Competition, November 2002, p. 23 [hereinafter Europe Economics (Media Sector)].
[458] O'DONOGHUE/ PADILLA, n. 6619.
[459] Europe Economics (Media Sector), p. 24.
[460] See SHAPIRO, Carl, "Aftermarkets And Consumer Welfare: Making Sense Of Kodak", 63 ANTITRUST LAW JOURNAL No. 2 (Winter 1995), pp. 483-511, available at http://www.jstor.org/stable/40843290 (last visited 29.06.2017) [hereinafter SHAPIRO (Aftermarkets)]; TEMPLE LANG, John, "Practical Aspects Of Aftermarkets", 7 COMPETITION POLICY INTERNATIONAL 1, (Spring 2011) pp. 199-241, available at https://www.competitionpolicyinternational.com/assets/Uploads/Temple-Lang-with-Cover.pdf (last visited 02.09.2017).
[461] Guidelines (Market Definition), n. 44.

to determine whether competition in the foremarket prevents exploitation of consumers in the aftermarkets.

For instance, there are domestic goods, and spare parts, maintenance and repair services for domestic goods. Different original equipment manufacturers (OEMs) substitute and manufacture the domestic goods. Thus, they are considered in same relevant market. In principle, there are three candidates for the relevant markets[462]:

1) A single system market: Where secondary products (spare parts and services for cameras) are included into the primary product (domestic goods) markets;

2) Dual markets: A relevant market for all primary products (all branded domestic goods) and another relevant market for the spare parts and maintenance and repair services (for all domestic goods brands);

3) Relatively Narrowly Defined Secondary Market (Brand-specific secondary market): a separate secondary market for each (domestic good) brand.

The facts of each case determine which definition is to be held. If consumers are able to consider the cost of spare parts and maintenance and repair services at the time of purchase of primary product, where "the characteristics of the primary products make it possible for the consumers to react promptly and directly to relative increases in the prices of the secondary products"[463], then a price increase in the aftermarket (spare parts and maintenance and repair services) would not be profitable due to a fall in sales of the primary product and the

[462] O'DONOGHUE/ PADILLA, n. 6636; ASLAN (2017), p. 178. See Board decision dated 12.06.2010 and numbered 10-44/771-253; TEMPLE LANG (Aftermarket), p. 201.
[463] Guidelines (Market Definition), n. 44.

aftermarket[464]. In this instance, a broader market definition for secondary products may arise (a single system market).

If the spare parts and maintenance and repair services for each brand are compatible with the spare parts and maintenance and repair services for other brands (and consumers are also aware of this), then it is likely that dual market system would be held. In this instance, the purchase of a particular domestic product brand does not “lock-in” consumers. They remain free to select the spare parts and the maintenance and repair services providers of rivals’ brands.

If the spare parts and the maintenance and repair services of one brand are incompatible with those of other brands (or consumer are not aware of this “lack of transparency”), then the determination will be as either single market system or brand-specific system. If consumers of a given domestic product brand are “forced” to make use of the spare parts for that domestic product, then they are “locked-in”.

Which system determination will be appropriate depends on whether it is possible for a user of primary products of one brand to switch to primary products of another brand, in order to avoid a price increase for secondary products of the first brand. It depends on the extent to which current and future consumers of domestic goods react to a price increase in spare parts and maintenance and repair services. In the meantime, it depends on whether consumers consider the whole-life cost of the domestic goods, including its maintenance and repair, when choosing the primary product. If they consider the cost of spare parts and maintenance and repair services when purchasing domestic goods, then price increase in the aftermarket would not be profitable. Thus, under this circumstance the aftermarket does not constitutes a separate market, and therefore single system determination will be appropriate.

[464] See European Commission, “XXVth Report on Competition Policy” Brussels-Luxemburg (1996), available at http://ec.europa.eu/competition/publications/annual_report/1995/en.pdf (last visited 03.08.2017), n. 86 [hereinafter XXVth Report on Competition Policy (1995)].

In the decision, the Board determines relevant market for domestic goods and spare parts, as follow[465]:

1) First, the Board brought distinction between standard spare parts and non-standard spare parts in the secondary market. For standard goods, determined that spare parts of different brands were compatible with spare parts of primary products of a brand when it is expensive for user.

2) For non-standard goods, the Board considered the "switching costs". Regarding switching costs, the Board denoted that they occur mainly in two ways[466]: In the first instance, for users to sell the used primary product at an attractive price in order to buy a new primary product of another brand should not be economically viable. This becomes even more important if the price of the primary product is higher than the secondary product. The second type of switching costs relates to investments other than prices, such as training, routine replacement, downloads, software, and so on. By finding that switching costs were low between primary products (domestic goods), the conclusion is that, instead of brand-specific secondary market, it would be proper to determine the relevant market as "spare parts of the domestic goods provided by the domestic goods producers operating in the sector".

3) In the end, the Board reached the conclusion that there are two relevant markets, i.e., one for domestic goods, and the other for all spare parts brands [including standard and non-standard (brand-specific)].

In our opinion, the Board's determination that standard spare parts as a separate market was correct. Since there were undertakings that operate only in the production of standard spare parts[467] and in the event of a price increase of

[465] Board decision (Preliminary Investigation) dated 14.07.2011 and numbered 11-43/942-306, n. 280 (hereinafter Domestic Goods decision).
[466] *id*., n. 260-270.
[467] *id*., n. 150, 160.

standard spare parts, consumers could switch to spare parts manufactured by another producer.

However, for non-standard (brand-specific) spare parts, it should not be considered as a separate market. Since, non-standard parts were not compatible, i.e., switching to secondary products of other brands was not possible. Therefore, they would not be part of spare parts for all domestic goods brands market (dual system). In this instance, there were two possibilities: either a single system market for domestic goods, including their non-standard spare parts, or a separate secondary non-standard spare parts market for each domestic product brand (brand-specific).

Since the Board found that switching costs were low in the market for the primary product, then it was possible for a user of primary products of one brand to switch to primary products of another brand. Because price increase in the aftermarket would affect demand for products in the primary market, so that such price increase would be unprofitable for the sellers in the primary market. Then, the Board should reach the conclusion that there is a "single system market".

If, instead, there were high switching costs in the market for the primary product, then non-standard spare parts would constitute a separate secondary market for each (domestic good) brand.

Furthermore, the Board should explain that the mere possibility for a consumer to choose from several brands on the primary market should not be considered as a sufficient condition for the acceptance of the single market system. In addition, the Board did not demonstrate or mention whether a sufficient number of consumers would switch to other primary or secondary products in order to render price increases unprofitable[468]. Nonetheless, it was interesting that the Board pointed out whether users could sell their primary products in the

[468] See the General Court decision, Case T-427/ 08, Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission [2010] ECR II-05865 (15. 12.2010) paras. 79-121.

second-hand market in order to buy a new primary product of another brand. However, the Board did not clarify if it is plausible, or under which circumstance it should be considered economically viable.

Proper market definition requires some specific attention for each case and it may seem complicated. However, simplified logic follows that greater importance to be on “consumers’ preferences”. In tying and bundling cases where firms offer AB and B. The question that whether there is separate demand for B, is not sufficient. In addition, it should be asked whether there is consumer demand for A without B. If the answer to both questions is yes, then relevant markets are market for A and market for B. If the answer to second question is no, then relevant markets are market for AB and market for B.

In aftermarket tying cases, key factors are “consumers’ reaction to price increase”, “existence of ‘available’ and ‘compatible’ secondary products”, and switching costs. First thing to determine whether there are compatible secondary products in the market. If there are, to include this factor into market definition, they should also be available to consumers. It means that consumers should have the knowledge that they have compatible options and they should be free purchase a different brand’s secondary product. If compatible secondary products are not available for consumers (it can also be due to contractual/technological tying) then competition in the foremarket does not prevents exploitation of consumers in the aftermarket. In this case, the analysis should continue including the “switching costs” factor. If it is possible for a user of a primary product to switch to another brand’s primary product as a reaction to price increase in the secondary product, then consumers are considered not “locked-in”. In this case, there is a single system market. Rather, switching costs are high, and then consumers are locked-in and one brand of a product can constitute a separate market.

3. DETERMINATION OF DOMINANT POSITION

Once the relevant market where alleged dominant undertaking operates is defined, then its potential dominant position is assessed. Dominant position itself is not an infringement in the application of Article 6. However, establishing dominant position is an essential pre-requisite under Article 6, as well as antitrust analysis of tying practice[469]. If dominance is not found, regardless of the anticompetitive effects of the conduct, no abuse can be carried out under Article 6. Two different concepts of dominant position are considered under Article 6. First situation is when a single undertaking is a dominant seller. Second concept is joint (collective) dominant position, which occurs in oligopolistic markets when firms are interdependent and realize that competing with each other would ultimately be self-defeating and, thus, behave "as if" they had coordinated their behavior in the market place[470].

3.1. Single Dominant Position

3.1.1. The concept of dominant position

The legal concept of dominant position refers to a firm with a high degree of immunity from the normal disciplining forces of rivals' competitive reactions and consumer behavior[471]. The concept of dominant position is defined in Article 3 as "[t]he 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". The economic concept of the dominant position is associated with the degree of an undertaking's market power, behaving independently from competitive pressure, and capable of profitably increasing its prices above the competitive level and maintaining them at that level for a certain period[472]. In addition, such an undertaking would be able to control other factors, including the level of

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[469] Unlike Article 6 of TCA and Article 102 of TFEU, tying antitrust analysis under Section 1 of Sherman Act and Section 3 of Clayton Act do not require dominant position or monopoly power, but "sufficient market power" over the tying product.

[470] O'DONOGHUE/ PADILLA, n. 7236.

[471] O'DONOGHUE/ PADILLA, n. 7204.

[472] See Guidelines (Dominant Position), n.8, fn.: 3 ("While for the purposes of determination of dominant position the relevant period of time can vary depending on the characteristics of the product and market under examination, it is generally accepted that a two-year period would be sufficient."). See Court of Justice, judgement of 14 February 1978, Case 27/ 76, United Brands Company and United Brands Continental BV v Commission [1978] ECR 207, at 65, p. 277 ("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").

production and distribution, the variety and/or quality of goods and services, and the level of innovation, below the competitive level to its own advantage and to the detriment of consumers[473].

In principle, a dominant position derives from a combination of several factors. The assessment of an undertaking's ability to behave independently of competitive constraints on the relevant market will depend on the circumstances of each case. Such assessment requires a comprehensive analysis, taking into account all the factors that strengthen or weaken undertaking's market position, its advantages and disadvantages, and constraints on its competitive behavior in the relevant market.

In the first stage of this assessment, the relative strength of the firms on the relevant market is based on their market shares, alongside with the consideration of the stability of this market share in time and the number and market shares of competitors operating in the relevant market[474]. The second step of the assessment is to examine whether entry or expansion by rival firms is likely, timely and sufficiently to exert competitive pressure on the behavior of the undertaking examined[475]. Another factor to include in the assessment is the ability of buyers ("buyer power") to restrict the conduct of the undertaking examined[476]. Finally, those elements will verify the evidence of actual competition on the market whether undertaking examined can act independently of competitive pressure.

[473] Guidelines (Dominant Position), n.8.
[474] See Guidelines (Dominant Position), n. 11-14 ("There is no specific market share threshold that proves an undertaking is dominant. However, the established practice of the Board, in the absence of any indication to the contrary, is to accept that undertakings holding less than 40% of the market share are less likely to be dominant5, and more detailed examinations are conducted for undertakings with a higher market share."). See also Guidelines (Market Definition), n. 41 ("Definition of relevant product market and relevant geographic market enables the determination of suppliers and buyers/consumers active in that market. From this point, based on the suppliers' sales of the relevant product in the relevant region, total market size and the market share of each supplier may be calculated. Total market size and market shares can mostly be calculated from the data of research companies or from the studies of the professional associations. When this is not possible or when available estimations are deemed unreliable, each supplier may be requested to provide its own sales numbers in order to calculate the total market size and market shares.").
[475] See Guidelines (Dominant Position), n. 15-20.
[476] See Guidelines (Dominant Position), n. 21.

3.1.1.1. Important factors for the assessment of market power of tying firms

In context to tying practice, the important point is not the existence of high market shares, but whether such shares are likely to confer lasting market power, which requires a proper assessment of barriers to entry and expansion. It has been long recognized that the likelihood of new entry or expansion by existing rivals may constrain the conduct of the leading firm and, therefore, preclude dominance. Because, a firm with a high market share is much less likely to be able to behave independently of competitors, customers, and consumers in a market where entry or expansion barriers are low. While the likelihood of new entry or expansion by existing firms in the market is high, incumbent firms will be constrained by the threat that increased prices would lead to actual or potential rivals expanding output in response to price rises[477].

Barriers to entry refers the factors which prevent or hinder companies from entering a specific market, while barriers to expansion represent the barriers against the increasing market share for companies already in the market[478]. Entry barriers can be legal or economic. Most associated legal entry barriers with tying practice is intellectual property rights, while in many cases source of restriction on entry and expansion is inherent in the economic characteristic of the relevant market, such as sunk cost of entry, economies of scale or scope, the network effects, and switching costs for consumers.

3.1.1.1.1. Intellectual property rights

Intellectual property rights may create difficulties or prevent expansion and entry. Especially under US tying case law, existence patented, or copyrighted tying product had been implied sufficient market power for condemning tying practice for a long period[479]. However, currently, it is understood that intellectual

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[477] O'DONOGHUE/ PADILLA, n. 7415, 7432.
[478] Competition Terms Dictionary, p. 106, 107.
[479] See International Salt Co., Inc. v. United States, 332 U.S. 392 (1947); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), United States v. Loew's Inc.,371 U. S. 38 (1962); Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).

property rights do not constitute automatic entry barriers and do not necessarily render tying goods as a unique product that implies a dominant position[480]. If the competitors are not able to provide close substitutes, then an intellectual property right may confer a dominant position[481].

3.1.1.1.2. Sunk costs of entry

Start-up costs are the costs of establishing the infrastructure, such as building, machinery, equipment, etc., required to start an activity[482]. Especially when these costs are in the form of sunk costs[483], entry into the market is considerably more difficult. In aftermarkets, a high level of start-up costs exists for an independent manufacturer. An independent manufacturer should bear sunk costs such as investments in facilities and machines, and in information technology development needed to enter a specific market and that cannot be used for other purposes, since produced spare parts would be specific for each branded model. Furthermore, products become outdated very quickly due to their technological qualities and the use of high-tech production processes in production makes it difficult for general business principles to produce spare parts for use in each branded durable product for undertakings rather than the firms in the foremarkets[484]. Moreover, it is likely that incumbents in the foremarket will also have intellectual property rights over their durable goods. Therefore, it is common to find a dominant position in the relevant product market for each brand.

[480] Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. (2006). See also See General Court decision, Case T-321/ 05, AstraZeneca v Commission [2010] ECR II-2805, paras. 270-272 and in Case C-475/ 10 P, AstraZeneca v. Commssion [2012] ECR-I, paras. 186, 187 (Also referring to Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission ('Magill') [1995] ECR I-743 and in "IMS Health" (NDC Health/ IMS Health, OJ 2003 L 268/ 69, the Court confirmed that the mere possession of intellectual property rights is not sufficient to establish the existence of a dominant position.
[481] See Court of Justice decision, Case 40/ 70, Sirena S.r.l. v. Eda S.r.l, [1971] ECR 69, para. 16; Case 78/ 70, Deutsche Grammophon v. Metro [1971] ECR 487, para. 16 (O'DONOGHUE/ PADILLA, n. 7534).
[482] Competition Terms Dictionary, p. 66.
[483] Sunk costs are costs that a firm must incur to enter a market but that are not recoverable upon exit of the market (Competition Terms Dictionary, p. 66, 67)
[484] See Board HP decision dated 08.05.2001 and numbered 01-22/192-50, p. 5, 6.

3.1.1.1.3. Economies of scale/ scope

A firm enjoys economies of scale in the production or distribution of a product when its average costs fall as output increases[485]. The economy of scope occurs when a firm produces two or more products and it may be cheaper to produce the two products than it would be to make each of them separately[486]. When a market present significant positive returns to scale, the largest firm will have a significant advantage over firms who have not yet reached the same level of production (or distribution)[487]. Where the production of the tied product benefits from economies of scale, it may become likely for competitors in the tied product market to lose customers that purchase the tying product and fail to achieve sufficient sales to realize economies of scale[488]. In those circumstances, economies of scale or scope may give rise to barriers to expansion.

3.1.1.1.4. Network effects

Network effects is seen when the increase of the value of some product (or service) depends on the increase of number of users[489]. An example is the Microsoft case, regarding the operating system (OS) and its applications, in which Commission established the network effects, evidencing high entry barriers in the personal computers and software markets. To the consumer, the utility of the operating system depends on the numbers of applications made to run in this system. Therefore, a popular OS will have more applications written to it. Consequently, the more applications are written to an OS, the more they will be preferred by the users. The Commission concluded this behavior, based on network effects, "constituted a significant entry barrier to potential competitors", considering Microsoft´s dominant position[490]. Thus, costs and other obstacles

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[485] Competition Terms Dictionary, p. 151.
[486] Competition Terms Dictionary, p. 127.
[487] O'DONOGHUE/ PADILLA, n. 7570.
[488] See Guidelines (Dominant Position), n. 91.
[489] Competition Terms Dictionary, p. 175.
[490] Microsoft, OJ 2007 L 32/ 23, at 515-525 which upheld on appeal in Case T-201/ 04, Microsoft v Commission [2007] ECR II-03601, paras. 558, 562.

resulting from network effects, faced by customers switching to a new supplier may also constitute a barrier to expansion or entry[491].

3.1.1.1.5. Switching costs for consumers

Switching costs are the costs other than the price that the customer will pay for the goods or services that the provider has encountered while moving to a new provider[492]. A barrier to entry may also exist if customers face high enough costs when switching suppliers[493]. Switching costs can be in form of costs of information, learning, or transaction costs, or they can result of the technological or commercial choices of the incumbents.

When switching costs are high, and most consumers are lock-in, switching costs deter entry. While switching costs are low, it may still deter entry on the ground that incumbents are likely to fight entrants in order to retain their customers and avoid losing market power[494]. On the other hand, switching costs may facilitate entry into the market, even though on a limited scale, if incumbents opt to focus on exploiting their locked-in customer base, and leaving to entrants those customers with low (or no) switching costs, whereas entrants may prefer to operate at a low scale, leaving incumbents to exploit their bases of captive consumers, rather than invest in the development of a large customer base[495].

3.1.1.2. Nature of conduct as evidence of dominant position

For the finding of abuse, the Board should first prove that an undertaking holds a dominant position on the relevant market and then prove abuse of that dominance. However, the Guidelines (Dominant Position) states that "[i]n order

[491] Guidelines (Dominant Position), n. 18.
[492] Competition Terms Dictionary, p. 105.
[493] Guidelines (Dominant Position), n. 17. See Microsoft, OJ 2007 L 32/ 23 which upheld on appeal in Case T-201/ 04, Microsoft v Commission [2007] ECR II-03601, paras. 177, 484, 528.
[494] See National Economic Research Associates, "Switching Costs", Office of Trade - Department of Industry, Economic Discussion Paper No. 5 (2003), available at http://webarchive.nationalarchives.gov.uk/20130301190828/http://www.oft.gov.uk/shared_oft/reports/comp_policy/ oft655.pdf (last visited 09.09.2017) [hereinafter OFT (Switching Cost)].
[495] KLEMPERER, Paul, "Entry Deterrence in Markets with Consumer Switching Costs", 97 THE ECONOMIC JOURNAL (1987), pp. 99-117, available at http://www.jstor.org/stable/3038233 (last visited 09.09.2017).

for a particular conduct examined under Article 6 of the Act to constitute an infringement, the undertaking engaged in the conduct must hold dominant position in the market and the conduct itself must be of an abusive nature. Where the absence of one of these fundamental factors may be demonstrated, the Board may choose not to perform analysis concerning the remaining factor"[496]. The Board consistently has opted for an approach that, instead of determining the dominant position, directly assesses the abusive character of the alleged conduct under the "dominant position assumption"[497]. However, the Administrative Court stated as one of the grounds for dismissing the Board's appeal, the Board opted to investigate directly abuse of the conduct without examining whether the relevant undertaking was in a dominant position, and held that this approach might prevent the achievement of correct conclusions[498].

It is true that the conduct of a firm in the market relates to the issue of abuse, and not to the assessment of dominance. We share the administrative court's stated concern because this methodology may lead to an implementation that abusive practice as an indicator of market power. Similar to the Hilti decision, the Commission determined the commercial behavior of the undertaking as being "witness to its ability to act independently of, and without due regard to, either competitors or customers"[499].

Likewise, US courts had long established the ability of a firm to price discriminate as an indicator of significant market power, which is held also where tying facilitates price discrimination[500]. Moreover, the mere fact that a tying

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[496] Guidelines (Dominant Position), n. 7.
[497] See Board decisions dated 08.12.2010 and numbered 10-76/1569-604, dated 4.11.2010 and numbered 10-69/1458-557, dated 24.09.2014 and numbered 14-35/690-308; dated 28.12.2015 and numbered 15-46/766-281.
[498] Ankara 11. Administrative Court decision dated 11.07.2013 and numbered E.2012 / 1727, K.2013 / 1083.
[499] Eurofix-Banco v Hilti, OJ 1988 L 65/ 19, para. 71 which is upheld by the General Court, Case T-30/ 89, Hilti AG v Commission [1991] ECR II-1439 (O'Donoghue/ Padilla, n. 7747).
[500] See KLEIN/ WILEY, p. 623-629 (collecting the example decision: Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1151-52 (D.C. Cir. 1988) ("The economists' definition of price discrimination requires, to be sure, that the seller have market power (i.e., a power to raise the price above competitive levels without loss of all sales): otherwise the discriminates would simply buy from alternative sources"); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671 (7th Cir. 1985) ("Both the extension of power and the practice of price discrimination are impossible unless the seller has substantial market power"); Coal Exporters Ass'n of the U.S. v. United States, 745 F.2d 76, 91 (D.C. Cir. 1984) ("it is well established that the ability of a firm to price discriminate is an indicator of significant monopoly

product is patented is also considered a proxy of market power. However, over the years, Supreme Court's approach relying on assumptions is revised. In its more recent opinions, the Court has required a showing of market power in the tying product. This understanding explicitly stated in Illinois Tool Works v. Independent Ink decision and the Court held that neither patented tying product nor tying-induced price discrimination, or even their combination, should give rise to a presumption of market power[501].

Relying on the nature of the conduct as an indicator of market power is problematic. This occurred in US tying case law due to patented tying products or price discrimination, and tying practice was ill-treated. Thus, presumed market power coupled with long-time *per se* treatment of tying practice hamper successful tying antitrust analysis. Establishing a dominant position due to an undertaking's conduct alongside denoted "special responsibility" can lead to *per se* treatment without actual anticompetitive effects[502]. Therefore, the Board should ensure that this approach does not turn into a substitute for determination of dominant position, but can be considered as a verification of the analysis of market conditions in the assessment of dominance.

3.1.2. Abuse of dominant position

Article 6 seeks to detect anticompetitive unilateral conduct, and it prohibits "abuse", but it does not prohibit creating or having a dominant position that is result of its internal efficiencies. The term "abuse" broadly covers three types of abuses under Article 6, viz. 1) exploitative, 2) exclusionary, 3) discriminatory.

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power."); USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 511 (7th Cir. 1982) ("But if a patentee has no market power -and, of course, not every patentee confers market power, ... he cannot use a tie-in to practice price discrimination, which presupposes market power"); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 943 (5th Cir. 1975) ("Moreover, the increased revenues possible through price discrimination are really available only to manufacturers already enjoying an 'entrenched market position', and they tend to enhance monopoly power with no countervailing benefit to the consuming public"); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 349 (D. Mass. 1953) ("price discrimination has been an evidence of United's monopoly power, a buttress to it, and a cause of its perpetuation.."). See also Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), at 15 (fn.:23); Eastman Kodak Co. v. Image Technical Services, Inc. 504 U.S. 451 (1992), p. 499.

[501] Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. (2006), p. 5, 15.

[502] See O'DONOGHUE/ PADILLA, n. 7747.

Article 6 does not define "abuse" itself, rather suggests lists of abusive conducts. Some abuses can be exploitative or exclusionary, or both at the same time, such as discrimination or tying. The Board does not have tendency to determine the meaning of the term "abuse" for the categorization of abuses, unlike EU Courts that have articulated several different general formulations[503]. However, the Board has adopted some formulations provided by EU institutions that were used for the determination of broad concept of "abuse", such as "competition on merits"[504] and "special responsibility"[505] with respect to dominant undertaking's duty not to abuse its position[506].

Some commentators[507] argue that the pure exploitation should not be found abusive under Article 102 of TFEU, since exploitation on its own does not demonstrate harm to competition and mostly constitutes rather a contract law problem than a competition law. While, pure exclusion on its own without exploitation also should not be found abusive under Article 102 of TFEU to avoid protecting competitors rather than competition[508]. Exploitative abuse can and should be used as the test of anticompetitive effects on the market and conduct should only be found abusive if it is exploitative. Thus, neither exploitative nor exclusionary abuse making sense on its own, this implies that there is ultimately one type of abusive unilateral action, which is exploitative[509].

In this context, in Turkish literature, it is argued that to intervene with competition law it requires injury to competition[510]. However, unlike Article 4 of the TCA that prohibits agreements, decisions, and concerted practices that have

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503 See O'DONOGHUE/ PADILLA,, n. 9594-9646.
504 See Commission *ECS/AKZO* decision, OJ 1895 L 374/1, para 81 (O'DONOGHUE/ PADILLA, n. 9594).
505 See General Court decision, Case 322/81, NV Nederlandsche Banden Industrie Michelin v. Commission [1983] ECR 3461, para. 10.
506 See Board decisions dated 15.05.2017 and numbered 17-16/223-93, dated 07.07.2015 and numbered 15-28/345-115; dated 05.06.2007 and numbered 07-47/506-181; dated 01.12.2005 and numbered 05-80/1106-317.
507 FOX, p. 393-397; AKMAN (2012), p. 301-315.
508 See AKMAN (2012), p. 301-315.
509 See FOX, p. 393-397.
510 AŞÇIOĞLU ÖZ, p. 25,26; TOPALÖMER, p. 28,29; GÜRKAYNAK, p. 26-28. See also ÜNAL, p. 191, 192 (Intervention for the exploitative abuse should be limited to the circumstances where barriers to entry and expansion exit, and in market that are unlikely to self-correcting).

as their object or effect the prevention, restriction, or distortion of competition, Article 6 of the TCA only states 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”.

Article 6 of the TCA does not require a prevention, restriction or distortion of competition and does not lay down the certain objective(s) or standard of harm of the provision itself. However, the dominant position itself is not prohibited, and Articles 1 and 2 of the TCA states competition law aims at ensuring the protection of competition, which then requires there should be injury to competition. The competition itself is immeasurable, therefore injury to whom or what should be determined, i.e., injury to market structure, injury to competitors, injury to consumers or combination of these. Moreover, there is no consensus among commentators whether harm to consumer is the necessary condition for condemn exclusionary conduct[511].

To us, it is not questionable whether Article 6 covers exploitative abuse. The question is how the prohibition of exploitative abuse under Article 6 should be interpreted for it to be used in a substantive way for the competition law and policy purposes. We agree that pure exclusion should not be found abusive under Article 6, because competition law does not protect competitors, and Guidelines (Dominant Position) explicitly states that exclusionary abuse to be find “detriment to consumer” is necessary[512]. Moreover, if the objective of Article 6 is

[511] See ASLAN, Ece, “Türk Rekabet Hukukunda Hakim Durumun Kötÿe Kullanilmasi Doktrininde Ayrimcilik Eylemlerinin Siniflandirilmasi Sorunu [The Problem of Classification of Discriminatory Actions under Abuse of Dominant Position Doctrine in Turkish Competition Law]”, pp. 277-279, in Abuse of Dominant Position: Problems and Solution Suggestion Symposium, 22.06.2010), On Iki Levha Yayincilik, Istanbul 2011 [hereinafter ASLAN (2011)] and ODMAN BOZTOSUN, p. 122, 137 (advocate that direct harm to consumer is prohibited under Article 6 without harm to market structure or competitors). See ODMAN BOZTOSUN, p. 127 (exclusion without exploitation also should not be found abusive under Article 6). See AŞÇIOĞLU ÖZ, p. 15; TOPALÖMER, p. 28; GÜRKAYNAK, p. 27 (Exploitative abuse -harm to consumer- should not be used as the test of anticompetitive effects on the market).
[512] See Guidelines (Dominant Position), n. 22 (“For a particular conduct examined under article 6 of the Act to be considered an infringement, not only the undertaking concerned must hold dominant position, but the conduct in question must have an abusive nature. Abuse may be defined as when a dominant undertaking takes advantages of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare. Abuse of dominant position by a dominant undertaking can lead to result that may harm consumer welfare including increases

enhancing consumer welfare, then harm to competition resulting in harm to consumer should be the test of abuse.

However, suggestion that pure exploitation should be found abusive under Article 6 has been hesitated. It can be supported that consumer protection law was designed for this, thus it has tools that are more efficient in this instance. However, we are not convinced with this understanding. Consumer law can only condemn pure exploitative practice, but does not have proper means to detect source of the exploitation. Moreover, the question whether Article 6 should cover pure exploitative abuse is distinct from how enforcement action against exploitative conduct should be. To us, competition law commentators should deal with the latter more comprehensively, instead of automatically omitting pure exploitative abuse from scope of Article 6 of the TCA or Article 102 of TFEU.

Nonetheless, even if it is important that the overall concept of exploitative abuse should have a unified meaning, in each case, the legal and economic principles are somehow different. The above-mentioned discussion is overall valid, yet our aim is to find a meaningful interpretation of exploitative tying practice under Article 6 for the competition law and policy purposes.

The Board only in one decision stated that tying practice might have two anticompetitive effects, namely exploitative and exclusionary. Therein, it is stated that "[e]xploitative abuse is pricing or other practices that cause a direct loss of consumer welfare. In such abusive conduct, the dominant undertaking takes advantage of its market power to extract rents from consumers that could have not been engage by non-dominant firm"[513]. In the same decision, the Board did not require injury to competition. However, in the remaining decisions that

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in prices, decreases in product quality and innovation level, and reduction in the variety of goods and services. This reduction in consumer welfare may emerge at the resale level or at the final consumer level.). See also Guidelines (Dominant Position), n. 8, 25, 36 (requires detriment to consumer for determining exclusionary abuse).

[513] Board *Garanti Bank* decision, dated 05.08.2009 and numbered 09-34/787-192 ((Forcing consumers who borrowed a loan from bank to take the insurance policy while there were lower premium alternatives is considered as an exploitative practice as leading loss of consumer welfare. Yet, the Board did not condemn alleged practice due to lack of dominant position).

addressed tying practice under Article 6, tying practice is considered only exclusionary. Furthermore, Turkish literature only has mentioned in passing the notion that tying can be exploitative and focuses instead on the exclusionary effect of it.

First, we will present an alternative interpretation of exploitative tying abuse, and then present our point of view.

3.1.2. Alternative interpretations for exploitative tying abuse

3.1.2.1.1 “Competition on merits”

An alternative interpretation is to suggest that abuse is anything that is not legitimate competition or “competition on merits”, if it is accepted that a dominant firm is “entitled to compete on the merits”[514]. The term “competition on the merits”, however, is vague[515]. MONTI attempted to define the competition regarding “price, quality and functionality” of the product[516]. However, this does not provide sufficient limiting principles. For example, tying is competition by adding functionality, and reducing usually tying product price, but it is not always permitted[517].

If the main concern of the provision of abuse is directed against the further restriction by dominant firms of residual competition that preventing the strengthening of dominant positions by means other than competition on the merits, the relevant question is whether the initial standard of *“as if”* competition was referred mainly to exclusionary practices. Since dominant positions are not illegal when it has emerged from competition on the merits (because of their

[514] See Commission *ECS/AKZO* decision, OJ 1895 L 374/1, para 81 (O’DONOGHUE/ PADILLA, n. 9594).
[515] See OECD -Policy Roundtables, “Competition on the Merits” (June 2005) available at http://www.oecd.org/competition/abuse/35911017.pdf (last visited 20.07.2016) [hereinafter OECD (Competition on the Merits)].
[516] Comments by Mario Monti, European Commissioner for Competition, on the speech given by Hewitt Pate, Assistant Attorney General, US Department of Justice, at the Conference “Antitrust in a Transatlantic Context” (Brussels, 7 June 2004), p. 5, available at http://ec.europa.eu/competition/speeches/text/sp2004_005_en.pdf (last visited 02.09.2017) (“I think we can both agree that in competition the best should win on the merits, but only on the merits. Whenever dominant companies can use their market power to win in a market for reasons that are not related to the price or quality of their products, then we should consider intervening”).
[517] See O’DONOGHUE/ PADILLA, n. 9626.

internal efficiencies), MARTÍN-LABORDA suggests that the aim of any intervention was to support the competitive process, not to change its outcome. Therefore, "as if' standard for the control of dominant firms should be abandoned, and conduct should only be found abusive when it is exclusionary[518].

It is not clear whether the term "competition on merits" is used to determine whether the "dominant position is legitimate", or if it is used to determine whether "conduct constitutes an abuse"[519]. Perhaps this distinction is not necessary, or perhaps only the latter should be considered for exclusionary abuses in the sense that lack of "objective economic justification" is necessary for the exclusionary conduct to be found abusive[520]. However, our understanding of the notion of "competition on merits" is that conduct can be exploitative whenever a dominant firm exercises its legitimate market power not only based on its price or quality, but due to market imperfections.

In tying practice, lack of sufficient information at the time of purchase, may able firms to force consumers to accept tied product. In this instance, ability to force does not occur from dominant undertaking's internal efficiency. Then, the related question is what the relevant parameters of exploitation are, i.e., price, quality or choice. In other words, if the consumers had sufficient information about price, quality and/or alternative choice, would they accept tying offer?

From the efficiency-minded point of view, such tying practice may have efficiency enhance effect, thus firms compete on merits. However, antitrust scrutiny on the source of the exploitation is a different issue from whether increased efficiency offsets adverse effects on consumer harm or competition.

[518] MARTÍN-LABORDA, p. 10, 11.
[519] See O'Donoghue/ Padilla (criticizing that the terms, "normal competition", "competition on the merits, and "genuine undistorted competition" are not merely vague, but also conclusory. Those terms are defined according to what the EU institutions or national authorities happen to conclude is an abuse in each case which is not satisfactory).
[520] See General Court decision, Case T-203/01, Manufacture française des pneumatiques Michelin v. Commission [2003] ECR II-4071, para. 107, 110.

3.1.2.1.2 "Special responsibility" of dominant firms

Another alternative to be considered for the definition of abuse is the term "special responsibility", which refers to "a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings"[521]. Further, it is stated that "special responsibility" indicates "not to allow [dominant undertaking's] conduct to impair genuine undistorted competition on the ... market"[522]. Our reading of those two statements suggests that dominant undertakings have "special responsibility" not to cause *further* distortion. To understand that "special responsibility" requires dominant firms to behave "as if" they lack market power does not make sense, since a dominant position is not prohibited.

Concerning exploitative prices, "special responsibility" does not prohibit profit maximizing prices, which will be monopoly prices only if they are inherent to the possession of a dominant position[523]. Since "monopoly price" is not prohibited, then "special responsibility" does not allow "supra-monopoly price". ELHAUGE challenges that tying-induced price discrimination practice is exploitative as it allows firms greater consumer surplus extraction than the profit maximizing of a single monopoly can do[524].

However, simple consumer surplus extraction is hazardous reason for intervention by a competition authority. First, consumer surplus requires interpersonal valuation, which is not obtainable. In addition, (further) consumer surplus extraction can only be made comparing "as if" monopoly pricing without tying, and "monopoly pricing" under tying. Then, the difference will indicate "as

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[521] See General Court *Atlantic Container Lines AB and Others v. Commission* decision, Joined Cases T-191/98, T-212/98 and t-214/98, [2003] ECR II-3275, para. 1460 (O'DONOGHUE/ PADILLA,, n. 9594).
[522] General Court decision, Case 322/81, NV Nederlandsche Banden Industrie Michelin v. Commission [1983] ECR 3461, para. 10.
[523] See WAHL, Nils, "Exploitative high prices and European competition law – a personal reflection", Fredenberg and Strand (eds) (2007), The Pros and Cons of High Prices, Swedish Competition Authority, p. 51 (noting that the monopoly pricing is inherent to the concept of dominance, thus prohibiting such pricing policy would be equal to prohibit dominance as well).
[524] ELHAUGE (Rehabilitating Jefferson Parish), p. 498-500.

if” consumer surplus loss, but will not include consumer utility or preferences. Second, intervention with firms’ pricing strategy that leads to regulation of the prices of firms, even if they are monopolist, should be done *ex ante*. Condemning exploitative abuse due to simple consumer surplus extraction will create hesitation for determining an undertaking’s optimal prices for their products, and this may impair market efficiency, which can also benefit consumers.

3.1.2.1.3 “Perfect competition” as a benchmark

“Perfect competition” can be considered as a benchmark to answer the question in which alternative state of competition the consumer welfare should be compared to decide whether they are being exploited by dominant undertaking. Which will imply that pricing at marginal cost[525]. In competitive markets, the price of goods or serviced tends to equal marginal cost of production. When production represents consumer preferences, firms produces at an allocatively efficient level. While, in markets where firm enjoys substantial market power (i.e., a dominant position), the equilibrium price (monopoly price) tends to equal marginal revenue, exceeding the marginal cost and thus leading to allocative inefficiency (deadweight loss) and producing a wealth transfer from buyers to the dominant firm (increasing of producer surplus)[526]. In addition, perfect competition does not occur in the real world, requiring pricing at marginal cost is the same as stating that dominant firms should not be free to charge prices at the level they choose. However, it has been challenged that supra-competitive prices will attract new competitors, and this requirement (pricing at marginal cost) could distort incentives to invest and innovate[527].

[525] LANDES/ POSNER, p. 937; AHLBORN, Christian and PADILLA, A. Jorge, “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law”, in C.D. EHLERMANN AND MEL MARQUIS (eds.), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC, (Hart Publishing, 2008), p. 13, 18 available at https://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Padilla-Ahlborn.pdf (last visited 12.08.2017).

[526] See LANDE (1982), p. 74-80.

[527] MOTTA/ De STREEL, p. 17,18, EVANS, David S. and HYLTON, Keith N., “The Lawful Acquisition and Exercise of Monopoly Power and its Implications for the Objectives of Antitrust”, 4 COMPETITION POLICY

3.1.2.1.4. Direct harm to consumer is sufficient condition, exploitative abuse does not require injury to competition

ODMAN BOZTOSUN[528] and ASLAN[529] suggest that dominant undertaking's conduct that cause a direct harm to consumer should be deemed anticompetitive under Article 6, since objective of Turkish Competition policy is to enhance consumer welfare.

Likewise, The Board's interpretation suggests that direct harm to the consumer is the main characteristic of exploitative abuse. There is no requirement of injury to competition. However, the Board abandoned the assessment that tying can be pure exploitative abuse. Considering the date of the decision wherein exploitative abuse by tying practice was accepted, it runs into the acceptance of Guidance on the Commission's Enforcement Priorities in Applying Article 102 of the TFEU to Abusive Exclusionary Conduct by Dominant Undertakings that brought emphasis on exclusionary practice and perceived by the Board in a way that competition law concern is limited only to exclusionary abuses. Since then, the Board evaluated exploitative abuses only in excessive pricing decisions.

However, excessive pricing is rarely condemned due to the Board's reluctance to regulate prices using general competition law powers. We had concluded above: intervention for excessive pricing only is accepted where there are significant barriers to entry where the self-correcting mechanism of market is not available. In the absence of these conditions, competition is usually the preferred method to remedy excessive prices, due to the difficulties in identifying and monitoring a competitive price. If one considers the Board's reluctance to intervene in exploitative abuse, then a simple case of direct harm would not be embraced by the Board. Nevertheless, applying underlying reasons to interfere with excessive pricing suggests that exploitative tying should raise antitrust

INTERNATIONAL 2 (2008), p. 46, 47, available at https://ssrn.com/abstract=1275431 (last visited 12.08.2017).; MARTÍN-LABORDA, p. 13.

[528] ODMAN BOZTOSUN, p. 127, 128.

[529] ASLAN (2011), p. 277-279.

concern, provided the self-correcting mechanism does not exist for the source of the exploitation (market failures, for instance), namely information asymmetries in tying cases.

Considering above all mentioned alternative formulations for the definition of exploitative abuse with the emphasis on the aim to protect competitive process, we suggest that 1) due to only consumer surplus extraction (even if it causes further consumer surplus extraction than single monopoly pricing can), tying should not be regarded as exploitative abuse; 2) consumer choice will be more relevant parameter to determine whether tying practice leads to exploitative abuse; 3) due to the goal of "protection of competitive process", the requirement of "injury to competition or distortion of competition" should not be limited to "exclusion"; rather, it should be interpreted to mean that competition law requires examination of whether exploitative abuse occurs from distorted competition in addition to exclusion. The latter purpose draws a distinction from consumer law. In addition, the chosen remedies by competition authorities, who have ability to consider market structure as a whole rather than a single firm conduct, would be complementary to consumer law application.

Furthermore, excessive pricing analysis under competition law suggests that lack of self-correcting mechanism in the market requires intervention through competition law. This approach guides us to understand that competition policy, which aims at protecting competition, is not limited to "injury to competition" requirement, but also suggests detecting the "source of the exploitation". Therefore, for the determination of competitive harm or exploitative abuse we infuse the "source of the exploitation" criterion in tying cases in a way that addresses the "market failures".

Moreover, the approach to excessive pricing under antitrust analysis also verifies that a pure supra-competitive price or monopoly pricing does not result in anticompetitive harm. Thus, proper determination of exploitative abuse should not be based on merely consumer surplus extraction or solely outcome of the conduct. An overarching definition should cover possible related dimensions of consumer welfare. Since tying is imposed on consumers, we conclude that the focus should be on "consumer choice". Therefore, we suggest that exploitative tying should be determined as (1) either a tying practice distorts the consumer choice, or (2) it could be imposed due to the distorted choice (in the instance of market failures). These two together we refer to as "restrain in freedom of consumer choice".

Developing a definition of exploitative abuse will also be consistent to follow an objective that promote efficiency and increase consumer welfare, because this approach does not include only consumer surplus but covers consumers' utility, their satisfaction, so to say all aspect of consumer preferences. Nevertheless, this chapter also provided an insight that "consumer preference" has decisive role in the separate product requirement and market definition in the tying antitrust analysis.

3.2. Joint Dominant Position

3.2.1. The concept of joint dominant position

Article 6 of the TCA prohibits the abuse by one or *more undertakings* of their dominant position *through agreements with others or through concerted practices*. Article 102 of TFEU also prohibits collective dominance, yet there is important difference between Article 6 of the TCA and Article 102 of TFEU. The latter does not require concerted practice or agreement for the joint dominant position, but "the undertakings concerned must, *from an economic point of view*, present themselves or act together on a particular market as a collective entity"[530].

Article 102 of TFEU envisages the situations where abusive behavior originating from one or more undertaking which collectively hold a position of economic strength on the market, and there does not need to be an agreement between them, and behavior not necessarily caught by Article 101 TFEU.

[530] See Discussion Paper, n. 20, 44 (emphasis added).

However, letter of Article 6 blurs the distinction between the application of Articles 4 and 6, and further limits prohibition of abusive behaviors that fall outside the scope of behaviors through agreement or concerted practice.

In Turkey, majority argues that joint abuse of dominant position should omit from scope Article 6, because it should not treat as unilateral conduct, it would be proper if they should treat either under Article 4 or concentration concept[531]. Nonetheless, it is noted that effective supervision is necessary for joint dominant position, especially in Turkey where has high degree concentration and given the prolonged consequences of the inflationist effects of joint dominance practice[532].

Article 6 does not foresee any criterion of how a joint dominant position should be considered. When we examine the implementation of the Board, a few decisions that addressed a joint dominant position, which can be termed tight oligopolies in all cases[533]. In these cases, there were only 3-5 undertakings in the relevant market, and this situation was held to be sufficient for them to establish collective dominance. The Board did not clarify the characteristic of the relations among the undertakings[534].

For the application of Article 102 of TFEU in the concept collective dominance, the criteria developed by the Court of Justice of the European Union, and the relevant case law is reiterated in Commission Discussion Paper[535]. Therein, "collective entity" concept and "incentives to tacit collusion" and the

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[531] See ODMAN BOZTOSUN, p. 121, ÖZKAN (2014), p. 25; KEKEVİ, H. Göksin, Anlasma, Uyumlu Eylem ve Birlikte Hakim Durumun Kötüye Kullanilmasinda Kolaylastirici Eylemler [Facilitating Practice for Agreement, Concerted Action, and Joint Dominant Position], Rekabet Kurumu, Ankara 2003, p.64, 65; TEKDEMİR, Yasar, "AT Rekabet Hukuku Işiğinda 'Birlikte Hakimiyet' Kavrami: Oligopol Sorununa Yeni Bir Yaklaşim [The Concept of 'Joint Dominant'' in the EC Competition Law: A New Approach to the Oligopoly Problem], Persembe Konferanslari (Mart 2000), p.31-33. See O'DONOGHUE/ PADILLA, n. 7956 (noting that mergers and acquistions that create or strengthen situations of collective dominance are subject to merger control laws, yet merger control laws can onl tackle the problem of collective dominance as and when transaction happen to arise).

[532] SANLI, p. 256-259; ASLAN (2017), p. 692.

[533] See ASLAN (2017), p. 692-695.

[534] See Board decisions dated 14.12.1999 and numbered 99-57/ 614-391; dated 17.07.2000 and numbered 00-26/ 292-162, dated 26.04.2001 and numbered 01-21/ 191-49.

[535] See Discussion Paper, n. 43-50.

conditions to sustain tacit collusion (1- market transparency; 2- mechanism of retaliation; 3- lack of competitive pressure from outsiders to the oligopoly) are emphasized.

However, neither Guidance (2009), not Guidelines (Dominant Position) explain abuses of joint dominant position, instead focus on single firm dominance.

3.2.2. Abuse of joint dominant position

Neither being single dominance nor being collectively dominant is not illegal in itself. Nonetheless, if joint dominant position is proved, then behavior of each undertaking is in principle subject to under Article 6 and abuse of their joint dominant position will be deemed illegal. However, noteworthy uncertainties arise in abuses of joint dominance under Article 6.

First, Article 6 should not deal at all with agreement or concerted practice that falls under Article 4, but parallel to suggested application Article 102 of TFEU, which deals with collusive conduct that cannot be caught by Article 4. Otherwise, it blurs the important distinction between unilateral conduct and collusion and the relevant provisions of the TCA envisaging with these two types of anticompetitive conduct.

Second, the abusive character of the conduct should not be inferred only from the joint dominant position of firms that raise prices above a competitive level. Monopoly pricing is not illegal in itself for a single dominant firm, thus prices above the competitive level under an oligopoly should not be deemed abusive on their own; additional proof of abuse is needed[536].

Third, it is unclear whether one undertaking in an oligopoly market can commit an abuse even though other undertakings do not act in similar way. EU case law suggests in this situation that the factor to be considered is whether the

[536] See O'DONOGHUE/ PADILLA, n. 8515 (stating that condemning mere participation in oligopolies is impractical and induce firms to behave irrationally).

conduct is the manifestation of the collective dominant position, i.e., the conduct should be part of a tacitly agreed course of action and not merely unrelated conduct that an individual firm happens to carry out in an oligopolistic market[537].

Finally, in practice, it will be unusual that an exploitative abuse could be committed by one of the joint dominant firms acting alone, but it is more common for abuses of collective dominance that the firms concerned tacitly collude to exclude firms that do not form part of the oligopoly, thereby maintaining or strengthening their overall dominant position[538]. Herein, exclusionary abuse can be accomplished even by one firm. However, to be linked to an abuse of joint dominance, there must be proof that the conduct of one undertaking is part of a tacitly agreed course of action[539].

Since tying practice is common, it is likely that it also occurs in usually highly competitive markets. Evidence that there are only 3-5 firms in the market and they offer similar tie should not establish joint dominance in those instances. On the other hand, it is true that in the situations where similar tie-ins are imposed, consumers will not be able to assemble their preferred tying and tied product combinations. It is more likely that the consumer will consider the overall price and utility of two or more consumable goods tied or durable plus consumable package at the issue. In this case, antitrust concern should be focus on whether consumers are aware of their utility of purchasing tying product will exceed their loss that arise from not being able to purchase otherwise preferred tied product. Provided consumers have sufficient knowledge about this trade-off and switching cost, there is no need for intervention. Nonetheless, objective business justifications or efficiencies can exit, thus similar tying might be imposed not due to collusion, but based on each firm rational behavior.

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[537] See General Court decisions, Case T-228/97, Irish Sugar plc v. Commission [1999] ECR-II-2969, para. 66; Case C-393/92, Gemeente Almelo and others v. NV Energiebedriff Ijsselmij [1994] ECR I-1477. See also O'DONOGHUE/ PADILLA, n. 8147-8235; ASLAN (2017), p. 692.

[538] See General Court *Compagnie Maritime Belge Transports AS and others v. Commission* decision, Joined Cases T-24/93, T-25/93, T-26/93, T-28/93 [1996] ECR II-1201, para. 98, 187.

[539] See O'DONOGHUE/ PADILLA,, n. 8515.

Imposition of similar tie-ins often also occur in aftermarket tie-ins. However, therein, it is likely that foremarkets will be highly competitive, while aftermarkets will be determined for each brand in the relevant market. Thus, it will be unlikely to establish joint dominant position. Nevertheless, competition authorities should take necessary measures to ensure that consumers are aware of the cost of gathering their desired combination of tying and tied products at the time of purchasing.

CHAPTER FOUR

INQUIRY OF UNILATERALLY IMPOSED EXPLOITATIVE TYING

After we determined exploitative abuse in tying cases as the conduct that results in restraining the freedom of consumer choice, in this chapter we elaborate the studies and denoted circumstances that suggest tying can be exploitative. This chapter questions whether the common understanding, including the Board's approach, that tying conduct is exploitative only when it is exclusionary, has merits. We remark that the suggested exploitative effect of tying induced price discrimination is limited to certain circumstances and merely focus on the outcome of the conduct and equates consumer welfare to consumer surplus. Therefore, to reach a conclusion, we will analyze whether theoretical conditions to hold exploitative effect of tying is applicable to concrete cases. There is no obstacle that the Board may find tying practice exploitative due to mere consumer surplus extraction, but we will test our suggestion that consumer choice as a relevant parameter is better suited through our reading of concrete cases. While doing so, we aim to answer whether a conduct found to be abusive should also be exclusionary to be exploitative in tying cases.

1. ASSESSMENT OF COMPETITIVE EFFECTS

1.1. Tying Induced Intra-Product Price Discrimination (Metering Pricing)

1.1.1. Tying durable goods with consumable goods

The given classic example is when a seller ties a durable product (printer) to a consumable product (ink). As we mention above under tying practice, the seller will offer the tying product at a discount, but will raise the tied product price at supra-competitive level. Current proposition of welfare effect studies of metering pricing, whether such tying practice should raise antitrust concern, is based on categorization of price discrimination that tying facilitates.

ELHAUGE and NALEBUFF challenges that third-degree price discrimination has a direct analogy for metering pricing practices, due to welfare effects of it. Because metering pricing allows the seller to sort consumers of tying product into different groups (based on their number of tied product purchases) and charging each group a different effective price for the same product (by inflating price of the tied product)[540]. Thus, it leads to reallocation of some outputs from high-value consumers to low-value ones like third-degree price discrimination. Such studies[541] on welfare effects of third-degree price discrimination suggest that price discrimination practice will reduce consumer welfare, unless it increases output. They conclude that output increase is a necessary condition for metering tie-ins to not to reduce consumer welfare[542]. However, one should be aware that direct analogy from welfare effects of price discrimination studies in metering tie-ins has a difficulty, i.e., while studies on price discrimination content output of one product, in tying practice two products are involved. Their economic model proposes that welfare effects of metering tie-in should be measured with tying product (durable good) output[543]. Under their model, even though the durable goods output is a *necessary* condition to show that a metering tie increases consumer welfare or total welfare, it is not *sufficient* condition unless it increases overall output *and* the size of that output increases offsets the welfare harm from reallocating some output from higher-value buyers to lower-value buyers[544].

Based on classic categorization of price discrimination schemes, the difference between second-degree and third-degree price discrimination lies on the price schedule to consumers. Within second-degree price discrimination, seller sells product or service under a single price schedule, but the price differs related to consumers' consumption pattern[545]. However, under third-degree price

540 ELHAUGE (2009), p. 431; ELHAUGE, Einer and NALEBUFF, Barry J., "The Welfare Effects of Metering Ties (June 2016)", HARVARD PUBLIC LAW WORKING PAPER No. 16-20, available at http://ssrn.com/abstract=2591577 (last visited 20.07.2016) [hereinafter ELHAUGE/NALEBUFF (2016)].
541 See SCHMALENSEE, Richard, "Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination", 71 THE AMERICAN ECONOMIC REVIEW 1 (1981), pp. 242-247, available at http://www.jstor.org/stable/1805058 (last visited 27.06.2017).
542 ELHAUGE/ NALEBUFF (2016), p. 2.
543 ELHAUGE/ NALEBUFF (2016), p. 2,6.
544 ELHAUGE/NALEBUFF, p. 2,3 (emphasizes in original).
545 HOVENKAMP/ HOVENKAMP (2010), p. 935; LAMBERT (2011), p. 26. See also KLEIN/ WILEY, p. 612. Another reasoning of the acceptance of metering ties as a form of second-degree price discrimination see HOVENKAMP/ HOVENKAMP (2010), p. 936 ["Customers may all purchase a single printer but use it by differing

discrimination, seller divides consumers into groups before the sell and charges the different prices for each group[546]. Regarding this traditional categorization, HOVENKAMP/ HOVENKAMP and LAMBERT claim that the assumption, analogy of third-degree price discrimination welfare effect (always reduces consumer welfare and likely to reduces total welfare) for metering ties-ins is invalid[547].

It has been accepted that third-degree price discrimination is likely to reduce total welfare, unless increase output by generating purchases by a category of consumers who would not buy the product or service at a uniform monopoly price, but will buy at a discriminatory price to enjoy the discount on the product or service[548]. This condition (increasing output) is not necessary for the second-degree price discrimination, because a reduction in the fixed costs (cheaper tying product) and an increase in variable costs (above the competitive price tied complements) are together, it will cause different welfare effects for consumers who have different usage rates of tying product[549]. Basically, for low-intensity users, it generates greater consumer surplus as lowering price of tying product[550],

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amounts, in which case the customer's average cost of using the printer (i.e., the per-print price) decreases as the total amount of use increases…Thus, the tie operates as a quantity discount: the more you print, the less you pay per page. This is exactly the sort of situation that occurs under second-degree price discrimination."].
HOVENKAMP/ HOVENKAMP (2010), p. 933,934,936; LAMBERT (2011), p. 26.

546 See HOVENKAMP/ HOVENKAMP (2010), p. 934, 936, 937; LAMBERT (2011), p. 27.

547 See HOVENKAMP/ HOVENKAMP (2010), p. 935-938; LAMBERT (2011), p. 28-31.

548 LAMBERT (2011), p. 27, 28. See also HOVENKAMP/ HOVENKAMP (2010), p. 938 ("The fact that purchases are reallocated under tying does not prima facie imply that consumer welfare is harmed. In fact, because the price cut applied to the tying product is more significant to lower-use customers, they often benefit from tying even if they purchase fewer units of the tied product.").

549 LAMBERT (2011), p. 26, 30. See KLEIN/ WILEY, p. 613 (stating that "[t]he essential economic determinant of how closely using an aftermarket metering arrangement can approximate increases of perfect price discrimination is the accuracy measuring intensity of package demand above the non- price. If the meter is highly accurate in this regard, to high-intensity users will not result in the loss of intensity users. The meter will merely increase the package high-intensity users in a way that collects varying levels surplus. On the other hand, sales to low-intensity users package price will expand.").

550 It is assumed that additional consumer surplus gained from cheaper tying product(CS_{tying}) is bigger that consumer surplus loss on increased tied product (CLS_{tied}) x unit of tied product (U_{tied}). For instance, under single monopoly pricing tying product (a printer) is 100 liras, while tied product competitive price is 5 liras. With tying, printer price falls 70 lira, whereas ink price begins to sell 10 liras. Therefore, for one cartridge users: (CS_{tying}) is 30, (CLS_{tied}) is 5 liras. Furthermore, cheaper tying product brings into market new consumers (whose reservation prices were lower than uniform monopoly price of tying product but higher than tying price) that would not be into market absent tying, thus increase output too. Continuing the same example, who values the printer between 85-100 lira and uses up to 1-3 cartridges will enter into market. *Compare* HOVENKAMP/ HOVENKAMP (2010), p. 943, 944, 948.

also medium-intensity users will obtain consumer surplus[551], while for high-intensity users it probably generates a consumer surplus loss[552]. Therefore, welfare effects of metering tie-ins as second-degree price discrimination depends on the concentration of low-, medium, and high-intensity users in the market[553], and how accurately meter is refined[554].

Furthermore, it is contended that, even though second-degree price discrimination produces distortions from perfect competition, it is different than third-degree price discrimination incidences, i.e., second-degree price discrimination allows the consumers to change "the level of the ratios of the price to marginal cost they have been charged"[555] depending on their consumption[556]. Moreover, in second-degree price discrimination, as the number of the classification increases, the scheme comes near to first-degree (perfect) price discrimination, thus output is likely to increase toward to the competition level[557]. However, in practice it is rare to reach perfect price discrimination kind of scheme, variable proportion (metering) ties theoretically allows an infinitive number of degrees depending on the number of tied units that consumers buy[558].

Regarding to categorization of metering tie-ins, we agree with ELHAUGE and NALEBUFF approach that offers other categorization for metering pricing and rejection of general assumption of welfare enhancing effect of it, based on

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551 As long as their (CS_{tying}) is bigger than (CLS_{tied}) x (U_{tied}). *Compare* HOVENKAMP/ HOVENKAMP (2010), p. 946, 952.

552 Since (CLS_{tied}) x (U_{tied}) will exceed the (CS_{tying}). *Compare* HOVENKAMP/ HOVENKAMP (2010), p. 949, 952.

553 See HOVENKAMP/ HOVENKAMP (2010), p. 945-949, 952; LAMBERT (2011), p. 30, 31. See also BURSTEIN (Full-line Forcing), p. 626,627 (noting that under uniform tying requirement only marginal consumer would be fully exploited, supramarginal consumers would retain consumer surplus from the use of the tying good).

554 See KLEIN/ WILEY, p. 613. See also HOVENKAMP/ HOVENKAMP (2010), p. 941.

555 See HOVENKAMP/ HOVENKAMP (2010), p.938 ("Both economists and others often use the term 'price discrimination' to mean charging different prices to two different groups, or for two different classes of sales. More technically, it is commonly defined as sales at differing ratios of price to marginal cost, or as prices that have different percentage markups in relation to cost."). See also KLEIN/ WILEY, p. 603 ("…economic definition of price discrimination, whereby a firm takes advantage of differing elasticities of demand for similar goods by charging different profit-maximizing prices relative to cost.").

556 It is not possible for third-degree price discrimination, because consumers cannot change in which segmented group they are unless change their title such as becoming student or senior citizen etc. See HOVENKAMP/ HOVENKAMP (2010), p. 935.

557 See also KLEIN/ WILEY, p. 612, 613; HOVENKAMP/ HOVENKAMP (2010), p. 935.

558 HOVENKAMP/ HOVENKAMP (2010), p. 935.

the analogy from classic second-degree price discrimination. Determined categorization depends on the preferred characteristic. If one accepts for categorization that ex-ante division of the consumer population determine the price discrimination whether it is second- or third-degree, then metering tie-ins fall under the former, but one contends that distributive inefficiency is the criterion for this determination, then metering tie-ins should be classified as third-degree price discrimination. Because, it *does* reallocate output from high-value consumer to low-value consumer[559].

The proposition that metering tie-ins has similar welfare effects to second-degree price discrimination is based on the presumption that who has higher reservation price also has higher value for per printed page[560]. For instance, consumer X values the printer 100 liras, and values the per printed page 1 lira; while consumer Y values the printer 50 liras ad values each printed page 0,50 lira. This presumption follows that there is a perfect correlation between the usage rate the consumer desire and the consumer's average value per page. Thus, the suggested economic model does not include whether there is a consumer values the printer 100 liras, but value per usage 0,50 lira or a consumer that whose reservation price for printer 50 liras, but per usage 1 lira.

Even though, an economic model can be developed that includes that number of the consumable units desired and the value per unit vary separately. This model would be able to offer the conditions that can lead to a net welfare effects of metering tying[561]. Which means a proposition that not to *compensate*

[559] See HOVENKAMP/ HOVENKAMP, p. 951- 954 (observing that seller expects profit from high-intensity consumers' purchase to offset his surplus loss from medium-intensity users, and expects to offset output reduction which occurs under tying as result of medium and high-intensity users purchase fewer units of tied product by purchases of the new entered low-intensity customers, but ignoring that this means also reallocation of output form high-value consumers to low-value consumers).

[560] See HOVENKAMP/ HOVENKAMP, p. 944-951; LAMBERT (2011), p. 37-41.

[561] See ELHAUGE/ NALEBUFF (2016), p. 28-33 (They suggest a more realistic model that the number of consumable units desired and the value per unit vary separately and they adopt a lognormal distribution of buyer usage rates. Under their assumption, the lognormal distribution offers a good fit for the distribution of income and firm size, and thus to extent that desired usage is proportional to income or firm size, it is appropriate. Based on this assumption, they purpose that profitable metering ties always reduce consumer welfare, while the results for total welfare depend on the cost and the dispersion level: With zero capital good costs, metering ties will lower total welfare unless they increase output of the tying product by more than 37%; and when capital costs are positive , metering will reduce total

the alleged consumer surplus loss occurs from high-value users, but the necessary and sufficient conditions that leads not to decrease *aggregated consumer surplus*. Moreover, these conditions require a trade-off between consumer surplus loss from high-value consumers and consumer surplus gain from low-value users. This is the point we disagree that antitrust enforcement is a proper tool for intervention whereby wealth transfer between consumers.

It has been observed that antitrust enforcement may have shortcoming to deal with distributional issues in this concept and consumer surplus standard provides only "a very poor approximation to a welfare measure that weights impacts using ordinary notions of distributional preferences" and one of the handicap of this standard is insisting that they count equally all the consumers. However, "distributional concerns would suggest weighting the impact on the poor more heavily", whereas the rich and poor consumers are affected differently by an antitrust decision[562].

Furthermore, it has been challenged mostly by total welfare (surplus) standard supporters that antitrust law is limited in its ability to achieve distributive objectives, as it has most indirect means. Furthermore, even the consumer welfare standard cannot accomplish this task, because it embraces all consumers (rich and poor). However, the wealthy benefit relatively more than the poor do from competitive pricing, since they consume more and the benefits of competitive pricing tend be proportional to consumption, which rises less than proportionally with income, thus enhancing consumer welfare generates greater gains to those already economically more affluent[563].

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welfare unless they increase sales of the tying product by 30% which arises when the distribution in buyer usage rates exceeds 0.62.Moreover, with lognormal distribution of usage rates, reasonable costs, if 3% or more of metering profits are dissipated, metering ties will lower total welfare for all costs levels unless the dispersion of desired usage is above 0.79, which is more than the dispersion of income in the United States).

[562] FARRELL/ KATZ, p. 11, 12. (They are also remarking when the market is not a final-goods market, consumer surplus standard favors buying firms over selling firms).

[563] KAPLOW (The Choice of Welfare Standard), p. 5, available at http://www.law.harvard.edu/programs/olin_center/ See also BAKER/ SALOP, p. 1-3 (showing data that in last two decades the economic growth has been effectively arrogated to those already well off).

Nevertheless, there is consensus that metering tie-ins reduces consumer surplus (at least harm high-intensive users) either it is considered second- or third-degree, and its effect on output is ambiguous. Even if the output effects were precise, we do not see why this presumed welfare effects should be the basis for antitrust enforcement. Indeed, almost in all jurisdictions, “increasing price as decreasing output” is assumed harm to consumer or anticompetitive. However, the handicap of the studies on welfare effects of price discrimination or tying induced price discrimination practices is that they use “perfect competition” or “perfect price discrimination” as a benchmark. Creating an economic model and purposing metering tie should be deemed anticompetitive if it reduces X% consumer surplus unless increase Y% tying or tied product output, is only useful if the competition policy is “maximizing consumer surplus” or aiming “perfect competition”.

Our understanding does not suggest that the goal of competition is maximizing consumer surplus or allocative efficiency. Nor do we suggest that *merely* consumer surplus extraction or supra-competitive prices should be deemed exploitative abuse. Price-based exploitative abuses should raise antitrust concerns on the grounds that the source of the exploitation is not the market power obtained through efficiency, but is facilitated by market failures.

In addition, we did not detect any court decision that stated tying induced price discrimination, in this instance, second- or third-degree price discrimination increases of output or surplus of low-value user should be X amount to offset the Y amount of consumer surplus extraction from high-value users. We do not expect to see this either. If we recall mostly cited court decisions that addressed metering tying[564], we can explain better.

For instance, in International Salt Co., Inc. v. United States[565], the Court determined a tying arrangement because the International Salt Company (the Int. Salt. Co.) leased its patented machines “Fixator” and “Saltomat” (the tying

[564] See ELHAUGE (Rehabilitating Jefferson Parish), p. 473; BORK (The Antitrust Paradox), p. 376-377.
[565] International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

products) on the condition that the buyer purchases the unpatented salt products (the tied products) to use with its machines from the Int. Salt. Co.[566]. It is worth to note that provisions in the Lixator tying contract foresee that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market; if the appellant did not receive the salt at an equal price, as in the Saltomat tying contract, the lessee was entitled to the benefit of any general price reduction in lessor's salt tablets[567].

The Court determined that the Int. Salt Co. closed the salt market to the competition when it tied its patented machines to unpatented salt[568]. The tying arrangement was condemned as it was a *per se* violation of Section 1 of the Sherman Act[569] and Section 3 of the Clayton Act[570]. There was no indication that the Int. Salt Co. had monopoly power on the tying product or the Court did make requirement for it[571]. The Court determined that the volume of business affected was not insignificant or insubstantial, by virtue of the sales of salt products for use in the machines[572].

The Court did not accept that the price-protection clause in the "Lixator" contract can save the tying arrangement from unreasonableness, because it does not stop the anticompetitive effect of the agreement on competition[573]. The Court did not agree with the Int. Salt Co. argument that the tying was necessary to

[566] See *id.*, at 395, 396.
[567] See *id.*, at 396, 397.
[568] See *id.*, at 395, 396.
[569] "…it is unreasonable *per se* to foreclose competitors from any substantial market…The volume of business affected by these contracts cannot be said to be insignificant or insubstantial…" (*id.*, at 396).
[570] "…the tendency of the arrangement to accomplish of monopoly seems obvious…[A]greements which "tend to create a monopoly" being forbidden, it is immaterial that the tendency is a creeping one, rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement" (*id.*, at 396).
[571] Neither actual market for salt machines (whether there were competing machines that available as substitutes for its patented machines) or its market share were considered by the Court. This position of the Court received criticism by the literature, because, thereof there could be no market power in the tying product. TURNER, Donald F., "The Validity of Tying Arrangements under the Antitrust Laws", 72 HARVARD LAW REVIEW 1 (November 1958), pp. 52, 53, available at http://www.jstor.org/stable/pdf/1338363.pdf (last visited 05.04.2017); BORK (The Antitrust Paradox), p. 368.
[572] 332 U.S. 392, at 395, 396.
[573] See *id.*, at 396, 397.

minimize maintenance burden and to guarantee the satisfactory operation of the machines, since the obligation to repair and maintain the machines belonged to the lessor, for the reason that this could be overcome by setting reasonable standards which other suppliers can meet[574].

How can this case guide the Turkish Competition Board enforcement? In several aspects. First, tying (selling or leasing) a durable product to a consumable product – a staple item such as salt – that is largely used in the industry, cannot cause foreclosure share in the tied markets or it is impossible for the seller to attempt to become dominant position in these markets. While the Guidelines (Dominant Position) requires evidence of anticompetitive foreclosure as one of the necessary conditions, it offers limited guidance on specifically what is involved in the case of tying and bundling. It refers to the general factors that apply for other exclusionary abuses: (1) the extent of dominance; (2) barriers to entry (including network effects); (3) the position of the dominant firm's competitors; (4) the position of the customers or suppliers, including, in particular, the pervasiveness of the practice in the market; (5) the scope and duration of the conduct examined: (6) possible evidence of actual foreclosure; and (7) direct evidence of any exclusionary strategy. Furthermore, the Board implementation for tying antitrust inquiry focuses on factors 1) and 2). Therefore, the Board should include in its assessment whether the volume of business affected in the tied market was not insignificant or insubstantial whereas the tied product has a staple character. However, in the factor (5) it is noted that "the higher the percentage of sales affected by the conduct within the total sales in the relevant market, the longer its duration, and the more regularly it has been applied, the greater is the likelihood of market foreclosure". Therein, The Board

[574] 332 U.S. 392, at 397, 398 (referring to International Business Machines Corporation v. United States, 298 U.S. 131). However, the Court does not count the oversight cost that tying firm should burden, if it is the alternative to tying. See POSNER (Antitrust Law), p. 172.

may consider a comparison between the tying firm and its rivals' percentage of the sales of the tied product[575].

Second, it has been remarked that price-protection clause has potential to convert consumers into cartel police who would report to the dominant tying seller, if any suppliers were selling the tied product for below the market price, which was fixed by cartel[576]. The Court did not recognize this issue, yet tying was deemed anticompetitive due to distortion in the tied market even though customer was able to buy tied product at competitive price.

Third, The Board has tendency focusing on abuse and anticompetitive effect rather than market power over the tying product due to procedural economy. Even if the Board becomes aware that in this instance substantial amount of tied sales can be the indicator for abuse instead of foreclosure, the Board should be cautious that market power should not be inferred from this outcome. However, in this instance, lack of market power may still not be sufficient evidence for competitive effect of tying practice. The Board should also count whether the competitors may have using similar tie-ins to detect parallel behavior in the market[577].

In International Business Machines Corporation v. United States[578], leased its patented tabulating machines provided that the lessee's exclusive use of IBM manufactured tabulating cards. IBM challenged that tying was necessary due to quality control, but could not prove that other manufacturers were not able to offer adequate supply of tabulating cards at same or lower prices[579]. What we want

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575 See International Business Machines Corp. (IBM) v. United States, 298 U.S. 131 (1936), at 136, 139 [The Court looked at the average of the gross receipt of the machines and the average sales of the cards per year, and compared sales by IBM (which makes and sells 3,000,000,000 cards -tied product- annually, 81 percent of the total) with the sales by the Remington Rand Company, its only competitor (representing the remaining 19 percent, are approximately 600,000,000) and convinced that IBM's leases "may be to substantially lessen competition"].

576 LESLIE (1999), p. 1785.

577 See GRIMES, Warren S., "Antitrust Tie-In Analysis After "Kodak": Understanding the Role of Market imperfections", 62 ANTITRUST LAW JOURNAL 2 (Winter 1994), pp. 263-325, available at http://www.jstor.org/stable/40844119 (last visited 17.06.2017) [hereinafter GRIMES (The Role of Market Imperfections)]

578 298 U.S. 131 (1936).

579 *Id*., at 134,139, 140.

to draw attention with this case, the government brought the suit against IBM and three other corporations, all manufacturers of machines performing substantially the same functions as IBM's, using similar ties[580]. In fact, the Board has not been able to carry out a successful examination in the case that involved similar complaint.

In a preliminary investigation, the Board evaluated the claim about Hewlett Packard (HP), Lexmark, Canon and Xerox (printer suppliers) tied their own licensed cartridges, toner or ribbon product sales to their printer sales, as refusing the exercise of warranty rights if the customers/consumers have not been used original consumables with their printers[581]. The Board determined that in addition to the licensed (tied) products on the relevant market, there were equivalent and refill products, which have a certain quality that could be substituted by these products[582]. The Board assessed the complaint that distributors, head dealers or technical services of HP, Lexmark, Canon or other printer manufacturers companies make verbal notices to customers during the sale of their products that the printer will be out of warranty if the original cartridge is not used following the depletion of the cartridges within the printer that have a life of about 2 years[583]. Then, the Board looked at the provisions contained in the manufacturer's (cited to HP's) guarantee documents and the booklet which denote that malfunctions and damage caused by non-genuine HP supplies will be repaired by HP services for normal hours and material charges, while damage caused by original consumables is directly covered by the warranty[584].

However, the complainant acknowledged that despite the existence of these provisions in the guarantee document and the booklet, there was opposite *de facto* application in the market. If the technical services of the printer manufacturer companies saw refurbished/ refilled cartridges/ toner/ ribbon in the printer, they

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[580] *Id.*, at 132.
[581] The Board decision dated 17.6.2004 and numbered 04-42/ 490-118 (hereinafter Printer Suppliers decision).
[582] Printer Suppliers decision, p. 6.
[583] Printer Suppliers decision, p. 6.
[584] Printer Suppliers decision, p. 6,7.

do not repair those damages even in the event of a failure not caused by the non-original consumable usages and they keep the printer out of warranty[585].

In the investigation, the Board concluded that since non-original cartridge is used by the complainant, there is no *document* showing that the malfunctions that occur in the printer and damage not caused by the cartridge are excluded from the warranty[586]. However, in the investigation, it was clear that a customer/ consumer who was subject to such an application, the notification was made verbal.

Once again, the Board did not explain whether alleged tying practice is addressed under Article 4 or Article 6 of the TCA. Since there was no showing in the decision that the Board assert collusive or parallel behavior between the printer suppliers, it is assumed that the case was handled according to Article 6[587]. It can even be said that Board merely focused on HP's practices (which has a higher market share). The Board was convinced that HP did not have intention to force consumers to use original consumable goods, due to HP statement that HP has sent a letter to the responsible persons in charge of sending a warning to the technical service to prevent any application from happening individually in the direction claimed by complainant[588].

Therefore, the Board failed to assess tying practice comprehensibly and overlooked whether there was parallel behavior. Even if, rigid competition exists between the competitors, the Board may find necessary a market inquiry to understand better whether this practice occurs due to natural character of the market or due to asymmetric information problem in the demand-side.

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585 Printer Suppliers decision, p. 7.
586 Printer Suppliers decision, p. 7, 8.
587 See ARDIYOK, Sahin, "Motorlu Taşıtlar Tebliği'nin Rekabet Hukuku ve Satış Sonrası Pazar Teoriler Analizi [Competition Law and Aftermarkets Sale Theory Analysis of the Communiqué on Motor Vehicles], Rekabet Hukukunda Güncel Gelismeler Sempozyumu – V, Rekabet Kurumu Yayınları, Ankara 2007, p.19.
588 Printer Suppliers decision, p. 8.

More importantly, the Board only considered market shares of the printer suppliers in the tying product (printer) market and in the tied products (printer toner, cartridge and ribbon) market[589]. However, it was not the market power over the tying product that may force consumers to use original cartridges or toner in their printer, but the market power over in the aftermarket services. Consumer received the printer with original cartridges, sufficient for 2 years average consumption. According to the booklet, if they use non-original inks, their printer would not be out of warranty automatically. They faced with this implementation when they needed aftermarket service. The Board investigation did not include the determination of neither the warranty services market nor the market power in there.

Northern Pacific R. Co. v. United States[590] was the case in which the Court determined a tying arrangement ("preferential routing clauses") in land sales contracts and leases, regarding the Northern Pacific required buyers and lessees to use also transcontinental railroad lines to ship over all commodities produced or manufactured on the land and condemn the tying arrangement as finding *per se* violation of the Section 1 of the Sherman Act[591]. The contracts provided a price-protection clause that the rates charged would be equal or better than those of competing carriers and the land was sold at the market rate (and also, in some instances, the vendee or lessee is permitted to ship by competing carrier, if its service is better)[592]. Evidence of market power was not required by the Court[593], which held that "sufficient economic power" over the tying product is able to restrain free competition in the market for the tied product[594].

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[589] Printer Suppliers decision, p. 3-5.

[590] 356 U.S. 1 (1958).

[591] 356 U.S. 1, at 3-4. The tract of the land was the tying product and the use of the railroad was the tied product.

[592] *id.*, at 7 (fn.: 6), 11.

[593] But it is assumed by the virtue of Northern Pacific's extensive landholdings (*id.*, at 7).

[594] "They [tie-ins] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected." (*id.*, at 6 and also see *id.*, at 11). *Cf.* see dissenting Justice Harlan and two other justices join (*id.*, at 14-19) (disagreeing the making inferences from merely based on appellant's (Northern Pacific) landholding without showing the proportion of Northern Pacific lands of various types to the total of the lands of the same types sold and leased in the area of the defendants' operation or no findings of the uniqueness of any of

The Court did not consider metering pricing effects of tying, yet in the literature it is suggested that Northern Pacific case involved metering pricing[595]. It is also noted that cartel facilitation features of a meeting-competition clause (such as in the Int. Salt case) was presented[596]. Furthermore, it is also suggested that tying in the Northern Pacific case had a role for evasion of price regulation[597].

The last proposition was made by BORK, who indicated that Northern Pacific might have used the tie for undercutting the fixed-rail charges that were set by Interstate Commerce Commission (ICC)[598]. This is an important finding that may support why competition authorities should not reject an inquiry merely because the alleged exploitative practice occurred in a price-regulated market. In previous decisions, the Board chose such an approach that any inquiry was rejected because alleged excessive pricing took place in the price-regulated sector[599]. Hence, it shows that for tying practice that occurs in sector regulated market, it requires special concern from competition authorities[600]. The sector specific regulator may not be aware of this effect of tying practices, and solely be concerned with the price of the tying product. Therefore, a generalist competition authority can screen such behavior. We do not suggest that when the competition authority determines such a behavior, they should also impose

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the appellants' lands either because of the location or the qualities of the production (superior mineral, timber, or agricultural products) in there. Also, criticizing (*id.*, at 20) not following the request that monopoly power (or dominance position) in the tying product for violation of the Sherman Act as stated in *Times-Picayune*, but not saying so "a monopoly power in the sense of § 2 of the Sherman Act must be shown over a tying product", but "*sufficient economic power* in cases of this kind could be based upon a variety of factors, such as significant percentage control of the relevant market, desirability of the product to the purchaser, use of tying clauses which would be likely to result in economic detriment to vendees or lessees, and such uniqueness of the tying product as to suggest comparison with a monopoly by patent").

595 See GRIMES (The Role of Market Imperfections), p. 300, 301.

596 *Id.*, p. 301.

597 BORK (The Antitrust Paradox), p. 376.

598 BORK (The Antitrust Paradox), p. 376

599 See Board decisions dated 8.3.2002 and number 02-13/ 127-54; dated 29.06.2006 and numbered 06-46/ 601-172; dated 30.10.2008 and numbered 08-61/ 996-388.

600 This effect has been recognized by the Guidelines (2009), n. 92. Yet, since the Guidelines addresses merely exclusionary tying practice, here we draw attention of the Board for considering this effect for the exploitative tying practice as well.

sanctions. It will be more efficient and appropriate if the competition authority co-operates with the sector specific regulator[601].

GRIMES offers an approach to antitrust analysis of ties that include the roles of market imperfections and market share in the tying product, and comparing possible results from the interaction of the two key variables[602]. He concludes that market imperfection coupled with high market share poses an anticompetitive risk against static and dynamic efficiencies, and even though the tying firm lacks high market share, whether the collective market share of all sellers use a tie can be indicator for likely harm from cartel facilitation or market foreclosure[603]. His proposition for integrating market imperfections into tie-in analysis[604] was based on the presumption that ties can undermine consumer demand quality[605] when buyer is not a frequent purchaser of the tying product; or purchase of the tied product is deferred (and the seller controls the price of the tied product); or the tying product (not the tied product) is the major object of the buyer's purchase[606].

We share the concern with respect to questioning whether competitors may have seen using similar ties, but we do not agree with Grimes's theory that "tying complicates/confuses buyers while making it more difficult for them to compare

[601] See BORK (The Antitrust Paradox), p. 381.
[602] See GRIMES (The Role of Market Imperfections), p. 273.
[603] *Id.*, p. 273 (It is called dual Market imperfections/ Market power test that is premised on a tie causing substantial injury to static or dynamic efficiency should be prohibited and it assumes ties are harmful when either of two preconditions are met: 1- as the result market imperfections, the tie causes competitive injury that would be caused in the absence of a tie; or 2- as the result of the share that the tying seller possesses in the market the tie causes competitive injury in any of a number of ways. And it accepts only one exception that the efficient bundling of products sought by informed consumers, ties are likely to have few significant procompetitive benefits that cannot be attained in less anticompetitive ways. I*d*., p. 292-297).
[604] GRIMES (The Role of Market Imperfections), p. 273 ("Any departure from perfect competitive conditions may be called a market imperfection. In the context of a tie, market imperfections should be a concern to antitrust only to the extent that the tie worsens the injurious effect of a market imperfection beyond that which would occur in the absence of a tie.").
[605] "Consumer demand quality" refers the level of consumer knowledge, understanding, and motivation that be effective on purchase decision [GRIMES (The Role of Market Imperfections), p. 267, fn.: 10)].
[606] Grimes also observes further market imperfections affecting buyer motivation that may bear on the use of tie-in in the absence of information problems, i.e. The seller may be able to extract a premium price, if the buyer can pass on the increased costs to the next level or the seller may also enjoy leverage over an intermediate buyer if the buyer receives that tie-in is an industry wide practice (See *id.*, p. 275-279).

prices due to deferred purchase in metering ties". LARSON suggests reconsidering the applicability of this standard in producer goods market and limit it in consumers goods markets[607]. However, there is no consensus about its applicability for end-user consumers regarding whether market imperfections should be included in antitrust analysis or alleged additional harm can be addressed under consumer protection laws[608].

At a glance, it seems more plausible limiting Grimes' suggested presumption for the consumers' goods market. However, we are not convinced that metering tying merely due to deferred purchasing should indicate information asymmetry in the market or consumers will unlikely consider the price of their consumable goods at the time purchase. Information asymmetries or other market imperfections should be included in antitrust analysis, but competition authorities should ask the right questions to interested persons, instead of leading an investigation based on presumption.

Likewise, The Board in another preliminary investigation about Hewlett Packard (HP), implicitly included information asymmetry concerns and stated that "conscious users who see the product price and the price of consumables together as a data, have a tendency to choose the most appropriate product among the producers on the market when purchasing the product"[609]. However, the Board draw this conclusion from a decision by the Office of Fair Trading of the UK

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[607] LARSON, Alexander C., "Antitrust Tie-In Analysis After Kodak: A Comment", 63 ANTITRUST LAW JOURNAL 1 (Fall 1994), p. 263, available at http://www.jstor.org/stable/40843279 (last visited 16.06.2017).

[608] See Kodak case, p. 494, 495 (the Dissent challenged that market imperfections should not be included in antitrust analysis and it should be addressed exclusively under consumer protection laws). See also CRASWELL, Richard, "Tying Requirements in Competitive Markets: The Consumer Protection Issues", 62 BOSTON UNIVERSITY LAW REVIEW (1982), p. 679-681, available at https://law.stanford.edu/publications/tying-requirements-in-competitive-markets-the-consumer-protection-issues/ (last visited 16.06.2017)(suggests alleged injury was worked by ties associated with market imperfections should be addressed through consumer protection laws); Larson, p. 265, 266 (suggests dealing with information-based problems that leads consumer harms under consumer protection law or contract law rather than under antitrust law). *Compare* GRIMES, Warren S., "Antitrust Tie-In Analysis After Kodak: A Reply to Larson's Comment", 63 ANTITRUST LAW JOURNAL 1 (Fall 1994), p. 271, available at http://www.jstor.org/stable/40843280 (last visited 16.06.2017) [hereinafter GRIMES (Reply to Comment)] (agrees with them, but since market imperfections effects recognized, ignoring them will be inconsistent with legislative intent).

[609] The Board decision (Preliminary Investigation) dated 08.05.2001 and numbered 01-22/192-50, p. 4 (hereinafter HP decision).

(OFT), about an investigation in HP practice. OFT had directed the question to HP, "do you really think that consumers consider after-sale maintenance and repair costs when they make a decision to buy a printer?". HP answered that "based upon surveys conducted by the company, it is found that consumer take into consideration all costs when they buy a printer. This is the reason for the efforts to give sufficient information at sales points about consumables (cartridges, paper, etc.), additional warranty and support packs".

Thus, the Board did not overlook market imperfections, but obviously failed to assess it successfully. First, considered only UK consumers as a parameter, second and more importantly, presumed parameter was not based on an impartial survey.

Additionally, IBM and Northern Pacific cases have a common feature that tying did not impose against larger volume buyers. Hence, ELHAUGE and NALEBUFF theory does not fit in this instance, and the allocative efficiency of tie-ins is not held. GRIMES argues that the seller's selective imposition of a tie is consistent with the thesis that information problems allow the seller to exact a supra-competitive return from less informed, but is inconsistent with the perfect conditions required to increase allocative efficiency[610].

We agree partly with Grimes proposition. In tying cases where one or more large buyers are relieved of the requirement to purchase the tied product, it may show that the seller used the opportunity to exploit the inexperienced buyers (who are not frequent purchaser)[611]. However, we do not agree that in the indicated instances it is reasonable to call the buyers (who was imposed tie) inexperienced, since they were purchasing for their business, and it can be explained with negotiation power of the parties, which is different than calling a merchant

[610] GRIMES (The Role of Market Imperfections), p. 287, 288. ("In all probability, the lowest per unit price for the bundled items is now paid by the intensive user; the highest price is paid by the medium intensity user unable to get out from under the tie; and a mid-level price is paid by the low-intensity user." id., p. 287).

[611] Referring to Kodak case that tie not imposed against buyers who service their own machines); IBM case that tie was not imposed against the government) and in Northern Pacific, the railroad tie did not impose against 390 of its larger customers (*id.*, p. 275, fn.: 43).

behaved inexperienced while doing a purchase for his own business. Second, in the stated cases, there is no showing that tied products were sold at supra-competitive price. Contrary, in the Northern Pacific case tying contract had included a price-protection clause[612], while in the IBM case, the government was exempt from tying imposition, but therefore, the government had lost the discount for leased machine[613], while the buyers had received such a discount in the tying product. Thus, consumer surplus extraction depends on whether the seller offered overall competitive price for tying plus tied product. Nevertheless, exemption of large volume buyers indicates that tying was discriminatory between the customers, but not necessarily exploitative (as inflating tied product price).

In the Tetra Pak II case, the EC Commission evaluated the misuse of the dominant position of Tetra Pak due to the sale of cartons and filling equipment used in packaging milk and dairy products. Commission concluded that Tetra Pak had abused its dominant position in the aseptic sector in order to establish a dominant position in the non-aseptic sector through predatory pricing and tying[614].

The Commission found in its investigation that Tetra Pak’s sale or lease of the machine was tied to the purchase of cartons from Tetra Pak, i.e., tying practice was fulfilled by Tetra Pak requiring its customer to use only Tetra Pak cartons in Tetra Pak machines and by only allowing the customer to obtain supplies from Tetra Pak itself[615]. Tetra Pak also tied its machine sale/lease to an exclusive right to provide maintenance and repair services, and to supply spare parts was also reserved for Tetra Pak[616]. The Commission held that these obligations had no connection to the purpose of the contract itself, i.e., selling or leasing machines practice, thus created an “artificial and unjustified” link between Tetra Pak and

612 356 U.S. 1 (1958), at 7.
613 298 U.S. 131 (1936), at 131.
614 EC Commission decision, 92/163/EEC of 24 July 1991, (Tetra Pak II), (OJ 1992 L 72). Tetra Pak applied this decision to the CFI (the General Court) and, the case send to the ECJ for final judgement. Tetra Pak’s appeals were dismissed by the both Courts. See CFI decision, Tetra Pak International SA v Commission of the European Communities, Case T-83/91 (06.10.1994), ECJ decision, Case C-333/94 P, Tetra Pak International SA v Commission [1996] ECR I-5951 (Tetra Pak II).
615 Commission Decision, Tetra Pak II, at 115-116.
616 Commission Decision, Tetra Pak II, at 107-109.

its customers as a violation of Article [102][617]. Regarding the pricing of machines through sales of carton, The Commission emphasized that the machines and cartons are separable, thus, Tetra Pak's price differentials and trading conditions discriminated between customers and submitted that the primary consideration was the customer should be free to decide to pay more for the machine on purchase and less for the cartons afterwards[618].

In sum, current suggestions for welfare effects of tying induced intra-product price discrimination (metering pricing) that direct analogy from second-degree or third-degree price discrimination instance does not fit in the concrete cases.

In the concrete cases, tying product was a durable good, usually sold or leased with the requirement of purchase of tied products (consumable goods) from the seller as well as guarantying either to meet competitive price for tied goods or maintenance or repair of the tying product. Thus, concrete cases are not consistent with the concern about supra-competitive prices, but, indeed, in these cases price-protection clause or warranty conditions indirectly forces customers/consumers to go with the tied products. Therefore, "consumer choice" is a better indicator for the evaluation of exploitative effects of metering pricing rather than "consumer surplus extraction". However, the Board should identify as a relevant consideration in the assessment of foreclosure "the extent of the allegedly abusive conduct" including "the percentage of total sales in the relevant market affected by the conduct" when tied product has staple character. It is belonged to the Board establish a "safe harbor" or "threshold" that below which the tying conduct would not be considered exclusionary[619].

[617] Commission Decision, Tetra Pak II, at 117.
[618] Commission Decision, Tetra Pak II, at 158,159, 169. See also the CFI decision, Tetra Pak II, at 206.
[619] See UK Office of Fair Trading decision, CE/9322/10, IDEXX Laboratories (2011), n. 6.35, 6.66-6.71 (it is denoted that the foreclosure of actual or potential competitors did not occur due to a small portion of the tied market was affected -less than 5% in one market and 15% in another) [O'DONOGHUE/ PADILLA, n. 22564].

1.1.2. Tying in aftermarkets sale

Availability of complete information for buyers and sellers is an assumption that perfect competition relies upon. However, it is understood that information cannot be obtained without cost, and when information is vital for the functioning of the market, it places responsibility on the government to gather or process the necessary information[620]. Government may adopt measures not merely through economic regulations or consumer law, but also competition law[621]. The US Supreme Court's decision in the Kodak Case put the information asymmetry on the agenda and drew attention to the need for a more detailed review of the market that is theoretically supposed to operate properly[622].

Indeed, Kodak case brought a new perspective as including the possibility that lack of information may facilitate antitrust violation especially due to the after-sale costs of durable goods. The discussion is focused on whether consumer considers the upcoming costs of the product during its economic lifetime while buying it, as well as the possibility for the consumer to switch to substitute products if unexpected costs arise. Thus, information asymmetries and switching cost were considered as basic market failures. Theories on the aftermarket analyze the possibility of firms violate competition rules through the interaction between foremarket and aftermarket. In addition, suggest that, whereas a firm has a strong market position in the aftermarket, the tying of spare parts sale under its control with repair and maintenance services may create an abuse of market power.

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[620] See BEALES, Howard and CRASWELL, Richard and Salop, Steven, "Information Remedies For Consumer Protection", FTC Bureau of Economics Working Papers No. 36 (1980), available at https://www.ftc.gov/reports/information-remedies-consumer-protection (last visited 12.06.2017).
[621] LANDE, Robert H., "Market Power Without A Large Market Share: The Role of Imperfect Information and other "Consumer Protection" Market Failures" (2007), available at https://www.justice.gov/sites/default/files/atr/legacy/2007/03/27/222102.pdf (last visited 12.06.2017).
[622] See SHAPIRO, Carl, "Aftermarkets and Consumer Welfare: Making Sense Of Kodak", 63 ANTITRUST LAW JOURNAL No. 2 (Winter 1995), pp. 483-511, available at http://www.jstor.org/stable/40843290 (last visited 29.06.2017) [hereinafter SHAPIRO (Aftermarkets)].

Since the literature offers detailed analyses of aftermarket sales theories[623], our questioning will focus on the role of metering pricing in aftermarket sales, and whether the underlying reasoning for tying is the exclusion of rivals or exploitation of consumers, or if the exploitative effect can be achieved merely due to information asymmetry or switching cost. In this context, we will review the Kodak case and a similar decision in the EU, the Hugin case, in order to conclude whether emerged concepts from these cases affected the Turkish Competition Board's analysis in the aftermarket tying.

1.1.2.1. Kodak case

The case developed like this[624], prior to 1982, Eastman Kodak Co. (hereinafter Kodak) offered to service almost all of its micrographic and copier equipment, and also Kodak sold replacement parts (*at profit*) to any part that used them to repair Kodak equipment. Image Technical Services and other independent service organizations (hereinafter ISOs) do not manufacture the replacement parts, they use in the providing service. Due to Kodak's policy that freely selling replacement parts, ISOs began to compete significantly with Kodak (in 1984-1985), and offered service price for as little as half of Kodak's price. Respond to this result, Kodak went to price cut for service in some cases. Meanwhile, it had been observed that some customers found ISOs service superior to service of Kodak.

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623 BORENSTEIN, Severin and MACKIE-MASON, Jeffrey K. and NETZ, Janet S., "Antitrust Policy In Aftermarkets", 63 ANTITRUST LAW JOURNAL (1995), pp. 455-482, available at http://faculty.haas.berkeley.edu/borenste/download/ALJ95Aftermarkets.pdf (last visited 05.06.2017) [hereinafter BORENSTEIN et. al. (1995)]; BORENSTEIN, Severin and MACKIE-MASON, Jeffrey K. and NETZ, Janet S., "Exercising Market Power in Proprietary Aftermarkets", JOURNAL OF ECONOMICS & MANAGEMENT STRATEGY (2000), pp. 157-188, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1430-9134.2000.00157.x/epdf (last visited 05.06.2017) [hereinafter BORENSTEIN et. al. (2000)]; ELZİNGA, Kenneth G. and MİLLS, David E.,"Independent Service Organizations and Economic Efficiency", 39 Economic Inquiry 4 (2001), pp. 549–560, available at http://onlinelibrary.wiley.com/doi/10.1093/ei/39.4.549/full (last visited 20.06.2017); FARRELL, Joseph and KLEMPERER, Paul, "Coordination and Lock-In: Competition with Switching Costs and Network Effects", 2001, available at http://www.nuff.ox.ac.uk/users/klemperer/lockinwebversion.pdf (last visited 20.06.2017).

624 See Image Technical Services, Inc. v. Eastman Kodak Co, 903 F2d 612 (9th Cir 1990), at 614.

At the beginning of 1985, Kodak stopped selling parts to ISOs and made agreements with its contracted original-equipment manufacturers not to sell parts to ISOs, and also pressured independent parts distributors not to sell Kodak parts to ISOs. In addition, Kodak attempted to restrict the availability of used machines. To foster this policy, Kodak also adopt the practice that it would not sell replacement parts for its equipment owners unless they agree not to use service of ISOs. In 1987, ISOs filed an antitrust law suit. The District Court granted summary judgment for Kodak, and determined that Kodak's conduct did not constitute tying, because Kodak did not condition the sale of one product (equipment) on the buyer's purchase of another product (replacement part)[625] and the Court of Appeals for the Ninth Circuit reversed the summary judgment, on the ground that the District Court misconstrued alleged tying as determining Kodak tied equipment to parts, or parts to equipment, instead, Kodak tied parts to service, therefore correcting included components of tying would require determination of market power over the tying product, which would be power in the parts market instead of equipment market[626]. Then the Supreme Court, where granted Kodak's petition for certiorari, affirmed the Court of Appeals' reversal of the summary judgment, and remanded the case for trial[627]. In the re-trial, the Federal District Court found Kodak guilty and imposed fine as well as obliged Kodak to sell, for a period of 10 years, spare parts to ISOs, at prices that were not discriminatory against them[628]. Kodak appealed this decision again, yet The Ninth Circuit Court of Appeals kept the Federal District Court's verdict[629] .

The Court affirmed that Kodak tied the sale of service for its machines (photocopiers and micrographic equipment) to the sale of replacement parts for its equipment, and this practice brought violation of section 1 of the Sherman Act[630], and Kodak's refusal to sell parts to ISOs had unlawfully monopolized, and

[625] Image Technical Services, Inc. v. Eastman Kodak Co., No. C-87-1686-WWS, at 5, 1988 WL 156332 (N.D. Cal. Apr. 18, 1988).
[626] Image Technical Services, Inc. v. Eastman Kodak Co, 903 F2d 612 (9th Cir 1990), at 616, 617.
[627] Eastman Kodak Co. v. Image Technical Services, Inc. 504 U.S. 451 (1992) [hereinafter Kodak case].
[628] Image Technical Service, Inc, et al. v. Eastman Kodak Co., C 87-1686 (January 18, 1996).
[629] Image Technical Service, Inc, et al. v. Eastman Kodak Co., 125 F.3d 1195, cert. denied (1998).
[630] Kodak case, p. 479.

was an attempt to monopolize, thus violated section 2 of the Sherman Act[631]. Kodak's conduct had two-stage, because Kodak adopted policies to limit the availability of parts to ISO in order to obstruct competition of ISOs in the service market for Kodak equipment[632]. That created unilateral refusal to deal (with ISOs). To prevent ISOs' competition further, Kodak deployed conditional refusals in the form of tying which was imposed on customers, i.e., Kodak would not sell replacement parts for its equipment to Kodak equipment owners unless they agree not to use ISOs.

The Court determined that: 1- Service and parts are distinct products, since there is sufficient consumer demand for proving them separately[633], 2- Appreciable economic power in the tying product market is necessary for condemning tying[634], 3- Kodak's claim that prevent ISO's from free-riding on Kodak's investment in the copier and micrographic industry was not valid business justification[635], 4- In some instance such as in Kodak position, one brand of a product can constitute a separate market[636], 5- The Court concluded that high information and switching costs (market imperfections) enabled Kodak to price discriminate.

Kodak, first, tried to defeat the claim as contending that competitiveness of the equipment market precludes the market power in the aftermarkets, further Kodak contended that "cross-elasticity of demand" of the customers would not allow exercising this power exploitatively in the parts or service market, because

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631 *id.*, p. 480-486.
632 *id.*, p. 455, 458
633 *id.*, p. 462, 463.
634 *id.*, p. 464. The Court inferred the existence of such power from Kodak's possession of a predominant share of the market as referring to Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with *no readily available substitutes* (id., p. 457, 464, 481) Kodak contended that lack of market power in the primary equipment market precludes the possibility of market power in derivative aftermarkets and a single brand of a product or service can never be relevant market (p. 456, 461, 467). See the dissent in the Court of Appeal accepted Kodak argument that with respect to lack of market power [903 F2d 612 (9th Cir 1990), at 622].
635 Kodak case, p. 461, 485.
636 *id.*, p. 481, 482 ("The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners"). *Compare* SALOP, Steven C., "The First Principles Approach to Antitrust, Kodak and Antitrust at the Millennium", 68 ANTITRUST LAW JOURNAL (2000), p. 192, available at http://scholarship.law.georgetown.edu/facpub/208 (last visited 12.06.2017).

if Kodak raised its parts or service price above competitive level, potential customers would regard this as an increase in the price of equipment, thus stop buying Kodak equipment[637]. However, the Court did not find Kodak's argument was plausible, and concluded that "equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of power in those markets"[638]. Furthermore, the Court remarked that Kodak increased service prices without decreased in equipment sales, therefore found Kodak claim lacks coherence[639]. In sum, the Court did not accept Kodak defense for lack of market power to exploit the tied market.

When Kodak failed with this argument, by changing tactics,they brought the defense that it was a "marketing strategy of spreading over the time the total cost to the buyer of Kodak equipment"[640]. The Court denoted that this pricing strategy argument would make sense if Kodak offered sub-competitive prices for equipment or parts as hoping to recoup its profits through service, and since Kodak set prices of equipment at competitive level, the Court concluded that this pricing strategy cannot be the explanation for Kodak's policy[641].

However, this "hypothetical" (so called by the Court) pricing strategy could be sufficient explanation and even though it was not uttered, it was able to serve for metering tie-in. The Court missed the point that Kodak did not need to reduce the price of equipment or parts, because if Kodak could not charge supra-competitive prices for service, it had to reflect its investment costs on equipment or parts, which would make Kodak less competitive in those market. In other words, Kodak already was offering a lower price for those than it could not offer without tying (along with attempt to exclude ISOs from service market)[642].

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[637] 504 U.S. 451, p. 469, 470.
[638] *id.*, p. 471.
[639] *id.*, p. 472.
[640] *id.*, p. 472.
[641] *id.*, p. 472.
[642] See KLEIN/ WILEY, p. 607 (affirming that pricing equipment similarly to their competitors and expected to earn profits on both equipment and service sales does not contradict the use of metering tie price discrimination strategy, it can be explained by that all firms in the industry found it profitable to adopt this same strategy).

Instead, the Court found that this strategy would be inconsistent with Kodak's policy toward its self-service customers, because Kodak could not sell them parts without service[643].

Moreover, the Court did miss out the detail that Kodak induced tying was not strictly requiring the purchase of service tied to parts, but requiring not buying the service from ISOs. Therefore, Kodak was aware that self-service customers would not purchase the service, and if Kodak wanted to attract self-service customers into its own service market, Kodak would require explicitly purchase of service tied to parts, without mentioning ISOs. However, the Court did not accept that Kodak offered overall a competitive price for package of equipment, parts and service, but at the same time affirmed that Kodak was not able to sell service to high-intensity users of service.

Furthermore, to strengthen its argument the Court assumed that exploitative tying market power occurred from market imperfections. The Court affirmed ISOs counter argument for the service market price to affect equipment demand that suggests consumers must have the information of the total cost of the equipment, parts and service altogether at the time of the purchase, viz. "life-cycle price"[644], and determined that to acquire this information is difficult, is likely to be customer specific and since it is expensive, consumers who are more concerned about equipment capabilities than service costs, they may not found it is worth to gather the information[645].

With respect to lack of information of life-cycle price, the Court stated that Kodak exercise price discrimination between sophisticated (knowledgeable) customers and unsophisticated (uniformed) customers[646]. The Court was concern with alleged price discrimination practice, together with high switching costs,

[643] Kodak case, p. 472, 473.
[644] *id*., p. 473.
[645] *id*., p. 474, 475 (The Court also did not accept Kodak claims that market power arising from inadequate information would be negated by competitors who supply consumers accurate information).
[646] *id*., p. 475.

because, as a result of that, consumers who already have purchased the equipment become "locked in", so they will tolerate some level of price increase for service before changing the equipment brands. As the Court stated "[u]nder this scenario, a seller profitably could maintain supra-competitive prices in the aftermarket, if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers"[647]. Therefore, the court concern about consumer surplus extraction arouse from absent information that blurs the total cost of the product for consumers, and due to the high switching cost where locked-in consumers, there is the possibility to worsen this. In sum, the Court found that market imperfections (lack of information about life-cycle price of the tying product at the time of the purchase) enabled Kodak to price discriminate (not via metering tie, but *ex ante* categorization of consumer groups as informed and unformed, and charging supra-competitive prices from the latter group) via tying (sale of the parts to service) had anticompetitive effects.

The dissent challenge with the Court's conclusion (the tie between parts and service somehow does enable Kodak to increase overall monopoly profits) mainly offering two counter arguments: 1) The distinguishing Kodak's consumers as sophisticated and unsophisticated is unreasonable, they are all rational consumers[648] 2) Since without inter-brand power, Kodak cannot engage price discrimination[649]. We only agree with dissent's argument with respect to the Court's approach is inconsistent due to distinguish whether tie equipment to parts or part to service, and assumed in the former it does not raise antitrust concern[650]. This understanding does not explain why consumers are able to inform life-cycle price when tie parts to equipment, and why not tie parts to service.

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[647] Furthermore, the Court remarked that this strategy is even more likely to be profitable when the seller can price discriminate between its locked-in customers and potential new customers, Kodak case, p. 476.
[648] Kodak case, p. 495, 499.
[649] *id*., p. 499.
[650] *id*., p. 478, 479.

It is also questionable whether the market imperfections enabled Kodak to price discriminate or if it was the policy that aimed to exclude ISOs from the tied service market. Nor Kodak Court neither market imperfections based market power supporters considered the role of refusal to deal policy of Kodak[651], but they merely assumed that market imperfections led to separate sophisticated and unsophisticated customers groups, and Kodak was able to price discriminate between them. Further ties between parts and service enable Kodak to charge supra-competitive prices for tied service products from the latter customer group.

The Court did not denote that Kodak implement metering tie, but the dissent stated alleged price discrimination was through metering tie[652]. To be profitable of a tie between foremarket and aftermarket, firm's strategy as follow, customers could receive equipment and service from same prices, however firm lowers equipment prices and raises service prices as aiming metering-tie induced price discrimination that permits to charge higher total package prices from high-intensity users (who demand more service) relative to cost than low-intensity users (who demand less service)[653]. Therefore, we suggested that it was necessary to assess distribution of intensity of use of unsophisticated customers in the post-1985 market to conclude Kodak's practice could harm economic efficiency and consumer welfare. Since the Court conceded that high-volume users were knowledge and self-service users; if uninformed customers were not heavy users, Kodak overall pricing might be seemed competitive or at least not excessive.

However, the court insist that Kodak could charge supra competitive prices since customers were locked-in due to high switching costs. However, high switching costs was not created or increased after Kodak new policy, it always existed. Customers would become locked-in with Kodak service market, as losing

[651] See also FOX, Eleanor M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", 62 ANTITRUST LAW JOURNAL (1994), p. 760, 761, available at http://heinonline.org/HOL/Page?handle=hein.journals/antil62&collection=journals&id=801&startid=&endid=810, last visited (02.09.2017) [hereinafter FOX (Information Failure)].
[652] Kodak case, p. 499.
[653] See KLEIN/ WILEY, p. 601, 603, 604.

their alternative for service. Nonetheless, this explanation does not fit the facts, since Kodak sought to make its parts policy change prospective and apply it only purchases of its new model while continued to make replacement parts available to ISOs servicing for old models, and this restrictive part policy was generally known[654].

Thus, we are looking for a coherence explanation for Kodak marketing strategy. As we seen before in the printer-ink tie, pricing based on the intensity of tied product (here is the aftermarket) usage has potential to increase seller's overall profit as permitting collection of consumer surplus across different users and uses. If intensity of equipment use is related to customer value, the price discrimination could be a way to charge higher package price to relatively high-value buyers while charging lower overall prices to relatively low-value buyers[655].

Another likely explanation for the practice where a manufacturer cut the price of equipment and increased the aftermarket service price suggests that it is a way to assure consumers about quality of the equipment, because lower-quality products will be used less intensively, thus generate lower profits under tying[656]. Therefore, a warranty would solve the problem of pre-purchase consumer quality uncertainty.

When Kodak claimed that tying was necessary to defeat ISOs free riding by taking advantage of the low equipment prices without paying the price of higher service prices, the Court did not accept this argument, and in the decision, it was not argued whether refusal to deal with ISOs enabled Kodak to price discriminate. However, it can be questioned whether manufacturer could meter value by including an upcharge on replacement parts. Even though customers used ISOs's

[654] See Kodak case, dissent opinion, p. 492. See also KLEIN/ WILEY, p. 608.
[655] KLEIN/ WILEY, p. 604, 605.
[656] See SCHWARTZ, Marius and WERDEN, Gregory J., "A Quality-Signaling Rationale For Aftermarket Tying", 64 ANTITRUST LAW JOURNAL No. 2 (Winter 1996), pp. 387-404, available at http://www.jstor.org/stable/40843333 (last visited 29.06.2017).

service, Kodak could still sell replacement parts to ISOs at high and profitable prices[657].

KLEIN/ WILEY suggests that this strategy (replacement parts as an effective metering device) may not serve, because an increased price of parts would lead customers to economize on high parts price by increasing the servicing of the equipment, and this incentive to substitute service for parts could be large, and further the result would be large increase in parts prices as compared to service prices that would lead a reduction in manufacturer profit[658].

In addition, refusal to deal also explains why equipment manufacturers also may aim to discriminate in favor of relatively more knowledgeable high-intensity customers that prefer self-service, because placing a metering upcharge on replacement parts would have resulted in substantially high package prices that drive away high-intensity users[659].

Now we have alternative explanation for Kodak induced price discrimination that why Kodak preferred metering service demand instead of direct sells of replacement parts at higher price or what was the reason not imposing tie on high-volume users, but still we have to conclude that when information asymmetry and customer lock-in stemming from high switching costs "could create a weaker connection between service and parts prices and equipment sales"[660].

In fact, we are not challenging that the Supreme Court has failed, regarding the interaction between the foremarket and the aftermarket, as denying the applicability of economic theory that solely takes into account conditions in foremarket. Supreme Court correctly considered the burden of the costs throughout the economic life of a product. However, we suggest that inclusion of

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[657] See Image Technical Services, Inc. v. Eastman Kodak Co, 903 F2d 612 (9th Cir 1990).
[658] KLEIN/ WILEY, p. 606.
[659] KLEIN/ WILEY, p. 607.
[660] Kodak case, p. 473.

"unexpected pricing experienced by current customer base" criteria, also requires considering whether the practice is proactive or retroactive[661]. Primarily, locked-in should be assumed if aftermarket tying has effects retrospectively. If aftermarket tying effects are prospective, then competition authorities should not impose sanction, but should introduce remedies to ensure that customers/ consumers are aware of this practice and the future costs.

1.1.2.2. Hugin v. Liptons case

While Kodak case provided the first time the US Supreme Court used the term "aftermarket"[662], a decade before Kodak case, in the EU, the Court of Justice easily found an inter-brand aftermarket in the Hugin case[663], wherein a similar prevention of supply to an independent servicer and repairer were addressed[664]. Hugin was a Swedish firm that manufactured cash registers. It had a 12 percent market share in the EU and 13 percent share in the UK cash register market, which were considerably competitive[665]. At the time of purchase, Hugin informed customers about after-sale services, and offered a free one-year warranty. In addition, contracts were offered for periodical maintenance, including spare parts at a fixed price and servicing at significantly low prices for the following years.

Due to the high demand for cash registers in the UK at the time, Hugin appointed a firm – Liptons – as its distributor for the London area. Liptons also offered the sale, rental, maintenance, and repair of various brands of cash registers in addition to that of Hugin cash registers, providing maintenance and repair services and necessary spare parts supplied by Hugin. Hugin first offered Liptons the opportunity to be the authorized dealer in the London area. However, Liptons refused it due to low profit margins. Following that, Hugin confined its

[661]See KLEIN/ WILEY, p. 639 (concluding that "Kodak's conduct did not meet this test of an unanticipated change in aftermarket arrangements. Instead, Kodak's refusals to supply replacement parts to ISOs were largely prospective").
[662] SHAPIRO, C. and TEECE, D. J. "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin (Spring 1994), p. 2.
[663] Hugin Kassaregister AB v. Commission, Case 22/78, [1979] ECR 1869. (hereinafter Hugin case).
[664] FOX (Information Failure), p. 762.
[665] The Leading firms in these markets have 34 percent share in UK market and 18 percent in EU market.

sales to its own distribution system and stopped supplying cash registers and spare parts to Liptons.

Liptons filed a complaint to the EU Commission alleging that Hugin abused its dominant position and breached article 102 TFEU. After examining the case, the EU Commission held that Hugin abused its dominant position in the after-sale services for Hugin branded cash registers, by refusing to supply Liptons the spare parts required to provide maintenance and repair services[666]. Hugin appealed this decision to the Court of Justice, and challenged with similar grounds to Kodak's arguments[667].

The Court of Justice held the Commission finding that spare parts constituted a separate market and Hugin was dominant therein. The Court stated that independent firms might specialize in maintenance and repair of cash registers, hence Hugin needed to provide spare parts to repair Hugin machines, unless Hugin showed an objective reason and therefore its practice could not be abusive[668]. However, the Court did not assesse the abuse and dismissed the Commission's Decision due to Hugin's conduct did not restrict the trade between member states.

In the Hugin and Kodak decisions, courts held that, despite the competitive foremarket, if a firm has a dominant position in the aftermarket, exclusion of ISOs must be justified. However, in the Hugin decision, Court primarily considered whether there was an exclusionary behavior, it did not include information failure or consumer exploitation. Although, in response to Hugin's submission to the Court of Justice, the Commission stated that a dominant firm "cannot deny its customers freedom of choice ..."[669]. In Kodak case, information asymmetry and switching costs (exploitation of consumers) were the leading reasons of the

[666] Commission decision, OJ L 22/23, 25 January 1978, p. 23.
[667] See FOX (Information Failure), p. 763-767 (comparing Kodak and Hugin's arguments).
[668] Hugin case, at 1896, 1897.
[669] Hugin case, at 1884.

finding of an intra-brand aftermarket power[670]. In other words, market imperfections emphasis and its connection to price discrimination overshadowed the role of refusal to deal policy of Kodak in the case.

1.1.2.3. The Turkish Competition Board decisions

The Board assessed the claims that Hewlett Packard Computer and Measurement Systems Inc. violated the TCA provision as determining high prices for printer consumables and spare parts, and the maintenance and repair costs for after-sales services, as well as obligating their use the STREP program in after-sales services and not to sell spare parts to third parties who are outside the authorized services[671].

The Board, similarly to the Kodak and the Hugin decisions, determined the aftermarket as separate market, regardless of the competition level at foremarket (the printer market). However, the Board approach was different from Kodak decision, but more similar to Hugin in the sense that not granting information asymmetries a decisive role for the determination of abuse of dominant position.

The Board approach was also interesting and different from stated cases, on the ground that it opted a bifurcated analysis for market power in the spare parts and consumable goods as considering dynamic structure of the market.

The Board even placed a subtitle "economic analysis" under the heading of determination and legal evaluation issue. Therein, the Board pointed that "Unlike traditional industries, the short life span of the information technology industry, not 10 years but just 6 months, makes the production of spare parts for HP products, which are in great demand in the market, economically impossible for secondary producers"[672] and concluded that "[t]he fact that products become outdated quickly due to their technologic characteristics, a newer product,

[670] See FOX (Information Failure), p. 766.
[671] The Board decision (Preliminary Investigation) dated 08.05.2001 and numbered 01-22/192-50 (hereinafter HP decision).
[672] HP decision, p. 4.

replacing such a product, is offered by a lower price though with higher performance, thus the use of high technology, and a high start-up capital cost is required. Therefore, the firms other than HP would face difficulties in the sense of general principles of business management in manufacturing spare parts to be used with HP products leads that HP is dominant in the market of spare parts for HP products"[673].

For the dominant position in the consumable goods for HP printers, The Board again denoted the dynamic structure and requirement of investment in the high R&D processes to achieve necessary know-how, and pointed that "the cost efficiency in the production of consumables limits the production of secondary consumables to large chemical companies in scale. When they start to make monopolistic profits on prices, they will be faced with the threat of these secondary producers. This situation is seen as an important valve head preventing the contrary practice in the sector. On the other hand, there is a tendency for conscious (aware) users, who receive the product price and the price of the consumables together, to select the most appropriate combination among the producers in the market when they buy the product, where the secondary consumables producers cannot intervene for various reasons"[674].

However, the Board continued that "[t]herefore, if printer manufacturers sell their products to consumers and make the consumers depend on them for their consumables, secondary manufacturers may be able to enter the market of major ink producers if they use these advantages to increase their consumables prices so as to obtain monopolistic profit. For this entry, it will be necessary to provide a scale to present products for all models of all available printer brands on the market. Therefore, printer manufacturers are dominant in the consumable markets that they used as their foremarket"[675].

[673] *id.*, p. 5.
[674] *id.*, p. 4.
[675] *id.*, p. 6.

Since the Board found that HP had dominant position in spare parts and consumable goods, it went on analysis whether alleged abuse of dominant position exists[676]. Regarding the allegations of excessive pricing in spare parts and consumable goods, the Board followed again bifurcated approach for spare parts and consumable goods. However,, this time, included information asymmetry concern like in Kodak case, yet reached different conclusions:

> *Users who demand products in this market need to consider not only their price but also after-sales services and the cost of consumables when buying a printer. The cost of consumables is the main decision variable, while spare parts prices are not effective in making this decision because the product starts to become outdated before the warranty expires. Enterprises operating in this market, including HP, compete on this variable by taking the single variable 'product price + consumable price to be used during economic life' when determining product prices*[677].

The Board did not explicitly exclude information cost of high spare parts prices, but rather showed the tendency to convince that it cannot be relevant for the purchase decision. Further, the Board explained "the fact that spare parts prices appear to be high in the eyes of the user does not exactly reflect the reality of the industry specifications because the sales prices of the models sold in the past years are so high that the annual price erosion in the information technology sector is 20%, resulting in high maintenance and repair costs of the old models but it has been found that the reason for this is due to the high inventory costs incurred in the past years[678]"[679].

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[676] It is another decision that the Board did not explicitly stated its analysis was subject to Art. 6, yet we are sure that the Board evaluated the case under Art. 6, since merely focus on determination of dominant position.
[677] *id*., p. 7, 8 (emphasis added).
[678] In accordance with the legislation in force, spare parts must be stocked for a period of 10 years for a product presented to the market. Due to this legal necessity, even spare parts that have not received any demand will have to be loaded in quantity. The necessity of having this stock is adversely affected by spare parts prices.
[679] *id*., p. 8

The Board concluded that "the spare parts and *especially* consumables were priced too high when compared to the product price, not because of a competition infringement but as a requirement of the industry's structure, where users *must be aware* of the amount of possible costs to be incurred during economic life of a product rather than considering its price only"[680].

Regarding the claim for refusal by HP to sell spare parts to third parties other than authorized service providers, The Board has found that spare parts were available for persons and entities other than authorized service providers[681]. However, the Board did not evaluate the claim that whether consumers are forced to use HP's own consumable goods due to technological reasons or lack of compatible substitutes for them.

Likewise, three years later, in Printer suppliers' decision, the Board faced similar claim, and determined that compatible (same quality and function) consumable goods were available for the HP printers[682]. Therefore, even though high prices could be justified due to high investment costs, and could be assumed consumers should bear information cost of consumable goods as conscious users, these grounds could not be justified reduction in consumer choice through alleged tying practice.

We agree partly with the Board approach as leading different paths for inclusion of information asymmetries for spare parts and consumable goods. It is more likely that consumers see printer plus ink price as a package, and take into account cost of life cycle[683]. While, need for spare parts and after-sale service arise more delayed time of period relatively need to consumable goods. Even if the Board approach to high spare part prices is acceptable, this justification does not allow that information cost of spare parts should be bear by consumers.

[680] *id.*, p. 8, 9.
[681] *id.*, p. 7.
[682] Printer Suppliers decision, p. 6.
[683] See XXVth Report on Competition Policy (1995), n. 86-87.

Later on, the Board launched a preliminary investigation its own initiative for examination of whether the companies operating in the medical imaging and diagnostic devices market violated the Law No. 4054 by applying passwords and spare parts in the technical service market of these devices[684]. Therein, the Board, expressing clearly the fact that it considered Kodak and Hugin in its examination, has defined the relevant product market as technical service and spare parts market separately for each brand of medical imaging and diagnostic devices[685]. The Board had determined the dominant position, this time parallel to Kodak case, as including high switching and information costs. In addition,

> *medical imaging and diagnostic devices manufacturers are the only manufacturer of the spare parts of such devices and most of the customer services are provided by the manufacturer or distributors, considering the factors such as the high prices of medical imaging devices, non-publication of spare parts price lists (non-transparency), and [that] the price of spare parts is lower than the price of these devices, the customer who bought the device once does not change the device despite the high spare parts prices, [which] indicates that the price of the secondary product may be increased independently of the primary product market*[686]*. Therefore, it has reached [the point where] the technical service and spare parts market for medical imaging and diagnostic devices belonging to each brand has the dominant position of the authorized undertakings of these brands*[687].

Furthermore, the Board designated possible competitive effects, as follows[688]:

1) The main product, service and spare parts are complementary products, and because of the effect of each other on price and demand, companies can expect

[684] The Board decision dated 18.02.2009 and numbered 09-07/ 128-39 (hereinafter Medical Imaging and Diagnostic Devices decision).
[685] *id*., n. 240-300.
[686] *id*., n. 320.
[687] *id*., n. 240-320.
[688] *id*., n. 570- 680.

to be in applications such as reducing spare parts prices or providing widespread service in order to increase their competitiveness in the main product;

2) However, these companies may only aim at providing the service to the product in order to maintain the service quality and product safety, and therefore may not want to provide spare parts with the service provider other than its own service network, or special tools or software required for malfunction detection may require such a situation;

3) However, considering the Kodak and Hugin decisions, firms may tie spare parts and consumable goods or prevent supplying spare parts or consumables to independent service providers, may lead independent service providers to be excluded from market, thus causes restriction in the competition.

Therefore, the Board concluded that some of the undertakings in the market may use their dominant position in the spare parts market to impose tying on customers and obstruct independent service providers' activities. Even though, the Board determined that "there are currently no such problems in the service market, it has potentially serious drawbacks". Thus, the Board ordered to relevant undertakings to take these measurements, as follows[689]:

1) after the expiration of the guarantee period of the medical devices, in the event that the customers, who purchase the devices, applied a written request or the technical services received from the customers are in writing, passwords for devices, or any similar function internal system information, should be given to interested person, except the force majeure, on the working days, in 24 (twenty-four) hours free of charge; 2) In the case that apparatus/devices which allow technical service for external devices to be installed, these apparatus/devices should deliver to customers within 3(three) days from the date of the written request from the customers or the technical services; 3) Determination of rental fees for these apparatuses in a manner that is not discriminatory and proportional

[689] *id*., n. 690-710.

to the cost of the apparatus; 4) Informing the customers in writing about the above points during the first sale of the devices; 5) Based on the last 3 (three) years sales figures of medical devices, the current price lists of the 100 most frequently used spare parts are announced on the Internet; 6) Answering of the spare part price requests coming from the customers and competitor service providers within 3 (three) working days at the latest;7) To avoid discriminatory practices against competing service providers and their customers that are not based on objective criteria in the sale of spare parts.

We believe that the Board delivered sound decisions, as considering for exploitative practice not merely market structure for dominant position, but also bringing connection to information asymmetry and customer lock-in stemming from high switching costs, and whether these concepts could weaken the connection between service and parts prices and equipment sales.

We conclude that in metering pricing for durable and consumable goods, merely charging a supra-competitive price for the latter cannot establish exploitative abuse, if consumers consider the overall price (price of tying product plus tied product), since tying firms will continue to compete on overall price. In this case, a price-protection clause or threat for not covering warranty will be a better indicator for forcing consumers and reducing consumer choice than artificially expanding consumer demand in the tied product sales. Likewise, when a consumable product is a staple item, foreclosure share effect, preservation, or extension of dominant position are unlikely. The relevant question here is whether tying conduct expands consumer demand artificially. In other words, if consumers would not have otherwise bought even from another seller in the tied product market, then tying did not induce artificial demand[690].

[690] See Jefferson Parish, at 16 (“Similarly, when a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.”).

However, merely asking whether they were forced to purchase unwanted-product is not sufficient[691]. It should also be asked whether they were forced to relinquish their preferred tied product elsewhere. Therefore, the Board will examine the "percentage of total sales in the relevant market affected by the conduct"[692], and then compare the percentage of total sales of the tying firm before and after tying conduct in order to determine whether there is significant increase after the tie-in. Furthermore, the Board also verifies whether the percentage of total sales of rivals decreased significantly. Only the latter verification can indicate that consumers are forced to give up their preferred tied product. In addition, the competition authority should be aware that even though both tying and tied products are placed in a competitive market, if tying producers impose similar ties, it reduces freedom of consumer choice, and also can create an entry barrier for firms who are willing to enter only tying product market.

With regard to aftermarket tying, the HP decision shows the possibility of other explanations rather than price discrimination or mere consumer surplus extraction for why tied products (spare parts and aftermarket service) prices can be supra-competitive, or even excessive. However, concrete cases also show that competitiveness of the tying product does not automatically weaken the dominant position of the firms in the aftermarket. In this case, information failure demands greater concern compared to tying of consumable goods because, in the former, deterred purchasing plays a more decisive role. Therefore, competition authorities should be cautious to ensure that customers/consumers are aware of the expected life-cycle costs.

[691] Compare ELHAUGE (Rehabilitating Jefferson Parish), p. 503, 504 ("[T]he unwanted-product exception affirmatively fits strongly with the price discrimination and extraction theories as an economic matter. Intra-product price discrimination requires that the consumer wants the tied product to use with the tying product, and thus it cannot occur if the consumer does not want the tied product at all. To put it another way, this theory of consumer harm requires a correlation in product demand that is impossible when there is no demand for one of the products").
[692] The difference between Guidelines (Dominant position) and Sherman Act requirement is that, the latter suffices that the tying agreement to restrains competition if it affects substantial *dollar amount of sales* in the tied market, but does not require a substantial share or percentage of the tied market.

In addition, when a tying firm refuses to sell spare parts for independent service organization, creating obstacles for competition in the service market, it reduced the choice of consumers. However, this practice, in fact, does not exclude the ISOs from the market, but prevent them to compete with the tying firm. Thus, narrow definition of the aftermarket- establishing relevant product market for each brand, should be hold for the assessment of exploitative effect, not for the exclusionary effect. In other words, tying firm practice that refuses to sell spare part to ISOs is *exploitative* on the ground that it forces consumers to give up what they want, namely ISOs aftermarket service.

Competition authorities should not intervene with undertaking's marketing or pricing strategy. Firms should be free to reflect overall cost, either on the foremarket products, on spare parts, or on aftermarket service. In practice, there may be firms who reflect high fixed cost on durable product + consumable product package and offer competitive price for aftermarket service, and also there may be firms who reflect high fixed cost on aftermarket service, thus offer competitive price for durable product + consumable product package. It is likely that manufacturers will opt to similar ties to compete efficiently. If consumers' purchasing decision is based on durable product + consumable product package, then they will opt to reflect high fixed cost on aftermarket service. To be able to do this, they have to prevent ISOs competition for their own aftermarket service. When tying manufacturers or producers impose similar ties, this cumulative effect excludes ISOs from the market, and also reduces consumer choice.

Even if this imposition occurs due to market structure, the relevant question is whether competition authority should look if less strictive alternatives are available. However, this will be associated with whether competition authorities should impose its preferred pricing strategy. Because less strictive alternative will result in higher prices for durable + consumable goods package. Which means interference in consumer preferences. Then the question is whether consumer have preference to opt lower durable + consumable goods, but higher spare parts + aftermarket service package, or *vice versa*, or another combination. The answer can change in sector bases. The ideal is, for competition policy, to ensure that consumers are able to gather their best combination. However, due to high fixed cost in durable goods and spare parts, the market structure may lead that tying is indispensable for the supply-side. On the other hand, competition authorities have also responsibility to ensure demand-side function in the competition. To provide this, for metering pricing practices, it requires that consumers' purchasing decision is made by sufficient information.

1.2. Tying Induced Inter-Product Price Discrimination

1.2.1. Bundling

Bundling is a common feature of pricing[693], may be used to reduce cost and improve quality[694] and can be device to facilitate price discrimination[695].

Early studies suggest that a monopolist cannot increase the monopolistic profit through bundling its monopoly goods with a competitive product[696]. This has become known as "the single monopoly profit theory" that claims the leverage of monopolistic power is not possible due to this theory.

When it is concluded that leverage is not possible, then price discrimination is suggested for explanation of bundling[697]. Different than metering pricing where only demand for tied product is elastic or heterogenous, bundling allows price discrimination even when products are tied using a fixed ratio[698]. The underlying reason is that buyers have a different reservation price for different products in

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[693] ADAMS/YELLEN, p. 475, 476.

[694] EVANS, David E. and SALİNGER, Michael, "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law", 22 YALE JOURNAL ON REGULATION 37 (2005), p. 52-65, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=550884 (last visited 15.10. 2015).

[695] STIGLER (Block-Booking), p. 152-157.

[696] DIRECTOR, Aaron and LEVI, Edward H., "Law and the Future: Trade Regulation", 51 NORTHWESTERN UNIVERSITY LAW REVIEW (1956), pp. 281-296, available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5416&context=journal_articles (last visited 20.07.2016); BORK, p. 372–375; POSNER, p. 197-199; Bowman (Leverage Problem), p. 19-24.

[697] DIRECTOR/ LEVI, p. 281-283; Stigler, p. 152-155.

[698] NALEBUFF, Barry, "Bundling and Tying", The New Palgrave Dictionary of Economics, Second Edition, Eds. Steven N. Durlauf and Lawrence E. Blume, Palgrave Macmillan, 2008, p. 2,3, available at <http://www.dictionaryofeconomics.com/article?id=pde2008_B000304> (last visited 23.07.2016) [hereinafter NALEBUFF (2008)]; ELHAUGE (2009), p. 409; ELHAUGE (Rehabilitating Jefferson Parish), p. 474.

not positive way, unlike metering pricing. Thus, monopolist offers the goods only in a package and the buyers are sorted into only two groups in between those whose reservation price for the bundle is at least equal to the bundle's market price and those whose reservation price is lower than it[699]. Reducing the diversity of the population of consumers facilitates sellers to extract more consumer surplus[700]. This is the advantage of the package selling compared to direct price discrimination, because former requires less information, i.e.,commodity bundling can be practiced even though monopolist knows only the joint distribution of reservation prices of consumers[701]. Therefore, bundling helps the seller set a profit-maximizing price without losing sell due to negatively correlated demand for the products in the bundle.

Later examination of bundling shows that bundling can leverage market power and drive out rival from the tied market due to dynamic reasons[702]. When the bundling firm has market power over both products, it can use the bundle to deter potential entrants. If a monopolist observes the threat that a rival can produce one of the components at a lower price, it will opt to sell the first product only in combination with the second product with the incentive of subsidizing second product in order to sell first product[703]. Thus, even though rival goods may be efficient to compete with second goods, bundling will reduce the availability of potential market to the entrant. Furthermore, entering only one of the

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699 ADAMS/ YELLEN, p. 479.

700 SCHMALENSEE (Commodity Bundling), p. S211, S218; ADAMS/YELLEN, p. 496.

701 See SCHMALENSEE (Commodity Bundling), p. S211, S227; SALINGER, Michael A., "A Graphical Analysis of Bundling", 68 THE JOURNAL OF BUSINESS 1 (January 1995), p. 97, available at http://www.jstor.org/stable/2353084 (last visited 07.08.2016) [hereinafter Salinger (1995)]; ADAMS/ YELLEN, p. 490; BAKOS, Yannis and BRYNFOLSSON, Erik, "Bundling Information Goods: Pricing, Profits and Efficiency", 45 MANAGEMENT SCIENCE 12 (1999), p. 1625, available at http://people.stern.nyu.edu/bakos/big.pdf (last visited 07.08.2016) [hereinafter BAKOS/ BRYNFOLSSON (1999)].

702 See WHINSTON, Michael D., "Tying, Foreclosure, and Exclusion", NBER Working Paper No. w2995 (1989), available at https://ssrn.com/abstract=227224 (last visited 15.10.2016); CARLTON, Dennis W. and WALDMAN, Michael, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries" NBER Working Paper No. w6831 (December 1998), pp. 1-64, available at https://ssrn.com/abstract=141885 (last visited 15.10.2016) [hereinafter CARLTON/ WALDMAN (Strategic Use)]; NALEBUFF, Barry J., "Bundling as an entry barrier", QUARTERLY JOURNAL OF ECONOMICS (2004), pp. 159-187, available at http://faculty.som.yale.edu/barrynalebuff/BundlingAsEntryBarrier_QJE2004.pdf (last visited 15.10.2016).

703 NALEBUFF (2008), p. 3.

components' market may not be attractive when this market is not large enough to cover costs of entry or achieve minimum efficient scale[704].

It is always possible that a rival can enter the market with competing bundle products. However, it will be more difficult to develop two better products[705]. Furthermore, even if a rival responds to the bundle with a bundle, this offer can reduce the prices and consumers will benefit from lower prices, but consumers will not have the option buy components separately[706].

These theories suggest that pure bundling can be a device to protect and leverage market power, or enable sellers to extract more consumer surplus through price discrimination. However, even if the most vigorous advocator who emphasizes price discrimination effect of bundling, recognizes that the firms cannot extract significant amounts of consumer surplus unless bundling forecloses a substantial amount of sales[707].

1.2.1.1. Google case

There is no decision that the Board assesses the claim of price discrimination through bundling practice. However, it is worth to review the Board's Google decision where addressed the tying arrangement under the scope Article 6 of the TCA and reached the conclusion that anticompetitive effects of tying would not occur, due to alleged practice was not limiting the consumers' preference[708].

Limited Liability Company YANDEX (hereinafter YANDEX) claimed that GOOGLE, which is allegedly found dominant in a significant portion of the world,

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[704] WHINSTON, Michael D., "Tying, Foreclosure, and Exclusion", NBER Working Paper No. w2995 (1989), p. 41,42 available at https://ssrn.com/abstract=227224 (last visited 15.10.2016) [hereinafter WHINSTON (1989)].
[705] NALEBUFF (2008), p. 4.
[706] See MATUTES, Carmen, and REGIBEAU, Pierre, "Compatibility and Bundling of Complementary Goods in a Duopoly", 40 THE JOURNAL OF INDUSTRIAL ECONOMICS 1 (1992), p. 42, 46, 47, available at http://www.jstor.org/stable/2950626 (last visited 13.09.2016).
[707] See ELHAUGE (Rehabilitating Jefferson Parish), p. 474 (suggesting cumulative conditions for tying induced inter-product price discrimination to be deemed anticompetitive).
[708] The Board decision (Preliminary investigation) dated 28.12.2015 and numbered 15-46/766-281 (hereinafter GOOGLE decision).

had violated of Article 6 of the TCA, by introducing some anti-competitive conditions to the original equipment manufacturers (OEM) who want to use the Android operating system (OS) on their mobile devices. Accordingly, GOOGLE signed agreements with original equipment manufacturers under the name of (a) a mobile application distribution agreement, (b) a revenue sharing agreement, (c) an Android compatibility program, and a non-piece-breaking agreement. Due to these agreements, OEM who wanted to opt for the Android OS, should pre-install Google Play Store, Google Play Services and Google Mobile Services Package (including Google Search, and Chrome) for their device; Google Phone-top Search icon must be placed at least on the panel immediately adjacent to the Default Home Screen; and Google Phone-top Search must be set as the default search provider for all Web search access points on the devices, and OEM should *not* pre-install apps that compete with Google Mobile Service (GSM) apps (such as third-party "store" and third party "search") on any other of its devices running other versions of Android. Thus, equipment makers would be able to get a share of revenue gained from the GOOGLE's search through engine adds or apps.

Regarding the market power assessment of GOOGLE, The Board determined these findings[709]: 1) With a market share of 82.8% in the second quarter of 2015, Android had a significant market power in the mobile operating system market[710]; 2) It was seen that market share of Android rose from 69.3% to 84.8% in 2012-2014, while iOS 'market share fell by 5%; 3) The Google Play Store was well ahead of rival app stores in terms of the number of apps it had[711] which indicated that Google Play Store had a significant market power in terms of mobile apps; 4) Obtained from YANDEX and the results of a consumer survey conducted by an independent research company to examine consumers' use habits of Android smartphone application also indicated that GOOGLE had a high market power (According to the survey results, the Board compared the ratio of

[709] *id*., n. 38, 39.
[710] Android is followed by iOS mobile operating system owned by Apple with a market share of 13.9%.
[711] By 2015, Google Play Store has applications more than 10 times comparing to Yandex Store and Samsung App Store, and Amazon App Store more than 4 times comparing to Amazon App Store. In addition, a similar result is achieved when the number of applications downloaded from the Google Play Store and Yandex Store are compared.

application stores pre-installed on smartphones using Android operating system and *actually used* application stores)[712].

First, the Board evaluated agreements that GOOGLE signed with OEM under the scope of Article 4 of the TCA. The Board denoted that the agreements between Google and OEM who are placed at different levels of mobile operating systems, mobile applications and services market was vertical agreement, thus the exclusive pre-installation provisions in the contracts were vertical restrictions[713]. The Board continued that "this can create a competitive disadvantage for competitors in the presentation of their search services/application/application stores to consumers. Indeed, exclusive pre-loading can provide to GOOGLE a distribution advantage which other mobile apps and service providers do not have at the point of reaching the consumer" [714].

However, the Board remarked that "[a]t this point, however, it should be noted that the exclusive pre-installation in devices does not prevent consumers from downloading other applications afterwards. Although, the search service /application /app store that consumers meet in first their smart devices belong to GOOGLE, consumers will be *able to create shortcuts to download alternative apps*"[715]. Furtmermore, the Board denoted that:

> *Some of the mobile device users do not confine themselves to using default / pre-installed apps and services, and search for new and alternative applications and use it by loading it on the device, while the remaining users can be satisfied with the default applications and services. Therefore, exclusively pre-loading does not impose a restriction on the testing/choosing competing applications for Google applications, for consumers who are not satisfied with the default/ preloaded application*

[712] The Board also compared the Google internet browser's pre-installed and the actual usage rate on Android devices. Yet the rates did not share due to confidential business information.
[713] Google decision, n. 70.
[714] *id.*, n. 71
[715] *id.*, n. 72.

and services. …according to [above mentioned survey] pre-loading and usage rate are different from each other. In this respect, the exclusive pre-installation provides a key distribution advantage to GOOGLE, not for all Android-based mobile device consumers, but only consumer who are satisfied with default applications and services… At this point, it is noteworthy that the actual usage rate of the Google internet browser and app store is higher than the pre-installation, thus it can be deduced that the consumer has a prior preference in terms of Google internet browser and application stores[716].

In the end, the Board concluded that "*the absence of an obstacle for consumers to download other mobile services and applications to their mobile devices, as they desire, may limit the adverse effects of the exclusively pre-installation agreements*"[717]. Thus, it was found that there was no need to open an investigation, but it was appropriate to send an opinion to GOOGLE pursuant to the third paragraph of Article 9 of Law No. 4054 that it was beneficial to remove the provisions relating to exclusively pre-installing from contracts signed with original equipment manufacturers.

The Board assessed the complaint that Google Play is contractually tied to other apps in GMS including Google Search and Chrome, as well as forcing consumers to use Google's Network Location Provider service as their location provider under the scope of Article 6. However, they merely repeated determinations and recommendation related to tying in the Guidelines (Dominant Position)[718], and recognized only the exclusionary effect of tying, stating only indirect harm to consumers ("a dominant undertaking can harm consumers by causing foreclosure in the tied market")[719]. After stating that dominant position is a pre-condition for the violation of Article 6, the Board noted that "since no precise dominant position determination for GOOGLE has been made at this stage,

[716] Google decision, n. 73.
[717] *id*., n. 75.
[718] Guidelines (2009), n. 26, n. 82-88, n. 94 were repeated.
[719] Google decision, n. 78.

it is important to assess whether there is an abuse under the assumption that it is dominant"[720]. The Board repeated the above finding that pre-installing does not prevent consumers from subsequently downloading other apps on devices they purchase, and added that "for consumers who prefer GOOGLE apps and services, GOOGLE also reduces the cost of pre-loading these applications and services in bundles"[721]. Therefore, it has been concluded that the relevant actions of GOOGLE did not drive competitors from the mobile operating systems, mobile applications, and services markets, and did not violate Article 6 of the TCA.

The Board conclusion and reasonings can be questionable in varies aspects:

1.2.1.1.1. The Board addressed only bundling, did not grab tying

GOOGLE's Android is the dominant mobile operating system available for installation on third-party hardware, while Apple iOS and RIM Blackberry are only available on those companies' own devices[722]. Google had begun to use its control over Android to require that device manufacturers carry and favor other Google services in the way that Google specified, if a manufacturer wanted to distribute a commercially-viable Android device (branded with the Android name and logo associated with other Android devices, and able to connect to the Google app store to download other apps), the manufacturer had no choice but to make Google location services and Google Search the only and default providers for their respective functions[723]. Further, due to the Android compatibility agreement (even if stated that the Android OS is open source)[724] a manufacturer needs Google's certification and approval to ship a new device[725]. In other words,

[720] *id.*, n. 83.
[721] Google decision, n. 85.
[722] *id.*, n. 20, 30.
[723] See EDELMAN, Benjamin, "Leveraging Market Power Through Tying And Bundling: Does Google Behave Anti-Competitively?", May 12 2014, p. 55, 56, available at http://www.benedelman.org/publications/google-tying-2014-10-26.pdf (last visited 02.09.2017).
[724] Google decision, n. 25, 26
[725] Google decision, n. 36.

GOOGLE tied Android OS (tying product) with GMS (tied products) as using its dominant position in Android platform to favor its other services.

The Board did not evaluate this tying arrangement under Article 6, but merely assessed bundling (GMS package). With respect to assessment under Article 4, the Board mentioned this issue, but our reading suggests that the Board *implicitly* concluded that the adverse effect to competition created by Google's conduct (tying) is outweighed by dynamic efficiencies. Since there is a general emphasis in the language of the decision that Android is "open" and "open source", and within the entrance of GOOGLE (even it was late) into the smartphone market, Android OS was able to compete with iOS by making it open source, and the financing for this is obtained from advertising revenues[726]. The Board considered that tying (Google Play) was the only way to generate income, and the compatibility requirement was necessary to be part of this ecosystem[727].

Regarding Android as open source, indeed the main Android code is available and manufacturers can substitute improvements that provides itself or licenses from others[728], does not change the availability of Android OS without GMS. The OEM have strong preference to include Google's applications, which provide features that users expect[729]. However, the restrictions in the agreement are contractual, not enforced through software (OS). Thus, it implies no technical obstacle to a manufacturer installing non-GMS, despite lack of permission from GOOGLE, but in practice, the threat of contractual enforcement prevents these tactics[730]. In other words, even it is accepted that pre-installation benefits consumers, consumers *do not* benefit from the prevention of installing rivals' apps. They may prefer a combination of Google Play Store with rival's internet browser.

[726] Google decision, n. 19-30. See n. 22 ("[Innovation in the relevant market] has been slower until 2007 as a result of the insufficient number of applications supported by each mobile operating system).
[727] *id*., n. 27, 30, 32,36
[728] *id*., n. 25, 28.
[729] *id*., n. 20, 21.
[730] EDELMAN, p. 58.

With respect to compatibility requirement, GOOGLE's certification is required for a device to access Google Play to obtain apps, and GOOGLE reserves the right to withhold the Android compatibility certification, if "devices aren't compatible", without explaining the factors that determine compatibility[731]. The Board neither elaborated on the criteria for compatibility, nor questioned whether there was less strictive alternatives to obtain same benefits without hampering competition.

In dissenting opinion, tying issue has been correctly addressed, and it has been suggested that through tying Google has been leveraged its market power (likely dominant position) in the Android operating system into the mobile applications and services market, while through bundling it has been leveraged its market power of certain mobile applications and services into other mobile applications and services, and used the powers in these markets to maintain its Internet advertising market place[732].

In sum, the Board took into consider dynamic efficiencies crated by GOOGLE's Android Open Source Project (AOSP) until the time, but failed to balance those benefits against potential harms that reduced choice, slower innovation, lower quality, and higher prices due to exclusion of rivals from relevant market[733].

1.2.1.1.2. Sophisticated users v. unsophisticated users' preference (lock-in effects)

The tendency toward to lock-in effect for successful technologies is determined one of the characteristic of dynamic markets[734]. A lock-in effect

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731 EDELMAN, p. 55, 56.

732 Google Decision, n. 17, 18.

733 It was recorded that market share of Android rose from 69.3% to 84.8% in 2012-2014, while iOS 'market share fell by 5%, but the Board did not question whether Android success is achieved through superior product or tying and bundling practices. Blindly assumed that GOOGLE has *eventually* good intention for developing Android as an open source.

734 See KATZ, Michael L. and SHAPIRO, Carl, "Product Compatibility Choice in a Market with Technological Progress", 38 OXFORD ECONOMIC PAPERS, New Series, Strategic Behaviour and Industrial Competition (November 1986), pp. 146-148, available at http://www.jstor.org/stable/2663007 (last visited 12.09.2017);

indicates that once consumers get familiar with a product and are practiced using it, they become reluctant to switch to a different product[735]. Thus, this create tendencies toward monopoly or maintain market power in dynamic markets.

The Board considered the lock-in effect, but not in the sense above mentioned. The Board understanding was GOOGLE may have distribution advantage through only consumer who are satisfied with default applications and services. In addition to strength its argument propounded that actual usage rate of GMS is higher than rate of pre-installed GMS[736]. The Board read this finding as higher preference for GMS, but failed to elaborate whether once users get used to Google Chrome or Google Play Store, they find difficult or time consuming to look for other applications even when they switch to non-pre-installed applications in Android mobiles. Further, almost all the information kept confidential, we are not able to compare actual usage rate and rate of pre-installed applications. More importantly, it is a shortcoming that the Board did not compare the change in actual usage rates after GOOGLE's conduct (tying and bundling) and before its conduct.

The Board found that defaults do not have a lasting effect, consumers can easily download a browser or desired application later on. However, the Board

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RUBINFELD, Daniel L., "Antitrust Enforcement in Dynamic Network Industries", 43 ANTITRUST BULLETIN(1998), pp. 960-868, available at http://scholarship.law.berkeley.edu/facpubs/985 (last visited 12.07.2017); LITAN, Robert E., "Antitrust and the New Economy, 62 The University of Pittsburgh Law Review (2001), p. 429, 430; PITOFSKY, Robert, "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy", 16 BERKELEY TECHNOLOGY LAW JOURNAL (2001), p. 538-540, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1312&context=facpub (last visited 12.07.2017). The other determined characteristics are strong economies of scale; the presence of network effects; and the tendency toward rapid technological change: Economies of scale exist on the supply side in dynamic markets indicates that the necessary knowledge to develop software or other types of high-tech products, is generally expensive to produce. But, once these products are developed, they are usually cheap to reproduce, i.e. these industries tend to be characterized by high fixed costs and low marginal costs, thus, average costs are reduced as output increases (See LITAN, p. 429). Network effects occur when the value to a consumer of using a good or service increases with reference to the number of other consumers who also use it. For instance, in computer operating systems market, the larger the network of users (system has more users), the more likely that higher initiatives to develop applications for use on that system (KATZ/SHAPIRO, p. 146-148; RUBINFELD, p. 861; PITOFSKY, p. 539). While first two characteristics (economies of scale and network effects) create tendencies to become monopoly in dynamic markets, characteristic of rapid technological change, can have the opposite effect as making it difficult for a monopolist to dominate a market over the long term since competitors are likely to produce superior or competitive products meanwhile.

[735] LITAN, p. 430.

[736] Google decision, n. 73.

did not ask whether these required top placements or default status are removable, or if removing them is practical for users. Indeed, receiving mobile phone with Google Play will ease for user to install other desired Google apps, but when user has preference for rival's application instead of pre-install one, whether out would like to keep and let the apps get clutter. The Board settled that there are some sophisticated consumers (who will not be satisfied with pre-loaded applications and service) may pose some constraint on Google's conduct[737]. However, this ability, on a user-by-user basis, does not grant competing search providers and application developers to attract users all together[738].

In summary, the Board concluded that coercion or reduction in consumer choice did not occur, as asking the question whether consumers are forced to purchase unwanted product or at higher price. Answer this question negatively due to higher actual user rate (as indicating even without tying user would opt GMS) and cost savings from pre-installation. However,, the Board did not ask the question whether consumers were forced to give up the product or service they wanted. Since, due to lock-in and network effects rival's service and product might become less available for the users.

1.2.1.1.3. Intention v. effect

Yandex made a request for the re-assessment of the Google decision of the Competition Board, yet the Board found that there was no room for the removal, withdrawal, amendment or a new transaction of the Board decision[739]. Thus, Yandex resorted to the Administrative Court.

The Court held that to decide not to open investigation, the conclusion should be based on undoubtful evidence and documents that showed the relevant behavior would not be considered a violation of competition, otherwise, it was

[737] See Ankara 5. Administrative Court decision dated 8.3.2017 and numbered 2017/741, p. 6,7.
[738] See EDELMAN, p. 64.
[739] The Board decision dated 09.06.2016 and numbered 16-20/ 332-151 (hereinafter YANDEX re-assessment requirement).

necessary to open an inquiry in order to comprehend it in any way[740]. The Court adjudged that since Google's tying and bundling tactics were suspect under antitrust law (as considering dissenting opinion), the Board decision with respect to no need to open the investigation, was not justifiable[741].

YANDEX challenged in its application that the relevant concerns in the complaint were not handled and underestimated because the relevant market was not determined in the decision and all markets in which GOOGLE operates are generally ambiguous[742]. Further, systematic regarding to evaluation of tying and bundling practice was wrong due to lack of dominant position determination[743]. The Board conclusion was incorrect because GOOGLE violated Article 6 as reducing consumer choice and creating entry barriers and obstacles for potential developments of applications, and ability to install alternative application could not outweigh these adverse effects[744].

YANDEX did not challenge before the Board and the Court, and the Administrative Court did not consider whether GOOGLE behaviors were infringements of Article 6 subparagraphs (a)[745] and (d)[746]. We are not surprised that this possibility was not considered by the Board. Since, the Board's approach is clear for evaluation of "objective" factor in its previous decisions as indicating that if the conduct does not have a restrictive effect or that effect is limited,

[740] Ankara 5. Administrative Court decision dated 8.3.2017 and numbered 2017/741, p. 4.
[741] *id.*, p. 6-8.
[742] YANDEX re-assessment requirement, n. 3.
[743] YANDEX re-assessment requirement, n. 3.
[744] YANDEX also claimed that assessment under Article 4 was incorrect, the Board should evaluate vertical restraints under Article 5 whether it was possible to grant exemption, yet since GOOGLE has more than 40% market share, it should not be ensured block exemptions for the alleged restraints, and it should be held that violation of Article 4 existed. See YANDEX re-assessment requirement, n. 2-4; Ankara 5. Administrative Court decision, p. 1, 2.
[745] "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" (emphasis added).
[746] "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" (emphasis added).

merely existence of stated "objective" in the relevant subparagraphs cannot be established automatically an abuse under Article 6[747].

Now, the Board is given a third chance to correct its decision about GOOGLE. Following a comprehensive analysis, GOOGLE's practice should be found anticompetitive. Nevertheless, we suggest that YANDEX can also challenge against GOOGLE practices under Article 6 (a) and (d), since the Board stated that:

> *both the increase in internet usage and the shift of this usage from personal computers to mobile devices, GOOGLE has come to experience the AOSP, which aims to develop a mobile operating system for fault-free, integrated, portable devices with original equipment manufacturers, mobile network operators and other technology companies to actively take part in the mobile services market <u>with the aim of protecting its position in the internet advertising space market</u>*[748].

Even if, the Board fails to determine anticompetitive effect that cannot be outweighed by created efficiencies by GOOGLE's conduct, YANDEX may have chance before the Council of State as requesting consideration of Article 6 (a) and (d). Because, the Council of State has taken a formal approach for applying mentioned subparagraphs in the judicial review of Board decisions, and has hold that the relevant behavior is a violation of Article 6, if there is a restrictive purpose for competition, even if there is not a restrictive effect in competition[749].

1.2.1.2. Avea/TTNet case

The Board evaluated the claim that the Türk Telekomünokasyon abused its dominant position via tying/package sales in a campaign which was offered a global system for mobile (GSM) operator (Avea) subscription with a dominant

[747] See the Board decisions dated 05.06.2007 and numbered 07-47/506-181; dated 27.5.2008 and numbered 08-35/466-166.
[748] Google decision, n. 65 (emphasis added).
[749] The Council of State 13.D, dated 07.02.2011 and numbered E.2007/13574, K.2011/ 486; The Council of State 13.D, dated 12.04.2011 and numbered E.2008/ 8249, K.2011/ 1525.

Internet provider's (TTNet) subscription[750]. The alleged campaign was providing for users, who connect to the internet via TTNet, would be given total 960 minutes free-talk as a gift for three months (which was valued 109 Turkish Lira per month), if they obtained Avea postpaid line.

After indicated that those four conditions should be looked (cumulatively): 1) Determination of the dominant position, 2) the products subject to the tying/ package sale are different/ independent products, 3) the practice can have an anti-competitive effect (exclusion/ foreclosure)[751], 4) the absence of an objective justification and/or lack of efficiency defense; the Board determined that alleged campaign was a mixed bundling practice, therefore it was sufficient to determine the dominant position in any of the subject products[752].

For the conclusion, the Board elaborated those findings, as follows:

1) Considering the demand/ the number of persons participating in the campaign and the demand shift in terms of the determination of a possible foreclosure effect, it has been noticed that the Avea GSM subscription (which is the tying product) was already the least preferred GSM service by consumers, even from Avea users, only few of the them showed interest in this campaign during the offer, the contribution of the campaign to TTNet was at a minimum level and that there was no question of consumers passed to the TTNet from the competitors due to the alleged campaign, therefore, it was not possible to prevent competition in the retail broadband internet access services market[753];

2) "User preferences" has been examined in virtue of the fact that when the users' value attributed to products is positively correlated, even if the products

[750] The Board decision (Preliminary Investigation) dated 9.10.2008 and numbered 08-57/ 912-363 (hereinafter Avea/TTNet decision).
[751] Regarding foreclosure effect in the tied product market, the Board denoted that "In principle, the evaluation of the foreclosure effect on the market is determined by, (1) the type (s) of the users/ clients that the competitors of the dominant undertaking are unable to compete with, (2) the percentage of the user/ customer (who accepted tying) in the tied market" (Id., n. 240).
[752] *id*., n. 220-230.
[753] *id*., n. 280-420.

are not complementary, the foreclosure effect will increase; and found that that there was no complementarity/substitution feature between the internet subscription and the GSM subscription[754], and the cost of the product in question was related to the use and therefore the free minutes to be given were valid for only 3 months, indicating that the campaign could only be considered as a promotion[755] and it was not possible to prevent competition in the retail broadband internet access services market[756].

3) Considering that mixed package sales could lead competitors to drive out of the market through a predatory pricing, thus the Board evaluated those factors, i.e.,the size of the discount offered at the campaign, its Impact on price of TTNet, those who participated in the campaign had the right to have a free speech for 109 TL, the price of the internet will not be deducted from the cost of the internet, internet subscription to make use of the campaign, Avea postpaid line subscription, existence of negative margins in exceptional cases when the total amount of expenditures such as related taxes and fixed costs is taken into account, and held that the practice is far from limit to competition in the market[757]

It was an interesting decision, due to the alleged market for anti-competitive effects would be seen as a result of tying/package sales, at the same time it was the retail broadband internet access services market which is claimed to be dominant. In addition alleged campaign was a mixed bundling practice that the products (Avea GSM and TTNet internet subscriptions) were available separately, thus *prima facie* consumers were free to buy preferred item from competitors, especially the tying product. However, the Board correctly considered that whether offered package was priced in such a way that it would not be rational for consumers to buy individual products from the bundle to match

[754] Avea/TTNet decision, n. 790, 800 ("…the presence of 63 million GSM subscribers and only 5 million internet subscribers mentioned above clearly demonstrates that such complementarity is not acceptable…Apart from this, in the request of the complaint, 960 min. of free speech duration, covers only Avea and the fixed line, thus this constitutes another limiting direction of the campaign").
[755] Avea/TTNet decision, n. 810.
[756] Avea/TTNet decision, n. 680-770.
[757] Avea/TTNet decision, n, 850-1300.

them with complementary products produced by a competitor. The Board evaluated carefully and concluded that the discount (the offer of free-talk minutes in value of 109 TL) was not large enough that efficient competitors could not offer[758].

Above concrete cases show that the primary focus in the competition law on tying has been the foreclosure of competition in the tied product. In contrary to this focus, concrete cases (clearly in Google decision) demonstrate that tying was used to preserve and extend the dominant position in the tying product. The fact that products are available or consumed separately does not prevent undertaking to engage tying practice. Since economists are almost sure that tying creates efficiency, competition authorities may grant important weight to any plausible efficiency gains from tie, even it is difficult to qualified or quantify. However, what economists do not include their analysis is "the motivation" of the undertaking. There is no reason to rule out underlying aim of undertaking for tying practice for jurists. Further, economists suggest efficiencies achieved through physical integrations should receive greater weight than efficiencies achieved through contracts[759].

Regarding dynamic efficiency concern, indeed, it is more difficult to evaluate the welfare consequences of encouraging more innovation. Because, initially tying can increase the rate of return, thus promote more innovation, yet the consequence of strategic conduct may attenuate the incentives for subsequent innovations[760]. Nonetheless, if social rate of return from innovation exceeds the private rate of return, then such a tying maybe desirable[761]. However, it is difficult

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[758] Avea/TTNet decision, n. 430-670.
[759] See CARLTON/ WALDMAN, p. 38.
[760] See POSNER, Richard A., "The Social Costs of Monopoly and Regulation", 83 The Journal of Political Economy 4 (August 1975), pp. 807-828, available at http://www.jstor.org/stable/1830401 (last visited 11.04.2017) [hereinafter POSNER (Social Cost of Monopoly)]; FISHER, Franklin M., "The Social Costs of Monopoly and Regulation: Posner Reconsidered", 93 JOURNAL OF POLITICAL ECONOMY 2 (April 1985), pp. 410-416, available at http://www.jstor.org/stable/1832184 (last visited 11.04.2017) [hereinafter FISHER (1985)]. See also ELHAUGE (2009), p. 440-442; CARLTON/ WALDMAN, p. 39.
[761] See CARLTON/ HEYER (Extraction vs. Extension), p. 292, 294, 305; KLEIN/ WILEY, p. 618.

to say that competition authorities will grant decisive role to innovation in order to allow monopolization[762]-unlike the Board Google decision.

We do not find concrete evidence that tying used for price discrimination or merely for consumer surplus extraction raises antitrust concern. However, we have supportive findings that competition law grants a decisive role to freedom of consumer choice in the determination of exclusionary and exploitative abuse. However, in the Google decision, the Board failed to establish that cost savings for sophisticated users through pre-installed apps and service could not offset the loss in unsophisticated consumers' freedom of choice. Moreover, the Google practice signaled a potential reduction in consumer choice due to preserving its dominant position in the tying product and dampening rivals' incentives for developing competitive tied products.

Furthermore, "forcing" is not a precise requirement in all cases. Instead, it is more of a means to comprehend whether an anticompetitive tie and effects arise. Tying induces inter-product discrimination will likely ease for the firm to set the profit maximizing prices. However, in challenge practices, especially in the case of technological tie-ins, such as in Google case or Microsoft (Windows Media Player or Internet Explorer) decisions, the fact that there was not separate charge for tied items or consumers were not strictly prevented from using a rival's tied product. Therefore, in this instance, percentage of the sales of the tied product cannot be the only relevant factor to pose the risk of harm to competitive structure. Likewise, percentage of the sales of the tied product may not sufficient to understand of reduction in consumer choice. In this case, barriers to entry, extent of dominant position and all other factors should be included for the assessment. In addition, in bundling cases, rather than price discrimination

[762] See Guidance (2009), n. 30 ("Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.").

(therefore consumer surplus extraction), discriminatory conduct (between sophisticated and unsophisticated users) leads to exploitation. The higher the number of unsophisticated users (who are satisfied with pre-installed tied items), the higher the degree of reduction in consumer choice. In addition it leads not only exploitative effect, at the same time stands for injury to market structure as creating higher entry barriers.

Virtual freedom of consumer choice does not prevent antitrust scrutiny for mixed bundling either. An antitrust concern arises in mixed bundling, where undertakings can achieve similar results (of pure bundling or tying) by keeping the component prices artificially high[763], and the "economic coercion" is more likely to occur through predatory pricing, which is exclusionary.

1.3. Tying Induced Intra-Consumer Surplus Extraction

Tying induced intra-consumer surplus extraction occurs, when the undertaking ties the sale of product (tying product) to an obligation to buy another product (tied product) from it at an elevated price (required tie-in). This effect is well recognized by the literature[764] and by the legislation, especially for tying where results in a single branding type of obligation imposed through vertical agreement[765].

The seller can successfully impose tying by taking advantage of the fact that buyers' valuation for the tying product is significantly higher than for the tied product. However, the main concern in this case is that such tie-ins restrain competition for tied product sales[766]. Nonetheless, tying can raise prices of tied product for customers of tying firm as well as customers of rivals of tying firm.

[763] NALEBUFF (2008), p. 4.
[764] See BURSTEIN (Tie-in Sales), p. 69-73; BURSTEIN (Full-line Forcing), p. 613, 614; ELHAUGE (2009), p.412, 413; ELHAUGE (Rehabilitating Jefferson Parish), p. 469-472; Justin Ho, Katherine, Ho and Holland Mortime, Julie, "Analyzing the Welfare Impacts of Full-line Forcing Contracts" (2011), available at http://www.columbia.edu/~kh2214/papers/hhm_revised_121211.pdf (last visited 20.06.2017).
[765] See EC Guidelines on Vertical Restraints (2010), n. 214; Guidelines on Vertical Agreements, n. 202.
[766] See ELHAUGE (2009), p.412, 413; ELHAUGE (Rehabilitating Jefferson Parish), p. 469-472 [showing a model and suggests that such ties restrain competition for tied product sales (in a substantial dollar amount) in a way that always lower consumer surplus, but does not leads necessarily a substantial foreclosure share].

These condition is well recognized in the EC Guidelines on Vertical Restraints (2010), as follows[767]:

> Tying may lead to anticompetitive foreclosure effects in the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under Article 101(1), the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the supplier in the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

Studies and legislations indicate concern for the tying effect on tied sales, and requires quantity-forcing on the buyer or lack of fixed ratio between the tying and tied products to occur the foreclosure effects[768]. Here, we contend that quantity forcing or lack of fixed ratio criteria do not need to be hold for exploitative effect of tying in this instance. However, the question is whether the exploitative effect of tie-ins should be deemed anticompetitive. We propose that surplus extraction and supra-competitive prices cannot be deemed exploitative for metering pricing and bundling, and competition authorities should focus on reduced consumer choice or the source of the exploitation.

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767 Guidelines on Vertical Agreements, n. 216. Turkish Authority adopted the same provision under Guidelines on Vertical Agreements, n. 205.

768 See ELHAUGE (Rehabilitating Jefferson Parish), p. 471 (contending that such effect only possible when buyers purchase multiple units of the tying product and do not purchase the two products in fixed ratio. Because if buyers instead bought only one-unit tying product or bought in fixed ratio, then obligation to buy the tied product at an elevated price is equivalent to price increase on each unit bought of the tying product and it will cause buyer to purchase fewer units of tying product).

Indeed, dominant firms may use their market power over one product to force consumers to buy another product which they do not want. In Jefferson Parish, it is stated that "forcing" someone to buy a product she/he "did not want at all" or "might have preferred to purchase elsewhere on different terms" means tying "foreclosed a choice"[769].

The question is that should we apply this holding for requirement ties to be deem anticompetitive? What can be the right question to ask: Can seller force consumer to pay something they do not want; or can seller force consumers to pay more than they should for the things they do want; or can seller force consumers to buy things they would prefer to buy from another seller?

Let us answer these questions through a concrete case. In "Inter Milan-Spiel" decision[770], the German Competition Authority addressed the FC Köln practice that sold the ticket for national game (the FC Köln v. Braunschweig) as announcing that who purchase of this ticket would also be given a ticket for an UEFA Cup game (the FC Köln v. Inter Milan). This behavior was considered as tying and found exploitative on the ground that consumers who have high interest to see Inter Milan game, were forced to purchase the ticket for Braunschweig game.

The German Competition Authority supposed it detected exactly what a tying firm may try to achieve through a requirement tie, i.e.,creating artificial demand for tied product through high reservation price for tying product. However, did supporters of the FC Köln not want to see at all Braunschweig game, or were they forced to pay more than they would?

CRANE challenges that no matter how great its market power, the seller cannot force the consumers to pay for something that they do not value. In other words, the seller cannot exceed the buyer reservation price, it can only extract the

[769] Jefferson Parish, at 12, 28.
[770] OLG Düsseldorf, 22.01.1985, WuW/E OLG, s. 3335 (KARAKILINÇ, p. 136-138).

amount for thing they value, buyer will see that the additional things are given free[771]. We agree with this observation, for the example second ticket was given or charged would not change the existence of tying[772], and also could not change supporters' reservation price. It does not matter whether they wanted to see only one game or both.

The relevant question to be asked, is whether they are forced to give up something they want. For this, the buyer does not need to pay more for tied product than she/he would pay for the rival's product. Buyer may prefer the rival's product, and thus may suffer a loss in utility when forced to buy through tying. Even if the buyer values a rival's product more than the tying seller's tied product, she/he will select the tied product provided her/his utility for the rival's product exceeds her/his utility for the tied product by less than the price of the rival's produc. In this case, the buyer will decide to consume the tied product rather than make an additional purchase of the rival's product.[773]. Thus, here, tying forecloses a choice, without even decreasing consumer surplus.

For instance, the buyer's need for the tied product of a rival is 10 liras (assuming utility is measured in monetary term), and the tied product of tying firm is 8 liras. While the tied product of the rival is sold at 3 liras, the tied product of the tying firm is sold at 5 liras. The buyer will select tying. If the buyer's need for the tied product of a rival were equal to or exceeded 14 liras, the buyer would also purchase the tied product from the rival. This illustration suggests for calculation of aggerated consumer surplus loss or utility, to know buyers' reservation price or utility which measured in monetary term and each lira has the same value for to all buyers. That is not administrable for the competition authorities. Thus, comparison the tied sales before and after tying practice would

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771 CRANE, Daniel A., "Tying and Consumer Harm", 8 COMPETITION POLICY INTERNATIONAL 2 (2012), p. 29, 30, available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2373&context=articles (last visited 05.04.2017). [hereinafter CRANE (Tying)].

772 Compare Case T-201/04 Microsoft v Commission [2007] ECR II-3601, at 970 ("It does not follow from either Article [102 (d)] or the case-law that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to supplementary obligations within the meaning of that provision").

773 See CRANE (Tying), p. 31.

be better indicator whether tying artificially increased the demand for the tied product of the tying firm, and force buyers to forego without rival's tied product.

If we return to our example, from Inter Milan supporters point of view, they might force to buy FC Köln v. Braunschweig game due to high demand for seeing Braunschweig game that they were worry that they could not find ticket for Inter Milan game. Or, *vice versa* from Braunschweig supporters point of view, they might force to buy FC Köln v. Inter Milan game due to high demand for seeing Inter Milan game that they were worry that they could not find ticket for Braunschweig game. For FC Köln supporters tying likely provided the most benefit. In the end, no one had been forced to giving up they did want.

When tying forces the buyers to forego a rival's product, it increases the demand for its own tied product artificially. However, it is difficult to say that this effect occurs merely due to reservation price for tying product significantly more then tied product. The effected tied amount of sale will be a better indicator of whether tying foreclosed a choice, unless consumers lack price consciousness or cannot evaluate the quality of the tied product[774], which means that we do not suggest condemning tying induced intra-consumer surplus extraction, unless the percentage of total sales on the market of the tied product is significant. To determine this effect, the Board first will examine the percentage of total sales in the relevant market affected by the conduct, then compare the percentage of total sales of the tying firm before and after the tying conduct in order to determine whether there is significant increase after tie-in. Thereafter, they will verify whether the percentage of total sales of rivals decreased significantly. In other words, tying cannot be exploitative unless it is exclusionary in this instance.

[774] See Jefferson Parish, at 27, 28.

2. PRO-COMPETITIVE JUSTIFICATIONS AND DEFENSES

2.1. Objective Necessity Justification

Article 6 does not contain an exemption provision similar to Article 5, yet it has long been established that "objective justification" can immunize conduct that would otherwise be an abuse under Article 6 from liability by the Board. The Board implied this approach either (disputably) infusing it in commercial usage test under the assessment of whether tying involved separate products or referring to Discussion Paper, which suggests assessment of objective justification for the evaluation of exclusionary dominant undertaking's conduct[775]. Guidelines (Dominant Position) explicitly suggests that a dominant firm's conduct may be justified by objective necessity[776].

When assessing an objective necessity justification, the Board will consider whether 1) the conduct protects a legitimate benefit; 2) the conduct is indispensable for achieving the relevant benefit; 3) this conduct of the dominant undertaking must be caused by external factors (such as health and safety requirements set out by relevant public authorities); 4) the undertaking must not restrict competition more than necessary when protecting the benefit in question. The burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking[777].

It has been criticized that the defense of objective justification is in some ways a tautology. As Advocate General Jacobs stated in *Syfait*, "the very fact that conduct is characterized as an abuse suggests that a negative conclusion has already been reached", thus objective justification means that "certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all"[778]. Similar argument has been suggested for the assessment of

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[775] See The Board *Digitürk* decision (2008); *Avea/TTNet* decision (2008).
[776] Guidelines (Dominant Position), n. 31.
[777] Id., n. 31.
[778] See Opinion of Advocate General Jacobs in Case C-53/ 03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE [2005] ECR I-4609, para. 50-53.

"objective justification" defense, since if the practice is objectively justified, then it should not be abusive in the first place[779]. Two-stage analysis is artificial for the exemption of the conduct due to objective justification[780]. Therefore, it is argued that the competition authority should prove the absence of an objective justification as an integral part of determination of the infringement[781]

We agree with the arguments partly. Whether it is found that conduct could be justified on objective necessity bases, then it was not abusive. Therefore, the two-stage analysis that the Board first used to establish abusive behavior then accepts that the defense of "objective necessity" becomes artificial. However, we claim that there should be distinction between defenses of "objective necessity" and "efficiency". Then, the conceptual problem is whether "objective necessity" justification is a "defense", since there was no abuse in the first place, thus removing the need for an undertaking to provide a defense[782].

Our reading of the Guidelines (Dominant Position) suggests that, for "objective necessity" justification, the dominant undertaking does not need to prove *prima facie* objective justification, but it will merely claim this[783]. In other words, the two-stage analysis implies that the burden of proof is borne by the competition authority to show an infringement under Article 6 and cannot shift to the defendant[784]. However, the legal burden must be distinguished from the

[779] See NAZZINI, Renato, "The Wood began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases", 31 European Law Review 4 (2006), p. 533, available at https://dialnet.unirioja.es/servlet/articulo?codigo=2101311 (last visited 02.09.2017); O'DONOGHUE/ PADILLA, n. 11108.

[780] See Opinion of Advocate General Jacobs, para. 53; Akman (2012), p. 118.

[781] LOEWENTHAL, Paul-John, "The Defence of 'Objective Justification' in the Application of Article 82 EC", 28 World Competition 4 (2005), pp. 459-461, available at https://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2005028 (last visited 02.09.2017); AKMAN (2012), p. 118-120.

[782] See van der VIJVER, Tjarda, "Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?", 4 Journal of European Competition Law & Practice 2 (2013), p. 124, available at doi:10.1093/jeclap/lps062 (last visited 02.09.2017).

[783] Guidelines (Dominant Position), n. 30 ("In the application of article 6 of the Act, the Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified. Claims of justification examined by the Board may be classified under the categories of objective necessity and efficiency.").

[784] See the speech of 16 September 2006 at the Fordham Conference by Emil Paulis, available at http://ec.europa.eu/competition/speeches/text/sp2006_014_en.pdf. (last visited 12.08.2017).

evidentiary burden, which demands that the person who makes an assertion must provide proof thereof[785]. However, a dominant firm that merely claims "objective necessity" cannot fulfill the requirement of evidentiary burden. The dominant undertaking can be expected to demonstrate "with a sufficient degree of probability, and on the basis of verifiable evidence"[786]. Furthermore, evidentiary burden requires proof from the litigating party that is best positioned to provide it, and this makes it unattractive for a party to make assertions that it cannot substantiate[787]. Therefore, it should be the dominant undertaking that bears the (initial) evidentiary burden to provide proof, since success of the objective necessity will be based on the evidence that is usually *only* available to the dominant firm.

After the possibility of conduct protects a legitimate benefit is shown, then the Board assess whether the conduct is indispensable for achieving the relevant benefit"[788]. However, the Guidelines (Dominant Position) foresees that "the burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking"[789]. Here, burden to proof "indispensability" is problematic. Since, to show indispensability, the dominant undertaking should prove that there is no less strictive alternatives to the conduct that are capable to fulfill objective necessity.

In the context of "objective necessity" the dominant firm should show that it had no alternative way to conduct. Van der VIJVER claims that this will not be easy to prove, as alternatives courses of action will often be imaginable[790].The

[785] van der VIJVER, p. 123 ("The evidentiary burden may thus be borne by any of the litigating parties depending on what they have asserted").
[786] See Guidance (2009), n. 30.
[787] van der VIJVER, p. 123.
[788] Guidelines (Dominant Position), n. 31. Compare Guidance (2009), n. 31 ("It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies").
[789] Guidelines (Dominant Position), n. 31.
[790] van der VIJVER, p. 128.

standard will be easily satisfied, if the lack of alternatives can be shown from the available evidence, for instance that the dominant firm's conduct was prescribed by law[791]. The Board embraces this example and even in a previous decision went further and *ex officio* considered that the undertaking's conduct was legitimate to compulsion by the relevant law[792].

UZUNALLI argues that in the field of quasi-judicial actions, the principle of *in dubio pro reo* is valid, and the Board is obliged to prove that the substantive fact has occurred by providing a full proof[793]. Therefore, any information, documents and evidence that may have influence on the decision may be submitted to the Competition Board by the dominant undertaking, as well, *ex officio*, the Board may do any necessary research, or will be able to evaluate all the information, documents and evidence submitted by the third parties[794]. Then, nonetheless, the dominant undertaking can prove that its behavior is economically the only possibility based on its right to defense[795].

In the context of requirement of "indispensability", we also argue that it is contrary to the terms of administrative and civil proceedings in Turkey[796]. The evidentiary burden should be borne by the Board or the other party to provide for less anticompetitive alternatives, since they have the benefit from the legal consequences. Then, the burden shifts to the dominant undertaking to refute or rebut the evidence to show that less anticompetitive measures would not be sufficient[797].

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791 *Id.*, p. 128.
792 See the Board *HP* decision.
793 UZUNALLI, Sevilay, "Avrupa Birligi Rekabet Hukuku Isiğinda Yikici Fiyat Uygulamalari ile Hakim Durumun Kötüye Kullanilmasi [The Abuse of Dominant Position Through Predatory Price Practices Under The Light Of European Union Competition Law]", 11 Rekabet Dergisi 4 (2010), p. 95.
794 UZUNALLI, p. 95, 96.
795 *Id.*, p. 96
796 Code of Civil Procedure No: 6100, dated 12.01.2011, Article 190 ("The burden of proof shall be borne by the party making the claim for its benefit from the legal consequence attached to the alleged case unless a special arrangement is made in the Code.").
797 For the allocation of burden of proof in the application of less restrictive alternatives in US Competition Authorities See FELDMAN, Gabriel A., "The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis", 58 AMERICAN UNIVERSITY LAW REVIEW 3 (February 2009), p. 583, available at

The most recognized objective necessity argument under tying practice is tying as a means to improve product quality, quality control, product safety, and the protection of reputation. It is a shortcoming of the Guidelines (Dominant Position) that does not suggest any objective necessity examples under tying practices but merely proposes to assess cost savings as an efficiency defense.

Quality control or quality assurance is matter since increasing sophistication (and sometimes coupled with fragility) of products in modern economies is important for producers to be able to provide quality assurance[798]. When the consumer gathers the products, it may not be clear whether any malfunctions are the fault of the consumer or of the component suppliers, which may also lead a reputation for poor quality. Thus, protection of reputation necessity will usually intertwine with quality control or product safety. Here, tying proper complementary products or components may provide more certainty for the consumer and the producer more certainty about the product quality.

However, claims that tying as a means to maintain product quality or product safety have been dealt very cautiously in the decisional practice and case law, on the grounds that there are less restrictive alternatives to achieve the relevant objective necessity [799]. The usual counter-argument will be that publishing a specification for necessary quality standards or providing training to a health and safety authority is a less restrictive option[800]. However, these arguments should not be asserted without consideration of whether it may not be

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http://digitalcommons.wcl.american.edu/aulr (last visited 10.06.2017) (as reviewing courts' decision, has found that inconsistency exists, i.e. "With respect to the burden of persuasion, the majority of the circuits place the burden on the plaintiff to prove the existence of a less restrictive alternative. The U.S. Courts of Appeals for the District of Columbia and the Seventh Circuit, however, place the burden on the defendant to prove the absence of less restrictive alternatives, while the U.S. Courts of Appeals for the Eleventh and Second Circuits have been inconsistent, placing the burden on the defendant in one case and the plaintiff in another.").

[798] O'DONOGHUE/ PADILLA, n. 22631; KARAKILINÇ, p. 544, 545.

[799] See Case T-30/ 89, Hilti AG v Commission [1990] ECR II-163; Tetra Pak International SA v Commission [1994] ECR II-755, para. 138; and C-333/ 94 P, Tetra Pak International SA v Commission [1996] ECR I-5951; Int'l Business Machine Corp. v. United States, 298 U.S. 131 (1936); Int'l Salt Co. v. United States, 332 U.S. 392 (1947). United States v. Jerrold Elecs. Corp., 187 F. Supp 545 (E.D. Pa. 1960), *aff'd percuriam*, 365 U.S. 567 (1961).

[800] See O'DONOGHUE/ PADILLA, n. 22631.

easy, useful, or less costly to publish specifications, due to lack of assurance that consumers or customers will follow them[801].

Through tying, especially technological ones, it may be aimed at improving the tying product or creating a new or upgraded one[802]. For instance, new additional functions such as adding a camera or internet browsers into cellphones became a device that consumers prefer.

The Board approach has a clear tendency to include objective necessity justification issue in its assessment of tying under Article 6, but it provides no clear framework as to the applicable standard of proof. We detect only two Board decisions that tackled with objective necessity. In one of them, Board considered objective necessity as a part of separate product test[803]. In the other, concluded that tying was economically indispensable due to statutory obligation[804]. In both decisions, the Board carried out an *ex officio* analysis. However, it is difficult to say that the Board embraces the understanding that objective necessity as a part of definition of abuse under tying assessment. Since, in the former, the Board include objective necessity as expanding the scope of commercial usage test, while in the latter a clearly available evidence exits. Nevertheless, we do not find obstacles for the Board to take into account objective necessity *ex officio* provided it reaches relevant documents or evidence, either by itself or supplied by the parties, even if it is not claimed by the dominant undertakings.

2.2. Efficiency Defenses under Article 6 of the TCA

2.2.1. Discussions on the legal basis of efficiency defenses

We determined the objective of Turkish Competition Policy and Law as "promote consumer welfare through efficiency", by examining constitutional basis alongside the Competition Authority's policy declaration in chapter one.

[801] See POSNER (Antitrust Law), p. 175; HOVENKAMP (Tying and the Rule of Reason), p. 22,23; O'DONOGHUE/ PADILLA, n. 22631, SAGI, p. 8.
[802] SAGI,, p. 6, 7.
[803] The Board *Digitürk* decision.
[804] The Board *HP* decision.

Here, we will examine whether wording of the Article 6 of the TCA allows to achieve this objective and if the application of the provision by the Competition Board is consistent with the stated objective. Unfortunately, there is no traceable legislative history that demonstrates explicitly preference for improvement of efficiency and consumer welfare were the objectives of Article 6. It is a repetition of Article 102 of TFEU[805].

While Article 4 can be interpreted as having consumer welfare objective due to Article 5, that making exemption from prohibition of Article 4 as conditioning "benefitting consumers", Article 6 does not include similar clause or provision. Thus, it is questionable whether Article 4 and 6 can have the same objective, or application of Article 5 is extendible to Article 6.

However, first it should be questioned whether even Article 5 provides a consumer welfare objective for the application of Article 4. Then, we can examine the role of efficiencies under Article 6 and whether Article 6 has also (if so) consumer welfare objective. This context is relevant, due to determine whether efficiency resulting from otherwise competitive conduct must be pass on to consumers is a necessary condition.

Article 5 is applicable where a conduct is found to be restrictive under Article 4. For the application of Article 5, the procompetitive effects of the practice should be determined in order to assess whether these procompetitive benefits outweigh the anticompetitive effects[806] . If the foreseen conditions meet[807], then practice would not be considered infringement of Article 4.

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[805] For the review of historical roots of Article 102, see AKMAN (2012) (observing that efficiency was the utmost importance for the creators of the Article 102); CSERES (2009), p. 4. During the modernization process of Article 102, the Commission had expressed the necessity of consideration efficiency gains under Article 102, as it was done under Article 101(3). See Discussion Paper, n. 84-92; KROES, p. 598, 599.

[806] Guidelines (Exemption), n. 15.

[807] *Id.*, n. 16 ("a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, b) Benefitting the consumer from the above-mentioned, c) Not eliminating competition in a significant part of the relevant market, d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b)").

There is a significantly critical difference between Article 5 of the TCA and the referenced provision in 101(3) of TFEU. Article 5 merely states "benefitting consumer", while 101(3) requires consumers to be allowed a "fair share of the resulting benefits" from the restrictive practice for the exemption. This precise requirement (*fair share*) in Article 101(3) indicates "consumer welfare" consideration, and excludes the "total welfare" perspective[808]. The implementation of this, under the consumer welfare standard, dictates that benefits only can be considered if they pass on to the consumer. This also means that assessment of efficiency gains is the core test in the understanding of the preferred welfare standard being applied by the competition authority[809].

Therefore, the relevant questions are whether Article 5 can be a proxy for consumer welfare objective. If so, whether the same objective can/should be valid for Article 6. Furthermore, it should be answered why there is no clause or provision similar to Article 5 for Article 6. What are the possible reasons for the non-existence?

2.2.1.1. The welfare objective under Article 5 of the TCA

Determining whether Article 5 has consumer welfare objective is relevant in order to question if one accepts that Article 5 can transpose to Article 6 (if it was the intention of Turkish legislators), and if one concludes that efficiency defenses is part of determination of abuse without necessarily meeting conditions established under Article 5. Thus, whether it is supportable that competition rules can follow different objectives under Articles 4 and 5, and whether this will be consistent with stated competition policy.

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[808] See LYONS, Bruce R., "Could Politicians be More Right than Economists? A Theory of Merger Standards", Revised Centre for Competition and Regulation Working Paper CCR 02-1 (2002), p.2 (fn.;2), available at https://pdfs.semanticscholar.org/53f7/a90f066190beeffdc24a371509274de8d0f9.pdf (last visited 02.09.2017) [hereinafter LYONS (2002)]; GiFFORD, Daniel J. and KUDRLE, Robert T., "European Union Competition Law and Policy: How much Latitude for Convergence with the United States?", 48 THE ANTITRUST BULLETIN 3 (2003), p. 773, available at http://www.heinonline.org/HOL/Page?collection=journals&handle=hein.journals/antibull48&id=735 (last visited 02.09.2017).

[809] See LYONS (2002), p. 1.

There are several reasons for questioning whether Article 5 indicates a consumer welfare objective. First, it can be argued why Turkish legislators avoid including term "*fair* share", and this is not only in Article 5[810], but also Article 6 excludes "unfair trading conditions"[811]. Turkish legislators have clear tendency to avoid the "fairness" objective in competition rules[812]. The question turns to whether omission of "fair share" indicates that the aim was exclusion of distribution of income concern, or "benefitting consumer" request means resulting benefits should be *higher* than detriment to consumer, not merely *neutral*. If it is the latter, then distributional concern is excluded.

The Board will decide on a case-by-case basis the meaning of "benefitting consumer" under Article 5. However, the suggestions brought by the Guidelines for the application of Article 5 creates serious obstacles to follow a consumer welfare objective: First, the Guidelines (Exemption) limits the first requirement of Article 5 (a) to efficiency gains, and dispense non-efficiency related benefits[813]. Second, the Guidelines (Exemption) suggests that the resulting efficiency gains must *compensate* consumers for the actual or potential negative impact of the agreement on competition or consumers[814]. However, in this instance, the compensation does not require an offset atoningly or higher benefit than detriment to consumer, but suggests that "the net effect of the agreement on consumers must at least be neutral"[815]. Furthermore, compensation is not used in the sense of Pareto Principle, which proposes that everyone would be better off or *at least no one would be worse off*. Since, the Guidelines (Exemption) propose that "in terms of consumer benefit, the overall impact on consumers, not the impact on a group of consumers, should be taken into account"[816]. The overall language of the Guidelines (Exemption) reflects Kaldor-Hicks' criterion, that claims if in society some persons are better off and some worse off, the gainers could compensate the

[810] *Compare* referenced Article 101(3) of TFEU.
[811] *Compare* referenced Article 102 (a) of TFEU.
[812] The only exception is Guidelines (Technology Transfer Agreements) in no. 128.
[813] Guidelines (Exemption), n. 22.
[814] *id*., 44
[815] *id*., 44.
[816] *id*., 45.

losers in such way that, on every person was better off, then welfare would be increased[817].

In addition, according to the Guidelines (Exemption), the concept of "consumer" covers not only end users, but also those who purchase the products for resale purposes[818], which indicates that it aims to ensure the welfare gains through increased efficiency. Thus, the consequences of the practice will also lead to an increase in social welfare, not necessarily consumer welfare. Alternatively, the Guidelines (Exemption) should require proof that likely benefits from customer pass on to end-users. While the customers may desire a product that may maximize their profits, the interests of the consumers may not be related to merely surplus, but to the broad notion of satisfaction[819].

Secondly, it is disputable whether recognition of "pass on to consumers" is an independent requirement to be shown or whether it will be assumed merely from established efficiencies or residual competition.

It has been suggested that the cumulative conditions for the exception in Article 101(3) (equivalent to Article 5 of the TCA) assumes that some resulting benefit for consumers due to an improvement in production or distribution or technical or economic progress is inevitable, Hence, the "benefitting consumer" requirement becomes a formality, once the existence of the possible efficiencies were established[820]. This interpretation can be hold the ground that the Guidelines (Exemption) does not require that "to demonstrate that all of the efficiency gains

[817] See *id.,* n. 45 ("Consumers as a whole may benefit from lower production costs, production of new and advanced products or services and more efficient allocation of resources thanks to efficiency gains"); n. 46 ("It is not required to demonstrate that all of the efficiency gains expected from the agreement are passed on to consumers. It is important that sufficient benefits be passed on to compensate for the negative effects of the agreement").
[818] İd., 43.
[819] See AKMAN, Pinar, "Consumer Versus Customer: The Devil in the Detail ", ESRC Centre for Competition Policy Working Paper No. 08-34 (2008), available at SSRN: https://ssrn.com/abstract=1313802 (last visited 20.06.2017) [hereinafter Akman (Consumer versus Customer)].
[820] See EVANS, Andrew, "European competition law and consumers: The Article 85 (3) exemption", 2 European Competition Law Review (1981), p. 429-431(concluding that assessment of the existence of resulting benefit for consumers plays no decisive role in the application of Article 101(3). The Commission treats the promotion of "consumer welfare" as an outcome of the application of Article 101(3) rather than as a consideration affecting the content of this provision).

expected from the agreement are passed on to consumers"[821], and listing the circumstances where passing on the benefits are likely[822].

It has been also argued that the requirement of a fair share for consumers can be inferred from the fourth requirement imposed by Article 101(3); that is, sufficient remaining competitive pressure will ensure that the benefits resulting from an agreement are passed on[823]. There are also some viewpoints placed in the Guidelines (Exemption) that supports this understanding. The Guidelines (Exemption) put forwards that "if the restriction of competition generated by the agreement is substantial and the efficiency gains are insignificant, it is unlikely that the agreement will be exempted from the prohibition in Article 4"[824]. Reverse version of this suggestion is that "if the restriction of competition is not substantial and the efficiency gains are not insignificant, it is likely that requirement of pass on to consumer is fulfilled"[825].

In addition, the Guidelines (Exemption) states that "the basic principle of the assessment is the maintenance of the competitive process in the market"[826], which is a repetition of Article 1 of the TCA. Thus, elimination of competition is not accepted under Article 5. Therefore, this raises the question whether Article 5 can be transposed to Article 6, since elimination of competition is inherited where dominant position exits. Whether due to the practical impossibility of fulfilling the last condition of Article 5, efficiencies are deemed irrelevant to Article 6. Moreover, this indicates that Articles 4 and 6 pursue different objectives.

Therefore, although the recognition of consumer interests exits, it is not clear whether the requirement of pass on to consumers indicates consumer welfare

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[821] Guidelines (Exemption), n. 46
[822] See Guidelines (Exemption), n. 48-53.
[823] See VEDDER, H. H. B., "Competition Law and Consumer Protection: How Competition Law can be used to Protect Consumers Even Better –Or Not?", 17 European Business Law Review (2005), p. 87 [AKMAN (2012), p. 145].
[824] Guidelines (Exemption), n. 45. See also n. 49, 52.
[825] Because this suggestion is given under the title of "Consumer Benefit".
[826] Guidelines (Exemption), n. 54.

objective under Article 5, since not only creates ambiguous "consumer" concepts, its practical relevance is also questionable.

2.2.1.2. The issue of lack of a provision similar to Article 5 for Article 6 and the implication of this

In this context, one can possibly think that efficiencies are irrelevant due to lack of exemption clause for Article 6. To support this view, it can be argued that while under Article 4 "commercial usages" is placed as a prerequisite for tying practice, it is excluded under Article 6 intentionally.

For the absence of an exemption clause, the other and more plausible possibilities are that 1) it is a silent acceptance, considering the clause already exists in Article 5, 2) it is an omission of drafters (of TFEU) and also legislators of the TCA, 3) it is a silent refusal.

First possibility can be supported on the ground that unlike Article 101(3), which is placed in the Article 101 that equivalent to Article 4 of the TCA, Article 5 is placed separate from Article 4. This is the reason that, while drafters of Article 101 (3) have limited the applicability and effect of that paragraph to Article 101[827], Turkish legislators have anticipated Article 5 as a common provision for Article 4 and 6. However, Article 5 explicitly states that it is for the application of Article 4, and extension of its implementation for Article 6 will be inconsistent with legal certainty.

Second explanation is also difficult to hold, because to consider the absence of Article 5 as an omission, Article 4 and Article 6 should have the same contexts. In fact, they have difference context, since Article 4 addresses multilateral conduct, Article 6 deals with, in principle, unilateral conduct and pre-requires a

[827] See AKMAN (2012), p. 115 (concluding that although Articles 101 and 102 are in the same Chapter of TFEU, the drafters have not envisaged paragraph (3) of Article as a common clause to Article 101, therefore it cannot be transposed to Article 102).

dominant position. Thus, it is more likely that lack of similar provision to Article 5 is not an omission, but a silent refusal[828].

However, it demonstrates that drafters and legislators were aware of efficiency concept, but did not envisage it for Article 6. Then, question turns to how should we interpret this silent refusal: Are efficiencies not relevant to Article 6? Alternatively, are they inherited already in Article 6? Article 6 does not allow for an exemption, yet it does not answer whether efficiencies are relevant and, if so, how they should be treated under Article 6.

The Guidelines on The Assessment of Exclusionary Abusive Conduct by Dominant Undertakings brought similar conditions of Article 5 and has been "efficiency justification" under Article 6.

Thence, the dominant undertaking must be able to show that the efficiencies created by the alleged conduct outweigh the likely negative effects on competition resulting from the conduct and the likely harm to consumers that the conduct might otherwise have[829]. In order to establish this justification, the dominant undertaking must demonstrate that 1) the efficiencies should be realized or likely to be realized as a result of the conduct; 2) the conduct should be indispensable to the realization those efficiencies; 3) the likely efficiencies brought by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets; 4) the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition[830].

Indeed, it was necessary to include the assessment of efficiencies under Article 6. However, inclusion via Guidelines of this issue is not without its problems. This is because of the following: First, as ODMAN BOZTOSUN

[828] See AKMAN (2012), p. 115.
[829] Guidelines (Dominant Position), n. 30-32. See also Discussion Paper, n. 79; Guidance (2009), n. 30.
[830] Guidleines(Dominant Position), n. 32. *Compare* Guidelines (Exemption), n. 16. See also Discussion Paper, n. 84; Guidance (2009), n. 30.

correctly argues that introducing an "exemption" or an "exception" rule under Article 6 through Guidelines, which is a secondary-legislation, is against the wording of the provision. Since an exemption rule does not exist in Article 6, it cannot be introduced without an amendment to the TCA[831].

Second, the last condition asserted for the justification, viz. "conduct does not eliminate effective competition", makes the proof of efficiencies under Article 6 almost impossible, because there is already an elimination of competition in the market due to the existence of a dominant position[832]. However, in the application of Article 6 of the TCA, it is not in itself an infringement for an undertaking to hold a dominant position[833]. Therefore, there are two possible ways to follow: either with the elimination of competition will not be a consideration when assessing the efficiencies of the conduct[834]; or the requirement of "substantially eliminated" will be interpreted in a narrow sense, i.e.,whereas alleged conduct has been found to have an actual or likely exclusionary effect[835].

The Guideline (Dominant Position) foresees that efficiencies should be treated as "justification" and it should be invoked by the dominant undertaking[836]. This approach indicates a two-stage evaluation, like in Article 5. In the first step, practice should be found to *prima facie* breach of Article 6 (abusive). Then, as a second step, the undertaking could prove that efficiencies outweigh the likely negative effects. Thus, if the undertaking cannot prove the efficiencies, the conduct will be deemed abusive.

The third problem that arises is related to two-phase analysis that suggests distinguishing between abuse and its justification. ASLAN proposes that objective justifications and efficiency defenses should be included in the definition and

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[831] See ODMAN BOZTOSUN, p. 108, 109; AKMAN (2012), p. 116.
[832] AKMAN (2012), p. 117.
[833] See Guidelines (Dominant Position), n. 2.
[834] AKMAN (2012), p. 117.
[835] O'DONOGHUE/ PADILLA, n. 11234, 11236.
[836] Guidelines (Dominant Position), n. 30, 32.

finding of abuse under the assessment of Article 6[837]. Unlike Articles 4 and 5 – that in the case of the determination of a negative effect under Article 4, then the rule of reason approach under Article 5 – Article 6 requires a rule of reason approach that considers the negative and positive effects of the conduct concurrently to be determined as abusive[838].

AKMAN suggests that the lack of exemption rule in Article 102 does not indicate that the drafters of the Treaty intended to prohibit efficiency enhancing conduct of dominant undertakings. On the contrary, her examination of the *travaux préparatoires* demonstrates that efficiency – and especially eliminating the productive inefficiency of dominant undertakings – was the primary concern of the drafters[839]. Hence, under Article 102, efficiency has a decisive role for the determination of "abuse", rather than as a defense or justification[840].

The implication of the acceptance of the understanding that efficiency defense is involved in the determination of abuse is that: 1) inefficiency of conduct should be seen as a necessary condition for finding the practice abusive[841], and 2) efficiencies should be considered *ex officio* by the competition authority before finding that conduct is abusive[842].

Indeed, increasing the performance and efficiency of undertakings is one of the reason for the adoption of competition rules. However, inclusion of efficiencies in the definition of abuse is difficult to support. First, the Board is

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[837] ASLAN, I. Yilmaz, Rekabet Hukuku [Competition Law], Ekin Yayin Evi, Bursa (2005), p. 365 [hereinafter Aslan (2005)].
[838] ASLAN (2005), p. 366. See also Speech of Philip Lowe, "Consumer Welfare and Efficiency- New Guiding Principles of Competition Policy?" Munich 2007, p. 6, available at http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf (according to the previous Director General of DG Competition, efficiencies will be assessed in an integrated approach as part of an overall weighing of positive and negative effects of the conduct, like in mergers).
[839] AKMAN (2012), Part I, 2, section V (for the review of *travaux préparatoires*; for the implications of the review, p. 95-102).
[840] AKMAN (2012), p. 118.
[841] AKMAN (2012), p. 119.
[842] AKMAN (2012), p. 119. See also ROUSSEVA, Ekaterina, "The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82 EC?", 2 The Competition Law Review (March 2006), p. 68, 69, available at http://new.clasf.org/CompLRev/Issues/Vol2Issue2Art2Rousseva.pdf (last visited 02.09.2017)(suggesting that efficiencies should be involved in the concept of competition on the merits).

not in the position that can have the knowledge whether dominant undertaking's intention was to increase efficiency. In addition cannot have the knowledge unless, at least, the dominant undertaking claims this. Even if, it is accepted that efficiency gains will be considered *ex officio* by the competition authorities, whether competition authority is able to obtain possible and plausible efficiency gains created by the alleged conduct sufficiently. The dominant undertaking has the necessary information for this, and obtaining the necessary information from dominant undertaking will likely be less costly and more sufficient than *ex officio* analysis.

Thus, we do not agree that burden of proof should be bear by the competition authority or the other party. To grant importance for the efficiency defenses, an understanding can be adopted such as claiming that dominant undertaking initially bears at least evidential burden of asserting the relevant efficiency and providing some initial evidence of it. Then the burden shifts to the competition authority (or the other party if it concerns litigation) to *prima facie* evidence on efficiency adduced by the dominant firm[843].

Nonetheless, two-stage analysis is inevitable for the assessment of efficiency defenses. Unlike legitimate objective business justification that eliminates abuse in the first place, efficiency gains cannot automatically eliminate restriction in competition and consumer harm. Efficiency gains are accepted provided they deliver sufficient benefits to offset adverse effects in competition and consumer welfare. To evaluate if this offset occurs, it is necessary to conclude whether the conduct was abusive in the first place. In the first step, determination of abuse does not mean that the conduct is *per se* illegal. It is necessary to calculate the actual or possible adverse effects of the conduct in order to evaluate the extent of the outweighing test. Thus, application of two-stage analysis does not prevent overall rule of reason approach, or indicates that the dominant undertaking cannot challenge against findings related to alleged adverse effect.

[843] See O'DONOGHUE/ PADILLA, n. 4924, 22610.

Hence, there is no plausible reason to reject two-stage analysis for the assessment of efficiency defenses under Article 6. In addition, the argument that competition authority should bear the burden of proof is not administrable.

2.2.1.3. Pass on requirement

The Guidelines (Dominant Position) for the acceptance of efficiency defense requires that the likely efficiencies should outweigh any possible negative effects on competition and consumer welfare[844]. For the exclusionary tying practice, it also suggests that

> [t]he Board may consider and include in its analysis arguments of the dominant undertaking engaging in the tying conduct, which claim that the practice ensures production and distribution savings to the benefit of customers, that it reduces transaction costs for customers who otherwise would have to buy the bundled products separately, and that it allows the supplier to pass on to the customers any efficiencies stemming from the production or purchase of the tied products in large numbers[845].

Then, the general requirement of the Guidelines (Dominant Position) suggests that the net effect of the agreement on consumers must at least be neutral. It does not explicitly require that the benefit to consumers should be higher than the negative effects to consumers, but at least equal, which also means efficiency gains should be at least equal to consumer loss. Further, for tying conduct, the Guidelines (Dominant Position) merely suggest consideration of productive efficiencies. Thus, this understanding suggests that under Turkish competition law, one lira of consumer surplus is equivalent to one lira of producer surplus, which means the income distribution effects of economic activity are excluded. However,, it is not surprising, since the concept of “consumer” includes all direct and indirect users of the product or services covered by the practice, such as input,

[844] Guidelines (Dominant Position), n. 32.
[845] *Id*., n. 94.

wholesalers, retailers, and dealers who purchase the products for resale purposes, and not only end users[846].

Guidelines (Dominant Position) suggests for efficiency gains created by tying practice merely taking into account the benefit of "customers" or passing such benefit on to "customers", even if distributional effects can be ignored in the pass-on requirement at consumer level. Moreover, the Guidelines (Dominant Position) does not stipulate whether the benefits to customers will also be passed on to end users. Accordingly, Article 6 cannot be about more than "Borkean consumer welfare", which has only the title of the "consumer", but it is all about "total welfare" that is disguised by "allocative and productive efficiency".

Furthermore, the general requirement of the assessment of the efficiency does not explain indicate which type of efficiencies should be taken into account, or whether qualitative efficiencies (that take the form of the production of a new or advanced product, greater product variety and higher quality) may be considered. Guidelines (Dominant Position) propose considering the contribution to innovation for specific type of conducts[847] and suggests the Board consider the short- and long-term effects of the conduct, but does not provide any elaboration model for the necessary trade-off between static and dynamic efficiencies.

In addition, the Guidelines (Dominant Position) embodies the intention to include efficiency defenses for exclusionary conducts. There is no secondary legislation for the exploitative conduct that addresses similar issues.

Finally, neither embracing the understanding that Article 5 can be transposed to Article 6, nor clarification of the inclusion of efficiency justification by the Guidelines (Dominant Position) suggests that the consumer welfare objective can be achieved by the way in which Turkish Competition Law is applied. To clarify, inclusion of efficiency defenses as an exemption or

[846] See Guidelines (Dominant Position), n. 22; Guidelines (Exemption), n. 43.
[847] See Guidelines (Dominant Position), n. 35, 37 (refusal to supply) and n. 68 (exclusivity agreement).

exception proxy is not illegal in itself, but the suggested balancing test (net effects) is contrary to the letter of the provision and stated Turkish competition law and policy itself. Without the proper pass-on (of efficiency gains to end users) requirement, competition rules can only serve for a total welfare objective.

After all, the fact is that Article 5 cannot be transposed to Article 6. It is desirable that efficiencies become a part of Article 6. To establish the consistency with Article 5, the requirement of pass on to consumers is necessary that efficiencies to be legitimate. However, the Guidelines (Exemption) creates contradiction to stated competition policy, furthermore it is against the letter of the Article 4 which states “consumer”. We do not find legitimate that extension of the legal and economic understanding of the term “consumer” to “customer”, and not requiring the benefitting of end-users to countervail this extension via secondary legislation. Thus, the Guidelines (Dominant Position) has a similar problem with the Guidelines (Exemption) in respect to pursuing consumer welfare objective.

We do not challenge that consumer welfare should be the objective of Turkish Competition Law. We point out that implementation and application of the secondary legislation is contrary to the wording of the TCA, as well as declared competition policy. One may argue that it does not contradict the wording of the TCA or the legislative intent, since it is stated that to “protect the competitive process” is the goal, and the promotion of consumer welfare and efficiency is considered a possible outcome of the competition law enforcement.

Nevertheless, even if one accepts that Article 5 demonstrates “consumer welfare” objective, application of the relevant guidelines completes the lack of similar provision; yet, it results that Articles 4 and 6 pursue a “total welfare” objective.

2.2.2. The Board's approach to efficiency defense

Even though it is debatable whether the wording of Article 6 allows efficiency defenses, we concluded that efficiencies are welcome and do not contradict Turkish competition policy. In fact, tying practices were never examined under the *per se* rule by the Board. We determined that the Board explicitly includes efficiencies in its examination at the end of 2008[848]. However, even before the Board did not follow an approach that nature of the conduct itself anticompetitive (*per se* treatment), but tying conduct is examine through its adverse effect on competition[849].

Both Guidelines (Dominant Position) and the Board explicitly states in most cases tying is a common practice and benign[850]. Regarding the debate of whether inefficiency of conduct is a necessary condition for determining this practice, efficiencies should therefore be considered *ex officio* by the competition authority; or if they are accepted as a defense, the Board decisions have the tendency to embrace the former understanding[851]. However, it should be noted that, to date, number of the tying cases examined under Article 6 do not provide sufficient conclusion for this. In addition, our position is clearly the latter one, even though we do not challenge that the Board should not evaluate efficiencies *ex officio* if it can determine. In the first instance, the burden of the proof, on the dominant firm to raise the relevant efficiency asserted, and the *prima facie* evidence or arguments to support it[852].Then, the burden shifts to the Board to address the *prima facie* evidence on efficiency put forward by the dominant firm.

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[848] Board Avea/ TTNet decision dated 09.10.2008 and numbered 08-57/912-363.
[849] See Board Tekhnelogos decision dated 11.09.2008 and numbered 08-52/791-320; Digitürk decision dated 07.02.2008 and numbered 08-12/126-43; HP decision dated 08.05.2001 and numbered 01-22/192-50.
[850] Guidelines (Dominant Position), n. 83, Board Google decision dated 28.12.2015 and numbered 15-46/766-281, n. 78.
[851] See Board Google decisions [that efficiencies (costs saving benefits) are explicitly considered]. See also Digitürk decision [our reading suggests that the Board application of separate product test inclusively examine efficiencies considering whether combining two independent products bring into a new product to the market]. See also HP decision (where the Board considered *ex officio* not merely efficiency but generally objective justifications).
[852] See Guidelines (Dominant Position), n. 32.

However, considering the cumulative conditions determined in the Guidelines (Dominant Position)[853], it is likely that it will be difficult for a dominant firm to present a successful efficiency defense, unless those conditions are applied strictly.

First condition that efficiencies are realized, or likely to be realized, as a result of the conduct do not bring limitation in types of efficiency to be considered. The Guidelines (Dominant Position) indicates possible efficiency arguments that the Board may consider[854]. These include the claims that savings in production or distribution that would benefit customers, reduction of transaction costs for customers who would otherwise be forced to buy the components separately, and the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product. Efficiency defenses and motivations are non-exhaustive,[855] through the change in market and depend on market's creativity and necessity they will diversify. The key point to be considered that tying practice satisfies this condition is that "any efficiency enhancing tying must be driven by customer preferences for joint consumption"[856].

Second condition that the conduct should be indispensable to the realization of those efficiencies, will be difficult to satisfy. To do this, the defendant must show that "there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies"[857]. The indispensability requirement assumes that firms would often evaluates whether there might be

[853] Guidelines (Dominant Position), n. 32 ("The Board will expect the undertaking to prove that all four conditions listed below are fulfilled: 1) the efficiencies should be realized or likely to be realized as a result of the conduct, 2)the conduct should be indispensable to the realization of those efficiencies, 3) the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets, 4) the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition).
[854] Guidelines (Dominant Position), n. 94.
[855] Such as reducing cost of searching for most appropriate combination of products; give rise to new or better products/ services, avoid double marginalization, create economies of scale and scope in production and distribution are among other efficiencies can be created by tying practices. See KARAKILINÇ, p. 562-567; O'DONOGHUE/ PADILLA, n. 21913-21985.
[856] See Case COMP/39230, Rio Tinto Alcan, Commission Decision of 20 December 2012, para.89 (O'DONOGHUE/ PADILLA, n. 22614).
[857] Guidance (2009), n. 30.

alternative conducts that would have less impact on rivals and on consumer welfare while decide to tie or bundle two products in order to achieve certain efficiencies[858]. However, in practice, it may not be possible for a dominant firm to make such a detailed assessment at the time it decides on its commercial strategy *ex ante*. Similar to our suggestion for requirement of indispensability under objective necessity justification is valid for efficiency justification as well. Burden of proof should be borne by the Board. The Board may able to identify *post hoc* an alternative, but key question to ask whether the relevant information was available to the firm at the time it decided tying practice. If the Board can prove that at the time of the decision less restrictive alternatives existed, then the dominant undertaking can refute the evidence as showing its behavior was the economically the only possible way[859].

Third condition that the conduct should not eliminate “effective competition” by removing all or most existing sources of actual or potential competition, may cause problem through strict interpretation, but Turkish competition law is clear that dominant position does not necessarily mean that effective competition is eliminated[860]. The Board application implies that a finding of dominant position and foreclosure effect under Article 6 will indicate whether competition is substantially eliminated[861].

Final condition requires the trade-offs to be made between likely benefits brought by the tie and any possible negative effects on competition and consumer welfare in the affected market. The Board considers whether efficiency gains pass on to consumers, but does not explain on which ground or which amount of efficiency to be satisfied this requirement[862]. It is a difficult task, and there will often not be a single right evaluation, due to it is inherently based on value judgments. However, the main problem with the suggested trade-off model, in

[858] See O’DONOGHUE/ PADILLA, n. 22664.
[859] See UZUNALLI, p. 95, 96.
[860] See Grounds of Article 6; Guidelines (Dominant Position), n. 22-26.
[861] Board TTNET/Avea decision; Google decision.
[862] See Board Google decision.

principle, it requires as a net effect of the conduct on consumers. In other words, if the tying worsens the conditions prior to the conduct for consumers, this condition is not fulfilled. Therefore, if one unit of Turkish lira has the same value to both producer and consumer, then the application of this trade-off model can be consistent with Turkish competition policy, which claims to "to maintain competition in order to create efficiency market *and* increase consumer welfare". Hence, in the implementation of this, whenever efficiency and consumer welfare are not aligned, efficiency will be favored, and then the objective is not to increase consumer welfare, but at least not to allow its decrease.

CHAPTER FIVE

SUGGESTED LEGAL CONDITIONS AND REMEDIES

This chapter suggest minimum legal conditions to determine the anticompetitive effects of tying. The last chapter also suggests possible remedies for violation of Article 6 of the TCA, and proposes possible difficulties and shortcomings for successful implementation of these remedies.

1. SUGGESTED LEGAL CONDITIONS FOR ANTICOMPETITIVE EFFECTS

1.1. General Remarks

Few tying cases are addressed by the Board, but they are in sufficient numbers so that we can determine the antitrust treatment of tying practice under Turkish competition law and the Board approach against tying.

The Board approach is consistent regarding treatment of tying practice under rule of reason approach. However, there are also several shortcomings in respect to its procedures and its determination of competitive harm.

We detected at least three cases that the Board did not state alleged tying practice was examine under Article 4 or Article 6 of the TCA[863], which is inconsistent with Article 52 of the TCA, which envisages required points in its decision which included the grounds for and the legal basis of the decision.

Regarding the legal conditions to determine abusive tying or bundling practice are lack of systematic. While the market definition and the dominant position analysis are consistent with decisions, they are divergent in terms of evaluation of anticompetitive effects and the necessary conditions for the violation of Article 6: In one decision, it is stated that it would be sufficient to exclude competitors from the violation[864]. In another decision (which was

[863] See Board Digitürk decision dated 07.02.2008 and numbered 08-12/126-43; HP decision dated 08.05.2001 and numbered 01-22/192-50; Printer Suppliers decision dated 17.6.2004 and numbered 04-42/ 490-118.

[864] Board decision dated 05.08.2009 and numbered 09-34/786-191, n. 220 (it is stated that in order to a tying practice to reduce “consumer welfare”, actual or potential competitors must be excluded from the market as a result of the practice).

delivered on the same date of the previous one), it was remarked that tying may be harmful due to exclusionary practice as well as the exploitation of the consumer[865] (which is also the only decision to examine the exploitative effect of tying). In another decision, the cumulative factors are presented: (1) determination of dominant position, (2) the tying product and the tied product should be distinct, (3) it should be likely for the tying practice to lead to anti-competitive foreclosure, and (4) there are no objective necessities or efficiency[866]. In its latest decision, parallel to Guidelines (Dominant Position), the Board denoted those two factors for the violation: 1) the tying product and the tied product should be distinct, and 2) it should be likely for the tying practice to lead to anticompetitive foreclosure[867].

We suggest that there is no satisfactory answer why the Board abandoned its previous approach (even if not an established one) that inclusion of exploitative effect of tying as anticompetitive. The only explanation we can purpose that the process of modernization of Art. 102 TFEU had affected Board's approach, and the paradox arose from there that exclusionary practices should be the primary concern of competition law, since they ultimately exploit consumers. It is not the modernization process of TFEU to blame; it is the Board's failure to internalize this understanding along with Turkish competition law policy. Even the Guidelines (Dominant Position) also state that abuse can be exploitative or discriminatory (n. 5). Lastly, the Board approach is lack of a comprehensive theory of anticompetitive harm in tying cases, which is the reason that leads insufficient antitrust analysis.

Therefore, we suggested a determination of "competitive harm" following Turkish competition policy that its objective "to maintain competitive process in order to increase consumer welfare through efficiency", which can help to

[865] Board Garanti Bank decision dated 05.08.2009 and numbered 09-34/ 787-192.
[866] Board Avea/ TTNet decision dated 9.10.2008 and numbered 08-57/912-363. See also Board Tekhnelogos decision dated 11.09.2008 and numbered 08-52/791-320 (stated cumulative conditions are: 1- presence of separate product, 2- tying of product, 3- determination of dominant position).
[867] Board Google decision dated 28.12.2015 and numbered 15-46/766-281.

establish necessary legal conditions for tying antitrust analysis. We purposed that objective of competition policy which is placed at the center of free market economy has two dimensions: Maintain competitive process requires protect and establish undistorted competition, which can be achieved through ensuring all market actors (both producers and consumers) have “freedom of choice”. Since, restraining a choice is inherent in tying practice, it should be the main concern of tying antitrust analysis. Detection of restrain in freedom of consumer choice can also indicate restrain in rivals’ freedom of choice. Because, provided resource allocation is directed by the consumer, the tying firm will not able to force the purchase of an unwanted product or give up a wanted product from another seller. Thus, where consumers’ purchases are based on undistorted decision, tying can be neither exploitative nor exclusionary. The second dimension, “increase consumer welfare through efficiency”, is associated with consequences of the conduct, which cannot serve to detect the source of the abuse, but can decide whether tying abuse can be acceptable due to its neutral effect. It will also be more useful for evaluating indirect harm to consumers.

Moreover, we do not confine consumer welfare with consumer surplus, but suggest that consumer choice should be at the center of it, which covers as such quality, utility, price, satisfaction aspects of consumer preference. Finally, since our theory of harm is embodied around “freedom of consumer choice”, it answers the question whether tying practice should be exclusionary in order to be exploitative.

1.2. Legal Conditions for Anticompetitive Effects

Metering pricing or tying induced intra-product price discrimination effects has been long established. However, the truth is, suggested welfare effects are unlikely to occur in practice. Moreover, we argue that neither the consumer surplus standard nor the total surplus standard should be applied as an overarching goal in this context. We purpose three reasons for this: First, welfares (consequentialist) approach does not cover two-dimensional objective of protection of competition from the point of consumer. “Protection of competition” requires ensuring allocative resources are directed by consumers, while at the same time, detecting anticompetitive behavior that is detrimental to consumers. Application of consumer surplus standard in metering pricing case overlooks that competition rules are not only about outcome of the conduct but also competitive process. Likewise, the total surplus standard suggests metering pricing is likely to increase output, therefore it should not raise antitrust concern. However, they miss the point that the consumer should lead the allocative resources for establishing competitive environment. Second, denoted welfare effects to be hold tying should be imposed on high volume purchasers, and/or tied product should be sold at supra-competitive price. In concrete cases, either of these conditions does not fit. Third, tying induced price discrimination, which should be seen as pricing strategy, and firms should be allowed to set their profit maximizing prices. This understanding includes that dominant firms’ tying induced price discrimination to set their profit-maximizing price should be allowed. Otherwise, forbidding monopolistic price will be equal to prohibiting dominant position itself, which can cause consumer harm in the long-term as hindering dynamic efficiencies.

In the case where firms tie durable goods to consumable goods, first thing to look character of consumable good. If it is staple good, the Board approach that “a dominant undertaking can harm consumers by causing foreclosure in the tied market through driving existing competitors from the market by reducing the number of potential customers and create new barriers to entry for its competitors in the tied market” is not sufficient for detecting anticompetitive effect. Our suggested criterion is “whether tying conduct expands consumer demand artificially”. To determine this requires two-fold question: First, whether consumers are forced to purchase unwanted product; second, whether they force to give up their preferred tied product elsewhere. However, supra-competitive price of tied product is not accurate indicator to answer these questions affirmatively, because, consumers consider the price charged for consumables in their decision to purchase a durable product. Therefore, intense competition on the "primary" (durable good) market restrains firms to enjoy their dominant position in a "secondary" market for consumables. Thus, some firms can opt for lower tying product price plus supra-competitive tied product price, or *vice versa*, and in the end consumers consider overall price of tied items, which means also that tying firms are competing through the overall price of tying products in the market. Furthermore, the competitive price of tied product is not an accurate indicator to answer the relevant question in a negative way automatically, especially where the primary market is not competitive. Herein, a dominant firm may envisage a price protection clause in order to detect whether any seller offered below the market price for tied product. In addition, the dominant firm can use its market power in the primary market to meet the prices offered for tied product by other sellers. Thereby, the "percentage of total sales in the tied market affected by tying" will be the better indicator to answer whether tying conduct expands consumer demand artificially. Comparison of the percentage of total sales of the tied product before and after tying conduct will answer the first part of the question. Moreover, a significant decrease in the percentage of total sales of rivals' tied product will verify the validity of the first answer.

In this instance, where consumable good does not have staple character, follows the same above mention approach. However, in addition to this, there are further points to cross check. Because, when consumable good is non-staple item, there are circumstances where a producer may enjoy its dominant position in a secondary market for consumables or service for its own primary products. Again, supra-competitive or competitive price of the tied product will not be proper indicator. Because, constraints on substitution of tied product may be imposed through warranty right of consumers (i.e., not covering warranty for durable goods that are used with non-original consumables). The practice without objective necessity basis that complicates consumer to purchase compatible tied product for primary product may force to consumer to give up wanted tied product, and go with tying firm's tied product. Furthermore, imposition of similar tie-ins by firms in the primary market will also adverse effect on sales in compatible tied market. At this point, practical difficulties to monitoring consumers' consumption of rival's tied product will be overcome due to guaranteed durable goods.

Tying aftermarket product (spare parts and service) as metering pricing, and practicing price discrimination does not establish *a priori* that such a practice is anticompetitive. Metering pricing may allow more users to reach primary product or to monitor an investment made by the dominant firms. Nevertheless, the condition (reallocation of some outputs from high-volume purchasers to low-volume purchasers) that welfare effects to be occur in this instance does not fit in the practice. It is more likely that high-volume purchasers are more price sensitive and they are conscious about total life cost of the durable good, so firms will not be able to impose tying against them. Then, exploitation does not arise due to price discrimination, but discrimination between sophisticated consumers and unsophisticated consumers. This outcome supports our suggestion that tying should be exploitative not due to consumer surplus extraction, but distorting consumer purchase decision, or where tying firms able to engage tying practice due to distorted consumer purchase decision. This determination also will suggests an opposite condition for offsetting adverse effect of tying on competition: While to outweigh adverse effect on consumer welfare of tying induced intra-price discrimination, concentration of low- and medium-volume purchaser should be higher than high-volume purchaser; where tying induced discrimination between sophisticated (likely high-volume purchasers) and unsophisticated consumers, same outcome (higher concentration of low- and medium-volume purchaser) will indicate that tying harms consumer welfare. However, we are not embracing a welfarist approach here; our main consideration remains on whether resource allocation is directed by consumers.

To determine this, it requires market definition is correctly done. Which will focus on consumer preferences, consumer reaction on price increase in secondary products, and switching costs factor in particular to extent which competition in the primary market prevents exploitation of consumers in the aftermarket. At least but not last, those key factors for proper market definition to be hold, consumer should have sufficient information about whole-life costs of primary good at the time of purchasing.

Therefore, key points to cross check for successful antitrust examination of tying in aftermarket, as follows: (1) Awareness of whole-life cost of primary good, i.e.,consumers' freedom to choose from several brands on the primary market is not sufficient to assume the primary and aftermarket as single market unless choice is made based on competitive conditions on the secondary market (2) Whether secondary products of different brands are available and compatible (3) It must be showed that sufficient number of consumers would switch to other primary or secondary products in order to render price increases unprofitable (4) Whether there are "active" undertakings which operates *only* in the aftermarket.

Technological tying cases (particularly the Board examination of Google practice), show that the Board primary focus on the foreclosure of competition in the tied product does not provide sufficient antitrust analysis. Welfarist point also is not sufficient to detect anticompetitive effect, since either tied products are given free or it is likely that consumers receive costs saving benefits from tying. Furthermore, in this instance, consumers are not strictly prevented from using a rival's tied product. Anticompetitive effects arise from intention of the dominant firms to preserve and extend their dominant position in the tying product (e.g. Google's dominant position in the internet advertising market) and due to lock-in and networks effects in dynamic markets. In associate with the latter effects, number of sophisticated users (who can download/obtain rivals tied product) should not be assumed to adverse non-lasting effect of tying *prima facie*. Such practice result in that tying firms a head starts than rivals to compete. Therefore, whether tying firm remains ahead of the game should be detect with comprehensive foreclosure analysis that includes all relevant factors, i.e.,sufficient number of sophisticated users, barriers to entry, percentage of the sales of tied product, extent and intent of dominant position. Those are the factors that will determine whether tying practice reduces consumer choice in the long-term.

In requirement tie-in, for a tying practice to be exploitative, it should also have anticompetitive foreclosure effects in the tied market. The foreclosure effect may occur in two ways: First, the higher the percentage of tied sales affected by the conduct within the total sales in the relevant market, the greater is the likelihood of market foreclosure. Second, if there is an insufficient number of consumers who will buy the tied product alone, the rivals' tied market will be affected, and then the rivals' consumer will face higher prices due to output reduction. Furthermore, if the tied product is a complementary product of a tying product, it may increase the barrier to entry to the tying market alone. Therefore, the two-fold question for determining is "whether tying conduct expands consumer demand artificially", which forecloses the choice, is also held in this instance.

Clearly, the Board confines its enforcement policy to cases where tying is exclusionary. However, the Board fails to examine anticompetitive foreclosure effects in a tied market. The Board also underestimates the undertaking's intention to strengthen or maintain its dominant position in the tying market. Furthermore, implicitly tying practices are allowed where they result in a net effect on consumers (it does not need to be efficiencies are greater than the anticompetitive effects of the tie, but must at least be neutral). The Board proposes efficiency gains that are passed on to consumers, but does not render an insight on which grounds the condition is satisfied. This creates a dichotomy between the Competition Authority policy and application of the competition rules by the Board. Because, the Board implementation does not provide a sound indicator of whether the objective of the competition policy that increases consumer welfare through efficiencies is achieved.

It can be said that main handicap of the Board approach is that, it is lack of an overarching theory of harm, but it is focused on entry deterrence. Thus, we first attempted to determine an inclusive theory of harm that tying can cause to consumer. Then, given consumer harm coupled with fact-specific indications in concrete cases lead us to submit that legal conditions described above, which are not sufficient, but minimum necessary conditions.

2. REMEDIES

2.1. Fines

2.1.1. Legal basis for fines

Articles 16 and 27[868] of the TCA and Regulation on Fines[869] compose the legal power of the Competition Board to impose fines. According to relevant regulations, infringements to impose fines can be categorized as procedural acts [foreseen under Article 16(1)] and substantive acts [foreseen under Article 16(3)]. In principle, the fining decisions are based on annual gross revenues (turnover)[870] in the preceding business year. Therein, The Board may impose administrative fine where a dominant undertaking's conduct that violates Article 6, falls into scope of Article 16 (1) the subparagraphs (c) and (d), i.e.,"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*".

According to Article 16 (1), the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations an administrative fine by one in thousands of annual gross revenues of undertakings and associations of undertakings or members of such associations which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest

[868] Article 27 (f) (The duties and powers of the Board are as follows: "To issue communiqués and make the necessary regulations as to the implementation of [the TCA]").

[869] Regulation on Fines to Apply In Cases Of Agreements, Concerted Practices And Decisions Limiting Competition, And Abuse Of Dominant Position (Official Gazette dated 15.02.2009 and numbered 27142) (hereinafter Regulation on Fines).

[870] See Regulation on Fines Article 3(g) ("Annual gross revenue: net sales in the uniform chart of accounts, or if this cannot be calculated, the revenue closest to the net sales, which is to be determined by the Board.").

to the date of the decision if it would not be possible to calculate it and which would be determined by the Board for those mentioned in sub-paragraph (c), and by five in thousands of their gross revenues to be calculated in the same manner for those mentioned in sub-paragraph (d).

However, the penalty to be determined pursuant to this principle cannot be less than ten thousand Turkish Liras[871]. It should be noted that this fixed lower limit on fine may cause unfair consequences for some undertakings. It is suggested that the fixed lower threshold should be removed, especially in the case of small enterprises, and the fixed lower threshold should be made gradually[872].

Pursuant to Article 16(3), the Board shall impose administrative fine where abusive conduct by dominant firm is find: "*An administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board.*". Further, up to five percent of the administrative fines that are imposed according with Article 16(3) on undertakings or associations of undertakings, shall be imposed on managers or employees of the undertaking or association of undertakings if those are determined to have a decisive influence in the infringement[873].

The administrative fines may be determined by showing the upper and lower limits[874], nevertheless, the amount of the penalty is at the discretion of the Board.

[871] Article 16(1) of TCA.
[872] ASLAN (2017), p. 1044. *Cf.* ARI, M. Haluk and AYGÜN, Esin, "Rekabet Kurulu'nun Ceza Yönetmeliği: Yeni Bir Dönemin Ayak Sesleri [Regulation on Fines adopted by Turkish Competition Authority: Footsteps of New Era], 10 Rekabet Dergisi, 4, p. 26.
[873] Article 16(4) of TCA.
[874] Article 16(5) referred to Article 17 paragraph two of the Faults Act dated 30/3/2005 and numbered 5326 which prescribes that "Administrative fines can also be determined by showing the upper and lower limits in the act. In this case, while the amount of administrative fine is determined, the unfairness content of the offense committed together with the defect and economic situation of the perpetrator are considered together.".

When deciding on an administrative fine pursuant to 16(3), the Board shall consider the repetition of infringement, its duration, market power of undertakings or associations of undertakings, their decisive influence in the realization of infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place[875].

Regulation on Fines sets out the methodology for calculation of fines that may be imposed pursuant to Article 16 (3) and (4). The stated Regulation, suggests basic steps to apply: First, the base fine shall be calculated[876], then following the calculation of the base fine, aggravating[877] and mitigating[878] factors shall be considered within the framework of relevant provisions in the Regulation, and an increase and/or a reduction shall be made. However, the cumulative application of those calculation is subject to ten percent of the annual gross revenue (of the undertakings and associations of undertakings or the members of such associations) upper limit[879].

Furthermore, Article 17 foresees proportional administrative fine to strength the enforcement of penalties mentioned in Article 16:

> [T]he Board shall, for each day, impose on undertakings and associations of undertakings an administrative fine by five in ten thousand of annual gross revenues of the relevant undertakings and associations of undertakings and/or members of such associations which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision, if it

[875] Article 16(5) of TCA.
[876] According to Article 5 of the Regulation on Fines, the base fine will be calculated, a rate between five per thousand and three percent for the violations of Article 6 of TCA, and in the determination of the rates issues such as the market power of the undertakings or associations of undertakings concerned, and the gravity of the damage which occurred or is likely to occur as a result of the violation, and the duration of the infringement shall be considered.
[877] According to Article 6 of the Regulation on Fines, the base fine might be increased due to aggravating factors in the cases such as repetition of the or coercing other undertakings into the violation.
[878] According to Article 7 of the Regulation on Fines, the base fine might be reduced due to mitigating factors in the cases such as terminating infringement as soon as the Board intervenes, existence of encouragement by public authorities or coercion by other undertakings in the violation.
[879] Regulation on Fines Article 4 (2).

would not be possible to calculate it and which would be determined by the Board in the event that

a) Obligations introduced or commitments made by a final decision or interim measure decision are not complied with,

b) On-the-spot inspection is hindered or complicated,

c) In implementation of articles 14 and 15 of the Act, information or document requested is not provided within the duration determined.

Pursuant to paragraph one sub-paragraphs (a) and (c), administrative fines can be imposed from the completion of the duration determined for complying with the obligations in the decisions mentioned in these sub-paragraphs. The administrative fine related to the act in sub-paragraph (a) can be imposed from the day following the notice of this decision if any duration has not been determined in the decision where an obligation is introduced and the administrative fine related to the acts in sub-paragraph (b) can be imposed from the day following the day when the act has been realized.

The associated problem with the application of Article 17 is that, there is no upper limit. For instance, if the undertakings did not provide the requested document, because they lost or destroyed the relevant document, then will imposition continue for perpetuity? For instance, if the fine (%0,05) is to be applied for 20 days, it will be equal to one percent of the turnover. This will be an average penalty for the abuse of dominant position. In this case, the total fine that can be given should not exceed the fine that would have been paid if a violation was found as a result of the investigation[880]. Nevertheless, in this instance, the envisaged fine pursuant to Article 16 (1) (d) can be imposed additionally.

2.1.2. The nature of the fines and the *ne bis in idem* principle

According to Article 2 of the Faults Act, every act that is foreseen by law to result in administrative sanction is "fault". Administrative penalties imposed by the Competition Board are also administrative sanction. Thus, it is a fault on

[880] ASLAN (2017), p. 1059.

the basis of every action that has been defined in contradiction to the Turkish Competition Act[881].

The *ne bis in idem* principle (double jeopardy) sets prohibits being tried or punished twice for the same offence, and is applicable, in principle, in criminal law[882]. It has a precise role in the system of human rights protection, which is founded in Europe on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR/Convention)[883] and is envisaged in the Article 4 of the Protocol no. 7 to the ECHR[884].

The ECHR is an international supremacy norm and Turkey is party to the Convention. In accordance with Article 90 (5) of the Turkish Constitution, International agreements duly put into effect have the force of law. Moreover, in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Therefore, the guarantees mentioned in the ECHR are binding for Turkish law and courts. Likewise, it is understood that the European Court of Human

[881] See ÇAĞLAYAN, Ramazan, "Kabahatler Kanunu ve Uygulamasi [The Faults Act and its Application]", Persembe Konferanslari (April 2010), p. 148, available at http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fPer%25c5%259fembe%2bKonferans%25c4%25b1%2bYay%25c4%25b1n%2fperskonfyyn131.pdf (last visited 20.09.2017), Aslan (2017), p. 1043.

[882] ROSİAK, Przemysław Kamil, "The Ne Bis in Idem Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law" 5 Yearbook of Antitrust and Regulatory 6 (August 16, 2012), p. 113, available at https://ssrn.com/abstract=2130859 (last visited 20.09.2017); ÖZEN, Mustafa, "Non Bis In Idem (Aynı Fiilden Dolayı İki Kez Yargılama Olmaz) İlkesi [The Ne bis in idem Principle (Prohibition on Repeated Trial)]", 14 Gazi University Law Faculty Journal 1 (2010), p. 390, 391, available at http://www.webftp.gazi.edu.tr/hukuk/dergi/14_1_14.pdf (last visited 20.09.2017); WİLS, Wouter P. J., "The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis" 26 WORLD Competition: Law and Economics Review 2 (2003), p. 3, available at https://ssrn.com/abstract=1319252 (last visited 20.09.2017); KOSTOVA, Lubomira, "The Non-Interaction between Actions for Damages and Ne Bis in Idem" Utrecht University, Department of Law, Economics and Governance, Utrecht 2013, available at https://ssrn.com/abstract=2295588 (last visited 19.09.2017), p. 31-35.

[883] The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedoms singed in Rome and d in 1950 entered into force on 3 September 1953.

[884] Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force November 1, 1988.

Rights (hereafter, the ECtHR) judgments are important in determining the scope of the guarantees, given the interpretive nature of the ECHR provisions[885]. It should be noted that Turkey has not yet ratified Protocol no. 7 to the Convention. However, this does not prevent the consideration of ECtHR's jurisprudence regarding the scope of "criminal charge and proceedings" that suggests a wider application of the procedural guarantees enshrined in the ECHR. As in the cases examined under Article 6 of the ECHR[886], the accusation may be deemed to be a criminal charge even if they are not characterized as an "offence" under applicable national law, but correspondingly based on a general norm of a preventive and repressive nature and of universal application[887]. Within this scope, its jurisprudence provides that severe financial penalties imposed by the administrative authorities might be equivalent to a criminal nature of the proceedings[888].

In fact, even though the Turkish Constitution does not itself include a provision explicitly stating the *ne bis in idem* principle, its binding force can be originate from the "state governed by rule of law", which is enshrined as a general principle under Article 2 of the Turkish Constitution[889]. Furthermore, the *ne bis in idem* principle is placed in legislative provisions such as in Articles 44 of

[885] ASLAN (2017), p. 1045; GÜNDÜZ, Harun, Avrupa İnsan Hakları Sözleşmesi'nin Rekabet Hukuku Uygulamasına Etkisi [Effect of the European Convention on Human Rights on Competition Law Enforcement], Rekabet Kurumu Uzmanlık Tezleri Serisi No: 122, Ankara 2009, p.13.
[886] Article 6 of the ECHR envisaged "right to a fair trial".
[887] See ECtHR judgment, *Öztürk v Germany* (application no. 8544/79 dated 21,02,1984). See also ROSİAK, p. 115; WILS, p.5; KOSTOVA, p. 19-23.
[888] See ECtHR judgments*, Engel and Others v. The Nederlands* (Application No: 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 and dated 08.06.1976); *Jussila v. France* (Application No:73053/01 and dated 23.11.2006); *Hüseyin Turan v. Turkey* (Application No: 11529/02 and dated 04.03.2008).
[889] *Cf*. In practice, the Constitutional Court accepted the *ne bis in idem* principle, but denoted that this principle was not envisaged by the Constitution, thus left to the discretion of the legislator to act in accordance with this principle. See the Constitutional Court decision dated 29.04.1980 and numbered E. 1980/1, and K. 1980/25, AMKD No. 18 (1982), p.157.

Turkish Criminal Code[890], 223(7) of Turkish Criminal Procedure Code,[891] and Article 15 of the Faults Act.

Therewithal, the Turkish Constitutional Court in its decision regarding issued "Principles relating to offences and penalties" (the Article 38 of the Constitution)[892], determined that the relevant article does not bring distinction between judicial penalty and administrative penalty, thus the security provided by Article 38 of the Constitution shall also be implemented in administrative penalties[893].

These explanations indicate some basic safeguards related to faults, some of which are general principles related to criminal law. With respect to application of *ne bis in idem* principle, the relevant question to ask is under which

[890] Turkish Criminal Code Law No. 5237 (Official Gazette No. 25611 dated 12.10.2004). Article 44- Conceptual Aggregation: "A person, who is considered to have committed more than one offense through performance of an act, is punished from the offense which requires imposition of heavier punishment ".

[891] Criminal Procedure Code Law No. 5271 (Official Gazette dated 12.10.2004 and numbered 25673). Article 223(7): "The cases, where there is a previously rendered judgment, or a pending case against the same accused because of the same conduct, the case will be declared inadmissible".

[892] Article 38 of Turkish Constitution: "No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.

The provisions of the above paragraph shall also apply to the statute of limitations on offences and penalties and on the results of conviction.

Penalties, and security measures in lieu of penalties, shall be prescribed only by law.

No one shall be considered guilty until proven guilty in a court of law.

No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence.

(Paragraph added on October 3, 2001; Act No. 4709) Findings obtained through illegal methods shall not be considered evidence.

Criminal responsibility shall be personal.

(Paragraph added on October 3, 2001; Act No. 4709) No one shall be deprived of his/her liberty merely on the ground of inability to fulfil a contractual obligation.

(Paragraph added on October 3, 2001; Act No. 4709, and repealed on May 7, 2004; Act No. 5170)

(As amended on May 7, 2004; Act No. 5170) Neither death penalty nor general confiscation shall be imposed as punishment.

The administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the armed forces.

(As amended on May 7, 2004; Act No. 5170) No citizen shall be extradited to a foreign country because of an offence, except under obligations resulting from being a party to the International Criminal Court."

[893] See the Constitutional Court decisions, dated 11.09.2014 and numbered E. 2014/52, K. 2014/139; dated 10.01.2013, E. 2012/93, K. 2013/8 (Official Gazette dated 28.03.2013 and numbered 28601; dated 29.11.2012 and numbered E. 2012/106 K. 2012/190 (Official Gazette dated 06.03.2013 and numbered 28579).

circumstance it can be determined whether an administrative penalty is criminal in nature. In this context, the jurisprudence of ECtHR can provide guidance, which provides the criteria of (1) the legal qualification of the offence under the domestic law of a given state; (2) the nature of the offence, as well as the "repressive" and "deterring" character of the penalty; and (3) the type and the degree of severity of the penalty[894].

In the application of the criteria, the ECtHR emphasised the second and third criterion. Essential for the "criminal nature" determination according to the ECtHR is (1) the scope of the violations and the deterrence effect of the penalties, i.e., whether the penalty is imposed via a norm addressed to the whole population or to a specific group with a specific status (as in disciplinary provisions), and whether it is intended to deter the repetition of a given conduct[895]; (2) the type and the degree of severity of the penalty, such as imprisonment, or, in cases where failure to pay the penalty may result in imprisonment or the compulsory liquidation or bankruptcy of the sanctioned undertaking, are considered to be belonged to "criminal sphere"[896].

Within this framework, the ECtHR concluded that administrative penalties, which include penalties imposed by national competition authorities due to the aim of competition law (protection of the economic public order), the nature of penalty (preventive and repressive effect), and the severity of sanction (high

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[894] The criteria for the qualification as "criminal" are so-called "*Engel* criteria' which named after the judgment in which they were proposed for the first time. See ECtHR judgement, *Engel and Others v. The Nederlands* (Application No: 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 and dated 08.06.1976).

[895] The ECtHR judgments, Jussila v. France (Application No:73053/01 and dated 23.11.2006); Bendenoun v. France, (Application No: 12547/85 and dated 24.02.1994); , Öztürk v Germany (Application no. 8544/79 dated 21,02,1984). See also ROSIAK, p.116;

[896] See the ECtHR judgement, Özturk v. Germany (Application No: 8544/79 and dated 21.02.1984); Engel and Others v. The Nederlands (Application No: 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 and dated 08.06.1976). See also KOSTOVA, p. 20; ROSIAK, p. 116; WILS, p. 5, 6.

financial penalties) have a criminal nature, thus competition proceedings should be covered by guarantees envisaged in Article 6 of the Convention[897].

2.1.3. Determination of "criminal nature" of the penalties applied to competition infringements by Turkish Competition Board

The Turkish Competition Board operating within the framework of Act No. 4054 imposes fines in accordance with Articles 16 and 17, which are stipulated in the third chapter titled "Administrative Fines" of the mentioned Law against competition infringements. Therefore, the penalties imposed by the Board are considered administrative penalties in national law. Thus, in the assessment of whether administrative sanctions are criminal in nature, it is seen that the formal qualification of the act under national law is not criminal law. Nonetheless, the legal qualification of the sanction in national law does not play a decisive role in determining whether the sanction is criminal.

In assessing whether the penalties imposed on competition violations are criminal in nature, the scope of the infringed rules and the deterrent effect of punishments are emphasized. In addition to the applicability of Act No. 4054 to all goods and services markets[898], according to the given definition of the undertaking in the TCA, partnerships and individuals without legal personality can be subject to competition law[899], and it can be said that the Turkish competition rules can be applied to all citizens[900]. In addition, administrative penalties imposed on competition infringements may be considered deterrent in terms of the violation, given the existence of the provision of recurrence[901].

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[897] In this context, see the following ECtHR judgments, Hüseyin Turan v. Turkey (Application No: 11529/02 and 04.03.2008); A. Menarini Diagnostics S.R.L. v. Italy (Application No: 43509/08 and dated 27.06.2011). See also ROSIAK, p. 116, 117; KOSTOVA, p. 28-30.

[898] Article 2 of TCA.

[899] Article 3 of TCA ("Undertaking: Natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole. Association of Undertakings: Any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals.).

[900] KARABEL, Gözde, Rekabet Hukukunda *Ne Bis In Idem* Ilkesi [The *Ne Bis In Idem* Principle in Competition Law], Rekabet Kurumu Uzmanlik Tezleri Serisi, No: 141, Ankara 2015, p. 37.

[901] See Article 16(5) ("When deciding on an administrative fine pursuant to paragraph three, the Board shall take into consideration issues such as the repetition of infringement…").

Likewise, on the grounds of Article 16[902] and in the general preamble of the Regulation on Fines[903], the "deterrence effect" is explicitly mentioned.

Moreover, within the scope of "severity of the penalty" criterion, pursuant to Article 16 of the TCA, the Board has the authority to apply fines of up to 10% of the annual gross revenues of undertakings. Thus, it is understood that this criterion is met in terms of administrative fines imposed by the Board[904].

In summary, acts that violate competition rules can be defined as "faults" and the fines imposed by the Board can be defined as "administrative penalties". However, absence of the legal qualification of "offence" or "crime" does not prevent competition proceedings to be covered by guarantees laid down in Article 38 of the Constitution, such as the principle of legality, the presumption of innocence, and the right to remain silent[905]. This understanding is found in the Constitution Court's interpretation of the scope of Article 38[906]. Even though the Turkish Constitution does not include the *ne bis in idem* principle, considering the supremacy norm character of Article 6 of the Convention, and the ECtHR's jurisprudence that considers its close relation to Article 4 of Protocol no. 7 to the Convention[907], we conclude that the *ne bis in idem* principle should be applied to

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[902] "Furthermore, a paragraph has also been added stating that natural persons serving in managerial bodies of the legal personality shall be fined personally, for purposes of being deterrent".

[903] Therein, it is stated that the goals to be accomplished by the Regulation on Fines are as follows: "Ensuring that fines are specifically and generally deterrent. Specific deterrence is preventing those undertakings, which are the addressee of fines, from violating the Act. General deterrence is dissuading those undertakings which are likely to violate the Act or which continue a violation that has not been detected yet. In this context, fines should be determined in such a way that they ensure both types of deterrence.".

[904] KARABEL, p. 38.

[905] See ASLAN (2017), p. 1046; KARABEL, p. 39.

[906] It is also accepted in the doctrine that mainly the basic criminal law principles should be applied on administrative fines. See GÖLCÜKLÜ, Feyyaz, "İdari Ceza Hukuku ve Anlamı; İdarenin Cezai Müeyyide Tatbiki [Administrative Criminal Law and Its Meaning: Imposition of Criminal Sanctions]", 18 SIYASAL BILGILER FAKÜLTESI DERGISI 2 (1963), p. 118, available at http://dergiler.ankara.edu.tr/dergiler/42/398/4310 (last visited 19.09.2017); DONAY, Süheyl, "İdarenin Ceza Verme Yetkisi Konusunda Anayasa Mahkemesinin Bir Kararı Üzerine Düşünceler [Thoughts on a Decision of the Constitutional Court on the Right of Punishment]", 37 İSTANBUL ÜNIVERSITESI HUKUK FAKÜLTESI MECMUASI 1-4 (1971), p. 418, available at http://www.journals.istanbul.edu.tr/iuhfm/article/view/1023005182 (last visited 19.09.2017); ÖZKAN, Faruk, "Kabahatler Hukukunun Rekabet Hukuku Açısından Uygulanması [Application of the Faults Act in Competition Law]", Istanbul University Social Sciences Institute, İstanbul (2011) [hereinafter ÖZKAN (2011)], p. 40; ASLAN (2017), p. 1045, 1046.

[907] Article 4 of Protocol no. 7 to the Convention:

competition proceedings, as competition rules are applied to all citizens (with their deterrence effect), and imposed fines can reach the weight of criminal sanction.

2.1.4. The circumstance to be taken into consideration the *ne bis in idem* principle in the application of Turkish Competition Law

First, the application of the *ne bis in idem* principle prohibits not only "repeated punishment" but also "repeated trial". In other words, *ne bis in idem* grants an undertaking procedural and substantive protection of its rights in the initiated legal procedure following the infringement of Articles 4, 6, or 7. However, in Turkish law, no legal regime prevents duplicate investigations for administrative violations. Therefore, in the case of the same act resulting in multiple faults, each offence/fault is examined by different authorities under different rules and will follow different processes.

One of the legal basis for the application of *ne bis in idem* in terms of administrative financial penalties is Article 15 (3) of the Faults Act, which regulates the method of punishment in the case of a crime and a fault at the same time due to the same act. On the other hand, Article 15 (1) of the Faults Act, which regulates the possibility of imposing more than one administrative financial penalty for the same act, can be regarded as another aspect of the principle[908]. In this context, repeated punishment may occur when 1) an act constitutes both offence and infringement of competition 2) if the same act is treated both as an individual punishment and as an aggravating factor in the determination of the amount of the final administrative fine 3) the same act results in multiple faults.

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State.

2.The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3.No derogation from this Article shall be made under Article 15 of the Convention.".

[908] ÖZEN, p. 395.

2.1.4.1. The situation that an act constitutes both offence and infringement of competition

Pursuant to Article 15 (3) of the Faults Act, if an act constitutes both a fault and an offence, the act may be punished for the fault, unless the act is not punished due to an offence. In this respect, if the violation of the competition constitutes a crime at the same time, the act should not be punished by the Board, if the act has been sanctioned bt criminal courts[909]. Within this framework, the application principles of the Article 15(3) of the Faults Act are as follows:

1) During the preliminary investigation or investigation, if the Board finds that the investigated act may constitute a criminal offence, the Board should file a complaint in accordance with Article 158 of the Criminal Procedure Code. Thus, the Board should suspend the examination of whether Act No. 4054 has been violated by considering the decision of the public prosecutor or criminal court[910]. If the public prosecutor decides that he/she is unable to obtain evidence to constitute sufficient suspicion as to the occurrence of a crime, or if there is no room for criminal prosecution, the Board will be able to continue the investigation.

2) If a criminal prosecution is instituted, at the end of the prosecution, pursuant to Article 223 of the Criminal Procedure Code, the criminal court can rule acquittal, conviction (imprisonment or punitive fine), and/or security measures. If the court decides on a conviction and/or security measure, and this decision is finalized, the Board, in accordance with 15(3) of the Faults Act, will no longer be able to impose administrative fines[911]. In that case, the criminal court decides on acquittal because the alleged act was not fulfilled by the person who is the subject of the case, the Board should not apply administrative fines again for that person[912].

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909 KARABEL, p. 41.

910 *İd.*, p. 42.

911 ÖZKAN (2011), p. 40; ÖZEN, p. 412, 413; KARABEL, p. 42.

912 KARABEL, p. 42.

3) As for the rule in Article 15 (3) of the Faults Act, the same action must be taken by the *same* person. In the evaluation of the same person's condition, legal persons and natural persons are not considered as one and the same[913]. Therefore, the ongoing criminal prosecution or conviction and/or security measures for the legal personality of the undertaking is not an obstacle to the Board launching an investigation or imposing administrative fines on managers or employees of the undertaking or association of undertakings who are determined to have a decisive influence in the infringement, according to Article 16(3). On the other hand, *vice versa*, the continuing criminal prosecution or conviction and/or security measures for the natural person (managers or employees) does not prevent the imposition of a fine on the undertaking[914].

2.1.4.2. Possible repeated punishment to occur while determining final administrative fine

The method to be applied in determining the penalties to be imposed by the Board is specified in the Regulation on Fines. Accordingly, when the Board determines the penalty, it firstly determines the base fine pursuant to Article 5 of the Regulation on Fines, then in the framework of Articles 6 and 7 of the Regulation on Fines, aggravating and mitigating factors are taken into consideration (by increasing or decreasing) and the final amount of the fine is calculated. In Article 6 (2) subparagraph (b) of the Regulation of Fines, "no assistance with the examination" is counted as an aggravating factor. Furthermore, Article 16 (1) subparagraph (d) foresees that administrative fines (by five thousand of the gross revenues) on the undertaking that prevents or complicates the investigation as an independent punishment from the investigation conducted.

[913] See Board decision dated 26.07.2007 and numbered 07-62/740-268. Council of State decisions dated 01.02.2013 and numbered E. 2009/3363, K. 2013/217; dated 25.01.2011 and numbered E. 2007/16188, K. 2011/240.
[914] See Council of State decisions dated 01.02.2013 and numbered E. 2009/3216, K. 2013/219; dated 30.05. 2013 and numbered E. 2009/3218, K. 2013/1632.

Therefore, following the application of the fine stipulated in Article 16(1)(d) of the TCA in the phase of preliminary investigation/ investigation, if the base determined as the result of the investigation is increased on the basis of the same hindering or complicating action, repeated punishment will arise and the *ne bis in idem* principle will be violated[915].

Thus, precaution is needed in the implementation of the aggravating factor so that the same act is not punished individually. If the act (no assistance to examination) is punished under Article 16 (1) of the TCA, due to the *ne bis in idem* principle, the same act should not be taken as an aggravating factor.

2.1.4.3. Same act that leads multiple faults

According to Article 15(1) of the Faults Act, in the event of the act constituting more than one fault, the act shall be punished by the heaviest administrative fine envisaged. In the case of enforcing sanctions other than administrative penalties, each of these sanctions shall apply. Therein, the scope of the *ne bis in idem* principle is limited to administrative fines[916]. However, it is unclear whether Article 15 (1) of the Faults Act contains the situation in which faults falling within the jurisdiction of different administrative authorities, or that fall under the jurisdiction of the same administrative authority. With respect to this question, the application of Article 44 of the Turkish Criminal Code, which is indicated as a reference for the application of Article 15 (1) of the Faults Act in its grounds for Article 15 (1), can provide insights.

Article 44 of the Turkish Criminal Code stipulates the "conceptual aggregation" provision for a situation in which more than one crime is committed by a single act. In the enforcement of the verdict, the competent authority, the criminal courts, conducts the legal characterization of the act and identifies the

[915] ARI/ AYGÜN, p. 40-42; ASLAN (2017), p. 1090. See also Council of State decision dated 14.05.2008 and numbered E. 2006/1113, K. 2008/4207 [cancelling the Board decision (dated 14.10.2005 and numbered 05-68/958-259) due to repeated punishment]. See also KARABEL, p. 44.
[916] KARABEL, p. 45.

most severe of the different offences. Thus, Article 44 of the TCK is applied in the situation where offences fall under the jurisdiction of the same authorities, namely the criminal courts[917]. Therefore, it is considered that the stated regulation cannot be applied to the problem of repetitive punishment that may arise because of the same act being punished by multiple administrative authorities[918].

Moreover, the same act constitutes more than one fault within the competence of the Competition Authority, i.e., the same act that violates different subparagraphs of the same article of the TCA, or violates Article 4 and Article 6, can elicit the repeated punishment. However, in addition to Article 15 (1) of the Faults Act, the envisaged method of determining the base fine within Regulation on Fines provides a solution to the problem. According to Article 4 (1) subparagraph (a), only behaviors that can be regarded as independent in terms of market, nature, and chronological process will be punished separately[919].

Lastly, a violation of competition within the scope of the TCA may bring also violation of different kinds in another law or regulation, and the issue of repeated punishment may occur. Especially, if the same act is described as fault in the regulated sectors' legislation and is also prohibited under the TCA. This situations might arise repeated punishment by different competent administrative authorities. Turkish law does not seem to have an arrangement to deal with this problem. Nonetheless, application of the *ne bis in idem* principle in EU competition law can provide guidance in this subject.

Similar to the jurisprudence of ECtHR, the General Court has specified that the *ne bis in idem* principle prohibits punishing the same subject twice for the same illegal act and for the same protected legal interest, while emphasizing that in order for the principle to be applied, three conditions should be met: (1)

[917] ÖZEN, p. 408; KARABEL, p. 46.
[918] KARABEL, p. 46.
[919] See ARI/ AYGÜN, p. 19-21 (reviewing both the Board decisions and Council of State decision, and concluding that no approach has been followed in the Board decisions related to the issue, which would cause repeated punishment). See also KARABEL, p. 47-50.

identity of the facts[920], (2) unity of offender[921], and (3) unity of the legal interest protected[922].

The Competition Authority is competent and responsible for ensuring and protecting competition in all sectors[923]. In this regard, it appears to be unable prevent that competence of the Board from overlapping with the sector specific regulator authorities' competence. This issue is recognized and the cooperation protocols between the authorities have been signed[924]. However, cooperation or collaboration protocols are not sufficient in themselves to avoid infringement of the *ne bis in idem* principle. On the other hand, it does not mean that the Competition Board abdicates its competence over the regulated sector.

On this subject, in its decisions the Board explicitly states the *ne bis in idem* principle, but does not interpret this principle as an obstacle for launching its own investigation under the TCA even if the same conduct is being investigated concurrently, or is punished by another administrative authority[925]. The course of the Board depends on "competitive harm". The Board has opted to start its own investigation if it determines that ongoing investigation by another administrative authority will not address competitive harm or is not able to offset competitive harm[926].

However, it cannot be said that the Board consistently followed this approach. In some decisions, the Board decides not to intervene in the presence

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[920] Connect to this subject, Article 4 of Regulation of Fines that defines independent behavior can be considered for the identity of the facts whether the acts constitute same event and followed by same aim.
[921] See the General Court *FNCBV v Commission* decision, Cases T-217/03 and T-245/03, ECR [2006] II-4987 (concluding the lack of identity of the offenders as considering separate legal personality, separate budget, and separate statutory aims, and that each of offenders' own collective actions to protect their own specific interests).
[922] ROSIAK, p. 120 and stated case law therein.
[923] Article 2 of the TCA.
[924] Protocol on Cooperation between Information Technology and Communication Authority and Competition Authority (02.11.2011), Protocol on Cooperation between Public Procurement Authority and Competition Authority (14.10.2009), Protocol on Collaboration and Information Sharing between Banking Regulation and Supervision Agency and Competition Authority (15.11.2012).
[925] See the Board decision dated 09.06.2003 and numbered 03-40/432-186 (KARABEL, p. 51).
[926] See the Board decisions dated 10.02.2005 and numbered 05-10/81-30; dated 08.01.2009 and numbered 09-01/2-2 (KARABEL, p. 52, 53).

of the sectoral regulator and the regulations without further evaluation[927]. In this aspect, The Board's approach is unapproved by the Council of State, and the court has canceled the Board's decision as recognizing that sectoral regulations do not change the scope of the Competition Authority's authority over all goods and services[928]. The Council of State emphasizes that the Board has the discretion not to open an investigation if the interference of another authority has resulted in the termination of the effects of the existing competition infringement and the competitive harm has been completely eliminated.

The Council of State does not explicitly state "protected legal interest", but its emphasis on "competitive harm" is in line with this criterion. In the determination of legal interest, it would be appropriate to take into consideration the facts of the authorities that called for the sanctions. In that case, the administrative authority imposes sanctions by considering competition law, and a second intervention by the Board will mean a breach of the *ne bis in idem* principle. In this respect, the information and documents, analysis and calculations that form the basis of the evaluations and determinations made by the relevant administrative authority on the issue of penalty matters should be obtained and examined by the Board[929].

The importance of cooperation and transparency between administrative authorities is the key to determining whether rules on competition law are taken into consideration by another authority. If the penalty imposed by the relevant authority is directed towards the establishment and protection of the competitive environment, it can be considered that both institutions pursue the same interest. However, the Board should be aware throughout the investigation, and if an infringement is determined, there should be concern about foreseen penalties or

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[927] See the Board decisions dated 22.12.2005 and numbered 05-87/1199-348; dated 11.09.2008 and numbered 08-52/792-321; dated 21.10.2009 and numbered 09-48/1206-306; dated 8.3.2002 and number 02-13/ 127-54; dated 29.06.2006 and numbered 06-46/ 601-172; dated 30.10.2008 and numbered 08-61/ 996-388.

[928] See the Council of State (13th Chamber) decisions dated 20.11.2007 and numbered E. 2006/2052, K. 2007/7582; dated 08.05.2012 and numbered E. 2008/14245, K. 2012/960; dated 13.02.2012 and numbered E. 2008/13184, K. 2012/359. See also KARABEL, p. 50-55.

[929] KARABEL, p. 55, 59.

remedies for the infringement by sector regulators. The imposed remedies by the sector regulator may not be equal to the weight of the remedies that would be imposed by the Board if the conduct were examined before the Board. This can be true even if competitive harm is addressed by sector regulator.

We propose that if another administrative authority addresses the "competitive harm" and also considers competition law, but fails to introduce effective remedies for the identified abuse, it does not grant the Board the right to initiate its own investigation to introduce a complementary measure for the same abuse. It is clear in the jurisprudence of the ECtHR that the *ne bis in idem* principle does not accept an offsetting of the amount of the first penalty imposed because of the earlier proceeding from the amount of the second penalty[930]. The principle forbids repeated punishment as well as repeated trial for the same offence.

Therefore, the suggestion of the Council of State that "*and* the competitive harm has *completely eliminated*" for not breaching the *ne bis in idem* principle is not sufficient to avoid a repeated trial. Provided that the sector regulator takes into account the competitive sphere of the conduct, undertakings should be guaranteed that a repeated trial will not be conducted.

In summary, the *ne bis in idem principle* should be viewed as a fundamental human right consequent to the principle of the rule of law and the right to a fair trial. Absence of explicit reference to the principle does not change this outcome for Turkish Law. Administrative fines imposed by the Board meet the conditions (applicable to all citizens, their deterrence effect, and severity character) stressed by the ECtHR for the wider application of the *ne bis in idem* principle.

[930] ECtHR judgement Franz Fischer v. Austria (Application No:37950/97 and dated 29.05.2001) (ROSIAK, p. 117).

2.2. Consequences of the Restriction of Competition in Private Law

2.2.1. Contractual validity in abuse of dominant position

Abuse of dominant position may occur due to a contract or a contractual clause. In this context, the question to be asked is what the effect is of a finding of abuse under Article 6 of the TCA on the validity of the legal transaction (a contract or a contractual clause)? This issue has not been clarified by the Board or the TCA. For Article 4, the answer is clear pursuant to Article 56 of the TCA, which stipulates that "any agreements and decisions of associations of undertakings, contrary to Article 4 of this Act, are invalid". However, Article 56 does not cover the Article 6.

Since there is no statement in the TCA, we should invoke the general provisions of the Turkish Code of Obligation[931]. According to Article 27 (1), "Contracts that are contrary to the provisions of the law, morals, public order, personal rights or impossible are absolutely null and void". Therefore, in the case where a contract or contractual clause is itself considered abusive, it should automatically be deemed void, since it will be contrary to the imperative provisions of the TCA. However, this approach will be inconsistent with the legal structure of the TCA, due to clear distinctions introduced by Article 56 between Article 4 and Article 6.

Moreover, acceptance of invalidity may cause further damage to the party injured by abusive conduct[932]. In this context, ASLAN and O'DONOGHUE/ PADILLA suggest applying the doctrine of severance[933] to determine whether the offending terms can be severed from the contract, leaving the remaining terms to continue operating as an enforceable contract[934].

[931] Turkish Code of Obligations Law No. 6098 (Official Gazette dated 04.02.2011 and numbered 27836)

[932] ASLAN (2017), p. 1135.

[933] Doctrine of severance is placed under Article 27(2) of Turkish Code of Obligation:" The invalidity of some provisions of the contract does not affect the validity of others. However, if it is clear that the contract will not be made without these provisions, all of the contract will be null and void.".

[934] ASLAN (2017), p. 1135, 1136; O'DONOGHUE/ PADILLA, n. 32329.

There is no Board decision on this issue, and in many cases, the Board specifies a remedy (usually imposition of "termination of infringement"[935] proactively) instead of determining the effect of Article 6 on contractual validity. In our opinion, if the conditions for severance are satisfied, the doctrine of severance can be applied. However, the principle to be applied for these cases must be in favor of the injured party. The undertakings should not be entitled to derive advantage from unlawful agreement[936].

2.2.2. Right to compensation

Compensatory provisions that may be claimed in the event of a competition violation are regulated as follows:

> **Right to compensation**
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> **Article 57-** 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 behavior of more than one people, they are responsible for the damage jointly[937].
>
> **Compensation for the Damage**
>
> **Article 58-** [1] Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited. [2] Competing undertakings affected by the limitation of competition may request that *all of* their damages are compensated by the undertaking or undertakings which limited competition. [3] In determining the damage, all profits expected to be gained by the

[935] Article 9 (1) of the TCA: "If the Board, upon informing, complaint or the request of the Ministry or on its own initiative, establishes that articles 4, 6 and 7 of this Act are infringed, it notifies the undertaking or associations of undertakings concerned of the decision encompassing those behavior to be fulfilled or avoided so as to establish competition and maintain the situation before infringement, in accordance with the provisions mentioned in section Four of this Act.".

[936] ASLAN (2017), p. 1136; O'DONOGHUE/ PADILLA, n. 32329.

[937] Emphasis added.

injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three-fold of the *material* damage incurred or of the profits gained or likely to be gained by those who caused the damage.[938]

Burden of Proof

Article 59- Should the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants that the undertakings are not engaged in concerted practice.

The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence.

Claims for compensation will be invoked before the general courts by those who are injured as a result of a competition law infringement. Although it is expected that the TCA, which is a special law according to the Turkish Code of Obligation Law No. 6098[939], will allow the issues to be settled by general law, the TCA has introduced some specific regulations. However, these arrangements can lead to divergent interpretations and problems due to poorly written regulations. If the right to compensation were to be regulated clearly, it would have been more accurate to state who could be sued for what, and the method for the quantification of damage.

When the mentioned TCA provisions are evaluated collectively, plaintiffs, defendants, and the compensation that may be awarded for damages under a violation of Article 6, can be expressed as follows:

[938] Emphasis and numbered references added.
[939] Turkish Code of Obligation Law No. 6098 (Official Gazette dated 04.02.2011 and numbered 27836).

1) Any person injured by a violation of Article 6 of the TCA may file an action against the undertaking(s) that abuse their dominant position. Anyone who may be harmed by this violation may claim compensation on this basis.

2) There is no uniformity in terms of "plaintiff" in the related provisions. Expressions of "those who are injured/suffer" (57, 58/1 [1]-2, 59), "competing undertakings" (58/1 [2]), and "injured undertakings" (58/1[3]) are used. Therefore, it is not necessary for those who can sue to be an "undertaking". In this case, consumers seem to be able to bring a compensation claim due to infringement of competition. However, although it is possible for consumer organizations to file lawsuits related to consumers in general, they are not able to open lawsuits for damages in the name of consumers[940]. Pursuant to Articles 73 and 74 of the Law on Protection of Consumers Law No. 6052 (hereinafter Consumer Law), in cases where there is no individual consumer problem and consumers are generally concerned, consumer organizations may file lawsuits in consumer courts in order to prevention of the violation of the Consumer Law. Thus, these regulations are limited to violation of the Consumer Law, and they cannot be implemented in cases that will be opened due to competition infringement[941].

3) It can be said that provision 58(1) [1] refers implicitly to customers and consumers. However, it is difficult to find an objective explanation why the law stipulates different provisions in respect of customer/consumer compensation for damages. By considering the provision 58(1)[1] on its own, it should not be concluded that consumers and customers can only claim the difference in price ("overcharge"). That is not to say that prices will always increase when competition is restricted. In this respect, in Article 58(1) [1], "may claim", and in Article 57, "any damages of the injured" should be interpreted jointly, and consumers and customers should be considered to be able to claim all types of

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[940] As a matter of fact, cases that can be filed by consumer organizations within the scope of Article 56 (Unfair Competition provision) of the Turkish Commercial Code do not include compensation cases.
[941] ASLAN (2017), p. 1140.

damage[942]. In this regard, consumers and customers should be able to claim compensation for both material and immaterial damages.

Within the scope of these provisions, whether immaterial damages can be claimed is disputed. According to ATILA[943] and SANLI[944], relevant provisions do not cover immaterial damages. While this view accepts that immaterial damages may be occur, it also suggests that the case must be filed in accordance with the general provisions[945]. On the other hand, ASLAN claims that "any damages" (in Article 57 of the TCA) also covers immaterial damages[946].

In our opinion, "any damages" includes implicit immaterial damages. If the legislator had only predicted material damages, it would be explicitly stated as under Article 58 (2). Although it is unclear where consumers and customers may suffer immaterial damage due to competition infringement, at least from the point of competing undertakings, violation of inner peace, freedom of enterprise, and causing discouragement may also cause immaterial damages[947].

As stated, the amount of the material damage that customers/consumers can claim should not be limited to "overcharge". Loss of profits (including loss of future profits) can be demanded[948]. However, due to lack of similar provisions in

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[942] See ASLAN (2017), p. 1140. *Cf.* SANLI, K. Cem, "Türk Rekabet Hukukunda Haksiz Fiil Sorumlulugu[Tort Liability in Turkish Competition Law]", Rekabet Hukukunda Güncel Gelismeler Sempozyumu I, Kayseri (2003), p. 244, available at http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/Etkinlik+Kitab%c4%b1/etkinlikkitap12.pdf (last visited 30.09.2017) [hereinafter SANLI (2003)].

[943] ATİLA, Metin, "Rekabet Hukuku Açisindan Zarar [Damages in Competition Law]", REKABET HABER BÜLTENI 15 (2005), p.7, available at https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.rekabetdernegi.org%2Frk_bulten%2Fsayi15.doc (last visited 30.09.2017).

[944] SANLI (2003), p. 236.

[945] It should be noted that neither the White Paper nor the Green Paper, as well Directive on Antitrust Damages Actions which are the instruments that suggest specific policy measures to establish effective redress mechanism in order to be fully compensated for the harm of victims of infringements of the EU antitrust rules, do not include immaterial damages. The relevant documents are available at http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html (last visited 20.09.2017).

[946] ASLAN (2017), p. 1141, 1142.

[947] See ASLAN (2017), p. 1141.

[948] See also Directive of The European Parliament And of The Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("Directive on Antitrust Damages Actions"), Brussel 24 October 2014, available at

Article 58 (2) and Article 56 (1) (e) of Turkish Commercial Code Law No. 6102, “the profits gained or likely to be gained by those who caused the damage” cannot be awarded as compensation within the framework of 58(1) for customers/consumers.

4) Article 58 (1) [2] emphasizes that “competing undertakings’ will be able to claim compensation for *any* damages. In respect of Article 58(1)[3], it is debatable whether this provision is a tautology as foreseeing “loss of profits (including loss of future profits)” can be claimed as damages, or whether the legislator had intended to refer to the profits gained “by those *who caused the damage*”, instead of “by the injured”. The latter view makes more sense, since Article 56 (1) (e) of Turkish Commercial Code provides similar provision that allow those who are injured to claim as material damage “the expected benefits of the defendant to be obtained as a result of unfair competition”. Accordingly, it is generally accepted that Article 58 (1) [3] is badly worded, and it should be understood as “by those *who caused the damage*” in accordance with Article 56 (1) (e) of Turkish Commercial Code[949].

According to us, it should be placed as “by those *who caused the damage*”, in order to explain why Article 58(1) [3] is written while Article 58(1) [2] exists. This interpretation is also necessary to bring consistency between provisions 58(1) [3] and 58(2). However, this clear distinction exists, thus the best solution is to change this expression. Thus, the difficulty in the quantification of “loss of profits” can be simplified. Nonetheless, since Article 59 (2) is present, the expression of “as well” in Article 58 (1) [3] will serve rather than an unnecessary repetition.

5) Article 58(2) has resulted in “treble damages”, and it is the first time that the Turkish legal system foresees punitive damages. By virtue of the

http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf (last visited 20.09.2017).

[949] See ASLAN (2017), p. 1144, 1145; AŞÇIOĞLU ÖZ, p. 182,183; ATİLA, p. 7.

provision, consumers/ customers and competing undertakings that suffer injury may demand such compensation. Accordingly, compensation may be awarded at the rate of three times the "material damage" or "the profits gained or likely to be gained by those who caused the damage".

In this context, those issues can be discussed: when the conditions of 58 (2) are fulfilled, shall the judge award punitive damages; can the judge award compensation only at the rate three times; or this rate may be up to three-fold but not exceed three-fold?

The questions mentioned above are answered differently in the literature. GÜL purports that even if the conditions are met, the indictment is at the discretion of the judge, but it cannot be awarded in one- or two-fold form instead of three-times[950]. According to this view, if the judge rules for compensation, this should only be three-fold.

AŞÇIOĞLU ÖZ argues that the judge does not have the discretionary power when the conditions are met; however, the compensation rate need not be three-fold[951]. It should be understood that it can be *at most* three-fold. ASLAN also accepts that the judge must award compensation if circumstances arise, but, it is not possible for the judge to award compensation "up to three-fold"; it must be three-fold[952].

We suggest that the expression "judge may" cannot be interpreted as awarding compensation up to judge's discretion. Our reading suggests that 'judge may" refers here to "upon the request of the injured". In other words, the judge cannot rule "treble damages" *ex officio*. It should be required by the injured plaintiff, and if the resulting damage arises from an agreement between or decision of the parties, or from cases involving gross negligence, then the judge

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[950] GÜL, Ibrahim, Tesebbüsün Alicilarina Ayrimcilik Yaparak Hakim Durumunu Kötüye Kullanmasi [Abuse of Dominant Position through Discrimination between Customers], Rekabet Kurumu Yayini, Ankara 2000, p. 27.
[951] AŞÇIOĞLU ÖZ, p. 197.
[952] ASLAN (2017), p. 1148.

must award compensation. In respect of the rate to be determined, the wording of the provision is clear; it cannot be up to three-fold – it should be three-fold. Otherwise, the legislator would grant discretionary power to the judge for decreasing the compensation amount to be awarded, as in Article 52 of the Turkish Code of Obligation.

Aside from the grammatical interpretation, we should examine the *ratio legis* of the TCA. Even though private litigation is not aimed at protecting the public interest but at protecting individuals' subjective rights, such as right to compensation, the TCA legislator would not stipulate right to compensation separate from general provisions, unless the additional benefit to be derived was apparent. Indeed, private litigation indirectly benefits competition law enforcement by increasing the detection rate of the competition infringements and fostering private parties to identify violations. While Articles 57 and 58(1) provide this indirect benefit, Article 58(2) aims to exert an additional deterrence effect due to its punitive character. It is similar to the US regulation that aims to grant private enforcement a prominent role in the enforcement of competition law.

Article 58 (2) has the potential to render the private litigation as a first-resort remedy. However, lack of necessary regulations that allow representative and collective actions in compensation cases hinder this effect. Damages suffered individually by final consumers or low-volume purchasers will often not attract litigation, especially considering the regulation that the unsuccessful party pays the other party's costs. Therefore, it also hinders private damage claims. For the effectiveness of the compensatory provisions in Turkey, legal reform is necessary that introduces a collective redress mechanism for injunctive relief and compensation caused by competition law violations, and which enables consumer associations to represent consumers in these litigations[953].

[953] See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013, available at http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html (last visited 20.09.2017).

6) The further issue to deal with is burden of proof under compensation litigations. In these cases, general provisions are valid, i.e., in principle, all persons are obliged to prove their claim. Article 59(1) eases the burden of proof, in accordance with paragraph three of the Article 4, as foreseeing the concerted practice presumption that transfers the burden of proof to the defendant party in cases where certain evidence exists. Furthermore, Article 59 (2) denotes that the claim may be proved by any kind of evidence.

However, even though any kind of evidence may be provided by private parties, identification of the documents by the courts can raise problems. Furthermore, certain evidence may not be held by the parties but be in the file of the Board. The general court does not have the authority to order the defendant or a third party to disclose evidence, and the claimant does not have access to documents held by the Board.

Moreover, the Board's decision is not binding on the general courts. There is no legal basis that envisages given a final decision finding an infringement of the TCA is binding for the general court, or a pending proceeding before the Board arises prejudicial issue for the general courts. Notwithstanding, the Court of Appeal has held that in cases where the Competition Board did not find infringement, it does not require the court to suspend its proceedings while awaiting the Board's final decision[954].

This problem can be overcome with a legal regulation that defines the relationship between the Competition Board and the general courts. The White Paper recommends that national competition authorities' final decisions when finding an infringement should be binding in subsequent civil antitrust damages cases in order to ease the burden of proof of claimants[955]. We propose that this

[954] Court of Appeal (19th Chamber) decision dated 29.10.2002 and E.2002/2827, K. 2002/7580 [Aslan (2017), p. 1153, 1154].

[955] White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165, Brussels 02.04.2008, p. 6,7, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN (last visited 30.09.2017).

approach be adopted by Turkish practice, since it will increase legal certainty and procedural efficiency. Within this framework, under Turkish law, the plaintiff will need to prove "fault", "damage", and "causal link (alleged infringement that caused the damage)". Under current legislation, it is discretionary on the courts to consider a non-final decision as a prejudicial issue. We foresee that it will be beneficial for practical reasons: the introduction of a legal regulation that envisages the Board's finding of an infringement as binding, and a non-finalized decision as a prejudicial issue for the general courts.

The compensatory provisions are not without problems. Nonetheless, they offer indirect and direct benefit to competition law enforcement. Currently, it cannot be said that their application is able to foster private action to become dominant in the enforcement of competition law. The underlying reasons include a lack of representative and collective actions, costs of action, claimant's inability to obtain certain evidence within the competition authority's confidential files, or the files that are held by the defendant. These shortcomings should be eliminated with legal regulations that enable consumer associations to represent consumers by bringing collective actions for injunctive relief and compensation resulting from competition law violations, introduce cost allocation rules and rules for necessary disclosure *inter partes*, and have a binding effect in terms of the final infringement decision of the Board[956]. Furthermore, in the implementation of Article 58(1) it should be clarified that anyone (including consumers and customers) can require full compensation, not merely the "overcharge" portion. In respect to Article 58(2), it should be clarified that judges do not have the discretion, upon the request of the injured and when conditions are met to award "treble damages" should be awarded. It should also be explained that the rate is fixed, and it cannot be interpreted as "up to three-fold". This issue is important, considering the general attitude of the courts that consider "compensation is not a tool for enrichment" when determining the amount of the compensation. Article 58(2) is a novel provision for Turkish law, which not only

[956] See White Paper, p. 4, 5; Directive on Antitrust Damages Actions, paras. 15-25.

aims to protect the individual’s subjective right, but also to strengthen antitrust enforcement via private litigants.

2.3. Remedies in Tying Cases

In contractual tying cases where the dominant undertaking sells its product on the condition that a second product is purchased, or offers its product via pure bundling, the Board has chosen termination of the infringement (tying) and, depending on the restrictive effect of tying on the competition, also imposed fines.

Tekhnelogos, which offers software program to the natural gas installation companies, required the issue a digital insurance policy for the application of ZetaCad digital sending/ online approval system (DIPOS), which is used for project delivery. The application is made by its own company, the Üç Elma Sigorta Aracılık Hizmetleri Limited Company[957]. As a result of the preliminary proceeding the Board determined that the obligatory clause of Tekhnelogos (to issue insurance policy on this system, as well as the online project submission service in DIPOS) was tying practice[958]. Therefore, the Board held that Teknelogos abused its dominant position in the “online submission market of natural gas installation projects”, because it was seen that the applications adversely affected the competition in the insurance sector (especially local insurance agencies) and the installation companies were restricted in terms of options such as the price and the service of the insurance company[959]. After taking into account that the practice covered a significantly small portion of the insurance sector,and alternative options for competitors were found, the Board did not impose fines but ordered the removal of the compulsory digital insurance policy from DIPOS[960].

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[957] Board *Tekhnegolos* decision dated 11.09.2008 and numbered 08-52/791-320.
[958] *id.*, n. 580-600.
[959] *id.*, n.610-680.
[960] *id.*, n.700-710.

The rights of the football clubs related to the league matches were transferred to the Turkish Football Federation (TFF), and the TFF sells these rights exclusively through tender to a broadcasting organization "Digitürk"[961]. Digitürk, which won the tender and became a monopoly in this area, offered to sell these images in a package and allegedly discriminated on behalf of another television channel affiliated to the same broadcasting group[962]. Therefore, the Board concluded that Digitürk's packaging (pure bundling) practices constituted one of two actions to abuse its dominant position: Pursuant to the tender contract, upon request, Digitürk should provide to other publishers "these images for not more than 4000 US dollars per minute and limited to three minutes"[963]. Thereupon, Digitürk demanded 108,000 US dollars for 27 minutes of video band per week from other publishers by means of "not to selling images for less than three minutes" and "selling packaged images of nine matches played during the week"[964]. In this context, the Board first evaluated whether each of the images of the nine games played each week can be described as a separate product. The Boardconsidered that publishers request match-based images and publishers who have the right of publishing in the previous period also sell the images on a match basis, therefore it determined that there were nine different products at the issue[965]. However, it is noteworthy that the reason behind Digitürk's practice is not an attempt to earn more profit by selling products in packages but, because of the packaging practice, it intended to complicate these images to be supplied by competing publishers of Show TV, which is Digitürk's sister company[966]. Therefore, Digiturk is held to have abused its dominant position and is obliged to deliver "images" in standard lengths (which can be determined from market research by the broadcaster) within "1-3 minutes" of the broadcast standard, and

[961] Board *Digitürk/TFF* decision 28.08.2002 and numbered 02-50/636-258.
[962] *id.*, n. 130-150.
[963] *id.*, n. 600-610.
[964] *id.*, n. 630.
[965] *id.*, n. 1310-1370.
[966] *id.*, n. 1430-1460.

within “45 minutes after the end of the match” to the claimants and a fine is imposed[967].

Regarding the “1-3 minutes images” obligation, there is no explanation why the Board delivered such an demand to Digitürk, since it has the right not to sell less than three minutes pursuant to tender contract[968]. With respect to the obligation to deliver images within 45 minutes, it can be criticized whether it was economically or technically rational for Digitürk to create bands containing images of different lengths relative to the same game within 45 minutes. Eventually, the Board imposed fines and ordered that the tying and discriminatory practice end. However, the Board did not require ongoing monitoring for non-discrimination obligation to be effective in practice, but only repeated that if Digitürk continues such a practice, an investigation will be opened and the transactions will be carried out in accordance with Articles 16 and 17 of the TCA[969].

In this case, tie-in is not imposed by contract, but by the technical integration of two separate products; removing the tied product may seem suitable remedy. At this point, it can be useful to recall the remedies imposed in the Microsoft litigations[970]. In the Microsoft decision, the Commission held that Microsoft had abused its dominant position by tying its Windows Media Player (WMP) to the Windows PC operating system[971]. As a remedy, Microsoft is required to offer Windows without WMP in Europe. However, this remedy could not be effective due to the pricing of the bundled (Windows/ WMP) and unbundled versions (Windows), since Microsoft charged the same price for the unbundled and bundle versions. Herein, another issue to be questioned is whether the remedy was effective to off-set distortion of competition. The complainants argued that

[967] *id.*, n. 1540
[968] However, see *id.*, n. 1370-1380 (Board mentioned that the previous organizations with the right of publishing had given images in bands 1-3 minutes to publishers).
[969] *id.*, n. 1540-1550,
[970] For detailed critics of remedies in Microsoft litigations see O’DONOGHUE/ PADILLA, n. 32078-32094.
[971] The Commission decision, OJ 2009 C 166/20, para. 948-941.

Microsoft's past conduct would continue to hinder consumer decisions even though it was halted for the future, due to the "network effects" in the media player market[972]. In another decision in which Microsoft's tying practice (installing Internet Explorer) was addressed, Microsoft is required to use a neutral and unbiased screen design that guides users to have the choice of installing Microsoft's Internet Explorer or other browsers[973].

The above-mentioned decisions show that for the opted remedy to be effective often requires more specific commitments to ensure removal of the tied product. In this instance, further to the cancelling decision of the Administrative Court, the Board should open an investigation into Google's practice (obligation of OEMs to pre-install Google's apps in mobile phones). In the preliminary investigation, the Board held that the alleged practice does not restrict competition, because users remain free to download rivals' apps. Nonetheless, the Board also recommended that Google terminate this practice. However, the Board had also found that pre-installation has cost-saving benefits for users who prefer Google's app. Thus, if the Board requires the removal of Google's apps, it will harm consumers who are benefitting from pre-installation, witout affecting future consumer decisions (lock-in and network effects) due to past practice. It is obvious that the obligation to offer bundled and unbundled versions will not be effective. Even if it can also be required to offer an unbundled version at lower price, again it will not only harm the consumer but also increase costs for OEMs, as an unbundled version will probably have low demand. We suggest that, following the Microsoft (Internet Explorer) decision, a guidance design (perhaps an information package) can be required that explains to users that they have the option of installing competing apps, *and* the option of *removing* the default status of pre-installed apps.

Another issue that should be noted regarding the remedy for technological tying is the geographic scope of such tying. The competency of competition

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[972] *id.*

[973] The Commission decision, OJ 2010 C 36/7, para. 899-901.

authorities is limited within the field of application of competition rules. However, the relevant markets of Microsoft and Google are worldwide. Continued tying practice outside Turkey would also impact competition in Turkey. Each competition authority will impose its own remedies[974]. Therefore, while the Board choosing/designing and imposing remedies should consider its effectiveness in this regard.

In the cases where tying practice is used as metering pricing (even though in practice will often not result in a supra-competitive price in the tied product, but can be still discriminatory in favor of sophisticated consumers), the focus should be on establishing "transparency" of firms' pricing strategy instead of imposing remedial action that will affect firms' pricing decisions. When a firm offers a durable product (printer) with its own consumable product (ink), competition authorities determine that consumers of printers are well informed about the price charged for consumables and consider this in their decision to purchase a printer[975]. It is likely that the printer market will be highly competitive, and consumers that consider the useful life of a printer (including the total cost of consumables for that printer) will have a strong incentive to switch printer brand if the price of consumables for that brand are raised. Therefore, even if printer suppliers impose similar tie-ins, due to low switching cost and awareness, it can be assumed that consumer preferences are not distorted. Further, compatible consumables may exist in the market. Therein, the imposition of similar tie-ins will cause negatively affect the consumer and competing tied producers. However, the adverse effect of imposition of similar tie-ins can only occur if tying firms are able to monitor their consumers. Monitoring can be managed through a

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[974] Various complaints made against Google's several practices in the EU and US. See Statement of the Federal Trade Commission (FTC) regarding Google's Search Practices "In the Matter of Google Inc.", FTC File No. 111-0163 (January 3, 2013), available at https://www.ftc.gov/enforcement/cases-proceedings/102-3136/google-inc-matter [FTC reached the conclusion that Google's product design decisions (vertical integration strategy) was not anticompetitive, since plausible procompetitive justifications have been offered, and those justifications are supported by ample evidence]. *Compare* Commitments in Case COMP/C-3/39.740 – Foundem and Others (January 31, 2014), available at http://docs.dpaq.de/6448-google_commitments_full.pdf (Google has proposed to provide the "Rival Link" mechanism in Europe).
[975] See Board Printer Suppliers decision and HP decision; XXVth Report on Competition Policy (1995), p. 140-141.

provision in the guarantee documents that stipulates negation of printer warranty due to usage of non-original consumables. In fact, consumers may have preferences on price over the quality, and elect to purchase non-original or compatible, but lower-quality consumables. In this instance, by taking into account the printer suppliers' right of quality control, a moderate remedy can be followed: Cancellation of the warranty will be limited to the damages being caused by non-original and non-compatible consumables, and objective criteria will be placed in the guarantee documents and booklets to define when a consumable product is to be accepted as compatible.

In aftermarket tying cases, in Medical Imaging and Diagnostic Devices decision, the Board emphasized the transparency of price of the devices and their spare parts and directed several measurements to establish this. As we noted above, the Board decision was sound, but can be criticized on some grounds. The Board imposed several duties to deal, within them, considered upon the third parties (ISOs) request device's passwords should be given free of charge in certain time, but the Board did not mention or limit this implementation where/whether software protected by intellectual property rights.

The Board denoted that "ensuring passwords and the dongle or similar apparatuses for access to the technical services of the devices are provided for a reasonable period of time is necessary for establishing competition" in the service market for medical imaging and diagnostic devices[976]. However, while explaining why the number of independent service providers in the service market is very small, the Board offered two reasons[977]. First, the devices in question are complex high-tech products, and they are subject to tight regulations worldwide because they have a direct impact on human health, and the engineers who will care for them must have special training. This training can only be provided by the device manufacturers. Companies in Turkey are only providing this training to their own engineers. Independent service providers, which will be competing with the

[976] Board Medical Imaging and Diagnostic Devices decision, n. 480-490.
[977] *id.*, n. 480.

manufacturer, are therefore only possible through the establishment of their own companies or the employment of companies established for this purpose. The second reason is that access to the technical service department of the devices can be provided by means of a password or dongle device. Given the high cost of these, or other potential obstacles to their acquisition, lead to entrepreneurs being reluctant to enter the market. The Board's intention to stimulate new entrants is welcome and much needed. However, it is also clear that the service provided by the manufacturers carries a cost. It would be contrary to the aims of Article 6 if a compulsory dealing results in terms that promoted inefficient entry. Furthermore, such a duty is also likely to affect investment decisions. *Ex ante* decisions on investments are directed through assessment of expected costs, returns, and risk. In this respect, the risk that a firm might be subject to a duty to deal in future, might affect expected future returns[978].

To generalize the problem in the aftermarkets, imposition of similar tie-ins and market structure (brand-specific dominant position in secondary market) creates risk that may render anticompetitive behavior exclusionary or exploitative, or usually both in the market. At the same time, any compulsory remedial actions that result in the protection of inefficient independent service providers will result in higher prices for consumers. To increase consumer choice and ensure that purchasing decisions are not distorted, competition authorities should introduce remedies that establish transparency in the market, and a tying practice or conditional tying (refusal to supply to ISOs) that lacks objective necessity should be terminated.

The above-mentioned cases lead us to conclude that remedies should have at least these two characteristics: Effectiveness and proportionality[979]. More precisely, it may be educed that remedies for tying practice under Article 6 should

[978] See O'DONOGHUE/ PADILLA n. 31864.

[979] See Article 7 (1) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 (16 December 2002), available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001 (last visited 30.09.2017). See also O'DONOGHUE/ PADILLA, n. 30745-30885.

be imposed to fulfill the following objectives: 1) Termination of the infringement (either prohibiting or ordering certain behavior), 2) Elimination of the consequences of the abuse (not merely prospective), 3) Prevention of the repetition of abuse (monitoring or preventing similar conduct that has the same effect).

CONCLUSION

Under Turkish competition law, tying practices can be forbidden if they are conducted by dominant firm(s) and are found to be abusive according to Article 6 of the TCA. However, Article 6 does not provide necessary legal conditions that would deem tying practice abusive. We analyzed the Turkish Competition Board's approach through its decisions regarding tying practices in order to determine whether a consistent framework is provided by the Board. The Board stated that tying can be anticompetitive due to its exploitative or exclusionary effect, but consistently followed the approach that tying can be anticompetitive if it is exclusionary, i.e., if tying practice results in anticompetitive foreclosure. However, the Board's attempt to identify an abuse through anticompetitive foreclosure indicates a lack of systematic procedure and does not clarify what anticompetitive harm is addressed and which objective is followed to separate the pro-competitive tying from anticompetitive tying. Additionally, its approach does not justify why tying practice should not be considered exploitative if it is not exclusionary. Therefore, our thesis aimed to specify an overarching theory of anticompetitive harm in tying cases to determine minimum necessary legal conditions, and to answer whether a tying conduct found to be abusive should also be exclusionary to be exploitative.

To establish a comprehensive theory of anticompetitive harm in tying cases, our starting point was "competition" itself. Competition refers to the market structure which foresees an economic system that operates with its own dynamics, i.e., without interfering with the market conditions of supply and demand. It requires a free market economy that protects the independence of decisions of the market actors in order to distribute the scarce resources of the society in the most efficient way. Since competition is central to a free market economy, it was necessary to evaluate whether the economic structure envisaged by the Turkish Constitution offers guidance or limitation for selecting a free market system in Turkey. By assessing general principles of the Turkish Constitution along with financial and economic constitutional provisions, we recognized that the social state principle embraced by the Turkish Constitution is one of the fundamental elements that guide the economic order and policy. Furthermore, the Turkish Constitution also requires that the state provide an orderly functioning market and take measures to improve it. In this context, the constitution settles the legal substructure of a sound market economy, but does not necessarily impose any economic policy model that political power is required to implement. Therefore, there is no obstacle to choosing a free market economy, and it is currently the economic system in Turkey.

Under these determinations, we conclude that the state is obligated to ensure a competitive environment where all market actors have "freedom of choice" that enhances economic growth by reallocating resources in the most efficient way. Nevertheless, the enhancement of economic growth is not an end in itself; the state should also ensure that each member of society obtain a fair share of the benefits resulting from this economic growth. In other words, enhancement of economic growth should be done in tandem with fair distribution of national income.

Constitutional provisions also provide the legal basis for Turkish competition policy and law. According to Article 167 of the Turkish Constitution, "the state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods, and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets". Thus, in order to create a competitive environment, the Act on the Protection of Competition No. 4054 (TCA), which stipulates competition rules, has been prepared and come into force.

The adoption of the TCA was compulsory by a constitutional directive, but there is no obligation for the State that duty of fair distribution of national income should be fulfilled through the same policy, namely competition policy. Distributional concerns can be addressed by other policies such as tax policy, or competition authorities can select a policy that addresses this issue. Likewise, the

Turkish Competition Authority (the Authority) sets its policy as to maintain the competition process in order to create efficient market (promote efficiency) and increase consumer welfare. In this context, determination of understanding of “consumer welfare” of Turkish competition authority guided us to realize whether distributional concerns are part of Turkish competition policy, and also to specify relevant factors to determine anticompetitive harm.

First, we determined that “consumer welfare” does not refer merely to the economic interests of the consumer, but also to prosperity and standard of living or quality of life of the consumer according to the understanding of the Authority. While “promoting efficiency” refers to a practice that restrains competition, it also creates efficiency, which can be allowed under competition rules, provided the efficiency gains are greater than adverse effect on competition. The competition authority accepts more than one type of efficiency, as all kinds of efficiencies that can contribute to society are welcomed by the Authority. However, we remarked that there are different types of efficiency (viz. allocative, productive and dynamic), and they might not emerge concurrently. Furthermore, circumstances that increase efficiency do not necessarily increase consumer welfare. An efficiency gains may benefit producers while harming consumers.

At this point, the attitude of competition authorities indicates whether distributional concerns are addressed by their competition policy. Our reading suggests that the Turkish Competition Authority’s competition policy accepts that consumer welfare should have preference over producer’s welfare in this instance. This objective can be achieved by requiring that consumers receive a fair share of created efficiencies that resulted from the practice. However, pursuant to secondary legislation, the Board’s approach is not consistent with Turkish competition policy. In the secondary legislation [Guidelines (Dominant Position], the suggested trade-off in this issue grants equal importance to efficiency and consumer welfare. Application of this approach stipulates that the result of the trade-off must at least be neutral on consumer welfare. Thus, this trade-off can include distributional concern only if one unit of Turkish lira has the same value to the producer and the consumer. The Board can overcome this problem by adding its value judgements to the trade-off assessment, and by allowing the practice only if consumers receive benefits from created efficiencies. However, we did not observe any clear tendency of the Board that indicates distributional concerns had directed its trade-off assessment in tying cases.

In addition, approach to trade-off between efficiency and consumer welfare issue help us to understand that whenever efficiency and consumer welfare are not aligned, efficiency will be favored. Therefore, we concluded that application of the objective is not to increase consumer welfare, but at least not to allow decrease. Concordantly, we used this understanding as a threshold to set one of the premises for our determination of harm and abuse.

Our main and second premise stem from the Turkish competition policy emphasis on "consumer sovereignty" and its objective of maintaining competition. This can be achieved by ensuring all market actors (producers and consumers) have "freedom of choice". Restraining a choice is inherent in tying practice. Tying is imposed on consumers; thus, the focus should be on whether tying results in restraint of freedom of consumer choice. Restraint of consumer choice also indicates restraint in rivals' freedom of choice. Since resource allocation is directed by consumer, the tying firm will not able to force the purchase of an unwanted product or surrender a wanted product from another seller. Thus, where consumers' purchases are based on undistorted decision, tying can be neither exploitative nor exclusionary. To assume that consumers direct resource allocation freely, it requires that consumers have sufficient knowledge about their options at the time of purchasing.

Furthermore, the Board's approach to unilateral exploitative practice provides us with the insight that promoting efficiency and increasing consumer welfare (or not allowing its reduction) are not the only expected outcomes from protection of competition but, in some circumstances, it requires the competition authority's intervention. We remarked that legitimate intervention does not occur due to supra-competitive or monopolistic prices, but due to the absence of a self-correcting mechanism in the market.

Moreover, we noted that competition authorities are not equipped to function as price regulators; the Board also has a clear tendency to avoid trying to establish a "competitive price". Based on this understanding, we argued that tying practice that facilitates price discrimination to set its profit-maximizing price should not be found abusive, unless these prices are set due to the lack of a well-functioning market.

Likewise, our reading of concrete cases showed that the conditions to price discrimination effects of tying conduct unlikely occur in real markets. Concrete cases also show that supra-competitive or competitive prices of tying or tied products cannot indicate whether tying restrains a choice. In addition, fact-specific conditions indicate that tying practice cannot restrain a choice if the consumer purchase is based on undistorted decision. In this regard, it is not the tying practice itself that enables firms to force buyers to purchase their tied products, and relinquish their wanted product elsewhere, but consumers' lack of knowledge about their options in the market.

In contrast to the Board's approach wherein tying practice should be exclusionary to be exploitative, which results in gap cases, our proposition that "freedom of consumer choice" should be used for determining anticompetitive harm and abuse in tying cases is over inclusive but does not result in overdeterrence. It is also appropriate in all concrete cases. That is to say, it establishes a "safe harbor" for tying practices in aftermarkets, by allowing firms' pricing strategy through tying, provided their strategy is transparent in the eyes of consumers. It also establishes a threshold for other tying practices by suggesting identifying "restraint in consumer choice", including "the percentage of total sales in the tied market affected by the tying practice" in the assessment.

In addition, “consumer choice” as a benchmark promotes efficiency and increases consumer welfare. It does not limit consumer welfare within consumer surplus or allocative efficiency, but it covers quality, utility, and price – satisfaction aspects of consumer preference. By doing so, not only it does not hinder dynamic efficiency that can bring more sustainable and greater benefits for consumers in the long-term, but it also allows productive efficiency that reflects consumer preferences.

Ultimately, the distinction of exploitative abuse from exclusionary abuse, and merely focusing on the latter, is artificial and hazardous. It results in a consequentialist approach and overlooks the competitive process itself. The correct approach to successful antitrust analysis is to determine an inclusive anticompetitive harm that focuses on establishing exploitation to identify the factors that render tying practices abusive. In this way, it will clarify the objective of Article 6 of the TCA, and establish legal certainty for business. Nevertheless, exclusion is relevant for determining which exploitative practice can violate Article 6 of the TCA, but contrary to current antitrust analysis, the assessment priority should be on the exploitation, not on the exclusion.

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