Vth ANNUAL SYMPOSIUM ON RECENT DEVELOPMENTS IN COMPETITION LAW

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Vth ANNUAL SYMPOSIUM ON RECENT DEVELOPMENTS IN COMPETITION LAW

7 April 2007
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FIRST SESSION

Chairman of the Session
Prof. Dr. Ünal TEKİNALP

JUDICIAL REVIEW OF THE COMPETITITON BOARD DECISIONS REGARDING ADMNINISTRATIVE FINES, AND PROBLEMS ENCOUNTERED

Prof. Dr. Metin GÜNDAY[*]

Ankara University Faculty of Law

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1. THE OBLIGATION FOR AN EFFECTIVE JUDICIAL REVIEW OF THE COMPETITION BOARD DECISIONS IN GENERAL

It has been frequently argued in the first years following the promulgation of the Act numbered 4054 on the Protection of Competition that the Competition Authority is a semi-jurisdictional institution. On one hand the provision that the Authority is independent in fulfilling its duties; that no organ, authority and person may give commands and orders, may advise and make suggestions to the Authority (Article 20/1 of the Act numbered 4054), and on the other hand the fact that procedures to be followed by the Competition Board as the decisive body of the Authority have been laid out in detail in the Act numbered 4054 (Article 40 etc.) has been determining in the formulation of this view. During the same years, the view that the judicial review of the Competition Board decisions should be a minimal review has also attracted supporters, given that the decisive organ of the Board is characterized as a specialized committee in the implementation of the Competition Law, and the field to be reviewed has a technical and complex nature as well.

However, in time, after the idea began to become widespread that the Competition Authority was actually a public entity established pursuant to Article 123, Paragraph 3 of the Constitution in order to fulfill the duty as vested in the State by Article 167 of the Constitution to prevent *"monopolization and cartel formation that might arise in markets de facto or as an outcome of an agreement"*, in other words to fulfill the duty of protecting and overseeing the regime of free competition, and that it is therefore a part of the Administrative Organization of the Republic of Turkey, it started to find increasing acceptance that the Competition Board decisions should also be subject to an effective judicial review in the same way as the other administrative transaction and decisions. Especially, basing on Articles 1 and 2 of the Act numbered 4054, it has been understood that the main function of the Competition Authority is to

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protect and ensure competition and that it has been vested with profound powers of regulation, supervision and apply sanctions, as the need may be, and that it functions as the economic administrative supervisor which is a type of specific administrative supervision.

Administrative supervisor, regardless of its character as a general or specific administrative supervisor, functions in the area of the rights and freedoms of individuals and groups. And supervisory transactions and decisions touch upon rights and freedoms of individuals and groups, and limit and restrict these rights and freedoms. Indeed, as we take a look at the transactions conducted and decisions taken by the Competition Board in order to fulfill its basic function, we can see that these transactions and decisions are closely related with the fundamental rights and freedoms of individuals and groups. For example, the Board's decisions regarding the approval or rejection of an exemption request[1], its decisions concerning the authorization of mergers and acquisitions[2], its decisions regarding the approval or rejection of a request for negative clearance[3], decisions it will take in order to end the violation where it determines at the end of an investigation that there is a violation[4], its decisions regarding the issuance of administrative fines or its regulatory practices in the form of communiqué or regulations are closely related to the right to work and freedom of contract or freedom of founding private undertakings belonging to individuals and groups as secured by article 48 of the Constitution, and limit and restrict these rights and freedoms as the need may be. On the other hand, since the privatization of state economic enterprises or public assets has a merger and acquisition quality to a certain extent, finalization of privatization transactions has been subjected to the condition of an authorization to be granted by the Competition Board, which may cause that the privatization power bestowed on the State (Administration) by the provision of paragraph 3 inserted in Article 47 of the Constitution by the Act dated 13.08.1999 and numbered 4446 is not exercised or is unable to be exercised in the desired direction. All these reasons too, render it imperative that Competition Board decisions be subjected to an effective judicial review.

[1] Act numbered 4054, Article 5
[2] Act numbered 4054, Article 7
[3] Act numbered 4054, Article 8
[4] Act numbered 4054, Article 9

II. SCOPE AND LIMITS OF THE JUDICIAL REVIEW OF THE DECISIONS REGARDING ADMINISTRATIVE FINES

Taking account of the way the Act numbered 4054 regulates the conducts defined as violations of competition and administrative fines to be issued where these conducts are engaged in, judicial review of Competition Board decisions regarding administrative fines proves to be a matter needing to be handled and examined separately from the judicial review of the other decisions of the Board.

Administrative fines are a type of administrative sanctions, and the administrative fines which have been regulated in the Act numbered 4054 in fact fit in the sanctions of a specific administrative supervisor. As the principle of lawfulness of offences and penalties also apply to the field of administrative sanctions, in the Act numbered 4054, Article 4 and 6 as well as Article 11, sub-paragraph (b) provides what the conducts that are named as competition violations and that threaten, put in danger and distort competition are, and Article 16 provides the sanction to be applied in the event that these conducts are engaged in. Given that the decision of the Competition Board regarding the issuance of administrative fines is an administrative transaction as well, if any one of the conducts determined as competition violations in the Act numbered 4054, Articles 4 and 6 and Article 11 subparagraph (b) are engaged in, this would constitute the causal factor of the administrative transaction; whereas the administrative fine to be issued in the event that these conducts are engaged in would constitute the subject factor of this administrative transaction. Furthermore, the Act numbered 4054 (Art. 40) regulates in detail what procedures that are to be followed in issuance of administrative fines, thus the formal (procedural) factor of the transaction of issuing administrative fines has also been determined.

Competition Board decisions regarding administrative fines will in principle be subject to judicial review in terms of formal (procedural) and causal factors. If, at the end of the judicial review, it is found that the decision regarding the issuance of administrative fines has been taken without following the procedures envisaged in the Law numbered 4054 or in violation of those procedures or it has been taken where none of the conducts determined as violations of competition took place, that decision will need to be cancelled on grounds of form (procedure) in the first case and unlawfulness in terms of the cause, in the second case.

On the other hand we see that Article 16 of the Act numbered 4054 grants the Competition Board, to a certain extent, a power of discretion which

can be deemed quite profound in setting the administrative fine. Namely; *"Provided that it is not less than 6.368 NTL for those proven, by the Board decision, to have committed behavior prohibited in articles 4 and 6 of this Act, and for those who commit behavior written in article 11 sub-paragraph (b) of this Act, fine is imposed up to ten percent of the annual gross revenue of natural and legal persons having the nature of punishable undertakings, and of associations of undertakings and/or the members of such associations, which generated by the end of the preceding financial year and which shall be determined by the Board."*

Although the limit of judicial review is set by the power of discretion belonging to the Administration, and therefore it is not possible for administrative jurisdictions to adjudicate to the effect that it would nullify the power of discretion of the Administration (Constitution, Article 125/4), there is no possibility that the Competition Board may, in a totally arbitrary way, use its power of discretion in terms of setting administrative fines and set a fine, the way it desires, ranging between the lower and upper limits indicated by the act. As a matter of fact, as is the case with every supervisory sanction, the sanction of administrative fine to be enforced pursuant to the Act numbered 4054 needs to be proportionate and measured vis-à-vis the gravity of the action causing the sanction. Accordingly, after Article 16 of the Act numbered 4054 grants, to a certain extent, a power of discretion to the Board in setting of administrative fines to be issued, the last but one paragraph of this article provides that the Competition Board has to take account of the factors such as the existence of intent, market power of the undertaking or undertakings which are fined and gravity of the likely damage. Therefore, an administrative fine to be determined by the Competition Board without taking account of these factors at all or to a sufficient degree would be unmeasured and the decision calling for this fine would need to be cancelled on grounds of unlawfulness in terms of the subject factor.

III. POSITION OF THE COUNCIL OF STATE and PROBLEMS ENCOUNTERED IN THE JUDICIAL REVIEW OF THE DECISIONS REGARDING ADMINISTRATIVE FINES

1. Review by the Council of State has so far been more limited to reviewing the conformity of decisions regarding administrative fines to formal-procedural rules

As is known, in our case, just as all the other final decisions of the Competition Board, judicial review of decisions concerning administrative fines is carried out at the Council of State as the court of first instance, in accordance with Article 55, paragraph 1 of the Act numbered 4054. The Council of State Division in charge of this was previously the 10th Division of the Council of State, whereas today it is the 13th Division of the Council of State, with the inclusion of Article 34/C by the Act numbered 5184 in the Council of State Act numbered 2575.

Let us state thereupon that, up until now, the Council of State has reviewed the decisions of the Competition Board regarding administrative fines more in terms of their conformity to formal and procedural rules. The reason why these decisions has so far been reviewed by the Council of State more in terms of conformity to formal and procedural rules, and not in terms of the substance namely the causal and subject factors, is that the Competition Board, in some cases insistently did not follow the formal and procedural rules and that therefore the Council of State was forced to bear with making cancellation decisions only due to the violation of formal and procedural rules.

As regards several lawsuits opened for the cancellation of the Board Decision dated 17.06.1999 and numbered 99.30/276-166, the 10th Division of the Council of State cancelled the Board decision which was the subject of lawsuit on grounds that the decision did not include the notes on dissenting opinions[5]. According to the Council of State, since Article 52 of the Act numbered 4054 envisages that "*the notes on dissenting votes*" shall be among the necessary elements required to be included in the decisions, the Board decision which is the subject of the lawsuit is unlawful from the formal point of view and needs to be cancelled. Although at first look, exclusion of the notes on the dissenting votes may appear as a formal deficiency, the Council of State made the said cancellation decision on grounds that it was deemed necessary *"in Article 52 of the Act that the notes on the dissenting votes, if any, be included in*

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[5] For instance, decision of the 10th Division of the Council of State dated 15.01.2001 and numbered E.2000/1432, K.2001/54

the Board decisions, given that it is important, in the evaluation of the decision, to know the dissenting votes as well as the majority votes and because of the importance attached by the legislator to this issue for the sake of the integrity of the decision".

After the notification to the Competition Authority of the said cancellation decision of the Council of State, no new decision was taken by the Competition Board, but only the notes on the dissenting votes were attached to the former decision and notified to the claimants, and as concerns the lawsuits opened against these transactions, 10th Division of the Council of State made yet another cancellation decision[6] on the grounds it *was* not *"deemed lawful that the cancelled decision was renotified, with the addition of the grounds for the dissenting votes thereto, accompanied by an explanatory note,…disregarding the ground of the cancellation decision taken in consideration of the 'collectiveness of the transaction' and the fact that the cancelled decision was annulled,…whereas the Board was supposed to take action by making a new decision that would enter into force upon the date of acceptance"*. The Competition Board made a new decision in line with this cancellation ruling, however this time the 13th Division of the Council of State stayed the execution on the ground that this decision was taken without respecting the quorum for meeting and decision making[7]. As a consequence, the lawfulness of a Board decision taken back in 1999 on account of violation of competition has not been reviewed up until today in terms of its substance.

As regards other lawsuits opened for the cancellation of certain Competition Board decisions, the 13th Division of the Council of State found that it is in violation of the impartiality principle if the Board member carrying out the investigation participates in the meeting where the final decision is to be made and casts his vote, and it cancelled many Board decisions regarding the issuance of administrative fines which were decided with the participation of the Board member carrying out the investigation. The Council of State concluded "*taking into account that the Board member carrying out the investigation forms and declares his/her opinion beforehand by taking part in the formulation stage of the investigation report and of the additional written opinion prepared in relation to the plea presented in response to this report, and by signing under the report and the additional opinion, it is in contradiction with the principle of impartiality that the same member participates and casts vote in the meeting of*

[6] For instance, decision of the 10th Division of the Council of State dated 26.04.2004 and numbered E.2001/2004, K.2004/4070.

[7] For instance, decision of the 13th Division of the Council of State dated 12.07.2006 numbered E.2006/2431

the final decision, where the investigation report and the plea are supposed to be discussed and evaluated in an objective manner..[8]."

After the cancellation decisions of the Council of State based on this rationale, the Competition Board has taken new decisions in line with the cancelled decisions, based on the report prepared beforehand by an Investigation Committee headed by a Board member as well as on the information and documents in the investigation file, and without obtaining another plea from the undertaking about which the investigation was opened. It cannot be argued much that such a practice is lawful. Because, the cancellation decisions which were made by the Council of State beforehand acts retrospectively and renders the cancelled Board decision void as of the date of the decision. Therefore, if the Competition Board intends to make new decisions in line with the cancellation decisions, it has to follow the procedures envisaged in the Act numbered 4054 and within this context, firstly to decide that an investigation will be made and afterwards, to determine the reporter and the reporters to conduct the investigation under the supervision of the relevant head of department pursuant to the Act numbered 4054, Article 43, Paragraph 1 as amended by the Act numbered 5388, and finally to obtain the grounds of plea of the undertaking about which the investigation was opened. Especially, in consideration of the fact that some members of the Board changes in the mean time, it is absolutely imperative that the relevant undertaking to make, in particular, its oral plea before the new members. However, as regards the lawsuits opened against these new Board decisions mentioned above, since the requests for stay of execution are denied, it becomes clear that the Council of State does not give much credit to such unlawfulness alleged in these lawsuits.

2. Problems encountered in the stay of execution of the decisions concerning administrative fines

Another point that needs to be stressed is the problems encountered in the stay of execution of the Board decisions relating to administrative fines.

Both in Article 125, paragraph 5 of the Constitution and in the Administrative Jurisdiction Procedure Act numbered 2577, Article 27, paragraph 2, power of administrative jurisdictions for making a decision to stay the execution is subjected to highly strict conditions. The fact that making a decision

[8] Upon the decisions of the Council of State to this effect, an amendment has been made by the Act numbered 5388 to Article 45 of the Act numbered 4054 and it is provided that the investigation will no longer be conducted headed by a Board member but by reporter and reporters to be assigned by the Board, under the supervision of the relevant head of department

to stay the execution is subject to such strict conditions is one of the major reasons that the administrative judicial review has often become ineffective in Turkey. As for the decisions of the Competition Board regarding administrative fines, even though it is clear that the punished undertaking would suffer losses which are hard to repair if the administrative fines reaching very high amounts were implemented (collected); it is very likely that the stage of collecting the administrative fines concerning the lawsuit will be reached until a decision is made for the stay of execution since it cannot be determined at the very beginning of the lawsuit whether the second condition required for making a stay of execution decision, namely *"obvious unlawfulness,"* took place and such a determination can only be made after obtaining the plea of the defendant, Competition Authority. In some cases, after the request for the stay of execution is denied, the final decision establishes that the Board decision envisaging administrative fines is unlawful and it is decided to be cancelled; however, the administrative fine is collected before the cancellation decision is made. Big problems are encountered in refunding the collected administrative fines after the cancellation decision is made.

Having probably considered such problems, the legislator provided in the Act numbered 4054, Article 55, the first version of the paragraph 2, that the administrative fines to be issued by the Board may not be collected before they are finalized in administrative jurisdiction; in other words, it had conferred a provision that administrative fines may be collected upon the expiry of the period for opening a lawsuit if a timely lawsuit was not filed, and upon the denial of such a lawsuit with a final ruling if a timely lawsuit was filed. This provision was later amended by the acts numbered 4791 and 5234, and the new version confers the provision that *"Fines are paid within the first three months from the notification of the final decision to whomever is concerned"*. However; apart from the fact that even this three-month period provided for is not often sufficient for the conclusion of the request for stay of execution in the lawsuits opened as concerns administrative fines, nor does the new version of paragraph 2 of Article 55 provide a solution for the problems which might arise in fulfilling the requirements of cancellation decisions which may be made after the denial of the request for stay of execution.

3. Unconstitutionality question of the "Concerned practice" presumption

Article 4 of the Act numbered 4054 reads as *"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," and the same article provides *"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."*

The last paragraph of Article 38 of the Constitution reads as *"No one may be considered guilty until his/her guilt becomes certain."* This principle, which applies primarily to judicial offenses and penalties, is a principle absolutely required to be applied to administrative offenses and penalties as well, since administrative sanctions and penalties are subjected to the principles of Penal Law according to the established case-laws of the Constitutional Court.

The last paragraph of Article 38 of the Constitution stipulates two conditions for a person to be deemed guilty. The first one these is the certainty of the guilt of the person. And the second condition is that this proof should be by adjudication, in other words by a court decision. In the penal law, these two conditions must co-exist without fail. As concerns administrative sanctions and penalties to be applied by way of administrative transactions, for a person to be deemed guilty, it is obvious that the guilt has to be certain by proof of the administration. In other words, a person may not be considered guilty and may be subject to an administrative sanction or penalty unless his/her guilt is proved by the Authority. Therefore, unconstitutionality of the said provisions of Article 4 of the Act numbered 4054 is obvious. However, even though it has been claimed that the said provisions of Article 4 of the Act is unconstitutional in many lawsuits brought against decisions relating to administrative fines issued on grounds of concerted practice, the Council of State has not given credit to this claim of unconstitutionality so far and did not bring the matter before the Constitutional Court.

EVIDENCE IN COMPETITION LAW AND ITS ASSESSMENT

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I. SOME CONCEPTS OF PROCEDURAL LAW IN COMPETITION LAW

As follows from Article 4 Paragraph 3 of the Act No. 4054, "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."

As follows from the last paragraph of the same article, "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."

The language and wording used in perhaps the most important provision of the Act on the Protection of Competition relating to prohibited activities is of a nature which might seriously cause incertitude. The three parts highlighted in the text, namely "cannot be proved", "presumption", and "parties", to be more precise, the words proof, presumption and party are basically concepts of civil procedural law which is a field of law related to the settlement of private legal disputes before court. There is no doubt that these concepts are at the same time subject of civil law.

In fact, these terms chosen for drawing up Article 4 of the Act No. 4054 are related neither to private law nor civil procedural law, considering the subject of regulation of the article. This article is directed towards the purpose of ensuring the protection of competition as clearly provided for under Article 1 of the Act No. 4054 and represents a provision which should by all means stay within the realm of public law. With a closer look, the duty of protecting competition is one of the duties of the government, and thus it is one of the activities contained in the realm of administrative law. In brief, the activity of protecting competition is an administrative activity in a broad sense.

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It should straightaway be noted and reminded that Turkey presently does not have a general act on administrative procedure; however, the Act on the Protection of Competition No. 4054 sets the administrative procedural provisions in its field, and thus it is an important act. However, apart from the nonexistence of a general act on administrative procedure, it is seen that the concepts specifying the transactions of administrative procedure have not been formed to a sufficient extent either. Hence, Article 4 above, where emphasis was made on the three phrases, provides a very important example in this regard.

The word "proof" as used here does not have the same connotation as the term proof used in the Code of Civil Procedure and the Turkish Civil Law. Because, especially in terms of civil procedural law, proof is defined as an activity aimed at convincing the court that a fact, which is influential on the settlement of a lawsuit, occurred. Namely, from the perspective of trial law, proof is an activity where a party is involved, as clearly seen.

What does it mean to prove the existence of an agreement that has the purpose of preventing or restricting competition? If this is proof, who will perform this activity and addressing whom? In fact, the answer to this question has been provided for in detail under section four of the act, starting from article 40, via the provisions on the procedure of examination and inquiry by the board. What becomes clear after studying these provisions is that, in order for the sanctions in Articles 9, 16 and 17 of the Act No. 4054 to be implemented, the existence of an agreement that limits competition need not be proven but be determined. Indeed, where a preliminary inquiry or, if necessary, a subsequent investigation is performed, those who are to perform the preliminary inquiry and the investigation are the reporters. Examination and inquiry carried out by the reporters is an activity aiming at determination. The purpose is to determine the existence of one of the activities prohibited by the act. Hence, together with the board's conclusion, the sanction to be applied via a board decision is dependent on the existence of this activity of determination. It should be highly emphasized that the activity, to this effect, carried out first by the reporters and then the Board is by no means an activity of proof, rather an activity aimed at determination.

One of the procedural concepts cited under article 4 of the Act No. 4054 is the concept of party. Even further apart from the connotations of the word proof, this concept is, so to speak, a "pure" a concept of trial law, more precisely, a concept of dispute resolution. There are always two parties in civil procedural law. In the case of a dispute resolution before a court, there are only two parties as is known very well, and this is always the case. Party is not a concept which could be used by itself. In fact, the word *tarafeyn* (the two

parties) is interesting in the sense that it highlights the importance of the conception of two parties and its importance in trial law.

Both Article 4 and Article 44 of the Act No. 4054 refer to parties. In fact, who are referred to here are not parties, rather, they are persons who were referred to in Article 44 paragraph two as "those who were informed that an investigation was initiated about them". Perhaps in order to ensure the ease of expression, the word party was chosen, and it even gained acceptance in a field and with a meaning far apart from its meaning in procedural law. In short, my personal view is that the concepts of neither proof nor party fit in competition law as regards agreements and concerted practices restricting competition and especially in examinations and inquiries related to these. It can not be contended that the use of these words will cause a serious difficulty. However, assigning denotations of civil procedural law to these words and referring to this conception as concerns settlements within the framework of competition legislation would contradict the meaning and purpose of competition law.

Despite what has been explained, the provisions provided under section five of the act which relate to the private law consequences of restrictions of competition basically concern the realm of private law, and therefore the concepts of proof and evidence used in this section are unquestionably *in pari materia* with those concepts used in civil procedural law and these are concepts which should not be doubted about.

II. REFERENCE MADE TO THE CODE OF CIVIL PROCEDURE AND WHAT IT MEANS

As follows from Article 47 paragraph five of the Act on the Protection of Competition, "during the hearing, the parties concerned may utilize any evidence and means of proof provided under part two chapter eight of the Code of Civil Procedure. The parties claimed to have infringed this Act, or their representatives, and those who prove to the Board prior to the session that they have direct or indirect interests, or their representatives may participate in sessions."

This is a provision which needs to be discussed seriously in terms of its appropriateness and meaning. Actually, just as in the case of the last paragraph of Article 59, if the expression *any kind of evidence* had been used in this article, there would be no ground for any debate or uncertainty.

Reference to the code of civil procedure is made by specifying a chapter, without leaving any ground for doubt, and therefore it indicates that the means and procedures of proof in this chapter can be used as the basis of hearing.

Article 4 of the Act No. 4054 provides for the defense of the person or persons about whom an investigation is conducted. In other words, as follows from the wording of the article, the person to depend on evidence is the person about whom an investigation is conducted.

Now, this question needs to be asked here: How will the person defending himself during the investigation utilize the provisions of acknowledgement and oath as provided for under chapter eight?

As put forth above during the discussion of the word "party", whose acknowledgement will be resorted to given that the other party does not exist?

Also, who will be asked for an oath, given that the other party does not exist?

Considering that the other party does not exist, acknowledgement and oath, which always require the existence of an other party, do not make sense during the hearing as means of proof.

However, this collective reference also led the translation mistakes relating to evidence to be perceived as evidence within the field of competition law, albeit during the hearing stage. The most typical case illustrating this is the "reasons for special provisions" as cited under article 367 of the Code of Civil Procedure. In fact, as meaningless as its name suggests, this regulation does not indicate any type of means of proof. However, in an attempt to understand a term contained in the code, procedural lawyers occasionally tried to assign the meaning "means of proof" to the concept "reasons for special provisions", though with hesitation. Nevertheless, a type of evidence or a means of proof named "reasons for special provisions" does not exist under the source law Neuchâtel either.

Another drawback of the collective reference made to chapter eight is that it might give rise to the impression that the evidence which may be utilized during hearing is confined to the limited number of means of proof in the Code of Civil Procedure. That is to say:

Computer records and all sorts of electronic records have not been provided for under the Code of Civil Procedure. Elements which contain information such as maps, plans and photographs have not been provided for under the Code of Civil Procedure either. Also, the concept of document has not been provided for under the Code of Civil Procedure and no provision has been induced as to whether a document may become evidence or not. However, an undertaking which is supposed to defend itself, at a hearing, under article 47 and about whom an investigation is conducted, may wish to depend on one or all of

the above. In other words, an undertaking trying to convince the Board that the behaviors in the market for goods and services concerned by the investigation do not have a nature that could restrict competition or do not have the nature of a concerted practice may wish to depend on computer records, other electronic or magnetic records or maps, plans or photographs. Then, as concerns the implementation of the provision in effect, it is required that the reference made to chapter eight of the Code of Civil Procedure be not considered as limited to that chapter or even as limited to the Code of Civil Procedure and that it be interpreted to the effect that any kind of means of proof and any evidence may be suggested as basis of defense without being subject to any law. In the medium or long term, on the other hand, the last paragraph of Article 47 which does not have any meaning in terms of civil procedural law must either be re-regulated or abolished.

As regards Article 4 of the Act No. 4054, it is clear that the defendant of the hearing is involved in an activity of proof. This is because the defendant of the hearing, a person or undertaking, is in an effort to convince the Board. This activity of convincement can be described as proof. However, the hearing held by the Board and the activity of proof to this effect do not have the meaning of judicial proof. Considering that judicial proof is not the case, application of the rules and limitations relating to judicial/judiciary proof can not be possible.

III. CONCEPT OF DOCUMENT AND WHAT IT MEANS AS REGARDS COMPETITION LAW

The Bill on Judicial Code, which is presently at the General Directorate of Laws of the Prime Ministry, has differentiated between the concept document and the concept deed, this being the first time in our law, and document has been accepted to be a parent concept which also covers the concept of deed. Differentiation between document and deed is important both in conceptual and legal terms. First of all, in a broad sense, document means a setting or a thing convenient for conveying information. Although every conveyor of information has a certain amount of value as evidence, it is admitted that such information may be of varying power depending on how securely it has been conveyed and on its certainty. For this reason, to give an example, an undersigned text on paper has the nature of absolute proof as a deed, unless a denial of the writing or signature is the case. Whereas electronic data developed via secure electronic signature do not directly qualify as a deed, they are in the capacity of a deed. On the other hand, a writing on a paper which is not signed and which only conveys certain information is not in the capacity of a deed despite being a quasi-documentary evidence.

Deed is a type of document which is used as absolute evidence and which is assigned a special meaning by the law. On the other hand, not every document is a deed and there are documents other than deeds which the law accepts as evidence. For instance, quasi-documentary evidence is a document by its nature; however it is not a deed in a form that is accepted within the law. Apart from that, today, there are data which are developed in an electronic format. These data developed in an electronic format are documents in a general sense, however, they are not considered as deeds.

The fact that the Bill has accepted that document is a parent concept will ensure that technical developments which may arise in the future will more easily be kept up with and that regulation to this effect is instituted. If a conveyor of information has sounder persuasive power or security than a deed, in the sense that is understood today, or electronic data that have been signed with a secure electronic signature, it will be easier for it to be accepted as absolute evidence and there will not be any need for the system of the law to be distorted for this purpose.

For these reasons, a distinction has been made between document and deed, and the provisions relating to "proof via a deed" have been reviewed, and re-regulated by the bill.

The bill also aimed at the regulation of this distinction in a simpler manner, within a more reasonable and systematic hierarchy, under the framework of the "rule of proof via document and deed".

Article 203 of the Bill On Judicial Code is as follows:

"Document

Article 203- Data, which are convenient for proving the facts concerning the dispute, such as a written or printed text, deed, drawing, plan, sketch, photograph, film, image or a sound record as well as data in an electronic format, and similar conveyors of information are documents."

Document has been accepted to be a parent concept *vis-à-vis* deed. Due to the fact that it is new in our law for document to be included in the law, the definition of it has been separately provided for. Even though document has been defined, it is seen that a definition of deed has been specifically avoided. One reason for this is the fact that deed has been included in the law for a long time and that there is not a serious uncertainty in the doctrine and judicial practice in this respect. Furthermore, due to a categorical acceptance of deed, a definition to be made would also include some limitations; therefore it has not been defined so as not to prevent developments likely to arise.

The definition of document is a very general one. Rather than making a restrictive definition, a framework has been drawn up which specifies what a document is. Thus, as concerns this concept newly included in the law, it will be ensured that the hesitations are eliminated and that it is not mistaken for the concept of deed. According to the definition provided in the Article; data, which are convenient for proving the facts concerning the dispute, such as a written or printed text, deed, drawing, plan, sketch, photograph, film, image or a sound record as well as data in an electronic format, and similar conveyors of information are documents. It is also understood that when defining document, in order to ensure integrity within the legal system and that the same concept is not understood in different ways, the Bill on Judicial Code has also made use of the definition of document under the article titled "definitions" of the Access to Information Law which includes the newest definition about document[2].

Two aspects are important in this definition. A document is a "conveyor of information". However, not every conveyor of information, but only those which are convenient for proving the facts concerning the dispute have been considered to be documents in the meaning of trial law. It is no doubt that conveyors of information which are not used in the resolution of the dispute also have the nature of a document; however, it is not possible for them to have evidentiary value as in the case of other evidence for as long as they do not concern the dispute. The definition enumerates as examples some of the conveyors of information which are to be considered as documents; however, these which have been enumerated do not constitute all of documents. Still, the conveyors of information that have been enumerated are the most typical ones among those having different characters. For example, not only written or printed texts, but pictures and plans etc. such as drawings and sketches have also

2 Under Article 1 of the Access to Information Law No. 4982; " The following terms included in this Law are defined as follows;

c) Information: Any kind of data, covered by this Law, which are contained in the records owned by institutions and organizations,

d) Document: Written, printed or duplicated files, papers, books, periodicals, booklets, studies, letters, programs, instructions, sketches, plans, films, photographs, tape and video cassettes, maps, any conveyor of information, news or data recorded in an electronic format covered by this Law and owned by institutions and organizations,

e) Access to information or document: Depending on the nature of the information or document requested, provision of the copy of the said information or document to the applicant by institutions and organizations, and where it is not possible to provide a copy, permitting the applicant to examine the original document and take notes or to see or hear its contents, (…)

been considered to be documents; furthermore, photographs or films, which have the nature of conveying instantaneous or animated image, have been separately specified. Just as records of image or sound are suitable for conveying information, data in an electronic format too can convey information. As seen, by specifying different conveyors of information, a definition allowing for developments in this respect has been made.

The concept of "document," which has been provided for and defined under the Access to Information Law, has also been included in the Bill on Judicial Code in order to be used in the resolution of private law disputes. The importance of the concept of document is also obvious in terms of competition legislation. Especially in the implementation of articles of the Act No. 4054 such as Article 14 relating to soliciting information, 40 to 44 relating to preliminary inquiry and investigation, as well as Article 47 relating to hearing, the concept of "document" must be understood and implemented as a broad and legal concept. The grounds of the investigation and decision by the board are not legal evidence in a narrowed sense, meaning in the area of judicial proof; but they must rather be made up of information and documents in the broadest, yet, in a legal sense. The undertaking about which an investigation is carried out should be able to defend itself, based on any sort of document, without being restricted to the Code of Civil Procedure.

IV. THE CONCEPT OF CIRCUMSTANTIAL EVIDENCE IN COMPETITITON LAW, IN PARTICULAR AS REGARDS INVESTIGATIONS AND DECISIONS, AND ITS VALUE

Even though the definition of "evidence" has been made in the implementation and doctrine of Civil Procedural Law; with respect to the concept of circumstantial evidence which is also a proof-related concept by law, a definition that is agreed upon as much as the definitions of evidence has not been considered necessary.

What is important in terms of civil procedural law in this respect is to make a distinction between discretionary evidence and circumstantial evidence and to specify their differences. As far as legal evidence goes, no uncertainty is felt in this respect. This is because the difference between legal (absolute) evidence and discretionary evidence has been clearly set forth in terms of the extent that it binds the judge.

So, how may the content of discretionary evidence be different from that of circumstantial evidence? When may the judge consider that a fact concerning a dispute has been proven via discretionary evidence? Can the circumstantial

evidence be included in the expression "the judge appraises in a free manner the evidence submitted" given under Article 240 of the Code of Civil Procedure?

One point of view is that a piece of circumstantial evidence (indication) is a phenomenon which has presence in the outside world and courts could make use of these in the determination of the phenomenon that is the subject of the lawsuit. "For that reason, there should be no doubt that an indication is a type of evidence. Indications infer the phenomenon to be proved indirectly." "For instance we can figure out the speed of a car from skid marks." With regard to the same point of view, pieces of circumstantial evidence, as such, do not have the capacity of proof, but they can be considered to be evidence jointly to the extent that they complement each other. "In the first place, this classification used to be made in terms of whether the evidence is legal or not. Means of proof which the law indicates and often accepts to be binding the judge used to be considered as evidence; the remaining ones other than these used to be called circumstantial evidence and these used to attain the character of legal evidence, as a whole, only to the extent that they supplemented each other."

As seen, circumstantial evidence is evidence on one hand, but it is an "indirect" means of proof which infer a part of the phenomenon not the whole of it.

Another view is that, "there should not even be any need for discussing whether indications are evidence or not, given that our criminal procedural law is governed by the principles that the material fact is inquired, that everything is evidence and that the judge is able to freely appraise the evidence."

As per this view which perceives circumstantial evidence as one of the points of origin of the conception of scientific evidence, "when we fully proceed to the stage of scientific evidence in the future, indications will become even more important, and they will be accepted as indispensable means of proof since they will yield even more reliable results as compared to conventional evidence such as witness accounts."

As indicated by the aforementioned quotations and related explanations, the concept of circumstantial evidence, before all else, constitutes an interesting point in the area of criminal procedure. Some lawyers understand circumstantial evidence as a type of evidence which has a limited and partial proof capacity. On the other hand, a newer conception adopts a view which moves circumstantial evidence to the prospective high levels of proof law, from the point of criminal procedure.

This view which considers proof that is based on circumstantial evidence as "indirect proof" has also found acceptance in terms of private law disputes, in other words, civil procedural law. As per this view, "one of the two

aspects of evidential assessment is evidential material, the other is circumstantial evidence. Circumstantial evidence, which is also called indirect proof, is a subject of proof. It is a type of fact, not a means of evidence." This difference of judgment stems from characterizing circumstantial evidence as a supplementary fact. As per this view, "facts that are supplementary to proof are external facts which do not correspond to material element defined by law."

What matters here is not whether circumstantial evidence is a fact or not, but whether it has representative value. In the area of criminal procedure, a circumstantial evidence is assigned conclusiveness to the extent that it has representative value.

Putting aside the discussions on conclusiveness, there should not be any difference between the areas of civil procedural law and criminal procedural law in conceptual terms. In other words, the concept of "circumstantial evidence" and its definition cannot have different meanings within civil and trial systems of the same country, just as in the case of the concepts such as witness, deed, evidence. However, the proof value of circumstantial evidence may be different in civil and criminal lawsuits.

Upon these generic explanations, circumstantial evidence can be roughly described as follows:

Means of proof which make it possible to have a conclusion about the verification of a claim, but which at the same time are able to verify the claimed fact only to the extent of likelihood, or partially, due to its representative character.

As seen from the above matters examined in general terms, in order for proof to be possible through circumstantial evidence, there should not be any fact which resolves the essence of the dispute -a founding fact in other words- and, often, it should not be possible for the court to reach a precise conclusion regarding such a fact due to its nature. Furthermore, enabling proof via circumstantial evidence by legal arrangement should not harm the sense of justice.

According to the three basic principles of evidential appraisal, circumstantial evidence too must be coherent in reasoning; they must at least explain part of the relevant phenomena and have conclusiveness despite partially.

Assessment of the evidence is the stage when the conscientious conclusion of the judge is the basis. Therefore, the supervision of that can not have a legal basis in principle.

In fact, the appraisal of evidence takes place at the stage of determination. After that, the phenomenon is described. Appraisal mistake as provided for under 428/5 of the Code of Civil Procedure relates to this stage. "Material aspect is related to the action, in other words a past phenomenon, which the court of first instance is required to learn about via applying the principles of orality and directness; it is the issue of discovering how this took place." Issue of legality is determining the position of the phenomenon vis-à-vis law.

As regards the dimensions of supervision, three points can be determined here: *Consequence*, *totalness* (integrity) (=totalité), *persuasive power* (convincingness) power (=force convaineante).

Among these, the **principle of consequence**, denotes that the judge is coherent in his reasoning as concerns proof. The court can not determine the phenomena in contradiction with the evidence. This principle wholly rests on logical bases. In a divorce case, the Civil General Council of the Turkish Court of Appeals held that a testimony by a witness to the effect that "he saw a woman at the plaintiff's house when he went there in search for a rentable house and, when he went there for the second time, he met the real lady of the house" can not be relied upon because the said apartment was not announced to be for rent and the fact that he went there again after receiving a negative reply is a statement impossible to be given a logical explanation even if it might be considered, for a moment, that the witness went there to ask about another place for rent; in other words, the Council found that the witness accounts and what they implied were contrary to the rules of reason.

What must be understood from the **principle of totalness** is the ability of "all of the evidence" to clarify all of the phenomena important for the decision. This is the aspect where the conclusiveness of discretionary evidence is different from circumstantial evidence.

Finally, the third point in terms of the determination of conscientious conclusion is the **principle of persuasive power**. Especially, when the judge chooses one among the different witness accounts regarding the same subject matter, the Court of Appeals expects the grounds for this choice relating to evidence to be clarified and it overrules a court decision if it considers the evidential assessment thereof not convincing.

The issue about the conclusiveness of discretionary evidence also suggests that the point arrived at via evidence complies with (or does not contradict) the rules of experience. In case the statements by a kin of one of the parties to the lawsuit are chosen over the statements of a witness that may be

considered impartial, the Court of Appeals considers this a ground for overruling. This is because, as the general life experiences suggest, it is very common for a person to act in favor of his kin and make statements to that effect while witnessing at a lawsuit concerning him.

In fact, the reason why experiential rules are resorted to in determining the material aspect is the purpose of finding the truth. The source of truth is science and scientific thought. If a court wishes to determine the truth via discretionary evidence, it has to take scientific data as the basis. The judge may reach the scientific data directly or through the conclusions of the experts. However, science does not deal with all types of facts which are important for judicial decisions. Science is concerned about abstractions and general rules. The court, on the other hand, deals with concrete phenomena. Still, it can not be said that science is sufficient in every matter. For these very reasons, common experiments, namely rules of experience, are applied in order for the truth to be determined.

According to the joint implementation of these three principles, examined above, which relate to evidential assessment; *discretionary evidence and circumstantial evidence must be coherent in terms of reasoning, must clarify all of the relevant phenomena and must have persuasive power.* What this means on the part of the court of instance is as follows: unless these three points (coherency, integrity, persuasive power) are determined, the claim cannot be considered to have been proven via the discretionary evidence put forward.

These determinations made in relation to circumstantial evidence suggest the criteria to be taken into account during the implementation of articles provided for under section four of the Act on the Protection of Competition, such as articles 40, 43, 44 relating to preliminary inquiry, investigation, collection of evidence and notification of the parties together with articles 48 and 52 relating to final decision and points required to be involved in the decision; namely, while decisions are taken and reduced to writing. In fact these criteria mentioned are basically to be taken into account by the court in the assessment of evidence during trial. However, since a general criterion to be applied in the administrative decision making process does not exist and the Act No. 4054 does not provide for a specific criterion, while determining the points under Articles 4 and 6 of the Act as regards whether some behaviors in the markets for goods and services concerning the investigation have the nature of distorting competition or in the nature of concerted practice, it would be appropriate to consider the threesome criteria which are used in the assessment of discretionary evidence and circumstantial evidence. As follows from this:

Fact-findings made by the Competition Board and which have the nature of legal element must be coherent in terms of reasoning, must clarify all the relevant phenomena and have persuasive power. Unless these three points, namely coherency, integrity and persuasive power are determined, a decision which is to become the basis of implementation of sanction should not be possible to be made.

ARTICLE 81 EC: THE RULE OF REASON AND EXEMPTION

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A. INTRODUCTION

The Treaty of Rome's prohibition on anti-competitive agreements is set out in Article 81 of the EC Treaty. This provides:

1. The following shall be prohibited as incompatible with the common 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 common 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:

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- 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.

The application of Article 81 EC is therefore apparently simple. If an agreement does not fall within Article 81(1) EC, it is lawful. If an agreement is caught by Article 81(1) EC, it may still be lawful if it can be proved to meet the exemption criteria laid down in Article 81(3). If an agreement is caught by Article 81(1), but is not exempt, then agreement is unlawful and the restrictions in it are void under Article 81(2).

To make the interpretation of Article 81(3) even more simple, the European Commission have adopted a number of regulations giving block exemption to various categories of agreements (such as vertical agreements[2], R&D agreements[3], technology transfer agreements[4]) and have also issued a notice setting out the Commission's views on the interpretation of Article 81(3) generally[5] along with more specific notices concerning particular types of agreements such as vertical agreements[6] and horizontal co-operation agreements.[7]

However, this apparent simplicity is deceptive. There remains much lack of clarity as to both the extent of the prohibition laid down in Article 81(1) EC, and the application of the exemption criteria in Article 81(3) EC. It is these issues that this paper seeks to address.

Before doing so, it should be noted that the application of Article 81(2) EC is also not without difficulties. Although the wording of this paragraph refers

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[2] Regulation 2790/99, OJ 1999 L 336/21.
[3] Regulation 2659/2000, OJ 2000 L 304/7.
[4] Regulation 772/2004, OJ 2004 L 123/11.
[5] Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97.
[6] Guidelines on vertical restraints, OJ 2000 C 291/1.
[7] Guidelines on horizontal co-operation agreements, OJ 2001 C 3/2.

to an agreement being void, it has long been established that this voidness only applies to the restrictions which cause the agreement to be caught by the prohibition.[8] The consequence of the voidness of those provisions for the agreement is a matter of national law.[9] This is therefore not primarily an EC law issue and so is not considered further here.[10]

The extent of the prohibition imposed by Article 81(1) EC has provoked much debate. This is often couched in terms of the "rule of reason", adopting the terminology of US antitrust law in considering the extent of the prohibition imposed by the US prohibition on anti-competitive agreements under section 1 of the Sherman Act 1890.[11]

Prior to the modernisation of EC competition law by Regulation 1/2003, only the European Commission had the power to grant exemption under Article 81(3) to agreements that were not automatically exempt under one of the block exemption regulations. Since 1st May 2004, Article 81 has been directly applicable and effective in its entirety.[12] It might be thought that the availability of exemption for an agreement without the need for a prior decision of the European Commission to that effect would mean that the rule of reason debate has ceased to be of very much practical significance. That is, in my view, emphatically not the case, and the extent of the scope of the Article 81(1) EC prohibition remains a vitally important topic of debate.

In this paper, I will approach the issue by inverting the order of Article 81 EC, first explaining some problems that arise in seeking to rely on the exemption criteria in Article 81(3). I will then outline how the scope of the Article 81(1) EC prohibition is to be drawn in the light of the most recent jurisprudence of the European Court.

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[8] Case 56/65 *Société Technique Minière* [1966] ECR 235.

[9] Case 319/82 *Société de Vente de Ciments et Bétons de l'Est* [1983] ECR 4173.

[10] The leading case in English law is a decision of the Court of Appeal in *Chemidus Wavin v STERI* [1978] 3 CMLR 514. In that case, Buckley LJ held that whether an agreement remains in force severed of its void restrictions depends on whether "the contract could be said to fail for lack of consideration or on any other ground, or whether the contract would be so changed in its character as not to be the sort of contract that the parties intended to enter into at all."

[11] *"Every 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."*

[12] Article 1(1), Regulation 1/2003.

B. EXEMPTION UNDER ARTICLE 81(3) EC

The interpretation of Article 81(3) EC is not straightforward[13], nor is proving that the exemption criteria is met.

The burden of proof is placed on the person seeking to rely on exemption.[14] In other words, an agreement is presumptively unlawful unless the exemption criteria in Article 81(3) or a block exemption regulation are satisfied. This means that the parties to an agreement must satisfy themselves that they have sufficient grounds (which may include evidence as to matters such as market structure) to demonstrate to a court or competition authority that the exemption criteria are satisfied.

A distinction may be drawn here between block exemption regulations and the Article 81(3) exemption criteria. In general, it is likely to be easier to prove that an agreement falls within a particular block exemption than within the general exemption criteria.

Some block exemption regulations are highly specific. For example, the motor vehicle distribution block exemption[15] governs relationships between motor vehicle manufacturers and suppliers on the one hand and their dealers on the other. The regulation was the subject of extensive negotiation and consultation between the European Commission and both sides of the industry. It is tailored to the requirements of that industry as well as to the Commission's economic or political objectives. All major motor manufacturers and suppliers have therefore negotiated their dealership agreements with their dealers in the EU with the detailed knowledge of the block exemption's requirements. While some of the block exemption's requirements may be commercially unattractive, there is little doubt that agreements may be drafted in order to comply with the regulation.

Other block exemptions are more general in nature. For example, the block exemption for vertical agreements[16] governs all supply and distribution agreements, by laying down a few broad rules against certain types of

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[13] For an excellent recent account of the development of Article 81(3), see Brenda Sufrin (2006) 51 Antitrust Bulletin 915 "The evolution of Article 81(3) of the EC Treaty."
[14] Article 2, Regulation 1/2003.
[15] Regulation 1400/2002, OJ 2002 L 203/30. The European Commission has also published on DG Comp's website both an "Explanatory Brochure" and "Answers to Frequently Asked Questions" concerning the interpretation of this regulation, although their status as guidance, at least in an English court, is open to doubt.
[16] Regulation 2790/99, OJ 1999 L 336/21.

restrictions (such as restrictions on cross-border sales in the EU[17] and post-termination restrictions on competition[18]). The block exemption applies on the condition that the parties' market shares are below certain thresholds.[19] Subject to being able to make a realistic market share assessment, there is again little doubt as to how to draft an agreement in order to come within the scope of the block exemption regulation.

By contrast, complying with the general exemption criteria under Article 81(3) EC is not a matter of contractual drafting, but requires instead a detailed economic assessment of the impact of the proposed agreement within the market. The Commission's Guidelines on the application of Article 81(3) of the Treaty run to some 116 paragraphs of detailed analysis. Moreover, as the wording of the paragraph indicates, there are four requirements that must be satisfied in order for an agreement to comply with the exemption criteria. Failure to meet a single one of these criteria denies exemption to the agreement.

The difficulties of carrying out this analysis may be illustrated by the experience of the UK's primary competition authority, the Office of Fair Trading ("OFT"), in trying to adopt an official Opinion on the compatibility of national newspaper and magazine distribution agreements with the UK's domestic equivalent of Article 81(3) EC.[20] The problem arose because UK domestic law until recently excluded all vertical agreements (other than minimum price-fixing agreements) from the scope of UK competition law. This came to an end on 1st May 2005, and from then on the same rules applied domestically as apply at EU level.

Newspaper and magazines are distributed in the UK on the basis of agreements which divide up the UK into exclusive territories. In any particular area, a retailer has no choice as to the wholesaler or distributor with which it must deal in order to obtain supplies of newspapers and magazines. Publishers, wholesalers and distributors justify this system on the ground that it promotes efficient distribution of a highly time sensitive product on a sale or return basis. Retailers challenge the system on the grounds that it restricts competition by denying them a choice of supplier and argue that the use of exclusive territories is as anti-competitive at domestic level as it would be at EU level.

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[17] Article 4(b), Regulation 2790/99.

[18] Article 5(b), Regulation 2790/99.

[19] Article 3, Regulation 2790. In all cases other than exclusive supply agreements, the block exemption may apply if the supplier's market share does not exceed 30%. For exclusive supply agreements, that threshold applies to the buyer's market share.

[20] Competition Act 1998, section 9. Section 60 of this Act requires it to be interpreted consistently with the equivalent provisions of the EC Treaty.

Rather than take the matter to court, the suppliers' side of the industry requested the OFT on 1st December 2004 to give a formal opinion on the compatibility of wholesaling and distribution agreements with Article 81 EC. The OFT has so far issued for consultation two, contradictory, draft Opinions on 19th May 2005 and 31st May 2006. In the first draft opinion, the OFT said that newspaper distribution agreements met the exemption criteria but magazine distribution agreements did not. The suppliers responded by explaining that although magazines might have a longer shelf life in many instances than newspapers, distribution was nevertheless just as time critical as it is for newspapers and so there was no justification for treating magazines differently. The OFT reconsidered and issued a second draft opinion which accepted that newspapers and magazines should be looked at together rather than separately, but then did not give a firm opinion whether the agreements did meet the exemption criteria. Instead, the OFT stated that this was a matter for the parties to those agreements to assess in the light of the guidance given in the draft opinion. That guidance, however, made it reasonably clear that the OFT did not think that the agreements met all of the exemption criteria (although nothing had happened in the market which could have caused the OFT to take a different view on newspaper distribution to its first draft opinion a year previously in which the OFT had concluded that newspaper agreements were exempt).

In brief, neither draft opinion has given any clear or workable guidance on the application of Article 81(3) EC. Nearly two and a half years after the initial request, there is still no indication of when a final Opinion might be given by the OFT.[21] This saga illustrates, among other things, the difficulties involved in applying the exemption criteria under Article 81(3), even with the benefit of the Commission's Guidelines. If it takes an experienced competition authority such as the OFT three years to make an assessment whether agreements meet those criteria, what hope is there for the private parties to the agreement to self-assess with a sufficient degree of confidence to proceed on that basis?

In summary, therefore, for agreements which do not clearly fall within one of the block exemption categories, the position under the general exemption criteria of Article 81(3) is likely only to be clear for those agreements which are obviously anti-competitive and therefore could not reasonably be expected to be meet the exemption criteria. But for those agreements which might be exempt, it

[21] The OFT issued a press release on 8th March 2007 setting out its latest progress (Press Release 37/07 "OFT asked to consider referring the market for the supply of newspapers and magazines to the Competition Commission."). It seems doubtful that a final Opinion will be issued until very late this year – maybe three years after the initial request for a Opinion.

will normally be very difficult if not impossible in practice to conclude with certainty that the exemption criteria are met. Moreover, the fallback route to certainty that used to exist in the form of obtaining an exemption decision from the European Commission or, in the UK the OFT, has now disappeared.

This makes it all the more important to consider whether exemption is required at all for an agreement. If the agreement is not caught by Article 81(1) EC, then the question of the potential application of a block exemption regulation or the general exemption criteria need not be addressed.

C. THE SCOPE OF ARTICLE 81(1) EC[22]

The scope of the prohibition on anti-competitive agreements imposed by Article 81(1) EC is defined by its opening words. Article 81(1) EC prohibits "agreements … which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition".

Two points may be made at the outset about this prohibition.

First, the requirement that an agreement has an effect on trade between EU Member States is a jurisdictional requirement: it draws the boundary between EU and national competition law.[23] Lack of sufficient effect on trade means that Article 81 EC does not apply, though domestic competition law might nevertheless apply.[24] However, since most national competition laws model their domestic prohibition on anti-competitive agreements on Article 81[25], the effect on EU trade (or lack of it) ought not to affect the principles underlying the scope of the EU and national prohibitions (assuming, as will normally be the case in the EU and elsewhere in Europe, that national prohibitions are interpreted consistently with Article 81).

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[22] For a more detailed analysis, see Beverley Robertson [2007] ECLR 000 "What is a restriction of competition? The implications of the CFI's judgment in *O2 Germany* and the Rule of Reason." For another comparative analysis of this area, see Alison Jones (2006) 51 Antitrust Bulletin 691 "Analysis of agreements under US and EC antitrust – convergence or divergence?"

[23] See the Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/97.

[24] The relationship between EU and national competition law is governed by Regulation 1/2003, see in particular Article 3.

[25] See Article 2 of the Act on the Protection of Competition for the equivalent domestic prohibition in Turkish law.

Secondly, the prohibition applies to agreements which either have an anti-competitive object (i.e. purpose) or an anti-competitive effect. The former types of agreements are those which could not seek to serve any legitimate purpose, such as price-fixing and market-sharing cartels.[26] The raison d'être of such agreements is to prevent, restrict or distort competition so that the participants can reap the benefits in higher prices and profits. There is therefore no need to assess the actual or potential effects of such agreements, because they could never be anything other than restrictive of competition. To use US antitrust terminology, they are regarded as *per se* violations.[27]

This paper is concerned only with the latter type of agreement referred to in Article 81(1) EC, namely those agreements which "have as their … effect the prevention, restriction or distortion of competition". For the purposes of analysis, this paper will refer to the terms "prevention, restriction or distortion of competition" simply as a "restriction of competition" because there is no relevant difference for present purposes between these words in this context.

Therefore, the key question to determining whether the Article 81(1) EC prohibition applies to a normal commercial agreement is whether that agreement has as its effect the restriction of competition.

One further preliminary point needs to be mentioned here. Article 81(1) EC has been interpreted as applying only to agreements which have an appreciable effect on competition[28], and the Commission's current interpretation is set out in what is normally referred to as the *de minimis* notice.[29] But agreements which are *de minimis* at EU level will fall to be considered under the equivalent national prohibitions (subject of course to any national *de minimis* thresholds) and so the same issue arises domestically.

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[26] The European Court of First Instance referred in Case T-374/94 *European Night Services* [1998] ECR II-3141 at [136] to agreements "containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets".

[27] It must be borne in mind, however, that economic analysis may develop and alter the analysis of certain types of agreements. For example, in EU law resale price maintenance is generally regarded as *per se* unlawful, i.e. agreements fixing minimum resale prices are categorised has having the object of restricting competition. By contrast, the US Supreme Court in *Leegin Creative Leather Products* (oral argument heard on 26th March 2007) is currently considering whether to relax the equivalent US prohibition under section 1 of the Sherman Act 1890, and subject such agreements to a rule of reason (i.e. effects based) rather than *per se* (object based) analysis.

[28] Case 5/69 *Völk v Vervaecke* [1969] ECR 295.

[29] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty, OJ 2001 C 368/13.

So returning the principal question: when does have an agreement have as its effect the restriction of competition? What precisely is meant by "a restriction of competition"?

As Beverley Robertson observes in her article "What is a restriction of competition?":

"There seems to be remarkably little literature on the precise meaning of 'restriction of competition' under Article 81(1). There are, of course, numerous examples of arrangements which have been found to be restrictive in practice. However, few have attempted to pinpoint a single defining characteristic of such agreements."[30]

She identifies two possible theories: the "ordoliberal" approach and the economic approach.

The ordoliberal approach[31] equates restrictions of competition with restrictions on parties' "economic freedom". However, this does no more than reorientate the analysis to one of determining what constitutes "economic freedom"? The basic problem with this approach is that it conducts the analysis by reference to the position of the particular parties to the agreement. Doing so reveals a number of paradoxes. An agreement restricts economic freedom by tying the parties to binding obligations, but on the other hand the parties were exercising economic freedom in the first place by choosing to accept binding obligations to each other. Moreover, the economic freedom of an individual undertaking is at odds with the goal of EU competition law which is, under Article 3(g) of the EC Treaty, "a system ensuring that competition in the internal market is not distorted". In an undistorted system of competition, undertakings' economic freedom-in the sense of being able to act independently of competitors-ought to be completely constrained by perfect competition.

While the ordoliberal approach remains influential at national level in some EU Member States (most notably in its birthplace Germany), its influence on the European Court and European Commission is on the wane. There is instead a growing awareness of the importance of adopting an "economic approach" to the interpretation of Article 81(1) EC. Unfortunately, the analytical

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[30] Beverley Robertson [2007] ECLR 000 "What is a restriction of competition? The implications of the CFI's judgment in *O2 Germany* and the Rule of Reason."

[31] The term 'ordoliberalism' derives from the a school of thinking in pre-war German competition law, also known as the Freiburg school after the university with which this theory was particularly identified. See David Gerber "Law and competition in twentieth century Europe: protecting Prometheus" (Oxford University Press, 1998), chapter 7 "Ordoliberalism: a new intellectual framework for competition law".

clarity offered by this approach has been clouded by some difficulties of terminology, particularly the use of the term "rule of reason" as used in US antitrust, and by an over-rigid adherence to a textual approach to interpretation of the EC Treaty.

The root of the economic approach is to be found in some of the earliest case law on Article 81 in the Court of Justice. The Court held in *Société Technique Minière* that:

"where ... an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute" (Emphasis added) [32]

The underlined passage is crucial. It emphasises the importance of identifying what is now normally referred to as the "counterfactual", i.e. what would, or what would have been, the state of competition without the agreement in question.

This identifies the counterfactual framework in which analysis must be carried out. However, it leaves open the question of what criteria should be used to assess whether a comparison of the positions with and without the agreement leads to a conclusion that competition is restricted.

The Commission's Guidelines on the application of Article 81(3) of the Treaty state that:

"For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable."[33]

In other words, competition is concerned with effects on "prices, output, innovation or the variety or quality of goods and services". Other effects may result from an agreement or absence of an agreement, such as effects on the environment, but these are not effects on competition.

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[32] Case 56/65 *Société Technique Minière* [1966] ECR 235, 249-250.

[33] Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97, paragraph 24.

This is relatively straightforward where the effects are all one way: i.e. the effects are either positive (pro-competitive) or negative (anti-competitive). What is less straightforward is where the effects do not all unambiguously point in the same direction.

In the US, as there is no equivalent of Article 81(3) EC, the weighing of pro- and anti-competitive effects is necessarily carried out as part of the rule of reason analysis under section 1 of the Sherman Act 1890. It has been argued on a number of occasions before both the European Court of Justice and the Court of First Instance that the same rule of reason approach should be applied to Article 81(1) EC.

These arguments have met with a mixed reception. The Court of Justice contiues to leave open the question whether a rule of reason approach can be taken to interpreting Article 81(1).[34] On the other hand, the Commission[35] and the Court of First Instance have stated that anti-competitive effects cannot be weighed against pro-competitive effects under Article 81(1) EC but only under Article 81(3) EC. In its judgment in *Métropole* the CFI stated that "It is only in the precise framework [of Article 81(3)] that the pro and anti-competitive aspects of a restriction may be weighed"[36].

More recently, in *O2 Germany* the CFI stated that an economic analysis in accordance with *Société Technique Minière* which took into account the competitive situation existing in the absence of the agreement did not "amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC"[37].

It is submitted that there are a number of problems with the approach that the CFI states that it is adopting.

First, however pro-competitive an agreement might be overall, if it had one effect that could be said to be appreciably anti-competitive, that would be sufficient for Article 81(1) EC to catch the agreement and to require a full analysis to be carried out to prove the exemption criteria under Article 81(3) were met.

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[34] Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, [133].

[35] Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97, paragraph 11.

[36] Case T-112/99 *Métropole Television (M6) v Commission* [2001] ECR II-2459, [74]; see also Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, [106]-[107].

[37] Case T-328/03, *O2 Germany v Commission* [2006] ECR II-1231, at [69].

Secondly, this approach pays excessive regard to the bifurcated structure of Article 81(3) EC. Defining the scope of a prohibition by reference to the existence of an exemption from that prohibition puts the interpretative cart before the horse.

Thirdly, there is no good purpose to be served by drawing the scope of a prohibition excessively widely. An answer that there is an escape route from the prohibition afforded by the existence of exemption is no answer at all. Why should undertakings be required to prove their agreements are exempt when there is no reason for applying the prohibition to the agreement in the first place? In a system of undistorted competition, state intervention should be restricted to the minimum necessary to protect the public interest in free markets and competition.

Finally, in a world marked by an increasingly harmonised approach to basic competition law norms, it would seem desirable that the two most developed antitrust systems-those of the US and Europe-adopted the same analytical approach to the most basic norm of all in antitrust, namely the prohibition on anti-competitive collusion. Why should the approach to legal analysis vary where the approach to economic analysis does not?

However, it is submitted that the CFI's and Commission's statements on the lack of a rule of reason under Article 81(1) EC are-on a proper analysis of the jurisprudence-at odds with the approach that the Court of Justice and indeed the CFI itself have required to be undertaken in determining the scope of Article 81(1) EC.

In other words, there is a rule of reason inherent in the interpretation of Article 81(1) EC, although so far the European Court dares not speak its name.

D. THE *O2 GERMANY* CASE

As already explained, the Court of Justice in *Société Technique Minière* required Article 81 to be applied with regard to the counterfactual. Although not phrased in terms of a rule of reason approach, it is submitted that this is in fact what the Court in essence laid down.[38]

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[38] Advocate General Roemer referred in his Opinion of 23rd March 1966 in *Société Technique Minière* to a "rule of reason". The Court of Justice had been invited by Advocate General Roemer to apply a rule of reason approach in his Opinion of 27th April 1966 in Case 56/64 *Consten & Grundig* [1966] ECR 299. The Court did not do so. In my view, this was because of the single market integration imperative at the heart of that

Last year, the CFI in *O2 Germany* applied the *Société Technique Minière* approach to strike down a Commission exemption decision. In so doing, it is contended that the CFI was in reality applying a rule of reason approach, latent in the jurisprudence of the European Court since *Société Technique Minière*, to the interpretation of Article 81(1) EC even though it has not explicitly stated that this is what it has done.

The agreement in issue provided for the smallest operator in the mobile telephone network market in Germany, O2 Germany, to share the 3G mobile network of T-Mobile, the mobile business owned by the dominant fixed operator in Germany. The agreement was notified to the Commission which held that it was caught by Article 81(1) EC, but granted an exemption under Article 81(3) EC. *O2 Germany* successfully appealed to the CFI (and the Commission did not subsequently appeal that decision to the Court of Justice).

The Commission had decided that the network sharing agreement was caught by Article 81(1) EC because having access to T-Mobile's network would reduce the incentive for O2 Germany to roll out its own 3G network. Being dependent on T-Mobile's network would mean that O2 Germany could not compete by offering superior network advantages (coverage, transmission rates, price). Therefore, there was less competition on these factors than if O2 Germany had its own network rather than being dependent on T-Mobile.

When the Commission turned to exemption under Article 81(3) EC, it decided that network sharing would allow O2 Germany quicker access to the market than if O2 Germany had to construct its own network. This would enable O2 Germany to compete with the other larger network providers for customers, driving down prices and increasing the quality and choice of services available for consumers. Therefore the Commission concluded that the Article 81(3) EC exemption criteria were met and granted an exemption to cover a period to enable O2 Germany to complete the roll out of its own 3G network.

O2 Germany appealed on the ground that network sharing did not restrict competition for the purposes of Article 81(1) EC. O2 submitted that the Commission could only conclude that there was a restriction of competition on the basis of an analysis of the actual effects of the agreement, and by reference to the competitive situation which would exist in the absence of the agreement. Had the Commission conducted such an analysis under Article 81(1) EC, the pro-competitive effects of the agreement referred to within the decision would have forced it to conclude that there was no restriction of competition. In its

case. Judgment in *Société Technique Minière* was given after that Opinion and two weeks before judgment in *Consten & Grundig*.

defence, the Commission argued that such an approach would require it to weigh the pro- and anti-competitive effects of agreements under Article 81(1), and that this was contrary to the case law of the CFI.

The CFI upheld O2 Germany's appeal. In doing so, it made three important statements about the scope of application of Article 81(1) EC.

First, the CFI emphasised that in deciding whether an agreement has the effect of restricting competition for the purposes of Article 81(1) EC, it is necessary to compare the competitive situation to which the agreement is expected to give rise with the competitive situation existing in the absence of the agreement:

"*in a case such as this, where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute*"[39] (Emphasis added)

"*The examination required in the light of Article 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition ... and the competition situation in the absence of the agreement ... those two factors being intrinsically linked*"[40]

Secondly, the CFI made it clear that this assessment must involve analysis of the actual economic context of the agreement, not a mere assertion of what must be the case:

"*in order to assess whether an agreement is compatible with the common market in the light of the prohibition laid down in Article 81(1) EC, it is necessary to examine the economic and legal context in which the agreement was concluded ... its object, its effects, and whether it affects intra-Community trade taking into account in particular the economic context in which the undertakings operate, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functions*"[41]

Thirdly, the CFI claimed that this did not imply that all the positive and negative effects of the agreement had to be weighed under Article 81(1):

[39] Case T-328/03, *O2 Germany v Commission* [2006] ECR II-1231, [68].
[40] *Ibid*, [71].
[41] *Ibid*, [66].

"*Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC*"[42]

However, with respect this last statement does not withstand scrutiny, as it is inconsistent with both the way in which the CFI stated that the analysis was to be carried out under Article 81(1) EC and the analysis that the CFI actually did carry out in order to set aside the Commission's exemption.

This is because a comparison of "the competition in question … within the actual context in which it would occur in the absence of the agreement in dispute" cannot be carried out under Article 81(1) EC by reference only to some and not other factors. All relevant factors must be taken into account under Article 81(1) EC. It is not permissible to sideline particular factors and reserve them only for an Article 81(3) EC analysis. Anything that goes to or could affect "prices, output, innovation or the variety or quality of goods and services" must be taken into account in weighing up the counterfactual under Article 81(1) EC.

E. CONCLUSION

It is plain that the CFI's judgment in *O2 Germany* recognises the full implications of the approach laid down by the Court of Justice over forty years ago in *Société Technique Minière*. A rule of reason-or perhaps more correctly-a realistic economic approach ought to be taken to the interpretation of Article 81(1) EC.

Exemption under Article 81(3) should now be accepted as playing two distinct roles.

Block exemptions can give useful safe harbours for particular types of commonly encountered agreement where a rule based approach can be accepted as meeting competition requirements (i.e. if certain rules are respected, the agreement can be presumed not to pose an appreciable threat to competition).

The general exemption criteria can be reserved for those agreements that are, on a realistic economic approach, genuinely restrictive of competition, but which pursue some other objective by "improving the production or distribution

[42] *Ibid*, [69].

of goods or to promoting technical or economic progress" in a proportionate manner i.e. by "allowing consumers a fair share of the resulting benefit", not imposing " restrictions which are not indispensable to the attainment of these objectives" and not affording "such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

SECOND SESSION

Chairman of the Session
Prof. Dr. Ünal TEKİNALP

AFTERMARKET THEORIES IN COMPETITION LAW AND EMPIRICAL ANALYSIS OF NEW COMMUNIQUÉ ON MOTOR VEHICLES

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"Economists have always known that the extent and accuracy of the knowledge of the economic actor had influence, and often a decisive influence, on his behavior and therefore on the behavior of markets." - George J. STIGLER[1]

1. INTRODUCTION

Information is a commodity that has a cost to obtain. Spreading and transferring of information has become extremely easy by improving information technologies. Though these facilities make things easy to a certain extent, the question as to who will bear the cost of obtaining information when it comes to large masses, may become a big problem. It is because the information obtained is not only communicated to the one who bears the cost, but also to other individual in that group thanks to externality. This situation may cause the problem of free-riding and lower the demand to information.

Moreover, quantity and depth of accessible information in the world is enhanced by the Internet. This development makes it harder to find[2] and analyze the useful information. Even if individuals accept to bear the cost of obtaining information, in many cases they do not have the enough capability to process such information. Therefore, when information is a vital need for operation of the market (if there is a market failure), the responsibility of the government for

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[1] Stigler, G. J., "The Process and Progress of Economics", *Nobel Memorial Lecture*, 8.12.1982, p. 65.

[2] Lately, the increasing value of search engine companies such as Google, is representative of the volume and importance of the circulation of information..

all costs related to the obtainment and technical processing of information shall be taken into consideration.It is because, the positive externalities to be derived, as a contribution to social welfare, from processed information will be higher than the cost, with which government will be charged.

Market failure based on information asymmetry was particularly started to be eliminated by strong governmental intervention after the 1929 Crisis in the finance industry. Also in many matters related to consumer law, where large masses have the position of purchaser, measures adopted by government were aimed to cure the information asymmetry. Information asymmetry is covered by competition law in addition to economic regulation and consumer law.

One of the assumptions on which perfect competition market is based on, is that all purchasers and sellers in the market are fully informed. However, after Nobel awarded economist Stigler's study handling the information asymmetry regarding cartels, market failure caused by inapplicability of such assumption in the said markets was not so much discussed in competition law practice until 1990's. US Supreme Court's decision regarding Kodak put the information asymmetry on competition law's agenda again. Yet, this decision was adopted in a period when courts, policy makers and members of Chicago School, including Stigler, were convinced about confidence in market mechanism. According to some authors[3] Kodak decision, which points out the need for a more close review of the markets which are expected to operate duly theoretically but does not reach the predicted performance level in fact, is considered as the beginning of Post-Chicago School. It is because Chicago School considers that there is a low probability that a lack of information causes in breach of competition. Moreover, it is alleged that cost for the correction of such failure is high and that such failure may be eliminated through agreements contracted between and among actors of the market. Nevertheless, Post-Chicago School states the high likeliness of the occurrence of a breach of competition resulting from a lack of information, and remainsoptimist about the results of a possible governmental intervention[4].

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[3] Kodak Decision has been the main theme of the conference held under the title "Post-Chicago Economics". Steven Salop, who attended this conference made a presentation ("*Kodak* as Post-Chicago Law and Economics", Jan. 1993, unpublished manuscript) and Carl Shapiro ("Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-95, p. 483-511) stated that they agree on the point that there are much more market failures than the theory points out and therefore, that they consider the Kodak decision handling the same issue as a remarkable turning point..

[4] Lande, R. H., "Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World", 62 Antitrust L. J. 193, 1993-1994, p. 193.

Another remarkable point of this decision is that it adds a new dimension to the practice of competition rules to the durable goods often used in our daily life. Durable goods, of major importance in the GDP, play an important role in our decision of daily life. Motor vehicles can be quoted as a perfect illustration for this situation. The purchase of a durable good throughout its economic life, is followed by many after-sale activities, such as repair, maintenance, need for consumable products and insurance. The underlying reason of Kodak case is the after-sale cost that must be born after the purchase of durable goods. The discussion is focused on whether a consumer considers a product's economic life-time costs when buying it and the possibility for the consumer to switch to substitutive products if unexpected costs arise. Basic market failures presently faced are the information asymmetries and switching costs. After-sale market theories analyses whether undertakings infringe competition rules by using the interaction between sale and after-sale.In the event that an undertaking has a strong market power in the after sale markets, such as the tying of the spare parts sale under its control with repair and maintenance services may constitute an abuse of dominant position.

Tying actions are one of several areas, where Chicago School's views were not reflected competition law practice[5]. Lately, Illinois Tool decision[6] dated 2005 confirmed that prohibition of tying actions requires the existence of a market power in the relevant market. In this sense, it will be possible to prohibit tying spare part services with repair and maintenance services, if an undertaking, despite a small market share in sales market, has a dominant position in the after sale market. Emerging theories after Kodak case, explains the conditions related to the situation described here above.

In fact, Supreme Court denied the economic theory which solely takes into account the conditions in sales markets, with respect to the interaction between sales markets and after-sales markets. Supreme Court states, in opposition with the general theory, that buyer, in some cases, may not consider the cost to be incurred throughout economic life of a product and decide solely on the basis of the sales price. Because of information asymmetry, it also instructed the lower court to examine whether Kodak has market power in after-sales market. In a way, the lower court was instructed to analyze the decision-making process of consumers in a world, where obtaining information has high

[5] For the opinions of Chicago School about tying agreements see: Easterbrook, F. H., "Chicago on Vertical Restrictions", IBA Competition Law International, Vol. 3, No. 1, Feb. 2007, s. 3-7.

[6] Illinois Tool Works Inc. v. Independent Ink, Inc., U.S. Supreme Court Decision No. 04-1329, March 1, 2006.

costs[7]. Such decision by Supreme Court clearly illustrates that understandingof lawyers and economists may diverge in competition law, where law and economic discipline can easily be applied. Indeed, evolution in competition law, which is based on the industrial organization, can be realized by empirical studies that are reflecting analyses on actual conditions of a market.

Article of Peltzman, who represents the Chicago School in the regulation area, written for publishing, in the book titled *Handbook of Industrial Organization*, said to be a compiled up-to-date studies on industrial economy, has between its lines, the conclusions that will set a light to reasons of this fact[8]. Based on the figures he sets out, Peltzman states that economists are concentrated on theoretical studies more than empirical ones, and that they have a decreasing contribution to the formation of a rule of law or to its application. Economists do not manage to produce instruments to solve the difficulties faced by the lawyers in practice, and lawyers disregard the use of economics in rule-making and practice.

Therefore, empirical studies that guide decision-makers must be brought in the foreground in order to enable formation of a structure where free market economy process is secured by competition law. Thanks to these studies, correct methods and theories tested in real life may be developed where Competition Law is applied to eliminate temporary market failures. Especially in our country, majority of academic studies regarding Competition Law handle procedural rules, and the studies regarding the substance are nothing more than theoretical discussions. Such attitude is significantly caused by the fact that Council of State could not render decisions regarding substance due to various reasons, and by the legislator's empowerment of Council of State for appeal, resulting in the consideration of Competition Law as a part of Administration Law, the influence of French tradition. Therefore, we assert that that lawyers specialized in competition law must concentrate their work on more positive (empirical) studies so that economic institutions can be more accurately reflected to legal practice.

For this reason, our study aims to handle, by an empirical study, the aftermarket theories formed under influence of Kodak decision. Such study will allow the establishment of the analytical methods that can be invoked in all instructions conducted within the framework of competition law and related lawsuits regarding durable goods and other products, which bring along

[7] Hay, G. A., "Is the Glass Half-Empty or Half-Full? : Reflections on the Kodak Case", 62 Antitrust L. J. 177, 1993-1994, p. 184.

[8] Peltzman, S., "The Handbook of Industrial Organization: A Review Article", The Journal of Political Economy, Vol. 99, No.1, Feb. 1991, s. 201-217.

additional costs during their long usage life. Empirical study will handle information asymmetry as the most important variable with respect to aftermarket theories.

We decided to handle motor vehicle industry for the study. It is because Motor Vehicles Communiqué numbered 2005/4, issued by Competition Authority based on the legislation in EU, which fundamentally changed the industry structure, is indeed based on one of the aftermarket theories that will be handled hereunder. Our empirical study aims to show whether this normative choice was appropriate at least in the sense of information asymmetry.

Before New Motor Vehicles Communiqué, there are Competition Board's two preliminary investigation decisions on HP, relating to aftermarket theories similar to Hugin decisions in EU, failing to discuss analytical methods of the theories. EU Commission probably realized such deficiency by the latest events in the USA, since it included aftermarket theory discussions in its study of modernization of Article 82. However, the fact that such theories have not been discussed during the establishment of rules regarding industries of great importance with respect to their size and impact is a considerable gap.One of our aims in this study is to, with all due respect, to make a contribution in order to cure such gap.

In the second chapter of our study, information about durable consumables, relating to such theories will be provided, and the concept of aftermarket will be dealt with, handling the possible competition investigation stages thereby, then court decisions given on this subject, from Kodak decision in USA to Xerox decision, will be reviewed, and Hugindecision in EU as well as modernization of Article 82 and Competition Board's Preliminary Investigation decision on HP and Printers will be analyzed. In Chapter three, first the economic aspect of the issue will be dealt with, stages of the analysis regarding interaction between sales market and after sale market will be clarified on the light of opinions of various people representing Post-Chicago School age, and the issues related to intellectual property rights and efficiency defenses will be pointed out. Chapter four includes explanations about motor vehicle industry and the empirical study regarding after sale markets. Within this framework, after a brief presentation of the Communiqué 2005/4, its provisions regarding after sale will be analyzed. Subsequently, emphasis will be laid on the importance of information asymmetry and reasoning of the empirical study dealing with information asymmetry and questioning the appropriateness of the normative choice. Conclusion part sets out the conclusion we reached after our study.

2. COMPETITION LAW PRACTICES FOR AFTER SALE MARKETS

Our study constitutes analysis of the interaction between sale and after-sale in respect of rules of competition law. Taking into consideration this limitation, it is inevitable that the products in the market relating to our study will be the durable consumer goods. Because services are consumed at the moment they are produced. As for goods other than durable consumer goods, they involve no additional costs to be incurred by consumer after sale. Understanding this distinction is the first caveat to evaluate the interaction between sales markets and after sale markets. We think it is necessary to review the distinction between durable and non-durable consumer goods before dealing with how positive rules of law for the referred interaction are enforced.

2.1. Distinction Between Durable and Non - Durable Consumer Goods

Durable consumer goods are bought for long-term usage and utilization, whereas non-durable consumer goods are used for once. Many durable consumer goods require maintenance and repair throughout its usage life for continued utility[9]. Changing air and oil filter of an automobile, tuning car rod and wheel balance on a regular basis is required to get the benefit expected from automobile, for instance.

In macro-economic classification, we see that there is a triple distinction in respect of consumer goods. In Turkey, the largest expenditure item, forming GDP is private final consumption expenditures[10]. The term "consumption" here does not refer to usage of them for producing another good or for reselling but for being consumed by the end user. However, such consumption is not made only by consumers, but also by manufacturers.

The triple distinction between consumer goods is as follows: (i) non-durable, (ii) semi-durable and (iii) durable consumer goods[11]. Goods such as

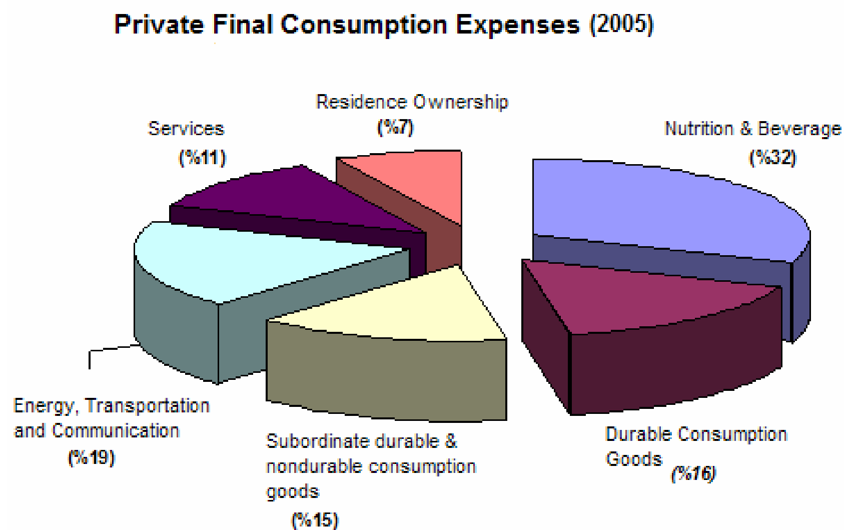
[9] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), *The Antitrust Revolution 4th Ed.* including, 2002, Cambridge University Press, p. 387.

[10] This term contains the word "private" because it is not included in current expenditure of public industry, in other words it covers expenditure of private industry entities and private persons only.

[11] Fourth group in macro economic classification consists of services like energy, transport and communication. Fifth group is formed of services other than those enumerated in fourth group. In terms of micro economy, it would be useful to consider group 4 and 5 under the title of services. Under the interaction between sales and after sale markets, services do not cause emergence of after sale markets like non-durable goods do, because the characteristic that differs services from goods it that they are

bread, water, any kind of food, beverage, cosmetics, cleaning materials, paper, and gasoline, which is consumed at once are accepted as non-durable consumer goods. Semi-durable consumer goods cover consumer goods that have durability a little longer than the first group such as dressings and shoes. As for durable consumer goods, being subject of our study, those are the consumer goods group consisting of articles such as automobiles, home electronics, office equipments, furniture, sports materials, computer hardware, software and toys. Such goods do not corrode and consume away quickly, in other words, they do not cease to exist once they are used but continue to provide service and benefit to use during time, however they require us to incur some additional costs after the sale. Many goods we experience in daily life can be defined as durable good.

As of 2005, private final consumption expenditures form nearly 68,3% of GDP. This figure corresponds to USD 245 Billion, approximately[12]. Total private consumption expenditures are distributed to expenditure items as shown in the graphic below:



Source: http://www.tuik.gov.tr/ulusalhesapapp/UlusalHesap_Rapor.do

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consumed at the moment that are produced. Ownership of house is the sixth and the last group among private final consumption expenditures included in GDP.

[12] Average currency rate for US Dollar in 2005 is taken TRY 1,3408 YTL.

16% share of durable consumer goods holds almost USD 40 Billion in our expenditures. With a view to dynamic course of these expenditures, it is seen that the most rapidly increasing private consumption expenditures in recent years, have been made for durable consumer goods. This tendency was observed in other developing countries as well. So, the more our income increases the more transitions are made to semi-durable and durable consumer goods[13]. Therefore, it is apparent that market hitches that may arise due to the interaction between sales and after sale markets concern a large public. Additionally, it is possible to say that these hitches have great impact on macro economy.

2.2. Concept of After-Sales Market and Competition Infringements

When studying durable consumer goods, some special terms were created regarding the markets wherein the goods are involved. Let us give an example regarding automobiles in connection with our study. The instinct bringing consumers to "fore market" or "primary market" is their desire to benefit from automobile driving. Users would not demand maintenance service or spare part before having an automobile[14]. Each demand arising after completion of maintenance, repair and sale is a derived demand. For this reason, the markets with such goods and services are called "derivative markets" or "after sale markets"[15]. It can also be said that goods and services in after sale markets are complementary to the good bought from sale market[16]. Shapiro and Teece state that aftermarket transactions have two main characteristics: (i) Aftermarket product and services are used together with the primary product. (ii) Purchase of such products and service take place after the transaction in the primary market[17]. The key after sale costs are as follows: Consumables, maintenance services, spare part costs, repair costs, insurance expenses, and training expenses.

Competition issues regarding aftermarket usually arise in cases when the firm, which made the sale, is also able to control the after sale markets. Relevant

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[13] Mahfi Eğilmez's article published in newspaper Radikal on May 7, 2006.

[14] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 387

[15] Sales and after-sales markets do not cover equipment and maintenance-repair only. For instance, computer operating systems constitute the primary market, applications operating on this operating system (as Word, Excel, Acrobat etc.) constitute the after-sale markets.

[16] Carlton, D. W. & M. Waldman, "Competition, Monopoly and Aftermarkets", NBER Working Paper: 8086, 2001, p.1.

[17] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 2.

firm produces after sale goods and services by itself in an original way of the brand, or provides original equipment manufacturer (OEM) produce the same in accordance with the specifications it gives. Application of traditional market definition tools such as SSNIP test shows that aftermarket consists of goods and services of the firm that made the same. This is caused by the fact that such producer often holds the patent right or know-how on the goods subject to aftermarket[18]. Common allegation of competition infringement in such markets is that durable good producer stops other aftermarket firms from offering complementary goods or services, by which it abuses its dominant position in aftermarket[19].

Relation between primary market and aftermarket of durable consumer goods requires that such competition infringement allegation to be different from other markets. It is because the competition in sale market determines the level of competition in aftermarket depending on whether the relation between them is strong or weak. However, there are many variables and technical details involved in analysis of such relation. This study aims to develop a methodology for such analysis.

Actions in such markets cause a competition infringement of abuse of dominant position if the conditions are met in the case. Pursuant to article 6 of Act no. 4054 on Protection of Competition (referred to as "Competition Act"), Competition Board decisions[20] and the adopted EU practice[21] provide that the following three stages of investigation must be completed:

1. Definition of the relevant market.
2. Analysis of dominant position.
3. Whether there is an abuse in the case.

In our study, we will give general information on actions of abuse of dominant position in after sale markets, based on these steps.

1. Definition of Relevant After Sale Market

The concept of "relevant market" used in practice of competition rules refers to the product group formed of other goods and services effecting, in a appreciable degree, a good, a service of such good's and service's sales. Here,

[18] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 68.
[19] Carlton, D. W. & M. Waldman, "Competition, Monopoly and Aftermarkets", NBER Working Paper: 8086, 2001, p.1.
[20] Competition Board Decision 01-35/347-95 of July 20, 2001 on Dominant Position of Turkcell.
[21] Akzo Chemie BV v. Commission of the European Communities, Case C-62/86 (1991).

the adjective “appreciable” means whether the products are in the same market with those handled. Level of substitution between the products is the reference to find it out. Setting out relevant market’s dimension in respect of product, geography and time aims to determine the industry’s part that will be subject to economic intervention[22].

With a view to practices abroad, it is seen that definition of relevant market is made in USA Horizontal Merger Guidelines[23]. EU Commission defines relevant product market, in its “Notice on definition of the relevant market[24]” as follows;

> "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use",

In analysis of a relevant market, the next step after determining the relevant product market is to find out boundaries of relevant geographical market. Though Competition Act is not clear about definition of relevant market, Competition Board’s Communiqué 1997/1 on mergers includes definition of geographic market. We do not consider it necessary to quote Competition Board’s expression as they are almost the same as the wording in EC Merger Regulation[25].

When determining a relevant market, there is no problem with applying the same approach to aftermarket. In other words, definition of sale market and definition of aftermarket must be handled separately in order to make the analysis step by step. Relation between these two types of market will be handled by analysis of dominant position. Therefore, after sale services provided for not the people who are potential buyers of durable consumer good from primary market, but those who have already bought the same, will be taken into consideration[26].

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[22] Ardıyok, Ş., “Mikro İktisadi Müdahalelerde Kavram ve Yetki Karmaşasının Analizi ve Çözüm Önerileri”, Erciyes Üniversitesi, Odman Boztosun (ed.), N. A., Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-III including, Seçkin Kitapevi, p. 155-199, 2005, p.155-199.

[23] U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines”, April 1992.

[24] EU Commission, “Commission Notice on the definition of the relevant market for the purposes of Community competition law”, OJ C 372, 9/12/1997.

[25] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[26] EU Commission, “Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses”, December 2005, p. 69.

This approach reflection, which represents EU's way of thinking and is agreed by us, is in parallel with the approach in USA Horizontal Merger Guidelines. So as: It can be said that a user, who previously bought a durable consumer good would sell such durable consumer good and not buy another durable consumer good in the primary market upon a small but an appreciable increase by supplier in spare part prices, for instance. In other words spare part or maintenance services do not substitute durable consumer goods. For instance, a car owner who realized a small increase in air filter price of his car would not sell his vehicle and buy a new one.

2. Dominant Position Analysis

After determining the relevant market with its goods and services in particular, comes stage of analyzing the market power of firm or firms providing such goods and services. Let us note that analyzing dominant position in after market has not different from other analyses[27]. The next stage is to find out whether the relevant firm has market power. Market power is defined as *"ability to set the price higher than the competitive level"* or *"ability to influence the price and quantity of a product in a market in a appreciable extent."*. Being an economic concept, market power reflects in Competition Act, which is a legal text, as dominant position. Dominant position can be defined as the power of a certain firm or a certain group of firms to set the price in a market higher than the competitive level. Competition Act defines dominant position as follows:

> "The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, amount of production and distribution, by acting independently from the competitors and customers".

As for durable consumer goods, there are many components brought together working in harmony. Manufacturer can produce all of such components by itself, or obtain all or a part of them from OEM firms through third party agreements. If manufacturer has patent right in a component, each of such agreement will become a license agreement. In some cases supplying firm may have intellectual property rights in the component.

In order to take the benefit a durable consumer good as expected, user may need to replace the components consumed or perished during its usage, with their spare parts. This fact is the source of demand to spare part in after sale markets. In addition, repair service is needed to install the spare part and render the durable consumer good, operating again. Maintenance service includes operations (oil changing, various checks, etc.) even if not replacement of a part.

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[27] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 3.

Even if relevant market is formed of goods and services peculiar to such durable consumer good, manufacturer of durable consumer goods will not be considered in dominant position, automatically. Because there may be alternative sources, other than that firm, of such brand-specific aftermarket products. With respect to the possible alternatives, some examples are given below[28]:

- Third parties' supplying spare parts to the market.
- Trade of used spare part.
- Supplying spare parts to the market through parallel trade (gray market).
- Using spare parts produced by other manufacturers after small modifications.

With respect to the first one, patent right on spare parts may grant a significant market power. This fact does not change if manufacturer produces spare parts by itself or OEMs produces them through licence agreements. But existence of patent on a good would not prevent its manufacture of a product substitutive for it unless it infringes patent rights of a product. In this vein, US Supreme Court has recently confirmed that holding a patent right did not automatically create a market power[29].

About the first, the patent right on spare parts may provide to the durable consumer goods manufacturer an important market power. The production of the spare parts by the durable consumer goods producer by its own or by OEM firms based on a license agreement, does not change the situation. However, the patent right on the product does not impede the production of a substitute good provided that it does not violate its patent rights.

However, there are not many spare part producing firms other than the original manufacturer and OEM firms. There are various reasons for this. First of them is the fact that a spare part manufacturer who fails to increase its scale to that of component manufacturer will be disadvantageous in respect of the costs. This negativity can be removed only in case such spare part is used in products of durable consumer good manufacturer so many to eliminate the scale disadvantage, or has so high a supply elasticity. Also, number of the components used in competitors' products may be limited. This situation can be a choice of durable consumer good's manufacturer and may be caused by the technology

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[28] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 7.

[29] Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281, 1284 (2006).

used and the difference between the product and competitor products. In addition, manufacturer's imposition of the requirement to use original spare parts during the warranty period causes some problems to alternative manufacturer with regard to reaching such a scale.

If there is no patent in a component or spare part, it will become harder for durable consumer good manufacturer to obtain market power in after sale markets. Even if there is no patent, having the know-how and production of spare parts by its own, causing alternative manufacturer have scale problem, may bring along the market power. In order to talk about a market power in a case where spare parts are produced as OEM, it must be prohibited or subjected to condition for OEM to sell to anyone other than the manufacturer of such durable consumer good. The fact whether spare part is used in products of other firms will determine the role of production of components peculiar to such firm in total manufacture of OEM (means buyer power of the firm), whether OEM has intellectual property right or know-how in the spare part and whether OEM would accept the non-competition.

OEMs holding patent or know-how in spare part would prevent durable consumer good manufacturer to have market power. Also, used spare parts and volume of parallel trade determined its effect on durable consumer good manufacturer's decision made in after markets.

What we told above, should not cause the idea that there is a low possibility for durable consumer good manufacturers to have a dominant position in after sale markets. If there is no difference between the products in primary markets or the products are completely homogenous, then it will be difficult to have a market power in markets where there are complementary products. However, primary, namely sale markets, where durable consumer goods are traded in fact, have a oligopolistic structure where there are differentiated products, generally[30]. In other words, after markets are the markets where there are limited substitution and entry barriers, generally.

Spare parts, maintenance and repair services are the most important part of after sale goods and services. In maintenance and repair services having market power is harder than it is in spare parts; since entry to this market and addressing to more than one brand therein is easy. Manufacturer may attempt to not give technical information, to prevent supply of diagnostic devices in order to have a market power in maintenance and repair services. However, even such

[30] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 393.

attempts would not bar entry to maintenance and repair service in most cases. Therefore, manufacturer may use their market power in spare part for having the same in maintenance and repair market.

Even if all conditions analyzed above are met in a case, the final criterion to determine whether the relevant firm is in dominant position in spare parts and/or maintenance and repair service is the relation between primary market and aftermarket. A firm will be considered dominant in an aftermarket if durable consumer good manufacturer's performance in sales market is not affected by its actions anyhow in such aftermarket. Chapter 3 of our study is to set out the methodology that can be used to make this determination.

3. Abuse of Dominant Position After Sale

Both in the adopted EU Competition Law practice and in Competition Board's practice in our country, being in a dominant position is not considered illegal. This reasoning is also applies for after markets. For instance, a firm in a dominant position in spare parts will not be charged by any legal responsibility unless it adopts an exploiting or excluding manner.

A firm's earmarking an aftermarket only for itself by excluding its competitors was qualified, by EU Commission, as abuse of a dominant position. According to Commission, such exclusion can be committed by tying or refusing to supply goods[31].

It is seen that excessive pricing in after sale markets is not considered an infringement by EU. Durable consumer good manufacturer's setting excessive prices in aftermarket, e.g. for spare part and/or maintenance and repair, should not be considered an infringement, as there is no possible remedy for it in scope of competition law[32], because price regulation by competition authorities, as if they were regulatory bodies, does not consist with their structure[33]. Excessive pricing in after markets would trigger new entries to the market and causes market power holder be motivated to bar or obstruct such entries[34]. For this reason, rendering after markets effective requires concentration on exclusionary conducts. In this way, it will be easy to eliminate by an *ex-post* intervention, the

[31] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 72.

[32] Borenstein, p. at al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 457; Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 502.

[33] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 p. Ct. 872.

[34] Borenstein, p. at al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 459.

actions that bar entry of or obstruct activities of competitors, and enforce the same as a remedy. Moreover, such sanctions would indirectly avoid formation of exploitive actions such as excessive pricing.

Having excluded exploitive acts as above, let us review, respectively, the two possible exclusionary acts; refusal to supply and the tying agreements.

Refusal to supply in after-sales markets; it can take place as not providing the information necessary for offering good and service, not putting into service an intellectual property right through licensing, and not providing the spare part necessary to render an after sale service[35].

As mentioned above, activity of independent repairer, which prevents durable consumer good manufacturer's excessive pricing in market, by entering into such market, may be dependent to some critical information. If these repairer, who may be equal to or even superior than the manufacturer's maintenance and repair service by their higher quality and better cost structure, cannot obtain the information necessary, then it will be considered an infringement. Here, the critical point is that obtaining such information should not constitute a free-riding. Along with information, there is also a gradual need for durable consumer goods, which started to be produced with embedded software[36], some special equipment and diagnostic devices for repair and maintenance. Manufacturer's prevention of sale of these devices to independent repairer is considered as an abuse, as well.

Though its practice is limited, not putting into service an intellectual property by licensing in aftermarket is considered an infringement of competition. Another form of abuse arises from the relation between spare parts and maintenance and repair. In scope of this relation, manufacturers' refusal of supply spare parts to independent repairer, who provide maintenance and repair service, is an infringement. Naturally, the manufacturer should be in dominant position in such spare part market, where independent repairer has no other source of supply, as a precondition, so that this act is considered as an infringement.

Another form of infringement based on the relation between spare part and maintenance and repair is tying maintenance and repair to spare parts. Tying is an imposition by a seller to buy product B (tied product) upon a buyer who intends to buy product A (tying product). In its decision of Northern Pacific,

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[35] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 72.

[36] DPT, *9. Kalkınma Planı Telekomünikasyon Alt Komisyonu Raporu,* Ankara, 2006, p. 104.

USA Supreme Court defined the competition infringement in form of tying, as follows[37]:

"a tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different product or agrees that he will not purchase that product from any other supplier."

Therefore, in tying agreements, client has to purchase product B, which he does not want, together with product A he indeed wants to buy. According to *Jefferson Parish* decision, being the applicable US case law in tying, infringement in form of tying must meet three conditions below[38]:

- Two different products or services must be tied to each other.
- Tying product must have a market power at a level that will bring restriction regarding the tied product.
- Competition conditions of the tied product must be influenced at a appreciable level.

Whereas, Competition Board regards 4 different conditions to determine whether there is tying arrangement[39]: (i) Existence of two separate products, (ii) tying arrangement between the products, (iii) sufficient economic power and (iv) agreement's creating of competition-restricting effect[40]. These conditions are same with those in USA.

Tying agreements may impede both dynamic and static efficiency. It may cause transfer of the economic surplus from buyer to seller. Static efficiency, which is also referred to as efficiency in distribution is outcome of perfect competition conditions. The fact that actual market conditions are different from perfect competition markets made it discussable whether such tying agreements should be prohibited by competition rules. In scope of this study, we deal tying arrangement's effects regarding dynamic efficiency. If tying agreement forecloses market of the tied product significantly, competing sellers will face increased costs and be excluded from the market[41].

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[37] Northern Pacific R. Co. v. United States, 356 U.S. 1, 5-6 (1958).

[38] Jefferson Parish Hospital District No. 2 v. Hyde, 466 US 2, 80 L. Ed. 2d 2, 104 p. Ct. 1551 (1984).

[39] Aslan, İ. Y., *Rekabet Hukuku: Teori - Uygulama - Mevzuat,* 4th Edition, published by Ekin Kitabevi, 2007, p. 496.

[40] Competition Board Decision 03-06/59-21 of January 23, 2003 on Coca-Cola Su.

[41] Grimes, W. p., "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 268.

In aftermarket, it is seen that durable consumer good manufacturers condition sale of a spare part (tying) to purchase of maintenance and repair services (tied) from itself. Competition investigations in after-markets are mostly caused by maintenance and repair services. Generally, firms give the first priority in aftermarket strategy to maintenance and repair services, because the spare parts to be used and their number is determined in maintenance and repair stage. Ability to control maintenance and repair stage or to have a market power is very important for increasing the revenue expected from the spare part, whose market power is held. In a scenario, where maintenance and repair cannot be controlled but spare part is controlled, users may have opportunity to substitute higher priced spare parts with better and frequent maintenance.

Selling maintenance and repair services to those who intend to buy spare part would exclude independent repairers from the market, because independent repairers' demand to spare part is caused by their aim to provide maintenance and repair service to those who do not intend to purchase maintenance and repair service from durable consumer good manufacturer anyway. Another form of such tying, which does not impose any requirement to end user (amateur home repair activities) and does not provide same facilities to those conduct maintenance and repair services commercially, is a type of discretionary practice, in a way.

Having theoretically made an introduction to definition of relevant market in after markets, to dominant position analysis, and to possible abuse conduct, let us see how the practice takes from in USA, EU and Turkey.

2.3. US Cases Handling After-Sales Markets

Lately, there has been competition investigations conducted for many companies in USA, including Kodak, Prime Computer, Data General, Northern Telecom, Picker, Unisys, Xerox, Rolm, Hewlett-Packard, EDS, General Electric and Siemens. Common characteristic of these companies is that each of them manufactures complicated durable consumer goods and their customers' demand to spare part, maintenance and repair and adaptation continues even many years after sale. Most of the cases have similar story. Firms sell durable consumer goods under their own brand in a market that can be considered competitive. Same firms sell products to users also in after markets. These products include spare part, after sale service, hardware maintenance agreements and software adaptations. Patent rights or other market conditions allow manufacturers to have a position of dominant seller in aftermarkets such as spare parts or software adaptation. Plaintiffs allege that manufacturers sell a product, of which they are

dominant seller, on condition that client will buy a product plaintiff wants to supply (maintenance and repair service generally), and in this way they use their market power as leverage in maintenance and repair services market[42].

1. Kodak Decision

Among these cases, Kodak case is where US Supreme Court used the term "after market" explicitly for the first time[43]. Indeed, during the period before this decision, some courts of lower degree had ruled that concept of market power could not apply in after sale services so often, despite the conclusion that *"every manufacturer has a 'natural' monopoly on its own product, which it sells and distributes"*[44]. Even though some other courts and Federal Trade Commission expressed that a judgment on aftermarket monopolies would be legally meaningful[45]. By its decision of Kodak, Supreme Court has sided with the latter group[46].

So, Kodak decision is the case law that still applies to US after markets. This decision is also where the most detailed discussion was made about aforementioned analysis on investigations regarding competition infringements against after-markets. Customers lock-in, information asymmetry, switching costs and other business elements, which are strategically important, all became subject of competition economy after Kodak decision[47]. The attribution that this decision was "*beginning of Post-Chicago School"* pushed, naturally, many

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[42] Borenstein, p. at al., "Exercising Market Power in Proprietary Aftermarkets", Journal of Economics & Management Strategy, Vol. 9, No. 2, Summer 2000, p. 158-159.

[43] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 2.

[44] Spectrofuge Corp. v. Beckman Instr., Inc., 575 F.2D 256, 282 (5th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979). See International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 908 (6th Cir. 1989) ("a manufacturer is entitled to take the advantage of monopoly it established on the products it developed and produced"), *cert. denied,* 494 U.S. 1066 (1990); General Business Systems v. North American Phillips Corp., 699 F.2d 965, 975 (9th Cir. 1983) ("a market formed on only one brand does not make sense in terms of economy").

[45] Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984) (computer systems after market sales), *cert. denied,* 473 U.S. 908 (1985); Heatransfer Corp. v. Volkwagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977) (after-sale market for automobile air-conditioners), *cert. denied,* 434 U.S. 1087 (1978); General Motors Corp., 99 F.T.C. 464 (1982) (after-sale market for automobile crash parts).

[46] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 4.

[47] Peritz, R. J.R., "Doctrinal Cross-dressing in Derivative Aftermarkets: Kodak, Xerox and Copycat Game", The Antitrust Bulletin, Vol. 51, No.1/Spring 2006, p. 219.

academics to write up studies that approve or criticize this decision[48]. With regard to this character it has, Kodak decision deserves to be handled in depth in this study.

Kodak started to produce and sell high-capacity photocopy machines in the middle of 1970's. These machines, having a large mass and weighting 500-600 kg, were offered with prices remarkably high. These machines were qualified as high-capacity because they could make 60.000 to one million print copies in a month.

At the beginning of 1980's we see many small scale independent service organization (referred to as ISO's) that provide maintenance and repair to Kodak photocopy machines. These firms provided service for a price almost 15 to 20% lower than Kodak's, and some of these services were rated as high-quality and some of them low-quality. Some of them provided solution in maintenance services more customized than Kodak. Among these firms, Image Technical Services (referred to as ITS) entered into a significant maintenance agreement with Computer Service Corporation (CSC). Before the agreement, Kodak was servicing to the same firm, for about USD 200.000 per year with a four- hour guaranteed response time. ITS, firstly, offered to provide service with same response time guarantee in consideration of USD 150.000. Kodak made a counter offer of USD 135.000. ITS reduced its offer to USD 100.000 and warranted to put a service technician full time in service for the client. Just after this competition, Kodak, who used to sell spare parts to anyone and even support small scale ISO's, implemented its policy of not selling spare part to ISO's. By the time, it started to check strictly whether this policy is practiced, insomuch that it started to require evidence from customers that they have a Kodak branded machine and a technician trained by Kodak, as a condition to provide spare part to a client demanding it. Kodak also had its customers sign a commitment letter to not resell the spare part they buy[49]. Afterwards, Kodak increased its maintenance and repair prices[50].

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[48] Naturally, the prominence is taken by the studies of lawyers who acted as attorney for plaintiffs or defendants, or of economists who worked as expert witness of court in after sale markets competition cases,.

[49] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 388-389.

[50] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 761.

In April 1987 many ISO, including ITS, filed a suit of competition against Kodak, in Federal District Court, Northern District of California. They alleged that Kodak monopolized its maintenance and repair services by using its market power over spare parts and components, it made an agreement, infringing competition, with OEM's to prevent ISO's access spare parts and it tied spare parts sales, maintenance and repair services to condition to purchase them from itself. There, it is alleged that sections 1 and 2 of Sherman Act were violated.

In its first objections, Kodak stated that the sales market it operates was a competitive one, and the market included many alternatives available to consumers, and that they made such decisions taking into account total cost of relevant durable consumer good bought and used. Taking consideration of this objection, Federal District Court, Northern District of California (with summary judgment) denied the action before initiating the trial. Plaintiff ISO's appealed the decision to the Ninth Circuit Court of Appeals alleging that Kodak's objections were completely theoretical, and that so many market imperfections could weaken the link that market sales can be lowered due to excessive pricing in after sale market[51].Court of Appeals held that ISO's are right and ruled to return the file to Federal District Court to make new trial of the case[52]. Kodak brought this decision in front of US Supreme Court, but it obtains the same result. Supreme Court rules to return the file to Federal District Courtto make a new trial of the case[53].

Here, let us note that Supreme Court did not hold that Kodak infringed the competition, but it held that their evidence of primary objection was not sufficient to render a decision without making trial. In other words, Supreme Court was not convinced by the assertion that Kodak could not be guilty according to economic theory, and stated, in consideration of ISOs' economic reasoning, the only way to find out whether Kodak infringed the competition was to make a trial, where fact of the market would be handled[54]. Supreme Court decision states that a durable consumer good manufacturer could restrict competition in after markets in legal sense, if the conditions are met in the case,

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[51] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 390.

[52] Image Technical Services, Inc., et al v. Eastman Kodak Company, 903 F.2d 612 (9th Cir. 1990).

[53] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2072 (1992).

[54] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 390.

even it does not have market power in primary market. Aftermarket can be taken as the relevant market even if primary market is competitive[55]. Even if Kodak loses some of its customers in primary market due to high spare part prices it applies in aftermarket, this still can be a feasible strategy as long as such loss is lower than the revenue derived from exploiting its customers lock-in[56]. According to the Court, existence of a mass of customers lock-in using Kodak machines, renders such a strategy advantageous when considered together with the information asymmetry problems that does not allow costumers to evaluate usage life-time costs of a durable consumer good. As expressed by the Court, market conditions may require confidentiality of the information on the costs that may arise during the life times of the machines in order to allow after sale prices and practices to be effective on the demand for the machines in sales market, in aspect of costumers[57]. Moreover, customers lock-in *"would tolerate increase in spare part, maintenance-repair prices to a certain extent before replacing their machines."*[58]

Trial in Federal District Court started on June 19, 1995. 27 days of hearings were hold, where 63 witnesses were heard and at the end of 13 day lasting jury meetings, Kodak is found guilty. It is found that Kodak's infringements cause damages in amount of USD 24 million, and plaintiffs were awarded compensation of USD 72 million, the triple damages amount. Court also decided that Kodak would sell, for 10 years, spare parts to ISOs at prices that are not discriminatory against them[59].

Kodak appealed this decision based on three grounds: (i) Can Kodak be forced to sell its patent-protected parts, copyright-protected software and manuals? (ii) Can all Kodak parts be considered one relevant market even if they cannot be substituted to each other? (iii) Can an firm be charged with monopolization of after-sales markets before determining it applies a monopolist system price (in sales and after-sales markets)? The Ninth Circuit Court of Appeals, handling the appeal, renders its decision on the date of August 26, 1997 and approves the Federal District Court's verdict[60].

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[55] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 483.
[56] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2084 (1992).
[57] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2085 (1992).
[58] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2087 (1992).
[59] Image Technical Service, Inc, et al. v. Eastman Kodak Co., C 87-1686 (January 18, 1996).
[60] Image Technical Service, Inc, et al. v. Eastman Kodak Co., 125 F.3d 1195, cert. denied (1998).

What makes Kodak Decision so important is the fact that Supreme Court mentioned the new economic thinking developed in last 15 years by then, more than ever[61].

2. Developments in USA After Kodak Case

After Kodak decision by Supreme Court, several Federal Courts of Appeal rendered 7 decisions about after-markets, three of which[62] are incompatible with spirit of Kodak Decision according to MacKie-Mason and Metzler[63]. In all these three decisions, Courts focused on the question "*Is Kodak decision based on opportunism toward existing customers?"*. On this basis, it was stated that relevant firm must have made an unexpected change in its policy so that one can call it an aftermarket separate from the primary market and that such market is monopolized, even if the primary market is competitive. Whereas, Supreme Court did not say that opportunism toward existing customers is not the only cause of aftermarket power[64]:

"Primary market's imposition of a restriction on aftermarket prices does not automatically terminate the market power in such markets… Thus, contrary to Kodak's assertion, there is no immutable physical law or a basic economic reality insisting that competition in the equipment market cannot coexist with market power in the after-markets."

Supreme Court emphasized[65] that market facts and hitched such as information asymmetry and customers lock-in due to high switching costs *"could create a less connection between service and parts prices and equipment sales"*[66].

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[61] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995,ps. 484-485.

[62] Decisions I find wrong are: Lee v. Life Ins. Co. of North America, 23 F.3d 14 (1st Cir.), cert. denied, 513 U.S. 964 (1994); PSI v. Honeywell, 104 F.3d 14 (1st Cir.), cert. denied (1997); ve Digital Equipment Corp. v. Uniq Digital Tech., Inc., 73 F.3d 756 (7th Cir. 1996). Other decisions: United Farmers Agents v. Farmers Ins. Exchange, 89 F.3d 233 (5th Cir. 1996); Allen-Myland v. IBM, 33 F.3d 194 (3rd Cir. 1994); and Virtual Maintenance v. Prime Computer, 11 F.3d 660 (6th Cir. 1993) ve Image Technical Service, Inc, et al. v. Eastman Kodak Co., 125 F.3d 1195, cert. denied (1998).

[63] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 406.

[64] Kodak, 504 U.S. at 471.

[65] Kodak, 504 U.S. at 473.

[66] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 407.

In *Virtual Maintenance v. Prime Computer* case, Federal District Court held that Prime Computer infringed the competition[67], whereas The Sixth Circuit Court of Appeals, in the appeal stage, dismissed District Court's decision when Supreme Court had not yet rendered its decision about Kodak[68]. Virtual appealed to Supreme Court, where it was returned to be handled again, in light of Kodak decision this time[69].

Prime is manufacturer of special designed computers names Series 50, with a proprietary architecture. Prime provides updates through support software used in these computers, and provides maintenance and repair services. Virtual Maintenance is a company intending to compete for providing maintenance and repair service to Series 50 computers. Because of its geographic location and prior customer relationships, Virtual intends to give its software named PDGS to its clients using Series 50 model computers of Prime. PDGS is a design software, which is owned by Ford and operates only in computers made by Prime. Ford assigned Prime exclusive distributor for sale and update of this software. Ford updates PDGS once or twice a year and requires independent designers to use the up-to-date software. Prime makes the update for USD 12.000 if the client also buys its maintenance and repair services, and for USD 100.000 if client demands update only[70].

In its second decision about the matter, The Sixth Circuit Court of Appeals held, in light of Kodak Decision, that Prime Computer, as supplier of the software used by firms making design for Ford, infringed the competition by providing software update on condition of buying computer maintenance services from it. There are great similarities between the case tried by this Court and the Kodak case. Court states that the alleged tying-in does not take place between primary market and after sale market, but between after sale markets. Like Kodak, Prime has a market power on software updates, which are provided to design firms through exclusive software distribution agreement in entered into with Ford, because Ford wants those firms to serve it with the most up-to-date software. If firms buy the up-to-date software instead of the update itself, it will have to pay 900% more. Beyond that, changing to another software system, not sold by Prime, (by buying from one of competitors of Prime in primary market) requires many cost-making items including many items regarding hardware, maintenance and training. Prime can hold its maintenances charges at high level

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[67] No. 89-CV-71762-DT (E.D. Mich. 1990).

[68] Virtual Maintenance v. Prime Computer, 957 F.2d 1318 (6th Cir. 1993).

[69] Virtual Maintenance v. Prime Computer, 113 p. Ct. 314 (1992).

[70] Borenstein, p. at al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 475.

before people make such changing[71]. In this decision, it is seen that Court takes into account the switching costs in order to find out whether there is market power in after market.

3. Xerox Decision and Debate on Intellectual Property Rights

Another decision we think worth to mention regarding after markets is Xerox Decision. This decision relates to spare parts, maintenance and repair of high-capacity photocopy machines and copying equipment of Xerox. Xerox is a firm that has patents on key replacement parts and its manuals and operating and diagnostic software are copyrighted. With a decision it made in 1984, Xerox declared that it would not sell spare parts of its machines called 10 Series to anyone other than end-users, namely not to maintenance and repair service providers (ISOs). In 1987 it applies this policy for all its product scale and implements mechanisms to monitor whether the spare parts bought from it are really used by end users. All of these make it impossible for ISOs to provide maintenance and service to Xerox branded machines[72].

ISOs initiated action in 1992[73]. Upon this, Xerox reached a settlement with some of ISOs in 1994. The terms of such settlement foresaw that Xerox would not apply spare part restrictions for 6,5 years and keep copyrighted guides and diagnostic software available to ISOs' use for 4,5 years. However some ISOs did not enter into the agreement arguing that spare part prices applied to them were higher than those applied to end users. They stated that such an act constitutes refusal of supply. They brought such allegation in front of Federal District Court on the ground of abuse of a dominant position. District Court took Xerox's primary objections into account and before starting the trial it held that

> "Xerox's unilateral refusal to sell or license its patented parts cannot constitute patent misuse or unlawful exclusionary conduct under the antitrust laws"

Plaintiff ISOs appealed the decision, to the Federal Circuit making appellate trial regarding intellectual property right at federal level. This court approved Federal Local Court's decision[74].

It can be alleged that Xerox Decision is inconsistent with Ninth Circuit of Federal Court of Appeals' 3rd decision rulings regarding Kodak's objections

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[71] Virtual Maintenance v. Prime Computer, 11 F.3d 660 (6th Cir. 1993).
[72] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 311-312..
[73] In re Independent Service Organizations Antitrust Litigation, 1997 WL 161940, at *1-2 (D. Kan. Mar. 12, 1997).
[74] In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1143 (2001).

of intellectual property rights[75]. ISOs brought Xerox Decision in front of Supreme Court claiming resolution of these two contradictory decisions of case-law., but the Court did not conduct an appeal trial[76]. For now, we postpone mentioning the differences between these two decisions and their analysis in aspect of market theories to chapter three.

2.4. After Market Competition Practices in EU and Turkey

Though after markets are discussed this much in USA, one cannot possibly easily find a case law and systematical academic study on this subject in EU. In our opinion, this is caused by the fact that the relation between theoretical and empirical studies in industrial organizations and EU competition law is being established so freshly[77].

1. First Decision in EU: Hugin v. Liptons

This subject came to agenda by Hugin Decision for the first time[78]. In this decision, EU Court of Justice stated that an independent firm prevents provision of maintenance and repair services by its practices of spare parts it disposes, and defined separate after market, easily[79].

Hugin is a Sweden firm manufacturing cash registers. It holds 12% share of EU and 13% share of UK cash register market, which are quite competitive[80]. When selling, Hugin informs its customers about its after-sales services, where they offer one-year warranty free of charge, and agreement for periodical maintenance, including spare part and workmanship, at a fixed price for the following years.

A demand explosion to cash register, owing to transition to decimal system in UK, was experienced in the period being subject of the decision, and Hugin assigned a firm called Liptons as distributor for London region. Liptons is

[75] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 310.
[76] CSU, L.L.C. v. Xerox Corp., 531 U.S. 1143 (2001), denying cert. to 203 F.3d 1322 (Fed. Cir. 2000).
[77] This process was accelerated as a head economist was assigned as General Director of competition in EU Commission, efforts of Neelie Kroes, influence of US practice as a result of global cartel and merger inspections, and many journals with many US academics, like Journal of Competition Law and Economics, commenced publishing.
[78] Hugin Kassaregister AB v. Commission, Case 22/78, [1979] E.C.R. 1869.
[79] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 762.
[80] Largest firms in these markets have 34% share in UK market and 18% in EU market.

a firm that is engaged in sale, rent, maintenance and repair of cash registers of various brands. In addition to sale of Hugin branded cash registers, Liptons provide maintenance and repair services, necessary spare parts of which were supplied by Hugin. Hugin first offer Lipton's to be reseller in London region. But Liptons refused it due to low profit margins. Upon this, Hugin assigned other resellers and stops supplying cash registers and spare parts to Liptons. Hugin supplied spare parts only to its own distribution system and prohibited its subsidiaries in other countries to supply spare parts to Liptons[81]. For a while, Liptons kept on providing maintenance and repair by the parts obtained from scrapped cash registers[82]. Later on, it applied to EU Commission alleging that Hugin abused its dominant position breaching article 86 of Treaty of Rome. After examining the case, EU Commission held that Hugin abused its dominant position in after-sale services for Hugin branded cash registers, by refusing to supply to Liptons the spare parts required to provide maintenance and repair service[83]. Hugin appealed this decision, bringing it in front of EU Court of Justice. Its appeal grounds were same with Kodak's.

Court of Justice agreed the suggestion that spare parts constitute a separate market. Court of Justice opined that independent firms can be specialized in maintenance and repair of cash registers. They do not need anything other than Hugin's supplying them the spare parts[84]. Hugin's after market is a separate market dominated by Hugin. For this reason, what Hugin needed to prove was that it had a objective reason for refusal of supplying spare part, and its conduct would not be considered an abuse therefore[85]. But the action was not settled as to the substance, and Court of Justice dismissed Commission's decision, without dealing the act of abuse, on ground that Hugin's conducts did not prevent the trade between member states[86].

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[81] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 763.

[82] In course of EU Court of Justice's appeal trial, it was officially noted that this method is not a substitutive of method of obtaining spare part from Hugin.

[83] Decision of Commission of 8 December 1977, OJ No L 22, 25 January 1978, p. 23.

[84] As a cash register is made of 2000 different pieces, the number of parts that a brand needs, in order to provide maintenance-repair service to different models of a brand, may reach 5.000.

[85] [1979] E.C.R. at 1896-97, para. 7-10.

[86] We opine that it is not right for Court of Justice to render its decision without handling all claims. As a matter of fact, Council of State in our country annuls Competition Board's decisions based on the earliest reason it finds in course of appeal trial of them. This method avoids determination of illegalities on time and avoids appeal phase to

According to Eleanor Fox, the US academics being the closest observer of EU Competition Law, a dominant position or monopolization in EU can be abused not only by exclusion of the competitors, but also by exploitation of consumers[87]. If a dominant firm in a market excludes its competitor from important part of the market, dominant firm will be charged with burden of proof and will have to show objective reasons for such act[88]. Also in Hugin decision, both Commission and Court of Justice adopted such approach without making detailed economic analyses. Whereas, US practice is focused on welfare-triangle-type exploitations, insomuch that some authors argue that competition infringement would not apply if after sale restrictions only causes re-distribution of producer surplus and makes no effect to consumers' welfare[89]. So, one must show the exploitation effects of an exclusion in order to provide prohibition of exclusionary conducts of a firm holding market power[90]. For instance, competition authorities, as to Hugin Decision, considered at length as to whether there is an exclusionary act, and did not analyze whether it caused an exploitation. Whereas, Kodak Decision held that information asymmetry and switching costs were the leading basic reasons of emergence of market power in aftermarket, and further analyzed consumers' role in a market. According to Eleanor Fox, the difference between Kodak and Hugin is the fact that USA Courts have managed to discover information failure, whereas EU authorities have not. Actually, the difference is caused by the viewpoints of the authorities. So as[91]:

> "US Jurists must justify abuse cases in the language of price theory economics while the European institutions-and most antitrust systems in the world- are content with and proud of the language of legitimacy, access, and the right of competitors to compete on the merits"

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guide Competition Board. Due to this method, Council of State has not rendered a precedence decision on the merits of a Competition Board case for last 10 years, except for several few occasions.

[87] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 259.

[88] United Brands Co. v. Commission, Case 27/76, [1978] E.C.R. 207.

[89] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 326-327.

[90] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 259.

[91] Fox, E. M., "Eastman Kodak Company v. Image Technical Services, Inc. - Information Failure as Soul or Hook?", Antitrust Law Journal, Vol. 62, 1993-1994, p. 267.

In economic analysis of exclusionary acts, proving the competition infringement requires to evidence that the competitor was provided to incur loss (by exclusion or increasing its costs) and that consumer was exploited. Adapting this to Kodak, firstly it was handled whether the excluded ISOs obtained the spare parts from alternative sources. Secondly it was considered important whether consumers could access ISOs' services as substitutive services or whether they bought machine from Kodak's competitors without incurring any loss[92].

2. EU Commission's Discussion Paper on Modernization of Article 82

In term of the years following the Hugin decision, neither EU Commission nor Court of First Instance and Court of Justice, being appellate authorities, have rendered any decision in capacity of a case law regarding after markets. EU's steps to make an analysis similar to Kodak case came after many years. Handling the matter systematically and setting out its conclusion thereon, EU Commission ended its long lasting silence by the discussion paper it issued regarding modernization of article 82[93]. After a general introduction, the part of this document regarding after sale markets, handled, under separate titles, the matters regarding definition of market in such markets, analyzing a dominant position, conducts of abuse, and objective reasons and efficiency defenses that a defendant may assert. It can be said that the approach adopted is in parallel with Kodak Decision.

In fact, EU made its most important effective step regarding after markets by its Regulation no. 1400/2002 on Motor Vehicles, because the methodology used and rules adopted in this Regulation are directly related to after markets though the relevant texts do not indicate it explicitly. This matter will be analyzed in chapter 4.

3. Turkish Decisions on After Sale Markets

Enforcement of Competition Law in Turkey actually started in 1997 when Competition Board and Competition Authority entered upon their duty. In this period of 10 years, Competition Board contributed much in development of competition law in our country, except for some difficulties faced in stage of appeal, and it became a reputable authority in view of international organizations like OECD, EU and UNCTAD. In this process, both academic studies and the

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[92] Salop, p. C., "The First Principles Approach to Antitrust, *Kodak* and Antitrust at the Millennium", Antitrust Law Journal, Vol. 68, 2000-2001, p. 192.
[93] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005.

decisions adopted by the Board brought to our country many competition law issues discussed abroad.

However, to the best of our knowledge, there is no decision or an academic study discussing aftermarket in the extent as Kodak Decision does, or mentioning such theories. Though aftermarket theories are not discussed in front of Competition Board expressly, Competition Board benefited from these theories were implicitly in two preliminary investigations it conducted against computer printers markets, as in Hugin Decision, and mentioned the same, in part, in the investigation about Renault Mais[94].

In HP Case, Competition Board rendered a decision after the preliminary investigation conducted upon complaint made by Yalova Provincial Governor's Office, a firm called Contimed and a person[95]. Regarding the after markets, they complained that maintenance-repair price of HP printers is higher than even a more advanced model of that product, and HP refused to sell spare parts to third parties other than authorized service providers. Investigating these allegations, the first definition of relevant market was made in accordance with afore-described phases[96]:

> "Presently, spare parts for HP branded products are manufactured by Hewlett Packard Company (referred to as HP) only. Since products become out-of-fashion quickly due to their technologic characteristics, a newer product replacing such product is offered with lower price though with higher performance, manufacture processes requiring high technology are used in production, and a high start-up cost is required therefore,the firms other than HP would face difficulty in manufacturing spare parts to be used with HP products, which constitutes a barrier against close substitution of spare parts and after-sale services for HP branded printers. For this reason relevant product market is taken as market of after-sale service for and spare parts and consumables materials of HP branded printers."

As seen, Competition Board, similarly with Kodak and Hugin Decisions, defined after markets as separate markets, regardless of competition level of printer sale market. However, it is seen that Competition Board acts in light of not Kodak Decision, but Hugin Decision with regard to dominant position. Competition Board making reference to a decision by Office of Fair Trade of UK stated that there is not much information asymmetry in printer market, where users do not consider only the sales price, but also the costs to be incurred in usage life-time[97]:

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[94] Competition Board Decision 00-42/453-247 of November 2, 2000 on Renault Mais

[95] Competition Board Preliminary Inspection Decision 01-22/192-50 of May 08, 2000.

[96] Competition Board Preliminary Inspection Decision 01-22/192-50 of May 08, 2001, p. 2.

[97] Competition Board Preliminary Inspection Decision 01-22/192-50 of May 08, 2001, p. 4.

"…Conscious users, who consider product price together with consumables price as the data, tend to choose the best combination among manufacturer in the market when they buy a product.

Thus, during competition investigation conducted about HP, in UK, the question "do you really think that consumer consider after-sale maintenance and repair costs when they make a decision to buy a printer?" asked by Office of Fair Trading, was replied by HP saying yes, according to surveys conducted by our company, it is found that consumer takes into consideration all costs when they buy printer. This is the reason of the efforts to give sufficient information at sales points about consumables (cartridges, paper etc.), additional warranty and support packs"."

Though one may think, based on Kodak Decision, that HP should be found not in dominant position due to the strong link between aftermarket and primary market, it has been decided that HP is in dominant position with regard to its market share only, saying[98]:

"Presently, spare parts for HP branded products are manufactured by Hewlett Packard Company (referred to as HP) only. Since products become out-of-fashion quickly due to their technologic characteristics, a newer product replacing such product is offered with lower price though with higher performance, manufacture processes requiring high technology are used in production, and a high start-up cost is required therefore, the firms other than HP would face difficulty in sense of general principles of business administration, in manufacturing spare parts to be used with HP products. Therefore HP A.Ş. is dominant in market of spare parts for HP products."

Since the Hugin Decision approach was adopted, determination of a dominant position was followed by analysis of abuse. In contrary to the allegations, it was seen that spare parts sales were available to persons and entities other than authorized service providers[99]. This could be the point causing problem for Competition Board to fully apply the aftermarket theories that arise after Kodak Decision. If HP had prohibited spare part sales to those other than authorized service providers, Competition Board would consider that as abuse unless it faces an acceptable defense of efficiency in course of the investigation, as happened in Hugin Decision.

In addition, Board's answers to allegations of excessive pricing in spare parts indicate that it implicitly takes into consideration the after sale market theories, just like information asymmetry[100]:

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[98] Competition Board Preliminary Inspection Decision on HP 01-22/192-50 of May 08, 2001, p. 5.
[99] Competition Board Preliminary Inspection Decision on HP 01-22/192-50 of May 08, 2001, p. 7.
[100] Competition Board Preliminary Inspection Decision on HP 01-22/192-50 of May 08, 2001, p. 8.

"These comparisons lead us to conclusion that the spare parts and especially consumables pricing is too high when compared to product price, not because of a competition infringement but as a requirement of the industry's structure, where users must beware the amount of possible costs to be incurred during economic life of a product rather than considering its price only."

So, it can be said that first HP Decision is in parallel with Kodak case in respect of aftermarket theories, except for the analysis of dominant position.

Competition Board's second decision on after-markets is regarding a preliminary investigation conducted about HP, Lexmark, Canon and Xerox (printer suppliers)[101]. Complainant asserts that printer suppliers refused exercise of warranty rights in case unoriginal consumables are used. In terms of competition law, complainant alleged that printer suppliers, holding market power in warranty services, tied it to consumables. It also asserted that suppliers applied parallel practice, whereby anti-competitive agreement or concerted practice came to question. However, Competition Board's decision, in nowhere, mentioned the article, according to which it handled the allegation. Based on wording of the Decision, it is assumed that the case was handled according to article 6 of The Competition Act. Even though, abusing behaviors were taken focus point directly, instead of following systematical steps. For instance warranty services market was not defined, but the market was defined, only for consumables, which can be qualified as tying product, as "printer toner, cartridge and ribbon market"[102].

Decision, either, does not include dominant position analysis, which was made in both Kodak and Hugin cases. Instead, it was directly examined whether such a tying-in exists in the case, and in contrary to the allegations, it was found, after review of Warranty Booklets, that there is no infringement[103]:

"…In respect of HP printer products, warranty given to customer and HP Support Agreement, which may be entered into with customer, shall not be affected by use of a non-HP or re-filled cartridge…"

Therefore, both HP and the Computer Printers Decisions relate to after market, where theories, being subject of this study, are not expressly mentioned. HP Decision includes provisions in parallel with Kodak decision, whereas it reminds of Hugin decision with regard to its dominant position analysis. The

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[101] Competition Board Decision 04-42/490-118 of June 17, 2004 on Computer Printers.

[102] Competition Board Decision 04-42/490-118 of June 17, 2004 on Computer Printers, p. 6.

[103] Competition Board Decision No. 04-42/490-118 of June 17, 2004 on Computer Printers, p. 7.

Computer Printers Decision does not allow an analysis with regard to after market theories, due to its systematic[104].

As one would infer from the explanations above, after market theories represent quite new an area in competition practice. Kodak Decision led to a significant accumulation regarding that area in USA. Nevertheless, there are many steps to be made by EU and Turkey in parallel with the role of economic in practice of competition law. Next chapter in our study shall set out a methodology that can be used in any competition law problem where after markets are handled, in order to allow such steps to be made faster.

3. AFTER SALE MARKET THEORIES

In this section of our study, a methodology which is to cover the decisions of competition authorities and mostly the assessment made thereon in light of the academic studies will be developed. The distinctive point of the aftermarket theories is the market power or, dominant position analysis, in its legal term. Even though the sales market is competitive, it is generally accepted that the individual definitions can be made according to which after sale goods and services may be purchased or sold. Also, as far as the matter of abusing is concerned, there is no problem after the dominant position is verified. As a result, our study claiming to develop methodologies for after sale markets will focus on how to analyze the market power in the relevant market. That is why the market power is the key concept not only in after sale but also in all competition reviews[105].

The economics after markets will be first given below, which serves a basis for the theories. Then, which theory would be valid is to be discussed according to the factor affecting the linkage between the after sale markets and sale market. In other words, whether a market power emerges or not will be emphasized. Finally, those situations which even though a firm with the power of market present such attitudes that may be considered abusing, the possibility of it competing may however be hitched. These situations are the existence of intellectual property and efficiency defense.

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[104] This decision would be more enlightening if it dealt with whether warranty services can be defined as a separate market, and if it can be defined as a separate market, whether printer suppliers would have market power in such market.

[105] Salop, p. C., "The First Principles Approach to Antitrust, *Kodak* and Antitrust at the Millennium", Antitrust Law Journal, Vol. 68, 2000-2001, p. 187.

3.1. Economics of After Market Theories

Before skipping any sub-sections, it might be useful making some economic remarks[106]. While a firm operating only in aftermarket decides on one single price (p^f), a company which operates in both primary market and aftermarket, on the other hand, has to decide on two prices namely (p^f, p^a). Thus, the company seeks to find such a composition which will yield the highest profit (**π**) for itself where the costs (c^f, c^a) are considered to be constant:

$$\pi = \pi^f + \pi^a$$

$$= (p^f - c^f)q^f(p^f, p^a) + (p^a - c^a)q^a(p^f, p^a)$$

We take it granted that the quantity demanded for each product depends on both the prices, namely $q^f = q^f(p^f, p^a)$. In other words, we expect, for instance, that the quantity of the products which are sold in the sale market falls when the spare parts' prices rise. This relationship is the most important economic feature of the after markets for all the durable consumer goods. The relationship is strong according to the system theory as we describe below, while it is weak to the power in the aftermarket theory.

Now, let us assume that both the primary market and after-markets are competitive.

Let $p^f = c^f$ and $p^a = c^a$. The question we seek to answer here is whether a company possessing market power after sale can increase its total profit up as long as the primary market remains competitive. In other words, the question is whether $\partial\pi^f/\partial p^a + \partial\pi^a/\partial p^a$ will be negative or positive if we start from competitive price.

There is consensus such that $\partial\pi^a/\partial p^a$ will be greater than zero, i.e. $\partial\pi^a/\partial p^a > 0$. However, with the rise of p^a, the total cost of having the durable consumer goods will also rise up, and some of the potential costumers may even give up buying such goods from the primary market, and then $\partial\pi^f/\partial p^a$ becomes smaller than zero, i.e. $\partial\pi^f/\partial p^a < 0$. What is to be determined here is whether $\partial\pi^f/\partial p^a$ is sufficiently negative to eliminate the extra profit obtained after sale. The Supreme Court notes in Kodak Decision that the extra profit may not be eliminated under some circumstances. Such circumstances as may be described below cause the relevant firm to possess market power.

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[106] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 392.

In case[107] the expression $\partial \boldsymbol{\pi}^{\mathbf{f}}/\partial \mathbf{p}^{\mathbf{a}}+\partial \boldsymbol{\pi}^{\mathbf{a}}/\partial \mathbf{p}^{\mathbf{a}}$ is negative with regard to the market under examination, the system theory becomes applicable, and it comes out evident that the firm does not possess market power. However, if this expression is positive, then it will bring into play the power in the after market theory.

It is almost impossible to calculate $\partial \boldsymbol{\pi}^{\mathbf{f}}/\partial \mathbf{p}^{\mathbf{a}}+\partial \boldsymbol{\pi}^{\mathbf{a}}/\partial \mathbf{p}^{\mathbf{a}}$ in real life. What comes to the mind first as an alternative to it may be the benchmarking methods.EU Commission says that such a benchmarking can be made in three ways[108]. But, there are essential problems such setting the proper example and accessing all information relating to that example, which preclude such benchmarking from being made. For this reason, the best solution for resolving the problem is the assessment of the market conditions which account for the sign of the said expression, i.e. negative or positive. When the findings of the system theory are dominant during the process of such assessment, then it demonstrates the lack of market power, whereas if the findings of the power in the aftermarket theory are prevalent, then it indicates the existence of a market power. Now, let us make our explanations regarding which theory surpasses under different circumstances.

3.2. The Factors Determining The Dominant Theory

According to the arguments made by the Claimants, Kodak surprisingly shifted its business policy after serving as a spare part supplier to ISOs for long time. Upon this, the services provided by the ISOs became unprocurable by the current customers that were not capable of purchasing another machine from the primary market due to the switching costs. Kodak did not consider the possibility of reputation loss in after-sale services, having been under the illusion that the demand from the potential customers in the primary market would not fall down. This assumption was influenced by information asymmetry, i.e. the inability of the customers to take into account the cost that may arise during the life time[109]. It is undetermined whether the competitors of Kodak have ever used the same method in the primary market.

Now let us see under which circumstances different results may come out, by going step by step through what we have mentioned in the preceding paragraphs.

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[107] If this figure is equal to zero, that means there is no market power.

[108] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 71, para. 259.

[109] Salop, p. C., "The First Principles Approach to Antitrust, *Kodak* and Antitrust at the Millennium", Antitrust Law Journal, Vol. 68, 2000-2001, p. 191.

1. Surprises to Installed-base Customers

All arguments alleging that a firm abuses its dominant position in the aftermarket start with a surprise facing the users. Such surprise may be in two forms. First one occurs at the first instant when the customers, having purchased an item on the primary market, realizes, while it needs after sale services, that there is no alternative to such service. Anyway, if it is possible for the customers to go to another firm that competes with that firm; that is, the said firm is not capable of increasing up p^a, then there will be no need making any analyze as the aftermarket may be deemed competitive[110]. For example, in case the spare part is got manufactured by OEM and such manufacturer is also allowed to supply the market with the same, and then no violation against competition will come into question.

The second way of occurrence of a surprise is that a client who has previously purchased in the after sale services and goods rendered by the alternative competitive resources, becoming devoid of the such opportunity any more because of the shift in the policy of such aftermarket supplier.

In both of the mentioned surprises, the client has now become a part of the clientele base of the corresponding firm having purchased one of the durable consumer goods. In such a case, it is evident that the said market is only composed of the products of that particular firm. However, even though the firm has possessed a high market share[111]in this way, whether it has a market power can not be ascertained by referring to such data[112]. Perhaps, it may be alleged that said firm is one of those ones which is able to control the after sale services to the extent such services relate to its own production line, as in the way the most producers of the consumer durables that operate as exclusively manufactures of the spare parts which are only used in their goods, or have such spare parts manufactured by others. But, the term "control" referred herein should not be perceived as to mean "*the capability of determining prices over the competitive level, independent from its costumers, suppliers and*

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[110] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 69.

[111] In some markets like electricity generation, even a very low market share can bring along the market power under certain circumstances. For further information see Ardıyok, Ş. "California Energy Crisis and Critics of Turkish Electricity Deregulation Process", International Conference on Business, Economics and Management, International Journal of Business, Management and Economics, Vol. 1, No. 2, June 2005.

[112] Hovenkamp, H., "Market Power in Aftermarkets: Antitrust Policy and the *Kodak* Case", UCLA Law Review, Vol. 40, 1992-1993, p. 1454.

competitors", i.e. the market power. This applies to the most of the durable consumer goods where a product differentiation[113] is involved[114].

Whether the rise in the existing after sale prices intended for the costumer base is an indicator of the market power can be tested by the statistical data; that is, an examination of the rises in prices at the aftermarket and variations in the sale prices may verify if the producer created a system pricing. In case of Kodak, it has been verified that no such relationship existed and the clients paid for very different system prices[115].

Even, under some market conditions, the customers take the system price into account, the producers may, however, use the market power. Shapiro and Teece list such market conditions as follows:

- For the industries on decline, the sales addressed to the costumers' base are deemed more important than those to be made in future.
- The customers experiencing difficulties in the aftermarket considers their aftermarket income more important.
- The performance in case of unbeneficial products, for any reasons, in the primary markets may not be so meaningful to the manufacturers.
- The after markets that are available as the most recent resources of income become more important to those particular manufacturers which experience financial difficulties and in urgent need for resources.

When it is the price theory is taken into view, it may be suggested that the surprises faced by the installed base customers give rise a deadweight loss in a traditional way to the effect that a surplus is transferred from the consumer to the manufacturer due to the spare part, maintenance and repair services priced in a monopolistic level. Besides, the monopolistic inactivity i.e. triangular deadweight loss also comes into question. Here, the deadweight loss has two components. The customers make use of less spare part, maintenance and repair services than the required, and they are motivated to change used goods earlier

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[113] This is a reason for mismatch-in other words unusability of spare parts with other goods.

[114] Hovenkamp, H., "Market Power in Aftermarkets: Antitrust Policy and the *Kodak* Case", UCLA Law Review, Vol. 40, 1992-1993, p. 1455.

[115] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 401.

than normally required due to the higher after sale prices[116]. When we take on this view in terms of market power, and see that the potential revenue transferred to the manufacturer turns back by the discounts made in the primary market, then, here the system theory applies, no market power comes into question. The early replacement of goods, on the other hand, does not apply to all consumer durable goods as it is based on the assumption that no supplementary procurement exists between the spare part, maintenance and repair services. Of course, when it does apply to the above, an unfavorable situation emerges as regards the public welfare, and undue waste of resources is present[117]. Shapiro has conducted an empirical study on the said loss of welfare[118]. This study assumes that the consumers change their consumer durable goods by the fluctuations in the after sale prices, and that the manufacturers call discounts in the sale prices in order to obtain over competitive profits after sale. When, according to the results of this study, the after market prices are developed 5% higher the competitive level, the resultant loss is calculated to be as much as 7,5%.

2. Switching Costs

In most of the markets, the consumers may easily pass from one supplier to the other. For instance, any one consumer may go to A and B dried fruit shops respectively and compare the price of pumpkin seeds from each of those shops, and buy the one he or she wishes to. The same client, if not liked the pumpkin seeds he or she bought in that day, may thereafter buy it from the other shop without incurring[119] any other costs. But, in case of consumer durable goods, it is not possible to say that the same easiness is available.

In case a surprise is addressed to the existing clientele base of the consumer durable goods, then the switching to the competitor's goods by the clientele in sales market should "require a cost" in order to ensure that it can provide the manufacturer which does not use system pricing with anti-competitive benefits. The switching costs are the additional costs necessarily

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116 Carlton, D. W. & M. Waldman, "Competition, Monopoly and Aftermarkets", NBER Working Paper: 8086, 2001, p. 31.

117 MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 455.

118 Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 505- 511.

119 Hofer, P. at al., "Competition Policy Analysis in Dynamic and Complex Markets: Switching Costs, Aftermarkets, and Network Effects", Nera Antitrust Insight, May-June 2006, p. 2.

born by a consumer wishing to use a product that is manufactured by another manufacturer than that of the one he or she has already used.

It has for long ago been understood by the economist[120]that the switching costs create an indirect market power[121]. It is also noted on the Kodak Decision that the switching costs for the existing customer base has provided Kodak with market power.

According to Klemperer, there are three main types of switching costs[122]: (i) Transaction costs, (ii) learning costs, (iii) artificial costs or contractual costs.

The transaction costs mean the costs from legal and administrative procedures such as the sales and re-purchasing which are essentially incurred in order to switch from one product to the other.

And, the learning costs are due to the impossibility of the transfer of the knowledge and experience attained during the use of a product, to the case of the switched product. In fact, it would be more meaningful to use the term "complementary cost" to also cover the learning costs. These costs are actually the sunk costs which are need for obtaining the maximum possible output from the goods that have been previously purchased from the primary market, and not used[123] in any other goods[124]. The complementary costs are higher for the consumer goods where there exists a product differentiation (i.e. technology, specific areas of usage, outer appearance etc.)

The artificial costs are caused by those practices which are developed on the manufacturers' own initiatives, and which provide additional benefits when a certain level of consumption is present as in the "frequent –flyer programs" in

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[120] Klein, B. et al., "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process", 21 Journal of Law and Economics 297, 299 (1978). Also: Klein, B., "Vertical Integration as Organizational Ownership: Fisher Body-General Motors Relationship Revisited", 4 Journal of Law & Organization 199 (1988).

[121] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 10.

[122] Klemperer, P., "Markets with Consumer Switching Costs", Quarterly Journal of Economics, Vol. 102, No. 2, (May, 1987), p. 375.

[123] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 393.

[124] Developing a special software that runs on a only one operating system, trainings, altering the format of the data and archives, custom configurations, contacting experts, repair and maintenance providers, etc.

airways and the subscriptions vouchers issued to the customers in the large grocery stores. Such costs may also be assured by means of contracts, i.e. the procedures which are to provide for penalties for those leaving off before the expiration, whereas, on the other hand to provide for awarding the loyal customers[125]. It is intended to make the rational consumers dependant on a certain brand despite the availability of other products which are functionally identical with that of the said brand, by creating such costs. In this way, the products in the sales market, which are functionally *ex-ante* identical with each other or even homogeneous, become *ex-port* heterogeneous products in the aftermarket[126].

Several conditions should be present in order the switching costs to enable the anti-competitive actions in the after sale markets without losing any potential revenue in the primary markets. Firstly, the absolute magnitudes of the price increases in the switching costs and after sale are significant. Also, the switching costs' effect on the prospective purchases to be made in the primary market by the installed base customers, the relative sizes of the primary and secondary markets, ratio of the existing customer base, that is the customer lock in, to the new customers are also important to verify whether the switching costs of any magnitude create a market power or not.

The switching costs determine the upper limit of aftermarket power of the manufacturer. If the customers lock-in, are exploited with this limit being exceeded, then the costumers' switch to another brand becomes unavoidable[127]. Hence, the criteria that should be observed in considering the switching costs is the ratio of the switching costs to the difference between the price demanded for the after sale goods and services and the competitive price. The higher switching cost as compared to this margin, i.e. the greater rate is indicative for the existence of an inelastic demand all other conditions are considered to be constant. Such an inelastic demand curve will enable the manufacturer to set higher prices for the after sale period.[128] In a market where product

[125] In GSM services market, consumer may be engaged to use that operator's service for a certain period, in consideration of a telephone granted free of charge or with subvention. Probably consumer will be claimed an amount more than the advantage he is granted if he fails to fulfill his commitment.

[126] Klemperer, P., "Markets with Consumer Switching Costs", Quarterly Journal of Economics, Vol. 102, No. 2, (May, 1987), p. 376.

[127] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 394.

[128] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 11.

differentiation is present, the increased market power of the manufacturers owing to inelastic demand relieves by the increased preferences for the consumers as a result of the product variety. However, if there are switching costs between those products which are appropriable for each other, or such costs are created, then the preferences of the costumers become limited, and therefore it is undesirable for the public welfare[129].

However, the magnitude of the switching costs depends on the sunk costs (learningcosts plus artificial costs) incurred in connection with the relevant consumer durable, and on the switching costs required to switch to the goods of another manufacturer. For instance, the declined second hand price of the first item is the leading switching cost item. In addition, the used products market has, in general, relatively less efficient in comparison to the primary markets[130]. Inactivity is the underestimation by the market of a product which is sold by its original user[131]. It should also be noted that the underlying factors effective on the price of the used goods and such ones which motivate the same user to switch to another product by selling his or hers are similar to each other[132]. For instance, the resale value of an automobile with higher costs of spare parts is realized less than that of another with an identical quality.

Sometimes, the switching costs may be effective over more than one period. A consumer who has a collection of CDs that can only be functional when used with a distinguished CD player even though with which he or she is not pleased may set an example for this situation. Such a consumer would have to buy again the same brand several times as his or her CD collection represents an economic value, though he or she wishes to change his or her CD player, or even in case the life time of such CD player expires[133].

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[129] Klemperer, P., "Markets with Consumer Switching Costs", Quarterly Journal of Economics, Vol. 102, No. 2, (May, 1987), p. 377.

[130] For a study that handles inefficiency of second hand markets with example of automobiles, see Akerlof, G. A., "The Market for Lemons: Quality Uncertainty and the Market Mechanism", The Quarterly Journal of Economics, Vol. 84, No.3, August 1970, p. 488-500.

[131] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 393.

[132] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 69.

[133] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 12.

In conclusion, if the switching costs are low in the aftermarket, no market power may come into being where $\partial \pi a / \partial pa < 0$, and the system theory is applied. In all other cases, the power in the aftermarket theory surpasses.

3. Reputation On The Eye of the Potential Purchaser in Sales Market

In the two headings above, we have focused on the existing customers base. However, what comes under this heading is that under which circumstances an firm is discouraged for the reputation reasons as regards to the potential customers in the aftermarket, to exploit the existing customer base by using the switching costs although it has sufficient means to do so. In other words, the effect of the reputation on the market power after sale is explained.

In *Parts and Electric Motors* Decision, the counter voter Posner highlights the importance of reputation for the aftermarket as follows[134]:

> "Sterling; in principle, the users may, instead of keeping on their engines by using spare parts, increase the price of the spare parts up to such levels that may turn such goods into scrap items. However, this practice is a short term game as nobody will buy Sterling engines any more once it is diffused among public over time".

From which instant forward the after sale services are needed is important for the effect of the reputation on the power in the aftermarket. The after sale products, spare parts, maintenance and repair services are demanded when a certain period of time elapses after the sale. If this period is rather short, the exploitative and excluding after sale actions may immediately affect the reputation of this brand in primary market. This situation is referred to as "effective simultaneity" by MacKie-Mason and Metzler[135]. In case it is materialized, the relevant manufacturer is required to return its additional income above competition level in the aftermarket, or to give up its behaviors after sale.

Another possibility for the corrective effect of the reputation is the ratio of the existing costumers to the potential customers. For instance, it has been seen, in a review carried out by FTC that the consumer durables supplier under survey made only a 5% aftermarket profit. However, the income potential of the above aftermarket has been found to be 75%. Despite this fact, the spare parts, maintenance and repair services are seldom needed for the equipments in the aftermarket, take TVs as an example[136].

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[134] Parts and Electronic Motors Inc v. Sterling Electric Inc., 866 F.2d 236, 7th Cir. (1988).

[135] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 395.

[136] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 13.

The higher ratios of the locked-in costumers to the new customers indicate that the manufacturer may obtain additional profits above competition level without incurring so many losses in sales market due to reputation. Two factors are operational in the magnitude of this ratio. The first is how long durable the consumer durable concerned, or its economic life time. And the second is whether the used technology is matured or not. If such durable has a long life time, then, there will be relative low number of the potential customers who are to buy it from the primary market. On the other hand, with the emergence of innovative technologies, there will be a number of customers who will change the said durable before its life time is expired[137].

Another case where the reputation causes that the system theory to be active is that the relevant manufacturer operates with the same brand in multiple primary markets and after-markets other than the above mentioned[138]. Such a manufacturer is expected to be more careful about the opportunism after sale. Because, any reputation that may arise will not only affect the sale market of the relevant product, but also affect all of the markets in which the corresponding brand is offered for sale (these may also include the other markets than the consumer durables). The effect of reputation may become weakened when, even in case of one single manufacturer, different brands are used in the markets in which it operates, or if these markets have different type of client base. For instance, there would be a relatively lower effect of reputation on the shavers market serving for male consumers and the depilation equipments markets serving for the female consumers even the same brands are used, and a market power may develop if all of the other conditions are met.

4. Information Asymmetry Problem

Even if the market power is not affected by reputation after sale, in case the users fail to have perfect information (i.e. the prices charged by the other manufacturers, or when it is too costly to obtain such information) the market power theory holds in the after sale market.[139]

The only factor impeding the manufacturers' ability to have market power in a context where the switching costs are higher is that the exploitative practices in the after sale market decrease the performance of the sale market at

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[137] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 14.
[138] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 15.
[139] Borenstein, p. At al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 458.

least as much as in the lack of market power. For this reason, the customers of sale markets should not only consider the sale prices but also the context after sale when they make their decisions. In other words, in calculating the system prices, they should take into view such costs that they are to bear during all of their life cycles. It is only the ordinary customers who need considerably extensive information to assess the costs (spare parts, maintenance, repair etc.) they are to incur after sale., except for the sale prices of many brands which compete with each other[140].

Since information asymmetry generally influences the level of the prices, such situation has a direct effect on the consumer wellfare and therefore related to competition law. Information asymmetry is defined as the difference of level of information between two groups regarding a certain subject.Information asymmetry within the meaning of competition law, can be classified according to the different market actors, as follow: (i) Information asymmetry between competitors (ii) Information asymmetry between the buyer and the seller (iii) Information asymmetry between the competition or regulatory authority and market actors. Information asymmetry which will be handled in the present study, is the information asymmetry between the buyer and the seller.

Therefore, lack of perfect information or information asymmetry problem may come into question both for the existing client base and the potential customers in the sale market. As also noted in Kodak Decision, information asymmetry as well as switching costs constitutes the most important criteria for the power in the aftermarket theory.

But, what are the components of the information to be taken into account by the consumer? The costs to be maintained for the life-cycle of the durable equipment can be expressed as follows[141]:

$$R = P + \sum_{t=1}^{T} \frac{M_t}{(1+i)^t}$$

In the above formula, **R** denotes the life time cost, **P,** the sale market price, $\mathbf{M_t}$, the spare parts, maintenance and repair costs to be born in ***t*** period, ***i*** the interest rate and finally **T** the economic life time of the consumer durable.

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[140] Shapiro, C. & D. J. Teece, “System Competition and Aftermarkets: An Economic Analysis of Kodak”, Antitrust Bulletin, Spring 1994, p. 4.

[141] Herndon, J. B., “Intellectual Property, Antitrust, and the Economics of Aftermarkets”, The Antitrust Bulletin/Summer-Fall 2002, p. 327.

As the life time cost (R) is important to the rational consumer, variation of each components of the formula means nothing unless such cost is changed. Competition will be present in the sale market from over the total cost (R).The increased after sale market prices will not produce any utility based on the system pricing for the manufacturer. It is because that the consumers have already made their decisions as regards the sales markets, by referring to their information of the after sale prices. If the consumer remains as captured to one specific product due to the switching costs, the manufacturer may use spare part, maintenance and repair services above the competition level. However, in order to be able to use the above, it should have previously sold the product to the relevant consumer in the sale market[142]. Whereas, the consumer, on the other hand, takes his or her decision on the basis of system price in a medium without information asymmetry, the market acts as an auction place. The manufacturers compete to make sure that the clientele keep on working with them also after sale, by submitting the lowest system price. The sale market is, in a sense, a place on which the winner takes it all[143]. The system theory normally applies to such market. But, as can be seen in the above formula, the extent and processing costs of the information to be made available may be so high that it becomes difficult for the consumers to compare the system prices.

Here, the information economy led by Stigler helps us. If one of the full competition market presumptions is aborted it will give rise failures in the market. One of these presumptions is that "*the purchasers and sellers should have full information*". In order to realize an economically effective sale, the purchasers and sellers should have the required information on the proposed transaction. Information is merchandise than can be purchased and sold like all other goods and services. For this reason, in obtaining information, which is a costly process, the free-riding problem becomes important. The consumers often realize the transaction in the market with imperfect information (by experiencing information asymmetry on behalf of the seller)[144]. Grimes calls this situation as "low consumer demand quality"[145]. The extent of the failures that may be

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[142] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 329.

[143] Hofer, P. at al., "Competition Policy Analysis in Dynamic and Complex Markets: Switching Costs, Aftermarkets, and Network Effects", Nera Antitrust Insight, May-June 2006, p. 3.

[144] For information on a simple model of markets with consumers provided with imperfect information, see Salop, p. C. & J. Stiglitz, "Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion", 44 Rev. Econ. Stud. 493 (1977).

[145] Grimes, W. p., "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 266.

resulted by the demands made by the law quality, insufficient information depends on the nature of the corresponding item in terms of information. The goods and services are classified as follows in for informational purposes[146]:

1. Search good: As goods which quality can be assessed by the buyers as to the easily measurable criteria by observing its outer appearance. For example: postcards.
2. Experience good: Are such goods that can be assessed by its user only after he or she purchases and uses them. For example foods, beverages.
3. Credence good: Are those goods that the customer is not able to rate without any recommendation or observation from another buyer. For example medical inspection service.

When this classification is taken into view, the low quality demand will not create so many problems for the search goods and experience goods that are purchased used very often with low prices. The buyer would have made a small investment only in case he or she faces with problems with the item he or she buys. In this regard, the mistake to be made may be corrected with the future purchase decisions. The information is most problematic where the more complicate, expensive and credence goods such as automobiles, computers are concerned. The expected performance of an automobile or computer can not be ascertained by only their outer appearance or by testing them before buying. And, any mistakes that may be fallen due to the above mentioned switching costs would give rise considerably devastating tolls.

In fact, there are a large number of consumers who act through myopic or imperfect information particularly in the durable goods, and who are not able to take into view the after sale costs while doing shopping in the sale market. The competition in the sales market can not create a competitive motivation for manufacturers in spare parts, maintenance and repair practices after sale as such consumers are not able to ascertain what the prices would be. On the contrary, the manufacturers try to make as much profit as possible after sale in a context where the switching costs are high. In other words, the information asymmetry on the system price of a particular product slackens the tie between the sales and after sale market, and helps the formation of a market power after sale[147].

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[146] Grimes, W. p., “Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections”, Antitrust Law Journal, Vol. 62, 1993-1994, p. 273.

[147] Shapiro, C., “Aftermarkets and Consumer Welfare: Making Sense of Kodak”, Antitrust Law Journal, Vol. 63, 1994-1995, p. 487.

On the other hand, although the consumers are aspired after obtaining information, they would have to take into view not the system price but the sales price if there is imperfect information regarding the after sale market. The after sale service package for each product newly promoted in the markets in which the technological improvements have a particular prevalence, is a murky boxwhose content is unknown for the customer[148]. In this case, the customers may be required to view the after sale market reputation of the other products of the brand, if any.

Shapiro says that the information asymmetry does not take place in the markets so often. Consumers have significant cost advantages for themselves in getting information about the system costs of the consumer durable costs. Therefore, the rational purchasers continue to gather and process information until the costs to be incurred to eliminate the information asymmetry reaches up to a level benefit to be obtained by having information on the system price[149]. Also important are the following factors to decrease the system costs: (i) Consultants as a source of information, brokers, intermediate agents and existing publications[150], (ii) the purchaser's capability of allocatingthe information costs to each unit item it purchases, (iii) the number of the purchaser's repeated purchases, (iv) contributions or conditions of the organization funding the purchases[151].

However, as in the way the postulate assuming that there is no information asymmetry is not valid in real life, it may be found out that the purchasers are not moving on the way anticipated by Shapiro. Yet, the empirical section of this paper is intended to measure the said form of behavior. When we observe from the eyes of the consumer, it becomes evident that a lot of information should be gathered and analyzed properly in order to assess the system price of even the simplest consumer durable[152]. Such difficulties are reported in Kodak Decision as follows:[153]

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[148] Kattan, J., " Market Power in the Presence of an Installed Base", Antitrust Law Journal, Vol. 62, 1993-1994, p. 20.

[149] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 493.

[150] After interstate phone calls were opened to competition in USA, other companies along with AT&T started to provide this service with various packages. However, expertise consultants appeared in the market to assist the consumers as to which product package is the most suitable for which consumer.

[151] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 5.

[152] Lande, R. H., "Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World", 62 Antitrust L. J. 193, 1993-1994, p. 195.

[153] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2085 (1992).

"The question is the procurement by a consumer of a large number of raw details and the analysis of the same in an effective way. The required information are; the costs to be incurred tolearn the level of quality of the products and which products may be required to use, adapt and develop the price date, average life time, consumer durable goods, and the costs that may arise in connection with any additional spare part, maintenance and repair services including the workmanship fees, the spare parts' prices,periodical maintenance costs, the possibility of any need for repair, and the costs may proceed from the inability of using the products during repairs."

Here, it is necessary to make distinction as to the nature of the users. A distinction between the corporate users and personal users is suitable for the motivation of getting information. It is much more probable that the corporate user act in consistent way with the definition of "prudent businessman" in our trade law, and adopt a rational stand. The personal user, i.e. the corporate users who must decrease their costs in order to survive under the market conditions, apart from the consumers, would rather need the system prices of the consumer durable goods. They would assign rather specialized professional technical departments, instead of administrative support departments, and provide support from the outsourced experts. And, if the manufacturers selling the goods are also wishing to compete in the context of system prices, then they can appoint special sales representatives to contact the said departments[154]. On the other hand, another part of the manufacturers apply it as a marketing strategy putting on the foreground some of the after sale services which they are more advantageous as compared to their competitors, rather depending on the technology they use.[155]

However, what about the consumers other than the corporate customers? In such cases where a certain part of the clientele has no information problem and is able to assess the system prices, it is again possible for the manufacturer to have a market power against that part of clientele failed to do so. Therefore, (i) the restricted exchange of information between two users groups[156] and (ii) the manufacturer's capability to make price discrimination are important[157].

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[154] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 334.

[155] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 4.

[156] USA 3rd circuit Court of Appeals *Town Sounds and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir.) (en banc), cert. denied, 113 p.Ct. 196 (1992).*

[157] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", Aralık 2005, p. 71.

With regard to the exchange of information, in an US 3rd Federal Circuit of Court of Appeals Decision[158], it is stated that a buyer of motor oil can not be said to have to pay more than the amount to be paid by another buyer who have more information on the product or its price regardless of whether the former has any information about the product. The Court says that *"we all act as free rider over the knowledgeable buyers"*[159]. However, it is impossible to ascertain the level of free-riding. Even if the buyers having eliminated the information asymmetry has provided a positive externality in the eyes of the other buyers, it is yet possible that some part of buyers which lack to have perfect information may be exploited by the manufacturers[160].

As with the matter of price discrimination, it is necessary that the manufacturers are able to distinguish between the knowledgeable and the other buyers lacking sufficient information, and to prevent arbitration. The simplest discrimination that can be done here is differentiation between the corporate users and the personal users. And, the arbitration may be prevented by means of several methods[161].

Moreover, USA Supreme Court noted that the information asymmetry may present problems even for a consumer durable which is almost solely addressing the needs of the corporate customers [162]such as quick photocopiers[163].

If the manufacturers are deemed to be well intentioned and aim only in increase their sales by producing quality items with lower prices, then there would be no need for Sherman Act, the competition rules of EU Convention and the Turkish Competition Law. But, it is unfortunate that a large number of instincts, in particular the instinct of making profit drives the manufacturers to

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[158] Town Sounds and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir.) (en banc), cert. denied, 113 p.Ct. 196 (1992).

[159] For another academic study sharing this opinion see: Beales, H. et al, "The Efficient Regulation of Consumer Information", 24 Journal of Law and Economics 491 (1981).

[160] Stiglitz, E. J., "Imperfect Information in the Product Market", in 1 *Handbook of Industrial Organization* 769, 779 (Schmalensee, R. & R. D. Willig eds., 1989).

[161] Prohibiting corporate users make sales to individual users, differentiation of the models, diverging distribution network into two, fixing a minimum purchase amount, etc.

[162] Many factors such as corporate client's volume, place in total costs of such durable good, its familiarity to such good affect information obtaining cost of corporate clientele. For instance, a law firm may be specialized in legal services or secretary job but would probably behave like individual consumers when buying a fast photocopy device.

[163] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2085 (1992).

violate the competition rules and, then, keep such breaches confidential. If the existence of information asymmetry is to the benefit of the manufacturers, then it should be expected, particularly in the below mentioned oligopolistic structures, that the manufacturers also to exhaust efforts to maintain the information asymmetry in the same way as the consumers do for getting information. For instance, the most important reference which is believed to be impartial by the consumers regarding the consumer durable goods is the monthly issued reviews dealing with the affairs of the relevant industry[164]. However, the most of such reviews receive the greater part of their revenues from the advertisements ordered by the manufacturers. Therefore, the reviews would not be so desirous of issuing those publications which may affect the market and sales interests of the major manufacturers or the overall manufacturers[165]. Establishment[166] of the resources that are to remove any information asymmetry by acting independent from the manufacturers, or state's involvement in undertaking this duty as it is in the consumer law may be suggested as resolution of this problem.

The Judge Scalia, a counter voter in Kodak Decision argued that State should not appeal to the competition law in the markets where there exists an information asymmetry. Scalia holds the opinion that the market dynamics may, sooner or later find a solution for this problem. According to his opinion, the ruling majority in the decision deviated from the reasoning of Chicago School and predicated on allocative inefficiency by means of information asymmetry. To Scalia, the small scale information asymmetry and the delayed provision of information is a part of the ordinary irregularity of the economic life. The consumers should take over the responsibility of getting information if they really deem it important[167].

Scalia has once again proved to be one of the most important supporters of the Chicago School by articulating his credence in the market mechanisms and mistrust for the governmental intervention. It should however be noted that the majority in Kodak Decision has an emphasis on the use of the economic

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[164] In the case, Kodak submitted as evidence, the magazines, providing information on calculating the lifetime costs of a good offered in the market, and applying this for some brands.

[165] For information on media's influence on operation of markets and on market hitched, see Ardıyok, Ş., "Regülasyon Teorisi Işığında Elektrik Endüstrisi İçin Model Önerisi", Aslan, Y. at al., in *Enerji Hukuk ve Politikası*.

[166] For instance, US consumer magazine name *Consumer Report* does not get any advertisement or other support from manufacturers and buys the goods, to be tested, acting as a consumer buying it in the market. For this reasons, information given in this magazine is generally considered reliable and independent.

[167] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2092 (1992).

findings in re-judging the market failures based on the information asymmetry. The Higher Court stated, acting with reference to the submitted findings, that the average level of the consumers in the said markets is not such that is capable of removing those market failures of the type that is mentioned by Scalia, by behaving in a rational way. In this sense, Differing assessments are present with respect to the corrective effect of the markets, which are made by both the subscribers and counter voters of the Decision. Therefore, though the majority view appears to be protective for the consumers and to have a social democrat line, as we have stated in the foregoing section of this paper, the information asymmetry is not far away from the economic facts as it is based on the economical concepts such as switching costs and reputation effect.

5.Agreements For After sale Markets

Having pointed out the importance of the information asymmetry in determining the market power in after sales, now let us mention about the protective agreements which include the basic principles to be applicable after sale. If it is possible to conclude an agreement to govern any potential transaction that may arise out between the manufacturers and consumers during the primary market transactions, then the system theory holds[168]. In other words, manufacturer's after sale market power may not come into question. Thus, existence of a power will be a breach to the contract.

Such contracts may be in such forms as extended warranty, long term maintenance and repair, price guarantee for spare parts and workmanship, the lowest price guarantee between competitors after sale[169]. Leasing the consumer durable, instead of purchasing, provided that it is provided as in an operating status will also serve the same purpose.[170].

If the contracts for after sale are used by the majority of the firms in the sales market, then the information asymmetry problem will be automatically removed. In this way, the consumers may assess the system prices by referring to the provisions of the contracts executed by each competitor manufacturer. The consumers are like a dealer who is granted a franchise. The conditions to be applicable for them during the term of Franchise are established, and both the

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[168] Klein, B., "Market Power in Antitrust: Economic Analysis After Kodak", 3 Sup.Ct. Econ. Rev. 43 (1993).

[169] Klein, B., "Market Power in Antitrust: Economic Analysis After Kodak", 3 Sup.Ct. Econ. Rev. 51 (1993).

[170] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 4.

franchisor and receiver should observe the same[171]. As long as the market in which such Franchise is granted, no market failure may arise. Besides, such contracts prevent the manufacturer from making any surprising changes in after sale policies.

However, as we have mentioned above it is most often that the manufacturers want the information asymmetry to survive, there by continued possibility of shifting to surprising changes on their own behalf. For this reason, there are conflicts of interests between the manufacturers and consumers with the regard to the accurateness of the scope of the contracts. In general, the resultant contract is such one that is lower than the required for the public welfare. The purchasing power of the consumers for an optimal contract gains impetus due to the bargaining power of the parties to the contract. In particular major corporate manufacturers may require, for example under the conditions of competitive contracts that may open for bids that offers should be supported by the completed after sale contracts. However, the consumer groups that are large in number but yet weak in organization have no such an opportunity for bargaining.

Although such a contract as to embody the above conditions is executed, there are however many other alternative methods[172]the manufacturers may use in order to make additional profits in after sale markets[173].

Under the assumption that there is not oligopolistic interdependence between the manufacturers, it may be argued that the manufacturers competing with each other would provide the consumers with the most optimal conditions[174]. But, concluding of extensive contracts for the after sale markets presents the need for coherent information regarding the future circumstances. As also stated in Kodak Decision, in the complicated cases where long life time, as for the consumer durable goods, and after sale market is present, such information is very costly to obtain, and without any guarantee of their

[171] Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), cert. denied, 118 p.Ct. 1385 (1998).

[172] For instance, manufacturer may lower quality and education level of the technicians for durable consumer goods subject to the contract, can increase prices and wages of parts and employees necessary for adaptation to an upper model, can use low quality spare parts, can lessen the number of periodical preventive maintenances and make other extra contractual attempts to accelerate expiration of good's usage life.

[173] Borenstein, p. at al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 473.

[174] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 496.

accuracy[175]. Therefore, even though it is assumed in theory that after market contracts would remove most market failures as desired the manufacturers as well as the customers, its practical implementation is not so possible.

Some of the economic studies have shown that those long terms after sale market contracts which do not govern the essential matters of the consumer even worsened the welfare of the consumers[176]. Additionally, whether a manufacturer's own future predictions about itself will come true or not depend on many factors. The state of the competitors, peculiar rules of industry and even the macroeconomic fluctuations may render such contracts unbearable for manufactures as well as consumers.

Yet, another dilemma of the long term contracts is related to uncertainty in the future. Earlier termination of most long term contracts is not preferable as the same may affect the long term plans of the manufacturer. For this reason, this condition is either limited or another punitive provision is stipulated. This situation artificially increases the switching costs in comparison to the after sale markets. Captivity of the user during the life time of the product (duration of the contract) based on the criteria being considered in making decision in sales market impedes the user to make use of the advantages that may come out later thereon. Such advantages would, for example, be the cheaper and more durable consumer goods, or more suitable after sale services.

To sum up, although the after sale long term contracts prevent the after sale market power; they have a very limited area of practice.

6. Oligopolistic Structure of Sales Market

Among the resources that may provide the consumer with the required information to assess the after sale market conditions are the competitors of that customer. This is because that the manufacturers closely monitor their competitor's after sale and sales market activities in order to know their position in it and thus develop the appropriate strategies thereto. However, it is a low possibility for them to share such information with their potential customers, under the premises of the oligopolistic mutual dependence in sales market. The Court stated, in Kodak Decision, that the said mass of information can not be

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[175] Borenstein, p. at al., "Antitrust Policy in Aftermarkets", Antitrust Law Journal, Vol. 63, 1994-1995, p. 457.

[176] Farrell, J. & C. Shapiro, "Optimal Contracts with Lock-in", 79 American Economic Review 51 (1989).

created by means of the own experiences of the consumer, and that "*the competitors of Kodak should not be trusted on this matter"*[177].

To Peritz, Kodak Decision has a limited effect since after sale market "parallel" behaviors of the manufacturers are not considered by the Courts at most of the judgments concluded thereafter[178]. In fact, the Higher Court has seen in Kodak Decision that the primary market presented an oligopolistic structure in which a limited number of actors were involved. The market actors, namely; Kodak, Xerox and IBM have almost a total of %100 market share. Even though the consumers are aware of the life time costs in such a market, they will be faced with the parallel behaviors in respect of the sales market. For instance, when a customer, having purchased a Kodak machine, purchases a Xerox as he or she is not contented with Kodak machine, he or she will be supplied with a service, quality of which is presumably to be in almost equal terms with that of Kodak[179]. The following quotation is particularly suggestive for the above:

"The competitor should be dispensed with the potential advantages from its future Kodak-like attitudes that it may consider to put into practice in order to raise awareness among the consumers of the behaviors of Kodak. … For this reason, in the sales market conditions where a few suppliers is present, it would be more advantageous, for it to adopt the policies of Kodak regarding the sale, spare parts, maintenance and repair instead of attempting to raise awareness among its competitors' clientele. … Even, in a market with lots of sellers, no sufficient motivation comes into question for informing the clientele by any competitor on the current policies in the after sale policies." [180]

The surprising shift in Kodak's policy for not to supply the independent repair shops with spare parts, which has been brought into legal action is, in fact, only an attempt, though delayed, to catch up with the process previously put intoaction by Xerox and IBM. Even if there is no after sale market power, a zero sum game which based on a few manufacturers may be constructed[181]. In this way, a low performance becomes apparent as it does when there exist a after sale market power.

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[177] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2086 (1992).
[178] Peritz, R. J.R., "Doctrinal Cross-dressing in Derivative Aftermarkets: Kodak, Xerox and Copycat Game", The Antitrust Bulletin, Vol. 51, No.1/Spring 2006, p. 219.
[179] Peritz, R. J.R., "Doctrinal Cross-dressing in Derivative Aftermarkets: Kodak, Xerox and Copycat Game", The Antitrust Bulletin, Vol. 51, No.1/Spring 2006, p. 220.
[180] Eastman Kodak Company v. Image Technical Services, Inc., et al, p. 112. Ct. 2086 (1992).
[181] Peritz, R. J.R., "Doctrinal Cross-dressing in Derivative Aftermarkets: Kodak, Xerox and Copycat Game", The Antitrust Bulletin, Vol. 51, No.1/Spring 2006, p. 223.

In the Computer Printers Decision of the Turkish Competition Board, as outlined above, the after sale marker behaviors of HP, Lexmark, Canon and Xerox have been reviewed. One of the allegations was as follows; *"…that they inhibited competition by tying two different products as such to cause the use of cartridges, toners or strips that are manufactured under the license they hold"*[182]. Since no concrete documentation or other evidences to support this allegation could be accessed, no evaluation would be possible in terms of the competition laws. It is however understood that if any evidence has been found in the wording of the decision[183], then this would have been a violation of competition. In this case, how the analysis of the market power could have been made would be note of interest.

The after sale parallel behaviors may also eliminate the reputation effect. In analyzing the market power, afterwards the negative reputation created by the manufacturer setting out surprising action in after sale, it should be examined to verify whether the after sale market competitors have more advantageous conditions of preference or not.If the competitors, too, stipulate the same conditions, then no reputation effect will be formed[184].

If there exist parallel behaviors in the sales and after sale markets and the independent maintenance and repair service providers are not able to operate in the after sale markets, then the dynamic efficiency will also be damaged. This happens in this way: A firm wishing to enter either on of the sales or after sale market will have to enter into both of them[185]. And, this, in turn, deters those financially weak companies wishing to enter, and/or capable of entering, into either one such markets.

EU Commission stresses that the competitive level in the sales market has an effect on the analysis of dominant position in after sale. For this reason, it is necessary to view the competition conditions both in the sales and after sale markets in order to evaluate the after sale market power[186].

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[182] Competition Board Decision 04-42/490-118 of June 17, 2004 on Computer Printers, p. 2.

[183] Stated evidence do not concern a tying agreement between the undertakings according to the article 4 of the Competition Act but it indicates a tying of spare parts and services for each.

[184] Borenstein, p. at al., "Exercising Market Power in Proprietary Aftermarkets", Journal of Economics & Management Strategy, Vol. 9, No. 2, Summer 2000, p. 163.

[185] Grimes, W. p., "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 300.

[186] EU Commission, "Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005, p. 70.

3.3. Intellectual Property Rights and the Efficiency Defenses

In the section above, the topics to be noted in analyzing the dominant position during a competition survey to be conducted after sale markets are explained under six headings. And, in this section, the factors are underlined, which factors eliminate the illegality of the abusive behaviors committed by the corresponding manufacturer to be found to have a dominant position as in the above way. Within this scope, it is firstly discussed how the intellectual property right of the manufacturer holding the market power comes into question for the spare parts it withholds to supply to the independent repair shops. Next, among the action defenses that may be put forward by the manufacturer; quality control, prevention of brand reputation and price discrimination are to be emphasized.

1. Intellectual Property Rights In After-Sales Market

A manufacturer of durable equipment may normally have patent rights over such durable commodity as well as the some parts and components of the said commodity. In addition to this, specific know-how may be used in the construction and design of the relevant parts. This know-how may also be kept confidential as industrial designs or commercially sensitive information. And, the manuals subject to copyrights are essential for maintenance and repair procedures. Moreover, most consumer durables include complex electronic circuits. In order to conduct repair procedures for such equipments, the diagnostic software is required, which are embedded in the said equipments, and which are probably subject to copyrights. Hence, it is unavoidable to face with the products are subject to intellectual property rights in the after sale markets of consumer durables[187]. If such rights are absolutely protected, then the above mentioned inefficiencies will occur in terms of competition law. But, if such rights are entirely omitted, this time, the dynamic efficiency becomes weakened, and no innovative invention takes place. Therefore, the two should be conciliated in such a position that will maximize the welfare of the both consumer parties.

The question whether a consumer durable manufacturer's refusal to supply ISOs with the spare parts for which it has intellectual property rights constitutes a breach to the competition is responded by 9th Circuit Court Federal Court of Appeals, USA with approval, whereas the Federal Court of Appeals has responded the same with disapproval. Moreover, the latter has given its flat refusal to the decision of the former. The Supreme Court, inspecting such dispute, has refused to review the case by taking into view the observations

[187] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 7.

commented by Attorney General, and acting on the ground that said dispute might only be reviewed after it was scrutinized by the Court of Appeals in all its aspects.

9th Circuit Federal Court of Appeals conferred the final decision upon Kodak based on the following grounds[188]:

"if the power that is attained by means of some natural reasons, or a legal means such as a patent, copy right, or as a result of commercial achievements is used such a manner that the dominant position in the market turns to be establishing an empire over another market, then a breach to competition may occur."

The interpretation of this judgment constitutes the dispute between the two courts. The Federal Court of Appeals which conducts appellate reviews for the establishments of intellectual properties and regulatory affairs is not considered to hear the cases relating to competition breaches. This Court has interpreted the Kodak Decision as follows[189]:

"In principle, Kodak was a bonding case as it first stood trial before the Higher Court, and the patent rights had not yet been mentioned in the arguments made for the defense of Kodak. Despite this, in this case, there has been no allegation stating that Xerox bonded by illegal means, the parts for which it holds a patent to the parts which it holds no rights. …the patent owner may not refuse to sell those parts subject to the patent, in order to get a market power beyond the scope of such patent."

Although the allegations in Kodak are in terms of bonding as stated by this Court, and those in Xerox are in terms of creating monopoly by way of patent, this is only a formal distinction, and has no economic meaning. In both cases, it is alleged that the manufacturers have a market power over spare parts, and used this to obtain market power over the maintenance and repair services. Again, the control over the spare part for both is that the said parts can only be used in the said brand[190].

If we set aside the allegations of both the Courts, we see the most important point that is balancing the intellectual property rights and legal

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[188] Eastman Kodak Company v. Image Technical Services, Inc., et al, 112 p. Ct. 2089 (1992).
[189] CSU, L.L.C. v. Xerox Corp., 531 U.S. 1143 (2001), denying cert. to 203 F.3d 1327 (Fed. Cir. 2000).
[190] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 323.

competition rules in order to establish consumer welfare[191]. In fact, both of these are intended to increase up the consumer welfare. This is done by the intellectual property rights through dynamic activities which pave the way for innovative ideas and inventions, and by the competition law through acting to prevent inefficiencies (to ensure activity in production and distribution). But, sometimes they may oppose each other.

While Kodak Court has weighted upon the competition rules in the search for balance, Xerox Court did the exactly opposite. The patent right, in the view of Kodak, is a legal protection, that is, a pro-competitive business justification for refusing to sell or license. However, the court stated that this was a reversible presumption, and concluded that plaintiffs successfully rebutted the Kodak‘s patent defense by showing that only about 65 of 10,000 parts were covered by patents, and that the author of the Kodak parts policy testified that he didn‘t give any thought to protecting Kodak‘s intellectual property when crafting the policy[192].

We have stated above that in case of the increased spare parts' prices, substitution may be possible to a certain level by means of more periodical maintenance and repairs. In fact, Xerox Court mentions that the patent owner should control over the maintenance and repair services in order to be aware of the benefits provided to it by means of such right[193].

For this reason, the intellectual property rights, along with the freedom of contract should be deemed to be the foundation of the free market economy, in the same way as the property right is done, but its abusing should not be permitted. Again, the economical means are the most suitable guides to lead us on the same, and the specific conditions of each individual market will become significant.[194]

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[191] For further information on this matter, see Yüksel, K., *Hakim Durumun Kötüye Kullanılması ve Fikri Mülkiyet Hakları*, Rekabet Kurumu Uzmanlık Tezleri Serisi, Ankara.

[192] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 450.

[193] Herndon, J. B., "Intellectual Property, Antitrust, and the Economics of Aftermarkets", The Antitrust Bulletin/Summer-Fall 2002, p. 342.

[194] For further information about US competition authorities about Competition Law and Intellectual Property Rights *see*.: US Department of Justice & Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,* April 2007.

2. Quality Control and Protection of the Brand Reputation

The efficiency defences are such that can be argued by the parties when mergers or acquisitions create concentration in the competition law[195]. In this way, it is argued that such mergers would, however, produce certain benefits beyond the social welfare loss to be caused by the concentration of several efficiencies as a result of mergers. Similar defences and investigations are used in the cases in U.S. where the rule-of-reason is applied to. We believe that the defences of the manufacturer in connection with the efficiency should be taken into consideration at time of assessing the abusive actions in the examinations of after sale markets. Because, the restriction imposed by the manufacturer is sometimes not intended to obtain monopolistic profits by means of after sale market power, but, in particular, to announce the high quality of its goods (experience goods) where it is not possible for the consumer to realise without using it[196].

The first efficiency defence that may be brought forward by the firm found to have a dominant position and abuses it by refusing to supply spare parts is the brand's reputation in case the after sale services are performed under its own control, and protection of its quality.

In Mozart Case[197] pertaining to the period before the Kodak decision, where resellers were prevented to obtain spare parts from other sources, Mercedes-Benz of North America, which precluded the dealers from buying spare parts from other suppliers, put forward the same defence, which was successful. Mercedes stated that tying the spare parts, maintenance and repair services was of critical importance to establish quality control, and assure its goodwill. To the ruling Court, the problem that Mercedes is faced is the free-riding of the dealers. According to Mercedes, the standard products should be presented in a dealer's network which operates in a franchise structure.It is only in this way possible for the users to trust the Mercedes brand. But, the dealers are faced with a contradiction. Because, among them are some dealers that has benefited from reputation of Mercedes as well as the others by using worse quality spare parts, and so obtained unfair gain. Its long term effect is the reputation loss of Mercedes products, and a decrease in profits of both Mercedes and the said dealers. Although each dealer is liable for any defects that may arise

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[195] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, April 1992, p. 30.

[196] Schwartz, M. & G. J. Werden, "A Quality-Signalling Rationale for Aftermarket Tying", 64 Antitrust Law Journal 387 (1996).

[197] The Mozart Company v. Mercedes-Benz of North America, 833 F.2d 1342 (1987).

in connection with the spare part it installs, in most situations it is not possible for the customer to limit such liability to that particular dealer in his mind[198].

All efficiency defences refer to whether if there exists a procedure which limits the competition in the lower degree in order to achieve the same goal. The Mozart Court stressed that it would be rather difficult to control compliance of each spare part with Mercedes standards if these are provided from other suppliers[199]. 80% the spare parts of Mercedes-Benz of North America is supplied by Mercedes Germany. And, Mercedes Germany manufactures half the amount of such parts by itself, and purchases the remaining volume from OEMs. OEMs are required to manufacture these parts in accordance with Mercedes quality norms and standards. A group of parts selected from a delivery lot being undergone a first class control is once again checked by Mercedes. In case any defects are found out in any of these parts, then all delivery is returned. The remaining 20% spare part demand of Mercedes-Benz of North America is met by the OEMs in Germany. As can be seen, Mercedes spare parts are subject to a scrupulous quality control procedure[200]. The Court has accepted the efficiency defences of Mercedes by taking into view the extent of controls that may arise out in the event that all suppliers are permitted to sell their spare parts to the dealers.

Apart from the situation in Mozart Decision, the manufacturer may refuse to supply ISOs with its spare parts on the basis of quality and brand reputation aspects. In this way, it performs the quality control by keeping all maintenance and repair services under its own supervision. If the consumer durable presents any problems after being repaired or serviced by one of ISO's, this will also affect the manufacturer. The market conditions should be analysed in a similar manner with the above if such a procedure is to be accepted as an efficiency defence. The validity of such a defence will depend on whether the actual reason for the defect observed in the said consumer durable can be found out by either by the manufacturer itself, consumers or the competition authorities.[201].

It is stressed that such an efficiency defence may easily be abused in practice[202]. For instance Kodak argued that tying between the spare parts and

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198 The Mozart Company v. Mercedes-Benz of North America, 833 F.2d 1342, 1349 (1987).

199 The Mozart Company v. Mercedes-Benz of North America, 833 F.2d 1342, 1349 (1987).

200 The Mozart Company v. Mercedes-Benz of North America, 833 F.2d 1342, 1351 (1987).

201 Borenstein, p. et al., "Exercising Market Power in Proprietary Aftermarkets", Journal of Economics & Management Strategy, Vol. 9, No. 2, Summer 2000, p. 185.

202 Grimes, W. p. , "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 285.

maintenance-repair services is a prerequisite for maintaining the quality level[203]. However, the counter evidences have shown that ISOs' service quality was equal to or higher than that of Kodak. Besides, when the quality level is excluded, this allegation of Kodak is based on the assumption that the clientele fail to decide on which quality level they should demand for[204]. Therefore, limitation of competition is not allowed in such cases where the manufacturer is able to determine the maintenance and repair service standard, and control the same. But, in the events where the manufacturer stands as new firm in the market and thus required to gather information on the market conditions after sale, such company's full control over the after sale period may allow it to be more competitive[205].

3. Price Discrimination Through Tying After Sales

Another efficiency defence, rather being mentioned by the economists than the manufacturers subject to the prosecution, is that the price discrimination to be provided by means of tying in contracts will bring about an increase in public welfare. The price discrimination means charging the clientele with different price for identical goods or services, and does not proceed from any costs related to the said services. In order to be able to use price discrimination in a market, arbitration should be prevented[206]. For this reason, several methods, also including the tying contracts are used to perform price discrimination.

Consumer durable goods in the sales market is sold to each consumer (except for the corporate customers) based on a fixed average price. But, these consumers have, however, differing utilisation rate and benefits from this durable. In another word, the consumers who have a higher utilisation of the durable pays less than those with lower utilisation as the prices are fixed on an average base. The less used balances the more used, in a sense. The economists argue that this adverse situation may be eliminated for the consumer durable goods if the control of the after sale market is handed over the manufacturer. In this way, all consumers in sales market will make a little payment whereas, in after sale market, will relatively pay more than in the former case where the durable are more utilised and require additional costs to be incurred for the spare

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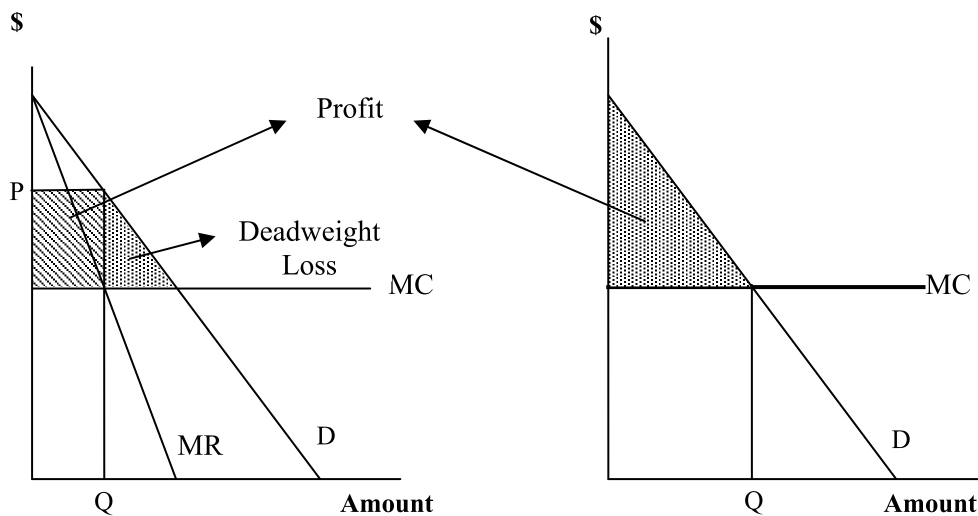
[203] Hugin had made a similar defence.

[204] Klein, B., "Market Power in Antitrust: Economic Analysis After Kodak", 3 Sup.Ct. Econ. Rev. 43, 63 (1993).

[205] This defence was accepted in US decision of United States v. Jerold Elecs. Corp., 187 F.Supp. 454 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

[206] Other two important conditions are firm's possession of market power, and awareness of user demands.

parts, maintenance and repairs. The value or benefit referred to by its user may be measured by the number of the after sale services rendered for it. If it is ensured that the consumers pay in proportion to the benefit they get from the goods, then, the consumers that can not normally afford to buy the said item based on the average prices (ones that are use it less) become able to buy the same. Hence, the quantity of market output (**Q**) may increase[207].



As can be seen in the above figure, the output level in a market in which the price discrimination can fully be implemented is equal to the quantity of competitive output. Besides, the deadweight that can also be defined as the loss of public welfare will be entirely eliminated. Despite all, the manufacturer's rate of profit will be higher than the monopolistic pricing. In other words, price pressure will no more leave out any surplus to the customers (the difference between the value in the eyes of customers and the price paid), and all such surplus is received by the manufacturer.

Price pressure has always been in dispute due to the social concerns caused by the latter feature. The price discrimination by way of tying[208], one of

[207] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and its Practice,* Second Edition, 1999, p. 298.
[208] For further information on this subject, see Ardıyok, Ş., "Tying as a Price Discrimination in Antitrust Law", Unpublished Paper for Advanced Antitrust Course in University of Chicago The Law School, 2004.

the several opinions of Chicago School that is not so much reflected to the application, also comes into question in the after sale markets. Because, the manufacturer is required to be able to perform pricing by utilisation in order to make this process practicable. In case the manufacturer may only control the spare parts' price, the users may be an impediment for the sound formation of pricing by the increased utilisation of after sale services. That is, the long life times of the consumer durable goods require extensive and constant maintenance and repairs to be performed on them. Spare part and service workmanship comes to the foreground at time of maintenance and repairs. Each maintenance call made by a user of the durable for the most part also requires utilisation of spare parts. However, maintenance and spare parts are not equally utilised. This ratio may decrease in case the worn parts are repaired instead of being replaced, or maintenance procedures are more frequently performed in order to ensure a longer life time[209]. Hence, it is not sufficient alone that the manufacturer controls only the spare parts. It should also exclude the ISOs which supplies maintenance and repair services[210]. Exclusion of ISOs may increase the consumer welfare by removing the price irregularities that cause ineffective use of the durable goods in the sales and after sale markets[211].

Another favourable result of the exclusion of ISOs is mentioned by Carlton. According to Carlton, the manufacturer would also have somewhat provided against the inactivity (delayed re-utilisation in the market) by preventing substitution of maintenance and repairs where the durable required replacement[212].

Despite all, the economic theory has not developed a general idea regarding whether the price discrimination increases the efficiency, consumer surplus and total output[213]. In general, the price discrimination may victimise some consumers while it pleases other part of the same. However, very complicated and realistic data oriented analyses are required to find out the winners and losers.

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[209] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), The Antitrust Revolution 4th Ed. including, 2002, Cambridge University Pres, p. 388.

[210] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 488.

[211] Elzinga, K. G. & D. E. Mills, "Independent Service Organisations and Economic Efficiency", 39 Econ. Inquiry 549 (2001).

[212] For further information on this theory, see Carlton, D. W. & M. Waldman, "Competition, Monopoly and Aftermarkets", NBER Working Paper: 8086, 2001.

[213] Shapiro, C., "Aftermarkets and Consumer Welfare: Making Sense of Kodak", Antitrust Law Journal, Vol. 63, 1994-1995, p. 499-500.

Because of these reasons, it is difficult to ascertain whether the performance presented by a manufacturer who had its market revenue increased after sale is either due to the increased efficiency as a result of the price discrimination or to exploitative behaviours. Even though this can be done, it will be evidenced by the aspects of the positive law that the competition rules are not merely intended to ensure economic efficiency. The practices of the competition authorities, especially in the EU, reveal that some social concerns, (e.g. income distribution) may also affect the intended function. Therefore, though the economic studies on the price discrimination verify that 1st and 2nd degree price discrimination provide increase in efficiency, these can hardly be accepted as efficiency defence.

4. AFTER-SALES MARKET POWER IN MOTOR VEHICLES

The conclusion from all of the above is: *"It does not always theoretically hold that the competitive sales markets prevent the manufacturer's abuse of market power they obtain from after sale. The proper practice from the point of the competitive policies view is to focus on the market conditions for each case under investigation, and to review to what extent the limitation of competition reaches to on the basis of each case."*[214]

Based on this reasoning, it can be said that analyse of each case should be done by taking into account the factors listed above, in particular to those ones related to the after sale market power. Demonstrating that such an analysis is done, though partly, on a sample case will increase the value of such study.

Sample selected is the motor vehicle industry, an outstandingly remarkable component of our life and budget. This selection is made under the impact of the fact that the Competition Board has very recently enacted a regulation relating to the aftermarket theories for this industry.

Communiqué No 2005/4 (New Communiqué) on the Motor Vehicles Vertical Agreements and Group Exemption Regarding Vertical Agreements and Concerted Practices has entered into force early 2006 following the 8 years long implementation of Communiqué No. 1998/3. This Communiqué is particularly important as it embodies the details of the provisions and opinions that may be articulated by the Competition Board in case of any investigation, though it is not a competition based preliminary enquiry or investigation. Another reason for setting this Communiqué as an example is to constitute an example based on the

[214] Borenstein, p. et al., "Exercising Market Power in Proprietary Aftermarkets", Journal of Economics & Management Strategy, Vol. 9, No. 2, Summer 2000, p. 159.

economic facts which is to verify what argument and counter arguments should be contained in issuing a regulation. We are sorry to say that no economic debate on the meat of the question i.e. on the after-markets has taken place neither upon issuance of the referenced Communiqué in EU nor of Communiqué No 2005/4 in our country[215]. We hope that the future regulations discuss the factual market conditions, and the regulations are directed by the empirical findings but not dogmas.

4.1. New Communiqué's Provisions Regarding After-Sales Market and Aftermarket Theories

Firstly, we address why Communiqué No. 1998/3 is substituted by a new Communiqué. It would be appropriate to make some clarifications regarding the EU Regulations as we have closely follow the same. EU has, as of early 2003 changed its Communiqué (No. 1475/95) on group exemption for motor vehicles industry which has been entered into force in 1985 and amended in 1995. The reasons for such change have been noted as non-achievement of the targets set thereon, and the fact that the established system failed to deliver to the consumers what they really deserved[216].

The referenced EU regulation is specifically intended to eliminate the after sale market inefficiency. Presently, there are a total of 178 millions automobiles and light commercial vehicles in circulation all over EU. To the survey conducted by Goldman Sachs and *autoPOLIS*, the suppliers' revenue share from the new motor vehicles is 60% of their total revenue; while the profit share is 20%. The after sale market services revenue share is 20%; and its profit share is 50%[217]. It is stated that the profitability ratios are changing from there to six times the sales ratios[218]. Whereas, OFT, United Kingdom Competition Authority says that the services purchased from the authorised representatives are in average 71% more

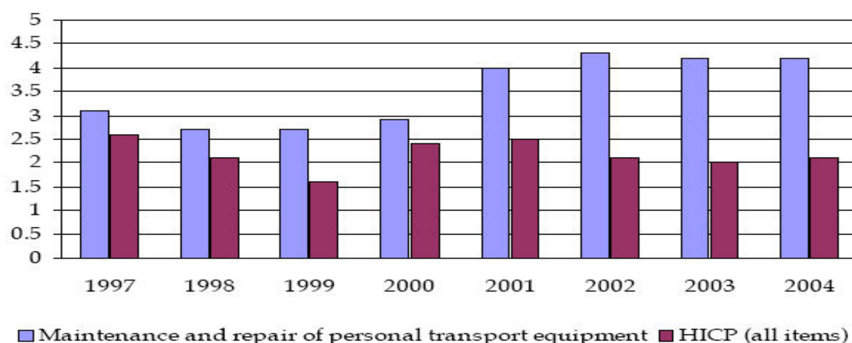
[215] Arguments asserted by manufacturers objecting the regulation do not contain the allegations that system theory, among after sale market theories, applies in the case. Consumer organisations do not only fail to contribute to this Communiqué but any to any part of competition law practice. Whereas, reasoning of Constitution 1982's provisions on consumer protection (articles 137 and 172) provide for that consumer can be protected best in a competitive market. Consumer organisations in our country still do not seek the solution of market hitches in efficient competition law practice, but in state-owned market structures.

[216] EU Commission Press Release, "Commission Adopts Comprehensive Reform of Competition Rules for Car Sales and Servicing", 17.7.2002, p.2.

[217] PricewaterhouseCoopers, *Block Exemption Regulation"*, January 2006, p. 35.

[218] Andersen, "Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned", 2001, p. 50.

expensive than those from the independent repair shops[219]. According to data of Eurostat, the aftermarket price increases in motor vehicles has continued to be above the inflation rate[220]:



Below are EC aftermarket sizes and shares in total[221]:

2000	Share in Total	Total Turnover (Billion €)
Accident parts and repair	%37,3	46,0
Spare parts and accessories	%35,7	44,4
Services	%21,7	27,1
Tire	%5,3	6,7
Total	**%100**	**124,2**

In the introduction of the New Communiqué it is said that the experiences obtained during the implementation of the Communiqué in Turkey in a period of more than 5 years has shown that some regulations in the Communiqué failed to achieve its goal of reaching to a competitive market,

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[219] PricewaterhouseCoopers, *Block Exemption Regulation"*, January 2006, p. 36.

[220] London Economics, *Developments in car retailing and after-sales markets under Regulation No 1400/2002*, Vol. I, June 2006, p. 177.

[221] Andersen, "Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned", 2001, p. 51.

while some others gave rise to disadvantageous for the implementation. A new Communiqué has been constituted, in light of these verifications, which

1. provides distributions to suppliers, and flexibility for creating a service network,
2. consolidates the power of authorised sellers and services against the suppliers,
3. ensures that the spare part manufacturers to be included in the competition,
4. takes initiative action by facilitating access by the independent repair shops to maintenance-repair services, equipment and diagnostic devices in order to enable them to set alternatives for the consumers.

Each of the targets set hereunder is intended for after sale market purposes. When we consider regulating the same competition rules as with EU, how important the motor vehicles are to ensure the economic activity after sale market will become evident. In case it is achieved to some extent, then tax load on the motor vehicles trade and on the gasoline may be weakened[222].

Now, in light of these important verifications, we look at which theory is accepted as valid by the Competition Board in the after sale markets in view of the regulatory framework of New Communiqué.

1. New Communiqué's Provisions Regarding After-Sales Market

When we look at the provisions, we can see that the Board views the after sale market same with those after sale markets as in Kodak, Hugin and HP Decisions. Subparagraphs (b) and (c), Article 8 "**Calculation of Market Share**" in New Communiqué are as follows:

> "The market share as mentioned in this Communiqué are calculates based on
>
> …
>
> b) the price of those goods which are deemed as substitutable as regards the product specifications, prices and intended uses in the distribution of spare parts, and other goods which are offered by the supplier, as well as the goods subject to the contract;
>
> c) the price of those services which are, in provision of the maintenance and repair services, offered, under contract, by the firms attached to the distribution network of the supplier; and which are deemed by the purchaser as substitutable as regards the product specifications, prices and intended uses, as well as other services that are offered by the other firms which are included within the network of the supplier."

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[222] Even this example set forth how important competition policies are with regard to macro economic policies such as lowering the inflation and providing the growth.

The Competition Board considers substitution of demand (by purchaser) in the both paragraphs. And, in the Guidelines[223] it issued to shed light upon the implementation, it makes the following expression with reference to its former Renault Mais Decision: *"And, with regard to the spare parts, it can be said that each single part of each brand automobile may constitute a distinct market for that particular product[224]"*. This proves us that a separate market specific to the sales market product of the manufacturer or supplier is to be defined[225].

The outweighing theory to determine market power can be inferred from the behaviours that will not be exempted by New Communiqué. Firstly in this scope, subparagraph (b) of article 3 provides as follows:

"…It will also be deemed that there is a non-competition obligation in case of any obligation imposed directly or indirectly to buyer to buy more than 30% of the goods or services, being subject of the agreement, or their substitutive goods and service from the supplier or another firm to be assigned by supplier, based on buyer's purchases in the previous calendar year."

In this way resellers will be allowed to buy spare parts from suppliers other than the manufacturer. So, the communiqué accepted market power in after-sales market. Foregoing provisions of article 5 also show that Communiqué denies system theory both in spare parts and in maintenance-repair, and accept the power in after market for this industry:

"h) Restricting the selective distribution system members freedom to sell motor vehicles spare parts to private service providers that will use these parts in maintenance-repair of motor vehicles.

i) Restricting supplier's ability to sell original spare parts, spare parts of equivalent quality, repair equipment, diagnostic device or other types of equipment to authorised or independent distributors, or independent firms and end users by manufacturer entering into an agreement with suppliers of these goods and services.

j) Preventing a distributor or authorised service provider to buy original spare parts or spare parts of equivalent quality from a third party firm of its choice, and to use then for maintenance and repair of motor vehicles. However, supplier of motor vehicles can condition usage of the original parts it suppliers for providing repair, free-of-charge maintenance and vehicle callback tasks made under the warranty.

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[223] Guidelines on Explanation of Group Exemption Communiqué 2005/4 on Vertical Agreements and concerted Actions in Motor Vehicles Industry.

[224] Competition Board Decision 00-42/453-247 of November 02, 2000 on Renault Mais.

[225] Hovenkamp alleges that motor vehicle spare parts cannot be defined as a separate market. For further information, see Hovenkamp, H., "Market Power in Aftermarkets: Antitrust Policy and the *Kodak* Case", UCLA Law Review, Vol. 40, 1992-1993, p. 1451-1452.

k) Imposing restrictions, by an agreement entered into by a motor vehicle manufacturer and supplier of the spare parts used in the motor vehicles it produces, that prevents putting mark or logo of spare part supplier on the parts supplied in a way that can be seen effectively and easily.

Exemption anticipated in this Communiqué will not apply if motor vehicle manufacturer prevents access of independent firms, to any technical information required for making maintenance and repair of the motor vehicles, or meeting environment protection criteria, or to diagnostic device and other equipment and to software or training necessary.

Such access must especially cover the usage of a motor vehicle without restriction on electronic control and diagnostic devices, the programming of the devices in a way that complies with standard procedures of supplier, maintenance-repair instructions, ant the information necessary for using diagnostic and service tools and equipment.

Independent firms must provide access without discrimination, fully and appropriately, and provide the information in a usable form. If the item in question is subject to an intellectual right or constitutes know-how, then access must not be prevented by abuse.

Subparagraph (h) prohibits manufacturer to tie spare parts to maintenance-repair services. Subparagraph (i) shows that it is not exempted to get around such prohibition, namely,to take under its control the after sale market through agreements entered into by manufacturers with their suppliers. Subparagraph (j) allows manufacturer to use spare parts from other sources in this service network, so that a competitive pressure will be created upon spare part prices. Subparagraph (k) supplements the facility provided in subparagraph (j).

Next two paragraphs were added to make independent repairmen's, namely ISOs' entry to market easier. Whereas, the last paragraph is New Communiqué's part on intellectual property rights that anticipates more restrictive provisions when compared to the cases we handled previously. Restriction therein is much slighter than other provisions. It is understood that manufacturer can benefit protection of intellectual property rights unless they abuse the right to access.

As these provisions directly address after sales market behaviours, new Communiqué contains many provisions that will take after sale market away from supplier's control, and open it to competition. Therefore, we clearly see that Competition Board adopts the power in after sale market theory in motor

vehicles. For this reason, each supplier is assumed to have market power in after sale market, by the first years of New Communiqué, at least[226].

2. Evaluation of the New Communiqué In Respect of After-Sales Market Theories

In this chapter of our study, we will evaluate the normative choices made by the Competition Board in parallel with EU, based on the assumption of the power in after sale markets.

Evaluating the possible surprises to present clientele base of motor vehicles, we see that a user may face an after sales surprise 1 to 2 years after the purchase. Because usually first checks on vehicles after the purchase are made free of charge until the motor vehicle reaches 1500 to 2000. As the technology advances, the first periodic maintenance is made when the motor vehicle is around 15.000. This amount is generally reached in 1 year. The essential maintenance, where corroded parts are replaced, is made in 2nd or 3rd year, generally. Therefore, a long time passes after the sales market transaction till the user faces after sale spare part and maintenance-repair prices. This period is suitable to make surprises to existing clientele base.

On the other hand, motor vehicle suppliers in our country have to give warranty for 2 years at least. There is a belief that one may face difficulties about his warranty demands if the vehicle's maintenance-repair is made by any service provider other than the authorized service provider of the vehicles during the warranty period[227]. For this reason, nearly 80% of users bring their vehicles to authorized service providers in warranty period. After expiration of the warranty, this rate decreases quickly, especially in commercial vehicles[228].

Suppliers had the control of after sales prices before Communiqué 2005/4, because services providers can hardly obtain spare part from sources other than the supplier. Though it is forbidden to maintain the resale price, the prices suppliers offered to authorized service providers were a basis for the prices offered to end users. Moreover, suppliers used to prohibit their spare part supplying OEMs and other manufacturers to supply spare part to those other than the supplier itself. This was causing independent repairers, face difficulty to

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[226] As inferred from definition of the market, it is expected from suppliers to lose their market power in spare parts and maintenance-repair, by the time.

[227] Grimes, W. p., "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 315.

[228] London Economics, *Developments in car retailing and after-sales markets under Regulation No 1400/2002*, Vol. I, June 2006, p. 122, 132.

obtain some critical parts[229]. Independent repairers also had stringency in obtaining technical knowledge and diagnostic devices. In this way, supplier had a after sales market power, though it was established through its own service providers during warranty period especially.

Volume of existing clientele base matters much for after sale market surprises become a profitable strategy. In this point of view, brands in Turkey, which started sales earlier than their competitors and therefore has a larger park of vehicles, can attempt surprise practices more easily. What is more, motor vehicles industry cannot be described as a industry on decline.

With regard to transaction costs, especially the operation costs are influential. Very high tax rates, notary, plate number etc. administrative costs restrict the used vehicle trade. The prices that a user intending to sell out his motor vehicle due to high after sales expenses, would be even lower in case there is ill reputation about that vehicle. Another factor that lowers the used vehicle price is potential buyers' doubts about perfection of the vehicle. Though we are breaking traffic accident records, there is no public registry of accidents, where accidents are recorded on basis for vehicles, in our country. Controls made by corporate used vehicle sellers eliminate this negative fact to a limited extent.

Another negative fact about transaction costs is the industrial norm of changing the models quickly. In 2nd or 3rd year that user faces high after sales expenses, his vehicle's model might either have a new make-up or be replaced by a brand new generation. This is another factor that decreases value of the vehicle. Whereas, it cannot be said that learning costs are so high. As an artificial cost, suppliers may undertake campaign for used vehicles of their own brand.

Therefore, transaction costs, and the difference between prices of a first hand car and a second hand car are the major reasoning that make the power in the after sales market theory applicable in this industry.

Reputation is another criterion to be handled. The effect of reputation weakens since after-sale services are usually needed abundantly after a long time. In motor vehicles industry, there are large differences among brands with regard to comparison of their existing clientele to potential clientele. The higher this rate becomes, the less reputation will have disciplining influence on after

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[229] In GM Decision, FTC defined these parts as "GM service crash parts", which cannot be obtained from other sources and can only be produced by GM (General Motors Corp., 99 F.T.C. 464, 510 (1976)).

sale market behaviors. In addition, motor vehicles are used for a longer time, comparatively, in our country. This may cause some brand give more importance to cash flows derived from after sale market. Automobile suppliers, in general, do not have business in other markets, and they have limited reputation concerns in this aspect.

In motor vehicles industry, consumers in particular, have almost no practice of contract for after sale issues. However it is seen that corporate users lately makes such practice in order to avoid a possible after sale surprises, and be able to make system pricing[230], because the distance logged by corporate users is much more than that of individual users and they consequently need after sales service more[231]. Corporate vehicle leasing agreements are the best example for such contracts. Also, suppliers may make service agreements in addition to fleet sales. Such practices are advantageous in taxation, too. Suppliers may eliminate the arbitrage between individual users and corporate users by several methods such as setting criteria of being corporate user, minimum purchase limits etc. Leasing firms, which provide both service and consultancy for such services, allow, at least, the corporate users in our country to make system pricing, but structural problems of preparing a perfect contract for after sales issues would prevent elimination of after sales market power completely by this facility.

Below is wording of article 7 stating that due measures will be taken in case new Communiqué causes oligopolistic parallelism between sales and after-sales markets:

> "If parallel networks, formed by vertical limitations of similar character, cover a significant part of relevant market, Competition Board will be allowed to exclude, by an additional communiqué it will issue, the agreements containing certain limitations in the relevant market, from the exemption of this Communiqué…"

In respect of intellectual property rights, New Communiqué attaches importance, where copyright is in question, to competition law in a way similar to Kodak case[232]. Obligations such as training, providing information to, and providing facility for diagnostic devices to independent repairers, all indicate this fact. As for patents, it is only stated that abuse of patent protection is prohibited, and the approach in Xerox case was preferred. In addition, spare parts that are patented are not so many as in Kodak case, but production of non-

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[230] Shapiro, C. & D. J. Teece, "System Competition and Aftermarkets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 4.
[231] Carlton, D. W. & M. Waldman, "Competition, Monopoly and After-markets", NBER Working Paper: 8086, 2001, p.32.
[232] Shapiro, C. & D. J. Teece, "System Competition and After-markets: An Economic Analysis of Kodak", Antitrust Bulletin, Spring 1994, p. 7.

patented spare parts through subcontract arrangements and the cover of know-how cause ambiguity. We opine that Competition Board could have diverged from EU practice, taking into consideration the volume and structures of OEMs and other manufacturers in our country, which is assumed as one of the leading automobile manufacturers[233] in Europe.

Price discrimination, among the defenses for acts of abuse, remains at theoretical level in Turkey, as in other countries. Motor vehicle spare parts and services can be used at changeable rates. Classifying spare parts into two, as crash parts[234] and maintenance parts[235], we find that crash parts in particular will more probably be repaired instead of replacement[236]. Better maintenance of other parts also renders economic life of such part longer. Since there are changeable rates, a supplier intending to implement price discrimination has to keep both spare part and after sale services under its own control.

When compared to price discrimination, which remains at theoretical level, quality control and protection of brand's image must be considered a serious defense. Though New Communiqué provides for rules that make usage of equivalent parts easier; that did not help rise of any independent reliable entities to provide accreditation for them. Small-scale and mostly out-of-record structuring set out be craftsmen in Industrial Estate and many authorized service provider to be brought by qualitative system in service causing suppliers to have concerns. Supplier will need to devote much more sources then they used to, in order to protect the after sale services quality and the image of their brand. In addition, sharing the liability of accidents, which are caused by a malfunctioning

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[233] Now, automobile manufacturer produce almost 20% of the parts they use in manufacture, and obtain the remaining 80% from OEMs through vertical agreements. (PricewaterhouseCoopers, *Block Exemption Regulation"*, January 2006, p. 5).

[234] Front and back wings, panels, doors, bumper and engine bonnet and their connection elements are the parts that protect the body of the vehicle and be damaged the most in accidents. (General Motors Corp., 99 F.T.C. 464, 465-466 (1976)).

[235] These are parts whose useful life ends after being used for a certain time or a certain km., such as oil filter, air filter and brake linings.

[236] A survey conducted by GM in Indiana, in 1974 revealed that 50% of the parts broken in accidents are installed after being repaired, without replacement. However, this rate decreases every day due to various reasons such as the changes in motor vehicle designs, users' demand for replacement of parts, cost of qualified manpower to make such repairs exceeding cost of replacement parts, obligation of supervision by insurance companies (General Motors Corp., 99 F.T.C. 464, 510 (1976)).

part, will be more difficult due to usage of original and equivalent parts that come out of supplier's control[237].

This is our evaluation of aforementioned matters of after sale market theories, except information asymmetry[238]. However, let us note that we cannot reach a definite conclusion before we conduct empirical studies as we do for information asymmetry below. In this sense, the most efficient study to make would probably be observing how the increases in after sale spare part market influence number of motor vehicles sold in respective sale market, taking into account the actual panel data of the period before Communiqué 2005/4[239]. However, such a study would require time, cost and facility much beyond of the study we conducted and emphasized as a reference.

4.2. Empirical Study on Assumption on Information Asymmetry

Information asymmetry constitutes the most important factor in determining after sales market power in motor vehicles industry, as in other industries. Transaction costs and reputation comes to question when a user, who has bought motor vehicle, (existing clientele base) faces after-sales prices of supplier for the first time, or the supplier changes its policy in an unexpected way that will affect the users who were previously informed about them, too. In a fiction, where transaction costs do not influence decision of users, reputation can be influential only if users are aware of after sales policies of its competitors, as well. In a fiction, where transaction costs apply, again there will be a need information regarding such supplier's competitors' after sales policy in order to compare the costs to the advantage of transition to other supplier.

As for potential buyers of motor vehicles, they have to be informed sufficiently about after sales pricing of each brand, in a way that allows making system pricing possible. Nevertheless, manufacturers contribute provision of such information in a quite small extent.

Empirical study, based on our survey, will examine whether there is a problem of information asymmetry, taking into consideration the predictions, on

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[237] Grimes, W. p., "Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", Antitrust Law Journal, Vol. 62, 1993-1994, p. 286.

[238] In these evaluations, we benefited from our case practices of motor vehicles and the article by Aslan, İ. Y. at al., named *Otomotiv Sektöründe Rekabet Hukuku ve Politikaları,* published by Ekin Kitabevi, in 2006.

[239] Hofer, P. at al., "Competition Policy Analysis in Dynamic and Complex Markets: Switching Costs, After-markets, and Network Effects", Nera Antitrust Insight, May-June 2006, p. 6.

prices set in after sales markets, made by consumers, who have no possibility of making contract for after sales issues.

1. Structure of Empirical Study Based on Survey

In the survey form, there were questions regarding sedan models of 6 different brands (Renault, Toyota, Ford, Volkswagen, Honda and Nissan) in C segment, holding the highest rates of sales[240]. Selection of these models aimed to include manufacturer originated from different countries (1 French, 3 Japanese, 1 US and 1 German manufacturers), and both domestically produced and imported vehicles (3 domestic, 3 exported vehicles). With regard to price consistency, the survey was conducted with 314 individual in November 2006[241]. In order to make the survey easier and avoid individuals lose their concentration, each individual was asked general questions in the beginning, and then questions about two random brands among the 6 brands.

General questions were age, sex, for how long has he/she been having driving license, education level, average monthly income, whether he/she owns a motor vehicles, brand and model of his/her vehicle, in any, the km. reached in a year, whether the vehicle is insured against damages to itself, his/her preference between authorized service provider and independent repairmen for repair, his/her preference on spare part usage (original or subsidiary industry), brands and models of the vehicles used before, and how often he/she reads automobile magazines.

In the section regarding the specified vehicles, the subjects were firstly asked to estimate sales prices of basic model of the specified vehicle. Rest of the question all were regarding the extent of the individual's awareness of after sale price of such vehicle’s spare part, maintenance and repair prices. In this scope, they were asked to estimate original and spare part prices of 5 crash parts (front wing, left back door and wind screen) and 3 maintenance parts (oil filter, air filter and front brake lining set). Lastly, they were asked to estimate hourly maintenance and repair service fee.

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[240] Unlike the rest of Europe, sedan automobiles are more popular in our country because of their high baggage volume etc. characteristics.

[241] Survey, being basis for the study titled “Client Preferences for Existing and Potential Sales and Servicing Alternatives in Automotive Distribution” by Dr. Lademann & Partner in 2001 on behalf of EU Commission, was taken by 500 people in 5 different countries.

2. Evaluation of Results Obtained

Of the individuals of the survey, 65% reside in Istanbul, 10% reside in Ankara, 8% reside in Bilecik and 6% reside in Izmir. Remaining 10% are from 8 different provinces. 27% of the individuals were women and 71% were men. 22% of individuals were younger than 25, 51% between 25 and 35, 20% between 35 and 45, and 7% between 45 and 55, and they had been holding driving license for 10 years in average. 5% of the individuals were graduate of secondary school or less educated, 14% were graduated of high school, 54% had bachelor's degree, and 26% had master's degree. As for the vehicles they owned, 92% were newer than 1995 model and %51 were newer than 2002 model vehicles. Km. of 75% of these vehicles were less than 25 thousand, and warranty of 50% of them was expired. 76% of the vehicles were insured against damage to them. 73% of individuals state that they prefer original parts, whereas 3% of them said they preferred spare parts from other sources. 86% of the individuals own one or more passenger vehicles. 70% of the vehicles are sent to the authorized service provider for repair and maintenance[242]. A section of 9% uses his/her employer's vehicle.

With regard to the level of competition in sales market, it is a remarkable indicator that the given vehicles belonged to 31 different brands, none of which did exceed 13% of total.

Among those who answered to the question regarding industrial magazines, as a factor eliminating information asymmetry, 31% of them stated he/she reads them never, 55% rarely, and 9% one automobile magazine every week.

Analysis on the survey was designed in two groups. Firstly, it was handled whether there is a meaningful relation between the general information given, and the information asymmetry was handled.

Factors Influencing Choice of Authorized Service Provider:

Survey results show that sex of the individual has a clear impact on preferring to go to an authorized service provider. We see that 89% of women prefer to go to an authorized service provider, whereas 74% of men prefer the same.

In line with the surveys in EU and the general assumption, people's decision as to whether going to authorized service provider is strictly dependant

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[242] In USA, this figure is 59% for authorized service providers and 23% for independent repairmen (Dr. Lademann & Partner, "Client Preferences for Existing and Potential Sales and Servicing Alternatives in Automotive Distribution", 2001, p. 66).

on whether his/her vehicle is under warranty. According to results of the survey, 95% of users, whose warranty is in effect, prefer to go to authorized service provider, whereas 66% of those, whose vehicle warranty expired, prefers to go to authorized service provider.

It is so interesting that the leading factor that makes people go to authorized service providers is presence of insurance for damages against the vehicle, among other factors. %85 of those who have insured his/her vehicles against damages to the vehicle prefer authorized service provider, whereas only 25% of those, who do not have the same insurance, prefer them. Absence of insurance for damages against vehicle makes drivers neutral against authorized service providers and repairmen.

Factor influencing spare part use preference:

Though it does not have an active role as the motivation, it creates in preferring authorized service provider, sex has a significant factor for spare part usage. So as, 89% of women drivers prefer using original spare parts, whereas 79% of men appear to prefer original spare part.

Decision of using spare part is highly dependant on whether the vehicle is insured against damages to it. A high majority of consumers with insurance prefers original spare parts, whereas those without insurance do not find a significant difference between using original spare parts and subsidiary industry spare parts. According to survey results, 88% of consumers with vehicle insurance use original spare parts, whereas 35% of those without vehicle insurance use them.

Having a view to consumers' spare part preferences with regard to expiration situation of their vehicles' warranty, we find important results though not as determinative as the decision to go to authorized service provider. According to these results 92 consumers out of every 100 consumers with a warranty in effect, prefer original spare parts. This figure is 75% for the consumers without warranty.

Spare parts usage preferences and maintenance-repair place preferred could not be correlated, sensibly, to survey variables, such as age, driving license possession, education level, monthly income, vehicle ownership, km, in a way that gives puts forth structure of after-sales markets.

Information Asymmetry in Motor Vehicles:

The most important part of the survey is the section, where information asymmetry was rated. In this section, subjects were asked to make estimations about purchase price, original spare part price and workmanship price of

vehicles of 6 different brands. In this way, the theory that individuals are not informed about after sales prices as much as they are informed about vehicles' sales prices, was tested.

In this scope, arithmetical average, median and standard deviation of individuals' price estimations was calculated. Quotient of average estimation by the actual price is considered as a measure of success for the estimations. Coefficient of variation, which is the quotient of standard deviation by the average, is used as a unitless indicator of the variety of estimations, and is benefited, owing to its nature, to compare diversity of the estimations for different products. Coefficient of variation of estimations getting greater is seen as an evidence for the increase in information asymmetry. Please see **Annex** for the summary.

Motor vehicle prices:

With a view to estimations on prices of sedan, 1600cc with manual transmission, versions of Honda Civic, Renault Megane, Volkswagen Jetta, Ford Focus, Toyota Corolla and Nissan Primeria, it is seen that average estimation is 0,9029[243] to 1,0899[244] of the actual price. In other words individual can make comparatively accurate estimations on vehicle prices, with a fallibility of 10% less to 8% more than the actual price. Coefficients of variation are 0,16 to 0,24.

Crash spare parts and hourly maintenance fees:

We see that average of the estimations on original wing, back stop lamp, left back door, rear bumper and wind panel are 1,35 to 2,35 times higher than their actual prices. So, subject of the survey estimate, the value of 5 parts of six different brands, representing crash spare parts, higher by 35% to 135%. Quotient of estimated hourly repair-maintenance wage by their actual figures varies between 0,88 and 2,21. As Honda Civic left back door has the smallest coefficient of variation (0,76), back stop lamp of the same vehicle has the greatest coefficient of variation (1,5), according to the answers.

Maintenance spare parts:

Prices of maintenance spare parts, consisting of oil filter, air filter and front brake lining, are the products with the highest information asymmetry, due to the fact that the actual prices of the products are low. It is seen that individuals estimate these materials 5,17 to 9,26 times more expensive, in average of different branded vehicles. Coefficient of variation, which reflects the extent

[243] Ford Focus Sedan 1.6 lt. base model.
[244] Toyota Corolla Sedan 1.6 lt. base model.

these estimates vary, reached 4,45 for Honda Civic's air filter. Though Volkswagen Jetta's oil filter has the smallest coefficient of variation (0,88), even this figure is much higher than coefficient of variation in sales price of the same vehicle (0,16).

Though most of the individuals have insured their vehicles, their estimations on crash parts are more accurate than their estimations on maintenance parts. Considering all together the facts that maintenance parts are used more in authorized service providers, that most of the individuals prefer authorized service providers, and the estimations on workmanship fees, it is seen that there is an assumption of "high prices in authorized service providers". In addition, there is no result found showing that individuals, who said they read magazines, make better estimations. This fact shows, similarly with Kodak Decision, that industrial magazines do not have an effective role in eliminating information asymmetry[245]. One of the reasons of this is the fact that there is no commonly read, independent consumers' magazine like "Consumer Report" in our country.

General evaluation of survey results, in aspect of information asymmetry, concludes that there is a large negative difference between survey takers' sales price estimations and after sales estimations, and that there is a clear information asymmetry. Subjects of the survey are not provided with the knowledge to make system pricing as existing clientele base and as potential clientele. This show that information asymmetry of consumers in respect of motor vehicles after sales market creates an environment suitable for suppliers to have market power, in the ratio, at least, this survey represents the aggregate consumers. In other words, transaction costs caused by low quality demand toward after sale services, and by used vehicle value, appear to be the most important problem in our country.

5. CONCLUSION

Our country, which achieved a certain macro economic success in its anti-inflationist struggle, needs to direct its focus on the inefficiencies in markets in order to lower its inflation below 5% and stabilize it at such level. . Central Bank's President's recent critiques addressed on effects of an increase on the inflation, made by a market actor, illustrates this need. Since the suppression of inefficiencies in a market is an objective of competition policies, application of

[245] MacKie-Mason, J. K. & J. Metzler, "Links Between Vertically Related Markets: Kodak (1992)", Kwoka, J. & L. White (ed.), *The Antitrust Revolution 4th Ed.* including, 2002, Cambridge University Press, p. 403.

competition rules with macro-economic effects will be in our agenda oftener than ever. These practices will yield right results depending on the government's ability to efficiently exercise its power to intervene, under article 167 of the Constitution, duly and on time. Success of the empowered authorities is assessed on the basis by level of efficiency in the markets.

Durable consumer goods expenditure holds an important place in the GDP. Therefore, competition law practice for such expenditure items would highly contribute to macro economic performance. Motor vehicles have a major role among these expenditures and with respect to industrial performance; it is the leading industry according to export volumes. Therefore, competition policies for this industry are important for both consumers' welfare and the preservation of the export performance.

In the field of industrial organization, being the base of competition law, various new concepts and practices arouse concurrently with *Post-Chicago* age. Considered as beginning of this age, and dealing with durable consumer goods, Kodak Decision resulted in the application of concepts such as switching costs and information asymmetry in the area of competition law and the necessity for such application to be in line with the facts of the market has been clearly stated.Like other durable consumer goods, motor vehicles industry also has an after sales market in addition to the sales markets. Competition law analysis on after sales markets changed significantly after the Kodak Decision. It has been observed that an undertaking holding a significant market power in after sales spare part market can exclude its competitors by tying its maintenance-repair services with the spare part sales, whereby it can affect consumers' welfare. Such power is granted to such undertaking by switching costs, information asymmetries, insufficient reputation and other market failures.

The wind of change in USA also influenced EU, where the economic approaches began to have an increasing importance. The New Communiqué numbered 2005/4 on Motor Vehicles, enacted in our country, can also be considered as a part of such change.

Whether such change is appropriately managed in our country can be questioned solely through the conduct of empirical studies regarding this industry. Empirical studies must have theoretical bases that can be easily understood.Our study consisted in the review of after sales market theories that appeared and was developed by Kodak case and partly found its reflection in EU and Competition Board practices. The present work states the different steps of an analysis to be performed in the event of a competition investigation or normative discussion regarding the after sale markets of any durable consumer good.

In this respect, it has been concluded that the analysis shall comprise the stages of market definition, analysis of dominant position, and definition of abuse and it has been highlighted that the analysis of dominant position was the most critical stage. It was concludedthat 6 criteria must be analyzed in order to determine a dominant position in after sales market, and the “shape” they will take according to market conditions reviewed here, will bring forward the system theory or the power in the after sale market power theory. Regarding the abuse of dominant position, it has also been observed that, the relevant undertaking may invoke its intellectual property rights as an exception of performance of default, and that the preservation of quality, and -though on a theoretical basis- price discriminationmay be invoked as an efficiency defense. As it was understood that Competition Board, based on these theoretical findings, accepts the existence of market power in after-sales market of motor vehicle industry, such choice of the Competition Board was tested in an empirical study with regard to information asymmetry. Findings of the study show that consumers have limited information on after sale prices and they are not able to make system pricing. Therefore, it has been understood that the Competition Board’s choice was correct.

In particular for motor vehicles, steps to allow the application of system theory must be made in order to end the strict regime based on the assumption of after sales market power, so as to ensure the establishment of self balance in markets. In this respect, switching costs must be lowered, undertakings must adopt measures so as to eliminate information asymmetry, and emphasis must be put on the execution of agreement regarding after sale market, with consumers. As a matter of course, consequences of such steps must be assesses by the empiricalstudies.

		Automobile Price	Front left fender	Back stop lamp	Back buffer	Back left door	Front window	oil Filter	Air filter	Front brake shoe	Mending&Fixing Price (for an hour)
Renault Megane Sedan 1.6											
N	Valid	100	107	108	108	107	108	107	108	107	108
	Missing	215	208	207	207	208	207	208	207	208	207
Mean		31395,00	469,08	165,09	590,50	935,36	616,99	88,02	79,46	322,74	67,66
Median		31000,00	300,00	125,00	437,50	750,00	450,00	60,00	50,00	200,00	50,00
Std. Deviation		5310,22	442,29	139,18	534,68	770,28	500,30	149,98	157,09	354,12	61,30
Actual value		31000,00	197,00	68,00	284,00	380,00	365,00	5,00	22,00	98,00	59,00
Coefficient of variation		0,17	0,94	0,84	0,91	0,82	0,81	1,70	1,98	1,10	0,91
Actual value		1,0127	2,3811	2,4278	2,0792	2,4615	1,6904	17,6037	3,6120	3,2932	1,1467
Toyota Corolla Sedan 1.6											
N	Valid	97	110	110	110	109	110	109	110	109	109
	Missing	218	205	205	205	206	205	206	205	206	206
Mean		31769,58763	495,0636364	167	587,1636364	960,6788991	652,536364	98,23853211	86,2	389,4036697	72,37614679
Median		31000	322,5	150	460	750	500	60	50	200	50
Std. Deviation		6020,990007	440,4847054	126,204654	451,4792106	796,6038781	569,147708	114,5363357	116,2094597	674,5367542	70,58312528
Actual value		29150	282	170	243	539	509	13	40	100	59
Coefficient of variation		0,19	0,89	0,76	0,77	0,84	0,87	1,17	1,35	1,73	0,98
Actual value		1,0899	1,7556	0,9824	2,4163	1,7638	1,2820	7,5668	2,1550	3,8940	1,2267
Volkswagen Jetta 1.6											
N	Valid	87	95	95	95	94	96	95	96	95	95
	Missing	227	219	219	219	220	219	219	218	219	219
Mean		35810,34483	641,5473684	261,7473684	813,1789474	1271,329787	852,389474	110,6210526	98,16666667	500,2105263	79,74736842
Median		35000	500	180	700	1000	600	100	60	250	55
Std. Deviation		5702,570503	538,4615747	341,0851883	663,2242645	1070,14399	791,849818	97,4797501	100,321763	702,9028246	92,74363755
Actual value		34700	177	156	512	685	282	32	39	120	36
Coefficient of variation		0,16	0,84	1,30	0,82	0,84	0,93	0,88	1,02	1,41	1,16
Actual value		1,0320	3,6246	1,6779	1,5882	1,8560	3,0227	3,4569	2,5171	4,1684	2,2152
Honda Civic Sedan 1.6											
N	Valid	90	94	94	95	94	95	92	93	92	94
	Missing	225	221	221	220	221	220	223	222	223	221
Mean		32391,66667	480,0531915	247	639,1052632	1087,819149	872,936842	169,9782609	257,483871	529,7391304	82,55319149
Median		32000	326	160	500	825	560	86	60	225	59,5
Std. Deviation		7195,118703	461,5146025	369,2936879	558,6467211	827,9302969	928,506932	520,8079517	1145,646814	1108,828952	90,39466834
Actual value		33500	398	128	515	490	279	13	28	96	59
Coefficient of variation		0,22	0,96	1,50	0,87	0,76	1,06	3,06	4,45	2,09	1,09
Actual value		0,9669	1,2062	1,9297	1,2410	2,2200	3,1288	13,0753	9,1959	5,5181	1,3992
Nissan Primera Sedan 1.6											
N	Valid	86	95	95	95	94	95	92	93	92	94
	Missing	229	220	220	220	221	220	223	222	223	221
Mean		33505,81395	498,0947368	228,6210526	614,2842105	1062,521277	847,947368	128,3695652	113,9892473	631,3913043	93,86170213
Median		32250	300	150	500	800	600	100	75	250	60
Std. Deviation		7902,529076	448,4271585	215,3573348	481,9045254	837,152184	717,758959	128,1271447	129,9563049	1475,466497	155,926961
Actual value		32500	248	234	367	757	360	16	32	128	48
Coefficient of variation		0,24	0,90	0,94	0,78	0,79	0,85	1,00	1,14	2,34	1,66
Actual value		1,0309	2,0084	0,9770	1,6738	1,4036	2,3554	8,0231	3,5622	4,9327	1,9555
Ford Focus Sedan 1.6											
N	Valid	88	95	95	95	94	96	96	97	95	95
	Missing	226	219	219	219	220	218	218	217	219	219
Mean		31602,27273	491,0631579	194,7052632	627,8736842	1129,148936	650,645833	101,5833333	79,02061856	376,2105263	62,52631579
Median		32000	400	150	500	943	425	60	50	200	50
Std. Deviation		5855,618724	391,8308583	173,3100084	520,7672785	902,8401656	581,732385	186,0334812	101,0920558	503,5082854	58,95505719
Actual value		35000	246	141	318	926	347	12	30	85	71
Coefficient of variation		0,19	0,80	0,89	0,83	0,80	0,89	1,83	1,28	1,34	0,94
Avr./Actual Value		0,9029	1,9952	1,3809	1,9744	1,2194	1,8751	8,4653	2,6340	4,4260	0,8807

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THE ASSESSMENT ON THE REFORM OF THE ARTICLE 82 OF THE ROME TREATY AND ITS POSSIBLE EFFECTS ON THE TURKISH COMPETITION PRACTICE

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"Dominant companies should be allowed to compete effectively." Neelie Kroes

1) INTRODUCTION

The Directorate General of Competition (DG Competition) of The European Commission (Commission) under the presidency of Neelie Kroes, has published a Staff Discussion Paper on December 2005 regarding the application of EC Treaty competition rules on the abuse of a dominant market position (Article 82) with an *effects-based approach* in parallel with the reform realized recently regarding the mergers and acquisitions and the control of Article 81 of EC Treaty.

The Commission has conducted comprehensive debates on the Paper. Firstly, negotiations were made with the representatives of the member countries on the reform, and then the Paper was published on the web site of the Commission on 31 March 2006. Many persons, institutions and establishments gave their opinion regarding the Paper.

The Commission wants to concentrate its resources on those anti-competitive practices that are most likely to cause harm to consumers. As a result it has recently increased its enforcement activities against cartels. The proposals made in the Discussion Paper on Article 82 would in a similar way imply a strong focus on those abuses of dominant positions most likely to harm consumers[1].

Neelie Kroes, in her speech regarding the reform of the Article 82, stated that the objective of the reform and the Staff Discussion Paper is not to change the application of the Article 82 or moderate its application. The main purpose

[1] Memorandum of DG Competition dated 19 December 2005 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1626&format=HTML&aged=0&language=EN&guiLanguage=en

of the Commission is to develop theories of harms for the most frequent types of abusive conduct[2].

From the point of view of the firms, it is obvious that firms ask for judicial determination for the application of the competition rules. Therefore, guidelines which are effective, establish a serious determination for companies regarding the control of the Article 81 and concentrations. However, a guideline has not been drafted until now. Issuing guidelines as a result of this work is the expectation of the companies.

During her speech at Fordham Institute, Neelie Kroes referred to the application of USA[3] and stated that they accepted "*If it ain't broke, don't fix it*!" approach. According to this approach, there shouldn't be an intervention to the markets *unless* there is clear evidence and indices that the competition is not functioning well.

Kroes stated that with the Commission aimed to guide its own resources and the Enforcement Agencies' human and financial resources to the applications which clear the consumer harm away with a more effective way, thanks to this new approach.

Considering the critics regarding the formal applications of the article 82 of the Commission and EU jurisdiction, the Staff Discussion Paper states *effects-based approach* and relevant general and special principles for the application of the Article 82.

The Paper proposes a framework used by the Commission for its recent decisions based on economical analysis regarding the application of the Article 82. The Paper determines possible methods for the consideration of the abuses of competition such as predatory pricing, tying, rebates and discounts. It is explained on the Commission web site that exclusionary and exploitative conducts will be the subject of another work in 2006.

Our purpose for working on this reform is that the actual point where European Commission has come for the application of the Article 82 is an objective to achieve for Turkey due to its obligations regarding the harmonization of the *acquis communautaire* within the scope of the candidature

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[2] Speech of Nellie Kroes, on 23 December 2005 in Fordham Corporate Law Institute, New York.
http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en

[3] The speech of Nellie Kroes dated 23 December 2005 at Fordham Corporate Law Institute, in New York.

to the EU and also the more effective application of the competition rules apart from these obligations. As it is well known, economical analysis technique has been used by USA in order to determine the abuses of the competition rules to the consumer welfare for a long time. EU who has a shorter history than USA has been subject to the serious critics for many years because of its formal approach for the abuses cited in the Article 82. The reforms on the Article 81 and the control of concentrations and this reform on the Article 82 have to be accepted as a change and development on this way.

The application of competition has a 10 years past in Turkey. Although comparing with USA and EU 10 years may be understood as a short period, Turkey has considerable experience regarding this matter. It is normal that Turkey lives the difficulties experienced in EU. This has several reasons. First of all, article 4 and 5 of the Turkish Competition Act are almost the translation of the EC Treaty, article 81 and 82. This parallelism in the Law brings the parallelism in the application. The Competition Authority used mostly EU decisions for the examination and the investigations. Therefore, the information and the experience obtained in the mean time showed parallelism with the EU decisions. Consequently, we think that the actual discussion in EU must be inevitably followed by Turkey.

Finally, according to us also the main point of the competition rules should be the consumer welfare. Therefore, the analysis of effects of abuses of dominance on the consumer is more acceptable than other grounds for Turkey.

With this framework, this reform will be examined with main points in this paper. In the first part, the grounds of the reform and the new approach will be discussed. However, as the Discussion Paper is very extensive and there are many critics for this Paper, we will not explain in detail every types of abuse but the general framework will be explained. After then important critics regarding this approach will be presented. Finally, examples of dominance analysis of Turkish Competition Authority will be given and possible effects of the reform Article 82 will be discussed.

2) APPLICATION OF ARTICLE 82 AND NEED FOR A REFORM

In the markets where there the dominance exists, the main presupposition is that there is less competition in the market. The concern of the competition rules is therefore to prevent conduct by that dominant company

which risks weakening competition still further, and harming consumers, whether that harm is likely to occur in the short, medium or long term[4].

The types of abuse discussed by the Paper are generally divided into two as; exclusionary and exploitative abuses. The exclusionary abuse excludes the competitors away from the market and the dominant company exploits its market power with the predatory pricing.

As mentioned above, Discussion Paper is interested only in the exclusionary abuses. Given that the exclusion of the competitor away from the market is forming the base of the exploitation of consumers and customers, Discussion Paper prioritizes especially the exclusionary abuse.

Before the preparation of the Discussion Paper; Economic Advisory Group on Competition Policy-EAGCP has drafted a comprehensive report regarding the economics-based and *effects-based approach* and its exigency as a base of discussion Paper.

The report which discuss the *economics-based* approach in all its parts; states that the purpose of the restriction of the competition law is the *consumer welfare* and therefore the conduct needs to be examined in *each case* to determine whether or not the conduct constitute an abuse of dominance according to Article 82*, and whether that harm is likely to occur before the consumer*. According to the application of Article 82, the objective is to determine the *competitive harm* and *the effectiveness of the conduct which prevent negative effects* before the examination of the conducts of the company. And the *effects-based approach* is actually forming the *rule of reason* approach.

Essentially the Discussion Paper is a document, prepared on the basis of the experience of the Commission in the application of Article 82 and the case laws, formed by the courts of the EU and has essentially the nature of a guideline, proposing the general and specific principles, in the application of Article 82 to the *exclusionary abuses.* The discussion provides a framework to the Commission, for an analytical approach, yet does not provide the necessary details for each application of this approach. In case the approach, explained in this paper, is applied by the Commission, it will be applied as a result of the assessment and the conditions, specific to each case.

By stating that the purpose of the Discussion Paper was *the preservation of competition in the market in the sense that the provision of the welfare of*

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[4] Commission Press Release dated 19.12.2005 http://europa.eu/rapid/ pressReleases Action.do?reference=IP/05/1626&format=HTML&aged=0&language=EN&guiLanguag e=en

consumers and the effective usage of resources[5], the EU DG Competition, emphasizes that the main concern is on the welfare of the consumers and by reiterating this issue in many parts of the text, it promulgates the principle that the application of Article 82 was proceeding towards an *effects-based approach*, considering the effects of the attitude, rather than the attitude itself.

Within the framework of the paper, only the *exclusionary abuses* have been considered and it is stated that the other abuses would be considered with the additional guidelines to be prepared. Conditions of Exclusionary Abuse, are defined as, "*behaviors by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers*[6]*.*"

With the *effects-based approach*, introduced for the application of Article 82 with the Discussion Paper, has been appreciated in the related forums, yet, the majority of the criticisms, toward the paper, focus on the issue that some principles in the Paper did not match with this new approach and some points were missing and further clarification of these deficient and unclear points is requested. It is possible to compile the criticisms, towards the Discussion Paper under the following titles:

- In many sections of the Paper, it is stated that the actions went beyond the principles, introduced in accordance with *effects-based approach* and this situation is criticized. For instance, many formalist tests are proposed in the Paper and the actual or possible effects of the behavior on the consumer are ignored[7]. There are points, requiring further development both with respect to the general principles, related to the exclusionary abuse conditions, and the principles, adopted with respect to some specific conditions of abuse. In particular, the fact that the market shares, proposed for the determination of the dominant position are very law and the introduction of flexible standards in the

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[5] European Commission, DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December 2005. (§ 4) http://ec .europa.eu/comm/ competition/antitrust/art82/discpaper2005.pdf

[6] Discussion Paper (§ 1)

[7] Joint Working Party of the Bars and Law Societies of the United Kingdom ("JWP") Response to DG Competition Discussion Paper on the application of Article 82 to exclusionary abuses s.1-2

assessment of some attitudes, may lead the Commission to re-adopt the formalist approach, which has been and is being criticized heavily[8].

- In the efficiency defense, *the burden of proof* has been unrightfully charged on the undertakings[9]. In the Discussion Paper, many presumptions, which will not correspond to an *effects-based approach* and in such cases, the obligation of proof has been given to the undertakings. However the general principle in the application of Article 82 was that the obligation of burden of proof belonged to the *"Competition authority or to the complainant."* Thus, this approach, introduced with the Paper, imposes a burden of proof on the undertakings without any legal grounds and does not correspond to the *effects-based approach* principles[10]. The theoretical explanations of the conditions, in which a certain behavior, which may yield damages in violation of competition, will cause the undertakings to involve in detailed market analysis applications for determination whether the behaviors of the undertakings violated Article 82, and therefore impose a great burden on them[11].

- The Discussion Paper is strictly adheres to the previous resolutions of the European Court of Justice ("ECJ"). However, these resolutions are adopted under the conditions of the concrete incident. Because of this reason, general principles must not be extracted from these resolutions. In the Paper in question, the references, made to the resolutions of the Commission, which are already being criticized, creates great conflicts.

- Only the exclusionary abuse conditions are considered in the Paper. However, the exclusionary abuse behaviors and other behaviors are not entirely different from each other. Therefore, various behaviors must be analyzed as a whole and consistently at least with respect to their effects[12].

- Although the determination of an *economic* approach with the Discussion Paper is a positive development, the legal clarification requirements of the undertakings must be met and with the guidelines, to be issued at this

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[8] GIANNI, ORIGONI, GRIPPO&PARTNERS Comments on the European Commission's DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses

[9] Joint Working Party of the Bars and Law Societies of the United Kingdom ("JWP") Response to DG Competition Discussion Paper on the application of Article 82 to exclusionary abuses s.1-2

[10] Simmons&Simmons "DG Competition discussion paper on the application of Article 82 to exclusionary abuses; JWP; Akman, Pinar "The EC Discussion Paper on the Application of Article 82"

[11] AMCHAM EU p. 2, paragraph 5

[12] MEDEF

point, a balance must be provided in the issues of *predictability* and *clarity*[13]. A series of guidelines, containing examples, which will aid the undertakings with respect to the issues of safe harbors and commercial predictability and stability issues, must be published[14].

3) THE RELATION OF ARTICLE 82 WITH THE OTHER REGULATIONS

In the Discussion Paper, it is stated that both Articles 81 and 82 of Treaty of Rome served to the purpose of the maintenance of effective competition in the market with respect to the exclusionary abuse conditions and the simultaneous application of these were possible in accordance with the case laws of the ECJ, such as *Compagnie Maritime Belge*[15], arising from its decisions.

Along with the statement that the conditions, given in Article 81(3), had to be applied to the restrictive agreements, which will lead to the abuse of dominant position, with the stipulation reads as "*an undertaking, which is in dominant position, must benefit from the exemption, provided in this Article, in case the conditions, given in Article 81(3) are met*" the Discussion Paper suggests that the *efficiency defense* would be in question also with respect to the behaviors, concerning abuse of the dominant position. Within this framework, as long as the behavior of an undertaking provides effectiveness and in case of satisfaction of other conditions in Article 81(3), this behavior will not be considered as an abuse in the sense of Article 82[16].

It is seen that the approach, adopted in this observation of the Paper, had approached to *rule of reason* doctrine. However, further clarification is required concerning the issue[17].

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[13] MEDEF-Observations on the draft guidelines proposed by the European Commssion on the application of Article 82 of the Treaty-DAJ-01.03.2006; CROWELL&MORING s.6

[14] Simmons&Simmons "DG Competitiondiscussion paper on the application of Article 82 to exclusionary abuses"

[15] Compagnie maritime belge transports SA C-395/96 P ve Compagnie maritime belge SA ve Dafra Lines A/S C-396/96 P (merged cases)

[16] Discussion Paper (§ 8)

[17] Akman, Pınar "The EC Discussion Paper on the Application of Article 82" s. 3

4) THE DEFINITION OF RELEVANT MARKET WITH RESPECT TO THE APPLICATION OF ARTICLE 82

The Discussion Paper clearly states that the basic source to be used in the determination of the *relevant market* was the *Communiqué Concerning the Determination of the Relevant Market*[18]published on December 9, 1997, by the Commission.

However, the Discussion Paper emphasizes the problem, arising from the SSNIP *(small but significant non-transitory increase in price) Test*, called *Cellophane Fallacy*[19] and mentions the problems, which may emerge with the application of the SSNIP test alone and talks about other alternative methods, which may be considered in the definition of the market in question.

The Discussion Paper proves that the definition of the relevant market must be considered specifically and could not be determined with the application of a single method, in particular SSNIP test, and therefore proposes different methods.

Discussion Paper states that the competitive price had to be considered instead of prevailing price as price indicator in the application of SSNIP Test[20]. In the Paper, for the control whether there are false substitutes, it is stated that *reconstructing the competitive price*, in other words, to estimate the *competitive price* and the use of the same in the SSNIP test was a method, yet it was impossible to estimate the *competitive price* always at the requisite degree of accuracy and therefore this *method was not applicable.*

The Discussion Paper states that there were no problems in the application of SSNIP test in the second market since there were no reasons to doubt that the prices in the second market were increased over the competition

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[18] OJ C 372, 09.12.1997 " Commisison Notice on the definition of the relevant market for the purposes of Community Competition Law"

[19] SSNIP Test in general, is a test, structured on the question that by taking the current market price of a commodity in the market, whether a small, yet effective and permanent increase in this price by 5 % to 10 %, would lead the consumers to the substitutes of this commodity, readily available in the market and has been prepared on the basis of demand flexibility/demand substitute. However, SSNIP Test does not consider the possibility that the price, applied by the undertaking in question could already be well over the competitive level and therefore the consumer could recourse to substitutes even in the slightest increase of price. And this situation doubtlessly causes a broad definition of the market. Since this problem has first emerged in a decision concerning a cellophane producing company in the United States, it is called as cellophane fallacy.

[20] Discussion Paper(§ 15)

level in the situations, in which the undertaking in the dominant position expands its power from one market to another (leverage) and in the situations in which the markets, which do not possess a dominant position, could be included in the application of Article 82.

The Discussion Paper expresses that another approach, which may be considered in the determination of the relevant market was to check whether the non-flexible consumer demands are met, considering the nature and the intended usage of the related products[21]. Here the important point is, whether a product is accepted by sufficient number of consumers as the substitute for the product, produced by the undertaking in question with respect to nature and intended usage. In this case, these two products are accepted to be in the same market[22].

Finally, the Discussion Paper states that the comparison of the prices of different regions would be appropriate. While this comparison, above all, helps in the determination of the geographical market, it helps in determination of the market of the product in question[23].

By many persons and institutions, expressing opinions on the Discussion Paper, basing the determination of the relevant market on the Communiqué, dated 1997 and the definition of the problems, caused by the SSNIP test and mentioning the alternative methods, necessary for the removal of these, have been seen generally as positive developments. However, in many views, the Paper is criticized since it did not provide a clarification for the application of alternative methods and by only projecting the problems of the SSNIP test; it did not provide sufficient information concerning the removal of these problems[24].

[21] Discussion Paper (§18)

[22] Concerning this issue, the Discussion Paper gives the decisions, such as Campagnie general maritime and others v. Commission Case T-85/95 (2002); United Brands Case 27/76 as examples. However, in case a single product provider, manages to sell to the consumers with less flexible demands at a higher price and prevent the sale from more flexible customers to the less flexible customers, in this case, the customers with less flexible demand must form a different market.

[23] Concerning this issue, the Discussion Paper states that in case an undertaking makes sales in different regions and in case it applies a higher sales price in the region of highest sales percentage, this competitive pressure was not caused by different types of products, but caused by other providers of the same type of products. However, in inter-regional price comparisons, it is necessary to consider whether there are factors, other than the intensity of the competition, causing disparities between the regions.

[24] MEDEF p.5, Simmons&Simmons p.2-3; Akman, Pınar "*The EC Discussion Paper on the Application of Article 82" p. 4 "Although the presentation of the problems, caused by the application of SSNIP test, is a positive attitude, the Discussion Paper has just*

Other than this, since the alternative methods, proposed to be used in the Discussion Paper for the determination of market, can not be applied any time, it is emphasized that the Paper must be more explanatory at this point and must provide a clarification, when such methods will be used or not[25].

On the other hand, in some views, it is stated that in the definition of market, Commission must refrain from the mechanical application of a mechanical test, and in particular, the methods, which focuses on the product characteristics only, since these methods might lead to a very narrow definition of the market[26].

5) DOMINANT POSITION

Concerning the concept of dominant position, the Discussion Paper reiterates the definition, which has become established with various case laws of ECJ and the elements, derived from the definition.

From this approach of the Discussion Paper, it is understood that in the application of Article 82, the dominant position must be separately and preliminary determined apart from the situations of abuse of as currently. The Paper at this point, deviates from the report of the Economic Advisory Group.

In the Economic Advisory Group Report, it is stated that an economic approach removed the necessity to make a prior and separate determination of a dominant position and instead, the real emphasis had to be placed on the determination of the verifiable and stable existence of an effective competitive loss. Because in an economics-based approach, the important point is the behavior, disturbing competition and this, essentially is the proof of dominant position[27].

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presented the question and has not fully presented the alternative methods to be applied."

[25] JWP p.4; CROWELL&MORING p.4

[26] United States Council For International Business Submission to the Directorate-General for Competition on the application of Article 82 of the Treaty to exclusionary abuses p.17

[27] EAGCP p. 4 "In terms of procedure, the economic approach implies that there is no need to establish a preliminary and separate assessment of dominance. Rather the emphasis is on the establishment of a verifiable and consistent account of significant competitive harm, since such an anti competitive effect is what really matters and is already proof of dominance."

The Economic Advisory Group Report emphasizes that moving forward from a formalist approach to an economics-based approach had significant consequences with respect to procedure. According to the report, "*In a formalist approach, while first of all 1) the determination whether an undertaking is in dominant position and, 2) the determination whether it was in a certain type of behavior, are required, the verification of competitive loss is sufficient in the economics-based approach*[28]. The Report emphasizes that, concerning this issue, an *effects-based approach*, does not require the determination of the dominant position alone and separately, except the situations of de minimis, and in case of determination of the existence of a visible competitive harm, this was the proof of dominant position alone.

In the Report, it is stated that the traditional determinations of dominant position only indicated whether the undertakings were in dominant position or not and in case as a result of the *effects-based approach*, *indicates a loss, which may only be caused by an undertaking, which is in the dominant position, there would be no need to determine the dominant position separately*[29]. According to this approach, the traditional concepts in the application of Article 82 are not totally removed, yet they become a part of the procedure, aiming to determine the competitive harm only.

In its Report, Economic Advisory Group states that it referred to the provisions of Article 82 itself when diminishing the role of the separate assessment of the dominant position and Article 82 was related to the abuse of dominant position, instead of the dominant position itself. Therefore, according to the opinion of the Board, since a definition of the dominant position was not made even in Article 82 itself, it is emphasized that the application of the Article itself, instead of case laws would be more appropriate[30].

However, the Discussion Paper totally deviates from the opinion of the Board concerning this issue and just like in the traditional procedure; *it states the necessity to determine the existence of the dominant position separately and preliminary and adopts the traditional approach within this framework*[31].

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[28] EAGCP p. 12 "Moving from a form based to an effects based approach has importatnt implications for procedure. Whereas under a form-based approach, it is enough to verify (i) that a firmis dominant and (ii) that a certain form of behaviour is practised, an effects based approach requires the verification of competitive harm."

[29] EAGCP p. 14

[30] EAGCP p. 14-15

[31] Akman, Pınar "The EC Discussion Paper on the Application of Article 82" p. 6

"With respect to the Dominant Position, the Discussion Paper prefers to adhere to the existing situation, without adopting the innovations, brought by EACGP report. *Within*

The deviance of the Paper from the Report of EACGP in this way, is considered positive by the opinion-holders and because of this reason, it is emphasized that legal predictability and stability was provided to the undertakings[32].

By preserving the existing status quo in the Discussion Paper, as stated in many resolutions of the ECJ, such as *Hoffman-La Roche*[33], *United Brands*[34], *Continental Can BV*[35], the dominant position is expressed as *"the economic power of an undertaking, which allows it to prevent effective competition in the market, without considering its competitors, purchasers and consumers, by acting totally independent from these*[36]*."*

It is stated that the concept of independence, which is a specific nature of being in a dominant position is related to the level of the competitive pressure, exposed by the undertaking(s) in question. According to this, for the presence of a dominant position, related undertaking(s) must not be exposed to an effective

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this framework, the definitions and elements, used in determination of the dominant position have been quoted in the Paper."

[32] GIANNI, ORIGONI,GRIPPO&PARTNERS Comments on the European Commission's DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses "*In the Discussion Paper, the determination of dominant position, with priority, different than EACGP, is a positive approach.* Because, by this way, clarity is provided to the undertakings, which possess a limited market share that their actions would not constitute abuse and therefore would not be subject to the prohibitions of Article 82." Allen&Overy Comments on the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses p. 2 "*As Stated in EAGCP report, the adherence to the view that the determination of the dominant position may not be necessary, by the Discussion Paper, is positive.. Because, without the dominant position, punishment of the condition of abuse will be in violation of the application of Article 82."*

[33] Hoffman-La Roche, &Co. AG c/ Commission (Affaire 85-76) ve United Brands Continental BV de la Commission no. 27/76, Continental BV de la Commission no.27/76

[34] Footnote33.

[35] Footnote33.

[36] § 21 This definition of dominance consist of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on the market by (c) affording it the power to behave independently to an appreciable extent.

competitive constraints, in other words, this undertaking must posses a substantial market power[37].

In the Discussion Paper, it is reiterated that the ability to act independently from the competitors, customers and consumers meant the possession of substantial market share and the undertakings, which face the pressure of discounts, made by the competitors, were not in dominant position[38]. In addition, *provision of a profit, which is higher than normal*, will be accepted as an indication, pointing that the undertaking has not faced any competitive pressure[39].

However, along with the opinions, stating that the term, *higher than normal profit* must be clarified[40], there are also views, stating that the paragraph must be entirely deleted[41].

The Discussion Paper, concerning the term dominant position, emphasizes that *the competition in the market must not necessarily disappear totally and* for the determination of dominant position and this was not a condition for the application of Article 82[42]. (§ 27)

As it can be understood from the explanations, given above, the Discussion Paper tries to extract general principles, by combining the case laws, concerning the determination of the dominant position.

However, in many criticisms, brought to the text, it is contemplated that a broader explanation was required and in particular, it was necessary to provide examples for the application[43]. On the other hand, it is frequently reiterated that references to the resolutions of the Commission, which are already being criticized, was a great conflict.

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[37] The Discussion Paper defines the market power as the "power to influence the market prices, outputs, innovations, the variety or the quality of goods and services or other goods and services, for a significant period of time." (§ 24)

[38]AMCHAM EU (p. 3, paragraph9

[39] (§ 26) However, the Paper states that market power of an undertaking could not be measured with the profitability rate at a given time period, although the short-term profits do not correspond to the dominant position.

40 CROWELL&MORING p. 4 "*It must be stated that what excessive profit means and how this must be calculated.*"

[41] AMCHAM EU "*The Discussion paper can not explain the difficulty of the determination of normal or excessive profits under the economic conditions and why high profits were mostly compliant with the competitive profits.* Because of this reason, paragraph 26 must be deleted." (p. 4, paragraph 10)

[42] § 27Case 27/76 United Brands

[43] CROWELL&MORING

a) Single Dominant Position

As stated above, the Discussion Paper does not propose an approach, which is different that the current application, with respect to the determination of the dominant position, and only combines the existing application, by referring to the established case laws, concerning the issue.

In fact, in the Paper it is emphasized that there might be many factors, *which alone, were not decisive*, and within this framework a) the position of the undertaking in the market and the position of its competitors in the market, b) the presence of the obstacles in access to the market and the expansion in the market and c) the position of the purchasers in the market, must be considered[44].

i) The Market Position of the Undertaking, Which Is Allegedly In Dominant Position and Its Rivals

In the determination of the dominant position, as accepted within the framework of the case laws and applications, the Discussion Paper also emphasizes that the *market shares* was the starting point in the analysis of dominant position[45]. As emphasized in many decisions of ECJ, such as *United Brands* and *Hoffman-La Roche, in case an undertaking possesses a higher market share, compared to its competitors, for a certain period of time, this is accepted as an indication of the dominant position.*

In the Discussion Paper, the market share rates, to be used in determination of the dominant position, have been given. For example, in a situation, where an undertaking possesses 50 % or more market share, it is accepted that this undertaking has a dominant position, in case its rivals possess lower market shares. Other than this in various resolutions, the ECJ has accepted the shares between 40-45 % and 32-36 % as the indications of dominant market position, when the positions of the competitors are considered. However, it states that the undertakings, which possess 25 % or less market share, are not contemplated to be possibly in the dominant position.

In the Discussion Paper, it is also stated that factors, other than the market shares, such as the level of substitution of the products of an undertaking in a dominant position with the products of its competitors, must be considered.

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[44] Discussion Paper (§ 28)

[45] Discussion Paper (§ 29) "*At this point, along with the current market shares, the change of the market shares in time must be considered.. The dynamic structure of the market and similar structural features are considered in the analysis of the market shares."*

Although the Paper states that the market shares are considered to be only a starting point, still they are given great importance in the Paper and it is accepted that the market shares over certain limits, constituted a presumption for the dominance.

However, the fact that this did not correspond to the *effects-based approach*, intended to be implement with the Discussion Paper, is among the criticisms[46]. According to these criticisms, it is necessary to refrain from presumptions, based on market shares and all rates, concerning the market shares must be removed[47]. Also, the presumption, stating that a market share over 50 % provided a dominant position, provided that the competitors possessed lower market shares, weaken the economics-based approach and encourage unnecessary interventions by the competition authorities[48]. It must be clearly stated that the market shares alone were not the only indicator of the market power[49]. Even the shares over 50 %, must not be deemed automatically as the indicator of a dominant position and must be analyzed within the structure of the market[50].

Rather than display of the dominant position as a presumption for the presence of the dominant position, the recommendations include the necessity *to help to determine the thresholds, stating that there is no dominant position*[51] and the necessity of formation of safe harbors for the undertakings[52]

In addition, the Discussion Paper states that the undertakings, which possess a market share, less than 25 %, can not possibly possess a dominant position, it adds that while it is rare, the undertakings, which possess these rates, may possess a dominant position. In the views, related to the Paper, this rate was substantially lower than both US and EU applications, because in the EU, it is reported that the decisions, stating that the undertakings, possessing 30 % and 40 % market shares were exceptional. According to these views, the Commission must propose a market share of over 40 % in the determination of the dominant

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[46] Akman, Pınar p.6 "The criticisms, made concerning the market shares and the ones, defined in EAGCP report, have not been considered."
[47] MEDEF
[48] EVERSHEDS LLP
[49] AMCHAM EU(p. 3, paragraph 8)
[50] GIANNI,ORIGONI,GRIPPO&Partners
[51] JWP p. 5
[52] Simmons&Simmons p.3; CROWELL&MORING p. 4; AMCHAM EU p. 5, paragraph 15 "*Discussion Paper overemphasizes market shares with respect to the competitive importances of various undertakings..* (p. 4, paragraph 13) In Hoffman – La Roche decision it can not be explained why the market shares are proofs of the dominant position."; AMCHAM EU

positions and other than exceptions, the shares above this level must be accepted as the indicators of dominant position[53].

ii) Barriers to Entry and Expansion in Market

In the Discussion Paper, as defined in the established case laws and as currently accepted, the principle, "*in case the barriers to expansion faced by rivals and to entry faced by potential rivals are low, the fact that one undertaking has a high market share may not be indicative of dominance.*" is included[54] and as barriers to entry, legal obstacles, excess capacity, scale economy, the privileged access to providers, absolute cost advantages, highly developed distribution networks and similar elements are given[55].

Accordingly, the barriers to expansion or entry to the market, *which do not possess sufficient scope and magnitude,* may not impose pressure on relevant undertakings[56]. Within this framework, the discussion paper proposes a difference with respect to the obstacles for accession to and expansion in the market, with respect to dimensions. Therefore the presence of obstacles for accession to and expansion in the market is not sufficient and in addition, these obstacles must have reached a certain coverage and dimension. At this point, the fact that the Discussion Paper has adopted an arbitrary approach is criticized, because it is stated that it had to be determined which accession obstacles were of *"sufficient coverage and dimension"* which were not, yet this was not made[57].

iii) The Market Position of the Buyers

The Discussion Paper states that the presence of strong buyers in the market might act as an indicator of the extent to which they are likely to constrain the allegedly dominant undertaking.

In case the strong buyers in the market protect the market, along with protecting themselves in front of raises in prices (such as heading to the new companies in the market or providing the increase in production of other providers to combat with price increases), this situation will indicate that there is no dominant position[58].

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[53] United States Council For International Business Submission to the Directorate-General for Competition on the application of Article 82 of the Treaty to exclusionary abuses p.12
[54] Discussion Paper § 34
[55] Discussion Paper § 40
[56] Discussion Paper § 38
[57] Akman, Pınar p. 10
[58] Case T-228/97, Irish Sugar plc v Commission (1999)

It must be clarified under which conditions the different markets are defined. Otherwise legal uncertainty and distrust will occur[59].

b) Collective Dominance

The Discussion Paper also considers the Collective Dominance concept, proposed in various decisions of the ECJ. The Paper, which is based on the case laws of ECJ, defines the collective dominance as stated in the Case *Campagnie Maritime Belge Transport*[60], as, "*For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a particular market as a collective entity.*" The relevant undertakings must display equal attitudes from each perspective[61]. The important point is the possession of the ability to act independently from the competitors, customers and consumers at a certain level in the relevant market, by determination of a common policy[62].

For the determination of a collective entity in the relevant market, various factors, which lead to a link between the undertakings in question, must be considered. These factors may occur as a result of the nature and conditions or the application of an agreement, made between the parties[63].

However, for the determination of collective dominance, the presence of an agreement or other legal links between the undertakings is not necessary. Collective dominance may be caused by other unifying factors and in particular the economic structure of the market[64]. Within this framework, the structure of the market and the interactions of the undertakings in this market, prove the existence of collective dominance[65]. For example, in oligopolistic markets, the undertakings may significantly increase the prices over the competition level, without resourcing to an open agreement or harmonized actions. In the markets, in which economic conditions are simple and fixed, since the undertakings could harmonize their actions by monitoring the actions of each other and by reacting, it is easier for the undertakings to reach joint understanding.

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[59] ANTITRUST ALLIANCE
[60] Compagnie maritime document transports SA C-395/96 P and Compagnie maritime document SA and Dafra Lines A/S C-396/96 P (combined cases
[61] Case T-228/97, Irish Sugar plc v Commission (1999)
[62] Case T-68/94 ve C- 30/95 French Republic and Societe comercial des potasses et de l!axore ve Entreprise miniere et chimique (EMC) vs. Commission (1998)
[63] Case C-393/92 Almelo
[64] Compagnie maritime document transports SA C-395/96 P and Compagnie maritime document SA and Dafra Lines A/S C-396/96 P (combined cases
[65] Discussion Paper § 46

The determination of certain coordination in the market depends on the determination of certain factors, such as the case-by-case transparency level of the market, a sustainable common behavior, the lack of competitive pressure in the market. (§ 47-48-49-50)

The Paper is criticized due to uncertainties in the part, related to the collective dominance. According to these criticisms, the conclusion of the interpretation of the paper, is that the conclusion, stating that the undertakings were in a collective dominance due to the oligopolistic structure of the market, without any agreement and/or cooperation between them. Such a comment doubtlessly will lead the undertakings to find themselves in an unbearable uncertainty, without being aware of anything. Because of this reason, the structural/economic/contractual links, proving the presence of a common strategy, which will display the presence of a collective dominance, must be explained more clearly[66]. Otherwise, only a determination, depending on the structure of the market will be in question[67].

Another criticism, concerning the consideration of collective dominance in the Paper is that in case the determination of the collective dominance is not based on an agreement or a legal link, the undertakings in an oligopolistic market will be deemed theoretically in the dominant position in case the structure of the market causes the prices to increase over the competitive level and this approach is disputes and is not useful[68].

In addition, in an oligopolistic market, the undertakings may display parallel or independent behavior, in line with their own commercial concerns. It is stated that it would be difficult to distinguish such case from the concept of collective dominance[69].

6) GENERAL FRAMEWORK CONCERNING THE EXCLUSIONARY ABUSES

In the Discussion Paper, only the exclusionary abuse conditions are considered and other abuse conditions are mentioned only to the extent that they cause exclusionary effects.

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[66] ANTITRUST ALLIANCE p. 7, paragraph 44
[67] MEDEF; CROWELL&MORING p. 5
[68] AMCHAM EU p. 8, paragraph 19
[69] United States Council For International Business Submission to the Directorate-General for Competition on the application of Article 82 of the Treaty to exclusionary abuses p.17-19

Within this framework, the general framework to be followed is being drawn and the following titles are considered.

1) Predatory Pricing
2) Single Branding
3) Rebates
4) Tying and Bundling, and
5) Refusal to supply.

a) Main Concern and the Proof of Market Foreclosure

The Discussion Paper states that the main concern of Article 82 in regulating the exclusionary abuse conditions is consumer welfare. It is underlined that the main concern, is to prevent the exclusionary conducts of a dominant undertaking in the market which are likely to restrict the competitive restraints in the market, including the prevention of the access of the new undertakings to the market, and therefore to prevent the consumers to suffer damage. It is clearly stated that "*It is competition that is to be protected, not the competitors."* (§ 54)

The Paper underlines that the purpose of Article 82 was not to protect the competitors from the genuine competition of the undertaking, holding the dominant position, which yields consequences, such as high quality, better performance, instead the purpose was to allow the these undertakings to access to the market, to expand in the market or in other words, compete on merits and in fact Article 82 prohibited actual or possible exclusionary actions, which may directly or indirectly inflict a damage on the consumers and which may disturb the competition .

However, the most important criticism, brought to the term of competition on the merits is the fact that this term was a vague term and the acceptance of abuse, on the basis of this term, caused the reduction of examination to a formalist approach[70].

In the Discussion Paper, a presumption, stating, "Harm *to intermediate buyers is generally presumed to create harm to final consumers."* has been accepted. (§ 55) However, according to the received criticisms, this presumption does not correspond to an *effects-based approach*. Because in accordance with *effects-based approach*, the *welfare of the consumers*, which is taken as a basis, must be considered with respect to each case, and *an actual or possible harm with respect to the consumers* must be determined to determine an exclusionary

[70] Akman, Pınar p.11

abuse. Because of this reason, it is impossible to accept that there is an abuse just on the basis of a presumption[71].

In addition, in accordance with *effects-based approach*, not only the short-term losses, but also medium and long term losses must also be considered. However, since the determination of the *long-term losses* is different, the facts that this issue had to be defined in the Guidelines in detail and a high evidence standard had to be defined, are among the criticisms of the Paper[72].

The basic emphasis in the regulation of the exclusionary behavior of Article 82, is on the foreclosure conduct, which prevents hinders competition and thereby harms consumers.

Within this framework, the Paper proposes more detailed principled and case-specific tests, prepared for some situations. However, since sufficient data could not be provided, in cases, where the application of the tests or detailed principles is not possible, the Commission will consider the case, under the general principles within the framework of this main concern. (§ 56).

This regulation, included in the Paper, is criticized since it gives the commission a broad discretion. According to this, despite the presence of the compulsory power of the Commission to gather information, the conclusion that no abuse was present, had to be adopted in cases where sufficient evidence was not provided[73]. In other words, the Commission may not assume the presence of abuse due to lack of sufficient data and[74] it must be proven that the behavior constituted abuse under the conditions of the case with sufficient and concrete evidences[75].

Taking the abuse definition of the ECJ, adopted in Case *Hoffman-La Roche* as a starting Point[76], the Discussion Paper presents the main factors to be

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[71] JWP p.9

[72] CROWELL&MORING p. 5 United States Council For International Business Submission to the Directorate-General for Competition on the application of Article 82 of the Treaty to exclusionary abuses p.12

[73] Simmons&Simmons p.4

[74] Akman, Pınar p. 9

[75] JWP p.11

[76] Case 85/76 Hoffman-La Roche "*An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on a basis of transaction of*

used in the determination of the *exclusionary abuse*. However, while it is emphasized that an *effects-based approach* is adopted and the focus was made on the welfare of the consumers, on the other hand, there are criticisms, pointing to the conflict, caused by taking the definition of Case Hoffman-La Roche as a basis, which does not consider the harm consumers at all[77].

According to these views, this attitude could be easily understood from some behaviors, such as the single branding, with respect to some, the determination of whether this quality was present or not, requires a more detailed analysis. In particular, with respect to price-based abuse conditions, it may be difficult to make a distinction between the *deconstructive pricing application* and *pro-competitive pricing*. At this point, the Discussion Paper proposes the As Efficient Competitor Test for the analysis of price-based abuse behavior. The detailed explanation concerning this test will be given in the following parts.

After a conduct is determined to have the capacity, restricting the competition, secondly, it must be determined whether the behavior in question had actual or possible foreclosure effects on the relevant market.

Actual or potential competitors are completely or partially denied profitable access to a market

The term foreclosure of market is meant that the actual or potential competitors are completely or partially denied profitable access to a market. (§ 58) Therefore to conclude the foreclosure of the market, the competitors must not necessarily be forced out of the market. It is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively.

However, according to the criticisms of this approach, while the Commission constantly says that the competition had to be protected instead of competitors, the sufficiency of the disadvantageous position of the competitors is a conflict[78]. Because the disadvantageous position of the competitors, is not sufficient for a behavior to constitute abuse; because this situation may be in question even in case a strong or effective undertaking competes. At this point, the likely or actual harm to consumer welfare must be determined[79].

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commercial operators, has the effect of hindering the maintenance of the degree of competition stil existing in the market or the growth of that competition."

[77] Akman, Pınar p. 9

[78] AMCHAM EU p. 8, paragraph 22

[79] JWP p.9

On the other hand, in case the undertaking in the dominant position decreases the demand for the products of the competitors, it is stated that the foreclosure of market might be in question. However, this observation itself may yield punishment of competition on merits[80].

In addition, in the paper, it is accepted that the to establish such a market distorting foreclosure effect it is in general necessary not only to consider the nature or form of the conduct, but also its incidence, i.e. the extent to which the dominant company is applying it in the market, including the market coverage of the conduct or the selective foreclosure of customers to newcomers or residual competitors. (§ 59) However, to determine such disturbing effect of the behavior, it will not be sufficient to consider the behavior only with respect to the nature and the form of the behavior and in addition, *the reflection of the behavior on the market must also be considered*. Accordingly, it must be considered at what level the behavior covered the market. Other than this the market characteristics, such as the network effect, the scale or coverage economy, must be considered in the determination of the foreclosure effect.

On the other hand, in the Discussion Paper, as stated in the resolutions of the European Court of Justice, concerning *Compagnie Maritime Belge Transport* and *Irish Sugar*, it is stated that the degree of the dominance is also a factor to be considered.

Finally the Discussion Paper provides the opportunity to the undertakings to prevent the prohibition of such behaviors, providing that it is proven that a certain efficiency will be provided by the conduct which outweigh the negative effect of the behavior on the competition. According to the Discussion Paper, in case it is proven that a behavior, which is determined to have restrictive effects on competition, was an objective necessity, or was made to meet competition or the efficiency, to be provided by the behavior was eliminating the effect, which will disturb the competition, this behavior will not constitute an abuse. However, at this point the obligation of proof belongs to the undertakings.

However, this issue is heavily criticized, claiming that an unfair duty was imposed on the undertakings. According to these criticisms, the Discussion Paper modifies some presumptions and the obligation of proof in disadvantage of the undertakings, in a manner, which does not correspond with an *effects-based approach*, yet as stated in Article 2 of the Communiqué, numbered 1/2003, the obligation to prove whether a behavior constituted an abuse, is

[80] CROWELL&MORING s.5

imposed on the alleging party. Therefore it is stated that this regulation contained in the Discussion Paper lacked legal grounds[81].

As mentioned above, the Discussion Paper proposes many presumptions and this prevents the abandonment of formalist approach. Because of this reason, in the expressed opinions, it is stated that safe harbors had to be determined instead of these presumptions[82].

Another important criticism, concerning this issue, is the fact in the Discussion Paper, the consumer harm and the anti-competitive effects are considered as separate concepts. However, in the EAGCP Report, it is stated that a behavior might lead to the consequences, which violate the competition, only in case it harms to consumers[83].

b) Price-Based and Non-Price-Based Exclusionary Abuse Situations

In the Discussion Paper, exclusionary abuse situations are separated as price-based abuses and non-price-based abuses and it is stated that the effect would be in different form according to this nature of the behavior.

Based on the assumption that that the effect, to be caused by the price-based behavior will depend on the effectiveness of the competitor, the Effective Competitor Test is proposed for the determination of the nature and the effects of this behavior concerning the disturbance of competition. Accordingly, whether a price-based exclusionary behavior constituted abuse or not, will be determined in accordance with the hypothesis, "*only the price-based conduct, which eliminates as efficient competitor constitutes abuse.*"

The *As Efficient Competitor,* mentioned here is a "*hypothetical competitor having the same costs as the dominant company.*" (§ 63)

This test, proposed with the Discussion Paper, basically asks the following question: In the event that the dominant company itself would be the target of the exclusionary conduct would it be able to survive?

This basic question, naturally will occur in different formulas, according to the structure of the abuse behavior. When the dominant undertaking itself manages to compete under these conditions, this situation will prove that the behavior in question did not have the ability to disturb the competition and a safe harbor will be created for the undertakings. However, in case even the dominant undertaking can not compete under these conditions, in his case the Commission

[81] Simmons&Simmons p.4; JWP p.9; CROWELL&MORING p. 6
[82] JWP p.10
[83] Akman, Pınar p. 10

will conclude that this price behavior aimed the foreclosure of the market to the competitors and will examine the possible effects of this behavior on the market.

For the application of the test in question, "*price-cost*" test must be applied.

In the Discussion Paper, although all price basic abuse conditions are collected under the same group, different cost indicators have been determined for each condition. Within an *effects-based approach*, the usage of different cost indicators in determination of whether price-based behaviors will constitute abuse or not, is not a consistent behavior. For a more consistent approach, in all these conditions, the usage of a single cost indicator, and even AAC/ATC test, will be appropriate[84].

In the Discussion Paper, it is stated that for the application of "*As Efficient Competitor"* test, the Commission firstly would need reliable information concerning the price behavior and the cost of the dominant undertaking, yet it is stated these would not be sufficient, the sources, from which additional data could be provided, are given.

First of all, the necessity of examination of the turnover and costs of the dominant undertaking from a broader perspective, has been stated. With respect to the related product, it may not be enough to consider whether the price and the turnover covered the cost or not. In this case, for example, in cases where the behavior of the dominant undertaking negatively affected its turnover in another market with respect to other products, the incremental revenues must also be considered. In such two-sided markets, it may be necessary to consider the revenues and the costs of both products simultaneously.

Secondly, in case reliable data, concerning the costs of the dominant undertaking, can not be reached, it may be necessary to apply the *Effective Competitor* test on the basis of the effective competitors. (§ 67)

Thirdly, in case no information, concerning the cost data can be accessed, yet it is possible for the Commission to prove an abuse on the basis of some other reasons, it is possible that the dominant undertaking could show that its prices were below the appropriate price indicators.

Fourthly, in some cases, considering the interests of the consumers, *the protection of the competitors, which are not as effective as the dominant undertaking* may also be required. In these cases, the examination does not require only the comparison of the costs and prices of the dominant undertaking,

[84] Simmons&Simmons p. 1-2, JWP p. 12

but also the application of the *As Efficient Competitor* test under the market conditions, specific for the case.

However, at this point, the Commission is criticized for broad discretionary power and uncertainty. Because, according to these criticisms, the conclusion, obtained from the interpretation of the Paper, is that the Commission possessed a broad discretionary power in the determination of the effective competitor, as well as the dominant undertaking[85].

In addition, while the Discussion Paper claimed that the protection of the non-effective competitors could also be necessary, in some views, it is stated that it had accepted that in some cases, the protection of competition was integrated with the protection of competitors[86]. In addition, for the application of *As Efficient Competitor* test, it is supposed that many problems will occur with respect to the practical aspect in the phase of the collection of necessary information[87]. Because it is claimed that the Commission and the undertakings would be incompetent in the provision of information, necessary for the application of the test in many cases and therefore the test in question would leave too many open doors[88].

According to another criticism, made concerning the *As Efficient Competitor* test, although it is clearly emphasized that the aim of Article 82 was the consumer welfare and therefore the main focus was on determination whether the behavior was to the disadvantage of the consumer, this test aims to determine whether a certain behavior eliminates an effective competitor and does not consider the effect of the behavior on the consumer. Because the test does not propose any issues concerning the actual or possible consumer harm and focus more on the competitors[89].

On the other hand, it is stated that the borders of the definition of *As Efficient Competitor,* must be determined[90]. Within this framework, it is required that the *As Efficient Competitor* term must be matured and the issue concerning similar costs, must be clarified. Because, according to some criticisms, it is stated that even the exclusion of a non-effective competitor could damage the consumers, since such a firm could direct low prices[91]. In addition, dependence

[85] JWP p.12
[86] Akman, Pınar p.12
[87] MEDEF p. 6
[88] Allen&Overy p.3
[89] Akman, Pınar p. 10
[90] GIANNI,ORIGONI,GRIPPO&Partners p.6
[91] ANTITRUST ALLIANCE (p. 8, paragraph 60)

on a *as efficient competitor*, may not be realistic in some cases; in this case, it must be possible to depend on the criteria, such as effective competitor, as the dominant undertaking[92].

c) Vertical and Horizontal Market Foreclosure

In the analysis of the market foreclosure behavior in the Discussion Paper, it must be determined whether this action of the dominant undertaking targeted the competitors in the upstream market or in the downstream market.

In this case, two different groups, which may be called as upstream foreclosure and downstream foreclosure, occur[93].

The examples to the first group include *deconstructive price, single branding and rebates, tying and bundling.* The abuse behaviors, included in this group, are caused by the efforts of the dominant undertaking to prevent its competitors at the same level to reach the consumers and to drive them our of the market or to remove their ability to effectively compete in the market.

The behaviors in the second group include, *refusal to supply,* including *margin squeeze.* While in the behaviors, in the first group the dominant undertaking try to drive a competitor of the same level out of the market, in the behaviors of this group, the dominant undertaking try to drive the undertakings, which already exist in the downstream market or which are entering into the market.

d) Abuse of Collective Dominant Position

The Discussion Paper states that the determination whether the undertakings, which are in collective dominant position, abuse their dominant position or not, depends on the determination of whether these undertakings followed a common policy at least with respect to the behavior constituting the abuse. At this point, the Discussion Paper states that concerning the abuse of collective dominant position, with exclusionary behavior, the case laws of European

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[92] Akman, Pınar p.12

[93] The terms "Upstream Market" and "Downstream Market" are generally used to distinguish two different levels between the undertakings and the end consumers. Accordingly, the closer is an undertaking to the end consumer, it belongs to a lower group. However, in some cases, where both markets are at an equal distance to the consumers, the usage of these terms may not be appropriate. However in these cases, in case of provision of input from one market to another for a competitive benefit, the providing market is defined as "upstream market" and the market, which is provided, is defined as "downstream market."

Court of Justice had faced many incidents, in which there were strong structural bonds between the undertakings, forming the collective dominant position[94].

For example, the undertakings in collective dominant position may have determined a common policy to deprive their competitors from reaching the downstream market or to reflect excessive prices to the consumers. However, the abuse behavior must not necessarily be performed by all of these undertakings and the association of this behavior with one of the indicators of dominant position is sufficient[95]. This situation may be in question, for example, in case the undertakings in a collective dominant position have assumed different duties.

However, in the criticisms, concerning this title, it is stated that sufficient information was not provided in this section concerning the level of proof, with respect to the establishment of dominance. At this point, more explanatory information, concerning whether there are cases, in which Article 82 is applicable and 81 is not, is required[96].

e) Possible Defenses: Objective Justifications and Efficiencies

Efficiency defense is seen as the most important innovations, introduced by the Discussion Paper in the application of Article 82. According to this, in case the dominant undertaking *can provide an objective justification for its behavior* or it can demonstrate that its *conduct produces efficiencies which outweigh the negative effect on competition,* it will not be subject to the prohibitions of Article 82.

These defense means are divided into two groups as objective justifications and efficiency defense. The latter is a new concept and essentially based on the chance, given to the dominant undertakings to prove that the behavior of abuse possessed the conditions of exemption, given in Article 81(3). This defense has already been used in some decisions of the ECJ[97].

However, according to the new approach, the burden of proof belongs to the undertakings. In case of determination of the existence of abuse behavior by

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[94] Case T-228/97, Irish Sugar plc v Commission (1999) Compagnie maritime document transports SA C-395/96 P and Compagnie maritime document SA and Dafra Lines A/S C-396/96 P (merged cases)

[95] Case T-228/97, Irish Sugar plc v Commission (1999)

[96] ANTITRUST ALLIANCE p. 8, paragraph 60; JWP p.15

[97] Case 40/70 Sirena S.r.l.v. Eda S.r.l. and others [1971], Case 78/70 Deutsche Gramaphon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG [1971], Case 27/76 United Brands, Case 77/77 Benzine en Petroleum Handelsmaatschappij BV and others v. Commission [1978], Case T-83/91 Tetra Pak International SA v. Commission (Tetra Pak II), Case T-228/97, Irish Sugar plc v Commission (1999)

the Commission or other authorities, *the undertaking bears the legal burden of proof that necessary conditions for the application of these defenses had formed.*

The criticisms, concerning this point, arise from the fact that the imposition of the obligation of proof on undertakings. According to the criticisms, the undertakings must display the effects of their behaviors, leading to effectiveness and present documents and similar evidences related to this issue (evidentiary burden). However, the duty of legal determination of conditions (legal burden), must not belong to the undertakings, yet must belong to the Commission and/or to the Competition Authorities[98].

The obligation of proof on the undertakings is also criticized for lacking legal grounds. That is to say, the obligation of proof of the presence of the conditions, given in Article 81(3) is imposed on the undertakings in accordance with Article 2 of the Communiqué numbered 1/2003 of the Commission. However, no such duty has been proposed with respect to Article 82. Moreover, although the objective justification concept was existed when Article 82 was written, no such burden of proof has been imposed on the undertakings. In this case it is stated that the fact that the duty of proof was not left to the undertakings did not have any legal grounds[99].

On the other hand, the defense means, included in the Paper, have generally been welcomed, yet it is stated that broader explanation was required concerning the conditions, under which these defense means would be in question and under which conditions the reasons, to be presented by the undertakings would be deemed valid, must be further clarified[100].

f) Objective Necessity Defense

The objective justifications, mentioned by the Commission in the Discussion paper, are classified under two groups, *objective necessity* defense and *meeting competition defense.* Below, these issues will be addressed in detail.

In objective necessity defense, the undertaking must prove that the behavior was the requirement of objective factors, developing out of the control of the parties. In addition, these objective factors must be applicable to *all undertakings in the market* and the undertaking must prove that it would be

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[98] Simmons&Simmons p.5-7; ANTITRUST ALLIANCE (p. 8, paragraph 60)

[99] Simmons&Simmons p.5-7

[100] MEDEF-Observations on the draft guidelines proposed by the European Commission on the applicationn of Article 82 of the Treaty

unable to make production or distribution in the market. Here, the condition of indispensability is very strictly applied[101].

As example to the conditions, defined as objective factor, in the Discussion Paper, security or health reasons, caused by the hazardous nature of the product, are given.

This objective necessity test is criticized for possession of a very rigid coverage with respect to consideration of necessary factors for all undertakings[102].

In addition, from the interpretation of the Paper, it is understood that the performance of this defense by the dominant undertaking is virtually impossible. Because of this reason, the conditions, under which the Commission can accept this defense, must be clarified with more examples and clarifications must be provided with respect to the undertakings[103].

g) Meeting Competition Defense

The Discussion Paper states that in order to allege the "meeting competition defense" the dominant undertaking must prove that it protects its own commercial and economic interests against aggressive behaviors of its competitors. ECJ and the Court of First Instance have stated in many decisions that *the purpose of the undertaking to protect its own commercial and economic interests was a legitimate purpose, creating abusive behavior*[104]. In other words, the purpose of the undertaking to minimize its short-term losses against the competition, coming from the competitors, is deemed as a legitimate purpose. However, in the Paper, it is stated that this defense could only be used for *price-based abuse* conditions. On the other hand, this defense can not be applied to collective behavior and can be only applied to individual behavior.

Discussion Paper proposes a proportionality test for the application of this defense. According to this, the dominant undertaking must prove that the behavior is *1) suitable, 2) indispensable and 3) proportionate.*

First of all the undertaking must display that the behavior is *suitable* for a legitimate purpose. At this point, in case the selected behavior, for example, requires extra investment and in case the purpose of minimization of the losses, caused by the behaviors of the competitors, can not be determined, the

[101] Case T-30/89 Hilti, Case T-83/91 Tetra Pak II
[102] Allen&Overy p.3
[103] ANTITRUST ALLIANCE (p. 10) ; JWP p.16
[104] Case 27/76 United Brands, Case T-228/97, Irish Sugar plc v Commission (1999)

appropriateness of the behavior can not be in question. After it is determined that the behavior is appropriate, it must be determined that the behavior is *indispensable*, in other words, the undertaking must no be able to fulfill completely or sufficiently its legitimate purpose with another behavior. In front of the market conditions and the commercial truths of the dominant undertaking, it must prove that it did not have a behavior alternative, which might disturb the competition less, to minimize its losses. Finally, the dominant undertaking must prove that this behavior was *proportionate*. *With respect to the protection of then interests of the consumers in each case, this issue requires the measurement of the balance between the benefits in minimization of the losses of the dominant undertaking, and the benefits in accession of competitors in the market or their expansion in the market.*

The dominant undertakings also feel the need to respond to the competitive behaviors, they face, to compete with their competitors and to retain their customers. This emerges as a requirement of effective competition. Therefore, concerning the issue of a balance between the requirements of the effective competition and other requirements, the views, stating that the publication of additional guidelines has been commonly presented with respect to the Meeting Competition defense, which may be performed by the dominant undertakings[105]. Otherwise, such undertakings will face the risk of evaluation of these behaviors, which they contemplated as meeting competition, as abuse[106].

In addition, unnecessary restriction of the fields, in which this defense may be applied by the undertaking[107] and the fact that the dominant undertaking is only permitted to respond to the price rebates of its competitors[108] are criticized.

Other than this, it is stated that the satisfaction of the conditions for this defense was difficult. For example, the issue whether the behavior of a dominant undertaking constituted a proportionate response to the competition it faces, in the proportionality test, is evaluated as very vague[109] and in addition it is stated that it could constitute a right application risk[110].

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[105] CROWELL&MORING p. 6
[106] Allen&Overy p.4
[107] EVERSHEDS LLP
[108] Akman, Pınar p.13
[109] ANTITRUST ALLIANCE (p . 10)
[110] JWP p.16

h) Efficiency Defense

Different than other defense situations, efficiency defense is not based on objective factors, instead is based on the measurement of positive and negative aspects of the behavior, which constitutes abuse and in case of the positive aspects overweight the exemption of the behavior in question from the prohibitions of Article 82, is provided. Therefore, due to the focus of the *effects-based approach* on the actual or possible effects of the behavior, a harmony has been provided between the rigidity of the competition rules in Article 82 and the consumer welfare and it has been aimed to provide fair and more beneficial consequences with respect to economic aspect.

In the Discussion Paper, it is stated that the undertakings had to prove the fulfillment of four conditions together for the claim of *efficiency* defense. Although these conditions, which will be defined below, have not been described in detail in the Discussion Paper, they are similar to the conditions, sought for exemption under Article 81(3).

In the relevant case, the undertaking must prove the following:

1. that efficiencies are realized or likely to be realized as a result of the conduct concerned;
2. that the conduct concerned is indispensable to realize these efficiencies;
3. that the efficiencies benefit consumers;
4. that competition in respect of a substantial part of the products concerned is not eliminated.

In case it is proven that these four conditions are satisfied together, the consequence of the behavior in question will be the substantial increase of competitive process.

Within this framework, the dominant undertaking first of all, must display that its behavior *aimed improvement in production or distribution of products, the development of technical and/or economic process with results such as improvement of quality or decrease of costs and the provision of any other benefits,* and focused on this consequence.

Secondly, such behavior of the undertaking must be indispensable to achieve the alleged efficiencies. At this point considering the current market conditions and commercial facts, the obligation to prove that there was no other behavior alternative, which is more practical and less restrictive with respect to economic aspect, belongs to the undertaking. However, the undertaking is not expected to display theoretical alternatives. Commission may object to this

defense of the undertaking, only in case the presence of the actual and accessible alternatives is reasonably obvious. In this case the undertaking must explain and display that the behaviors, which seem realistic and less restrictive, will be less effective.

Thirdly, the undertaking must prove that the benefits, to be caused by the behavior, will overweight the *negative effects of the behavior in question on the competition and the consumers.*

Starting from the fact that the purpose of the competition rules was to protect the competition with a focus on the provision of the welfare of the consumers and the effective distribution of resources, the Discussion Paper, states that the reflection of the positive consequences of the behavior in question will be at least sufficient to compensate the actual or potential loss of the consumer, due to this behavior. At this point, it must be stated that the benefits, to be obtained by consumers in the future, will not be the same with the benefits currently obtained. In general, the later the benefits, arising from the behavior, are expected to occur, the less likely the Commission will consider these. Therefore, the realization time of the benefit, arising from the behavior, must be realistic.

The reflection of the benefits of the behavior of the dominant undertaking is in general related to the presence of the competitive restraints, caused by the undertakings, which have just entered the market. (§ 90) The lower the actual or possible negative effects of the behavior on the competition, the stronger will be the conclusion of the Commission that the claimed benefits are significant and will be reflected on the consumers sufficiently. Within this framework, it is hard to say that the benefits, to be caused by the behavior of an undertaking, which possesses a market power close to a monopoly, will exceed the negative effects of such behavior and therefore provide benefits for the consumers.

Finally, *it must be proven that the behavior of the undertaking will not eliminate a substantial part of the competition in the relevant market.* The assumption that the effective competition between the competitors was the fundamental impetus of the economic efficiency lies beneath this condition. Within this framework, as considered above, the dimensions of the market power of the undertaking must be considered. Because as the market power grows, the effect of the behavior on the market will also increase and at this point it is hard to say that the substantial part of the competition will not be eliminated. Within this framework, in case an undertaking possesses a market power of more than 75 %, it is accepted to have approached the power of

monopoly and it is possible to say that under these circumstances, there is virtually no competition in the market by other competitors in the market[111].

The *efficiency defense in the* Discussion paper is criticized firstly for the proposition of application of the conditions of Article 81(3). It is stated that there was not a fundamental principle for the application of the exemption conditions with respect to the application of Article 82 and contrary to as specified in the Discussion Paper, a basic principle was not introduced in the case laws of the European Court of Justice, concerning the issue. On the other hand, since there are no two-stage tests in the application of Article 82, and only the determination of the abuse condition was made, it is stated that whether the behavior will provide efficiency or not had to be considered within this analysis. In addition, the application of the two-stage test, proposed for Article 81 in here, is stated to be a strict and unnecessarily intervening approach with respect to Article 82[112].

According to another criticism, the efficiency defense must be considered automatically in the analysis of abuse. In other words, when it is determined that a behavior did not constitute abuse, instead of determination of abuse first and then evaluation of the presence of the conditions, concerning the efficiency defense, the presence of these conditions must be considered in the analysis of presence of abuse[113]. In addition, when this is made, it must not be limited as a reason for defense, the obligation of proof of which belongs to the undertakings[114]. The obligation to provide evidence must be imposed on the undertakings in some exceptional cases, but other than this, the effectiveness issues must be considered by the Commission itself.

Besides, in some received, it is stated that the application of the criteria, proposed in Article 81(3) could be erroneous, and why the consumers should be deprived of various benefits for the protection of non-effective competitors, could be questioned[115].

According to the Discussion Paper, the dominant undertaking is obliged to prove that there are no alternatives, which are less anti-competitive and economically applicable, when defending the necessity of its actions. However, this necessity is criticized for ignoring the commercial facts. According to this, the undertakings may not be expected to evaluate whether they have alternatives,

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[111] Irish Sugar plc v Commission (1999), C 85/76 Hoffman-La Roche
[112] Simmons&Simmons p.5-6
[113] GIANNI,ORIGONI,GRIPPO&Partners
[114] JWP p.13
[115] Allen&Overy p.4

which have less effects on their competitors; because this application may cause the undertakings to quit their applications to increase efficiency[116].

According to another view, the imposition of the obligation of proof on the undertakings concerning the issue that a certain behavior yielded certain activities may cause the firms to refrain from such actions. Therefore, it will be more appropriate to request evidence from the undertakings, after the determination of the positive consequences of the behavior as well as the negative consequences, by the Commission or the Competition Authorities[117].

In addition, the condition of necessity is evaluated as a very high standard in efficiency defense. According to the related criticisms, when an undertaking is able to perform more than one behavior, it is stated that it would be unrealistic to expect the undertakings to use their resources to determine which behavior would have less effect on the competitors. Consequently, it is claimed that this issue was an indication that the purpose of protection of competitors was considered superior to provision of effectiveness.

The Discussion Paper is heavily criticized since its proposition concerning the exclusion of near-monopoly undertakings from efficiency defense can not be corresponded with the fundamental purpose of the paper. According to the criticisms, the inability of the undertakings, which possess more than 75 % market share, display a formalist approach, instead of *effects-based approach*[118]. Accordingly, possession of a market share of 75 % alone must not be sufficient to prove the presence of a monopoly and this rate must only be accepted as a starting point and the behavior of the undertaking must be considered on a case-by-case basis[119]. Even some views state that this rate must be at least 90 %[120]. In this case it is stated that it was difficult to determine the issue, whether the effectiveness claims should be perceived as efficiency defense or a factor, which further increases the gap between the less effective undertakings and the dominant undertaking, with respect to the undertakings, which possess the dominant position[121].

From this point onwards, The Discussion Paper explains specific abuse of dominance behaviors. However, providing the evaluation of the general

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[116] AMCHAM EU
[117] United States Council For International Business Submission to the Directorate-General for Competition on the application of Article 82 of the Treaty to exclusionary abuses p.17-19
[118] AMCHAM EU, Akman, Pınar p.15
[119] JWP p.6
[120] Simmons&Simmons p.3
[121] CROWELL&MORING p. 6

principles of the reforms is considered to be sufficient for our purposes. Therefore, we will start our evaluations on the Turkish experience and possible effects of the reform in Turkish competition practice.

7) DOMINANT POSITION CASES IN TURKEY WITH RESPECT TO THE LAW NO: 4054

The Competition Authority follows the traditional approach of EU Commission, since the source of the Law on the Protection of Competition No: 4054 is the EU competition rules.

a) Market Definition

As in the traditional approach of EU, the Competition Authority starts its assessments on the Article 6 with the definition of the relevant market. The criterion of substitutability is the basis of its determination. In this regard, the relevant product market covers all products and/or services, which are deemed exchangeable or substitutable by the consumer with respect to the nature, prices and usage purposes of the products.

Coca Cola Decision of the Competition Board is one of the cases where economical techniques were used for the determination of the relevant product market. By considering the criteria of substitutability, the Competition Board has said, in this decision[122], *"within the framework of the definition of the relevant product market, to determine which of the product groups in question could be determined in the same products market, first the usage purposes of the products in question must be determined."* In this regard, the products in question; are first of all considered within the group of non-alcoholic commercial drink products. This product group in general, carbonated drinks, fruit juices, fruit aromatic juices, mineral water, soda water, hot drinks, ice teas and coffees and milk. Afterwards, in order to determine whether these groups could be divided into subgroups, two economical tests of Multiregression Analysis and Granger Test for Causality were applied. These two tests provided the results indicating that products within the carbonated drinks groups are substitutable in the eyes of the consumers, in this respect showed that cola does not constitute a separate product group. In the light of these information, the relevant product market was defined as the non-alcoholic drinks market.

[122] Competition Board Decision, dated 23.1. 2004 and numbered 04-07/75-18

b) Dominant Position

After the definition of the relevant market, whether the undertaking under investigation is dominant in the relevant market is determined. The Board refers to the definition of the dominant position in the Article 3 of the Competition Law and states that: *"... the definition of the Dominant Position has been made in Article 3 of the Law, titled Definitions. Accordingly, the Dominant Position expresses the power of one or more undertakings in a certain market to determine the economic parameters, such as price, supply, production and distribution quantities, by acting independently from their competitors and customers."*

In Turkcell decision[123,] it is stated that the high market share criteria alone would not be sufficient alone to determine the dominant position of the company in the relevant market, and the obstacles of accession and the vertical integrity advantages, providing the company a certain behavior freedom in the market, had to be considered as well. *"It was observed that Turkcell managed to preserve its position in the market for a long time, not only due to its high market share, but also the obstacles in accession, vertical integrity advantages and the size and the prevalence, which provide a certain freedom of behavior in the market and it possessed a freedom in the market behaviors in the GSM services market for a period of six years, which would not occur under competitive conditions, and under all these indications, Turkcell possessed the power to determine the variables, which play a decisive role on he demand in the GSM services market (subsidy amounts, line supply, etc) largely in line with its own strategies, "acting independent from its competitors and customers," in accordance with the definition of the dominant position, given in Article 3 of Law numbered 4054, and therefore Turkcell was determined to be in dominant position within the framework of Law, numbered 4054."*

The assessment of dominant position with regard to the market share criteria, the Board also decided that TürkŞeker with a market share of %80[124], Tüpraş with a market share of %86 in the refining capacity and %78 in the product sales are in dominant position in their relevant markets[125].

However, in the above-mentioned Coca Cola Decision, the Board first decided that due the competitive pressure of Pepsi Cola in the market, Coca Cola does not hold a dominant position despite the high market share of Coca Cola,

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[123] Competition Board Decision, dated 20.7. 2001 and numbered 01-35/347-95.
[124] Competition Board Decision, dated 13.08.1998 and numbered 98-78/603-113.
[125] Competition Board Decision, dated 16.042002 and numbered 02-24/243-98.

then in another decision decided that it is dominant despite the existence of other competitors in the market[126].

c) Collective Dominance

For the aim of restricting the competitive forces of the rivals or in order to prevent entry into the market, sometimes the undertakings come together without the existence of an agreement. In order t establish a collective dominance, existence of a small number of undertakings that are able to coordinate their behaviors so that they can act as a single undertaking should be shown.

The Competition Board has defined the dominant position with two types of approaches. In accordance with the first approach, the criteria of sole dominant position are taken as a starting point and the market shares and other qualitative measures of the undertakings, possessed as a result of the relations, established by the undertakings, which do not possess the dominant position alone, with each other, are being evaluated. In fact, this approach is in line with the approach of the European Court of Justice. The BİMAŞ Decision of the Board[127] may be given as an example to this issue. The Board here has stated that in order to determine whether DTV and SATEL possessed a dominant position collectively through BİMAŞ, established by them, it had to be analyzed whether they were in dominant position separately or collectively and within this framework, it has determined the separate market shares of the undertakings in question and then has considered the market shares, which is the sum of these and has resolved that this could not constitute a dominant position. The decisions of the Board, concerning Hürriyet, Sabah, Bursa Gazetecilik, Olay Basın[128] and BBD, BIRYAY& YAYSAT[129] are also within this framework.

The second approach of the Board is the determination of the dominant position by taking the concept of oligopolistic market as a starting point. In case the relevant undertakings are in an oligopolistic market, the Board adopts decisions on the basis of this structure. Concerning this issue, the Emlak Bankası and Koçbank resolutions of the Board are basic examples.

In its Emlak Bankası decision, the Board has defined the dominant position together with the abovementioned three forms and concluding that the first two were out of the question with respect to the case, and therefore an examination had to be made with respect to the third form, it has made the

[126] Competition Board Decision, dated 26.05.2005 and numbered 05-36/453-106.
[127] Competition Board Decision, dated 01.02.2000 and numbered 00-4/41-19.
[128] Competition Board Decision, dated 5.9.2000 and numbered 00-33/356-200.
[129]Competition Board Decision, dated 17.7.2000 and numbered 00-26/292-162.

following statements: *"in oligopolistic markets, even if there is no agreement between the undertakings, they may be in a Dominant Position as a requirement of the market structure. When the presence of the market structure, which will support the possibility of possession of Dominant Position, it is seen that there were 74 undertakings, operating in the market and considering the comparative sizes of these, it is seen that it was impossible to define this market as a narrow oligopolistic market for the formation of a Dominant Position."* The theme of the decision is that the Board was looking for the presence of an oligopolistic structure in the narrow sense for the presence of Dominant Position. The Emlak Bank[130] and Koçbank A.Ş.[131] decision of the Board is parallel.

In the National Roaming Decision[132], the Board has emphasized that Turkcell and Telsim, which have reached a coverage area of more than 90 % in the GSM infrastructure services market, which constitutes the relevant market, possessed a collective dominant position. Since the two undertakings, which entered the GSM services market after obtaining a license (IŞ-TİM and Aycell) did not possess a network, covering entire Turkey, it is stated that they could not access to the GSM infrastructure services market.

In particular, in the sectors, such as telecommunication, which possess specific qualities (scale economies in production and consumption, the universal service obligation, etc), the sui generis nature of the analysis in question becomes important. Because of this reason, the Board has stated that the lack of effective competition in the relevant market (GSM infrastructure services) and the adoption of a regular and common behavior model or a common policy by such undertakings in the relevant market, were the elements, sought for the determination of the dominant position.

d) Exclusionary Abuses

i) Predatory Pricing

The decision of the Board, in which it has explained its approach concerning price-cost and it has analyzed variable and fixed cost items, is the Coca Cola Decision[133]. Concerning the issue, in its Frito-Lay decision[134] the

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[130] Competition Board Decision, dated 20.05.1999 and numbered 99-24/211-124.

[131]Competition Board Decision, numbered 02-15/165-69.

[132] Competition Board Decision, dated 9.6.2003 and numbered 03-40/432-186.

[133] In the Coca Cola decision, dated January 23, 2004 and numbered 04-07/75-18, it is stated that to avoid the destructive price claims, the variable expenditures in the cost table could be displayed under the fixed value item, and the average variable cost value could be deceitfully displayed lower than it is. In the decision, the cost items have been considered in detail. Fuel or financing (short-long term bank loans) expenditures, which

Competition Board has emphasized the element of intention in the evaluation of the deconstructive price application. And the main abuse was predatory pricing via cross-subsidization in the ISS investigation[135].

In the Frito-Lay decision, the statements, *"when price-cost analysis for the deconstructive price, is made, the starting point is constituted by the average variable cost concept. In case the price is lower than the average variable cost, the suspicion of the presence of deconstructive price arises. In case this suspicion is reinforced by the intention to drive the competitors out of the market or to make their operation more difficult, this points to the presence of deconstructive pricing also in the regulation applications... The two exceptions of the evaluation of sales below cost, may be states as the promotional activities and monitoring the competitor. Sales price, below the variable average cost, is acceptable in the pricing policy, maintained within the framework of a certain promotion activity for a certain period of time"* the Board has emphasized the element of intention.

In the of ASKİ Decision[136], *"the purpose of the undertaking, to drive its competitors out of the market or to prevent accessions to the market, are basic elements in determination of deconstructive price application."* In the ISS Decision, *"determination of a price below the costs, with the intent of driving the competitors out of the market, is deconstructive pricing"* and decided that the these undertaking have violated the Article 6 of the Competition Law.

ii) Tying and Bundling

In Turkcell Decision[137], the Board has resolved that, by working exclusively with GSM cellular phone distributors or by making these dependent to itself, therefore restricting the realization of similar campaigns by these distributors to other operators and therefore restricting the devices, belonging to these distributors, with the lines of other operators, by working exclusively with activation centers, which are the at the same time the dealers of the abovementioned distributors, most of which are abovementioned exclusive and dependent distributors, by making the operations of competing operators in the market more difficult; on the basis of the dominant position of Turkcell in GSM

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have been displayed within the fixed items, yet, which in some cases, may possess variable expenditure nature has been evaluated as fixed expenditures with respect to the nature of the incident and it has been concluded that there were no deceitful displays.

[134] Competition Board Decision, dated 29.02. 2000, numbered 00-9/89-44.

[135] Competition Board Decision, dated 9.6.2003 and numbered 03-40/432-186.

[136] Competition Board Decision, dated 8.8. 2002, numbered 02-47/587-240.

[137] Competition Board Decision, dated 20.7. 2001, numbered 01-35/347-95.

services market, as a result of the discriminating applications among the distributors, operating in the cellular phone market, by causing the distributors, which do not work exclusively with it to become disadvantaged in front of the distributors, working exclusively with it, by using its dominant position to reinforce the position of KVK Mobil Telefon Sistemleri A.Ş. (KVK), which is in an economic integrity with it, in the cellular phone market, and by restricting the competition in the cellular phone market in disadvantage of the distributors, which are competitors of KVK, as a result of the application, stated until this point, by restricting the usage of the cellular phone brand of the choice of consumer with the network of the choice of consumer, it has been resolved that Turkcell has violated a violation within the framework of Article 6 of the Law numbered 4054.

In Densay Decision[138], the Board established a "vertical" relation between the port and the owner of the cargo, which are the undertakings of different levels of economy, pointing to the presence of an input/output relation. The port contract, establishing this relation, constitutes an example of the contracts, called as vertical agreements in the competition law. The determination of Densay A.Ş. as an agency in the port contract is an example to the violation, called as "tying" in the competition law, which means the obligation to purchase a certain goods or service together with another goods or service. When Liman A.Ş. provides port services to the owners of cargo, it stipulates the condition that the agent should be Densay A.Ş. The fact that the port is the strong party in the contract, signed by the owner of the cargo, allows it to determine the contract provisions unilaterally.

iii) Refusal to Supply

In its Tüpraş decision[139], the Board stated that; "the refusal to buy of the dominant buyer from its long-term customers without an objective justification; or to make the activities of its competitors' more difficult or to restrict competition in the upstream or downstream markets constitute a violation within the meaning of Article 6 of the Law."

Another decision in which the Board has focused on the intention of restriction of competition of refusal to supply behaviours is TKİ Decision[140]. In this decision, it is stated that "it should be considered that whether the dominant undertaking is also active in its customers market, in the determination of

[138] Competition Board Decision, dated 16.5.2002 and numbered 02-29/339-139.
[139] Competition Board Decision, dated 16.04.2002 and numbered 02-24/244-99.
[140] Competition Board Decision, dated 19.10.2004 and numbered 04-66/949-227.

intention or effect of the restriction or abolition of competition in the market by way of refusal to supply."

e) A Short Evaluation for Turkey

When the above-mentioned decisions are analyzed, it can be observed said that the Competition Authority generally follows and applies the traditional assessment methods. It is not very possible to say that quantitative techniques were applied or the effect on the consumer welfare is measured. In this respect, it can be easily said that application of the competition rules may face similar criticisms.

Starting from this point, the question of what should be done in Turkey can be answered in the following manner: The most convenient way to start is the assessment of 10 year history of the competition practice of the Authority. In this assessment, it is useful to monitor the markets during and after the investigations. By doing that, it will be possible to determine effects of the behaviours of the undertakings on the competition level of the markets and on the consumer welfare.

At this point, one example can be given as follows: During the ISS Investigation (before the investigation), there were approximately around 80 internet service providers. However, after the predatory pricing and other exclusionary behaviours of Türk Telekom, today there only a handful of service providers left in the market today. Moreover, TTNet (ISS of Turk Telekom), criticized of its anticompetitive behaviours, currently holds the highest market share.

An analysis on the costs and prices will yield some other interesting results as well. The prices of TTNet are still low. But when the speed of market growth is considered, this growth is only dependent on the investments or activities of Türk Telekom (or TTNet) only. This market is not under any competitive pressure from the competitors, since there are technical and economical barriers to competition for the competitors of Türk Telekom due to the behaviours of TTNet. Especially the quality, speed and coverage of ADSL[141] service is far below the actual demand. This is the result of competition depending on low prices. As a result, Turkey is left far behind both the developing and developed countries and this picture obviously demonstrates the adverse affects on the consumer welfare of Turkish citizens.

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[141] Competition Board Decision, dated 29.01.2004 and numbered 04-09/82-22 numbered and dated 02.09.2004 and numbered 04-57/796-199.

8) CONCLUSION

The *effects-based approach* foreseen in the Discussion Paper drafted by the Commission regarding the reform of Article 82 has been generally welcomed by the relevant parties. In the meanwhile many academicians, trade associations, companies, institutes, bars and similar institutions gave their opinion regarding this matter. The majority of the critics against the Paper is concentrated on the fact that some principles of the Paper are not compatible with this new approach, the Paper still contains many formal tests and companies have serious burden of proof. Therefore, additional guidelines to be issued are requested in order to clarify insufficient and undetermined points.

It is obvious that these above-mentioned critics will guide the Commission and the success of this new approach depends on how seriously the Commission will consider these critics.

In this point, it is necessary to ask ourselves the question how Turkey should take lessons from this Paper. EU, with the leadership of USA, bases the consumer welfare for the application of the competition rules and revises its competition policy within this scope.

We have mentioned that Turkey has 10 years of past for the application of the competition rules. Considering the changing conditions, Turkey always needs a roadmap of the competition policy. Therefore, firstly, the effect analysis of the Board decisions regarding the Article 6 until now should be useful for the determination whether or not the Article 6 of the Competition Act is effectively applied. If this work is done, the disruption of the application of the Turkish Competition Law will clearly appear.

After this analysis, within the scope of the results, The Competition Board should realize necessary regulations for a more effective competition policy as soon as possible, after having gathered the public opinion. This work has a vital importance for the reputation of the Competition Board before companies and consumers and the main objective of increasing the consumer welfare due to the protection of the competition.

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READOPTION OF THE CANCELLED DECISIONS OF THE COMPETITION BOARD*

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INTRODUCTION

The legal procedure to be followed in the event of cancellation by the Council of State of the decisions of the Competition Board (the "Competition Board" or the "Board"), adopted in a meeting attended by the investigating member who also casts a vote is a legally controversial subject.

As known, the Council of State decided that it was against the principle of "impartiality" if the Board members who conduct the investigations attended and cast votes in the final decision meeting, and all decisions of the Competition Board contested within due time were cancelled on this ground. Following such decision of the Council of State and the cancellation of the decisions of the Competition Board, the Law dated 02.07.2005 and no. 5388 was enacted to amend the related articles of Law no. 4054 on the Protection of Competition (the "Competition Law" or the "Law"). However, the Competition Board started to readopt the same decisions cancelled by the Council of State, based on the same file and the sane investigation report, but only without the attendance of the Board member who chaired the investigation committee.

Examination of the legality of this procedure followed by the Competition Board requires an analysis of the relevant Council of State decisions and the principles of administrative law. We would like to mention that the aim of this paper is not the determination of right or wrong method, but to open this important issue to discussion.

In its tenth anniversary, it is now obvious that great efforts and works were needed for the Competition Authority to become as it is now. On the other hand, it is not only Competition Authority's desire that competition culture is built in Turkey, and that competition law develops, but it is our common desire

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too. And, this, first of all, undoubtly serves the very best of public interest. Therefore, what is aimed in this paper is not to criticize practises of the Competition Authority, but to timely raise concerns about a matter of which legality is controversial.

In this context, we aim to discuss this issue from the perspectives of administrative and competition law and try to reach a common conclusion.

I. THE DECISION-MAKING PROCESS OF THE COMPETITION BOARD AND RECOURSE TO JUDICIAL REVIEW

Set forth below are some general information regarding the making of Board decisions.

A. The Decision-Making Process of the Competition Board

The procedure to be followed by the Competition Board is in inquiries and investigations set forth in section four of the Competition Law. Accordingly, in order to be able to impose a fine against the involved parties, the Board first must conduct a preliminary inquiry for determining whether there is a violation of competition, then open an investigation about the parties according to the findings of the preliminary inquiry (sometimes the investigation can be started without conducting a preliminary inquiry), grant the parties the right to defence duly in accordance with the Law and grant the parties with the opportunity to reply to the claims against them two separate times (first, when they receive the written notice on opening the investigation, and second, in reply to the investigation report). Following the submittal of the second written defence by the parties, there is a stage of submitting additional written plea and reply to the additional written plea. Following the submittal of the reply to the additional written plea, a hearing is held to listen to the oral defence mostly upon the request of the parties and the parties are granted with the right to defend themselves before the member of the Board. The Competition Board may make a final decision only after duly completing all these stages.

To describe the aforementioned procedure in the words of the Law, the Board, first of all, "*on its own initiative or upon the applications filed with it, the Board decides to open a direct investigation, or to conduct a preliminary inquiry for determining whether or not it is necessary to open an investigation. ... Should it be decided to conduct a preliminary inquiry, the Chairman of the Board assigns one or more of the experts among the professional staff as reporters…*" We should mention at this point that the former wording of article 43 before the amendment made by the Law dated 02.07.2005 and no. 5388[1] was

[1] Published in the Official Gazette dated 13 July 2005 and dated 25874.

as follows: *"If it is decided to perform an investigation, the Board also designates the member or members of the Board who shall conduct the investigation together with the reporter or reporters commissioned."* The relevant article of the Law was amended following the cancellation decisions of the Council of State discussed in this article -as will be discussed in more detail below- and the practice of conducting the investigation by a member of the Board was terminated.

The procedure to be followed after the investigation is initiated is described in articles 43, 44 and 45 of the Law: *"The investigation is concluded within 6 months at the latest… The Board notifies the parties concerned of investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days. In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims… The Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense. …The report prepared at the end of the investigation stage is notified to all members of the Board and the parties concerned. Those determined to have infringed this Act are notified to submit their written pleas to the Board within 30 days. Those charged with conducting the investigation declare an additional written opinion within 15 days against the pleas to be submitted by the parties, and this is also notified to all members of the Board and the parties concerned. The parties may reply to such opinion within 30 days…"*

A hearing for oral defense is held following the completion of all these stages -when the parties declare in their replies or pleases that they want to exercise the right to oral defense or when the Board ex officio decides to hold a hearing for oral defense. The decision is made on the same day after the hearing, or if not possible, within 15 days, together with its grounds. However, *"...In cases where a hearing is not requested by the parties, and the Board does not decide to hold a hearing on its own initiative, the final decision is made within 30 days following the end of the investigation stage, pursuant to the examination to be performed on the file…"*

At this point, it would be useful to quote the reason for the dissenting opinion of the Competition Board member Sıraç Aslan to some recent decisions of the Competition Board[2]: *"...Procedural rules are the rules related to the*

[2] Decisions of the Competition Board dated 02.10.2006, No: 06-68/926-265; dated 02.10.2006, No: 06-68/927-266; dated 03.10.2006, No: 06-69/930-267; dated 03.10.2006,

necessary stages of an administrative act in order to be in effect in the legal order. These rules must be complied with in order for an administrative act to be legally in effect. Turkish Administrative Law System does not yet have a general Administrative Procedure Act regulating the procedural rules applicable to all administrative acts. There are procedural laws setting forth the applicable procedural rules for some service areas and there are also procedural rules regulated by some material laws. Articles 43 and 44 of the Law no. 4054 on the Protection of Competition is a material law in this sense, which sets forth procedural rules. That importance of compliance with the procedures and form rules already set out in law and even the objective and feature providing a guarantee for individuals of this situation has been importantly emphasised by the Council of State-even in its first decision regarding decisions of the Competition Board.

B. Recourse to Judicial Review of the Decision of the Board

Recourse to judicial review against the decisions of the Board is set forth in article 55 of the Law. According to that provision, appeal may be made to the Council of State against the final decisions, precautionary decisions, fines and periodic fines of the Board, within 60 days after the notification of decision to the parties. Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines.

The decisions of the Competition Board were reviewed by the 10th Division of the Council of State until 2005 when the 13th division which is a specialized division was established. Following the establishment of the 13th Division, all cases were transferred to that division. The decisions of 13th Division of the Council of State regarding such cases which it hears as a first degree court of appeal can be contested/appealed at the Plenary Session of the Administrative Divisions of the Council of State.

II. ATTENDANCE OF THE CHAIRMAN OF THE INVESTIGATION COMMITTEE

As it is known, before the amendment made with the Law dated 02.07.2005 and no. 5388, the Competition Law contained the following provision: *"…"If it is decided to perform an investigation, the Board also designates the member or members of the Board who shall conduct the investigation together with the reporter or reporters commissioned."* Indeed, a Board member was designated in practice to conduct each investigation, and that

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No: 06-69/931-268; dated 07.12.2006, No: 06-88/1136-333; dated 07.12.2006, No: 06-88/1137-334.

member, as the “chairman of the investigation committee” participated in the preparation of the investigation report and the additional opinion.

A. Cancellation Decision of the Council of State

In the first half of 2005, the Plenary Session of Administrative Divisions of the Council of State, and subsequently the 13th Division of the Council of State adopted the view that the aforementioned provision of the Competition Law was in violation of the principle of impartiality, and thus all Competition Board decisions made in that way (provided that they are contested in due time) were started to be cancelled one by one.

Almost all decisions of the Council of State cancelling the concerned decisions of the Competition Board were based on the following grounds: *“...considering that the member of the Board conducting the investigation formed and declared an opinion in advance by participating in the preparation of the investigation report and the additional opinion and by signing the same, it is in violation of the principle of impartiality if the same member attends and votes in the final decision meeting during which the investigation report of the same member and the defense must be discussed and evaluated in an objective manner; therefore, the Competition Board decision subject to appeal, for which the member of the Board conducting the investigation cast a vote does not comply with the law…”*[3]

B. What Did the Competition Board Do

As the approach adopted by the Council of State on this matter was clarified and all decisions of the Competition Board contested were cancelled on the same grounds, the Competition Board, in order to avoid similar problems in the pending investigations, decided that the members of the Competition Board acting as the “chairman of the investigation committee” would not attend the

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[3] Decisions of 13th Chamber of Council of State, dated 11.10.2003 with Case No. 2005/135 and Decision No. 2006/3902, and dated 28.3.2006 with Case No. 2005/5043 and Decision No. 2006/1538; Decision of 13th Chamber of Council of State, dated 23.5.2006 with Case No. 2005/7504 and Decision No.2006/2230; Decision of 13th Chamber of Council of State, dated 9.5.2006 with Case No. 2005/7507 and Decision No. 2006/2138; Decisions of 13th Chamber of Council of State, dated 9.5.2006 with Case No. 2005/7386 and Decision No. 2006/2136 and dated 27.3.2006 with Case No. 2005/5763 and Decision No. 2006/1515; Decision of 13th Chamber of Council of State, dated 27.6.2006 with Case No. 2005/7426 and Decision No. 2006/2750; Decisions of 13th Chamber of Council of State, dated 23.05.2006 with Case No. 2005/6608 and Decision No. 2006/2228 and dated 29.6.2005 with Case No. 2005/5534 and Decision No. 2005/3339.

related decision meetings and then adopted a longer term and more effective solution, that is amending the relevant provisions of the Law. Indeed, the Law dated 02.07.2005 and no. 5388 amended the provision concerning the member or members of the Board who shall conduct the investigation, and stipulated that the investigation would be conducted by the reporters under the supervision of the "department head concerned".

Therefore, as examining the Board decisions adopted after the cancellation decisions of the Council of State-in the viewpoint of cancellation decisions which are subject of this paper and the relevant reasoning- they may be deed as adopted in accordance with the requirements stated by the relevant judicial decision. Notwithstanding, the situation is totally different with respect to the cancelled decisions by the Council of State.

Upon the cancellation of the aforementioned decisions, the Competition Board "readopted" the cancelled decisions based on the investigation which constituted the ground for the cancelled decisions (and on the investigation report prepared under the supervision of the member of the Board conducting the investigation), but only holding a new meeting not attended by the Board member concerned –as if a new investigation has been conducted. What should be discussed at this point is that whether the fact that the Board member who prepared the investigation report and who participated in the final decision did not just attend the final decision meeting is sufficient to render the cancelled decisions of the Board in compliance with the law.

Rationale of Council of State's cancellation decision and readoption of a cancelled decision will be elaborated in detail below. Nevertheless, before we start with our elaborations on the matter there is another matter that we would like to point out. The fact that decisions of the Competition Board, which had been cancelled by Council of State, were "readopted" by only having other reporters signed the decision and holding a new meeting not attended by the Board member, who was the chairman of investigation board, is already stated above.

In this context, although the difference between composition of the Board at the time when decisions thereof were cancelled and at the time when it decided to "readopt" such cancelled decisions may seem an insignificant detail there was a significant change in terms of composition of the Board between those dates.

Indeed, some of those members, who had signed the readopted decisions, did not involve in the investigation stage related with the previous board decision but rather had to solely rely on the content of investigation file, which was used as basis for the previous Board decision. However, Article 44 of

the Law, which prohibits the Board to rely on matters for which it has not granted the parties the right to defend themselves when taking its decision, is a mandatory procedural provision. Establishments, which were parties to an investigation, were not provided with the opportunity to properly defend themselves before such new members, nor was a duly investigation, which was in conformity with the statutory procedure, conducted in a manner to be taken as a basis fort he final decision. Therefore, in our opinion, if parties had been granted the right to properly defend themselves it would have been highly likely that the Board may have taken a different decision with its new members. Also, in decisions taken by participation of new members, expiry of terms of office and retirement of some of former members of Board, who had participated in previous final decisions and who had dissenting vote, may result in that a decision may be taken at unanimous vote instead of a majority vote like it was the case before and this, in return, may create an unfair situation.

Another possibility is that a significant change might have been occurred in the composition of the Board. Some of the members signing the new decisions were not present at any stage of investigation subject to the previous board decision, and made their decisions only on the basis of the investigation file for the previous V-Board decision, which the Law does not provide for any such procedure. The fact that the companies subject to investigation were not even granted with the right to oral defense before the new members participating in the readoption of the decisions is significant in this context. If the parties had been duly granted with the right to defense in accordance with the procedure set forth in the Law, different decisions could have been adopted with the changed structure of the Board.

In fact, when the related decisions of the Council of State are examined, it can be concluded that the cancellation decisions is not based on a simple procedural and formal invalidity, on the contrary, it was made on the ground that the administrative act was against the law in terms of its scope since the principle of impartiality was violated as a result of such procedural omission. Because, the procedural and formal invalidity of the cancelled acts affected the legal consequences of the decision made by the decision-making body (the Board) which lost its impartiality due to such procedural and formal invalidity. Indeed, a different decision could have been adopted without such procedural and formal invalidity. If the Competition Board had conducted a new investigation and duly asked the defenses of the parties, a different decision could have been adopted with the new composition of the Board.

On the other hand, most of the "readopted" decisions of the Competition Board were made with the participation of some of the members who also participated in making the decisions cancelled by the Council of State. In many

decisions cancelled by the Council of State on the same ground, it was clearly stated that ***"…The Competition Board must act in compliance with the principle of impartiality pursuant to the Law and general principles of law…"*** In this context, it is a matter of controversy to what extent the members who cast votes in making the decisions cancelled by the Council of State because of violation of the principle of impartiality can act impartially in the process of "readopting" the same decisions If the members who previously participated in making the aforementioned decisions cast votes for the punishment of the parties concerned in line with and under the influence of the report and the additional opinion prepared by the chairman of the committee (Board member) (and even the opinions which the Board member conducting the investigation has expressed) conducting the previous investigation, to what extent could these members act impartially in the process of readoption of the same decision? How could they be expected to act in an objective manner?

* * *

In our opinion, what is at stake here is more than a simple procedural matter. Therefore, it does not seem quite possible to comply with the requirements of the cancellation decision by just excluding the member chairing the investigation board from the meeting in which the decision is adopted.

C. What Should the Competition Board Have Done

The cancellation decisions of the administrative courts are retroactive and render the cancelled administrative act null and void from the date of issue. What the Competition Board should do upon such a cancellation decision differs according to the reasoning of the cancellation decision and which element of the administrative act is invalid in each case. In some cases, issuing a new act by the administration upon the cancellation decision may be compulsory. In these cases, the question whether the act cancelled upon the judicial decision may be reissued by rectifying the errors on it appears. Although such evaluation should be conducted together with other evaluations regarding administrative law, it is once more and especially necessary to underline that what is conclusive about answer of this question is the answer of whether the decision for cancellation was based solely on a procedural deficiency or on an invalidity which was influential on the substance of decision. In our opinion, it is not possible to claim that the reason of cancellation of the decisions basing on violation of the principle of impartiality is just a simple procedural and formal invalidity. In fact, "the principle of impartiality" is the basic principle of law and in case of violation of this principle, reissuance of the relevant act "ab initio" and in accordance with the principle of impartiality is unavoidable.

In this context, the administrative procedures to be followed by the Competition Board before adopting a decision involving an administrative sanction are set forth by the Law in a clear and detailed manner as stated in the beginning of our paper.. Therefore, the Competition Board must comply with such administrative procedures in the second decision to be adopted to comply with the aforementioned cancellation decision.

In fact, as emphasized in a decision of the Council of State, ***"The procedures to be complied with the Competition Board are set forth in detail to stipulate an administrative procedure. Accordingly, it is set forth in detail in the Law that the Competition Board … must notify the parties when it decides to start an investigation, the written claims and defenses must be submitted, and the Board must reach to the stage of final decision after a meeting for presenting oral defense upon the request of the parties or ex officio decision of the Board. As the Law on the Protection of Competition stipulates an administrative procedure to determine the principles of competition, the Competition Board, when adopting a decision on the violation of competition, must review and investigate the matter as stipulated by the Law.[4]"***

The same decision of the Council of State also states that ***"In legal doctrine, the administrative procedure is defined as the set of rules which ensure that the administration exercises the public power, that the authorities involved are vested with certain Rights and powers without affecting the rights and interests of the individuals and that the individuals can protect their interests before the administration. In this context, as the Law on the Protection of Competition stipulates an administrative procedure to determine the principles of competition, the Competition Board, when adopting a decision on the violation of the principle of competition, must review and investigate the matter as stipulated by the Law.***[5]"

The primary administrative procedure rule to be complied with is to decide to start and investigation pursuant to article 43 of the Law no. 4054, and then, to form designate an investigator or an investigating committee in accordance with paragraph 1 of the same article. According to paragraph 1 of article 43 of the Law no. 4054 as amended by the Law no. 5388, if it is decided to perform an investigation, the Board designates the reporter or reporters who shall conduct the investigation under the supervision of the department head

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[4] The Decision of 13th Division of the Council of State dated 19.04.2005 and no. 161E./K.2120, the opinion of the investigating judge A. Eğerci (www.danıstay.gov.tr accessed on: 16.03.2006)

[5] The Decision of 13th Division of the Council of State dated 19.04.2005 and no. 161E./K.2120 (www.danıstay.gov.tr accessed on: 16.03.2006)

concerned. However, that procedure rule was not complied with at all, neither a decision was made to start an investigation nor an investigator was designated pursuant to the law. The Board made a decision only on the basis of the former investigation reports and the file, and the previous report prepared by the investigating member who had attended the previous Board meetings and affected the other Board members for imposing a punishment was taken into consideration. When that decision was adopted, the defendant Company was not granted with the right to defense as stipulated by the Law in terms of scope and procedure. However, according to the Law, the enterprises subject to investigation must be granted with the right to defense with different contents and in a detailed manner, which is the right to written defense twice, the right to reply to the additional opinion (is the investigation committee submitted any) and the right to oral defense. Indeed, article 44 of the Law contains the following provisions to ensure that this procedure is followed: "***A delegation acting on behalf of the Board and composed of (Cancelled phrase: 02.07.2005-5388/Article 5) (…) reporters designated and commissioned by the Board may, during the investigation stage, exercise the powers to request information and carry out an on-the-spot inspection as provided in articles 14 and 15 of this Act respectively. Within this period determined, it may request from the parties and the other places concerned the forwarding of paperwork and the provision of any information which are deemed necessary by it. During the investigation stage of the Board, the person or persons claimed to have infringed this Act may, at all times, submit to the Board any information and evidence likely to influence the decision.***

Those parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Authority in connection with themselves, and if possible, a copy of any evidence obtained.

The Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense."

It should also be mentioned that the Law no. 4054 contains no provision concerning the adoption of a decision on the basis of the existing file. Considering the cancellation decisions of the Council of State and the legal grounds for cancellation, it is clearly against the law to adopt a decision only by having a file prepared previously signed by new reporters though the Law contains no provision to that effect (and especially when the related Board decision was cancelled). In our opinion, what should Competition Board have done upon cancellation by Council of State was to initiate a new investigation process by strictly complying with procedures for investigation specified in Law,

grant parties the right to present their written and oral defenses, and then take a decision aftermath of completion of such stages.

In fact, when the related decisions of the Council of State are examined, it can be concluded that the cancellation decisions is not based on a simple procedural and formal invalidity, on the contrary, it was made on the ground that the administrative act was against the law in terms of its scope since the principle of impartiality was violated as a result of such procedural omission. Because, it is thought that the procedural and formal invalidity of the cancelled acts affected the legal consequences of the decision made by the decision-making body (the Board) which lost its impartiality due to such procedural and formal invalidity. Indeed, as stated above, a different decision could have been adopted without such procedural and formal invalidity. Indeed, this conclusion is itself an indication that there was invalidity influential on the substance of cancelled decisions of Competition Board.

It is tried to limit the above evaluation with composition of Competition Board, relevant provisions of Law, and practises of Competition Board to date and it is thought that it would be more proper to elaborate the subject form an administrative law perspective under a separate section.

III. EVALUATION OF THE SUBJECT FROM AN ADMINISTRATIVE LAW PERSPECTIVE

A. The Obligation of and Procedure for Compliance with the Court Decisions

The obligation to comply with the court decisions is a requirement of the rule of law. Article 125 of the Constitution contains the provisions that "*Recourse to judicial review shall be available against all actions and acts of administration*." Availability of recourse to judicial review against all actions and acts of administration would have no meaning, if the administration does not comply with the cancellation decisions of the administrative courts.

Article 138 of the Constitution contains the provisions that "*Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution*." Therefore, the administration must comply with the cancellation decisions of the administrative courts fully and without delay.

According to Article 28 of the Procedure of Administrative Justice Act. No. 2577 *"The administration must implement the acts and take the actions required by the judgments and stay of execution orders given by the Council of State, regional administrative courts, administrative and tax courts without delay."*

Cancellation orders are the court orders which reviews the legality of an administrative act and which cancels the administrative act in a retroactive manner. As it can be understood from the rules stated above, the administration is obliged to comply with the cancellation orders of the courts. The obligation of the administration to comply with the cancellation decisions is also confirmed in the judicial decisions.[6]

B. The Procedure for Implementing the Cancellation Decision

Full implementation of the cancellation decisions may take different forms with respect to each decision. In some cases, the cancellation decisions create consequences automatically. The administration may not need to take any action to implement such cancellation decisions. For instance, when a regulation is cancelled, the administration does not need to adopt a new regulation to repeal the cancelled regulation.

Some cancellation decisions, on the other hand, may require a reverse action on the part of the administration. Particularly, the administration may need to take a reverse action when negative administrative actions are cancelled.

When an administrative act is cancelled, it may be necessary to change the legal statuses of the persons involved with the decision of the administration, and, in some cases, certain cancellation decisions may be impossible to implement.

Finally, it may be possible for the administration to readopt the same action upon a cancellation decision. In such cases, the administration complies with the requirement to implement the cancellation decision by correcting the action with regards to the matters considered to be invalid. One form of full implementation of the cancellation decisions that need to focus upon in this study is the "reissue of the administrative act."

When the administration is in doubt concerning how a cancellation decision should be implemented, it may ask the advisory opinion of the Council of State through the Prime Ministry.[7]

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[6] Also see, Council of State, 2nd Division File No. 1998/692, Decision No. 1999/2774, Date 3.12.1999; Council of State, 10th Division File No. 2002/3686, Decision No. 2003/5292, Date 23.12.2003; Council of State, 2nd Division File No. 1996/1529, Decision No. 1998/877, Date 12.3.1998 (Kazancı İçtihat Programı, *"http://www .kazanci.com.tr"*).

[7] For an advisory opinion of the Council of State on this matter, see Council of State, 1st Division File No. 984/221, Decision No. 984/218, Date: 5.10.1984, Journal of the Council of State, no: 58-59, p. 77; quoted by: Gözübüyük, S. – Tan, T., İdari Yargılama Hukuku, Volume 2, Ankara 2003, p. 588.

1. Rule: An Cancelled Act May Not Be Reissued

The cancellation decision of the administrative courts is a final judgment and binding for the parties involved as well as the third parties. As the cancellation decisions are retroactive, a cancelled act becomes null and void as soon as it is cancelled.

A cancelled administrative act may not be reissued in a manner identical to the original one or by modifying the type of the act to eliminate the final judgment effect of the cancellation decision. The fact that a cancelled act, as a rule, may not be reissued because of the requirement to comply with the final judgment.[8] For instance, the Council of State ruled that an individual act cannot be reissued as a regulatory act after it is cancelled.[9] Issuing a similar act to the one cancelled is considered, as a rule, a way to avoid the implementation of the cancellation decision.[10]

As the Council of State ruled in a lawsuit contesting a decision of the Competition Board, "*When a new act needs to be issued upon a cancellation decision, the administration may not act in a manner to eliminate the effects of the final judgment. In some cases, a cancelled act may be reissued. When the administrative act is cancelled on the grounds of procedure, reason or in adequate examination, reissue of an administrative act after rectifying it to comply with the law might not be considered as a violation of the law. However, in such a case, a new act must be duly issued to enter into force on the date of issue as the cancelled act has been void retroactively and as o the date of issue.*"[11]

The act to be issued by the administration upon a cancellation decision must be in compliance with the purpose of the decision and must intend to implement the cancellation decision.[12] Therefore, the grounds for the cancellation decision are extremely important to determine how the administration should comply with the said decision.

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[8] Çağlayan, R., İdari Yargı Kararlarının Sonuçları ve Uygulanması, Ankara 2000, p. 158.

[9] Council of State, DDUH File No. 56/27, Decision No. 58/253, Date: 6.5.1958, DKD. 79-80, p. 37; quoted by: Çağlayan, R., İdari Yargı Kararlarının Sonuçları ve Uygulanması, Ankara 2000, p. 158.

[10] Altay, E., *İdari Yargı Kararlarının Uygulanmasından Doğan Uyuşmazlıklar*, Ankara 2004, p. 64.

[11] Council of State, 10th Division File No. 2002/3686, Decision No. 2003/5292, Date 23.12.2003 (Kazancı İçtihat Programı, "http://www.kazanci.com.tr").

[12] Altay, E., *İdari Yargı Kararlarının Uygulanmasından Doğan Uyuşmazlıklar*, Ankara 2004, p. 17.

That the cancellation decision is based on which invalid element of an administrative act does not make any difference with respect to the obligation to comply with the said judicial decision. In other words, whether an administrative act is cancelled for procedural matters or with regard to its merits does not make any difference with respect to the obligation to comply with the said judicial decision. However, the question of which element of an administrative act together with the reasoning of the decision are crucial to determine the method of implementation of the relevant cancellation decision.

2. ***Exception: An Cancelled Act May Be Reissued Under Certain Circumstances***

In some cases, it may be possible and even necessary to issue an administrative act similar to the one cancelled. Accordingly, reissue of an administrative act which has been cancelled on the grounds of procedure, reason or in adequate examination may not be considered as a violation of the law.[13] In such a case, the Board decision cancelled by the administrative court should be readopted after rectifying the errors specified by the Council of State.

For example, according to Gözübüyük-Tan:

"In some cases, the administration may issue an act creating the same effect upon a cancellation decision. When an administrative act is cancelled on the basis of issues such as competence and procedure, the administration can rectify the act in such matters and issue an act creating the same consequences (CE, 11 October 1961, Clément, Rec. 560; CE, 5 January 1973, Dame Gueydan, Rec. 9.) ... Thus, the administration, by acting in accordance with the matters specified in the cancellation decision, would have complied with the court order."[14]

That new administrative act becomes effective as of the date of its adoption. In other words, it is not retroactive to the date of the previous act.[15]

In a ruling of the Council of State in 1998, an administrative act concerning the removal of a public servant from the office was contested and the said position of the public servant was restituted upon the decision of stay of

[13] Zabunoğlu, Y. K., *İdari Yargı Hukuku Dersleri*, Ankara 1980-1981, p. 208; Gözübüyük, S.-Tan, T., *İdari Yargılama Hukuku*, Volume 2, Ankara 2003, p. 566. Also see, Çağlayan, R., *İdari Yargı Kararlarının Sonuçları ve Uygulanması*, Ankara 2000, p. 172-178.

[14] Gözübüyük, S.-Tan, T., *İdari Yargılama Hukuku*, Volume 2, Ankara 2003, p. 566. Also see, Çağlayan, R., *İdari Yargı Kararlarının Sonuçları ve Uygulanması*, Ankara 2000, p. 172-178.

[15] Gözübüyük, S.-Tan, T., *İdari Yargılama Hukuku*, Volume 2, Ankara 2003, p. 566.

execution. However, the day he assumed office, the administration removed that person from office by issuing a new administrative act. When that second act was contested, though the second administrative act was a violation of the decision for the stay of execution of the first act, the Council of State ruled that the second administrative act concerning the removal of the public servant from the office was in compliance with the law since the stay of execution order was based on the procedural invalidity of the act which was rectified during the second administrative act.[16]

In theory, it is argued that a disciplinary punishment imposed without first taking the defense of the person punished, a decision by a disciplinary board not duly established, a rule cancelled because of not first being examined by the Council of State and a municipal council decision made without the quorum can be reissued when the necessary requirements are satisfied.[17]

In some cases, a procedural irregularity may not be considered as an illegality sufficient to cancel the relevant administrative act.[18] In French administrative law, any invalidity with respect to the procedure is not considered as a reason for cancellation. French Council of State makes a distinction between the procedural invalidities which affect or do not affect the merits of the case, and cancels an administrative act only on the basis of the procedures invalidities affecting the merits of the case. According to French Council of State, for instance, an administrative act is not considered to be against the law when the procedural rules set forth only with the purpose of protecting the interests of the administration are violated or when the violation of the procedural rules does not affect the act itself.[19]

In a cancellation lawsuit initiated to contest a Decision of the Competition Board not notified together with the dissenting opinions, the Council of State cancelled the said decision of the Competition Board on the grounds that "*it was a collective act requiring the involvement of more than one will and discussion of the subject*" and "*failure to notify the dissenting opinions*

[16] Council of State 5th Division, File No. 1997/2128, Decision No. 1998/2257, Date: 7.10.1998; quoted by: Altay, E., *İdari Yargı Kararlarının Uygulanmasından Doğan Uyuşmazlıklar*, Ankara 2004, p. 64.

[17] Çağlayan, R., *İdari Yargı Kararlarının Sonuçları ve Uygulanması*, Ankara 2000, p. 163.

[18] See Gözübüyük, *Yönetsel Yargı*, Ankara 1998, s. 238. Danistay also rendered in one of its decisions that the fact that the members of the panel did not wear academic clothes and the examination took longer than usual are not valid reasons for the cancellation of an administrative act. Danıştay 8th Chamber, E.1984/74, K.1984/1345, dated 5.11.1984.

[19] French Council of State, 24 October 1919, *Bonvoisin*, 776; French Council of State, 17 February 1932, *Bécard*, 191; quoted by: Laubadère-Venezia-Gaudemet, *Traité de Droit Administratif*, Paris 1984, p. 578-579.

on the date f notification of the decision of the board is a substantial invalidity." Upon that cancellation decision, the Board decision was notified again together with the dissenting opinions and an introductory letter signed by the Chairman of the Competition Board and was published in the Official Gazette. Following that, the Council of State decided that the Decision of the Board would not be effective by that way and the administrative act needed to be reissued by stating the following:

"... While an administrative act was needed to be issued by making a new decision to be effective as of the date of the decision, issuing the administrative act by notifying the cancelled decision again by adding the dissenting opinions and the introductory letter of the Chairman of the Board without taking into consideration the cancellation decision made o the grounds that the act is a "collective act" and that the cancelled decision is null and void, though it is known that the dissenting opinions were notified later is not considered to be against the law."[20]

Thus, the Council of State decided that the cancelled act can be reissued even when there is an invalidity affecting the merits of the case, provided that the invalidity affecting the merits of the case is rectified. However, a matter that should be examined in this paper is whether the invalidity affecting the merits of the case is rectified when a Competition Board decision cancelled on the grounds that the investigating member of the board attended and voted in the final decision meeting, is re-voted readopted in a meeting not attended by the investigating member. In other words, that Danistay decision should not be interpreted as permitting the re-adoption of the cancelled act in each case. As a matter of fact, there was only a procedural irregularity in the administrative act subject to that Danistay while the Competition Board decisions taken by the participation of the investigator Board member are, as analyzed below, contrary to law not only with respect to its procedure but also its subject-matter.

C. **Examination from the Perspective of the Decisions of the Competition Board**

It is important to examine the elements of invalidity that led to the cancellation of the decisions of the Competition Board cancelled because the investigating member voted.

First of all, it can be said that the decisions of the Competition Board are invalid because of the violation of the procedural rules regarding investigation and decision-making. Since all procedural rules are not the same, a distinction is

[20] Council of State, 10th Division File No. 2002/3686, Decision No. 2003/5292, Date 23.12.2003 (Kazancı İçtihat Programı, "http://www.kazanci.com.tr").

made between the primary and secondary procedural rules, and their effects on the validity of an administrative act is evaluated within this framework. For example, it is argued that when a person who is not a member of the board attends the meeting, but has no effect on the decision made is not itself a sufficient reason for the cancellation of the decision.[21] As it is stated above, French Council of State is of the opinion that procedural invalidities that have no effect on the decision made does not affect the validity of the administrative act.[22]

On the other hand, we are of the opinion that when the member of the board investigating the matter attends and votes in the final decision meeting of the Competition Board, there is substantial procedural invalidity affecting the decision. In fact, we think that the said invalidity is a substantial procedural invalidity because of the vote cast by the said member as well as his influence on other members.

The Council of State decided that the attendance and voting of the investigating member was against the law since it could influence other members of the board even though it was not significant for the quorum for meeting or voting or the decision-making. In the ruling of the Council of State dated 1992, it was decided that a disciplinary proceeding against a student based on the Higher Education Institutions Disciplinary Regulation was against the law since the investigating person attended and voted in the disciplinary committee meeting. In the aforementioned decision, 8th Division of the Council of State rescinded the decision of the first level court on the ground that "*the disciplinary meeting had the quorum for meeting and voting even when the investigating member did not attend and the vote cast by the investigating member could not affect the result.*" However, the Plenary Assembly of the Administrative Law Divisions of the Council of State, having reviewed the case upon the objection of the administrative court, decided that attendance of the investigating member in the meeting affected the objectivity of other members on the following ground:

"The decisions of the disciplinary committee can be sound and objective only when the committee members evaluate the case in an objective manner. In this respect, it is not acceptable from the perspective of disciplinary law if the person in charge of conducting the investigation attends and votes during the meeting of the disciplinary committee after having collected evidence, taking the

[21] Gözübüyük, S.-Tan, T., *İdare Hukuku*, Volume 1, Ankara 1998, p. 353.
[22] E.g. French Council of State, 17 February 1932, *Bécard*, 191; quoted by: Laubadère-Venezia-Gaudemet, *Traité de Droit Administratif*, Paris 1984, p. 578-579.

testimony of the related person and submitting the investigation report to the disciplinary committee."[23]

Furthermore, the aforementioned decisions of the Board involve not only a substantial procedural error, but also the violation of the principle of impartiality, which is a substantial invalidity. Therefore, we think that the said decisions of the Board are against the law not only because of procedural issues, but also with respect to the merits. In fact, as it is stated in the decisions of the Council of State, cancelling the decision of the Competition Board adopted with the attendance of the investigating member, the Competition Board which is empowered to determine the existence of any violation of the principle of competition and to impose penalties accordingly must be impartial pursuant to the Competition Law as well as general principles of law. Although Danistay does not explicitly state in its subject cancellation decisions as to which element of the administrative action was illegal, we believe that an irregularity which is contrary to the general principles of law as determined by Danistay should not be considered as a simple procedural irregularity. The Military Supreme Administrative Court also stated in one of its decisions that *"it would be doubtful if an official who prepares a disciplinary note regarding another official could be impartial if the said official previously made a complaint about the other" and rendered that the decision rendered contrary to the principle of impartiality would be contrary to the reason, subject and purpose elements of the administrative act.*[24]

It is accepted by the legal doctrine that, when an administrative act is cancelled because of an invalidity regarding the subject matter of the act, the administration may not reissue the same act for the purpose of implementing the cancellation decision, in other words may not reissue the reviewed administrative act with the same invalidity[25]

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[23] Council of State İDDGK, File No. 1992/316, Decision No. 1992/164, Date: 23.10.1992; Journal of Council of State No. 87, p. 102.

[24] Military Supreme Administrative Court 1st Division. File No .1995/274, Decision No. 1995/472, Date: 11.4.1995, Journal of Military Supreme Administrative Court No.: 10, Ankara 1996.

[25] For example, according to Çağlayan, *"when an administrative act is cancelled for its purpose and subject, a new administrative act can be rendered if material facts change. This is not a reissue, but a completely separate act."* Çağlayan, R., *İdari Yargı Kararlarının Sonuçları ve Uygulanması*, Ankara 2000, p. 170. According to Gözübüyük-Tan, an administrative act can be reissued only if it is cancelled only or matters such as competence or procedure. Gözübüyük, S.-Tan, T., *İdari Yargılama Hukuku*, Volume 2, Ankara 2003, p. 566.

In this respect, we think that the Competition Board, by readopting the decision in a new meeting not attended by the investigating member does not satisfy the requirements of complying with the decision of the Council of State. As it is expressed in the above-mentioned decision of the Council of State, attendance of the investigating member in the Board meeting might affect the impartiality of other members, thus, readoption of the decision in a meeting not attended by the investigating member does not rectify the substantial invalidity of the said decision of the Competition Board.

CONCLUSION

As expressed in the beginning of our paper, the aim here is not to reach out the consequences including a "definite judgment" but to open the issue to discussion and to provide thinking on it. However like all researches/papers, this paper also reached out a consequence and a final point.

In this context, we would like to mention that the most important and determining issue related to readoption of the Board decisions cancelled by the Council of State is the characteristic of such cancellation decision's reasoning. Having analyzed the subject decisions of the Competition Board, it can be seen that Danistay's cancellation decisions were not simply based on some procedural mistakes but also the irregularities in the subject element of such actions because of the adverse effect of such procedural mistake on the impartiality of the Board. Having also considered that Danistay rendered that the said Board decisions were contrary to **"the general principles of law"**, we believe that such irregularity should not be considered as a mere procedural mistake but an essential irregularity also affecting the subject element of the administrative action.

The act to be issued by the administration upon the cancellation decision must be in compliance with the aim of cancellation. Therefore the reasoning of the cancellation decision and violation of which element of the act are extremely important for determining how the administration is required to imply the mentioned decision. For all we see, the Competition Board interprets the reasoning of cancellation of the Council of State that there is "only" a procedural/formal invalidity in the relevant Board decisions and therefore in case of rectifying such formal errors, the same decisions may be readopted as it is. As explained above in detail we do not agree with such interpretation.

Additionally we would like to express that the constitutional principle of rule of law and the public interest require the Competition Board, which is empowered with broad authorities including quasi-judicial powers, to act in compliance with law in all of its transactions and to fully implement the court

decisions in a correct manner. For this reason the Competition Board must be utmost careful regarding the interpretation and implementation of the decisions it adopts and the procedures to be followed and the judicial decisions rendered by the high Court. This necessity is highly important for the competition law practices to be developed and for this branch of law to reach where it deserves as a legal discipline as well as for the enterprises which are parties of the investigations conducted by the Board.

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Chairman of the Session
Prof. Dr. İsmail Yılmaz ASLAN

CLASS ACTION LAWSUITS IN RELATION TO ADMINISTRATIVE JUSTICE AND POSSIBLE IMPLICATIONS WITH REGARD TO COMPETITION LAW

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INTRODUCTION

A lawsuit is a request of legal protection (asylum) from the court by the person (plaintiff) whose subjective rights are violated or imperiled or who is subjected to unfair demands by another person (defendant). In a lawsuit, there are two parties, namely the plaintiff and the defendant. The parties of a lawsuit are established in accordance with the statement of claim. The persons referred to as the plaintiff and defendant in the statement of claim are formally the parties of that lawsuit[1]. In order for the court to be able to rule on the merits of the right in dispute, these persons must in truth have the capacities of plaintiff and defendant. Therefore, in a lawsuit, the concepts of party and capacity are separate[2].

Whether or not a person holds the capacity of a plaintiff or a defendant is an issue of substantive law, related to the essence of the subjective right in dispute. The capacity is the relationship between the subjective right in dispute and the parties. Even if the persons referred to as the plaintiff and the defendant in the statement of claim are the parties of that lawsuit according to the formal party theory, this does not always mean that those persons hold the capacity of parties[3]. This is because in order to hold the capacity of a party as a plaintiff, one has to be the owner of the right in dispute. In exceptional circumstances, for various reasons, and particularly in cases of public interests, the right to sue may

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[1] The formal party concept was accepted instead of the material party concept at the beginning of this century. This is because of the fact that material party concept cannot explain the situation of those who claim for themselves the rights belonging to other individuals. TANRIVER, Süha, Medeni Usul Hukukunda Derdestlik İtirazı, Ankara, 1998, pp. 58-63; PEKCANITEZ, Hakan / Atalay, OĞUZ / ÖZEKES, Muhammet, Medeni Usul Hukuku, Ankara, 2005, p. 167.

[2] Real and legal persons who have the capacity to acquire rights also have the license to become parties.

[3] ULUKAPI, Ömer, Medeni Usul Hukukunda Tarafların Duruşmaya Gelmemesi, Konya, 1997, pp. 9-17.

be granted to prosecutors, associations, labor unions, legal persons and similar interests groups, even though they have no capacity as parties (i.e. despite having no subjective right)[4].

As a rule, the right to sue belongs to the owner of that particular right. However, in some cases, the right to sue has been granted to other persons as well, and class action lawsuits are included in this group. So, class action lawsuits are about the scope of the concept of parties, and whether or not that scope is interpreted in a more comprehensive sense. In this context, should lawsuits concerning the violations related to competition law be filed only by those affected? Or do others have the authority to file lawsuits and start procedural proceedings? In this study, we will examine the practicability of class action lawsuits in competition law.

I. CLASS ACTION LAWSUIT

Class action lawsuit is a type of lawsuit Americans adopted from the ancient Romans, and which belongs to Anglo-Saxon law. Even though there is not a type of lawsuit regulated under this name in those countries where the Continental Europe Law System is practiced, various lawsuit models are being proposed and discussed in the area of civil trial law in order to protect the public interests[5]. Though these types of lawsuits are mainly based on similar philosophical concerns, they may be given different names and classifications according to the place, time and country in which they are practiced[6]. Class action lawsuits are called Class Action in American Law; Sammelklage, Popularklage (Patent Invalidation Lawsuit), Eine Isolierte Prozessführungbefugnis (Classified Litigation Authorization) and Verbands-klage (union-association lawsuits)[7] in German Law[8].

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[4] PEKCANITEZ/ATALAY/ÖZEKES, pp. 171, 172.

[5] WALLER, Spencer Weber, "Towards a Constructive Public-Private Partnership too Enforce Competition Law", Recent Developments in Competition Law Symposium IV, Kayseri, 2006, p. 59, 68.

[6] Particularly for the developments in competition law, see GÜZEL, Oğuzkan, "Türk Rekabet Hukuku, Uygulamasında Yargının Rolü; On Bir Yıllık Deneyimin Sonuçları", Recent Developments in Competition Law Symposium IV, Kayseri, 2006, pp. 188-196.

[7] In case of mass damages done to more than one persons, those persons may take these to court on their own, or relevant authorities may file a lawsuit on behalf of those injured. If these types of lawsuits are filed separately, in the existence of the relevant requirements, the cases may be merged. However, if it is not possible to deal with the cases at the same court, the cases are not merged. In cases of mass damages, unlike American Law, it is not possible in German Law for an administrative representative to file a lawsuit on behalf of every person who suffered damages, that is to say on behalf of the community (or the group), without an authorization. Legal regulations in German

Class action lawsuits are a way for the masses to collectively file lawsuits. These lawsuits are filed in order to protect the interests of everyone in a similar situation. Class action lawsuits are filed on behalf of everyone similarly affected by the unlawful act. It is a way for the injured to correct the wrongdoing by coming together, creating a group and acting collectively, in order to eliminate the possibility that small, individual injuries are not pursued[9]. Class action lawsuit is a lawsuit where if the action is won, all of the members in the plaintiff category benefit from the ruling[10]. A class action lawsuit is one which

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Law only exists in relation to association lawsuits (Verbansklage) (ROSENBEG, Leo/SCHWAB, Karl Heinz/GOTTWALD, Peter, Zivilprzessrecht, Munich, 2004, p. 286; URBANCZYK, Reinhard, Zum Verbandsklage im Zivilprozess, Köln, Berlin, Bonn, Munich, 1981, p.2). These cases have various forms and characteristics:

1. Prevention of Intervention Lawsuit Request (Unterlassungsklage): This lawsuit is generally envisaged in order to protect the consumers from general transaction requirements in consumer law. Similarly and with the same purpose, European Union Regulation dated 18.05.1998 envisages union actions for the protection of consumers from general transaction requirements. A harmonization among all European Union member states is intended with this regulation, on the existence of these types of lawsuits. In order to be able to file such a lawsuit, a collective interest must exist within the framework of consumer protection, and this interest must not be currently lost.
2. In union actions, damages on behalf of the union or the members cannot be requested.
3. Even though it is in dispute whether the suing Union holds the license to capacity or the authority to litigate (See URBANCZYK, p. 1,2), it is accepted that a right to sue on behalf of the union or a legal right to litigation has been granted to the union for the purposes of social protection, etc. Though court decisions and a part of the doctrine hold that union actions have a "double natured" (Doppelnatur) characteristic that includes features from both material law and procedural law, it is accepted that the litigating union has no subjective rights and that it is accepted as a party by the law-giver just for general interests.
4. Unions that can file a lawsuit to protect interests on behalf of their members are those listed by the German Federal State, those listed by the European Union Commission in the EU Regulation on consumer protection, those protecting professional interests which hold the capacity to acquire rights and even industrial, commercial chambers or trade corporations. ROSENBEG/SCHWAB/GOTTWALD, pp. 283-285.

[8] ROSENBEG/SCHWAB/GOTTWALD, p. 282.

[9] Civil actions concerning price fixing or antitrust violations in the U.S. are mostly filed as class action lawsuits. In those cases where real persons are direct victims of antitrust violations, Chief Prosecutors of the States may file lawsuits on behalf of the citizens. WALLER, p. 54.

[10] WALLER, p. 54.

can be filed on behalf of those injured in case of mass damages done to more than one person.

In class action lawsuits, the capacity of parties and the concept of legal interest are interpreted in a more comprehensive way and have a collective nature. Because of this characteristic, class action lawsuits are listed under the objective lawsuits group. The subjective relationship required to have the capacity of parties in a lawsuit is enlarged for various reasons.

In our country's rules on trial law, there is no regulation with established general principles under the name of class action lawsuits. In Code of Civil Procedures Bill, class action lawsuits are defined under the name "group actions" as suits filed by associations or other legal persons within the framework of their status, in order to protect the interests of their members or of the group they represent, with an aim to establish relevant persons and their rights, or to eliminate the unlawful situation or to ensure prevention of similar right violations in the future. Beyond this regulation which is still in draft, under the Act on the Protection of Consumers, in the section of the Turkish Commercial Code (TCC) concerning unfair competition and particularly in the area of administrative justice, there are lawsuit types which are in accordance with the definition of plaintiff in class action lawsuits and which we can consequently call class action lawsuits.

II. CLASS ACTION LAWSUITS IN THE CONTEXT OF ADMINISTRATIVE JUSTICE

There are two types of lawsuits in administrative trial law, namely nullity suits and full trial suits. Other than these two types of lawsuits, there are no lawsuit types in our administrative trial law under the name class or group actions, either. However, in terms of capacity, particularly nullity suits are lawsuits where interest groups may become plaintiffs as in class action lawsuits and which consequently have the nature of class actions.

Nullity suits are filed by those whose interests are infringed, for the annulment of certain administrative transactions with the claim that they are unlawful in one of the aspects of authority, form, reason, subject or objective. Nullity suit is a type of lawsuit that is filed at courts of administrative justice, which aims the elimination of an unlawful administrative transaction retroactively, together with all of its rulings and consequences starting from the date the decision in question was taken.

Nullity suits are a type of objective lawsuits. Nullity suits are entirely specific to administrative justice, they proceed easily and they are not complex[11].

Even in nullity suits, in order to become a plaintiff, a person has to have the capacity to be a party and to file an action. That is to say, the person has to have the capacity to act and acquire rights. However, entities, associations or clubs without a legal personality[12], which we may call "legal entities[13]", are accepted to have the nature of a plaintiff[14].

In general, in order to file a lawsuit, a right must have been violated. However, in order to file a nullity suit, a personal, legitimate and recent violation of interest has been deemed adequate. The fact that violation of a right is not required for nullity suits facilitated and expanded the possibility for filing nullity suits. This expansion does not mean anyone can file a suit. According to the Council of State, this expansion indicates an area that may range from a small relationship between the decision to be annulled and the plaintiff to a right violation. In our country, the right to file nullity suits is granted neither to everyone nor only to those whose rights are violated. Instead, a middle way has been found and a connection with the decision requested to be annulled has been deemed adequate[15].

After the amendment made on Article 2 of the Code on Administrative Procedure with Law no. 4001, dated 10.06.1994[16], violation of a personal right criterion was accepted as a requirement to file nullity suits; however on subjects closely related to public interests such as the protection of environmental, historical and cultural values or city development applications, neither infringement of personal rights nor violation of interests criteria are required. In this period, in a suit filed by the Chamber of Architects of the Union of Chambers of Turkish Engineers and Architects, the Council of State overturned

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[11] SEZGİNER, Murat, İptal Davasının Uygulama Alanı Bakımından Ayrılabilir İŞlem Kuramı, Ankara, 2000, p. 20.

[12] Dan.İBK., E. 1971/1, K.1971/1, RG., 06.02.1980, S.16892.

[13] On this subject, see ÖZAY, İl Han, Günışığında Yönetim, İstanbul 2002, pp. 132-137. Legal Entity is defined as follows in Black's Law Dictionary: "[a]n entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations." Quoted from ÖZAY, p. 134.

[14] ÖZAY, p. 136.

[15] GÖZÜBÜYÜK, A. Şeref, TAN, Turgut, İdari Hukuku, Volume 2, İdare Yargılama hukuku, Ankara, 2003, p. 338.

[16] This amendment was repealed by the Constitutional Court. Constitutional Court, 21.09.1995, E. 1995/27, K. 1995/47, RG., 10.04.1996, S. 22607.

the decision of the first instance court, which rejected the case because of lack of capacity on the part of the Union. The Council of State ruled that **subjective capacity** and personal right violations were to be **established by court**; that in line with the interests of everyone living in the country, transactions which harm the interests of the society and consequently of the individual, which are against the rule of law, which violate public interests must be eliminated from the area of law and it was necessary to use a **more comprehensive interpretation of the individual's right to sue** to do this; that the duty and obligation of the Union to protect public interests was a natural result of its function as a public organization. Based on these reasons, the Council of State decided that the **Union** had the capacity to file a lawsuit[17].

In general, solely being a citizen is not sufficient to become a plaintiff. However, in a lawsuit concerning privatization, filed in capacity of a member of the parliament, the Council of State ruled that the member of the parliament had the right to sue "in the capacity of a citizen"[18]. In a suit concerning the annulment of a Decision of the Council of Ministers on requesting military forces from NATO, the Council of State decided that **"every Turkish citizen** who saw inviting foreign military forces into the country as war-mongering" could be a plaintiff[19]. İstanbul Administrative Court, in its SAVARONA decision, has deemed citizenship sufficient to file a lawsuit, stating that "it is natural that every transaction concerning the yacht, which is owned by the state and which has historical value, is of interest for **every person** having the nationality of the Republic of Turkey"[20].

Nullity suit is a type of lawsuit that show a tendency to become more comprehensive, in particular regarding the right to sue. In the beginning, administrative justice bodies adopted a narrow interpretation of the violation of interest concept and required that in order for interest groups such as trade unions[21], associations[22], professional organizations[23] to file a lawsuit on matters

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[17] D.10.D., 29.9.1994, E.1993/4733, 1994/4393 GÖZÜBÜYÜK/ TAN, p. 346.

[18] D.10.D., 25.11.1991, E.1990/2308, K.1991/3355.

[19] D.10.D., 13.10.1992, E.1990/4944, K.1992/3569, Council of State Journal, S.87, p.478 et seq.

[20] Quoted from İstanbul, 5th Administrative Court, 26.01.1990, E.1989/503, GÖZÜBÜYÜK/ TAN, p. 368.

[21] D.12.D., 01.06.1970, E.1969/205, K.1970/117, Council of State Journal, S.2, p. 911

[22] Quoted from D.8.D., 17.04.1969, E.1967/2297, K.1969/1547; D.12.D., 24.02.1970, E.1969/2703, K.1970/328, GÖZÜBÜYÜK/TAN, p. 370.

[23] DDK., 21.03.1969, E.1968/619, K.1969/322, Council of State Decisions Journal, S.131-134, p.153 et seq.; DDK., 25.12.1970, E.1968/197, K.1970/730, Council of State Journal, S.3, p. 173.

related to their members, the subject should be of concern to all members and a legal regulation should exist granting them the authority to file a lawsuit. However, later, administrative justice bodies began to adopt a larger interpretation of the concept of interest and deemed it sufficient to have a connection with the decision requested to be annulled. As seen in the decision examples below, the Council of State and the administrative justice bodies have ruled that trade unions, associations, professional organizations, chambers, unions and similar interest groups may become plaintiffs.

In a lawsuit filed concerning the Veterinarians Specialization Regulations of the Ministry of Agriculture and Rural Affairs, it was decided that the Veterinarians **Association** could be a plaintiff "in order to protect the rights of its members"[24].

In the case of Konak Municipality vs. Turkey Bread Industry Employers Union, it was decided that, even though denying work permit to a bakery is **a subjective transaction**, Turkey Bread Industry Employers Union could file a lawsuit on behalf of its member, since the lawsuit was filed not because of subjective reasons, but because of **objective reasons** – namely, that the transaction was in violation of the rules[25].

The Council of State, in a lawsuit for the annulment of the sale of a feed grain factory owned by the administration, ruled that the labor union could file lawsuits on behalf of its members on subjects concerning their work life[26].

In the case of Diyarbakır Municipality vs. UCTEA Diyarbakır Branch, the Council of State, disregarding the fact that the Branch was not a legal person, decided that the Branch could be a plaintiff in a lawsuit concerning the annulment of the city council decision which modified the Diyarbakır city plan, with the reason being the branch had the duty and obligation to protect public interests[27].

In the case of the Council of Ministers vs. the **Turkish Medical Association**, it was decided that the Turkish Medical Association could be a plaintiff in the nullity suit concerning the Regulations On the Management and Operation Procedures and Principles of the Medical Establishments Owned by

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[24] D.5.D., 27.11.1996, E.1996/2, K.1996/3674, Council of State Journal, S.93, p. 249 et seq.

[25] DİDDGK., 22.04.1994/, E.1992/668, K.1994/217, Council of State Journal, S.90, p. 193 et seq.

[26] D.10.D., 21.05.1996, E.1995/4319, K.1996/2743, Council of State Journal, S.92, p. 767 et seq.

[27] D.6.D., 13.05.1991, E.1989/2264, K.1991/1101, Council of State Journal, S.84-85, s. 422 et seq.

Public Institutions and Organizations, issued by the Council of Ministers, with the reason being the Association could file lawsuits on issues concerning its own sphere of duties and authority[28]. In the lawsuits filed recently by the Union of Judges and Prosecutors (YARSAV), the capacity of the **Union** as a plaintiff was admitted as well[29].

The Council of State also interprets the criterion of violation of interest in a larger sense for the lawsuits filed by the **Bars**. In the case of Ankara Bar vs. The Ministry of Interior, the capacity of the Bar as a plaintiff was admitted, concerning the annulment of the Circular On the Establishment of Areas Where Alcoholic Beverages Can Be Served[30].

In order to file a full trial action, a right must have been violated. The right required to file a suit (which was violated), is similar to the right required in actions before civil justice. In terms of full trial actions, it can be said that the criterion of right violation is implemented in its narrow interpretation. Like in general courts, any full trial action is rejected if filed by a person who cannot prove that one of his rights was violated, or there was an infringement upon his material interests[31].

Nullity suits and full trial actions may be filed **simultaneously**. **Which criteria** should be taken into consideration for establishing the capacity as a plaintiff in this situation: Infringement of an interest criterion which may be interpreted comprehensively, or the right violation criterion? On this subject too, the Council of State continued the positive development it displayed concerning nullity suits and ruled that a union may file a lawsuit where individual rights of its members are violated. Moreover, the Council of State put an end to the case law differences between chambers by taking a Decision to Merge Case Laws: …"It is concluded that labor unions and higher organizations of public officials, on the request of the public official who is a member of the union, may **file lawsuits** and **may become parties** to lawsuits filed against individual (subjective) transactions against their members, if these are based on the members' status and rights, obligations, duties and responsibilities thereof as well as assignments, transfers, disciplinary actions and other regulations concerning personnel law…"[32]

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28 DİDDGK., 08.03.1996/, E.1995/913, K.1996/143 Council of State Journal, S.92, p.143 et seq.

29 For detailed information on the lawsuits filed by YARSAV, see www.yarsav.org.tr

30 D.8.D., E.2005/6261, Ankara Bar web page.

31 GÖZÜBÜYÜK/ TAN, p. 647.

32 Dan.İBK., 03.03.2006, E.2005/1, K.2006/1, RG., 18.06.2006, S.26202.

The fact that interest infringement is interpreted in a wider sense and the members of interest groups such as trade unions, associations, professional organizations and chambers and unions have the ability to bring an action for protecting generally their common interests and sometimes their subjective rights is an example for class action practices. In this respect, a nullity case may bear certain results that can be expected from a class action. As we can see from the examples above, actions may be brought by people other than the substantive right holder.

III. POSSIBLE IMPLICATIONS IN RESPECT OF COMPETITION LAW

1. In General

Competition Law is a new branch of law in most of the countries as well as in our country. Regulations related to competition law used to be laid down in the Commercial Code; however, globalization that started to rise in 1980s has led to the enactment of a particular law related to competition. The Act no. 4054 on the Protection of Competition was put into effect in our country in 1994 in order 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 disputes that can be the subject matter of a competition law action are criminal and civil disputes. The Act on the Protection of Competition (APC) adopts the system of Continental Europe and while it provides for fines, it does not have any regulations related to imprisonment. In the United States of America, when practices restricting competition, especially price fixing, bid rigging, allocation of the market and illegal cartel are in question, jail sentence might be imposed[33]. However in Turkey, Germany and the European Union, administrative fines are imposed to practices that restrict competition.[34]

The Competition Board has the authority to give civil and criminal sanctions in cases where APC is violated. Especially when Articles 4, 6 and 7 are violated, the Board uses its powers related to administrative fines under

[33] The penalties in terms of criminal law may be very heavy. A person may be imposed ten year imprisonment and a company may be imposed very high fines. For instance, Hoffman-la Roche admitted its guilt and paid $ 500 million fine in the case related to international vitamin cartel. Samsung paid $ 300 million in price fixing case. WALLER, p. 52.

[34] ASLAN, Yılmaz, Rekabet Hukuku, Bursa, 2001, p. 363, 364.

Articles 16 and 17, upon notification, the request from the Ministry, *ex officio,* and complaint from a real or legal person who has an interest in order to terminate the violation.[35] These regulations show that the Board is in a very efficient position and is vested with important powers and tasks in respect of protecting competition. Moreover, in cases where the Board finds administrative transactions or regulations that have the effect of preventing, distorting or restricting competition in markets for goods and services, the right of the Competition Authority to bring an action to annul the said transactions or regulations in part or in full should be clearly regulated.[36] Amendments to the APC, regarding this issue, should be made immediately. As a result, class action lawsuits will be available.

The Competition Board imposes administrative fines as criminal sanctions according to Articles 16 and 17 of the Act. Administrative fines are substantively administrative transactions.[37] Therefore, administrative justice rules apply for the lawsuits related to administrative fines.[38]

The Act provides a mixed system in terms of legal disputes. There are actions that may be brought in administrative justice courts[39] with respect to their consequences related to administrative justice and there are actions that may be brought in civil justice courts with respect to their consequences related to private law. Here, class action lawsuits will be mentioned in the context of actions that may be brought to place of judiciary jurisdiction.

2. Class action lawsuits in terms of Competition law

There is not an action kind called class action lawsuit in our civil justice and competition law. However under Turkish Commercial Code and the Act on

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[35] For the procedural rules of the Board while using these powers see: ASLAN, Zehrettin, "The Working Method of the Competition Board as an example for the Act on Administrative Procedure", International Symposium on the Preparation of the Act on Administrative Procedure, 17-18 October 1998, Ankara, p.280-285.

[36] Although the amendment in this respect is not obligatory, it will be beneficial to prevent discussion about the plaintiff qualification of the Authority.

[37] For detailed information about fines under APC see: GÜVEN, Pelin, Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme ve Devralmaların Denetlenmesi, Ankara, 2003, s.432-443; ASLAN, 364-377.

[38] For the discussion about the place of jurisdiction for administrative fines imposed under the scope of the Act see ÖZEN, Muharrem, "Competition and Criminal Law", the Act no 4054 on the Protection of Competition and the Draft on the Amendment to the Said Act, Symposium, Banka ve Ticaret Hukuku Enstitüsü Yayınları, Ankara, 2006.

[39] For statistical information about supervision of the decision of the Competition Board by Council of State see, GÜZEL, 220-228.

the Protection of Consumers, lawsuits that are similar to class action lawsuits in some respects can be filed.

There is no explicit regulation in the Code of Civil Procedure; on the other hand according to the Article 118 of the Draft CCP this kind of action is laid down under the heading group action lawsuit: "**Associations and other legal persons can bring lawsuits on behalf of themselves,** in the framework of their status, in order to protect the interests of **their members or the groups they represent**, and in order to establish the rights of the concerned or to prevent unlawful practices or to prevent violation of the rights of the concerned in the future."

The regulation in the draft limits the ability to file a class action lawsuit to associations and legal persons. There is no distinction between a corporate body and a public legal person. Legal entities, unions and bodies that do not have legal personality cannot file a suit. In order for associations and legal persons to file a suit in the framework of group action lawsuit, violation of interest criterion applies. Although this falls under the scope of public law, the process that the administrative justice has experienced in this respect amounts to a successful accumulation.

There are provisions that can be called class action lawsuit practices in the Act no. 4077 on the Protection of Consumers. According to the Article 23/IV of the mentioned Act: "**The Ministry and consumer organizations** may file a suit in consumer courts in any case which is not an individual consumer problem but is concerning the consumers in general, in order to terminate the unlawful conditions which has occurred as a result of violation of the Act." Article 24/I: "In cases where staple goods offered to sail are defective, **the Ministry, consumers and consumer associations may file a suit** in order to terminate the production and sale of the defective staple goods and to collect them from those who hold them for sales purposes." The fact that the Ministry and consumer organizations are given the ability, via the mentioned regulations, to file a suit in consumer courts, in any case which is not an individual consumer problem but is concerning the consumers in general, in order to terminate the unlawful conditions which has occurred as a result of violation of the Act is a reflection of class action lawsuit practices in competition law. As laid down in the Act, giving the right to file a suit to the Ministry, consumers and consumer organizations in cases where staple goods offered to sail are defective in order to terminate the production and sale of the defective staple goods and to collect them from those who hold them for sales purposes is an implication of a class action lawsuit.

There are provisions that we can regard as class action lawsuit in the Turkish Commercial Code no. 6762.[40] Those who have the ability to file a suit, except damages actions in unfair competition cases, are people who has been harmed or who may be exposed to harm, customers and professional and economic unions. Chambers of commerce and industry, tradesman associations, stock markets, and other professional organizations that have the power to protect the economic activities of their members can file a declaratory action, prohibition action and an action to terminate the conditions resulting from unfair competition. The underlying reason for giving the right to sue to interest groups in this way is to protect the interests of the society.[41] The right to bring a damages action in respect of unfair competition is given to persons who are harmed and customers. Therefore, the plaintiff qualification in damages actions are limited to persons who are harmed and customers. Chambers of commerce and industry, tradesman associations, stock markets, and other professional organizations that have the power to protect the economic activities of their members do not have the right to bring a damages action.[42]

The fact that chambers of commerce and industry, tradesman associations, stock markets, and other professional organizations that have the power to protect the economic activities of their members can file a suit under

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[40] **Article 58 of TCC-**"A person whose customers, credit, professional dignity, commercial undertaking or other commercial interests have been harmed or may be exposed to harm may request:

a) Declaration of whether the practice is unfair;

b) Prohibition of unfair competition;

c) Termination of the material conditions resulting from unfair competition and correction of the statements if unfair competition has been made via incorrect or misleading statements;

d) Compensation of harm and loss if exists

e) Being paid intangible damages in cases where conditions laid down in Article 49 of the Commercial Code exist. The judge may rule, as per subparagraph (d), in favor of the defendant, for the offset of the interest that the defendant may have gained as a result of unfair competition as the damages.

Customers whose economic interests are prejudiced as a result of unfair competition may file the suits laid down in the first subparagraph.

If chambers of commerce and industry, tradesman associations and other professional or economic organizations that have the power to protect the economic interests of their members themselves or their members in the branches have the right to sue according to their by-laws as laid down in the first and second paragraphs, they **can file the lawsuits** stated in subparagraph (a), (b) and (c).

[41] EROĞLU, Sevilay, Rekabet Hukukunda Bilgisayar Programlarının Korunması, İstanbul, 2000, p.251

[42] EROĞLU, p.252.

Article 58 of TCC as well as the ability of the Ministry and consumer organizations to sue a file under the Act on the Protection of Consumers are examples of class action lawsuits. In this respect, giving the right to sue to those people other than the substantive right holder may bear results that can be expected from class actions.

A sort of action that can be called a class action lawsuit does not exist under the Act of the Protection of Competition. The consequences in the area of private law of the Act on the Protection of Competition are resolved by civil courts. Civil courts cannot decide on penalties provided by the Competition Act and cannot grant an individual exemption to an agreement. In our country, under the APC, competition law matters are dealt in civil courts in two circumstances. First one is disputes about the **invalidity** of any agreement or decision of association of undertakings violating Article 4, and legal transactions having the nature of the abuse of dominant position, which is contrary to Article 6. The second one is disputes about **damages** concerning third persons claiming to be harmed from an anticompetitive agreement or abuse of dominant position by an undertaking according to the Act. [43]

There are not any class action lawsuit practices related to damages actions in competition law field. In order to be a plaintiff in a damages action one should be harmed. The substantive right holder can file a pecuniary or intangible damages action. Considering the positive regulations related to civil justice law, there are not any provisions that can be regarded as an example of a class action lawsuit practice in respect of damages actions. In addition, damages actions are excluded in the regulation in the Draft.

In the regulation about invalidity sanction in APC there are not any provisions related to who can file a suit. Therefore it can be said that the said lawsuits can only be brought by the right holder and it is not possible for other people to file a suit in the context of a class action lawsuit. However if we establish general-private law relation between TCC and APC -in my opinion there is such relation- we can say that lawsuits concerning invalidity can be filed by those under the risk of being harmed, customers, chambers of commerce and industry, stock markets, and other professional and economic units laid down in Art. 58 of TCC. Moreover, achieving this result is more expedient because the

[43] İNAN, Nurkut, “4054 sayılı Rekabetin Korunması Hakkında Kanun’un Özel Hukuka İlişkin Hükümlerine Eleştirisel Bir Bakış”, Recent Developments in Competition Law Symposium II, Kayseri, 2004, p. 56,57. AŞÇIĞOLU, ÖZ, Gamze, Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması, Ankara, 2000, 176-1885; ŞİRAMUN, Serpil, Avrupa Birliği Rekabet Hukuku’nda Kötüye Kullanma Kriterleri, İstanbul, 2005, 102-115; ASLAN, p.378-391; GÜVEN, p.457-466.

Competition Act carries more features of public law compared to the Turkish Commercial Code. In particular, it aims at public interest and common interest in the area of competition. Besides, people sometimes cannot seek their rights in cases of small infringements and unjust treatment. Therefore the ability of chambers of commerce and industry, tradesman associations, stock markets, and other professional organizations to bring lawsuits, in addition to damages actions, such as declaratory actions, prohibition lawsuits, and lawsuits related to the elimination of results create more sound competition environment.

In respect of our civil justice law, there is an amendment about regulations related to group actions in Draft of CCP and a parallel amendment should be done to APC in a way to cover the interest groups in the field of competition law: "**Associations and other legal persons, chambers of commerce and industry, tradesman associations, stock markets, and other professional organizations that have the power to protect the economic activities of their members can file lawsuits on behalf of themselves,** in the framework of their status, in order to protect the interests of **their members or the groups they represent**, and in order to establish the rights of the concerned or prevention of unlawful practices or prevention of violation of the rights of the concerned in the future."

CONCLUSION

The principles of competition law essentially intend to provide public interest. The more efficiently the competition law is applied the more public interest will be provided to both producers and consumers[44].

The development of competition law is closely related to the issue of seeking rights. Consumer unions should be established and promoted for the sake of creation, improvement and even protection of competition culture. In addition, those unions should be given right to bring lawsuits related to competition law. Class action lawsuit practices can be considered as indicators of being a modern, democratic and organized society.

Determining the plaintiff qualification is for the most part a case-law issue. The legal criteria in administrative justice for the plaintiff qualification are violation of interest and violation of right. After the Constitutional Court cancelled the personal right violation criterion applied between 1994 and 1996, judiciary bodies determined the plaintiff qualification by their case-laws in respect of nullity actions between 1996 and 2000 although there were not any

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[44] GIFFORD, Daniel J., The Jurisprudence Of Antitrust, SMU Law Reviev, July-August, 1995. GÜZEL, s.187.

criteria. In order to be a plaintiff, the criterion of being a legal person may not be sought because of the fact that the subject concerns the public and is for the public interest and because of the principle of state of law. The improvement in administrative justice is a model and example. Civil judiciary bodies should follow this attitude by their case-laws. Especially in cases where the common interest of the public is in question, and the consumers should be protected, disputes should be solved by using the public interest perspective, which is the ultimate goal of competition law.[45]

With respect to our civil justice law, the amendment related to class action lawsuits should be done immediately in CCP and ACP. The regulation about group action lawsuits in the draft is an indication of this need.

Here we should not forget that by giving via class action lawsuits the right to sue to people, institutions and interest groups other than the substantive right holder does not mean winning the case; it only provides ground for the judiciary body to analyze the case on substance. This point should not be ignored.

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[45] The Supreme Court of Appeals accepts preliminary issue in damages actions filed under APC although there is no obligation to wait for the decision of the Competition Board and have not been able to look from this perspective and have not contributed to the realization of damages sanctions. Yargıtay 19.H.D., 01.11.1999, E.1999/3350, K.1999/6364, Ankara Barosu Fikri Mülkiyet ve Rekabet Dergisi, V.1, I.2, p.208, 209.

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THE ASSESSMENT OF ACTIONS FOR DAMAGES IN COMPETITION LAW IN THE LIGHT OF COURT DECISIONS

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INTRODUCTION

Competition law is a branch of law that exists outside the differentiation between public law-private law, under the title mixed law. It is assessed under economic or public law[1] and also as a branch of social law[2]. As rightly stated in the doctrine, it is possible to talk about a twofold differentiation as *public competition law* and *private competition law*[3].

In Turkish law, the Act on the Protection of Competition (APC)[4] was adopted in 1994 in order to provide against the agreements, decisions and practices preventing, distorting or restricting competition in the goods and services markets as well as to prevent undertakings which enjoy a dominant position in the market from abusing that dominance and to ensure the protection of competition by supplying the necessary regulations and supervision to that effect. The Act brings provisions concerning both private law and public law.

In Turkish law, in addition to the large number of decisions by the Competition Board in relation to the public law consequences of restriction of competition, there are also many Council of State Decisions, given as a result of appeals to the Council of State against Board Decisions[5].

Private law consequences of restriction of competition are regulated in *Section Five* of the ACP. In this section, between articles 56 and 59, the legal nature of agreements and decisions contrary to the Act, the right to

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[1] Turgut Tan, **Ekonomik Kamu Hukuku**, Türkiye ve Ortadoğu Amme İdaresi Enstitüsü Yayınları No: 210, Ankara 1984, p.1 et seq.

[2] İ. Yılmaz Aslan, **Rekabet Hukuku**, 4th Edition, Ekin Kitabevi, 2007, s. 22.

[3] Ergun Özsunay, *"Tahkime Elverişlilik" Kavramına İlişkin Yeni Gelişmelerin Işığında Rekabet Hukuku Uyuşmazlıkları Bakımından Tahkim ve Türk Hukukunun Durumu"*, **Uluslararası Tahkim Semineri**, 4 October 2005, Ankara, ICC Türkiye Milli Komitesi, p. 86.

[4] Adoption Date of the Act No. 4054 On the Protection of Competition: 7 December 1994, Date of Publication on the Official Gazette: 13 December 1994, Official Gazette No: 22140.

[5] For decisions see: www.rekabet.gov.tr

compensation, compensation for the damage and the burden of proof matters are regulated. Concerning the private law consequences of the restriction of competition, judicial jurisdiction must be applied. In practice, regarding the private law consequences of the restriction of competition, it is seen that the number of the actions for damages in judicial jurisdiction is not too large.

Actions for damages in judicial jurisdiction are very important in the sense that they show how the articles of the APC concerning the private law consequences of restrictions of competition are applied. For this reason, in this Paper, the matter of actions for damages filed in the courts is discussed and actions for damages in competition law have been assessed in light of the court decisions.

1- General Information

The subject of compensation for the losses caused by competition infringements has been regulated by a separate provision in the Act on the Protection of Competition (APC). Infringement of competition, in fact, is a tort. Even though the subject of tort has been regulated in Article 41 and the following articles of the Code of Obligations (CO)[6], since APC brings a special regulation in comparison to CO, it has priority.

As the provisions of APC are mandatory in nature and they have to be taken into consideration by the judge *ex officio*, in cases that come before the court –especially with respect to contracts- an assessment must be made not only according to the provisions of the CO, but also by taking into account the APC and relevant exemption communiqués, as well as any individual exemption decision.

The subject of compensation for the damages suffered because of an infringement of competition is dealt with in *"Section Five"* of the APC, under *"Private Law Consequences of Limiting Competition"*. According to Article 57 that regulates the matter of compensation;

"Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly."

According to Article 57 of APC, in order for a liability to occur:

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[6] Code of Obligations No. 818, Adoption Date 22 April 1926, Date of Publication on the Official Gazette: 8 May 1926, Official Gazette No: 366.

- There must be a behavior such as a practice, decision, contract or an agreement or an abuse of dominant position contrary to the APC and the element of illegality must occur in this way[7].

- There must be damages as a result of the anti-competitive behavior.

- There must be a suitable causality link, and lastly

- There must be a fault[8].

Within this scope, an action for damages may be filed for the compensation of the damage resulting from incompliance with the Articles 4, 6 and 7 of APC.

According to Article 4 of APC, 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. In the article, situations violating competition are listed. Accordingly, these are situations such as:

"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 firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,

e) Except 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

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[7] İsmet Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, **Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi**, Year:5, Volume: 5, Issue: 3, p. 30.

[8] Kerem Cem Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-I**, 4 April 2003, Competition Board Publications, No: 0137, p. 224-226.

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."

Therefore, in case of a violation of competition through agreements between undertakings, concerted practices and decisions of associations of undertakings, if other requirements are also present, compensation may be requested.

Similarly, in case a competition violation occurs because of an undertaking abusing its dominant position (APC Article 6) and damages occur as a result, the compensation of these damages may be requested. Examples as to how dominant position may be abused are listed in the relevant article. Accordingly, in situations such as,

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

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

c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

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

e) Restricting production, marketing or technical development to the prejudice of consumers.

there may be said to be an abuse of dominant position.

Finally, there may be competition violations through concentrations. Since there is no differentiation in Article 57 of the APC, creating or strengthening a dominant position through concentrations and causing competition to significantly decrease in any market for goods or services within the whole or a part of the country will be an infringement of competition (APC

Article 7) and compensation may be requested for damages stemming from this behavior[9].

Since in Article 57 of the APC, with the use of the relevant word *injured*, no restriction is brought on the persons that can file an action for damages, competitors, customers and consumers may file actions within the scope of those who are injured by the infringement of competition[10]. However, it is stated that cartel members may not file an action for damages against each other[11].

It is necessary to mention a special situation here. That is whether the counter party to an agreement may file an action for damages because of an infringement of competition. In case of an agreement between the parties, if one of the parties enjoys dominant position and imposes the agreement on the other side, that party may request for the compensation of the damages suffered because of an infringement of competition[12]. In this framework, in distribution contracts -since generally a party has the dominant position and imposes the contract on the counter party- the counter party to the contract may file an action

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[9] Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 41-42; Aslan, **Rekabet Hukuku**, p. 784. For the opposing view see: Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 232.

[10] Aslan, **Rekabet Hukuku**, p. 784; Gürzumar, *"Özel Hukuk Açısından 4045 Sayılı Rekabetin Korunması Hakkında Kanun"*, p. 164.

[11] Aslan, **Rekabet Hukuku**, p. 687; Ergun Özsunay, *"Rekabet Kısıtlamalarının Özel Hukuk Alanındaki Sonuçları"*, **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-III**, Seçkin Yayıncılık, Ankara 2005, s. 145; Osman Berat Gürzumar, *Özel Hukuk Açısından 4054 Sayılı Rekabetin Korunması Hakkında Kanun"*, **4054 Sayılı Rekabetin Korunması Hakkında Kanun ve Bu Kanun'da Değişillik Yapılmasına İlişkin Taslak**, Symposium, Papers-Discussions-Panel (7-8 October 2005), Banka ve Ticaret Hukuku Araştırma Enstitüsü, p. 164. In the doctrine, there is also a different opinion to the effect that Article 1 of the APC aims to protect the competing undertakings, that for this reason third partes other than the competing undertakings, even if they suffer damages, should not be able to claim compensation as they are outside the scope of the law, bu that if their absolute rights or interests under the protection of a legal norm are violated they should be able to file an action for damages based on those norms. See: Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 59.

[12] For detailed information on the subject see: Gürzumar, *"Özel Hukuk Açısından 4054 Sayılı Rekabetin Korunması Hakkında Kanun"*, p. 164-165; Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 58-61; Pelin Güven, *"Rekabet İhlalinden Doğan Zararların Tazmini Konusunun Motorlu Taşıtlar Sektörü ve Bu Sektörle İlgili Mahkeme Kararları Işığında Değerlendirilmesi"*, **Prof. Dr. Ergon A Çetingil ve Prof. Dr. Rayegan Kender'e 50. Birlikte Çalışma Yılı Armağanı**, 2007, p. 654 and et seq.

for damages resulting from the infringement of competition. For instance, distribution or service contracts prepared by various companies in the automotive sector (such as Peugeot, Hyundai, Tofaş) and white goods sector (such as Bosch, AEG, Ariston, Vestel) are just signed by the counter party. In other words, contracts are drawn by one party and imposed on the other. Here, an action for damages may be filed.

Even in case of dominant position, distribution contracts entered by a dominant undertaking are not assessed under Article 6 of the APC, but under Article 4 which is about agreements between undertakings[13].

It is observed that actions for damages filed in the courts are generally based on the infringement of competition defined in Article 4 of the APC. For that reason, it is necessary to summarize the importance of the subject of exemptions in relation to actions for damages.

In Turkish legal system, communiqués are among written sources of law and listed among quasi-Regulations regulatory transactions similar to regulations[14]. There are various communiqués published by the Competition Authority[15]. Communiqués on exemption published by the Board shall be taken into consideration in actions for damages filed because of competition infringements, under the relevant legislation.

The matter of exemptions is regulated in Article 5 of the APC. In the presence of the requirements listed in the relevant Article[16], the Board may decide to exempt the agreements and concerted practices between undertakings and the decisions of associations of undertakings from the application of the provisions of Article 4. Article 4 regulates that agreements and concerted practices between undertakings, and decisions and practices of associations of

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[13] Competition Board Decision, Case No: 2002-1-27 (Preliminary Inquiry), Decision No: 05-65-/928-250, Decision Date: 6.10.2005; Competition Board Decision, File No: 2004-3-145 (Preliminary Inquiry), Decision No: 05-38-/487-116, Decision Date: 2.6.2005. For decisions, see: www.rekabet.gov.tr.

[14] Abdullah Dinçkol, **Temel Hukuk Bilgisi**, Revised 2nd Edition, Der Yayınları, İstanbul 2005, p. 63-64.

[15] For the Communiqués issued by the Competition Board, see: www.rekabet.gov.tr.

[16] The terms listed in Article 5 of the Act are:

“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).”

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.

Therefore, in case of a competition infringement resulting from agreements or concerted practices between undertakings and from the decisions of associations of undertakings within the scope of the Article 4 of the APC, if there is an individual exemption decision on the subject or if the subject is under the scope of a block exemption communiqué, agreements and concerted practices between undertakings as well as decisions of associations of undertakings will be exempted from the application of Article 4 provisions.

When we look at the importance of Competition Board Communiqués and individual exemption decisions given by the Board in the actions for damages filed in relation to the APC, if an exemption exists, compensation for damages resulting from the competition infringement may not be requested. In other words, if the situation in violation of competition is under the scope of a block exemption communiqué or if there is an individual exemption decision granted by the Board, this situation will be deemed as rule of legality[17] and compensation for the damages may not be requested[18].

Granting of an exemption by the Competition Board may be tied to the fulfillment of particular conditions and/or obligations. If exemption is tied to a condition, since the exemption will be valid as of the date that condition is fulfilled, exemption will not be possible unless the condition is met (APC Article 5). As a matter of fact, Article 13 of the APC also states that in case the decided-upon conditions or obligations are not fulfilled the exemption decision may be revoked or particular behaviors of the parties may be prohibited. For that reason, in a case before the judge, if the Board has given a conditional exemption decision, the parties must prove that the relevant condition is fulfilled. Otherwise exemption will not be possible and rule of legality will not exist.

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[17] Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı",* p. 46; Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 232. In the doctrine, it is stated that the rules of legality in terms of general law in the form of the use of a right arising from private law such as the use of brand and patent rights or the use a public right shall be applied in competition law as well and that these situations were also a cause for legality. See Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 46; *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 43-46.

[18] In the doctrine, it is accepted that compensation shall be possible in a case of abuse of right. Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 47.

In a case where an exemption does not exist, all kinds of agreements and decisions of associations of undertakings contrary to Article 4 of the APC will be null[19]. In relation to nullity, the provision on partial nullity in Article 20 of the CO must also be accepted for situations concerning the infringement of competition. Accordingly, the provision that violates competition must be deemed void, and if in the absence of this provision or these provisions the agreement would not have been signed, then all of the agreement must also be accepted as void[20].

Where claiming nullity for the contract under concrete incident constitutes abuse of the right, since under the *"rule of honesty"* included in Article 2[21] of the Civil Code[22] the person claiming nullity would not be protected by law[23], the judge may not implement the provision concerning nullity in Article 56 of the APC[24]. In the doctrine, it is stated that although normally nullity means that the contract is null from the initial date, for contracts under execution that create a continuous relationship of indebtedness, deeming a contract null from the beginning will cause various difficulties, and for that reason in cases where contracts are deemed invalid because of their violation of Article 4 provisions, this must be a prospective invalidity as a rule[25].

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[19] About nullity see: Gürzumar *"4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. Maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi"*, p. 3-76; Kerem Cem Sanlı, **Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği**, Rekabet Kurumu Lisansüstü Tez Serisi No:3, Ankara 2000, p. 389 et seq.; Aslan, **Rekabet Hukuku**, p. 770 et seq.; Güven, **Rekabet Hukuku**, p. 579 et seq.

[20] Gürzumar *"4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. Maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi"*, p. 57; Sanlı **Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği**, p. 433; Aslan, **Rekabet Hukuku**, p. 773.

[21] Turkish Civil Code No. 4721, Adoption Date: 22 November 2001, Date of the Official Gazette: 8 December 2001, Official Gazette No: 24607.

[22] According to Article 2 of the Civil Code:

> *"Everybody has to abide by the rules of honesty while using his rights or fulfilling his obligations. System of law does not protect the explicit abuse of a right."*

[23] Kemal Oğuzman/Nami Barlas, **Medeni Hukuk**, 13th Edition, 2006, p. 164.

[24] Sanlı, **Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği**, p. 436.

[25] Sanlı **Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının**

The performance of acts arising out of agreements and decisions which were deemed null because of competition infringement may not be requested. In case a request is made for reclamation due to the invalidity of previous acts fulfilled, the return obligation of the parties shall be subject to the provisions in Articles 63 and 64 of the CO concerning unjust enrichment. The provision of the Article 65[26] of the CO is not applicable to disputes arising out of this Act (APC Article 56).

In case an infringement of competition exists, a separate provision is envisaged in APC concerning the compensation of damages. Accordingly, those who suffer as a result of the competition infringement may claim as damage the difference between the cost they paid and the cost they would have paid if competition had not been limited (damage suffered as a result of overpayment). 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. In determining the damage, all profits expected to be gained by the injured undertakings (the amount gained normally by the plaintiff as well as the amount it could have gained in the absence of the competition infringement) are calculated by taking into account the balance sheets of the previous years as well. Again, if the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them[27], 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 (APC Article 58).

Different methods are used in the calculation of the damage. In a study on the subject concerning American competition law, it is stated that three separate methods are used, namely the *"before and after method"* in which the differences in the income of the plaintiff caused by the infringement before, during and after the infringement of competition are taken into consideration; the *"yard-stick system"* in which the calculation is done by comparing a market

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Geçersizliği, p. 438-439. Similarly: Gürzumar *"4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. Maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi"*, p. 70.

[26] According to Article 65 of the Code of Obligations:

> *"There is no grounds for the restitution of somthing given to fulfill an unfair or immoral (indecent) purpose*."

[27] In the newly prepared *Draft Text On The Envisaged Amendments To The Law No 4054 on the Protection of Competition*, the phrase "arises from an agreement or decision of the parties, or from cases involving gross negligence of them" in Article 58 of the APC is amended as "arises from the intent or gross negligence of the parties". For the draft see: www.rekabet.gov.tr.

where there are competition infringements to a similar market where competition is not violated, and the *"lost market share method"* which is used to measure the absolute decrease in productivity[28].

Again, it is stated that determining the damage caused by the infringement of competition is difficult, but Article 42 of the CO[29] may be applied here and that accordingly, the judge may, in cases where the damage can not be calculated in absolute terms, estimate the amount of the damage by taking situation of the case and the measures taken by the injured into account[30].

Under damages, compensation of immaterial as well as material damages may be requested[31]. Where the damage arising from the infringement of competition is not direct, for instance, where not only the first buyer but also those who purchase the product from the first buyer and those who have other relations with it suffer damages, i.e. in case of damages caused by reflection, there are different opinions in the doctrine on whether or not these damages may be compensated[32]. In our opinion, compensation of damages caused by reflection should not be possible.

In case the compensation is requested by a commercial company, they also may request immaterial as well as material compensation if the requirements cited in Article 49 of the CO[33] are met[34].

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[28] Özsunay, *"Rekabet Kısıtlamalarının Özel Hukuk Alanındaki Sonuçları"*, p. 126-129.
[29] According to Article 42 of the Code of Obligations:
Proving the damage falls to the plaintiff, when proving the real amount of damage is not possible, the judge, after taking into consideration the normal process of the situation and the measures taken by the injured, estimates the damage in accordance with law."
[30] Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 265.
[31] Özsunay, *Rekabet Kısıtlamalarının Özel ukuk Alanındaki Sonuçları*, p. 144; Gürzumar *"Özel Hukuk Açısından 4054 Sayılı Rekabetin Korunması Hakkında Kanun"*, p. 165; Aslan, **Rekabet Hukuku**, p. 788; Pelin Güven, **Rekabet Hukuku**, Ankara 2005, Yetkin Yayınları, p. 5999; Ahmet Eğerci, **Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi**, Rekabet Kurumu Lisansüstü Tez Serisi, No: 12, Ankara 2005, p. 253. For an opposing opinion see: Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p.236.
[32] On the possibility to claim compensation for damages suffered as a result of reflection see: Aslan, **Rekabet Hukuku**, p. 792; for an opposing view see: Gürzumar, *"Özel Hukuk Açısından 4054 Sayılı Rekabetin Korunması Hakkında Kanun"*, p. 146-147; Sayhan, *"Rekabet Hukukunda Tazminat Sorumluluğu Bakımından Hukuka Aykırılık Unsuru ve Sorumluluğun Sınırı"*, p. 61; Ateş Akıncı, **Rekabetin Yatay Kısıtlanması**, Rekabet Kurumu Lisansüstü Tez Serisi No:5, Ankara 2001, p. 380; Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 239-240.
[33] According to Article 49 of the Code of Obligations, in order to claim damages:

Finally, there is a separate provision in the APC concerning the burden of proof, as well. According to this, the existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence.

The subject of evidence is generally regulated in the Code of Civil Procedure (CCP)[35]. Evidence is separated in two as definitive evidence and discretionary evidence. While definitive evidence can be categorized as acknowledgment (Article 236), deed (Article 287), oath (Article 337) and definitive provision (Article 237); discretionary evidence may be grouped as witness (Article 245), expert (Article 275), discovery (Article 363) and special provisions (Article 367)[36].

In Article 47 of the APC, there are provisions concerning the principles of hearings. According to the Article, *"...during the hearing, the parties concerned may utilize any evidence and means of proof provided in the Part Two Chapter Eight of the Code of Civil Procedure…"* The issue of whether or not all evidence provided for in the CCP may be utilized during hearings -ac cording to this provision- has been examined in detail in a study included in the doctrine. According to the author, the provision of the CCP to the effect that where taking an oath would mean punishment for the relevant person an oath may not be proposed (CCP Article 352) and provisions stating that an oath may only be executed by the judge would prevent oath evidence to be included among evidence permissible in a hearing[37]. As well, it is state that the matter of

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- there must be an illegal act,
- there must be a violation of personal rights,
- there must be an immaterial damage because of that violation,
- there must be a proper causality link between the damage and the act, and lastly,
-there must be a fault.

For detailed information see: Fikret Eren, **Borçlar Hukuku**, 9th Edition, Beta Basın Yayım Dağıtım A.Ş., December 2006, p. 757 et seq.

[34] In some cases it is possible for commercial companies to file for immaterial damages. For instance, anyone whose suffer damage to his customers, credit, professional standing, commercial business or other economic interests, or who is faced with such a danger because of unfair copetition regulated with Article 56 of the TTL, may request immaterial damages in addition to other claims (TTL Article 58/e).

[35] Code No. 1086 on Civil Procedures, Adoption Date: 18 June 1927, Official Gazette Date: 2, 3 and 4 July 1927, Official Gazette No: 622, 623 and 624.

[36] Baki Kuru/Ramazan Arslan/Ejder Yılmaz, **Medeni Usul Hukuku**, Yetkin Yayınları, Ankara 2006, p. 429-430.

[37] For detailed information on proving competition infringements see Ali Cem Budak, *"Rekabet Hukukunda Deliller ve İspat"*, **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-I**, 4 April 2003, Kayseri, Competition Authority Publication No: 0137, p. 51.

proof with deed also is not compatible with the nature of competition investigations, and that proof with deed may not be applied as the Competition Board is among the prosecution and it is not a party to the legal transactions which limit competition[38]. As it can be observed, the types of evidence provided for in CCP are applied to the extent that it is suitable in terms of competition infringements.

Within this framework, since under Article 59 of the APC the existence of agreements, decisions and practices limiting competition may be proven with all kinds of evidence in actions for damages as well, it must be stated that proof with evidence provided for in the CCP should also be applied in this context to the extent it is suitable.

There is a separate provision under APC about the proof of concerted practices. If 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 falls to the defendants that the undertakings are not engaged in concerted practice (APC Article 59)[39].

In actions for damages filed for violation of APC, the provisions of the CCP concerning the authorized court shall be applied. Special authorized court is the local court where the tort takes place (CCP Article 21). Since private authorization does not remove general authorization, in addition to the local court where the tort takes place, the court at the place of residence of the defendant shall also be authorized in actions for damages that may be filed (CCP Article 9)[40].

Finally, because of the fact that there is no separate provision in the APC concerning period of limitation concerning actions for damages filed because of competition infringements, the period of limitation shall be determined under the provisions of Article 60 of the CO[41] concerning torts. Accordingly, the term of

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[38] Budak, *"Rekabet Hukukunda Deliller ve İspat"*, p. 51.

[39] For detailed information on proving competition infringements see Budak, *"Rekabet Hukukunda Deliller ve İspat"*, p. 58-60; Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 254-255.

[40] Kuru/Arslan/Yılmaz, **Medeni Usul Kanunu**, p. 162, 178.

[41] According to Article 60 of the Code of Obligations:

"An action concerning the payment of a monetary amount for damages and losses or immaterial damages, may not be brought after one year as of the date the injured party

limitation shall be one year as of the date the injured party determines its damages and the perpetrator, and 10 years as of the date the tort causing the damage took place in any case.

2- Actions for Damages Arising from an Infringement of Competition

After supplying general information about actions for damages arising from an infringement of competition, it is time to examine actual actions for damages brought before courts:

2.1. In the first case where there was a request for compensation because of an infringement of competition[42], the plaintiff was Bor Industries Foreign Trade Ltd. Co. and the defendant was Etibank General Directorate. Plaintiff's counsel claimed that its client was a company that produces borax from the substance tincal, that the defendant holds the dominant position in the tincal market, that there were one-year contracts between the parties – which were drawn by the defendant and over which the plaintiff was given no opportunity of negotiations or bargaining – and that the defendant has set whatever price it wished in these contracts. The plaintiff, stating that while the defendant sold the raw material of tincal to its affiliated businesses at a price of $ 42 per ton, it increased the final price to $ 230 for the plaintiff and thereby it abused its dominant position under Article 6 of the APC, requested that the plaintiff be awarded compensation three fold of the damage incurred because of the competition infringement, as per Article 58 of the APC.

Local court stated that the defendant held dominant position but that since it sold the raw materials at cheaper prices to its own businesses they were under the same economic structure, that therefore selling raw materials to these businesses at a symbolical price was not against the principles profitability and productivity, that the same price was implemented for all other domestic buyers, that the businesses for which different prices for implemented did not hold the same status and finally that there was no abuse of dominant position in this case, and the court decided to dismiss the action.

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becomes aware of the damage and its perpetrator, and ten years after the occurance of the act that caused the damage in any case.

To the extent that the action for damages and losses is caused by an act for which the period of limitation is longer under the criminal codes, the actio personlis is also subject to that period of limitation.

If a tort gives rise to a receivable against the injured party, the injured party may avoid paying that receivable even if its own claim for compensation becomes invalid because of the period of limitation."

[42] Ankara 7th Commercial Court of First Instance, Case No: 1997/99, Decision No: 1998/732, Decision Date: 17.9.1998.

During the trial, the court has appointed expert witnesses to determine whether or not there was an infringement of competition and whether or not damages were incurred as a result, and it made its decision after taking the report drawn by these experts into consideration.

In the doctrine it is stated that it would be a beneficial solution to apply to the Competition Authority as an expert in order to prevent arriving at different outcomes for the cases brought before the judicial jurisdiction, that applying to the Board as an official expert would remove the inconsistencies between the decisions of the Board and the decisions of the judicial jurisdiction[43]. Similarly, since the Board is a public legal person it would have to be appointed by explicit legal provision in order for the courts to apply to it as an expert in judicial jurisdiction[44].

The subject of expertise is regulated in Article 275 and the following articles of CCP. For cases the settlement of which requires special or technical information, an expert shall be appointed (CCP Article 275). Where there are officially established expert institutions (such as the Council of Forensic Medicine), these must be consulted as experts (CCP Article 276/II), however where mandatory expertise is not provided the expert shall be determined by the judge if the parties can not come to an agreement (CCCP Article 276)[45].

There are no separate provisions stating that the Competition Authority may be consulted for mandatory expertise. Because of the fact that such a provision is non-existent, the courts generally appoint a three-person panel of experts consisting of a lawyer, a financial advisor and a technical expert. Undoubtedly, appointment of the Competition Authority as mandatory expert would be helpful in the sense that, concerning the cases before judicial jurisdiction, it would prevent different outcomes.

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[43] Budak, *Rekabet Hukukunda Deliller ve İspat"*, p. 60.

[44] Eğerci, **Rekabet Hukuku Kararlarının Hukuki Netliği ve Yargısal Denetimi**, p. 301-302. The author rightfully states that, because of the fact that Article 31 of the Code of Administrative Procedures (CAP) refers the provisions of the CCP, experts may be consulted during substantive examination for cases before the Council of State but that since the Council of State reviews the decisions of the Competition Authority, it is not possible to consult the Board as an expert and that for matters requiring technical knowledge, the dispute may be settled by consulting to outsiders, such as academics from schools of law or faculties of economic and administrative sciences, who are experts on competition law. See: p. 301.

[45] Hakan Pekcanıtez/Oğuz Atalay/Muhammet Özekes, **Medeni Usul Hukuku**, Yetkin Yayınları, 5th Edition, Ankara 2006, p. 462.

After the decision of the local court was appealed, the case was brought before the Supreme Court of Appeals[46]. The Supreme Court of Appeals overturned the decision of the local court, stating that for a compensation ruling first the Competition Board must establish an instance of abuse of dominant power, that within this framework it must be investigated whether the plaintiff had applied to the Competition Authority and that if it had not the application to be submitted had to be accepted as a preliminary question and its outcome had to be awaited and that the ruling of the local court which did not take into account these considerations was not appropriate. A request for corrective decision was made against the decision of the Supreme Court of Appeals. However this request was rejected[47]. The local court has abided by the decision of the Supreme Court of Appeals, however because of the fact that the case was not litigated and was not renewed within due period it decided to consider it not filed under Article 409 of the CCP[48].

In the case, the action for damages was filed by the raw material buying company against the company which produces that raw material and which holds dominant position. There is a contract between the parties. In other words, there is an action filed by one party of the contract against the counter party. As mentioned before, where one of the parties holds the dominant position and imposes the contract on the counter party, one party to the contract may file an action for compensation of the damages it suffered as a result of the infringement of competition. Neither the court nor the Supreme Court of Appeals has made any declarations in their decisions concerning the plaintiff of the action for damages.

First of all, it must be said that the decision of the local court to the effect that undertakings within the same economic structure are not equal in status to other undertakings is an appropriate one. In competition law, undertakings within the same economic group are accepted not as separate undertakings but as affiliated undertakings, and for that reason they are evaluated together with the main undertaking. Thus, they can not hold equal status with other undertakings[49].

[46] Supreme Court of Appeals 19th Civil Chamber, Case No: 1999/3350, Decision No: 1999/6364, Decision Date: 01.11.1999. For the decision see: www.kazanci.com.
[47] Supreme Court of Appeals 19th Civil Chamber, Case No: 2000/2925, Decision No: 2000/3369, Decision Date: 1.5.2000. (The decision has not been published).
[48] Ankara 7th Commercial Court of First Instance, Case No: 2000/532, Decision No: 2004/605, Decision Date: 8.10.2004.
[49] Güven, **Rekabet Hukuku**, p. 74 et seq.

In its decision, the High Court stated that, on the subject of determination of a competition infringement, the courts had to apply to the Competition Board and if there was an application to the Competition Board this should be considered as a preliminary question. There are various opinions on this matter in the doctrine, as well.

In the doctrine, it is stated that before taking a decision in a case before the judicial jurisdiction, it should be possible to handle the Competition Board decision as a dilatory question[50]; there is also a different opinion to the effect that it would be appropriate to wait for the decision of the Council of State, if an application is made, in addition to the Board[51].

A *"preliminary question"* is a matter that must be settled in advance in order to make a decision in a case and generally it includes dilatory question as well[52]. Under discretionary dilatory question, a civil court may decide to await the outcome of a case before the administrative jurisdiction[53], or it may consider the decision of the Competition Board as a dilatory question.

If there is an existing Competition Board decision at the time of application to the judicial jurisdiction, since the Board decision is not a court decision and can not be deemed as definitive evidence in this context, it may only be taken into consideration as discretionary evidence by the court[54].

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[50] Gürzumar, *"4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. Maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi"*, **Rekabet Dergisi**, Issue: 12, October-November-December 2002, p. 57-58; Odman, **Fikri Mülkiyet Hukuku İle Rekabet Hukukunun Teknolojik Yeniliklerin Teşvikindeki Rolü**, p. 300-301.

[51] Eğerci, **Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi**, p. 263.

[52] Baki Kuru, **Hukuk Muhakemeleri Usulü**, 6th Edition, Volume: III, 2001, Demir Demir Müşavirlik ve Yayıncılık Ltd. Şti. Publication No: 4, p. 3207; Kuru/Arslan/Yılmaz, **Medeni Usul Hukuku**, p. 556-557.

[53] Kuru/Arslan/Yılmaz, **Medeni Usul Hukuku**, p. 568.

[54] Eğerci, **Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi**, p. 259; Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 261. In the doctrine, it is stated that, in case there is a definitive Competition Board decision that a violation of competition occured, the court may not review whether or not the relevant transactions were in violation to the APC; that in case there is a negative clearance or exemption decision by the Board, the parties have to deny the claims of violating the APC; and that if there is a decision of the board stating that no exemption would be granted, the court had to apply Article 56 of the APC. N. Ayşe Odman, **Fikri Mülkiyet Hukuku İle Rekabet Hukukunun Teknolojik Yeniliklerin Teşvikindeki Rolü**, Seçkin Yayıncılık, Ankara 2002, p. 300.

In case, at the time of application to the judicial jurisdiction, there is an existing Board decision which has become decisive after Council of State investigation, because of the fact that finalized court decisions are accepted as definitive evidence in accordance with the CCP (CCP Articles 237, 295)[55] – and since a Council of State decision is a court decision – the decision will be taken into account under this context. In other words, the Council of State decision shall be treated as definitive evidence in an action for damages brought before judicial jurisdiction.

In case a matter with a definitive judgment is encountered as a preliminary question during an action before another court, since the court that is examining the dilatory question can not come to a different decision[56] where there is a decisive Council of State decision about a matter that is before the judicial jurisdiction under this context, the court shall be bound by the decision of the Council of State on the existence of an infringement of competition.

If there are no decisive Competition Board decisions at the time of application to the judicial jurisdiction or if there is no application filed to the Competition Board, in this instance the court may, on its discretion, consider the Board's decision, or the decision of the Council of State if there is an application, a dilatory question[57].

As a matter of fact, concerning the consideration of Competition Board decisions as dilatory question, the following provision is envisaged in the Draft Law on the amendments to be made to the APC[58]: *"In relation to the conflicts that include the claim of violation of this Law, the case will be suspended until the decision of the Board has been reached"*.

However, the doctrine rightfully states that considering the matter as a dilatory question in judicial jurisdiction would be against procedure economy, as the processes both at the level of the Competition Board and at the level of the

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55 Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 262.

56 Hakan Pekcanıtez/Oğuz Atalay/Muhammet Özekes, **Medeni Usul Hukuku**, Yetkin Yayınları, 5th Edition, Ankara 2006, p. 515.

57 For detailed information see: Güven, **Rekabet Hukuku**, p. 610 et seq. While there is no general regulation on dilatory questions in CCP, it is stated that the court may deem a subject out of its jurisdiction a dilatory question, but since the decision concerning preliminary question has the nature of an interim decision, in case the process takes too long it can always change that course of action. Alangoya/Yıldırım/Deren-Yıldırım, **Medeni Usul Hukuku Esasları**, p. 84; Pekcanıtez/ Atalay/ Özekes, **Medeni Usul Hukuku**, p. 342-343.

58 For the Draft Text On The Envisaged Amendments To The Law No 4054 on the Protection of Competition, see: www.rekabet.gov.tr.

Council of State are too long[59]. Just awaiting the decision of the Competition Board is not sufficient. If there is an appeal to the Council of State for annulment of the Board decision, awaiting the decision of the Council of State is also of great importance. This would mean a process that may take years. In fact there are many Board decisions which were overturned on substantive grounds. For that reason, a provision on mandatory expertise rather than dilatory question may be more beneficial.

2.2. The second case to be brought before the local court[60] is about a authorized seller contract in the automotive sector. The plaintiff is N. Şahsuvaroğlu (dealer) and the defendant is Ford Otomotiv San. A.Ş. (supplier). The plaintiff counsel stated that there was an authorized dealership contract between the plaintiff and the defendant company; that owing to its high sales plaintiff was among the four biggest authorized dealer of the defendant; that for this reason and counting on the good-will of the defendant the plaintiff, with an investment of more than $3,5 million, build a plaza with 36.000 square meters of closed area. In the case, it was claimed that the defendant practiced product restriction through 1998 and during the first fifteen days of 1999; that it prevented trade by the plaintiff; that the plaintiff was made to suffer losses because of the supply boycott; and that the plaintiff was made to sign dissolution protocols by intimidation. It was also contended that since the dissolution protocols were signed by intimidation, there was a deception of the law and the APC as well as the 2-year notification period for annulment stipulated by the Block Exemption Communiqué No. 1998/3[61] concerning motor vehicle sector was avoided; therefore, the plaintiff demanded damages for positive profit of two years, for the rent income loss suffered during the 2 years when the sales facility was empty, for the cost difference that arose because of the fact that the spare parts which remained on hand had to be sold beneath market price, for vehicle sales profit the plaintiff was deprived of for 2 years, for service workmanship profit and for the compensation paid to the workers who had to be dismissed, as well as for loss of profit at the rate of 10 per cent of its 1998 income because of intra-contractual competition violations. Within this scope, a

[59] Sanlı, *"Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu"*, p. 258.

[60] Kadıköy 1st Commercial Court of First Instance, Case No: 1999/466, Decision No: 2002/49, Decision Date: 31.01.2002

[61] Communiqué No 1998/3 on Group Exemption Regarding Distribution and Servicing Agreements in Relation to Motor Vehicles, Official Gazette Date: 1.4.1998, Official Gazette No: 23304. This Communiqué was repealed with the Communiqué No 2005/4. For detailed information on the Communiqué see: İ. Yılmaz Aslan/Erol Katırcıoğlu/Fevzi Toksoy/Ali Ilıcak/Şahin Ardıyok/Fırat Bilgel, **Otomotiv Sektöründe Rekabet Hukuku ve Politikaları**, Ekin Kitabevi, 2006.

total of TL 10.000.000.000 material and TL 50.000.000.000 immaterial compensation was demanded, on condition that rights as to surplus are reserved. With a petition submitted later, the TL 10.000.000.000 amount was increased.

The court, stating that an oral dealership and authorized sale contract was made between the parties and was in actual implementation, first assessed whether the protocols concerning the annulment of the contract were signed as a result of coercion as claimed. The court pointed out that the authorized dealership contract between the parties was dissolved retroactively, and that it was against usual practice in life for an experienced merchant like the plaintiff to end its dealership, which was going on for 2 years and in which he had made a considerable investment, by selling back the spare parts and vehicles in his hands at the price he had purchased them one year ago according to the provisions of the protocol – like an inexperienced merchant who puts himself at a disadvantage and who does not think of his own interests – and to accept these unfavorable conditions.

The court, within the scope of the evidence and documents presented, decided that the defendant as the firm granting the dealership abused its power and forced the plaintiff to sign an annulment protocol, that any annulment protocol signed as a result of a deceptive act contrary to the law was invalid; also in its evaluation on exploitation, it found the annulment protocols invalid in terms of exploitation.

In its evaluation concerning APC and Communiqué No. 1998/3, the court found that APC had the status of a special law in comparison to the CO and in terms of damages, the relevant provisions of the APC should have priority in application. As well, it was stated that the provisions of the APC and the relevant Communiqué should be applied to the conflict between the parties, and that the reports which were prepared by two different panels of experts accepted the fact that the defendant acted in violation of the provisions of the APC and the Communiqué No. 1998/3.

As a result, while the Court found the action partly admissible and ruled in favor of compensation, it decided that the since the damages were suffered as a result of parties' agreement and decision, as well as of gross negligence by the defendant, in accordance with the status and economic condition of the parties, existing evidence and the rules of right and equity the compensation for damages suffered because of profit loss should be increased by one-fold. As a result, it was decided that the damages determined at TL 2.048.026.464.000 in accordance with the evidence collected after the partial-admittance of the case should be increased one-fold by discretion to TL 4.096.052.938.000 under Article 58/2 of the APC, and the damages arising from the compensation paid to

the workers were found to be TL 14.696.200.000; so a total amount of TL 4.110.748.138.000 for damages was determined.

Regarding immaterial damages, it was ruled that the defendant, with the annulment protocols it forced the plaintiff to sign through coercion and extortion, caused the plaintiff to suffer losses and that an amount of TL 20.000.000.000 for immaterial damages should be determined. The court decided to collect the aforementioned amount from the defendant, together with the bank rediscount rates of 80 % from 24.05.1999, which is the date of the case, to 29.12.1999, and of 70 % after 30.12.1999.

The decision of the local court was appealed at the Supreme Court of Appeals. The Supreme Court of Appeals[62] stated that expert opinions saying that coercion was used against the plaintiff could not be considered as basis for a ruling as they are legal evaluations, that coercion is not possible when merchants are convinced to sign a contract with a threat of informing the justice, that if information and complaints are reflecting the truth they mean the use of a constitutional right and if they are not the informer or the complainant would suffer the consequences, that the one avoiding performance in contracts between merchants would suffer the same consequences, that this situation can not be considered as hardship that is among the elements of exploitation (exploitation of financial difficulties), that the merchant must take the necessary measures, and lastly that the conditions of abuse of dominant power were not present in the case. According to the Supreme Court of Appeals, the notification period for annulments provided for in the Communiqué No. 1998/3 was to be implemented in case one of the parties unilaterally wanted to annul the contract. However, in this case the parties have annulled the contract by the exercise of their individual wills. Referring to the Competition Board's decision[63], The Supreme Court of

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[62] Supreme Court of Appeals 19th Civil Chamber, Case No: 2002/2827, Decision No: 2002/7580, Decision Date: 29.11.2002. For the decision see: www.kazanci.com.

[63] Competition Board Decision, File No: D4/1/M.H.A.-99/1 (Preliminary Inquiry), Decision No: 99-58/624-398, Decision Date: 21.12.1999. In the complaint submitted to the Board, it was claimed that Ford infringed the APC by setting resale prices and discount rates of the authorized sellers, implementing different support premiums between the authorized sellers during fleet sales, implementing transportation subsidies by undertaking distribution costs of their vehicles to all of Turkey, implementing restrictions on sales of competing and equivalent spare parts, treating equal performing dealers differently, unilaterally setting vehicle sales prices, changing the contracted region of the authorized seller, implementing supply boycotts and annulling the agreement without regard to the notification periods established in the Communiqué No. 1998/3. Since the unwritten dealership agreement between the parties included both new motor vehicles and spare parts and servicing, the Board examined the issue by taking the provisions of the Communiqué No. 1998/3 under consideration. In the decision of the

Appeals stated that the defendant's practice was found to be in compliance with the APC and that the conditions for a compensation ruling were not present. Since the case did not include coercion, it was not necessary to await the outcome of the administrative action filed for infringement of the APC and therefore the case should have been rejected; as a result the Supreme Court of Appeals found that the decision to accept the case was not appropriate and overturned the ruling of the local court.

Upon the overruling decision of the Supreme Court of Appeals, the Court obeyed the overruling decision however the plaintiff's counsel waived the case; therefore it was decided that the case shall be dismissed[64].

The dissenting opinion in the decision of the Supreme Court of Appeals states that in order to rule for compensation, first of all, the Competition Board should establish that there is an infringement, if there is a procedurally finalized decision of the Board, the court should take a decision by determining the loss; APC authorizes the Competition Board of establishing a competition infringement and in order to avoid conflicting decisions civil courts should wait for the decision of the Board; the Supreme Court of Appeals adopted this view (in the decision no. 3350/6864 for the first case mentioned in the Communiqué); the issue is accepted as a preliminary matter therefore the administrative case should be accepted as a preliminary matter and the result of this case should be waited because of the application to administrative jurisdiction against the decision of the Competition Board; a decision should be made accordingly and the decision of the local court should be overruled on these grounds. However the majority did not agree with this opinion.

When we analyze the decision, since there is a vertical contract in terms of competition law, first we should state that an assessment must be done in respect of APC, not the Code of Obligations because contracts including

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Board, the relevant product market was determined as passenger automobiles and commercial vehicles production and distribution market and unanimously decided that since Fort Otomotiv Sanayi A.Ş. did not hold dominant position in the market complaints about this undertaking could not be examined under Article 6 of the APC; and that under Article 4, the claims did not reflect the truth and so there was no need for and investigation under Article 41. Concerning the claim on non-compliance with he annulment periods stated in Communiqué No 1998/3, the Board stated that these periods were in relation to the unilateral annulment of the agreement, but in this case the dealership agreement was mutually annulled by signing a preliminary protocol first, and then an annulment protocol and that therefore the provision of the relevant Communiqué was not violated. For the decision see www.rekabet.gov.tr.

[64] Kadıköy First Commercial Court of First Instance, Case No: 2003/876, Decision No: 2003/803, Decision Date: 08.09.2003.

competition infringements will be void (APC Art. 56), and it is not possible to terminate a void contract.

Therefore, first, whether the contract includes a competition infringement under Article 4 of APC, then whether the contract falls within the scope of block exemption communiqué or whether an individual exemption regulation exists should be assessed. If the contract is exempted, this creates a rule of legality and as a result claim for damages will not be made by asserting an infringement. In this stage, an assessment will be made in respect of whether the termination period laid down in Communiqué no. 1998/3 is complied with and in respect of the results of noncompliance – if there is a case of noncompliance the contract will not be assessed within the scope of the Communiqué, which is explained in detail in the decision mentioned below. If the contract infringes competition and does not benefit from exemption, an analysis may be made in respect of whether the infringement has caused any losses.

Hence, the argument that the agreement is terminated as a result of duress in terms of Code of Obligations can only be made after the assessment carried out according to APC because, as it is mentioned above, if the agreement between the parties becomes void as a result of competition infringement, its termination will be out of question.

The establishment in the decision of the Supreme Court of Appeals is correct. The Supreme Court of Appeals declared that the period for the notice of termination stated in the Communiqué no. 1998/3 shall be applied in cases where one of the parties terminates the contract unilaterally. In the case in question, the contract was terminated with both parties' discretion. The title of Article 6 of the Communiqué no. 1998/3, which was in effect at the time of the case, is *Mandatory Cases In Order the*

Exemption to be Granted. Under this title, it is provided that, for agreements made for an indefinite term, period for notice of termination should be at least two years for both parties, however in cases where the provider has to pay an appropriate compensation arising from the agreement or the law if he terminates the agreement or where the seller enters the distribution system for the first time and accepts the term of the agreement or natural period for notice of termination for the first time; this period will be at least one year. For the agreements made for a definite term, the term of the agreement should be at least five years and both parties should accept to notice their nonrenewal request at least six months before the termination of agreement. The article states that these exemption conditions are without prejudice to the right of the parties to terminate the agreement as a result of the failure by one of the parties to meet the

main obligations. As we see, the article regulates the requirements to be met in case of unilateral termination. If the agreement has a nature that is required to be assessed within the scope of Communiqué no. 1998/3, in case it is terminated unilaterally, it should contain an arrangement consistent with this provision in relation to termination and termination should be made accordingly. Otherwise, since the provision related to termination is included in mandatory cases in order the exemption be granted, the agreement between the parties cannot benefit from exemption because of noncompliance with the provisions of the Communiqué. The parties bilaterally terminated the contract in the case in question; therefore it is not possible to rely on the provision of the Communiqué no. 1998/3.

The Supreme Court of Appeals took the decision of the Competition Board into account and decided that the conditions to rule for compensation in terms of APC did not exist because it was stated in the Board decision that there was not a competition infringement and therefore declared that the local court should dismiss the case. However, the decision of the Competition Board was taken to the Council of State for repeal request and the Council of State revoked the Board decision on the grounds that inspection and inquiry was not sufficient, and proposed arguments were not investigated since they were not found serious as a result of insufficient inspection and inquiry[65]. Upon the overruling decision of the Council of the State, the Competition Board opened an investigation and took a new decision. It was decided that there was not a need to impose a sanction in the framework of APC as there was not a competition infringement[66]. Eventually, in this case, a different result did not occur because an infringement was not found after the new assessment made in the process

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[65] Tenth Division of the Council of the State, Case No: 2002/4519, Decision No: 2003/3811, Decision Date: 7.10.2003. (Unpublished decision of the Council of the State)

[66] Decision of the Competition Board, File No: D4/1/M.H.A.-99/1 (investigation), Decision No: 04-06/856-200, Decision Date: 20.9.2004. According to the decision:

"according to the scope of evidence and the file examined about the investigation about Ford Otomotiv Sanayi A.Ş. opened under the Board Decision dated 29.1.2004 and no: 04-09/90-M, on 20.9.2004, it was decided unanimously and resort to Council of the State being open that

1- *Ford Otomotiv Sanayi A,Ş, did not force or make pressure about reselling price of authorized dealers, authorized dealers can sell vehicles and spare parts of different prices,*
2- *Authorized dealers can use competing and equivalent spare parts, there is no pressure on them in this issue, warnings sent to authorized dealers aim to prevent unauthorized usage of the brand "Ford" therefore it is understood that it is not a practice contrary to the Act no. 4054 and it is not necessary to give a sanction in the framework of Act no. 4054 on the Protection of Competition to Ford Otomotiv Sanayi A.Ş.*

after the decision of the Competition Board, which the court relied on, was overruled. Nevertheless if the Board had come to a different conclusion, there would be a problem because the grounds in the decision of the Competition Board, which the court relied on, would be invalid. As we see, the existence of Competition Board decision is not enough and it is important this decision pass the process in the Council of State and be finalized.

Draft on amendments to APC provides that, with respect to disputes that include assertions that APC is violated, the case may be pended until the Board takes a decision; however this solution is not adequate if the decision of the Board is overruled, as we see in this case.

Another striking point in the decision is that although the plaintiff claimed for treble damages, the court decided the damage would be increased one time with discretion. The decision of the Supreme Court of Appeals did not mention this issue.

There are different opinions about applying the provision stipulating that treble damages should be awarded according to Article 58 of APC. It is argued that the judge should award treble damages if the conditions are met. On the other hand, it is also suggested that the judge may award up to treble damages[67]. The Article states that treble damages should be awarded. If we look at American practice, which the provision models, in order to be deterrent for competition infringements treble damages are awarded[68]. As a result, the provision in the article should be applied by awarding treble damages -until an amendment is made, even if it is not consistent with damages system regulated in the Code of Obligations- regarding the clear wording of the Act. The Draft on the amendments to APC provides an amendment to the Article and states that damages may be awarded up to treble damages. Unless an amendment is made to APC in this effect, the judge should award treble damages. Therefore the decision of the local court, which awarded damages increased one time, is not correct.

If we look at the issue of immaterial damages, as mentioned above, damages resulting from violation of ACP include immaterial damages. It is seen that the local court assessed immaterial damages within the scope of damages arising from competition infringement.

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[67] For opinions about awarding treble damages see Aslan, **Rekabet Kanunu,** p. 793; M. Nazlı Aksoy, **Rekabetin Korunması Hakkında Kanuna Aykırılığı Özel Hukuk Alanındaki Sonuçları,** Rekabet Kurumu Uzmanlık Tezleri Serisi, No: 52, Ankara 2004, s. 54; about ruling for treble damages see Sanlı, "*Türk Rekabet Hukukunda Haksız Fiil Sorumluluğu",* p. 271.

[68] Akıncı, **Rekabetin Yatay Kısıtlanması,** p. 386 et al.

2.3. In another case before the local court[69] the plaintiff is Maestro Otomotiv San. Tic.Ltd. Şti. and the defendant is Peugeot Otomotiv Pazarlama A.Ş. Here, there is a dealership agreement again and the plaintiff is one of the parties to the agreement.

In the case, an authorized dealer agreement related to automotive market was signed. With the argument that the agreement was terminated as a result of defendant's gross negligence and intentional behavior; and reserving the surplus rights, compensation for TL 1.000.000.000.000 as the profit from selling vehicles, which is deprived of within the scope of article 58 of ACP, TL 3.700.000.000.000 as services and labor cost profit, TL 1.560.000.000.000 as the loss for gross income from spare parts was requested. Moreover, compensation was claimed for the losses arising from the fact that another outlet and service station was illegally established in the region; and for the losses caused by infringing intra-agreement competition. The plaintiff, moreover, requested for treble damages for the whole loss created, under Article 58 of APC.

The local court declared that the APC provisions related to damages provides private regulations about damages apart from The Code of Obligations; the issue of damages includes material damages and immaterial damages and accordingly, first of all, it is necessary to assess whether there was an illegal conduct or not. Then it was stated that there was a contractual relationship between the parties and it should be discussed whether to apply the provisions of APC or Code of Obligations.

According to the court, the title of the agreement is *Authorized Dealer Agreement,* and in addition the plaintiff is not a sole seller but an agency. The court stated the grounds that different from an agency, a sole seller buys the products produced by an undertaking on his behalf, sells them in the monopolistic territory reserved to him on his behalf and he does not have the right and authority to represent the producer. Accordingly it was stated that there were provisions in the agreement between the parties stipulating that the defendant cannot grant a secondary authorized dealership, the authorized dealer was able to act on his behalf and could not act, make a disposition on anything, enter a commitment on behalf and account of the distributor in any case and as a result the defendant was not a sole seller but an agency.

The court stated that the agreement was an agency agreement for an indefinite term; it was terminated unilaterally and unfairly, provisions stipulating that no request shall be made in case of unfair termination were offending good

[69] Kadıköy First Commercial Court of First Instance, Case No: 2002/540, Decision No: 2004/328, Decision Date: 13.04.2004.

morals within the scope of Articles 19 and 20 of the Code of Obligations and therefore they were void.

The court affirmed that law provisions to be applied for unfair termination were assessed, even if the defendant was in a dominant position as defined in APC, in this case there was no abuse of dominant position therefore it was not possible to apply the provisions of APC. The court added that nonapplication of the provisions of APC does not mean that the plaintiff does not have the right to claim for damages, according to the provisions of the Code of Obligations unfair termination gives the responsibility of damages to the terminating party; in this case two boards of experts had different views about law provisions to be applied but they agreed that the termination was unfair and the loss incurred in this context was accounted. The court adopted the view in the second expert report that the sanction of the dispute was not related to the provisions of APC and had to be resolved according to the Code of Obligations and general provisions and predicated on this view in its ruling.

Accordingly the Court stated that the defendant did not have a good reason for terminating the agreement and failure to carry out his responsibilities given by the agreement, it was possible for the plaintiff to use optional opportunities in Article 106 of CO[70]; he was a right holder within the scope of this article and accordingly compensation for the loss resulting from failure to meet the obligations was requested, so the positive loss of the plaintiff should be compensated. It was stated in the decision that it was possible to apply by analogy the two-year period for notice of termination provided in the Communiqué of the Competition Board no. 1998/3. Consequently the Court adopted that loss of profits for the period between 18.8.2001 and 18.5.2003, in which the plaintiff did not carry out activities because of termination, was totally TL 3.218.684.321.722 consisted of automobile sales, service and labor cost, spare part sales.

As a result, the Court decided that TL 3.218.684.321.722 material compensation shall be collected with interest from the defendant and denied the

[70] According to Article 106 of the Code of Obligations:

"For a contract including mutual obligations, if one of the parties fail to meet his financial obligations, the other party may request to determine a convenient fixed period or request from the judge to determine a convenient fixed period for the payment of debts.

During this fixed period, provided that debts are not paid the creditor has the right to request the payment and file a case for damages due to the delay or the creditor may immediately declare that he forsakes the execution of the agreement and claim for damages due to the delay; and request damages resulting from failure to execute the agreement or terminate the agreement."

claim for immaterial damages. The court denied the claim for immaterial damages on the grounds that immaterial damages for the firms are accepted in limited circumstances in the Commercial Law, the plaintiff firm could not prove that it suffered from immaterial losses and the conditions for immaterial damages in CO were not met.

The case was appealed and the file was sent to the Supreme Court of Appeals however in the appeal phase, plaintiff's counsel waived from the case and it was decided that the case shall be overruled in order to take a decision due to the waiver and it was not necessary to analyze appeal objections of defendant's counsel in respect of overruling reason[71]. The local court obeyed the Supreme Court of Appeals overruling decision due to waiver.[72]

In the case, there was confusion about the notions in the decision of the local court. First the agreement between the parties were regarded as an agency agreement, then it was claimed that there was no dominant position in terms of APC and after that provisions in CO should be applied instead of APC.

Here, first, it should be assessed whether the relationship between the parties was an agency agreement. According to Turkish Commercial Law an agent is a person who permanently acts as a mediator in the agreements related to a business in a certain location or a region or carry out those agreements on behalf of that business without a natural title such as agency, commercial representative, mercantile agent, sales official or an employee (TCL Art. 116). Although an agency has monopolistic rights they are not compulsory as they can be abolished by the agreement.

A sole seller buys the goods produced by the trader on his behalf and account and resells them in the monopolistic region reserved to him. In this context he bears all the risks included in the activities[73]. Here monopolistic rights are compulsory in a sole seller agreement. The biggest difference between an agency agreement and a sole seller agreement is that while an agent does not act on his own behalf and account but acts as a mediator or makes an agreement on behalf of a trader; a sole seller buys the goods from the trader and sells to his customers on his behalf and account[74].

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[71] 19th Civil Chamber of the Supreme Court of Appeals, Case No: 2004/10981, Decision No: 2004/13171, Decision Date: 27.12.2004 (The decision was not published)

[72]Kadıköy First Commercial Court of First Instance, Case No: 2005/122, Decision Date: 17.02.2005.

[73] Arkan, **Ticari İşletme Hukuku,** p. 196

[74] Mehmet Bahtiyar, **Ticaret İşletme Hukuku,** Revised Fifth Edition, Beta Basım Yayım Dağıtım A,Ş Ekim 2006, İstanbul, s. 146.

Although the court analyzed the features of both kind of agreements in respect of whether the relationship between the parties was a sole seller or agency agreement and stated that the difference between them is that a sole seller, in contrast to an agency, buys goods from business owner on his own behalf and account and sells them in the monopolistic region reserved to him on his behalf and account -despite provisions in the agreement in the case stating that authorized dealer could not act, enter into commitment, on behalf and account of the distributor- claimed that the defendant was not a sole seller but an agent. However, the agreement clearly put forward that the defendant was able to act on his behalf and shall not act on behalf and account of the distributor in any case. In this context, we can say that it was not an agency agreement but a sole seller agreement.

In competition law, an agency agreement is not treated under Article 4 because there is a representation relationship between the agent and client, the agent does not act on his behalf and account and therefore does not bear commercial or financial risks[75]. There is a specific explanation in *Guidelines*[76] *on the Block Exemption Communiqué no 2002/2 related to Vertical Agreements*[77], about whether the relationship between undertakings in terms of agency shall be assessed under Article 4. Accordingly, it is declared that the determinant factor is whether the agency takes commercial or financial risks about activities he is appointed by the client, if financial or commercial risks are not taken, the agreement is not under the scope of Article 4 of APC; in the opposite situation, namely, if the agency takes financial or commercial risks the agreement is treated under the scope of Article 4. Also, the doctrine states that the agency taking risks related to mediating activities or making agreements on behalf of the client is treated under Article 4 of APC[78].

It is seen in the case that there were provisions in the agreement between the parties stipulating that the defendant could not grant a secondary authorized dealership, the authorized dealer was able to act on his behalf and cannot act, make a disposition on anything, enter a commitment on behalf and account of the distributor in any case. It is also seen that financial and commercial risks were taken. Therefore there was an agreement that had to be assessed under

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[75] Aslan, **Rekabet Hukuku,** p. 285. For a detailed study on the assessment of agency agreements see Metin Topçuoğlu, **Rekabet Hukuku Açısından Acentelik ve Dağıtım Sözleşmeleri,** Asil Yayın Dağıtım Ltd. Şti. 2006.

[76] For the Guidelines see: www.rekabet.gov.tr

[77] Block Exemption Communiqué no 2002/2 related to Vertical Agreements, Date of the Official Gazette: 14 July 2002, No: 24815

[78] Aslan, **Rekabet Hukuku,** p. 285; Metin Topçuoğlu, **Rekabet Hukuku Açısından Acentelik ve Dağıtım Sözleşmeleri,** p.146.

Article 4 of APC – even if the court accepted that there was an agency relationship. As a result, first whether there are provisions infringing competition under Article 4 of APC and should be assessed and if there are, whether exemption conditions are met should be looked at.

In order to benefit from exemption, there should be either an individual exemption decision or the agreement should be under the scope of a block exemption communiqué. As the case is about automotive sector, it should be assessed first whether the agreement is under the scope of Communiqué no. 1998/3 related to this sector, if it is not under the scope of that Communiqué it should be analyzed whether the agreement is under the scope of another block exemption communiqué. If the agreement meets the conditions of a communiqué, exemption will be possible. In case of exemption, the agreement is not subject to the sanctions provided by Article 4 of APC. Otherwise, if the agreement includes a competition infringement then it is possible to analyze whether the infringement causes any losses.

Consequently, the decision of the local court is not correct in these respects.

2.4. In a recent case[79] before the local court, the plaintiff is Aydoğanlar Otomotiv Servis San ve Tic. A.Ş, and the defendants are Koç Holding A.Ş. and Günoto A.Ş. There is again an authorized dealer agreement made in motor vehicles sector. The dealer terminated authorized dealership agreement and service agreement, and compensation of the loss incurred because of the violation of APC and provisions of Communiqué no 1998/3 related to motor vehicles. In this context, provided that surplus rights were reserved, TL 50.000.000.000 material damages and TL 50.000.000.000 immaterial damagesn due to the harm given to commercial dignity were claimed. Also, there was a claim for treble damages.

It was argued by the plaintiff that dealership continued for 6 years, USD 1.000.000 investment was made relying on the goodwill of the defendant, the termination of the agreement caused losses, price and discount rates were determined by the defendant during the term of the agreement, costs were increased through preventing other authorized dealers in neighboring cities from paying freight, profits were decreased by delivering the orders incompletely for three months, spare part usage was restricted and using products of competitors were prohibited, which constituted a competition infringement and 2 year period for notice of termination provided in the Communiqué was violated.

[79] Kadıköy Third Commercial Court of First Instance, Case No: 2002/739, Decision No: 2006/266, Decision Date: 04.04.2006.

The court carried out an investigation under the scope of Article 4 of APC stating that the agreement fell within the scope of a vertical agreement. Accordingly, it was declared that restrictions on exclusive territory, price and conditions related to spare parts were contrary to Article 4 of APC.

The agreement which was found to infringe competition was analyzed later to find whether it was under the scope of Communiqué no. 1998/3. In the case, there were two different agreements on authorized dealership and being an authorized repairer made on different dates and there were not any provisions stating that both agreements would apply together. According to the Communiqué no. 1998/3, the provisions of that Communiqué shall apply in cases where there is a single agreement on authorized dealership and being an authorized repairer. This point is emphasized in a study called *"Assessment of Block Exemption Communiqué no. 1998/3 Related to Motor vehicles Distribution and Service Agreement"*[80].

Consequently, the court declared that the agreements between the parties could not be assessed under the scope of the Communiqué no 1998/3, which was in effect at that time, even if they had a nature that fell within the scope of Communiqué no. 1998/3, exemption provisions shall not apply because of price fixing practices in the agreements. The court considered whether the agreement between the parties fell within the scope of the other block exemption communiqué and as a result it was stated that the agreement was illegal and prohibited under the scope of Article 4 of APC because it was not under the scope of any block exemption communiqué or individual exemption.

The court decided that the plaintiff was able claim for damages for the losses he bore due to competition infringement within the scope of Articles 57 and 58 of APC. However, the court denied the case because the losses, which occurred due to price fixing practices, different practices for equal activities in sales value dates, vehicle delivery and transport prices, decrease in benefits as a result of increasing costs; restrictions on the market through prohibiting competing and interchangeable goods and setting high prices, could not be proven by material evidence.

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[80] For this study see www.rekabet.gov.tr. In this study it is stated that while Communiqué no 1998/3 is a regulation related to motor vehicles sector, it only includes certain types of agreements in the sector, accordingly, agreements on joint distribution of spare parts and repair services of motor vehicles can benefit from the Communiqué; therefore agreements related to only distribution or only repair services are not within the Scope of the Communiqué.

In the case, the court properly handled the matter in respect of Article 4 of APC, provisions of Communiqué no 1998/3, other block exemption regulations or an individual exemption decision.

First, the provisions of the agreement was examined to find whether there was a competition infringement and it was concluded that there was an infringement; then the agreement was analyzed to see whether it was under the scope of exemption. Afterwards, it was concluded that the agreement was not exempted and the court dealt with the issue of losses.

The court decided to deny the case because the plaintiff could not prove that losses occurred due to competition infringement. As we see proving the losses causes by an infringement is very important. It is not sufficient to prove only the infringement.

If we consider the argument that the agreement was terminated unfairly, as it was stated in the court decision, we see that the agreement between the parties was anticompetitive due to some provisions and it was not within the scope of block exemption communiqué because of certain provisions. If it fell within the scope of block exemption communiqué, periods for notice of termination laid down in Article 6 of Communiqué no. 1998/3 should apply for the agreement between the parties. This provision is one of the necessary conditions for granting exemption to the agreement. This provision about the periods aims at strengthening distributors and authorized dealers who make large investments against providers and at creating a structure in which they can benefit from the investments they make and protect their economic independence against the provider[81]. Likewise, *Block Exemption Communiqué no. 2005/4 on Vertical Agreements and Concerted Practices in Motor Vehicle Sector*[82]*,* which repeals and replaces Communiqué no. 1998/3, provides, in Article 4 regulating the conditions for exemption, that the term for the agreement between the provider and distributor or authorized repairer should be five years at least and both parties should accept to notice nonrenewal request at least six months before the expiry date of the agreement; or if the agreement is made for an indefinite term, the period for notice of termination is at least two years for both parties. However, this period applies on condition that it shall be reduced to one year in cases where the provider should pay appropriate compensation due to the provisions of the agreement or law or terminates the agreement because he has to regulate the whole distribution system or a substantial part of it. This is

[81] Decision of the Competition Board, File No: 2004-4-93, Decision No: 04-49/660-164, Decision Date: 29.7.2004. For the decision see: www.rekabet.gov.tr

[82] Block Exemption Communiqué no. 2005/4 on Vertical Agreements and Concerted Practices in Motor Vehicle Sector, Official Gazette Date: 12 November 2005, No: 25991

without prejudice to the right of terminating the agreement due to other party's failure to carry out its main obligations.

The provision in the Communiqué no. 2005/4 aims to guarantee economic independency of authorized dealers and repairers who make large investments owing to the nature of their business. In this context, in *"Guidelines on Explaining Block Exemption Communiqué no. 2005/4 on Vertical Agreements and Concerted Practices in Motor Vehicle Sector*[83] the answer to the question of whether an agreement has to meet all of the requirements in Article 4 of APC in order to qualify for block exemption states that minimum periods related to agreements and notices only apply to agreements between new motor vehicle providers and their distributors or authorized repairers and these requirements are not compulsory for other kinds of agreements. In this context, if these periods are not complied with, the agreement between the parties will not be considered under exemption.

In the aforementioned case, as the agreement did not fall under the scope of the Communiqué no. 1998/3, noncompliance with exemption provisions is out of question. In other words, as the agreement is null and void because of competition infringement and termination of a void agreement is not possible, unfair termination is out of question.

In case the agreement between the parties is valid, it can be asserted that the agreement is terminated unfairly. Where a valid agreement is terminated unfairly, according to Article 96 of CO, where the creditor cannot obtain his due partially or completely, the debtor has to make up the losses unless he proves that he cannot be attributed any fault; therefore the creditor can claim for damages resulting from the violation of the agreement by unfair termination. In this context, the creditor may claim for both material and immaterial compensation[84]. Competition law accepts partial nullity, so if solely the provision infringing competition is deemed void in a concrete incident, other provisions of the agreement are deemed valid and therefore assertion for unfair termination can be made by depending on the valid agreement.

If the agreement would not exist without anticompetitive provision(s), whole agreement is deemed void. In distribution agreements, anticompetitive provisions are generally basic provisions of the agreement. Since the agreement includes anticompetitive provisions by its nature; it is assessed under exemption provisions.

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[83] For the guidelines see: www.rekabet.gov.tr

[84] Eren, **Borçlar Hukuku,** s.1011.

In the concrete incident, the agreement was anticompetitive and not granted exemption. Unless an exemption is granted, every agreement and decision of associations of undertakings is void under Article 4 of APC, consequently the agreement between the parties was void under Article 56 of APC.

In a case brought before the Supreme Court of Appeals, the plaintiff argued that the defendant uninstalled the machines although he should have only closed the bakery he operated according to the letter of undertaking and requested for the termination of the contract. The local court denied the case. Upon the appeal of the case, the Supreme Court of Appeals overruled the decision and declared that the provisions of the agreement between the parties infringed Article 4 of APC, the subject of an agreement can be determined freely within the limits set by the Law according to Article 19 of CO, in this context the agreement containing competition infringements was void with absolute nullity because it violated Article 4 of APC and the local court should have decided to annul the agreement that was the subject of the case but instead the court denied the case, which is contrary to the procedures and the law.[85]

According to APC, it is not possible to request performance of the activities resulting from a void agreement. In case of reclaim due to nullity of the activities performed before, parties' returning obligation is subject to Articles 63[86] and 64[87] of CO, namely returning obligation can be claimed on the basis of unjust enrichment. In addition, Article 65 of CO does not apply to disputes resulting from APC. In the case, the parties can claim for the acts they informed before, if exist, depending on unjust enrichment.

Here there is a void agreement because of anticompetitiveness, on the other hand the plaintiff's dealership has continued for 6 years and the plaintiff

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[85] 13th Civil Chamber of the Supreme Court of Appeals, Case No: 2002/12626, Decision No: 2002/14028, Decision Date: 25.12.2002. For the decision see: www.kazanci.com

[86] According to Article 63 of Code of Obligations:

"A person, who unjustly holds something, is not liable to give back the amount which he proves to have sold at the time of the restitution.

If the holder have sold it with malicious intent or he is aware that he will be obliged to return it while he is selling it, he is obliged to return it.

[87] According to Article 64 of the Code of Obligations:

The defendant has right to request for indispensable and additional costs. If the defendant behaves with malicious intent at the time of return, existing excessive amount shall be paid to him. The defendant cannot request compensation for other costs. However, before returning, the excessive thing incorporated to the good held by the defendant can be removed provided that it is possible to separate it without giving harm to that good and unless the defendant proposes the plaintiff to pay the costs.

has made large investments because of the confidence that the dealership will continue and goodwill of the defendant. In this stage it should be assessed whether compensation for the plaintiff's loss resulting from the investments, occurred due to voidness of the agreement[88]

In other words, according to APC, it is possible to claim for damages resulting from anticompetitiveness -for instance losses occurred because of an anticompetitive situation such as fixing purchasing and selling prices for goods or services, elements consisting price such as cost and profit- therefore apart from that, it should be considered whether costs incurred relying on the agreement can be requested under provisions of CO.

The issue should be assessed in terms of culpo in contrahendo[89]. While there is not a general rule in CO in terms of culpo in contrahendo, in doctrine, Article 20 of CO states that in case the agreement is unsound with nullity because of the impossibility at the beginning, claim for damages could be possible – under the scope of pre-agreement responsibilities[90]. According to that:

"... if one of the parties knows or he should know, at the time of the conclusion of the agreement that it is impossible to perform the activity he is obliged to, he has to compensate the loss from which the other party suffer because this constitute culpo in contrahendo even if the agreement is null. This person causes the agreement to be null due to his defective conduct. The loss to be compensated here is the negative damage the other party bore due to the nullity of the agreement. The same method for remedy can be used in cases where performance of partial activities is impossible (CO Article 20/II). In contrast, a person who does not know or does not have to know at the time of the conclusion of the agreement that it is impossible to perform the activity he is obliged to is not responsible[91]

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[88] In a case before the Competition Board, the complainant claimed that he made investments depending on the incentives of the dominant firm and one year later the managing staff changed and promises were not kept; therefore he suffered from losses. After an assessment the Board concluded that the subject is related to debts, credits, rights and obligations belonging to commercial relationship between the parties and not related to competition rules. The Decision of the Competition Board, File No: 2002-1-27 (preliminary inquiry), Decision No: 05-65-/928-250, Decision Date: 6.10.2005. See: www.rekabet.gov.tr

[89] For detailed information about culpo in contrahendo see Eren, **Borçlar Hukuku,** p. 1088 et al.

[90] Eren, **Borçlar Hukuku,** p. 1089; Safa Reisoğlu, **Borçlar Hukuku,** General Provisions, Nineteenth Edition, Beta Basım Yayım Dağtım A.Ş. İstanbul 2006, s. 300.

[91] Eren, **Borçlar Hukuku,** p.1089.

Therefore generally, since the agreement is void because of anticompetitiveness, costs incurred relying on the agreement can be requested under the scope of negative damage. According to Article 108 of CO, if the debtor cannot prove that he cannot be attributed any fault , the creditor can claim for damages due to voidness of the agreement.

According to the Supreme Court of Appeals[92] where the agreement is void due to objective impossibilities at the beginning, parties can only claim for negative damages[93] they cannot claim[94] for their positive damages[95].

In a case before the Supreme Court of Appeals[96], the plaintiff requested the compensation for the costs he made as a result of his belief that dealership agreement would be signed. Supreme Court of Appeals stated that legal relationship is deemed to start with the beginning of the dealership negotiations, this relationship relies on honesty therefore parties should inform each other about the content and condition of the contract, comply with the principle of honesty, should act carefully not to harm their personal and possession values. The Supreme Court of Appeals, overruled the decision of the court on the

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[92] 11th Civil Chamber of the Supreme Court of Appeals, Case No: 1988/9411, Decision No: 1990/1087, Decision Date: 20.2.1990. For the decision see: www.kazanci.com

[93] Damage resulting from the fact that the agreement cannot be concluded or concluded despite of nullity is negative damage. According to Article 108 of the Code of Obligations, if the debtor fail to prove that he cannot be attributed any fault, the creditor can claim for damages resulting from the nullity of the agreement. For information about negative damage see: Eren, **Borçlar Hukuku,** p. 1014.

[94] The Supreme Court of Appeals has taken numerous decisions on this issue. See 13th Civil Chamber of the Supreme Court of Appeals, Case No: 1993/2905, Decision No: 1993/4544, Decision Date: 25.12.1996; 15th Civil Chamber of the Supreme Court of Appeals, Case No: 1996/5425, Decision No: 1996/6930, Decision Date: 25.12.1996; 15th Civil Chamber of the Supreme Court of Appeals, Case No:2005/2929, Decision No: 2006/2493, Decision Date: 27.4.2006; 19th Civil Chamber of the Supreme Court of Appeals, Case No: 1993/7910, Decision No: 1994/550, Decision Date: 27.1.1994; Legal General Board of the Supreme Court of Appeals, Case No: 1989/13-392, Decision No: 1990/1, Decision Date: 17.1.1990, for the decisions see: www.kazanci.com.

[95] In the doctrine, it is stated that positive damage occurs from the difference between the current state of the creditor and the changes presumed to occur in his possessions if the debtor performed activities completely and properly and positive damage includes the actual loss and the profit being deprived of. Actual loss is the decrease in assets or increase liabilities of the creditor, and profit being deprived of includes the presumed increase in the possessions of the creditor if it were not for the noncompliance with the obligations. See Eren, **Borçlar Hukuku,** p. 1013-1014.

[96] 19th Civil Chamber of the Supreme Court of Appeals, Case No: 2005/2865, Decision No: 2005/11959, Decision Date: 1.12.2005. For the decision see: www.kazanci.com.

grounds that the court shall investigate whether the plaintiff suffered from losses because of the expenditures he made relying on his belief and confidence that the agreement would be made; and decide according to the results of that investigation.

As it is stated in the doctrine[97] there is no difference in terms of in culpo in contrahendo between the fact that the agreement is valid or invalid[98]. Therefore it should be possible to claim for damages in an invalid agreement. However in cases where traders are involved, it is compulsory to make an analysis in terms of the obligation to act as a prudent businessman[99] laid down in Article 20 of TCL[100].

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[97] Eren, **Borçlar Hukuku,** p. 1086

[98] However, the Supreme Court of Appeals makes a different decision on this issue. The Supreme Court of Appeals declares that pre-agreement responsibilities apply only to valid agreements, if the agreement is invalid since the effective date, it is deemed nonexistent and pre-agreement responsibility cannot be requested depending on that agreement. The Supreme Court of Appeals overruled the decision on the grounds that the plaintiff is a trader and according to Article 20 of Turkish Commercial Law, he should know that he has to act as a prudent businessman and expenses requested by the defendant depending on the null agreement should be denied. 13th Civil Chamber of the Supreme Court of Appeals, Case No: 2003/176, Decision No: 2003/5376, Decision Date: 30.4.2003. For the decision see: www.kazanci.com. According to the decision:

"*… 2. There is a fountain that has an ancient work feature and High Board of Monuments did not give a license and therefore the agreement is void starting from its effective date and the court also accepts this. The plaintiff argued that he made some preparations after the tender and requested collection of these expenses he made by goodwill from the defendant depending on pre-agreement responsibilities. Pre-agreement responsibilities called "Culpa in Contahendo" in Modern Law only apply to valid agreements. If the agreement is null since its effective date, as the court accepts, it is deemed nonexistent. It is not possible to argue for rights depending on culpa in contrahendo. The plaintiff is a trader and has to act as a prudent businessman according to Article 20/3 of TCL. The plaintiff should investigate whether the fountain is an ancient work and know that he cannot request for rights for his activities on a location which is not granted. Overruling reason is that the court accepted the request for expenses through written justification instead of denying, which is contrary to the provision and the law.*

CONCLUSION: It was decided unanimously on 30.4.2003 to deny the compensation requests of the plaintiff on the grounds explained in subparagraph 1, to overrule the provision appealed under subparagraph 2 in favor of the defendant."

[99] Sabih Arkan, **Ticari İşletme Hukuku,** Ninth Facsimile, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Publishing no: 423, p. 133; Poroy/Yasaman, **Ticari İşletme Hukuku,** Eleventh Facsimile, Vedat Kitapçılık, İstanbul 2006, p. 141.

[100] According to Article 20 of Turkish Commercial Law,

One of the rules and consequences of being a trader is the obligation to act as a prudent businessman[101]. In cases where the parties are traders, before making huge investments, the trader should carry out necessary examination and analyses to find whether the agreement is valid, whether it will continue and how long it will continue. In other words he should make investments after he guarantees himself so as to ensure that his investments will turn back. In this context, especially a trader who makes large investments should act carefully as a prudent businessman about whether the agreement is valid or not. Otherwise he should bear the risks. Especially the conditions in Turkey create risks for large investments made without taking care and paying attention. Therefore, it is exceptionally possible, depending on the concrete incident, for the trader to request for negative damage resulting from the nullity of the agreement due to the obligation to act as a prudent businessman, moreover in these circumstances an assessment should be made taking into account the provision laid down in Article 44 of CO[102] related to joint offence.

2.5. Again in a similar case[103], the plaintiffs are Aydoğanlar Otomotiv Sanayi ve Tic. A.Ş. and Aydoğanlar Otomotiv Mamülleri Sanayi Servis ve Tic. A.Ş.; the defendants are Koç Holding A.Ş. ve İstanbul Oto A.Ş. In the case, the plaintiffs' counsel claimed that although authorized dealership and authorized repairer agreements have been successfully in effect for 16 years and new investments were made relying on the goodwill of the defendant, the defendant terminated the agreement without any reason. The plaintiff's counsel argued that the plaintiff bore losses because the defendant violated APC and Communiqué no. 1998/3 related to motor vehicles during the term and with the termination of

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"*...Every trader should act as a prudent businessman in all his trade activities...*"

[101] The Supreme Court of Appeals declares that in cases where parties to an agreement are traders, it is a principle for traders to act as a prudent businessman and this principle should be followed signing, performing and terminating an agreement. 11th Civil Chamber of the Supreme Court of Appeals, Case No: 2003/13367, Decision No: 2004/9841, Decision Date: 14.10.2004, For the decision see: www.kazanci.com

[102] Article 44 of CO regulates decrease in compensation. According to the article:

"If the party suffering from damage accepts the damage or contributes to occurrence or multiplication of the damage and aggregates the conditions of the person causing the damage, the judge may decrease of the amount of the damage or may disregard the provision about the damage.

If the damage is not caused intentionally or due to heavy negligence or imprudence and compensation leads to financial difficulties for the debtor, the judge may decrease the damage in accordance with equity.

[103] Kadıköy Third Commercial Court of First Instance, Case No: 2002/624, Decision No: 2006/267, Decision Date: 04.04.2006.

the agreement; the defendant fixed prices and discount rates during the term of the agreement; the defendant prevented his own group firms from paying the fright and provided reasonable value dates therefore increasing costs; profits decreased because the orders were delivered incompletely for three months; the defendant infringed competition through restricting spare part usage and are prohibiting the use of competing products and noncompliance with 2 year term for notice of termination laid down in the Communiqué. In this context, provided that surplus rights were reserved, the plaintiff's counsel claimed for TL 50.000.000.000 material damages due to competition infringement and application of this fine as treble damages because of gross fault; and also claimed and for TL 5.000.000.000 immaterial damages.

The court decided to deny the case on similar grounds as the case above.

As this case is very similar to the aforementioned case, the explanations are true for the current case.

2.6. In the last case related to the motor vehicles sector[104], the plaintiff is Koruma Motorlu Araçlar San. Tic. AŞ. the defendant is Hyundai Assan Otom. San ve Tic AŞ. In the case, there was a dealer relationship between the plaintiff and the defendant. The counsel of the plaintiff (dealer) stated that there was a dealer relationship between the plaintiff and the defendant starting with the dealer agreement on 1.10.1996, his client was an authorized dealer and repairer of the defendant in İzmit, the defendant informed that he terminated the dealer agreement on 31.12.2004[105] with the warning notice taken from the notary on 28.04.2004, the defendant gave more advantages to other equivalent dealers while the agreement was in effect, paid different premiums to them and therefore caused losses to the plaintiff compared to other equivalent undertakings and claimed for TL 40.000.000.000 material damages because of the noncompliance of the termination with APC and related legislation and unfair and different practices during the term of the dealer relationship; and claimed for treble damages according to Article 58 of APC; and for TL 100.000.000.000 immaterial damages.

The local court stated that the case was related to compensation of the material and immaterial losses resulting from the termination of dealership agreement; the term of the agreement was 5 years and it was agreed that unless a notice was given before six months of the expiry date, the agreement would be expanded for a year, the defendant gave a notice of termination 8 months before and the agreement was terminated starting from 31.12.2004, the case was filed

[104] Kadıköy Fourth Commercial Court of First Instance, Case No: 2005/25, Decision No: 2005/854, Decision Date: 06.12.2005

[105] The Case was filed on 04. 06.2004. Dealership was not terminated at that time.

when the agreement was in effect therefore it is not possible for the plaintiff to bear losses due to termination, the agreement was terminated properly and there was no unfair termination.

In respect of the compensation of the losses, the court stated that it was not proved that the plaintiff lost income because the defendant had different and more advantageous practices for other dealers, in other words violation of APC could not be proved and therefore the court denied the case.

Upon the appeal of the decision, the Supreme Court of Appeals ratified the decision on the grounds that the agreement was not terminated at the time of the case according to the files, evidence, necessitating reason and the content of the warning notice issued by the defendant; and declared that the court decision was in accordance with the procedure and law[106].

In the case, the court firstly considered the termination period laid down in the agreement between the parties. Then an assessment was made according to APC and claim for damages was denied because violation of APC was not proven. As it is mentioned before, first an assessment should be made in terms of APC and related Communiqués and whether the agreement is valid should be determined and later a decision about damages should be taken. Explanations above apply for the issue of termination.

2.7. Apart from the motor vehicles sector, two other cases which relate to water sector were brought before court. In the first one of these[107], a 3-year dealership agreement between the plaintiff (Görkem Su), a producer, and the defendant dealer N. İlhan, regarding the sale of Yamanlar natural spring water, was signed. The plaintiff's counsel claimed that the defendant annulled the contract unilaterally, that this annulment was unjust, that the defendant was sent a notarial protest and was informed that the rights to indemnification would arise, that it was determined that the defendant sold another brand of water, that the carboys of that brand were found at the premises and the name of that brand was displayed on the window of the premises, and that, therefore, an amount of TL 12.000.000.000, which is the equivalent of US $ 8.000 indemnification based on the effective selling rate of the Central Bank on the date of the lawsuit, be collected from the defendant together with its commercial interests as of the date of the lawsuit, rights to further compensation being reserved under the contract. Article 10 of the contract provides that the dealer may not buy or sell any brand of water other than the 19 - Liter polycarbonate carboy water produced by the

[106] 19th Civil Chamber of the Supreme Court of Appeals, Case No: 2006/3877, Decision No: 2006/11286, Decision Date: 28.11.2006 (The Decision is not published).
[107] İzmir 3rd Commercial Court of First Instance, Case No.: 2003/307, Decision No.: 336, Decision Date: 03.04.2003.

producer firm, and may not act as a negotiator for the buying or selling of such water, that, otherwise, it will pay an indemnification amounting to US $ 8.000. Article 15 of the contract contained a provision to the effect that the dealer (defendant) will promote and market the product in the best way possible, that it will not sell it at a much higher or much lower price than the average price of the 19 - Liter polycarbonate carboy water sold in that city.

The defendant's counsel noted that his client undertook, pursuant to the contract, to distribute and sell the water produced by the plaintiff, however, his client incurred losses due to the facts that the market share of the water was low, the water was opaque and there were foreign substances in it and therefore his client annulled the contract pursuant to article 22/a of the contract, and he claimed that the case be dismissed.

No compensation on grounds of competition infringement was demanded for this case; penal sums and compensation have been claimed due to violation of contract.

The court asked for the opinion of the Competition Authority when considering the report submitted by the board of experts. The Authority was asked for general information on how single seller contracts related to spring waters are concluded. The communication sent to the court by the Authority gave some general information within the framework of the Communiqué on Vertical Agreements and the Guidelines for the clarification of the Communiqué, and a copy of the Communiqué and the Guidelines were forwarded in addition to this information. As seen, the Authority was not asked whether it received an application regarding the concrete event or whether there was an infringement of competition regarding the event; only general information was requested.

The court ruled that the case be dismissed, having noted that, according to the opinion of the Competition Board and the accompanying Communiqué on Vertical Agreements, Article 15 of the contract between the parties violates Article 4 of the APC and it does not qualify for exemption under the Communiqué, therefore it is void pursuant to article 56 of the Act, and that a right to file a lawsuit, based on an agreement that is void, and to claim indemnification in the filed lawsuit is not available.

Following the application for the appeal of the ruling, the Supreme Court of Appeals noted that, according to article 4 of the APC, agreements and concerted practices between undertakings which have the purpose of preventing, distorting or restricting competition in a certain market for goods or services, directly or indirectly, or have this effect or have the potential of leading to this effect, as well as such types of decisions and behaviors by associations of

undertakings are unlawful and forbidden, that these may be granted exemption under article 5 of the Act, and for this purpose, there exists the Communiqué on Block Exemption of Vertical Agreements No. 2002/2, and, it made an assessment within this context. The Supreme Court of Appeals considered that it is accepted under article 4/a of the Communiqué No. 2002/2 that the provider may set the maximum sales price or advise a sales price, and that, the provision, contained under article 15 of the contract between the parties, to the effect that the dealer (the defendant) will promote and market the product in the best way possible, and will not sell it at a much higher or much lower price than the average price of the 19 - Liter polycarbonate carboy water sold in that city, does not go beyond an advise about the price and does not constitute pressure over the distributor by the producer, therefore it decided that the provision of the contract is valid. The Supreme Court of Appeals overruled the court decision delivered without taking these aspects into account[108]. A rectification of the decision of the Supreme Court of Appeals was sought but not granted.

Upon the overruling decision of the Supreme Court of Appeals, the local court followed the overruling order in its rehearing and ruled that the provision, under article 10 of the contract between the parties, to the effect that an indemnification amounting to US $ 8,000 shall be paid due to the selling of different brand water is valid, that therefore the claim be accepted[109].

In this case, it should be stated before all else that the lawsuit opened before the local court does not refer to the APC at all, but claims damages based on the violation of the provision under the dealership contract. The board of experts made an assessment from the perspective of the APC and exemption, and the court made its decision taking into account both the expert report and the opinion of the Competition Authority of 22.04.2004, No. 1450 and made an assessment primarily from the perspective of Competition Law.

Apart from the two articles of the dealership contract, the decision does not contain any information regarding the other articles of the contract, therefore an examination needs to be made within the scope of these two articles. Article 15 of the contract does not set a fixed price, but it provides that the water will not be sold at a price much higher or lower than its average price. Under article 4 of the APC, setting of the purchasing or selling price of goods or services, and of factors constituting the price such as cost and profit, as well as of any conditions relating to purchasing or sales is unlawful and forbidden. However, under article

[108] 19th Civil Chamber of the Supreme Court of Appeals, Case No: 2004/9634, Decision No.: 2005/4463, Decision Date: 21.4.2005. For the decision, see www.kazanci.com.tr

[109] İzmir 3rd Commercial Court of First Instance, Case No: 2005/700, Decision No.: 2006/100, Decision Date: 23.03.2006.

4/a of the Communiqué No. 2002/2, the provider may set the maximum sales price or advise the sales price on condition that it does not become a fixed or minimum sales price due to the pressure or encouragement of either one of the parties. In this case, there has been no proof that a fixed or minimum price has been set based on article 15 as a result of pressure or encouragement by the producer. Thus, as the Supreme Court of Appeals rightfully stated, the provision does not go beyond advising the price and does not constitute pressure over the distributor by the producer. Therefore, it qualifies for the exemption. A contract covered by the exemption will be immune from the sanction under article 4 of the APC and therefore the contract between the parties will have the effect of a valid contract. For this reason, it will be possible to claim penal sums due to the violation of the article, contained by this contract, to the effect that other brand of water may not be sold.

2.8. In the second case related to water sector, dealership relation is in question.[110] The producer filed the case against the dealer. The plaintiff's counsel (Doğa su) stated that according to the dealership agreement between the defendant and his client, the defendant was the main dealer in respect of marketing and sales of spring water belonging to his client, it was proved by the notary that the defendant took out the signboard showing that he was the dealer of the plaintiff, he kept and sold another brand of spring water in his shop, he was notified by a warning letter from the notary that he should comply with the agreement otherwise material and immaterial damages action would be filed, despite of the time limit given the agreement continued to be violated, therefore TL 4.000.000.000 for the profit which the plaintiff was derived of, provided that the rights as to surplus are reserved, and TL 4.000.000.000 for the loss incurred because customer portfolio was not given back and dealership telephone was not transferred, totally amounting to TL 8.000.000.000 was requested for compensation. The defendant's counsel requested for the denial of the case stating that, among other responses, the plaintiff did not renew the carboys, gave authorization for sale to other persons in the area, competition with other firms became difficult because of old and dirty carboys and profit margin decreased.

The court decided that the case was an action of debt related to the compensation of the profit deprived of and the lost incurred because of violation of the agreement. Considering the expert report, the court decided that the legal relationship between the parties resulted from the dealership agreement, the agreement should be considered according to the provisions of both Code of Obligations and the Competition Act, the agreement should be deemed illegal as

[110] İzmir 3rd Commercial Court of First Instance, Case No.: 2003/596, Decision No.: 2004/183, Decision Date: 23.03.2006

it restricted competition according to Articles 4 and 56 of APC, Article 5/a of the agreement was contrary to Article 4 of the Communiqué no. 2002/2 as it stipulated that the dealer shall sell water to customers on the price that is fixed by the defendant, and the agreement shall be deemed invalid. Moreover, the Court also stated that an essential good, water, cannot be the subject matter of sole seller agreement and therefore denied the case.

Upon the appeal, the Supreme Court of Appeals decided that the grounds of the local court that a dealership agreement cannot be concluded for selling water was not correct; the dispute arose from not the provision about fixing sales prices in Article 5/a but from violation of Article 5/d; in the expert report which was the substance of the decision, an analysis was made under the scope of Article 5/a, which was not the subject of the dispute and the agreement was deemed invalid because that provision was contrary to Article 4 of the Communiqué no. 2002/2; however giving a decision according to an expert report that was inconvenient with the concrete incident is not correct; the decision should be given assessing the dispute under the scope of dealership agreement and after completing necessary analyses and inquiry, and the decision of the local court was overruled because it was deemed inappropriate to take a decision upon incomplete analysis.[111]

In the trial carried out by the local court upon the overruling decision of the Supreme Court of Appeals, three additional reports were requested from experts and a decision of the Competition Board that was issued after overruling verdict of the Supreme Court of Appeals was referred to and the subject matter of the case was reassessed stating that the Board decision was important in respect of solving the dispute[112]. The court denied the case on the grounds that provisions stipulating that dealers cannot sell any other products apart from the products of the seller in dealership agreements shall be invalid as of the date of the related decision of the Competition Board; the provision laid down in Article 5/d of the dealership agreement, which was the reason of the dispute, stating that "the dealer cannot sell, display, advertise, distribute or give for free and use other products in water sales station" was assessed considering the Board decision and since dealership agreements cannot contain sole seller provisions and provisions stipulating that the dealer cannot sell any other products shall be invalid; Article 5/d of the agreement between the parties was invalid according to the Board decision in the concrete incident, compensation cannot be demanded due to the violation of the agreement depending on this invalid

[111] 19th Civil Chamber of the Supreme Court of Appeals, Case No: 2004/7518, Decision No: 2005/378, Decision Date: 28.1.2005 (The decision was not published)

[112] İzmir 3rd Commercial Court of First Instance, Case No.: 2005/231, Decision No.: 2006/634, Decision Date: 07.12.2006

provision and therefore the case should be denied because of the aforementioned Board decision.

First of all, when we consider the decision of the Supreme Court of Appeals, the Supreme Court overruled the decision of the local court on the grounds that the dispute did not result from the provision in Article 5/a related to fixing sales price in the dealership agreement but from violation of Article 5/d of the agreement and the expert report included an analysis according to Article 5/a and it was incorrect to decide depending on an expert report that was inconsistent with the concrete incident. The provisions related to competition infringements in APC have mandatory nature and the sanction for being contrary to those provisions is invalidity. Although there are different opinions related to invalidity (for instance suspended invalidity or nullity), the invalidity in this case should be taken into account by the judge *ex officio* therefore the judge should make an analysis according to all of the provisions of the agreement in terms of invalidity. Similarly, in Article 19 of CO it is deemed that violation of mandatory provisions of the Act is a reason for nullity. In case of nullity, even if the parties do not claim nullity the judge should take it into account *ex officio*[113]. When an agreement causing a competition infringement is brought to the judge, it should be assessed whether there is competition infringement covering all of the provisions and whether the agreement can be granted exemption. Therefore an assessment should be made including not only the provision that is subject of the dispute but also other provisions, even if the parties do not request so. The validity of the agreement is determined as a result of that analysis. In fact, the Supreme Court of Appeals made an analysis according to Article 4 of APC although the parties did not request an analysis in a case[114]. Therefore we do not agree with the opinion of the Supreme Court of Appeals related to the concrete incident.

After the overruling decision of the Supreme Court of Appeals, the new decision taken by the court stated that, depending on a decision of the Competition Board related to another sector, the Board did not approve exclusivity from then on, sole seller provision could not be provided in dealership agreements, provisions stipulating that the dealer should not sell another brand of water were deemed invalid, the agreement between the parties was anticompetitive because of exclusivity provision and therefore the agreement was invalid. However the Board decision was taken in respect of a

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[113] Oğuzman/Barlas, **Medeni Hukuk,** p.164.

[114] 13th Civil Chamber of the Supreme Court of Appeals, Case No: 2002/12626, Decision No: 2002/14028, Decision Date: 25.12.2002. For the decision see: www.kazanci.com

specific case in that sector and related to withdrawal of exemption. It was decided for that specific case that exclusivity shall not be agreed on.

The Competition Board takes into account the characteristics of the sector while assessing whether exemption is possible or whether exclusivity is possible for a concrete incident. The Communiqué no. 2002/2 clearly puts forward that a provision related to exclusivity may be applied and in this case exemption can be granted. Article 4 of the Communiqué states that a provision related to a restriction, by the provider, of active sales to an exclusive region or exclusive group of customers assigned to it or to a purchaser may be included in an agreement, provided that it does not cover the sales to be made by customers of the purchaser and in this case exemption can be granted[115]. The Competition Board, exceptionally, may decide in specific cases apart from this general provision that a requirement related to exclusivity cannot be laid down. This is an exceptional case. The general principle is to apply the Communiqué provisions. Therefore, it is not correct to use a Board decision as a precedent case like a general rule in another case. The Court should make an assessment with respect to Article 4 of APC and provisions of the Communiqué no. 2002/2 and decide accordingly.

CONCLUSION

As it is seen in the court decisions mentioned above, most of the cases are those filed by one party of the agreement against the other.

There is confusion about when and how to apply the provisions of APC and Block Exemption Communiqués; and the provisions of CO in the decisions by the courts. For claim for damages in competition infringement cases, even if there is an agreement between the parties, an assessment should be made in terms of APC, not CO firstly and block exemption communiqués and existence or nonexistence of an individual exemption decision should be taken into account to reach a conclusion. The validity of the agreement will be determined after the analysis made in relation with Competition Law and after that stage, conclusions about the agreements in terms of CO can be drawn. The provisions in APC should be taken into account by the judge *ex* officio, even if the parties do not request, as they have mandatory nature and the sanction violation of that provisions is invalidity.

[115] There is a detailed explanation in the decision on the Explanation of the Block Exemption Communiqué no 2002/2 related to Vertical Agreements. Decision No. 03-46/540-M, Date of the Official Gazette: 25194, Number of the Official Gazette: 9.8.2003.

It is important to find competition infringements as well as proving the losses as a result of the infringement. We see that in the cases where the court finds the infringement, losses resulting from the infringement cannot be proven therefore claim for damages are denied.

In respect of dilatory matter, courts do not consider whether there are applications made to the Competition Board as a dilatory matter and there is not a stable practice about this in the decisions of the Supreme Court of Appeals.

Considering the courts' and Supreme Court of Appeals' decisions examined in this context, it is possible to say that there is not a stable practice related to claims for damages resulting from competition infringements, and decisions of courts and the Supreme Court of Appeals are mostly different from each other.

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Q & A SESSION

Prof. Dr. İsmail Yılmaz ASLAN ***(Bahçeşehir University, Member of the Faculty of Law)-*** Thank you Mr. Chairman. Dear colleagues, you already know my opinions, therefore I will not say anything about my opinions. I actually have a couple of questions. I am going to ask them. You all know my books, you read them and there is no need for repetition or no need to take your time. One of the questions is…Has Mr Konuralp left?

Chairman Of The Session- Mr. Konuralp was here, but he has just left. He will probably return.

Prof. Dr. İsmail Yılmaz ASLAN- In that case, he will not hear and we will not answer either.

Chairman Of The Session- You could leave that to later.

Prof. Dr. İsmail Yılmaz ASLAN- I shall do that. I do not go into the presumption of concerted practice at all. I have a question to Ms. Özge.

Chairman Of The Session- Konuralp has arrived.

Prof. Dr. İsmail Yılmaz ASLAN- My question is: She used a concept called "competitive harm" in her paper, which I hear for the first time. I would be pleased if she could elaborate on that a little. Now that Mr. Konuralp has arrived, I have a question to him too. He is coming from a community that is a bit exterior to competition law and he submitted a very important paper; therefore I pay particular heed to his answer. You said that the complainant is not a party. Here I totally agree with your opinions that the word "party" is by no means related to the legal procedure. In every article, "party" is used with a different meaning; I had published an article establishing this, 8 years ago. Now I would like to ask you this: The complainant makes the complaint. A letter saying, "We have initiated an investigation, we found it serious" arrives. Later, the Competition Board does not send the investigation report and does not send any documents or information, but makes an invitation to the hearing. What will the complainant say at the hearing? Or, should it be like this? The Competition Board must notify to the complainant its efforts as well as the reports, etc. saying, "Is there anything you would like to say on this matter, anything you would like to add to it, is there anything you could help us with?" Because, there is public benefit pertaining to the decision to be made. The result is that they do not send these-I do not know if they are trying to avoid photocopy costs. I wonder if you would think that a complainant should have such a position. Is it a problem when looked from this perspective? Things come to my mind such as,

the Competition Authority might be resisting to use a possibility. I would really like to hear your opinion on this. Indeed, we might also fail to see the truths perhaps, since we are too involved in the matter. In consequence, I realized that you are able to take a very nice look from outside and you have also read about, examined and mastered the subjects. I am really curious.

I would like to thank our guest Aydan in relation to the “Rule of reason” issue. Thank you very much. She told us here that this proposition, which was first put forth in 1973 by in relation to the European Union, was reflected in a decision taken a week ago. This is the first time we have heard of this decision. A very important development. Thank you.

I beg your pardon to say one last thing. I think I have become old enough to say this. I started my Masters at Ankara Faculty of Law in 1981. Our first lecture was with Professor Yaşar Karayalçın. I would like to remember him here with love. He taught us how to prepare a scientific paper, how to make references, he persistently told us to consume the resources; he persistently emphasized this for weeks. We learned some things thanks to the discipline we acquired there. As concerns a scientific paper, I think one should by all means look for and find what has been written about that subject before to make references thereto; and do this even when it is our own idea because somebody also might have talked about it before us, and say “She/he also said this”. I say this to my young colleagues because they are inexperienced. They have a very long time ahead of them. I request them to do this. We shall thank very much since they have prepared a work on a very engaging subject. For example, at least four articles on this subject, which also Ms. Zeynep and her colleague took up, have been published on the Competition Forum magazine (Rekabet Forum) accessible to everyone online. These have similarly been included in my book. At least a reference needs to be made to these works prepared before hers; one needs to say “This person said as follows.” This is something right, something that helps development and something encouraging and it enables us to broaden the scope of our own work by criticizing others, thus making you deserve to be criticized too. Therefore one needs to pay close attention to the matter of method. Here, I think we should criticize ourselves too; me, İsmail Karakelle, Cem, and perhaps our professor. We are in the selection Committee. Perhaps we should come together as the Selection Committee and make a decision about this method so that our young colleagues to come here may know, learn about them and carry out their works accordingly. Perhaps we might be withholding from them this knowledge or the contribution we may have to offer, so that they can be better. Therefore, perhaps we should have a meeting and set this out; namely, we should say, “A scientific paper should include the following, and our young colleagues, pay attention to these.” I think we might also help them in this way. I

am sorry if I exceeded my limits but these warnings have to be made. I had the same feeling because of the previous papers too. Therefore, I feel the need to make a warning. Thank you. This is about all I would like to say.

Chairman Of The Session- Thank you. Let us receive the answers now, starting with Ms. Özge. Please go ahead. Intern Attorney ÖZGE İÇÖZ- Thank you, Professor Here we talked about the term "competition harm," which is actually referred to as such and is basically the harm caused on the consumer. In other words, the main point mentioned is the consumer.

Prof. Dr. İsmail Yılmaz ASLAN- Are you referring to "loss of welfare"? Intern. Att. ÖZGE İÇÖZ- Yes, sure. However, because it was referred to as "competition harm" in the text, we translated it as "competition harm" too; but in many places, it is expressed as "harm on the consumer welfare", "harm caused on the part of the consumer." Actually, what we all eventually talk about is "the loss of consumer's welfare."

Chairman Of The Session- Thank you. Mr. Konuralp

Associate Professor Halûk KONURALP ***(Member of Bilkent University, Faculty of Law)-*** I would like to reply. Article 55 is entitled "Appealing Against the Decisions of the Board". Successively it reads as, "appeal may be made to the Council of State within due period against the final decisions, injunction decisions, fines and periodic fines of the Board, as of communication of the decision to the parties". Here, something general comes into the picture in relation to the wording of the act. This provision has been worded as if the Competition Board was a court; in other words, if we were to cover the upper part and read it again, it would appear as if it was written as a decision of a court of first instance or a court of appeals. For instance, it talks about a "final decision". "A final decision", in fact, is a concept relating to judicial activity. Let us have a look at the procedural laws; this is where it always departs from in terms of appealability. Of course the wording of this provision as such does not make the Competition Authority a court, however such a perspective exists throughout the act anyway. In a way, the concept of "party" also appears to have derived therefrom. Here it says "starting from the communication of the decision to the parties." Perhaps, as you say, if there is a complainant, but only if there is one, in that case I should say two "sides" avoiding the word "party"; this decision will be communicated to the two sides, of course. However, it is evident that there is no need for a complainant in order for the Competition Board to carry out the duty vested in it by law and to make a decision. What is the relation between the complainant and the undertaking about which the investigation is carried about and the Competition Board? Here is a triangular relationship; it is not that there is bi-party structure and there is the Competition

Board on the other side. There is a relationship between the Competition Board and the complainant, and there is also a relationship between the Competition Board and the undertaking about which the investigation is conducted, to whom a sanction is imposed or not imposed. The reason why this decision is communicated to the complainant actually relates to whether the Competition Board supervises its application in a lawful manner or not. It is not a call to account for the act instituted about the other party; it is about whether its own application has been lawfully assessed or not. Otherwise what comes into the picture would be as follows: what you say is correct, she/he is invited to the hearing, and is supposed to listen and the information she/he acquires here is for the same purpose too: Has its own application been assessed to a sufficient degree? Let us pay attention; despite it has the authority to invite her/him there, what takes place there is not a reciprocal allegation and defense relationship; in a sense, there is an allegation, an accusation here; there is an accusation to make a comparison. I said this at the beginning: I said that this reference made to the procedural law should be taken out wholly. I believe in this. There is no need to make a reference, and I also say and believe that there can be any sort of evidence. If a reference has to be made, though I can not find it in my heart, it appears more correct to me if the reference is made to the Criminal Procedure, at least in terms of setting the perspective right. The point in the Criminal Procedure is accusation; somebody is being accused for something there. In fact Mr. Günday made a similar comparison in his criticisms too. In fact, there is a difference between complainant and informant, and inevitably between complaint and informing as well. Information can be provided by a citizen or non-citizen residing in Turkey, who knows or has an opinion about the act, even if her/his individual interest is not harmed in any way. So this is informing and we exclude that as a whole. A complainant is somebody who expects a decision to be issued by the Competition Board, as a preparation to a future claims for damages based on private law, which she/he may actually be a party to. This being said, now I will use “party” in a different sense. She/he does not settle its accounts with the other party. She/he seeks to provide evidence to bring before a civil court, indicating that the other party’s acts are in violation of competition legislation, when she/he is to appear to settle his accounts, namely to appear with claims of damages in the meaning of private law. In other words, the evidence will be the content of a decision to be issued under private law in the future.

As a matter of fact; yes, what you said is correct. Especially the fact that an oral trial was held and that a right, the right to ask questions, was granted brings it closer to the concept of “party inevitably.” Nevertheless, I think it is not “party” technically. “Party” refers to persons having equal conditions. From the point of legal procedure, when we say “party”, it means that there has to be equal conditions whatsoever. Then one needs to do this: If they are parties, at the

hearing stage, what they say should be communicated to one another and their respective replies should be re-sent to the others. In that respect, I would still say that I think these are not “parties, if you let me. But I am repeating; this text here, the text that I wrote, has something similar too, use of the word “party” is such a bad thing. The difficulty might be here: there might be a problem if there is an attempt to basically attribute the meaning of “party” to these.

Let me say this: I will also be offering information to all of the audience. There are no references in the text that I prepared. I will include your books later when they are published. Let me also say that some things are in quotation marks. And that was done on purpose.

Associate Professor Halûk KONURALP- I did not take offense, but let me also say that I took notice of it.

Chairman Of The Session - Thank you. Mr. Aslan, you did not ask Mr. Robertson a question.

Prof. Dr. İsmail Yılmaz ASLAN- No.

Chairman Of The Session- Ok, that is what I thought too. Please go ahead, sir. Could you say your name too?

Bülent ÇAMLICA- Thank you Mr. Chairman. I am a practitioner, not a legal expert. I am neither a professor and I do not have a powerful oratory command. I would like to talk about the empty seats. I would like to talk about the fact that this organization fell short of finding customers in Kayseri. I would like to talk as a person who is aware that the concept of “customer” is the main factor for determining efficiency. I said this because my purpose is to talk about two issues and then relate them to what I just said.

I can not see a member of parliament, somebody from the Chamber of Industry or from the Chamber of Commerce. As for the practitioners, may be there are some lawyers from Kayseri. I know most of the people who are inside but they may be among those who I do not know. This is an important indicator. This is a very important matter. I can see very clearly that importance is not attached to this important matter. Therefrom, I arrive at competition law now. I would like to say that a distinction should be made between the competition law and the rivalry to discuss the procedural provisions, and that I worry that the latter might overshadow the discussion of the substance of the competition law.

I consider the likelihood that there might be discussions that I can not understand or discussions for other purposes, but I can not see anything else except that. These discussions on procedural law are very important issues.

Representatives of undertakings from private sector convene at Adıyaman Tilvan Hotel in June 1996 and make an agreement. This agreement is penalized at a time when the Competition Authority is not formed, and the Board members do not exist. There is not any organization to penalize the dispute here as if the members of the Council of State live not on the Earth but on Mars, and as if people who are to discuss administrative law would not be able to find one another. Therefore, I think one needs to define and discuss this activity in this respect too.

While it is this evident that the decisions that the Competition Authority took for so many years were overruled several times, with reasons many of which are similar but definitely because a general and necessary consensus was not reached; in the morning session of this Recent Developments Symposium, we discussed the presumption of concerted practice twice whereas we were unable to discuss the fact that the Competition Board does not provide its answers upon bringing up pleas based on economic analyses and assessing these pleas; that these are not taken account of in the competition Board decisions, and that, as Professor Erol said, in these dual markets, undertakings in the informal economy are penalized at the same level as those who have formal economic operations, on the basis of their turnovers, and that these decisions are made without taking account of these economic considerations, which are all related to the substance as we considered separately in different presentations here, for which I would like to thank our colleague Özge and our colleague Şahin; they delved into matters on the substance. The presumption of concerted practice is the peg of the competition law and it is even more important than the article that regulates dominant position. The article regulating concerted practice has had a comparable or more important influence than the open agreements among undertakings and decisions of associations of undertakings, as concerns the perception process of the Turkish competition law. Where an agreement cannot be evidently proven; if the undertakings follow the same direction as suggested by the evaluation of Professor Metin, which would lead to a result such as qualifying for exemption under Article 4 of the Competition Act, the justification of applying the Competition Act would already be eliminated. I think these should be taken into account in this way.

Besides thanking for the seats that are full, my evaluation as concerns the empty seats is that this is because the habit of discussing the subjects that are at the touch line or outside that touch line overshadows the contents of these meetings. I beg your pardon if I exceeded my limits. Thank you.

Chairman Of The Session- Thank you. Please go ahead.

Gani GÜNGÖRDÜ ***(Expert at the Competition Authority)-*** Mr. Chairman, thank you. I have two questions. My first question which is about the matter of concerted practice is to Professor Metin Günday and Professor Konuralp. Taking a look at the implementations of the Competition Authority in the last 10 years, we see that the Competition Authority never had an approach of saying to undertakings, "You are engaged in a presumption of concerted practice, this is what I think, prove it otherwise". On the contrary, in practice we see that it puts forth the presumption of concerted practice by bringing together what we may call "economic evidence," which is certain economic conducts among undertakings such as parallel pricing and coordination of it among undertakings, with legal evidences and material evidences to the effect that they support each other.

My question to Mr. Professors is: Do you think all these, these evidences, are not enough to allege a presumption of concerted practice? If not, which other determinations need to be made by the Competition Authority in addition to these? My second question is to Mr. Professor Erol Katırcıoğlu. Mr. Professor very appropriately pointed at a bleeding sore of Turkey; informal economy. My question to Mr. Professor is: If I am not mistaken, -please correct me if I am- as follows from your interpretation, because the rate of informality is high in some markets, the Competition Authority should be more "tolerant" while penalizing the undertakings in such markets or at least your expression amounts to this, again if I am not mistaken.

Prof. Dr. Erol KATIRCIOĞLU- I wanted to state that I thought the Board had an approach to that effect.

Gani GÜNGÖRDÜ- You also say that the Authority should be doing this. My question: If you too think the same in this respect, what should the limit of this be; what should the limit of this tolerance be in your opinion? In cases where the rate of informality is high, would this hold true outside the application of the Competition Act, for other laws, as well? For example, is there a need for such a tolerance in terms of the Tax Act? I would like to learn your thoughts on this matter Mr. Professor. Thank you.

Chairman Of The Session- Thank you. Mr. Metin Günday, let us start the answers with you, to be followed by Mr. Konuralp, and Mr. Katırcıoğlu.

Prof. Dr. Metin GÜNDAY- Our colleague perhaps wants me to further clarify my view on the presumption of concerted practice and that this is hard to be reconciled with the Constitution. Article 4 of the Act No. 4054 enumerates the conducts which are unlawful and prohibited. One of these is concerted practices, namely; agreements, concerted practices among undertakings as the Act suggests. That is to say, a concerted practice is a prohibited practice

infringing competition. In the presence of this practice, the administrative fine as provided for in Article 16 shall apply. Under this article, examples of these prohibited, unlawful and impermissible acts are illustrated. We also understand that these are not restrictive either; this is also how they are perceived. The last sentence of paragraph "f" reads as "cases where such and such happens constitute a presumption that the undertakings are engaged in concerted practice. A concerted practice is prohibited and deemed to be unlawful. If there is such a case and "it cannot be proved; the fact 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." There is no evidence but there is a similarity to that effect. It constitutes a presumption, in other words, there is concerted practice. No matter whether we name it "presumption" or not, the legislator assumes this. Anyhow, now that concerted practice is assumed, what will be done under the Act? Punishment under Article 16 will be applicable? We encounter many examples of this in practice. I wish we had brought some lawsuit files and I showed them here. I do not have any with me now. I could show our distinguished colleague if she/he wanted because she/he contends that "the Competition Authority does not do this". It does it, very much so. Concerted practice is legally assumed. So, there is penalty in return for this. Well then, what will the undertaking do to avoid this penalty? Mr. Konuralp says, "This is not a presumption, this is an establishment at most." An establishment; but this is in cases where it cannot be proved perhaps.

Associate professor Halûk KONURALP- It is assumed.

Prof. Dr. Metin GÜNDAY- It is assumed. Whatever we may call it, an assumption or not, it is such a situation that the other party -by "the other party" I mean the undertaking the investigation is conducted about- is supposed to prove it otherwise. How will it prove? Will it say, "No, I swear to God that I am not engaged in concerted practice?" Will it be asked to give an oath? I am not a swindler; how will I prove it? Same thing. This is one side of the matter. Under the law of sanctions, be it under a punitive sanction or administrative penal law, there is only one presumption: the presumption of innocence. There can be nothing else; there can be no other presumption in the penal code or administrative penal code of a state of law. The only presumption is "the presumption of innocence." There you go, prove the concerted practice; why is the burden of proof placed on the other party? For this reason, I think it is impossible to be reconciled with Article 38 of the Constitution. Unconstitutionality claims are and have been asserted many times. Perhaps one day, the high Council of State -sometimes inspiration finds the high Council of

State later- perhaps one day they will say, "This is really unconstitutional, let us bring this before the Constitutional Court". Maybe then this issue is resolved or hopefully this anomaly will be eliminated by amendments, as there are efforts going on for new legal amendments. This is how I think. Thank you very much.

Chairman Of The Session- Thank you. Mr. Halûk, go ahead please.

Associate Professor Halûk KONURALP- Firstly, I would like to touch upon a subject that you, as the first speaker, were hesitant about. You have talked about fields external to the touch line. Therefore I need to say something in response to that.

In fact the issue here is this: This field is not that external. For example, there is a large field of family law, there are many articles in the Civil Code; however, neither the law nor the said Code deals with the properly functioning families, children or husbands and wives. The field it deals with is those which do not function, which have a problem. This is true for all fields of law. Because family law targets everyone, the issue is obvious.

First of all this needs to be acknowledged and declared: Although the competition legislation is a highly novel field, it functions indeed. The fact that it functions is evident from this: Let me say that I had difficulty finding decisions especially in relation to the material law of competition. I could not find; in other words there is none. Mr. Günday will confirm. This shows that the other aspect of it functions on a large extent. Not every one carries out their economic activities by violating the competition legislation. That is to say, this is true for the field included in the formal economy of course, as appropriately stated in the morning. In fact the entire unregistered sphere is outside of this field and there is already no need to talk about competition there. Namely, this system works in the registered, lawful area. The figures give us an opinion here. In fact the size of the economic activity in Turkey is not that narrow and small.

Then, where does the question lie? In other words, why am I trying to say that it is not outside the touch line? Especially when we take a look at the decisions of the Council of State, we see that nearly all of them were cancelled due to procedural reasons. In fact this criterion that you apply does not constitute a contradiction to competition in terms of the material and economic aspect of competition, or there is no decision stating the otherwise. As far as I could determine, a large amount of the decisions, the disputes, which have been referred to the administrative judiciary in the area of competition today stem from the application of the procedure, the procedure of competition. Yes we had to touch upon some aspects in our field, and our field is a bit dry and a boring field, which might not be very pleasing for some of the listeners. But, the problems arise in that field.

One should also not forget this: The substance of the matter, unfortunately, is finalized through those procedural rules. All right, you might be right in terms of the substance of the matter but if you can not establish this right of yours procedurally, then you are deemed wrongful in terms of the substance of the matter. I will also add something about concerted practice very briefly.

Chairman Of The Session- Very briefly.

Associate Doctor Halûk KONURALP- I think there is a need to make a different point from Mr. Günday here. In fact, he also realized; he looked at me with such an expression when he addressed me a moment ago. The purpose or aim of this provision, namely the provision worded as "the party shall provide the proof on condition that it is based on economic and rational facts," is to set a criterion for the Competition Board in making its decisions, to give a more expedient interpretation. The purpose here, as far as I understand, is not to prove one's innocence -to the other party- Even if it is not proved for certain, given that they will not face each other, the Competition Authority will not say anything to its addressee when it considers that "there is concerted practice". This provision amounts to the fact that it is authorized by this provision to make its decision if it holds this conviction; otherwise it should not be understood as a provision which places the burden of proof on the other party. This would be something exceeding the purpose of this act. This sets a criterion for the Board in putting its discretionary power in to use. This is all about the issue, as far as I understand. Thank you.

Chairman Of The Session- Please go ahead.

Prof. Dr. Erol KATIRCIOĞLU- Thank you for the question. In fact I will take this opportunity and try to respond adding a few other things, without taking much time. An important reason why I brought up informality here is that I think the competition rules are very important, with an economist's perspective, because of the fact that they should be shaped according to the characteristics of the economy where the rules will be applied.

What I mean is: I am trying to say that there should be a difference between the legal system, understanding and practice developed on the basis of a developed country and legal practices of a developing country. To be honest, I can not see this difference much in the decisions taken by the Competition Board, as far as I am concerned; nevertheless I do not think this is very important either, not so due to several reasons. Informality specifically has become an important phenomenon in a globalizing world. With the increase of competition, it became inevitable, in a sense, for firms in various sectors to move towards informality. As I mentioned in my speech just a while ago -this is an estimate- it seems that there is informality in areas which constitute about 35

percent of the GNP. Therefore I think that this is a case which should be paid attention to in relation to the application of competition rules due to three reasons: One was related to the definition of the relevant product market. Indeed, there are some markets where you would not really be defining the market if you took an approach based on a typical market definition produced in western countries. If you need to make an analysis of the "fast-food" market, you have to include *lahmacun* makers or sandwich makers or *döner* makers, for example. Perhaps, these may not be included in the frameworks produced in the West; however, I wanted to say that it could provide an outlook which we should have, and which would at least have an effect as the expansion of the market definition and therefore could be important in the analysis of dominant position.

The second, frankly, is the matter of creating a relationship of unfair competition. There is an effort in the Competition Authority in this respect. If I do not get their names wrong, Burak Büyükkuşoğlu and Murat Çetinkaya have a paper which they presented in 2005 in an international symposium, if I am not mistaken. In that paper, which I honestly think is a very nice paper in one aspect of it, our colleagues pick 15 decisions, examine these 15 decisions in the context of unfair competition and informality. What I repeated was the conclusion they had reached therefrom. What they say is, "In its decisions, the Board chose to use informality, when found by it to exist, in the context of reducing fines; in other words they have some statements to this effect. I am not a legal expert, to be honest, but I do not embrace this approach. At least, if there is informality, I do not think that it would be correct to use the existence of informality in the context of reducing fines.

What I actually wanted to bring to foreground was a subject which appears likely to be a more important subject from the perspective that I am interested in, and it is not subject of this work and as far as I can see, I have not seen a similar view so far. That is, as I said, the issue that Article 4 is becoming ambiguous. Indeed, as I tried to explain, competition as increased with globalization, actually creates informality on one hand, and brings about seekings of cooperation in sectors by formal firms on the other hand. Accordingly I am trying to say that at least Article 4 should be rethought taking account of the fact that seekings of cooperation exist. There are such "cases" that in their current form and with the approach to date, it is very hard to understand what the real circumstance economically involved in these cases is. When looked from one framework, I am convinced that one should not rush to draw the conclusion, "Yes, these people sat together, talked, determined such and such, which all indicate that a cartel exists." In fact, in the structure which Turkish economy wants to be evolved into now, there shalll also be some

solidarity approaches and their existence should not be directly interpreted in the sense that they prevent competition.

I would like to say one last thing. Actually I shall take this as an opportunity to repeat what our colleague, who is also the member of the Competition Board, stated in the morning session. Competition laws are basically laws enforced in order to increase social welfare. But do not forget that, social welfare, especially in developing countries is related also to the existence of some areas where more than these laws can be done, some areas which should be intervened into. Therefore, competition laws, in my opinion, should be enforced looking from inside of the competition policies. There may be such areas where welfare increase may have been achieved not by enforcing competition laws fully, but by suggesting exceptional measures therein. In consequence, I know and I am aware that this is naturally the emergence of two different paradigms; however I am especially underlining this for Turkey, Turkey is a developing country by its characteristics. Actually, the fact that it is a developing country means this: Welfare in the Turkish economy would not increase only through reforms which open the way for market mechanisms, to be more precise, there is a limit to this increase. The condition for Turkey to become a much more developed country is the resolution of development problems of the Turkish economy. Resolution of development problems, in a sense, requires that certain industrial policies and technological policies should also be enforced besides the competition laws. Therefore, the perspective of enforcing competition laws should also be evaluated with an outlook in terms of these policies, in which way we would be of a greater benefit to the country I think. Thank you.

Chairman Of The Sessioon- Thank you. Please go ahead, Sir. If you may permit, I would also like to take the floor after this colleague; I am waiting for my turn.

Associate Professor Ayhan KORTUNER *(Member of Pamukkale University)*- I was going to present an answer to the statement of Mr. Professor Metin Günday; however, Mr Professor Konuralp provided an answer, though partially.

Here the unconstitutionality problem of the presumption of concerted practice may be criticized; however, what the legislator expresses as “each one of the parties may prove that they are not engaged in concerted practice provided that it is based on economic and rational justifications,” is in fact the doctrine of “rule of reason” which we discussed in the morning session. For example, there are two “GSM” operators which renew their infrastructure and increase their prices at the same time, but the consumers or the Board is not aware of this, and

it initiates an investigation; in that case, if these operators were to say that they renewed their infrastructures and now they provide a better service by switching from dual band to tri band, there would no longer be a problem of proof because of the existence of an economic and rational justification. I wanted to add this, Professor. Thank you.

Chairman Of The Session- Thank you. I would also like to point out something in relation to the presumption of Article 4. As you know this provision does not exist in the European competition law, which is our source legislation. This was derived from some of the decisions of the European Communities Court of Justice and was added here. This is possible. The important thing here is to what extent the context of the cases we took was transferred here and to what extent that context was taken into consideration in the Competition Authority decision. Unfortunately, Competition Authority has started to utterly disregard the context lately and took the issue to a point where we can agree with Mr. Günday. Let me tell you how the context is disregarded. Here the Competition Authority can not say "you took part in concerted practices", it's not as simple as "you have been taking part in concerted practices, the burden of proof is not on me". The Authority also has a point to prove; but the Authority does not do this. Let's see what it says: "If there are no means of proof to establish the existence of an agreement, it shall point to a market that is similar to a market where competition is prevented, distorted or restricted." Let me use a metaphor. Say, if the markets where competition is distorted are yellow in color, first of all it has to prove that the color of the market in question is in fact yellow. Secondly, it has to say, this yellow color is not because of the conjuncture, or because of economic reasons; this is because of you, but I can't prove it". There is a proof there. Competition Authority used to prove this point in the past; nowadays it abandoned this. Now it just points its finger, saying "you're in concerted practice" and stops there. After that you have to prove, "based on the economic and rational reasons listed in paragraph 5 everybody would have taken this decision, I took this decision and I took it independently, economic demands required this". I am of the opinion that if the Competition Authority returned to its previous practice this concern of yours might be less justified; but increasingly it deviates from that. This is a development of the last 2 years. This development… Look, this is the fifth time that the economists are criticizing. İzak Atiyas came and said "This has become completely obvious". Gürkaynak came and criticized, all on these issues. Publications are focusing on this point, all because of this presumption.

In my opinion, there is a burden of proof on the Competition Authority apparent within the presumption, which is to prove the existence of a distorted market. And this, as you mentioned before, takes the issue to an economic

dimension. We began to lose sight of the economic dimension. In the past, they cared about it, now they are losing sight of it. These are my remarks. The floor is yours, Ms. Aslan.

Hatice Fatma ASLAN- Hello. My question will be for Professor Metin, if it is all right with him.

It was said, in relation to the Misdemeanors Act, that "in case the course of law is not invoked, the sanctions shall not be definite." I would like to learn his thoughts on whether or not this situation is in conflict with the principle that administrative acts are definite and executive from the time they are implemented. In administrative law, we had a principle that said "the concerned of an administrative act is the person whose interests are harmed by the act", if I remember correctly. When we adopt this to the decisions of the Act on Competition concerning the establishment of nonexistence of competition violations, can we say the interests of the complainant are not harmed? If this can be said, then we can also say "the complainant is not the concerned of the act"; but if we cannot say the above, then does not the complainant become concerned and therefore a party to it? This is what I wanted to ask him. Thank you very much.

Chairman Of The Session- Thank you. Let me explain another matter. In the discussion I will give the floor to those who wish to ask a question; but the last 15-20 minutes will belong to Mr. Karakelle. Of course, he has the right to give answers to all these questions. Let me remind you that he holds that right of reply. Yes, please.

Att. Hikmet KOYUNCUOĞLU ***(Representative of the Istanbul Bar Consumer Rights and Competition Law Center)-*** I can see two flower arrangements in the hall: One from the Kayseri bar and the other from the Turkish Bar Association. I came from the Istanbul Bar Consumer Rights and Competition Law Center as part of a three-person group and with the support of our bar. Even though we may not present as pretty a picture as those flowers, I wanted to start with this introduction in order to convey the importance attached to these speeches by our bar and our Center.

On the relationship between law and economics. Now, I do not wish to go into detailed comparisons before my esteemed professors, but I will count on the idiom "do not take offense from similes". It is certain that competition law and competition issues are analyzed with the help of economics, it is certain that the veterans of this science made lots of contributions to those areas; but I can not understand why these two disciplines are always put into conflict, into opposition. We will make infinite use of this science in the establishment of evidence, in presumptions, in the establishment of factual cases, even in terms of

the institution of expertise. In truth my concern is this: as a representative of the Bar, I wanted to state that whether or not there are efforts to create a relationship similar to the one between tax law and financial advisors in this area also is an important consideration for the professional association I belong to; though I am sure that nobody has such an intention. This is like, since construction engineers are consulted concerning the damages to the roof of a factory, the discipline of construction should be taken as bases for the studies in this area; which is a debate and claim that I never saw being advocated by an engineer. Why is this something under discussion for law discipline, this is a question I would like to put forward, especially for Mr. Katırcıoğlu.

In Article 35 of the Act on Lawyers, it is stated that let alone investigations, even the written pleas fall within the definition of duty of the attorney profession and must be carried out exclusively by attorneys. I am surprised that this subject was not touched upon in an environment where competition law is under discussion and most of us are experts, academicians, jurists and the rest are practitioners.

En azından baro disiplininden geçmiş ve bu konuda bütün hukukçuların, bütün avukatların dilekçelerine ilk bakış açısı olan savunma hakkı, hatta en basitinden sonlarına eklediği savunma hakkının engellenmesi, taraf iddiaları, usuli konularda bu avukatların belli bir şekilde bu sürece dahil edilerek, en azından Rekabet Kurulu'nu, Rekabet Kurulu üyelerini, uzmanlarını antrene etmesi düşünülemez mi? Later we complain about the decisions rejected by the Council of State. All our petitions include the expressions, "right to defense" and "claims of the parties". These types of investigations are given to the attorneys exclusively, with the understanding that economics would be made use of. I did not plan on focusing on this discussion to this extent. Bu this is where the most important element, the most important contribution comes from. Why are we even discussing this in an environment where colleagues tasked with improving the procedure would make none of these mistakes and where esteemed members of the Board may impart this point of view, this notion to those without that kind of background? Yes, this is not so in Europe, but let's not confuse the jurist identity in Europe with that in Turkey. I especially want to emphasize the views of Professor Günday on the subject and leave the floor to Mr. Erol. Thank you very much.

A Participant- …as one of the jurists, I must say that my friends with economic backgrounds as well as those with other backgrounds are very mindful of the procedural rules; they are very sensitive on this subject.

I want to thank Professor Haluk. My thesis of expertise was on "evidence". You said that "this is unnecessary and we should not discuss it. Evidence may be any

kind of evidence, and this much reference is not needed." I, of course, agree. But I thought that I should throw my thesis out or something, when you said that.

A Participant (Cont'd)- No, not at all. I agree with you. Yes, we do not accept the complainant as a party. I agree with you on that point. I wanted to explain the issue of "why is the complainant participating in the hearing" by saying that we might have thought as follows: The parties under investigation, those who have proved before the hearing that they have direct or indirect interest in the parties and undertakings under investigation and the representatives thereof may participate in the hearing; we can also think of the complainant in this context. The complainant, as you mentioned, is a mechanism which informs us of the competition violations we should have found on our own initiative and then there no more connection between us. Sometimes the complainant may even take its complaint back; but we continue on or investigation or we find additional violations or we may find that there are no violations at all. I would also like to remind the following: In Europe there is a legislation known as "Right to access the file"; we also take this legislation into account

Att. Oya ŞEHİRLİOĞLU- Thank you. I will have a recommendation and a question. My recommendation is: It's about the length of these papers, as someone who has been participating in this conference for 4 years. I say this on the supposition that the selecting committee can see that the papers they examine are not equal to each other in terms of content. Therefore, I think that it is not fair to give equal time to papers with different levels of substance and content. To give an example from today, the paper of our colleague Şahin was quite comprehensive. I think that we would all like it if we could listen to that paper for another 10 minutes. I would be pleased if this was taken into account next year when reviewing the time to be given to each paper. My question is for Professor Haluk, for other professors who may wish to answer and for Mr. İsmail to respond to in the last 15 minutes.

Particularly in multilateral investigations where there is more than one undertaking under investigation -I especially avoided using the word "party" this time- 10 or 20 undertakings for instance, when the Authority requests information and documents from us, we deliver the requested information, documents, defenses, names, board decisions, numbers, invoices etc. to the Authority in due time and after confirming their accuracy, both in order to fulfill our legal obligations and to exercise our right to defense. Some of the other undertakings under investigation in the same case may intentionally avoid giving this information and even say as much and some others say "sorry, but we are not able to deliver these to you." When you receive the decision after the written plea and/or the hearing stage, you find out that the Board did not take a decision

on whether or not these undertakings, which intentionally failed to supply the required information and documents, were engaged in a conduct distorting or infringing competition since sufficient evidence to form an opinion could not be collected. I would like to know your ideas on the equity of this decision. Thank you.

Kemal EROL- Thank you, Mr. Chairman. I feel the same excitement that I had felt when we were holding the first meeting in this hall. To tell the truth, I was not so sure that I would get such positive results when I was trying to get Competition Board's support which was right after I started serving in the Competition Board with the feeling of responsibility of having started work on competition law at an early age. Just after that I met with Ms. Ayşe through the reference of esteemed PROFESSOR Ünal Tekinalp. She had worked in the area of "European Community and Competition" abroad but came back here because of her marriage and wanted to hold such a meeting. However, this day once again proved what a valuable thing I have done and therefore I am happy. I would like to thank everybody who worked for this meeting, particularly Professor Ünal and esteemed competition jurists as well as to those who arranged it.

Today, as a matter of fact, since I am the only one here who took part in the establishment of the Competition Board, there seems to be a need for me to make some explanations on some topics. Even though Mr. Nurettin made his speech, I think at least some subjects need clarification.

The fact that the issue of "parties" has been brought to attention today - for which we owe thanks to Prof. Haluk- is very important. Prof. Yılmaz Aslan, who coincidentally asked the relevant question, will remember that we found a middle way concerning this subject as the Competition Board because of a case for which he was the consult. Maybe this requires clarification. In the end, law is the art of balancing interests. As the Professor admitted, Competition Act, which includes the first expansive administrative law procedures, is considered a successful act in terms of regulating administrative procedures that were non-existent in Turkey. Here, it may not be appropriate to see the complainant as an assistant to the Competition Board, which must carry out the tasks assigned by law. Since the result the complainant gets after his complaint will largely affect his rights in terms of private law, thinking that the complainant – I am talking about the complainant, not the informer – thinking that even though it is not a party, the complainant should be afforded such rights as necessary to balance his interests, we brought the application Professor Yılmaz made as the complainant's consult before the Board. If I recall correctly, besides notifying the preliminary investigation report, we also took a decision that allowed him to

examine all documents in the file except those which were secret; this was the first decision on the subject.

I will not touch upon concerted practices since anything I can say has been already said. Though there was an observation. In fact, at the time we tried, as much as possible, to prove everything in terms of concerted practices; we, at least, first tried to prove that a situation resembling distorted markets was present in the relevant market and then left the obligation of proving the opposite to the other party, which we felt was more appropriate.

Another question I had… In fact, I was going to ask this as a question, but thankfully he made some good explanations and made it unnecessary for me to ask these. Professor Doctor Metin Günday's paper is very good. I agree with his views in all aspects. We would like the Council of State to start taking its decisions concerning the merits, thereby developing the case law. Unfortunately, we had received some serious criticism on this subject, to the effect that Competition Board decisions should be judged not by the Council of State but by administrative judiciary. As you will recall, 10th Chamber even took it to the Constitutional Court. As the person who defended this there -I must say, the Constitutional Court decision stating that there was no violation was taken unanimously- my reason was that competition law was new in Turkey. Arguments stating that the only way to create a case-law for this branch of law was to refer the cases to a single Chamber, that if they were referred to administrative courts it would be very hard to create a case-law enabled such a decision. I also wish that the basis of the Constitutional Court's decision on the subject is realized soon.

"Misdemeanors Act" has been an important development. We had a legal commotion on that subject. Many people in the hall may not be informed about this. The professor has summarized it very well. As a jurist, I would like to emphasize this to raise our awareness on the subject, since he repeated his observation that it falls within the definition of Act no 5326. Since it is within the definition of "Misdemeanor", it is also within the general framework of the Misdemeanors Act. Moreover, the act adopted after the annulment decision has reinforced this point. After the amendment, the Council of State was given supervisory powers concerning only the judiciary supervision. Unfortunately, because of the strangeness of this act, I think that Competition Board must implement the Misdemeanors Act. "Which provisions of it?" you will ask. Notification provisions. If we evaluate the special act-general act relationship, particularly if we have established that it is within the scope of general law, we will have to make the notifications not according to the Act on Competition, but according to the Misdemeanors Act. I think that "Limitation" provisions, the

provisions of Article 19 may have been annulled. We must carefully consider these, also.

The professor made a very good observation; in terms of finalization, the supervision of the Council of State will continue in relation to judicial supervision only. This is a very important development. As competition lawyers, we should either look into it, try to remove it from within the scope of the Misdemeanors Act, or we should take care to act accordingly as long as the act is in effect, especially after the amendment. I really think that this is a dangerous development. The Act may have been adopted with very good intentions, collecting misdemeanors under a single law like felonies may look like a good idea; however adopting a new act concerning not only the competition law but also the fines and other sanctions brought by EMRA, CMB and other administrative bodies for misdemeanors may void the relevant provisions of these other laws.

There is also the transition process, which is a very complex process. That is: As you know, for a time, until its abolition, the act stating that general courts had jurisdiction on administrative supervision procedures stayed in force. I do not want to mention the legal discussions during that process. Of course, it's possible to say that "provisions on function and acts concerning the function are retroactive". Even though the court of disputes did not take a decision concerning the Act on Competition, it took final decisions concerning a lot of acts after the Misdemeanors Act came into effect. I think that we are bound by these decisions. I would like an answer from Professor Metin on this subject which I shortly summarized so that he can answer quickly. Thank you very much.

Chairman Of The Session- Yes, please.

Professor Metin GÜNDAY- Mr. Chairman, when presenting my paper in the morning, maybe for want of time, I could not explain this Misdemeanors Act in detail. A little while ago a colleague asked, "What about the executive aspect of the administrative act," which was also related to this point I think. She's right. The executive aspect of the administrative act has already been postponed; it says "the fine shall be paid in 3 months." However executive administrative acts are immediate. First of all, there is an exemption to execution here. Moreover, previously it was also postponed until finalized by administrative judiciary. Now another 3 months. This is the first part.

Execution aspect is important, that's right; however if you bring very tight conditions on the stay of execution so as to make it nearly unusable, this does not work either. Clearly illegal.. These two come together. In that case taking stay of execution decisions would become impossible or too difficult,

unless there are some marked formal or procedural errors. Therefore execution aspect is okay, but for it to exist, an effective judicial control must be re-regulated; stay of execution institution, which is the most important instrument in nullity suits, must be re-regulated. If this is done execution creates no problem. You can apply to the courts or to the Council of State saying "an irreparable damage ensues…" If you can take stay of execution decisions based only on this, there is no problem.

It is this Misdemeanors Act that creates the dispute. Well, about positive aspects; yes, Misdemeanors Act does have positive aspects. Administrative penalties, administrative penalty law; these are not at all known in Turkey. Of course there is no law which includes the basic principles these administrative sanctions would be subject to. Misdemeanors Act, I don't know if it's on purpose or not, is positive in the sense that it brought regulations to that effect. It says "The general provisions of Misdemeanors Act are also applied for misdemeanors in other acts." This is after stating that "Actions and torts about which other acts bring administrative fines are also misdemeanors". What are these General Provisions of the Misdemeanors Act? For instance Article 9 (Misdemeanors Act, Intent and Negligence). Did we ever think about this before adopting this Act? We administrative lawyers did not think very much, let me accept. Until now, we never thought about, when applying an administrative sanction, whether or not we should look for a fault in the person or group of persons we would put the sanction on.

Misdemeanors Act General Provision Article 9- (Which will also be applied). "In cases for which the act does not have clear provisions, misdemeanors may be committed by intent or through negligence." So, we are going to look for minimal fault from now on; this is the general provision of the Misdemeanors Act. We will look for it in misdemeanors under the Act on Competition also, that's what the Misdemeanors Act says. Whether we accept it or not, that is the way it is. Gathering, are there provisions in the Act on Competition concerning gathering? No; there are none in other acts which stipulate sanctions either. Doesn't gathering exist? It does, very frequently. What are we going to do? Here; Gathering, (Misdemeanors Act, General Provision, Article 15), Participation, Attempt. Attempting the act that constitutes a misdemeanor, participating in it; these are all General Provisions. What does Article 3 of the Act say (after the amendment, the legislator emphasized this as you mentioned)? "These are applied in other acts also." What is not applied? "Without prejudice to provisions concerning appeal to legal process." All of the rest -whether or not we like this Act- must be applied; positive law orders this at the moment.

As I said in my speech in the morning: I am not discussing whether or not this administrative act is compatible with the executive one, whether or not it is appropriate. After the appeal to legal process according to the provisions of the relevant act -to the Council of State in competition law- what is the effect of this appeal on the execution of the decision? It says that "For the decision to be final, appeal must not be made to legal process in due time". If there is an appeal to legal process in due time, it won't be finalized. You could say that Article 55 is a special provision. True. If not for the following, it would be a special provision. This was re-emphasized in the new regulation. I don't think that it's still a special provision after that. Article 55 says that "an action being filed does not stay the execution", so I don't think that it is still a special provision. At least, when we look at paragraph 4 of Article 17 of the Misdemeanors Act- which is a General Provision- what does it say? "Finalized decisions concerning administrative fines which must be registered as income in the general budget shall be sent to the collection departments determined by the Ministry of Finance, to be collected in accordance with 6183." Council of State rejected the request for a stay of execution. Now, maybe my friend Mr. İsmail will ask, "What will be the practice of the Competition Authority?" According to this article, can you send this decision to the Ministry of Finance, can you say it's finalized? You can not demand the collection of an administrative fine which is contested before court, about which there is a request for annulment. The director of the tax administration would have to return it. He would have to ask, "Is this case closed?" No.

There is another strange thing, especially after this abolition decision of the Constitutional Court. It is also not possible to understand the abolition decision of the Constitutional Court concerning Article 3. That created a commotion, too. There would have been no problem if the Constitutional Court had taken an abolition decision on the basis of a separation between administrative justice-judicial justice and said "it is a violation of the Constitution to appeal to judicial justice against administrative sanctions which will be implemented by administrative boards and administrative authorities, and the case-law of the Constitutional Court in the last 10 years reflects this". No, it did not say that. "Article 3 is in violation of the Constitution since it does not take into account the provisions concerning appeal to legal course in special acts"; that's what the reason of the decision suggests. Why should it be in violation of the Constitution? It either infringes the Constitution all the time, or it never does.

Now, see, there are no special provisions in the Capital Markets Board Act. Capital Markets Board also imposes administrative fines. Where will you appeal? You will appeal at the judicial justice, at the criminal court of peace,

won't you? Will there be a stay of execution? Yes. Where will you appeal the fines of the Telecommunications Board? Is there a special regulation that says "The appeals are made at the Council of State?" No. What about RTHB? There no such thing in the RTHB Act either.

These are all independent boards, all of them are independent. "Supervisory and regulatory boards," they have been renamed. Formerly, terms such as "independent administrative institution", "independent administrative authority" or similar were used. Now, legally, they are called "supervisory and regulatory boards". At the same time, most of them have been given the same status, in terms of budget regime.

Actually, it is debatable from now on whether or not there are independent administrative institutions in Turkey. You have no budgetary financial autonomy anymore, that has gone. Your budget will be made by the Turkish Grand National Assembly. You will only prepare it. Capital Markets Board is an independent board, it has the same status in all aspects. When it imposes a fine, if you appeal to the judicial justice you will not make the payment until the objection is decisively resolved; the same for RTHB. What is the difference of the fines imposed by the Competition Board, then? Isn't that right, there will be such a contrary implication.

Therefore, this Misdemeanors Act creates a confusion as to the collection of administrative fines; it causes different practices concerning under which circumstances they will come to the collection stage, under which circumstances they won't; however, in my opinion, this General Provision must be applied for all administrative fines imposed for all misdemeanors. I could not understand the question of our other colleague, or if I misunderstood please correct me. Yes, nullity suits are filed by those whose interests are violated, that's right. Are you asking whether or not the complainant can file nullity suits?

Professor Metin GÜNDAY- Before the Board?

A Participant (Cont'd)- Before the Board, yes…

Professor Metin GÜNDAY- I got it. In fact I do not think that "complainants-informers" carry a lot of importance in terms of the application of the competition law by the Competition Board. The Board already has the power to open investigations ex officio, even without preliminary inquiries; it does not require any complaints or it is not necessary to prompt the Board by an outside application; that is, there is no legal obligation for that.

A complainant, someone with an interest may bring the competition infringement before the Board; a citizen -as Mr. Haluk, I guess, already observed- a citizen may bring it before the Board. In a way, in judicial justice,

for transactions concerning the public interest, we assume that nearly all citizens, or in case of a municipality everybody in that municipality, would take these infringements before courts in the form of nullity suits. Well, in case of competition infringements, since there is an element of public interest in ensuring that competition is not infringed, someone -call him "complainant" or call him "informer", I think generally they are called informers- would bring the matter before the Board in the end. Since, the Board has the power to open investigations on its own initiative even if it is informed of the issue by outside sources, it not that important here whether or not there is an infringement of interest or a complainant. But maybe, as the Professor remarked, if there is a chance that he will file a private law suit, it may be easier, for the purposes of that suit, for the complainant to have an interest and to file an action for damages with the support of the fine decision of the Competition Authority, imposed because of an infringement of one of his rights. In that respect only. Yes, please.

Professor Metin GÜNDAY- I think that in that sense the complainant would be a party. In that sense, I do not think that he would be a -to put in quotation marks- party. Thank you.

Professor İsmail Yılmaz ASLAN- I felt the need to take the floor again. I do not wish to be boring, but nobody else provided an answer and this was left up in the air. I do not want it to. Something was said about a professional rule that I attach great importance to.

I thank you for the support of the İstanbul Bar. Our colleague who came as a representative of the İstanbul Bar said "nobody talked about Article 35 here". So I need to make a remark on Article 35. And I do not think that anybody else here knows about what I am going to say. Maybe Mr. Kemal may remember.

I made a few objections before the Competition Board in relation to Article 35. I said that it was in violation of the Act on Lawyers for someone who is not an attorney or for someone who did not have accompanying attorneys to make legal defenses, that therefore they should not accept those defenses. The Competition Board did not listen to me and made no reference to the issue in its decisions. In spite of this, I brought this up again before the Council of State and included it in my statements of claim submitted to the Council of State, for more than one case. Unfortunately whatever you submit to the Council, or if you do not submit anything at all, you get only one answer: "annulment because of the participation of a member." On the other hand, pages of complaints do not come into the agenda in any way, unfortunately. Nowadays, this type of thing does not happen, I do not see it. Our colleague may be sure that if I see something like it again, I will make the same complaints again. This is about self-respect, it is

about looking after your own profession. Therefore, the representative mentioned in the Act is the lawful representative of legal persons. Other than that, the power to represent someone for the purposes of legal defense is given to attorneys with the Act on Lawyers, Article 35; therefore legal defense must be made by attorneys. I hope that I could satisfy the curiosity of our colleague on this matter. Thank you.

Chairman Of The Session- Thank you. The floor is yours.

İsmail Hakkı KARAKELLE ***(Vice President of the Competition Authority)-*** I am aware of the hour, but I also would like to summarize my thoughts as much as possible. If I am not mistaken, a tour of Kayseri and a cocktail awaits us. So I don't want to test your patience.

First of all, I wish to extend my thanks and congratulations again, particularly to Ms. Ayşe. Of course, I guess these meetings, this conference is held under the good care of Professor Ünal. Here we are, together again in the fifth one, and for myself, I can say that, as always, I learned a lot of things in this meeting. Now, Ms. Ayşe is not with us. Esma Zeynep, a new sister to Mehmet Kerem, was born recently, that's why she is not here. Let's wish the baby a long life. Let us reiterate that Ms. Ayşe is the chief architect of this meeting, even under these hard conditions, during pregnancy; let us thank her again, congratulate her and wish for her continued success.

I am going to do something. This meeting -this is the impression that I got, I don't know if I'm wrong- saw a great amount of discussions on "party". Last year, the focus was on "presumption of concerted practices", which was emphasized again by some, this year. Lots of effort was put into that discussion this year too. Maybe because it suits my purposes, I intend to avoid the concerted practice issue; that is to say, at least in my opinion the issue of "parties" is more important, a more marked discussion. For that reason, I will leave that for the last part of my speech. I will quickly touch upon some other points.

Before starting these assessments: maybe it was Ms. Zeynep, the owner of the last paper who said, I don't know why, "we do not want to criticize the Competition Authority and Competition Board," and then went on to criticize us quite extensively. However, I would like to observe something, since that sentence was uttered and put into the records. No, we will be criticized. There nothing that can't be criticized under the sky; Competition Authority is not exempt from it, either. Its decisions will be criticized; its practices will be criticized. We -Do not tanners beat more on the leather they like best?- we most value those who criticize us the most. That is what you did today, so you are very valuable. I felt the need to explain this, since those sentences were put into

record. No, the Authority will be criticized, of course with a suitable language, which is what you did, what all of the speakers did.

I will briefly touch upon some points which the other speakers, the owners of the other papers, mentioned: One of them, which Professor Metin mentioned in this meeting, is that famous first written plea of Article 43.2. I know that there are many people thinking the same. When you start speaking with -of course it's up to each person how to say what he's saying- though when you start with "in our administrative procedure"… We do not have an Administrative Procedures Act; and I guess we all agree that the law which has the largest amount of regulation in terms of administrative procedure, which gives the most extensive rights of defense in relation to the undertakings, is the Competition Act. Professor Haluk also stated that he thought that way. This is very clear. All right, it may give the most extensive rights, but -since it is a law- does it include a restriction concerning the first written plea in one of its sections? No. I feel the need to read it once more before you. Maybe all of you know it by heart. Let's read the paragraph of Article 43 concerning this first written plea, I am omitting the paragraph above which states what the undertaking would submit: "The Board notifies the parties concerned of investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days"; let's continue: "In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims". It says "information", not "documents". The legislator has made a conscious choice here. That is why we do not send the preliminary inquiry report, and that is why we do not send other documents, either. Okay, do we never send them, do we say that we would never send them? No. In Article 45 the legislator mentions the notification of the investigation report. When that report is sent, all other documents are sent too. The legislator does not think it appropriate to send these at a previous stage. When faced with these kinds of discussions, we always say "Let's look at the source legislation". Also in the source legislation, the documents are sent to the parties after the investigation. I would like to take back the word "parties". The documents are sent to those under investigation. What they call "State on objection" is the notification of the "investigation report" in our system. In our law the problematic part is -yes, all right, legislator does not do anything without reason- the request for a first written plea. In actuality, considering the main meaning of this word, a first written plea is not expected. The relevant people are informed of the fact that an investigation has been opened, that's all. As Professor Metin remarked, sometimes we receive just two sentences. That is right. At that stage we have only two sentences to say; the plea

will also be two sentences. It will be made of two sentences; for the first written plea they will say, "No, we did not do this". If rarely someone says, "Yes, we did, we are repentant" in case of a violation, we will be much happier. Generally they'll say "we did not do it". The real plea will be made when we begin to indict them, when we send the investigation report. Anyway, I do not want to belabor this point. On this subject, esteemed ladies and gentlemen, the fight will be done when the quilt is gone. You have seen our bill on our website. This institution of "first written plea," which should have never existed and which, forgive my frankness, has been a trouble for everyone will be gone. There will be sufficient pleas. As done elsewhere, we are going to notify the investigation report, the relevant people will submit their pleas, then if we respond to that they will submit additional opinions and lastly there will be the hearing; that is how it must be done, that is the right approach.

It appears that concerning the provision as it stands today, this discussion will continue, including the files before the Council of State; particularly since even Professor Metin, who is a professor we all look up to when it comes to administrative law still emphasizes it with great persistence. We all know the decision of the Supreme Court on the subject. I think the Supreme Court has taken the right decision.

And, it would be beneficial to say the following as a conclusion: Yes, Information Gathering Board made an assessment that found us at fault in this aspect. Supreme Court basically found us right; Information Gathering Board made a different assessment. Information Gathering Board was wrong, it made a mistake. It should have examined our Act. If it had, it would see paragraph 2 of Article 44. What would it see? It would see the provision that states: "The Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense" and it would start putting effort into making it encompass all public areas. If we're going to make amendments on laws… As far as I know, as of 1994 -I don't know the Acts adopted after 1994 very well- the only Act that says "you can not include in your decision any subject for which you have not granted to the relevant persons under investigation a right to defend themselves" is this one. For that reason, when introducing this bill at the beginning of the 90s, we used to say that this was a revolution in terms of administrative procedure; I am still of the same opinion. I don't know if we inspired the inclusion of that provision in other laws. This is what the Information Gathering Board should do. It should take this basic principle in this Act and ensure its practice by the whole administrative body, from the Ministry of Finance to the Land Registry Office; this is the right thing to do.

I will touch upon what Professor Konuralp said later; I left that for the last part since it's about the term "parties".

Professor Erol, Mr. Katırcıoğlu said something about unregistered economy. This is what I understood from what Professor Erol said: (It is not possible to understand the opposite, since Mr. Katırcıoğlu is the single economist member of the Commission which prepared this Act No. 4054 on the Protection of Competition; he does not mention this because of modesty, but he is the economist academic in the Commission who prepared that Act) Yes, unregistered undertakings are a very serious problem in Turkey which, firstly, distort the conditions of a fair race. You make someone run 100 meters and let another who does not provide insurance or pay his taxes run 80 meters. This is, basically, what the Professor said. This is a very serious problem. The existence of this problem should not force us to not applying the competition rules -that is not what I understood from Mr. Katırcıoğlu's speech. There is already a law and it will be implemented. The existence of this problem, this situation of the economic structure is a condition that we must take into consideration in economic analysis concerning Turkey. In his second speech, he emphasized the issue of "developing country". Yes, that is true. I would like to repeat something before you here that I heard in 1999 at Seoul from an Italian OECD Expert, Paulo Saba- I may have made him quite famous by repeating this nearly everywhere. Paulo Saba was also a quite young expert. He said, in a meeting in Seoul, for competition law and policy "these are not a religion or an ideology; they must be designed according to the conditions of each individual country." Yes. This is also the summary of Mr. Katırcıoğlu's remarks and it is very true and appropriate. This is something else. Competition rules, those three prohibitions, namely prohibition of agreements, prohibition of abuse of dominant position and merger-acquisition control must be implemented; I do not think he said anything different than that.

I did not want to touch upon this concerted practices issue. It's a very large discussion and we already had it last year; as our Professor said. There were long discussions on the papers of Mr. Gürkaynak and Mr. Atiyas; those can be seen in last year's book. I think one point is being missed, though there are lots of other things that can be said. In terms of burden of proof -Mr. Konuralp, with your permission I'm going to use the term "burden of proof" since it's in the Act- there are not too many differences, so there is no need for concern. What the professor says is something else, it's a different discussion concerning the route the Competition Authority has chosen.

When we open investigations based on concerted practices, generally as soon as the undertakings under investigation -this happens in oligopolistic markets- say "I have to follow the leader in an oligopolistic market" or "there is

a balance of terror, I have to take position accordingly, there are no agreements or concerted practices between us" the ball is in our court again. This is not a positive thing, what I mean is the burden of proof passes to us. This is true for all the files until today it is true for all our expert colleagues. This is the procedure. In that situation, it comes to that similar markets thing that the Professor mentioned… "To what extent we are doing it" may be debated; but we are putting effort into it. Displaying similarity in markets where the competition is violated is what is much more important, but here -in terms of "Game Theory", in order to exclude balance of terror- the burden of proving that "the competition infringement may only be possible through an agreement the existence of which can not be proven, that is to say through a concerted practice" passes to us. Those who were in this hall last year may remember; Mr. Gürkaynak gave an example: "the fact that there is coming smoke from a hut in the mountains does not mean that they cut down the trees and burned them, they may be burning coal or something else." Our burden is to prove that only cut down trees may have been used to light that fire that is true. Briefly, what I am trying to say is: This way has changed nothing. The ball passes to the undertakings' court once, but then we still have to prove it after their pleas are submitted; this is all we have been doing up until today. I would like to say a few things about our guest Mr. Robertson's paper.

I would like to thank him very much, particularly. I am an employee of the Turkish Competition Authority, who humbly pointed out the problems in the exemption regime, even in the version before 1/2003. After the adoption of 1/2003, now we learn from Mr. Robertson -and I agree- that difficulties concerning the exemption regime are not over, the problems are still there. Yes, that's right. Here, without being wordy, I would like to say this: Our guest, referring to a Commission decision, said "We should make evaluations according to 81.1 and we should take 'the rule of reason' into consideration". Yes, I believe we must take braver steps. Our colleagues in Brussels, slowly coming closer to the American school in a hesitant way..

…if you want to state the conditions concerning the exemption, without citing a specific exemption, you start with "unless they do not fulfill such and such conditions" in our Article 4 and in their Article 81; that is to say "agreements and concerted practices are prohibited unless they ensure the benefit of the consumer or technological development." Of course, I am talking off the top of my head. If you must make a reference, you start the sentence with those. However, as a regime, exemption regime is one that creates unnecessary bureaucracy, that creates burden for both parties in terms of competition law practices. I believe that competition law is not a branch of law which tells anyone how they should act; it just cites what they should not do; it states the

prohibitions, nothing more. If we must tell people how they should act, we must do that through guidelines, through the explanation of articles. I think that block exemptions and the like are not necessary.

One of Mr. Ardıyok's sentences in his conclusion drew my attention. There was a sentence about the role and importance of competition policy in the fight against inflation that excited me; the fact that it came from a jurist excited me. I thank him. The presidents of our Central Bank, both the previous president Mr. Sedengeçti and the current one, Mr. Yılmaz, stated the same frequently. It's an important subject that I would like to share with you, at least with those who do not know. Those Presidents of the Central Bank said "Lowering inflation from 70-80 per cent to 7, 8 or 9 per cent is an easier thing to accomplish than lowering it to 3 or 4 per cent from 7, 8 or 9 per cent. You can manage to lower it to 7 or 8 per cent, but after that it gets harder." When making this explanation, among other things, they said "now there are markets that resist the fight against inflation, there are markets where there is price rigidity, we are having trouble." When we looked at those markets, we saw that these were markets where competition was low. One, markets where the state is present; two markets where there is a low level of competition. So we have a job to do as the Authority that implements the competition law. I came to this same conclusion from Mr. Ardıyok's sentence and wanted to share it with you. He said empirical studies must be focused on. I agree with all my heart.

I also benefited a lot from Özge's paper. This was clearer in relation to Article 82, 4, mergers and acquisitions, cartels. I was one of those who expected a discussion to be brought in terms of Article 82, concerning damages and loss of welfare. When the report presented appropriately by Özge and her colleagues was published I was very much excited like lots of competition experts. Yes, the formal approach in terms of Article 82 must be abandoned, I agree, and we must be able to present the damage. Therefore we must clearly explain our decisions with economic analysis. To what extent we are doing this now, how can we do it, how can the Competition Board be made stronger in that aspect; these are long discussions but they are also what must be done in principle. Now, before starting on the subject of "parties", let's come to the paper of Ms. Zeynep on the annulment of our decisions because of the investigating member.

With your permission, during the symposium held in this same hall last year, this subject was discussed at length, and I would like to read the words which I said on this platform and which were recorded in the book. They are in the book. I am not saying these to have them recorded in this year's book also, Mr. Chairman; I want to repeat them just so that those who were not here last year can hear them. I said at the time…

Chairman Of The Session- They can be recorded.

İsmail Hakkı KARAKELLE- Yes, they can be recorded again, no problem; but, at least, that is not my intention. They are already in the records.

I said the following then: "Of course, the decisions of our Supreme Court are respected by me as first a citizen and then as a civil servant as well as by every other citizen and they must be obeyed; there is no doubt on this. However, I think we have a right to speak on the decisions on the Supreme Court with an appropriate language; that is to say while obeying them without hesitation, we must be able to emphasize the points with which we agree or disagree. Before the amendment of July 2005, Article 43 of Act No.4054 stated that one or more members of the Board would be charged with the execution of the investigation in case a decision to open an investigation was taken. When you consider the whole Act, there is no provision which states that the investigating member should not participate in the decision. When the wording of Article 43 is considered together with the provision which states that those who participate in the hearing must absolutely participate in the decision as well (the provision on the hearing), without going into particulars, the legislator practically orders the investigating member to also participate in the decision. What should the Competition Board do in these last 8 years? Should the investigating member not participate in the decision on the chance that one day the judiciary may find this against the general rules of law and annul it, in spite of the clear, and in my opinion, mandatory provisions of the Act? I do not wish to detail the problems of quorum (as you know as per Article 42.2 more than one, even 4-5 members might have been charged with the investigation, how would the Board ensure quorum in such a case according to the mandates of Article 43?). The Board has acted according to the clear provisions of the law and the investigating member has participated in the decisions. I am one of the people who thought that it was inappropriate for the investigating member to participate in the decision at the same time (I have witnesses to this; I mentioned this opinion of mine in various meetings, and before the Council of State decision as well); I am not one of those who learned that the situation was like this after the Supreme Court decision. But this should not have been a reason for the retroactive annulment of 8 years of Board decisions. Professor Ejder, while explaining a different subject, used the term 'law as it should have been'. My expectation from the Supreme Court first as a citizen and then as an employee of the Competition Authority was this: the Supreme Court should have taken these provisions of the Act on Competition which are in violation of the general principles of law before the Constitutional Court; that was the right thing to do. The result from that procedure would have been in accordance with our legal system. Our Council of State did not choose this path. We have to be respectful

of that. There is nothing else to do. We are doing what is required. However, being respectful does not prevent me, as an employee of the Competition Board, from mentioning this with an appropriate language, as I said before." I wanted these to be heard again, that is one.

Secondly; in relation to the new decisions -I listened with respect to and learned lots of things from your paper, God bless your hands and brains- I still think that the Board has done the right thing. Do you know what makes me think that it has? The fact that even you, as the owners of the paper, have not been able to come to an agreement.

It was Mr. Çağdaş Evrim, am I right?

"When retaking the annulled decision", you said in the records "at least there should be a hearing," which is probably what you would like. What did Çağdaş Evrim say? He said "The investigation must be conducted again." Maybe you have a disagreement on this point, I have respect for that. But you can see where this may lead to. Let me continue, it is my turn to speak.

Let's invite them to a hearing. That isn't enough; let's take a written plea like Mr. Evrim prefers. That isn't enough; let's re-investigate. How much further would we have to go? The Competition Board has done the right thing here. Of course, the Supreme Court will have the final word. The Competition Board is not re-adopting the old decision; I would like to particularly emphasize this point: it is not re-adopting the old decision. The fact that the penalties or some sanctions of the old decision were repeated has created this impression. No. The new Board takes new decisions. Based on what? Based on the file, based on the documents in the file; that is, based on the investigation report, on the pleas submitted as responses to the investigation report and other documents. It makes a decision based on the file after taking all of the above into consideration. This is a new decision. As a matter of fact, because of that, it also takes limitations into account in terms of the time that has passed between the decisions. Meanwhile there has been an amendment in July 2005 which eliminated notification penalties; so naturally those are not imposed. Therefore, these are completely new decisions. New decisions of the new Board. I cannot be more specific. I saw one professor looking at his watch and murmuring to his neighbor. He's probably talking about me at this hour. "He went up to speak 5-10 minutes, but it has been 20 minutes already", he must be saying to the professor at his side. However, I must express my thoughts on this "parties" issue.

First of all, we came a 300-kilometer road, and hopefully we will return tomorrow. All that we heard today, let alone those we will hear tomorrow, was worth every kilometer of that road, let me say that. While listening to Professor Haluk's paper, I thought that it was worth every kilometer that we came – the

owners of the other papers should not take offense, please. In the 10th anniversary of the Act on Competition, a competent procedure scholar has said, bravely, "parties, proof and presumption are concepts of private law; in that sense they have no place in (I may not be repeating the exact same sentences) competition law"; but he has concluded with "it is time for the Act to be amended on these aspects." In that sense, I attach great importance to Professor Haluk's paper.

I also completely agree with what he said on the subject of "parties". Please, do not think that I have been affected by this very impressive paper. Where is the proof that we agree with him? Again, in the bill on our website. What do we say there? We no longer use the term "party" concerning procedural provisions. In Article 40 and all the following articles -if we have missed some, we will take a look if you can warn us- we always say "those under investigation". This is the right term, that is why we use it.

Now then, at this point, I would like to express my thoughts concerning this "parties" discussion which has been going on for a long time between Mr. Aslan and both the Authority and myself, personally.

No; I agree with Professor Haluk, as well. Our jurist members, especially those coming from the courts and the bench, thought similar to you in relation to the term "parties" here because of the fact that it was in plural form - we sometimes discussed this in the Competition Board; they thought the term "parties" referred to the complained- complainant. No, that is not true. The term "parties" were used in the plural form, for "those under investigation", for the plural pronoun there. But, why? This is very clear in terms of Article 44; "Those parties which are notified of the initiation of an investigation against them…" There is more than one "party". If we think the term refers to the complainant in one way and those complained about in the other, why should the plural "parties" be used?

That is separate, that is different. I am going to come to that. It was considered a party; this fact was mentioned before.

According to Article 45, "Those determined to have infringed this Act are notified to submit their written pleas to the Board within 30 days, the pleas to be submitted by the parties…" Why should the complainant submit a plea? It is clear that here written pleas are requested from those under investigation.

So, let's come to the conclusion. Mr. Aslan, quite rightly, asked, "Why does the Competition Board refrains from notifying this investigation report to the complainant, what happens if it did notify this report?" Do you know what happens, professor? If we consider this notification a "procedure", the last

paragraph of our Article 44 says -as I read a few minutes ago- "The Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense". So if I consider the complainant a party and must inform him of the report, the decision would be annulled because I was not able to notify the investigation report to someone from the Kağızman district of Kars, who wrote two sentences about the case and whose address is not even known. So, he is not a "party". That is why we do not have to notify the investigation report to him. What do we have to do, then? One of our colleagues mentioned. Who? Firstly, Pelin talked about the right to access the file; the problem is not about "parties", it's about "the right to access the file". After that Mr. Kemal talked about the practice during his time, to which you were subjected.

My personal opinion is as follows: The complainant has the right to access the file, as in the source legislation. We do not have the obligation to notify the investigation report. The fact that we do not notify does not mean we are making a procedural mistake. The complainant retains the right to access the file. The complainant should come like a related third party, examine the file under the supervision of the relevant experts and gather the information he requires, of course with the provision that the trade secrets of others are sorted out. This is my personal opinion. There are some who do not agree with it. Some of our colleagues among the experts and probably among the Board as well, and those who don't agree with my view that the complainant should have the right to access the file say that "this is in the source legislation but not in ours, the Act grants no right to access the file to the complainant." In order to end such discussions we included in the bill a separate provision called "the right to access the file".

Lastly, as regards the discussion "who can defend the undertakings before the Competition Board," since Professor Yılmaz spoke before me, he said "Nobody said anything on this subject." I was going to speak on it, and now I am. My view on this subject is clear. Unfortunately there is no clarity about it in the Act. As a matter of fact, İstanbul Bar filed a suit against somebody -with a charge of representation without being a jurist- and unfortunately the Bar lost the case before the Supreme Court of Appeals, as far as I know.

İsmail Hakkı KARAKELLE- I know that. It's not important. The point is: (I will talk about what I think should happen in my view first) In our Act there is a certain ambiguity in that respect. In fact, both in terms of our Act and in terms of all other Acts, undertakings may defend themselves before the administration first, through their legal representatives, and second, through their counsels-that is to say counsels registered to the bar, I am not talking about jurists. Meanwhile, let me repeat for those who do not know, I am not a jurist or

a counsel; I am a Faculty of Politics graduate. What I said above does not mean that those who are not counsels may not participate in the defense. The defense counsel may use 5 minutes out of 3 hours granted for the defense and may let the economist use the remaining 2 hours and 55 minutes. This is a different issue. Advocacy is a profession and it is performed by those duly registered to the bar; it should only be performed by those people. In order to bring an end to these discussions we are putting a clear provision in the bill. This can also be seen on our website. There is no need to discuss the disadvantages of the other practice. It brings lots of disadvantages, it is not right. This does not mean that other professions are not as valuable as jurists or counsels. The help of an economist or a pharmacist may be requested in the defense; a pharmacist may speak for those 2 hours and 55 minutes; but the defense counsel should open and close the arguments. As you know, as part of my office, I sit for the hearings before the Competition Board. In those hearings, sentences to the effect of "I request the Competition Board to decide that we did not violate Article 4 of the Act" uttered by the distinguished representatives from professions other than law does not sound appropriate. Every profession has its own style. I think that those sentences are really suitable for our jurists; they should be the ones to utter them.

Now, before our Professor turns to Professor Haluk and says that I have spoken too much… I felt the need to briefly touch upon these points. At least I am not responsible for the prolongation of the meting until 5:30; though I take responsibility for afterwards. I would like to extend my gratitude to each of you for listening to me. Thank you.

Chairman Of The Session- We have concluded an intense work day. I think that we shall leave this hall with some knowledge different from what we already knew when we entered it at 9:30, and at least with the awareness of different problems than what we knew before.

We'd like to thank Mr. Karakelle. This was a very responsible speech on behalf of an Authority which meticulously follows the issues. I thank him for that. I also thank other participants and everyone as well.

I would like to conclude with two things. First of all: Act No. 4054 has ceased being just an Act and is in the process of fast becoming a law. Second of all: Today we are talking about our own law concerning the protection of competition. Even though our source is European law, our case-law is our own, our problems are our own. This is the young law leaving its home, and we, as jurists, attach great importance to this process. The Competition Board has a large role here, practitioners have a large role to play -let me say that I also mean the department heads, departments and experts when talking about the Competition Board- and education has a large role, as well. My observation is

that the courts' role is smaller than the others. For that reason, that was the most important observation in Gündeş's speech. The Council of State has not participated in the subject yet; it has concerned itself with procedure and form. The action for damages in Article 58 and the following articles, on the other hand, has not become a law yet. I would like to extend my regards to you all.

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A Participant- heard two very good papers. I have a few questions and I might also make some contributions. Maybe we can start from the last question, the question that you asked. At the beginning you talked about misdemeanors, etc. concerning the cartel agreement. True, misdemeanor is not required for the infringement of the competition law, especially in terms of the application of administrative sanctions; however it can affect fines. When you consider cartel agreements and misdemeanors together, you see that they are things that cannot co-exist. When talking about cartels, you also must talk about intent. On the other hand I think misdemeanors in competition law must be understood as follows: I think misdemeanor in competition law is not about being aware or unaware of the harmful consequences. This is a very important point. It can be confused. Particularly if one's starting point is the Act on Obligations, one should not think in terms of normal pecuniary damages. Undertakings would like to harm their competitors as a natural part of competition; there is no doubt on that. The point where we should make evaluations about misdemeanor is whether or not that undertaking knows the practices it should not engage in. This may be a cartel relationship or it may be a horizontal relationship, it may be a non-cartel or vertical relationship as well. Your misdemeanor must be evaluated in terms of whether or not you were aware of the fact that your practice or agreement violated the norms of competition law. This is a very important difference concerning normal damages. Therefore, concerning cartels and misdemeanors… there is no need for discussion, there is obviously intent there. I'm in agreement there. I also said in my previous paper, there may be a misdemeanor liability, because there are no clear regulations. For instance last year, either at the end of 2005 or at the beginning of 2006, a very comprehensive report comparing the member states in terms of tort liability was published in the European Union. It was a very extensive report. For all countries it examined how the systems are, how they should be, what the problems -particularly concerning damages- are; it is a very important report. That report may be an important guideline for us too. It's already on the website of the European Union Commission. I would advise reading it. Very interesting.

Regarding illegality, I may disagree with you at a certain point. This was not under discussion very much. The damage suffered is another issue concerning tort liability under competition law. For instance, I am a distributor

or the sole seller here and I claim that I suffered damages; here, what the claimant must specifically prove is this: if we assume that a competition law norm was violated, is this a norm which would protect me from the damage I suffered? This must be established.

What we call "illegality link" is especially important in terms of the violation of all competition law norms. This stems from the fact that the damages compensated here are solely the economic damages. Normally, Turkish law system does not compensate solely economic damages, unless there is a special norm; this is a problem arising from the nature of economic damages. Therefore, the existence of the competition law and the norm in Article 57 is a particularly necessary norm; they enable the compensation of solely economic damages. However, the problem with solely economic damages is that once the damage is done, it affects not only me, but those who make transactions with me. So this is where this kind of damage becomes problematic. In competition law, it affects who will be the claimant in an action for damages; it affects how the damages will be calculated. To tell the truth, this may require some lengthy discussions. If we start those, we may never finish them, at least not here.

For instance, let me return to the example you gave a little while ago. If I didn't misunderstand, you said "In cartel agreements there are no claims based on compensation for torts." Of course, in theory there can be; no doubt about that, because the law gives you that right. Let's imagine a cartel agreement. In fact we can imagine two types of agreements; according to Articles 4 and 6. We can also consider two types of damages: First; my practices targets someone and as a result I push him out of the market or cause serious harm to him. I am talking about exclusionary practices. This boycott may be in the form of a cartel; therefore there is no doubt that this will be compensated. It's a very typical form of this. It's the same for Article 6 too. Then, there is the real problematic issue: You are engaging in overpricing or your practice decreases quality, etc. which we call the other parameters of competition. What is going to happen in this case, how will you file an action for damages? That is the problem that arises in cartel cases. In principle you have the opportunity to file an action for these violations, too. But there is a very serious problem. You generally lack the "incentive" to file an action, because there are problems concerning proof and the smallness of the damage. As a matter of fact, maybe the second paper was important in this regard. What is going to happen if those who suffered the damages lack any "incentive"? Maybe in that case something like a "class action" should have been made available.

These were general explanations. Now I will return to the questions. My explanations might have been a little too long, I'm afraid.

I do not understand the matter of non-pecuniary damages, how it can be possible. I do not understand at all why we consider this with relation to the violation of the competition law norm instead of as a violation of personal rights. Competition law does not recognize a subjective interest, that is to say a non-pecuniary interest which is under the scope of personal rights. If there is such an interest, if we claim it to exist, then we must also think that it's under personal rights already. So, I think this is not an issue related with competition law. Of course a violation of the competition law may at the same time violate that person's personal rights; then we can consider non-pecuniary damages. However I think this does not concern competition law. Illegality will arise with the violation of personal rights, so I do not understand why we are talking about competition law at the same time. That was discussed before, as well.

You said "There is a decision to merge case-laws taken in 2006". You said "it became possible to file these together, it became easier." A few technical questions… The institution to file the action here may be an association or a labor union, for instance, if we take the application of the competition law into consideration. I'm talking about the action for damages. You also mentioned invalidity. I would like to ask why we need to file a suit as a group in relation to invalidity.

Let's assume an action is filed, a class action; and the damages are compensated. What is going to happen then, in relation to the case, that's what I wonder. I could not understand clearly what kind of an action this is.

(Someone intervenes)

That may be; but what I don't understand is, when we compensate the damages, are we going to be retrospective, are we going to make the payment to the state, are we going to hold it ourselves, are we going to allocate it to those who suffered the relevant damages? There are different practices in America concerning this. They can allocate it or an attorney may be assigned as a representative. So, that's one way to do it.

Another thing is "invalidity". I would like to ask why we need something like this.

Another question I want to ask is about actions for damages. How can we interpret… I think, in your view, in order to create harmony between the decisions of the Competition Authority and the courts, we should make it a dilatory question or mandatory expertise based on the fact that the Competition Authority is more qualified in this area. I would like to know your opinion on this. This way we can discuss that afterwards, which could be interesting. These are my somewhat long explanation and two questions.

Professor İsmail Yılmaz ASLAN (*Chairman Of The Session)*- Thank you.

İsmail Hakkı KARAKELLE- May I ask a question?

Chairman Of The Session- Of course, of course.

İsmail Hakkı KARAKELLE- First of all, I would like to thank owners of both of the papers. Talking for myself; both of the papers were real lessons in law. Let me say that for those of us from branches other than law, this damages section was one of the most boring ones within the practice of competition law. We listened to both of you without getting bored at all, with great pleasure, in fact. Thank you very much.

I had two questions. In fact one of them is not a question. We talked about the first with Mr. Hayrettin during the coffee break, but let me repeat it here so that I can be recorded. Concerning the proposal for amendment to the Act on Competition that Mr. Hayrettin put forward I asked, "We did not misunderstand, did we, this proposal is for judicial cases?" He said, "Yes, such an expansion is not necessary for administrative justice, those examples exist already." That's all right. I'm repeating this to be recorded.

Before my question to Ms. Pelin, I would like to tell a memory of mine concerning this class action issue which I told Mr. Hayrettin during the coffee break as well, so that it can be recorded. I would like to talk about Professor Akıncı, Ateş Akıncı. Some of you may have learned of it before, but I heard of the class action suit from Professor Akıncı for the first time in 1991; it was something I'd never heard of before then. He used to mention it quite a lot. I said, "What is this suit supposed to be, what is its difference form the intervention system in our law, we have such a system too, anyone can be an intervening party, etc". He had a ball-point pen in his hand – I remember like yesterday; holding it, he said "Look, İsmail, in the United States if this pen included a dangerous substance and if a lot of people were harmed by it, a person or a consumer association may file a suit because of it. Others would not have to be an intervening party until the conclusion of the suit. When he wins the action for damages, others may qualify for the same compensation just by proving their relation, without participating in the process." He explained class action in this way. I am just repeating it. I may be misremembering. That's why I wanted to remember him here. He was the first to give me information on class action suits.

Ms. Pelin, I gather from your paper that your stance is closer to expertise instead of dilatory questions. Yes. As far as I know, in the Switzerland Law there was an amendment concerning mandatory expertise and Switzerland

adopted mandatory expertise in competition law area. I don't know if there is any other country like that. I personally find that model as rational too. What concerns those who think like me is this: In this mandatory -or even voluntary, it does not matter- expertise, what will be the position of the Board, that's to say, who will perform this function? As you know, someone could come to the Board concerning the complaint instead of going to the courts. Imagine that this happens with a few months between the complaints and that the person first applies to the judiciary justice. What we propose is that the court would come to the Board, just like it goes to the Forensic Medicine Institution. A few months later, the Board would see it as a different case before itself. How do we solve this problem? I think I made my question clear.

I intervened because I thought that it can be answered together with Kerem Cem Sanlı's question. Thank you very much.

Chairman Of The Session- Thank you. Let's start the answers with Mr. Hayrettin.

Assistant Professor Hayrettin EREN- First of all let me start with Mr. Ayhan's observation.

Last year we had some meetings with Ms. Ayşe in order to create a discussion environment for "class action suits" and in this framework we had some results with the participation of Mr. Ayhan. Therefore, at this point, some regulations that exist within German law may be used. Within the framework of the Continental Europe law system, in some countries there may be different approaches to get some results similar those of class action lawsuits. In this context, there may be some amendments made within the Continental Europe law system.

With regard to Mr. Cem's question, within the context of actions for damages, Continental Europe law system, categorically, does not have an approach with the scope or nature of the one implemented in the United States. The situation is also valid for our country – and it is not about nullity suits. The point I mentioned before was within the framework of a decision for merging the case-laws as a new approach, in situations where both types of actions can be filed together. As a rule, when separate full judicial actions and actions for damages are filed, administrative judiciary requires the action to be filed by the owner or the material right; that is to say it requires the violation of right criteria for subjective license.

Dolayısıyla, olası açılımlar olarak, rekabet hukuku bağlamında, yani ben, bir rekabet hukukçusu olarak bu anlamda belki çok fazla açılım yapamayabilirim, ama geçersizlikle ilgili örneğin bir tespit davasının açılabilme

ihtimali, bir men davasının açılabilme ihtimali bir şekilde ortaya çıkarsa, o anlamda, söz konusu davaların, ilgili menfaat grupları tarafından, o menfaati zedelenen, ortak birtakım ihlale uğramış çeşitli kümelerin veyahut da çeşitli küçük ihlaller dolayısıyla takip etme düşüncesi, iradesi ortaya çıkmayacak kapsamda, mahiyette kalan kişilerin bir araya gelerek oluşturdukları o yapının, onlar adına birtakım davaları açabilmesidir; bu anlamda böyle bir yaklaşım. Otherwise, such an approach is impossible in terms of actions for damages possible under the judicial law of the Continental Europe law system to which our country also belongs. Naturally there wouldn't be sharing, either. At least, there may be some results we might call "class action implementations" with relation to the possibility of filing some actions under invalidity.

Chairman Of The Session- Wait a minute, wait a minute; do not speak without permission. First the answers to the questions, after that…

A Participant (Cont'd)- In relation to this matter…

Chairman Of The Session- Still, that is not the way. Is that all?

Assistant Professor Hayrettin EREN- Thank you.

Chairman Of The Session- Let's give the floor to Ms. Pelin for her answers.

Assistant Professor Pelin GÜVEN- First of all, I would like to thank Mr. Kerem. I really follow his work very closely and I benefit from it very much.

Concerning the matter of expertise, we're talking about a search for a solution. How can we solve the problems when they arise concerning the cases or the application not regulated under the Act on the Protection of Competition, what are the similar concepts within the Turkish judicial system; we're doing explanations or studies on them with these discussions.

I also researched the approaches of the procedural jurists concerning mandatory expertise, particularly through the assessment Professor Ali Cem Budak from Yeditepe University made with respect to procedural law. Here's the situation: The dispute in relation to competition law is multidimensional in the cases before the courts. There must be an economical analysis (on whether or not there is an infringement); as a second stage, there is the matter of illegality. Competition Authority has really large resources and trained personnel for such an analysis. In practice, when outside experts are assigned- which is a problem in the cases I gave as examples- in some cases they are "attorney, specialized in obligations law", in others they are "attorney, specialized in trade law", and in some cases someone with no relation at all to the subject matter. For that reason,

when, for instance compensation is requested for competition infringement, the expert report says "this case does not fall under the Act on Competition, provisions of the Act on Obligations must be applied." So, there are such problems. Therefore, when a mandatory expert is not required such as Forensic Medicine Institution, the courts assigns the expert on its own, unless the parties have previously come to an agreement. However, in these specific cases such problems occur in practice. As for the question "How can the issue be solved;" the most rational solution that could create a consensus may be to assign the Competition Authority as the expert. Otherwise, if this expertise is not established, the courts may still not refer the case to the Authority. On the other hand, if there had been real competition law experts, there would have been no problems when the file was referred to those. The first thing that comes to mind when we're faced with such a problem… Also, with such large resources, so many cases…

Of course, in my view, the drawback to this is as follows: The Authority would have to make responding to this referral a priority. Otherwise the process would take too long.

But, is it possible for the Authority to change its opinion and come to a different decision when the case comes before itself, what would happen if it does give a different decision? We're discussion this situation concerning the judicial justice; the Council of State, also, may apply to an expert for the cases that it examines. However, it can not apply to the Competition Authority in such a case, since the Competition Board would be supervising its own decisions. For that reason, the most rational solution seems to be assigning the Competition Authority as the expert, which is what these efforts of the judicial justice are trying to do. Of course, in practice, if proper evaluations were made in the expert reports, this would not be necessary. In one case -this is a very concrete example- the first experts committee comes to one decision, the second committee comes to the exact opposite decision, and the judge, not being able to decide which to apply, applies the provisions of the Act on Obligations to half of the case and the provisions of Act on Competition to the other half. The worst part of all this is that since most of the cases are withdrawn we are unable to learn the opinion of the Court of Appeals. The situation stays the same.

All right, but are there other solutions, alternatives? Naturally, if there is a better alternative, that alternative should be the practice. But since there are no other alternatives, and considering the fact that we have an existing Authority with the necessary equipment, I think that this might be the way to go if we can come to a consensus on the doctrine after weighing the advantages and disadvantages of each approach. Otherwise, as Mr. İsmail already mentioned, considering this as a dilatory question… cases in Turkey generally take years to

conclude, and there is the question of what would happen if the decision of the Competition Board was annulled by the Council of State… this would be a really long process. For that reason, I think that I am more in favor of this approach. Of course, when we have really well trained experts in the area, these steps will not be necessary. Thank you.

Chairman Of The Session- The floor's yours Ms. Ece.

Ece…- Concerning declaratory actions in relation to class action lawsuits; what is going to happen if we evaluate the matter under the scope of the provision which says " declaratory actions cannot be brought in cases where filing an action for performance is possible"? Besides, it is stated that an action may be filed to eliminate the illegal situation. The decisions of the Authority itself specify how the illegality should be eliminated. To tell the truth, I don't think that, in that situation, an action can be brought for that reason, either.

We think that an action may be filed in order to prevent future violation of rights; we say, "we can add these into the Act through comparison". Doesn't there need to be a decision of violation for that? Without such a decision, how can we go on to bring an action to prevent the future violation of rights? That's because this is a request for compensation based on fault. I also do not think that such an action may be brought if there is no previous decision of violation. What are your thoughts on this? Thank you.

Assistant Professor Hayrettin EREN- Let me make a distinction here: I understand your question with relation to the ability to file some kinds of lawsuits under private law, with no prejudice to some violations or other situations concerning administrative law. Am I right?

Ece…- Yes.

Assistant Professor Hayrettin EREN- Therefore there must be no prejudice to the part concerning compensation claims either, since there is no such practice within the law system of European Union, of Continental Europe. So, at this point, actions for damages must be brought directly by the owner of the material right. Bu çerçevede, uygulama, sadece, evet, çeşitli durumlarda ortaya çıkabilecek birtakım ihlaller söz konusu ise, zarar şartı ve tazminat veyahut da bu zararın giderilmesi, eda davası kapsamında olmamak şartıyla, çeşitli ihlallerle ilgili, tespit davası, ihlalin durdurulması davası gibi birtakım davaların açılabilmesi kapsamında uygulamanın olabileceğini söylüyorum ben.

Chairman Of The Session- Thank you. Yes, Ms. Nuran.

Nuran İNAN ***(Deputy Legal Counselor, Competition Authority)-*** In her previous explanations, Professor Pelin stated that it would pose a problem

for us if the Competition Board, as an expert, made a contradictory decision or if the decision of the expert was different from that of the Board. I don't think that such a problem would arise in practice. The experts, within the framework of their experience… We are acting especially particular in these situations and assign one of our experts and one of our jurists from a different department than the one which normally examines the relevant sector to investigate and report on the case… As you know, this expert report is not binding for the judge in the doctrine or in practice. This is not a Board decision, but an expert report; so I do not think that it would be binding for the Board, either. Plus, there are reports of the experts, of the reporters within the investigation report also and these too are not binding for the Board. For that reason, I don't think that it would create a legal problem if these are contradictory with the Board's decision. However, I think that the most reliable information for the judge would come from our Authority; that's because I believe the most specialized experts in terms of research, knowledge and training are within our Authority. Thank you.

Chairman Of The Session- We thank you. Yes, please.

Larry WHITE- I would first like to ask Ms. Pelin a question and then say something. Unfortunately I have to speak in English. I am an American specializing in the antitrust law, competition law and the comment about triple damages perhaps being changed I would in fact recommend that you keep the flexibility to now either give or not give triple damages. The automatic triple damage provisions under the Sherman Act are right now being changed in that way through. Our Supreme Court has recently limited the amount of punitive damages. In many cases punitive damages for someone who create gross misconduct may only be three or four times actual damages. So the competition damages of three times automatically may in fact be quite illogical now. So the automatic damage provisions of the Sherman Act may in fact be changed or limited in many respects and this is a…research and I think the Turkish approach of keeping the flexibility of triple damages up to triple damages is a much better approach. The last with regards to the question is on competing expert opinions. Why does not the judge take the most legally persuasive opinion as oppose to one from a certain person? I should be the one that is most legally persuasive expert opinions disagree.

Chairman Of The Session- Thank you, Larry White.

Assistant Professor Pelin GÜVEN- The practice of "treble damages" in the American law was discussed. I examined the decisions under the scope of the practice here for my decision study; these are not the opinions in the

doctrine. Our competition law practice is, in fact, based on the European Union law; however only the provision concerning this penal clause was taken from the American law. So, "treble damages" came to us from there. The studies in the doctrine state that this is applied as a penal provision, and that it should be applied in the same way here. In the decisions this situation arises: This practice is not a frequent one in our Turkish law system. Generally compensation is limited with the damages suffered and is aimed to reimburse that amount; so the courts look at the case from that point of view. I think there is a provision in the intellectual property law concerning treble damages; otherwise this is not a frequent provision in Turkish law. Therefore, even though it's clearly stated in the Act, in practice the court sets the fine as "up to treble damages". The thinking is that the amounts in the actions brought for compensation of damages are already too high, and if they were trebled it could be too destructive for the other party. None of the decisions in the cases brought with a treble damages claim imposed treble damages. Generally, the fines are one times the damage suffered, not even double.

What can be the solution, then? First of all, everyone must act in line with the provision of the Act until it's amended. That provision may be wrong, it can be criticized, it can be amended, it may be different in the source; these are separate issues. Since the wording of the Act says "treble damages" – otherwise it would have said "up to treble damages" – I think treble damages must be applied. But what can be done? There is already an amendment in the bill; it says "this provision should state 'up to treble damages'". In that case smaller amounts will have a legal basis. Because of this reason I think that court decisions are not very appropriate.

Chairman Of The Session- Thank you. Ms. Banu.

Att. Banu GÜLTEKİN- My question will be to Professor Pelin. In general we consider these actions for treble damages as a special type of the actions for damages in the Act on Obligations. In that context, we may have some injunction requests when we file actions for tecavüze aykırılık, for prevention of unfair competition or actions for damages such as "the prevention of this tecavüze aykırı fiil". There is not a consensus on this subject in the resources that I've read. I would like to learn your thoughts on the application of these injunction requests to treble damages actions.

Chairman Of The Session- Yes, Ms. Pelin.

Assistant Professor Pelin GÜVEN- When you say injunction, if I understood correctly, is when you file the action…

Att. Banu GÜLTEKİN- When filing an action for damages, there is no consensus in the doctrine -on whether or not general rules are applicable- concerning the requests for the prevention of that competition violation, not in the resources that I've read. I would like to know your thoughts on this. Say, I filed an action for damages and at the same time I requested an injunction, I requested the prevention of the act in violation of competition; for instance I requested a stay of execution for the relevant regulations if the case is about telecommunications, or for the prevention of certain tariffs or broadcasts. On the basis of such concrete cases, what are your thoughts on the subject?

Assistant Professor Pelin GÜVEN- Again, there are no provisions in the Act on Competition; out of necessity, we will look to other laws. There is no regulation stating that there can be no injunctions; so I think that there should be no reason under general provisions not to request it. Otherwise, there should have been a provision concerning that; persons should be able to make use of every instrument available in order to claim their rights. I think that there should be no obstructions to it, unless it is stated otherwise elsewhere.

Chairman Of The Session- We're running out of time. Let me give he floor to our colleague.

Assistant Professor Ahmet BAŞÖZEN *(member of the Erciyes University Faculty of Law)-* I would like to start with a few questions to Ms. Pelin. Please correct me if I misunderstood. You said, for cases brought to Judiciary Justice, "some experts said Act on Competition should be applied, and some others said Act on Obligations should be applied." First of all, experts do not have the power to state these things. Why? Because, on legal matters the judge applies the law on his own initiative, in accordance with Article 76 of our Code of Civil Procedure. So, since the judge will apply the law on his own initiative, this seems like a pointless discussion to me. Do you mean to say "experts should be used in new legal matters"? I do not think so, that's the first question.

If this mandatory expertise approach is implemented -which I think our Professor is in favor of- a competition expert will both prepare the file and the Board will take a decision based on that file, and the same expert will also function as an expert in the general courts. I wonder how we will ensure the impartiality of an expert who can be rejected according to the provisions for rejecting a judge; this is a discussion.

Concerning compensations, Article 21 of our Labor Law states "in case of unfair termination, wages of 4 to 8 months shall be paid." Again, in our Law of Bankruptcy, Compensation in Lieu of Denial of Debts has been set up to 40 per cent. Therefore, if your Act says "treble", wouldn't it be better if we

considered it not as a specific compensation in the sense of material law, but as a fine in material law?

Lastly, it may be a misunderstanding in Professor Hayrettin's paper, or I may have misunderstood something, so I am going to ask him to clarify.

When Mr. Hayrettin was talking about procedure or when he mentioned the general law-private law relationship between the Act on Competition and the Code on Commerce, I never came to the conclusion that these associations may file actions for pecuniary damages. Article 58 refers to paragraphs "A, B and C". There is not any referral to the paragraphs on pecuniary damages in the Code on Commerce. Why not? They can file prevention actions, declaratory actions or civil nuisance actions. So, after this we can discuss "whether or not they should" or "if they should, whether or not the income from that actions should be recorded as revenue to the Treasury or should be distributed". These may be discussions. There is no such conclusion in Mr. Hayrettin's paper. I think that we can not come to a conclusion from this paper that they may file actions for pecuniary damages, or other actions under the scope of class action lawsuits. I would like it if Mr. Hayrettin corrected me in case I misunderstood. Thank you.

Chairman Of The Session- Yes, Mr. Hayrettin.

Assistant Professor Hayrettin EREN- I agree with Mr. Ahmet's views. I did not say anything different in my paper. I separated the actions for damages. Such a practice is not possible for actions for damages at the moment, in terms of the system that our country implements. In this respect, it is not possible to file actions for damages.

In that sense, the decision to merge the case-law may have created questions related to the matter of concurrent filing of nullity suits and full judicial actions in terms of administrative justice. This is an area about administrative law, too. So, at the moment, there is no practice of class action lawsuits with relation to actions for damages within the framework of civil trial regulations. In relation to the invalidity you mentioned, there may be class actions within the scope of declaratory actions, prevention actions, etc.

Chairman Of The Session- Ms. Pelin.

Assistant Professor Pelin GÜVEN- First of all, of course you're right; the judge can not apply to the expert in legal matters; that is what we know, what we were taught in theory. But should I speak about the theory or should I speak about the practice? When you look at the practice, you see that the judge looks at the expert report even in most legal matters. As a matter of fact, in one of the cases that I talked about, a matter which is specific to the Act on Obligations comes up, namely "coercion". The judge looked at the expert report. He made a

decision after taking into account the matter of coercion in the expert report; based on that matter. There is a decision of the Supreme Court: "This issue is a legal evaluations, the expert report is…" That's the situation.

As you know, in such complex areas -which also happens in intellectual property, brands, patents etc, as well as in competition law- certainly the judge must determine and apply the appropriate provision on his own. Before submitting their reports Experts have already made their decision after discussing and assessing which provisions should be applied. The judge is just looking at this expert report. Besides, the expert report does not bind him at all. Because of the complexity of the subject matter, because there are not very many examples, the judges generally rule based on the experts reports as they do in other matters; this is the practice. What should be done is different, that's a separate issue. So, there have been a discussion for those cases because of the two separate expert reports: which should be applied?... The judge took a decision based on the expert report which settles the case by applying the provisions of the Act on Obligations. The Supreme Court has no ruling. "Expert reports may not make an assessment on this matter, the judge may not base his ruling on that"; there is no such thing. Of course, these are not legal assessments; that is not what I mean. Legal assessments may not be done by experts; that is a separate issue. However, as you see in this case, you are unable to determine which report to apply in the first place… Therefore it does not seem too out of question for the judge to look at the expert report, to base his decision on it; that's because this is a very specific area.

Secondly; there is an opinion by the experts of the Competition Authority before the court. The two parties are different, here. In one situation the Competition Authority is one party and the other is the person under investigation or claimed to have violated the law; on the other hand, in courts one party is who causes harm and the other party is the harmed one. So, in one sense it does not have too many disadvantages to apply to the Competition Authority as a third party, in that case. The parties may not have applied to the Competition Authority; Competition Board may not, on its own initiative… it may not have noticed or examined the matter. So, this may be a case that has only been brought before the courts. For that reason, since he wouldn't be bound by the opinion of the Competition Authority, the expert or the person assigned, the judge can make his decision on his own. Of course -as I mentioned previously- we're looking for a solution here; what must be done, which is the best method?… As you see, even we, after all these years of study, are sometimes coming up against such specific cases that we can not solve them immediately. For that reason, I think that maybe the assessments of an Authority

who works solely on competitive matters may be more appropriate, and that it may be better to apply to them with relation to expertise. Thank you.

Chairman Of The Session- Dear audience, I am going to give the floor to myself, because the discussion has shifted to a very different area. We have to put some limits to the basic issues. We've lost sight of them. These are the issues that we have lost sight of:

We are talking about actions for damages in the private law area. The fact that actions for damages are within the private law area means that they are within the area of freedom. The person to file the action is, first of all, free to bring the action to court or not; he may choose to absorb the damages. "I won't file an action," that's it. If he does pursue the case in court, this freedom continues. In our law, the provisions of private law are together with the provisions of public law and administrative law. In the application of administrative law provisions, a procedure quite similar to that used in criminal law is applied; that is to say, there is an obligation to find the truth. The Competition Board itself looks for the truth and persists in its search for it in order to prove its claims. However, private law cases are not like that. In private law suits, the plaintiff proves his case on his own. So, the parties prepare the case by themselves. The judge does not make examinations, the judge does not make investigations; the judge creates the environment appropriate for the parties to prepare their cases. Here, the person who thinks that he will advocate his case well goes to the court directly, and puts his case forward in the best way, with the best petitions and the best attorneys. Those who must be informed in this situation are the attorneys of that party. They will direct their case with the appropriate petitions and evidence. The same is also true for the opposing party. So, you start to introduce compulsion in this area of freedom. You restrict the area of freedom. You confuse an area of freedom with the area of public law. I think that this may be very dangerous. So, we have to discuss these issues in the right place.

Look, let's say I am a person who suffered damages and wishes to file a lawsuit. If I want to apply to the Competition Authority, I can do that. If I would like the Competition Authority with its expansive and reliable knowledge to look into my case, that way is already open. I apply to the Competition Authority, simultaneously I file my lawsuit and inform the court of my application to the Authority, requesting it be made a dilatory question. There are no drawbacks to this. That's the current system. It tells us to what extend the public law system can be harmonized with private law system and gives the plaintiff the freedom to choose. The plaintiff may combine them if he wants. Or parties, we should say, since this may also be requested by the defendant. We don't take that freedom from him through law. So, consequently, the current system gives the initiative

to the plaintiff on whether to employ public law, private law or a combination thereof. So we have to think about this in terms of the trial procedures within private law and we have to think about the public law part of it within the framework of public law rules. Provisions which combine these two will create problems, in my opinion. And that's where the discussions are headed. That will create problems, too.

I would like to say something else while I have the floor. I think that treble damages should be interpreted as "up to treble" damages. It should be "treble damages" and should not be removed. I have better realized that this is a very important provision in the last few years. Let me clearly state the reason. The Competition Board may skip some cases, may not want to examine those. If the person that is harmed really suffered damages, the desire to get treble damages would motivate him, would be an incentive. Without that incentive they would not want to file lawsuits. I think that this treble damages provision have been very efficient in encouraging lawsuits. If it is amended as up to treble damages, I think that there will be less of an encouragement. And I think that it is needed. The reason is very clear. When people file lawsuits, they don't solely protect their own rights. Yes, maybe they get compensation, they get enriched when they protect their rights. This may not seem fair. But they also put an end to a competition infringement that distorts or decreases public welfare. These have very large benefits in terms of public law, in terms of public interests. Consequently, there is a logical reason to encourage that. Treble damages provision also has a discouraging aspect. Now, since the fines of the Competition Board are a little low, all the firms tell us that they are afraid of the compensation. They say that "There is a treble damages provision, we should not make mistakes, please ensure that we don't make mistakes." This is a very important thing. It has a discouraging aspect and it also acts as an incentive to file suits. For that reason, I think that leaving this provision as it is would be very beneficial; the few years of market experience…

Assistant Professor Pelin GÜVEN- … would like to ask a question that concerns them. Have you received a request from courts for opinion or a question of whether or not there is a violation in a certain case?

Nuran İNAN- I have…

Asst. Professor pelin GÜVEN- What is it? In which connection do you generally receive them?

Chairman Of The Session- I leave the floor to Ms. Nuran. Yes, Ms. Nuran. Before you take the floor on your own, let me yield it to you.

Nuran İNAN- The courts send their statement of claim. They request for expertise concerning the competition infringement stated on that statement. We have no such thing as a "list of experts". To expand the previous topic; but these are very few yet, there are a limited number of cases. As I said we take the sectors and departments of our colleagues into consideration and let an expert from a different department and an attorney send the report to the court. The rest is in the court's discretion. I don't know if it can be accepted as case-law on the matter, but in administrative justice we receive advisory opinions; the Authority itself, took advantage of this practice. Does the advisory opinion of the first department bind the Board?

Nuran İNAN- Since it's not binding, this is an advisory opinion. It is evaluated in that context. It is binding neither for the department that submits it nor for the institution which receives it. But, abiding by it or not… I think that our situation, pardon the comparison, is a little like that.

What I think is appropriate: I think that the experts of the Authority are better trained and more experienced in finding the truth than other colleagues around who may serve as experts in courts. They have been trained specifically on this subject. It's not always possible to figure out the exact truth in science; but I feel like we are the best way in seeking remedy. Thank you.

Chairman Of The Session- Anyone else… I will give the floor to last two persons, dear friends. After that Mr. Nurettin and Mr. İsmail will have things to say. After that we will close the meeting.

İsmail Hakkı KARAKELLE- No, I will not take the floor.

Chairman Of The Session- You do not wish to add anything, all right.

Two more questions: one of them from Mr. Ayhan and the other from that gentleman.

Ayhan KORTUNER- Thank you, professor. Forgive me for talking twice, but I absolutely have to say something. I partially agree with your reasoning concerning "up to treble damages". Law is an art of finding balance between rights and interests. There is a danger of destruction for the firms…

Chairman Of The Session- They will use insurance. There is a solution.

Ayhan KORTUNER- That is a separate issue. That may be discussed. They may come face to face with the risk of destruction. For instance, were 100 persons to suffer damages of 10 units -I'm talking off the top of my head- because of the competition infringing conduct of one firm, that means the firm would have to pay damages to the amount of 3000 units; if you assume the

number of those who suffered damages to be 10.000, that amounts to 30.000 people to be compensated. Mr. Erol, who is an economist, is up there. He may be able to do much better calculations. So, there may be destructions.

Secondly; "compensation hunters" -pardon the expression- may spring up. We have to think about that too. This may become a method for improper personal benefit.

I think that the system is being operated in the wrong way concerning expertise. First an investigation must be initiated. Let's say a request for an expert was send to the Competition Authority; what will happen? Will the Authority initiate an ex officio investigation? It's a problem if they do and another problem if they don't. So, maybe the courts can consider this a dilatory question and notify the Competition Authority, or the Authority should see this as a notification and should start the system at the right place by opening an investigation… Can the court do a sector analysis on its own, Professor? It's impossible, especially when you take the situations where even the Competition Authority is hard pressed to do one.

So, the system should be operated in the right way from the beginning. Therefore, in this sense, I do not think the matter of expertise is appropriate. First the investigation must be concluded. After that, the court should decide to impose a payment for damages or not.

Mr. Sanlı had a question. He said, "I do not understand how compensation will be distributed in class action lawsuits, I don't get that." That's a good observation. What they understand from class action in Continental Europe is different from what is understood in the USA. What is understood there is the ability to file injunctions suits. Again, actions for damages may be filed by individuals. There is a problem here: small consumers – for instance I bought cement. There was an investigation in Denizli because of cartel allegations, so I have a decision ready, which means I can claim damages in court. Let's say I bought 100 sacks of cement; some people may not deem it sufficient to go to court for that. So, the firms that caused the damage can get away with what they did. What are we going to do about that, then? In Germany, there is a procedure of transfer of right of action. I can transfer my right of action to a legal person or to a company. A company is established in Germany against competition infringements in cement sector, just as an example. Persons, individuals have transferred their right to action to that company. So, this is suitable for procedure economy, it prevents waste of time and it prevents the courts from dealing with hundreds of cases. Maybe something like this can be considered.

Class actions are a must. Injunction suits are important. Why? Say, we initiated investigations, we fined the firm but it continues the infringement because it profits better like that. The only way to prevent that is by filing injunction suits. That should be introduced into the Act as soon as possible.

The matter of "damages" should be left to the initiative of individuals. Maybe a procedure similar to the "transfer of right to action" or an article to the act must be added so that I can file a suit for the 100 sacks of cement that I bought, so that the perpetrators can not get away with their infringements. I'm saying that the right to indemnity must be ensured. Thank you very much.

Chairman Of The Session- Thank you very much. Lastly, I'm giving the floor to this gentleman here. Go on, please.

Murat DOĞAN ***(Member of the Erciyes University Faculty of Law)-*** First of all, I would like to thank Mr. Chairman for giving me the floor. Also, I would like to thank our colleagues for the very valuable papers they presented. I am curious about something. So I would like to ask a question to Ms. Pelin.

Tort liability is generally accepted in competition law. That's right. When you look at the general picture, it's natural for tort liability to be accepted. Articles 4 and 6 of this Act include regulation on torts. However, wouldn't paragraphs "E" and "F" of Article 4 and paragraph "C" of Article 6 makes it look like there might be a race between torts and contract-violating acts? You may think, "What does it matter?" The main problem is, you said "since there is no special provision in the Act on this matter, the provisions of the Act on Obligations concerning limitations shall be applied, which are 1 and 10 years." But we know that the limitation concerning contractual obligations is 10 years in the Act on Obligations. So this will create a much more advantageous situation. Can't this be taken into consideration? I would appreciate it if you could satisfy my curiosity.

Chairman Of The Session- I will leave the floor to you.

Assistant Proffessor Pelin GÜVEN- Of course in many cases, there may be contracts; however there are cases in which competition is violated without a contract. Therefore there is no such distinction as “what will happen if there is a contract or if there is not a contract”. One has to asses the case with a general point of view because there aren’t any particular provisions related to time limits in terms of this. Otherwise “resulting from the contract, tort…,which will be applied for the competition of rights” may be in question. In fact it would be beneficial if this is brought up, but I am not sure, it may lead to a more complex structure with regard to the results. A single system…because

consequently this is tort. If this is tort, I think applying the time limits related to tort while solving the case would be more suitable.

Chairman Of The Session- Yes, Mr. Kerem wants to add something to this answer. I will not call upon anyone to speak after that.

Kerem Cem SANLI- In fact this is not an exact answer to this question but I want to add this. I would like to say something related to the previous issue. When we ask “How would the judge analyze the market?” we should not ignore this: evidence provided by the parties would answer this question. The judge will not ask any questions to the market. This is not possible. You may prove it and you will prove it. If you cannot prove it, the judge will deny the case because of lack of evidence. The judge will not go out and talk to consumers or ask questions to the competitors in the market. Therefore, think like that: the system in a typical proceeding, a civil law proceeding, is more efficient than that of Competition Authority in terms of information flow. The Competition Authority may know the subject better, this is a different issue. If you are accompanied by people who know the subject very well, naturally what will you do? You may provide the information about a practice that is harmful to you to the court. And the other party, as the addressee of this information, will provide its information. The judge will answer then as he has got the information. Here the judge cannot carry out investigation like a criminal judge or the Competition Authority. I think this is an efficient system, we should see it like this. Of course this might be a problem: the judge may not know how to apply the law. Maybe what you say in your question may lead to several problems in this respect. This is a matter of time. This knowledge will improve in time. If you stop practices in this area, you will hinder the improvement at the beginning. We should look at these 5-10 years later. When this rose in America for the first time nobody solved that by just sitting. As we know well from the decisions that are the subject of Supreme Court, there were very serious mistakes in simple questions. This is a matter of time, we should leave it free.

In article 4(e)(f)…If there is illegality the contract itself will probably be invalid therefore there would not be competition between contractual rights and rights stemming from the tort, I think. In case of partial invalidity there may be a discussion. We may think of such possibility. Yes, then it may be beneficial to rely on the contract, as you say.

Maybe we have to say that it will make the contract invalid. There wouldn’t be a contract in that respect.

Chairman Of The Session- Thank you. I would say the last sentence about this subject. We will continue to discuss this, of course.

Here first of all, the court cannot go to the expert, this has to be requested. Secondly, which subject will be referred to the expert should be stated. Therefore subjects related to law and information will not be referred to the expert but a technical subject will. While the plaintiff makes a request will he say "I would request that experts from the Competition Authority shall be charged in order to make a sector inquiry in this subject"? Such questions will rise. Moreover, when this is brought to you; it means that you learn something. There is an infringement and you have to take action ex officio. Is it possible not to take an action even if you have heard it and learnt it? These are the problems. We will continue to discuss these.

I think that the discussions on the second day are very beneficial. I would like to thank everyone who has participated. I would like to give the floor to Mr. Nurettin for the closing speech.

Prof. Dr. Nurettin KALDIRIMCI- I would like to speak here.

Chairman Of The Session- Please, give the microphone then. Thank you. Mr. Nurettin is very kind.

Prof. Dr. Nurettin KALDIRIMCI- You are very kind Mr. Chairman. Thank you. I would like to thank all of the participants. Particularly I would like to congratulate my colleagues who have presented a communiqué. I would like to thank all my colleagues who are involved in the preparation of the organization.

It is very difficult and risky to take the last word in a meeting because one should say unforgettable things and it is more difficult to come here. I will speak shortly.

I would like to share my opinions with you. Yesterday Mr. Erol intervened upon first sentences and relieved me. We know that law and politics have been on the upper ranks in the classification of the sciences; that means they are difficult fields. Only those who have knowledge in other fields of sciences can attempt to be a scholar or to have a profession in those areas. Those are difficult fields; I understand this in the discussions. Even if politics does not have such an image, in fact it includes complicated issues as much as law, maybe more, it includes issues that require technical discussions and one needs to have a high level of mental capacity. This is true.

If you ask me "What is the meaning of these meetings for those who are not involved in legal society and who are not jurists?" I would like to share my opinion with you in short. I listened to the presentations with pleasure. I had to leave yesterday afternoon but I listened to the communiqués this morning with pleasure and I tried to learn something. I am not familiar with legal terminology

but I am interested. Nevertheless I think it would be reckless to lead a discussion, to make an assessment or comment, so I didn't ask any questions. I want to tell you again one of my wishes. I ask myself whether there should be a parallel -not an alternative -Symposium on the Recent Developments in Competition Economics. In order to think of this, this symposium should have the necessary features to meet that needs. Procedure is very important. Science completely relies on procedure, I respect that. Methodology is important. The value of what you know depends on how you obtain it. This is very important.

Fortunately, I have colleagues from legal society and we have Legal Counseling Office, but I will confess the issues that are difficult for me:

* Is there infringement?

* How could we deal with this issue, how could we identify it?

* Could it be imposed penalty?

* Where will we place this issue in economics in general?

* Developments in the world, sector developments in Turkey, main parameters of Turkish economy These are the issues that I have difficulty.

Of course I don't mean ignoring the legal methods by saying this. That is a necessity. The law is clear, procedural provisions, the general principles of administrative law is clear, obligations brought by the public law are clear. Maybe it would be a rude expression or a wrong metaphor, maybe we sometimes cannot see the forest because we are too much concerned with the trees. This is what I am worried about. Therefore I would like to share my opinion by asking a question: Could these programs be prepared in order to make a synthesis? I wish all of you success and I would like to extend my thanks and gratitude to you.

Chairman Of The Session- I would like to thank Mr. Nurettin. I think these symposiums should continue they are very beneficial; however, the format should change. First, I think that we, the Selective Committee, should see all of the communiqués.

Second, I will repeat what I have said before; we should be consulted while choosing the invited speakers.

Third, considering that the host is Erciyes University, there should be an invited speaker from Erciyes University.

A Participant- competition…

Chairman Of The Session- Yes, I agree with you. Therefore we need to talk these issues in a meeting maybe in an Advisory Committee Meeting. I think we should work in order to improve these meetings; we should carry out our responsibilities. I would like to thank all of the participants.

I would like to thank our host Erciyes University Rectorate, and respectively Faculty of Law, Faculty of Economics and Administrative Sciences.Thank you all.