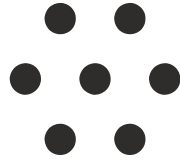


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CHAPTER 1

COMPETITION LAW

1.2. Abuse of Dominance

1.2.1. An Evaluation of the TCA's Predatory Pricing Cases in 2019

By Reşat Eraksoy

1. Preface

The TCA rendered only five decisions in 2019 regarding predatory pricing allegations. Predatory pricing is a form of abuse of dominant market power as stated in Article 6 of Competition Law. None of these preliminary investigations culminated in a full-fledged investigation and in all these cases the TCA judged that no findings showed these five undertakings excluded their competitors from the markets in which they operated. Exclusionary practices by dominant firms take different forms, especially in their pricing policies. One of the possible venues of increasing market share or weakening a competitor's current market position is charging a price such that this pricing strategy will incur a financial loss for the dominant undertaking. Such an allegation can be put forward easily as most of the complainants will only have their own prices and those of the dominant undertaking to compare, only a rough guide to decide whether the dominant firm implemented a predatory pricing policy. One should also calculate the profits of the dominant firm to decide whether the alleged predatory pricing caused financial loss, by analyzing the costs of the dominant firm, which is almost always unknown to the complainant firm. When the TCA investigates the full price and costs of dominant firms, it is rare to find a sustained low pricing strategy of the dominant firm that would foreclose the market to an equally efficient competitor, but mostly a competitive behaviour put into effect for a short period of time especially during a product campaign. In this article, these five predatory pricing cases are summarized while providing market information, relevant markets, and explanation of calculation methods employed by the TCA. The main goal of this article to show how the TCA evaluated market and financial information to come up with no breach decisions.

2. Fundamentals of Predatory Pricing Analysis

Predatory pricing is defined in the TCA's Guideline as "an anti-competitive pricing strategy in which a dominant undertaking determines the sales price below cost for a short term, affording a loss or waiving a profit, in order for the dominant firm to preserve or increase its market power by forcing one or several of its current or potential competitors out of the market, disciplining their pricing behaviours, or by obstructing competitors' competitive market behaviours in any other way." In this regard, for the predatory pricing behaviour to violate the Competition Law, (i) the breach should be done by the dominant undertaking, (ii) the dominant undertaking should sustain financial loss with below-cost prices in the short run, and (iii) there should be a possibility of market foreclosure to an equally efficient competitor.

According to the Guideline⁵⁸, in predatory pricing analysis in which the dominant firm's prices and incurred costs are compared, it is imperative to investigate whether there is a possibility that the market could be closed to an equally efficient competitor as a result of the examined market behaviour of the dominant firm. In this context, in predatory pricing evaluation, like the accepted understanding in EU practice⁵⁹, the TCA does not come to an automatic conclusion that below-cost prices cause competitive damages. Instead, the necessity of an investigation to determine whether an anti-competitive market closure is possible with a predatory pricing policy is accepted.

Primary determination in predatory pricing analysis is to decide whether the investigated undertaking relinquished its short-term profits with its predatory pricing policy; in other words, whether the undertaking incurred loss even though it could have avoided these losses. In the Guideline, it is stated that the AAC⁶⁰ will be the main criterion to determine whether the dominant undertaking waived the short-term profits. In this regard, when a dominant undertaking charges a price below the AAC for the whole or a part of its production, it is accepted that this undertaking incurs costs that it could avoid just by not producing the concerned product and waive a profit it could earn.

However, according to the AKZO⁶¹ decision of the CJEU, which sets a precedent for predatory pricing assessments within the scope of EU practice, when the price charged by the dominant undertaking is a below AVC, the pricing policy is accepted as a breach of Competition Law and the upper limit for predatory pricing is defined as the ATC. A price between the AVC and ATC is determined as a breach of Competition Law when the authorities can prove that the dominant undertaking intends to exclude its competitor from the market. Finally, a charged price over ATC will not be deemed as predatory. It can be seen that the AKZO test was performed in the TCA's HABAŞ⁶², İSBAK⁶³, and Coca-Cola⁶⁴ decisions.

After the AKZO decision, in both the EU and the TCA practice, the cost criterion used in predatory pricing cases differed. In addition to AAC, the LRAIC is taken into consideration in investigations. The LRAIC is the average of all incurred fixed and variable costs of an undertaking, including sunk costs, to produce an increment of a certain product. Sunk costs could be R&D and marketing costs incurred specific to a product. In addition to these costs, operational, maintenance expenses and incurred capital costs for the incremental production with indirect costs stemming from the incremental production are also calculated while computing the LRAIC.

⁵⁸ Guideline para 51.

⁵⁹ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45, 24.2.2009, pages. 7–20.

⁶⁰ Average Avoidable Cost (AAC) is defined as the possible cost-saving or cost not incurred when an enterprise does not produce a certain amount of output. When AAC is calculated, the sum of all directly related fixed and variable costs are taken into account and it becomes possible to compute the undertaking's total incurred costs for the investigated production. Generally, as only variable costs are avoidable in the short run, in most cases AAC and AVC are equal to each other. But when the dominant undertaking is required to make additional production capacity investment to perform the investigated market behaviour, the said fixed costs are also taken cognizant of while accounting the costs. In these types of cases, AAC is a better criterion than AVC.

⁶¹ AKZO Chemie BV v. Commission (1991) EC I-3359.

⁶² TCA's 19.09.2006 dated and 06-66/887-256 nr. HABAŞ decision.

⁶³ TCA's 22.05.2006 dated and 06-35/444-116 nr. İSBAK decision.

⁶⁴ TCA's 23.01.2004 dated and 04-07/75-18 nr. Coca-Cola decision.

The ATC and LRAIC are similar and sometimes equal-cost criteria. These two criteria are even the same for single product manufacturing undertakings. Despite that, for multi-product undertakings when economies of scale are involved, the LRAIC might be lower than the ATC for each manufactured product. In the case of multi-product manufacturing, any cost that could be avoided by not producing the concerned product cannot be deemed as a general cost. However, if an undertaking's general costs are high, these costs also could be taken into account while assessing whether an equally efficient competitor is excluded from the market. The LRAIC is said to be a more suitable cost criterion in network, high-technology, and R&D investment intensive industry markets where variable costs are very low, and fixed costs are very high.

3. The TCA's 2019 Decisions Regarding Predatory Pricing

3.1 *The TECHNIQUES SURFACES Decision*⁶⁵

3.1.1 Background

The complainant alleged that TS ISTANBUL, a subsidiary of HEF DURFERRIT, implemented a predatory pricing policy in nitration salt and nitration regenerator salt products thus abusing its dominant power in the relevant market. The complainant briefly stated in its allegations the following points:

- HEF-DURFERRIT is the dominant undertaking in nitration salt and nitration salt regenerator products in the world as well as in Turkey. TS ISTANBUL both sells and uses HEF-DURFERRIT products in Turkey.
- HEF-DURFERRIT gradually decreased its prices in the market and according to complainant's opinion, after taking into account the import, transportation, and operational costs added with a reasonable profit, HEF DURFERRIT's prices can be deemed as sales at a loss. Thus the complainant requested the TCA to investigate whether HEF-DURFERRIT performed market behaviours that could harm the competition using its dominant position.

3.1.2 Brief Information about the Nitration Salt and Nitration Regenerator Salt Sector

The concerned nitration salt and nitration regenerator salt products are chemical products used in the salt bath nitration process, which is one of the surface hardening processes lengthening the useful service life of metal parts. In the chemical process, the concerned products change the micro-structure of metals and alloys while improving their surface hardness, thermal resistance, durability, and continuity. The nitration process is widely applied to all iron and alloyed components used in the mechanical parts that are subject to friction and wear. Engine valves, crankshafts, bearing housings, bushings, pins, moulds and gear guides are some of the mechanical components to which the nitration process is applied. This chemical process is mainly used in the automotive, manufacturing equipment, and weapon industries.

3.1.3 Brief Information about TS ISTANBUL

Regarding the concerned products, TS ISTANBUL has two main activities in the Turkish market, selling chemicals specific to the surface treatment of metals in the nitration process directly to its customers and applying thermochemical treatment to metal surfaces by using the chemicals. TS ISTANBUL does not produce the chemicals that it sells but buys them from HEF DURFERRIT exclusively. HEF DURFERRIT and TS ISTANBUL are wholly owned by HEF Group, headquartered in France.

3.1.4 Predatory Pricing Analysis of the TECHNIQUES SURFACES Case

As the first step of analysis regarding the predatory pricing allegation, the unit selling price and ATC of nitration salt and regenerative nitration salt products are compared. If the selling price of the concerned products were over ATC, the predatory pricing allegations would be denied. TS ISTANBUL's selling prices excluding VAT during January 2015-October 2018 were over ATC, which concluded there could not be any predatory pricing policy. In addition to the first step of the analysis, the TCA also compared TS ISTANBUL's selling prices with those of the complainant firm.

When TS ISTANBUL's concerned product selling prices were compared to those of the complainant's products, it was seen that TS ISTANBUL's prices were higher. Therefore the complainant's allegation that TS ISTANBUL constantly undercut and lowered its prices to obstruct the complainant's sales could not be verified. The TCA also stated expressions in TS ISTANBUL's customer visit reports, obtained by the TCA while conducting on spot inspections, demonstrated there were other firms already quoting lower prices and some of TS ISTANBUL's customers had begun procuring the concerned products from its competitors as a result of price competition. Another allegation made by the complainant stated that although the complainant quoted a price to a certain customer, HEF-DURFERRIT had constantly lowered its prices and sales to this certain customer could not be realized. When the documents and relevant information were examined regarding this case, the TCA found that no sales made to this certain customer had been realized by TS ISTANBUL or HEF-DURFERRIT during the first 10 months of 2018.

In addition to these inquiries, the TCA evaluated in detail the sales trend of the complainant firm and contrary to the complainant's allegations stating its market activities had been obstructed and it had been pushed out of the market, in reality, the complainant firm's sales had been increasing. Thus there was no finding that showed

¹⁰ This is valid for the cement products under Codes 14 and 24.sector.

¹¹ TCA – Cement Sector Report, Section III.B.II.III, p.102.

¹² TCA – Cement Sector Report, Section III.B.II.IV, p. 103-104, Chart 34 and 35.

¹³ In terms of the observations made for the cases where only one unit operates currently, the monopolistic course of behaviour has been included into the simulations. The prices obtained as a result of the simulations and actually observed average prices in the concerned province/year have been compared and the closest course of behaviours/actions to the reality has been established. Considering the simulation performances of the closest scenarios to the reality and the proximity ratios between calculated and real prices, it has been evaluated in three categories (five percent or below, between five percent and ten percent, and between ten percent and 15 percent). Accordingly, in 277 observation points from 404, the difference between the calculated prices for the closest scenarios to the reality and observed prices is 15 percent or below. In 234 of these 277 observations, the joint profit maximisation behaviour reveals a result with 15 percent or much lower proximity on average. Taking lower proximity levels into account, it is seen that the wholly or partially joint pricing behaviour in the cement sector generates results to the observed prices in reality at a significant rate.

the complainant was forced out of the Turkish market.

In light of the cost-price analysis and findings regarding the case, the TCA decided it was not necessary to open a full-fledged investigation against TS ISTANBUL in relation to the abuse of dominant market power by implementing a predatory pricing policy.

3.2 *The SONY EURASIA Decision*⁶⁶

3.2.1 Background of the SONY EURASIA Case

The complainant alleged that SONY EURASIA had abused its dominant power in the game console market by exclusionary market behaviours, culminating in obstructing its competitors' market activities and pushing them out of the market.

SONY EURASIA distributes, sells, markets, and performs after-sales and consulting services of Sony brand consumer electronics products and Sony Professional group products in Turkey as well as provides marketing, localization, software engineering, and security to Sony group companies through global Sony business units.

The complainant briefly stated in its allegations the following points:

- Game producers are required to obtain a license from SONY EURASIA to produce games compatible with the PlayStation⁶⁷ game console. In the game console market, SONY EURASIA is the dominant market player. By using its dominant power, it exerts its market power over game producers and has a substantial advantage while negotiating commercial terms in procuring games from game producers.
- SONY EURASIA sells the concerned games below the complainant's costs. At the same time it requires the complainant to buy the concerned games at higher prices from game producers, thus increasing the complainant's costs. In doing so, it seeks to exclude the complainant from the market.
- Although the prices SONY EURASIA's products, which are bought over the PSN, are similar to each other around the world, the prices of the same products in Turkey are much lower than world prices, a pricing strategy that aims to exclude the complainant from the market.
- PSN campaign durations are long and frequent. Outside of campaign periods, game prices are predatory, with prices lowered to below cost.
- SONY EURASIA sells its games to consumers at very convenient prices through pre-sales activity over PSN, and with this activity, it obstructs the complainant from achieving the economies of scale necessary to operate in this market. The

⁶⁶ TCA's 07.02.2019 dated and 19-06/47-16 nr. SONY EURASIA preliminary investigation decision.

⁶⁷ PlayStation is a video game brand designed and manufactured by Sony Interactive Entertainment, a division of Sony.

complainant stated that the PSN game FIFA 19 was sold at very low prices during a short pre-sales campaign before the game entered the market. The same strategy was used with PSN game PES 19, when the price was reduced before product launch for a two and a half month pre-sales period and shortly after the product launched. Because of the alleged irreparable damages to the complainant due to the anti-competitive market behaviours of SONY EURASIA regarding PSN games, the complainant requested that the TCA force SONY EURASIA to cease its PSN marketing activities temporarily in accordance with Article 9 of the Competition Law and send an opinion letter to the Information and Communication Technologies Authority⁶⁸.

- With the “PlayStation Brotherhood” campaign on PSN, it was possible for two consumers to each pay half of the game’s price and buy the game, a marketing campaign designed solely to cloak the exclusionary and predatory pricing policy of SONY EURASIA.

3.2.2 Brief Information about the Video Games Sector

Video games⁶⁹ are a special type of computer-based software constructed on game scripts and visuality, written for use in entertainment and spare-time applications that can be played online or on a physical network by one or more players on computer and game consoles. Although the video games sector can be classified as a software industry, it has distinct features such as bespoke gaming hardware and technical infrastructure. It is an important industry that directly or indirectly affects many other sectors.

Currently, developments in communications and internet technologies, with the widespread use of PC, game consoles, smartphones, and tablets, enable digital games that can be played on or through these devices, advance visually and content-wise and comprise a big industry that is rapidly growing with mobile and online platforms, new business models, and new market players.

For a video game to be developed, produced, marketed, and sold to consumers, the producer must interact with many different sectors such as game console hardware manufacturers, game developers, game localizers, publishers, distributors, retailers, dealers, and customers. Companies use different business models in distributing their products to consumers such as (i) selling the boxed products in stores, (ii) selling products in digital form in digital stores, (iii) membership-based online product selling, (iv) freeware sales where the revenues are gained by inserting advertisements in the games, and (v) allowing players to play the first level of the game free of charge and purchase the product in order to advance to the second level.

Although the role of the distributors in the supply chain is to transport the physical copies of games to retailers, this activity is diminishing and transformed because of the

⁶⁸ National Telecommunications Regulatory and Inspection Authority of Turkey.

⁶⁹ Ankara Development Agency, Digital Games Sector Report, page 9.

current technological developments that have created alternative digital sales channels that have decreased the profitability of physical sales channels. The low costs of digital sales channels and the convenience of buying from digital stores has led to an increase of digital game sales in a short time period. In terms of revenues, with PC and console-based game sales surpassing physical sales. In the PC game category, digital sales earn twice the revenue of physical sales.

As the game consoles are produced solely for gaming and targeted at consumers who wish to play video games, their hardware is different from that of other game-specific hardware. Because technical hardware of the game consoles is radically different and requires a high level of expertise to develop and manufacture that can only be realized with high fixed asset investment that creates an entry barrier to the market, only three big companies lead the industry: Sony (PlayStation), Microsoft (XBox), and Nintendo (Nintendo Wii). Similarly, as the cost of producing a video game for console games is higher compared to that for mobile and PC games, generally only big budgeted game developers can produce game content.

3.2.3 Relevant Product Market in the SONY EURASIA Case

In the Sony Eurasia case, the TCA decided that fixed and hand-held game consoles are not substitute products and belong to different product markets in line with previous similar decisions by the TCA⁷⁰ and EU Commission⁷¹.

To start playing, the player has to buy the game console and the game cartridge. Nowadays, consumers can buy console games in a box or digitally from a digital store. From the consumer's point of view, there is no difference in the game content whether it is bought from physical or digital channels, but boxed games and digital games differ in usage. For example, in digital sales, a player can register for a pre-order and buy the new game as soon as it is launched. Buying a game digitally and downloading it to the game console by entering a user name and a password is much quicker than going to a store to buy a boxed product or order the game cartridge CD from the Internet for and wait for the CD to arrive at the player's address. Contrary to digital games, second-hand sales of boxed games are possible. However, as the prices and the main features of boxed and digital game channels are similar, it is decided that physical and digital channels are substitutes and these two channels belong to the same market.

In the SONY EURASIA case, the TCA decided the market can be defined as fixed console games and hand-held console games without distinguishing and analysing these two different markets separately, in line with the ARAL decision⁷².

⁷⁰ TCA's 24.11.2005 dated and 05-79/1086-312 nr. NINTENDO and NORTEC decision.

⁷¹ EU Commission's COMP/35.587 PO Video Games; COMP/35.706 PO Nintendo Distribution and COMP/36.321Omega-Nintendo decision.

⁷² TCA's 07.11.2016 dated and 16-37/628-279 nr. ARAL decision.

3.2.4 Predatory Pricing Analysis in the SONY EURASIA Case

According to the market analysis, SONY EURASIA's PlayStation game console was the market leader during 2015-2017 against its competitors Xbox and Nintendo, although there was considerable competitive market pressure coming from parallel imports of PlayStation⁷³. Those parallel imports were made by many companies competing directly with SONY EURASIA. In 2017, SONY EURASIA was the market leader in the game cartridge market followed closely by the other market player ARAL. ARAL's close market share showed that it had the potential to exert competitive market pressure over SONY EURASIA.

The complainant stated that the Sony Group's PSN sale prices were 80% lower than its own, which could not be explained with any economic efficiency arguments and further added that PSN campaign sale durations were very long, almost encompassing normal sale season. Allegedly, even the PSN sale prices were at predatory levels out of campaign periods. With the aforementioned campaigns, PSN units were sold below cost. In order to determine whether these allegations were true, the TCA investigated the pricing policies of SONY EURASIA and its parent company, Sony Group. Although PSN prices were determined by Sony Group, SONY EURASIA's domestic market knowledge and recommendations were taken into account as evinced by the documents found during the on-the-spot investigation.

The first price comparison was made with the PSN and boxed prices of the same games in December 2018. According to the comparison for some games, PSN prices were even higher than those of boxed games. SONY EURASIA also said that in line with worldwide-accepted discount seasons such as school opening months, Black Friday, New Year, and the semester holiday, PSN runs campaigns in these seasons with reduced prices. When Sony Group's 2017 sales were observed, it was seen that almost every day of the year some games were sold at discounted prices. The TCA also analyzed Sony's discounted sales revenue share in total sales revenue and in total market revenue.

The TCA opined that in the preliminary investigation period, the complained prices were not continuous in nature and were only temporary sale campaigns with no evidence that Sony Group had an exclusionary pricing strategy. Some of the documents obtained during on-the-spot inspections showed that even in periods when PSN prices were higher than those of its competitors, Sony Group did not reduce its prices, indicating that the price is determined according to a matrix quoted in foreign exchange currency. The abovesaid document made it clear that PSN was not sold steadily at lower prices when compared to its competitors and PSN prices were sometimes above the market average. The prices were volatile because they were based on foreign currency, which increased drastically against TL in the second half of 2018.

⁷³ Parallel imports (sometimes referred to as grey market goods) refer to branded goods that are imported into a market and sold there without the consent of the owner of the trademark in that market.

The TCA judged that while some of the games specified in the complaint had short-run campaigns and were limited in scope so that even those of Sony Group were dominant in the market and prices were below cost, the pricing policy of the Group could not be defined as predatory.

As per the PlayStation Brotherhood campaign's predatory pricing allegation, the TCA stated that as boxed games could also be used in more than one device, games that were bought from digital stores through the PlayStation Brotherhood application could not bring about predatory pricing as the goal of this application was not to reduce the selling price of the games and was not in the scope of excluding competitors from the market.

Evaluation of SONY EURASIA's pre-sales practice showed that this marketing activity was also used by SONY EURASIA's competitor, Microsoft Xbox. Pre-sales practice allows consumers to buy a new game before it is launched. In this way, a PlayStation user buying a digital game must wait until the new game is launched into the market. SONY EURASIA remarked that the rationale behind pre-sales marketing activity is to gauge market demand and, by increasing awareness of the new game, to increase demand. This situation also has to do with game publishers' setting the wholesale price of the games for pre-sales with more advantageous conditions. Pre-sales activity is not used for each game, only for some of the new games and pre-sales prices are available only for a short period of time. The TCA stated these discounts, applied for a short period of time and limited in scope, could not be deemed as predatory pricing.

One of the allegations of the complainant involved SONY EURASIA's pressure on game producers to sell their PS-compatible products to the complainant at higher prices. In order to substantiate this claim, the TCA requested signed agreements between SONY EURASIA and the game producers. After its evaluations, the TCA found no contract clause that could cause an increase in game distributors' costs. In this regard, it was concluded that Sony Group was not in a concerted agreement with game producers in the console games market to obstruct its competitors' market activities and thus it was not in violation of Article 4 of the Competition Law, which forbids any agreements between undertakings to restrict competition in the market.

As a result of the preliminary investigation, having assessed all the findings and documents regarding the case, the TCA decided to reject the complaint and not to open a full-fledged investigation in accordance with Article 41 of the Competition Law.

3.3 *The HABAŞ Decision*⁷⁴

3.3.1 Background of the HABAŞ Case

The complainant claimed that the marketing activities of HABAŞ in the industrial and medical gas sector violated Article 6 of the Competition Law by abusing its dominant power in the relevant market. The complainant briefly stated in its allegations the following points:

- The complainant claimed that because of HABAŞ's marketing activities in time it had suffered client loss and instead of producing industrial gas, it had begun to buy the concerned products from HABAŞ;
- HABAŞ tempted the complainant's dealers by selling at lower prices than those of the complainant and eventually had begun working with them with a strategy to offer lower prices to the complainant's dealers to push the complainant out of the market and dominate the sector.
- HABAŞ bid much lower prices than those of the complainant's 2017 prices in medical gas acquisition tenders for hospitals with prices were even lower than the designated price of the tender which had been appraised by a surveyor in accordance with market conditions. As a result of this low bidding, HABAŞ won the tender.
- The cost breakdown of the industry is 50% for energy, 25% for transportation, 15% for labor, and 10% for operating equipment and general expenses. The major cost item in an air decomposition facility to produce industrial gas is for energy. Because the complainant imports energy for the production, if this energy is not put to work in their facilities, the Turkish economy will suffer economic loss due to foreign currency spent without return. HABAŞ's market activities to abuse its dominant power with the intent to gain higher profits will destroy other players in the market and affect the Turkish economy in a negative way.
- Even though in 2018 energy costs tripled, liquid fuel costs doubled, and operating equipment costs and general expenses increased 100% compared to 2017 prices, HABAŞ quoted half of its 2017 prices while competing with the complainant.

3.3.2 Brief Information about HABAŞ

HABAŞ is the leading company in Turkey manufacturing industrial gas. HABAŞ is a group of industrial plants that produce industrial and medical gas, steel, electrical energy, heavy machinery, tubes, and cryogenic tanks as well as distributes and transports by sea liquified petroleum gas (LPG), liquified natural gas (LNG), and compressed natural gas

⁷⁴ TCA's 07.03.2019 dated and 19-11/125-53 nr. HABAŞ preliminary investigation decision

(CNG). The company produces industrial gas in its air decomposing facilities in İzmit, Bilecik, and Aliğa while marketing its products by direct sales or dealer network in Turkey.

HABAŞ's services to its clients include providing liquified gas tanks for storage, steel tubes, gas regulators, evaporators, gas distribution lines and systems, tube collectors, specific equipment for its client's needs, technical assistance, and training and maintenance services for all the systems and instruments.

3.3.3 Brief Information about the Relevant Market

Industrial gases, which are used in industries as main or raw material, are in a gaseous state at normal temperature and pressure conditions and are liquefied at lower temperatures under pressure. These gases are generally used in the iron and steel, automotive and automotive supplies, white appliances and their supplies, metal and machinery manufacturing, shipyard, chemicals and petrochemical industries.

Oxygen, nitrogen, hydrogen, argon, carbon dioxide and acetylene are the main industrial gases produced from air by naturally or chemical processes. Air is composed of 78% nitrogen, 21% oxygen, 1% argon, and minimal amounts of other inert gases such as neon, krypton and xenon. Oxygen, nitrogen, and argon are called atmosphere gases and are produced from air by cryogenic air decomposition technology cooling the air to very low temperatures while compressing it in air separation units. As all the different gases in this gas mixture are vaporized at different temperatures, it is possible to obtain them separately in their purest form. This process is totally physical and does not contain any chemical reaction. Other industrial gases not found in the atmosphere are produced with different processes. Hydrogen gas is produced by the electrolysis of water or by the cracking of hydrocarbons while carbon dioxide is made by liquefying purified underground carbon dioxide. Acetylene gas is produced by the chemical reaction of calcium carbide with water.

Industrial gases are not sold in retail stores because of their intermediate product characteristics. Sales are made according to the customers' purchase orders by directly contacting the customers who buy in large amounts, and are made through a dealership system for those who buy in smaller amounts. Although the main raw material of the industrial gases is air, the production inputs are electricity, human resources, and fuel as a result of transportation costs.

Imports and exports of industrial gases are extremely limited because of difficulties in storing and transporting the gases, leakage of gases to the air even when the temperature rises slightly, and because the gas storage tube is more expensive than the gas it contains. The export business is confined to neighbouring countries in small amounts. As not enough argon gas is produced in Turkey to satisfy demand, the deficit in production is covered by imports.

In Turkey, industrial gases are bought either in cylindrical tubes in gaseous form or in bulk and transported by tanker in liquefied form. Bulk industrial gas sales are made for customers who need greater amounts of gas continuously. In this method, the storage tanks of the gas manufacturer are installed on the customer's premises and tanks fill these storage tanks with liquified gas. As the storage of gas in liquified form is more practical and because of the need to it at very low temperatures, gas storage and transportation can only be made with cryogenic tanks and tankers that have superb heat insulation resistant to very low temperatures.

Industrial gas sales in tube form are the selling of gases with pressurized tubes. Customers with less than 1000 m³ monthly demand prefer to buy gases in tubes. Selling the gases in tubes can be done directly by filling the producer's tubes on the customer's premises or by transporting the gases from the tube filling stations in liquid form with tankers.

Some industrial gases are also used in medical applications and are called medical gases. These gases are intensively used to meet the narcosis and oxygen needs of patients and for the operation, calibration, and sterilization of medical devices and instruments. Medical and industrial gases are supply substitutes because the same manufacturing process produces both gases. Although they do not demand substitutes like filling and control processes, medical gas purity ratios are different from industrial gases and hospitals can only use gases that are labelled as medical gas. Thus, as indicated in the EU Commission's Linde/AGA⁷⁵ and Air Liquide/BOC⁷⁶ decisions, as industrial, medical, and special use gases have different physical and chemical properties, and can not be used interchangeably, each gas has distinct product markets.

As a result, the TCA decided that industrial and medical gases form two different main markets, and the market can also be differentiated according to purchasing method either in liquid form or bulk. The TCA further stated each gas in industrial and medical gas definition can have its own product market, and the relevant product market is defined separately for each different gas as oxygen, nitrogen, argon, carbon dioxide, narcosis procured in bulk and oxygen, nitrogen, argon, carbon dioxide, hydrogen, acetylene and narcosis gases procured in tubes.

3.3.4 HABAŞ's Defensive Statements

HABAŞ stated there are many producers and sellers in the industrial and medical gas industry and that their market behaviours cannot be independent of foreign competitors, which are prone to technological innovations. HABAŞ also said foreign capital and other domestic manufacturers are heavily involved in the sector and HABAŞ is not superior to its competitors in any market factor and thus is not in a dominant position in the market as judged by the TCA in its 20.12.2006 dated and 06.92/1173-351 nr. decision.

⁷⁵ EU Commission's Case No IV/M.1641, Linde/AGA (1999).

⁷⁶ EU Commission's Case No M.1630, Air Liquide/BOC (2000).

HABAŞ further stated that while oxygen, nitrogen, and argon gases are obtained from the air and thus have no raw material costs, energy, wage, maintenance, transportation, depreciation, and other costs are incurred in the manufacture of these industrial gases. For the production of gases other than these atmosphere gases, raw material and auxiliary material costs should also be added to cost items such as calcium carbide for acetylene, ammonium nitrate for narcosis, and natural gas for hydrogen. Raw and auxiliary material, energy, and transportation are variable costs while other cost items are fixed costs.

HABAŞ added that prices are determined according to many variable conditions such as quantity, quality, distance to customer's premises, procurement form (big or small tubes, tube bundle, tank, etc.), supply conditions, economies of scale, commitments (uninterrupted supply guarantee, other guarantees for quantity, pressure level, min. gas temperature), and payment terms. To prove that price is decided in a purely competitive market, HABAŞ said incurred prices are equal to the point where the manufactured supply output and required demand amount in the market's demand and supply curve are the same.

3.3.5 Predatory Pricing Analysis of the HABAŞ Case

Each industrial and medical gas, meaning atmosphere gases other than mixture gases, produced by HABAŞ have the same cost items such as auxiliary materials, energy, employment, maintenance, transportation, and depreciation costs per m³ or per kg. As the first step of the analysis, the TCA decided to compare the unit selling prices of different HABAŞ products with their respective ATC and if the selling price was above its ATC, the predatory pricing claim would be rejected.

When HABAŞ's concerned products' prices were observed during January 2017 and September 2018, it was obvious that its selling prices for the concerned products were above ATC. As a side note, when the e-mails were examined during on-the-spot inspections, many conversations revealed that dealers' buying prices from HABAŞ were well above the market rate and that dealers demanded price reductions from HABAŞ. In some of the e-mails, HABAŞ management stated that due to increases in electricity and fuel costs coupled with cost increases in imported raw material and other material costs because of the appreciation of foreign currency against TL, whole prices would be revised with new higher prices.

In light of the information and documents obtained during the on-the-spot inspection at HABAŞ, and market information from HABAŞ and its competitors, the TCA decided HABAŞ did not exclude its competitors from the market by using a predatory pricing policy.

Another allegation was that HABAŞ offered below-cost prices in medical gas tenders opened by hospitals in an effort to eliminate its competitors. When all 113 tenders won

by HABAŞ in the previous two years were examined, it was seen that HABAŞ did not win all the tenders in three cities subject to complaints. In other words, competitors were chosen to provide the concerned products to the hospitals. So HABAŞ did not have any effect on market prices in these three cities. In addition to these observations, the lowest price bidding in these tenders between January 2017- September 2018 was greater than HABAŞ's highest costs and HABAŞ's prices were higher than the alleged lower prices in the region subject to complaints. These facts proved that HABAŞ did not use predatory pricing in tenders.

By taking into consideration all the facts and findings pertaining to the case, the TCA judged HABAŞ did not implement predatory pricing in selling oxygen, nitrogen, narcosis, hydrogen, argon, carbon dioxide, and acetylene in industrial and medical gas markets and there was no evidence showing HABAŞ excluded the complainant from the market or had incorporated the complainant's dealers. Thus in the conclusion, the TCA decided not to open a full-fledged investigation as the complainant's claims were not substantiated.

3.4 *The GLANBIA Decision*⁷⁷

3.4.1 Background of the GLANBIA Case

The complainant claimed GLANBIA abused its dominant market power by implementing predatory pricing in protein powder and weight gainer products. The complainant stated that GLANBIA, which has 47% market share in the protein powder market and a 41% market share in the weight gainer market, has market dominance in the world and in Turkey. The allegations claimed that GLANBIA has high brand awareness and by using its financial power it tried to force its competitors, especially domestic producers, out of the market with its predatory pricing policy. The complainant also said that GLANBIA launched products into the market at the expense of not earning profit to secure its position as the unrivalled market leader.

3.4.2 Brief Information about GLANBIA

GLANBIA, which is controlled by its parent company Glanbia Nutritionals Limited, started its operations in 2015. The undertaking has no production facility in Turkey and it imports Glanbia Nutritionals Limited's Optimum Nutrition, BSN, and Isopure branded sportsman nutritional supplements into Turkey. GLANBIA sells these products to wholesalers through distributors and thus does not sell directly to consumers.

3.4.3 Brief Information about the Nutritional Supplement Sector

Nutritional supplements are used to support normal nutrition. These supplements are either solely composed of or are a mixture of nutritional elements such as

⁷⁷ TCA's 23.05.2019 dated and 19-19/268-116 nr. GLANBIA preliminary investigation decision.

vitamins, minerals, proteins, carbohydrates, fibers, and fatty and amino acids with the addition of herbal and animal substances and bioactive and similar products in concentrated and extract forms. Nutritional supplements are prepared in liquid or powder forms of capsules, tablets, drops, instant use powder packages, and liquid bulbs. These nutritional supplements are not used to cure or prevent disease but are used to complement nutrition deficiencies because of changing life and work conditions' bringing insufficient daily nourishment.

The nutritional supplement sector has a growing trend in the world and in Turkey. The outlook for the future growth of the sector is positive thanks to the changes in lifestyles because of industrialization and urbanization. The total world market size in 2016 was USD 132.8 billion, whereas in Turkey, it size was TRY 735 million and is expected to be TRY 950 million in 2021.

One of the submarkets of nutritional supplements is supplements for the sportsman (or athlete), specially prepared food and food mixtures used to satisfy the sportsman's special nutritional needs to perform at the highest level. In 2016, the sportsman supplement market reached TRY 180.9 million, comprising 25% of the whole nutritional supplement sector. Although there are many different products, only protein powder and weight gainer products are examined regarding the case at hand.

Protein powders are mixtures of more than one amino acid types with different additional vitamins and minerals used to meet the protein needs of athletes in the fastest way after their performance. Weight gainer products contain 25% protein, 75% carbohydrates and as these products have more carbohydrates compared to protein powders, these two types of products are preferred by different athletes. While weight gainers are used by low weight persons, protein powders are used by all.

3.4.4 The Turkish Protein Powder and Weight Gainer Product Market

Nutrition consumption habits in Turkey are changing from low protein to high protein-based nourishment. As the number of people playing sports and pursuing balanced diets increases, demand for sportsman dietary products is growing and this trend makes the market bigger. During 2012-2018, the market size increased each year and is expected to grow for the coming years.

Even though local distributors, stores, and pharmacies play an important role in reaching consumers, almost half of the total sales are realized through online channels. Online platforms like Supplementler, Protein7, and FitPro also sell their own branded products. Marketing and advertising spending are mostly done for online platforms in parallel to e-commerce's growing importance in sportsman products. Studies for which products are suitable for athletes and consciousness of consumers have gained momentum in the sector.

The biggest share in sportsman supplementary nutrients belongs to protein powders with 48.6% of the market. In this regard, the protein powder market, which represents almost half of the sportsman supplementary products, encourages both domestic and foreign enterprises entering the market and forms the growth dynamic of the market. On the other hand, domestic production is very limited so the market need is largely met by importing foreign brands. According to the information obtained regarding the case, the sector is dynamic and has many market players, although statistical data and analyses are limited due to the fact most of the sales are done via many channels like the internet, local distributors, and pharmacies. Some of the brands have higher brand awareness, like GLANBIA's Optimum Nutrition brand, which has a worldwide reputation.

The data showed the protein powder market grew during 2012-2018, except for 2017. Compared to protein powders, weight gainers had a smaller share in the sportsman supplementary nutrients market because they are preferred by a limited number of consumers. Beginning from 2015, the non-protein sportsman supplementary nutrient market in which the weight gainer products are included has lagged behind the protein powder market. These two market characteristics were similar and generally, the same market players were present showing that a producer can manufacture both products.

3.4.5 Relevant Market for Protein Powder and Weight Gainer Products

The concerned protein powder and weight gainers are developed to satisfy the increasing protein needs of athletes and help people gain weight more easily. Protein powder has amino acid types both necessary and unnecessary for the body, and vitamins and minerals, whereby weight gainers have a high amount of carbohydrates in addition to certain amino acids like protein powders. As the amount of carbohydrates in weight gainers is much greater than that in the protein powders, they appeal to a more limited consumer base. Accordingly, whether protein powder and weight gainer can be substitutable depends upon the goals and expectations of the individual who uses the two products. For example, a mid-level athlete could use weight gainer to gain weight and protein powder to maintain muscle mass.

The TCA assessed the market situation and evaluated the purpose of using these two products, their ingredients, their differing product positioning in the consumers' eye and concluded that the demand substitutability of the two products is weak. However, from the producer's point of view, there is a certain supply substitutability of the two products as the similar features of the products both can be produced by the same companies. In accordance with the market information obtained during the investigation, the TCA decided to describe the relevant market as "protein powder" and "weight gainer" products.

3.4.6 Predatory Pricing Analysis of the GLANBIA Case

The only market information source is Euromonitor's "Sports Nutrition in Turkey," which provides a comprehensive evaluation of the whole market. In terms of retail sale, GLANBIA and three other competitors were the four biggest companies in 2017 and 2018 in sportsman supplementary nutrients. In the investigation period, GLANBIA's estimated market share was calculated according to data from major online platforms and GLANBIA. Within this framework, in order to ascertain the retail sales value of protein powder market, GLANBIA's protein powder turnover was multiplied with its maximum margin percentage value obtained by the difference between the recommended retail sales price and the distributor sale price. To determine whether the undertaking had market dominance, the resultant retail sales value was divided to find the total protein market value measured by Euromonitor to reach GLANBIA's market share in the protein powder market, which was found to be below the 40% threshold. GLANBIA's market share was also below 40% in the weight gainer product market.

There are many domestic and foreign producers in the protein powder and weight gainer market, which is growing each year. There are no entry barriers to these markets, which also have no import restrictions. As these products can be sold online, distribution channel limitation does not exist.

Taking into consideration the market shares, the multi-player structure of the market, the absence of limitations on distribution channels, and new entrants to the market, one can easily conclude that GLANBIA is not in a dominant position in the market. In order to examine GLANBIA's market behaviours, the complaint was evaluated under the assumption that GLANBIA was dominant in both of the concerned markets.

The basic claim regarding the case was that GLANBIA implemented predatory pricing and supplied its products to the market at the expense of not profiting. To prove predatory pricing behaviour, there should be evidence that the dominant firm sells its products below cost in the short-run. When GLANBIA's protein powder and weight gainer products' distributor sale prices and costs in 2017 and 2018 were examined, it was evident that GLANBIA was profitable for each of these years even if all of its costs were deemed avoidable. As a conclusion, it was decided GLANBIA did not engage in the alleged predatory pricing market behaviour.

3.5 *The HUAWEI Decision*⁷⁸

3.5.1 Background of the HUAWEI Case

After several complaints were filed against the market activities of HUAWEI, the TCA decided to open an ex officio preliminary investigation regarding the company's

⁷⁸ TCA's 23.05.2019 dated and 19-19/268-116 nr. GLANBIA preliminary investigation decision.

alleged obstruction of its competitors by predatory pricing in the mobile network infrastructure installation market. Although the complaints were not within the scope of the Competition Law, the complainants' statements claiming that HUAWEI had improved its standing in the mobile telecommunications network infrastructure and implemented below-cost prices in some bids, and thus obstructed its competitors in the relevant market, led the TCA to open an investigation.

Huawei Technologies Co. Ltd. is a China-based telecommunications company that has operated in Turkey under the trade name Huawei Telekomünikasyon Dış Ticaret Ltd. Şti. since 2002. HUAWEI's operations consist of three different business segments:

- Carrier Business: In this business segment, HUAWEI cooperates with main mobile carriers in order to install mobile and fixed networks,
- Enterprise Business: In this business segment, HUAWEI provides equipment and related services to state institutions and various companies through its distributors,
- Consumer Business: In this business segment, HUAWEI sells smartphones.

The case is about HUAWEI's mobile network equipment and installation business under its carrier business segment. HUAWEI provides mobile network equipment and related services to TÜRK TELEKOM, TURKCELL, and VODAFONE. These equipment and services are provided through tenders or proposal requests and price negotiations by mobile carriers. HUAWEI imports the necessary equipment from China or buys directly from domestic manufacturers in Turkey. It also conducts domestic production and provides network installation, network maintenance, and equipment warranty services. HUAWEI and ERICSSON are the two dominant firms in 3G and 4.5G network installations.

3.5.2 General Information about the Mobile Network Installation Sector

Mobile carriers can provide mobile electronics telecommunications services only by installation, operation of base stations, and the establishment of mobile network infrastructure. Wireless networks consist of hardware and software infrastructure enabling communications technology equipment to connect wirelessly and is made up of three subsections, namely antenna, base station, and field infrastructure.

An antenna is used to receive and transmit signals. It receives electromagnetic waves and guides the waves to the receiver and transmits electromagnetic waves that the receiver generates. A base station is a piece of equipment that produces a wireless signal the signal coverage of which is dependant upon frequency band and application scenario. Because of these dependencies, the number of base stations for uninterrupted wireless coverage for a certain area varies. A base station is generally composed of a baseband unit and a remote radio unit. A mobile carrier needs approximately 6000 to 12,000 base stations to provide 4.5G mobile communications service throughout Turkey. Field

infrastructure consists of an antenna tower, power supply system, air conditioning, and batteries. Technical requirements for the field vendors are not as strict as other equipment parts of the mobile signalling system and as these products are not high-tech equipment they can be purchased through domestic small and medium-sized companies. As a result of this market condition, there are many vendors providing equipment and services to mobile carriers.

Base stations are connected to a core network, which processes voice and data signals. The core network and base station must be compatible with international standards. The base station can connect to the core networks of different vendors. Base stations belonging to different vendors require distinct high-level technical expertise regarding equipment installation, configuration, and maintenance. Mobile carriers do not prefer to work with more than two base station vendors considering cost-saving and management convenience and use only one vendor's base station in a certain area.

When a new technology is being launched into the market, it coexists with the older one and becomes widely used in time. For a new technology to be widely used takes 5 years whereas in 10 years it becomes obsolete. Like base stations, network equipment is manufactured according to internationally accepted standards. The general features of this equipment do not change frequently and one supplier's equipment can be replaced with those of another supplier with the same technical capability. Mobile carriers prefer to procure from one or two main vendors to save on operational costs and the same suppliers provide all required network equipment in a certain area.

As the technological developments regarding network equipment do not occur synchronously and the acceptance of different network equipment in the market differs, mobile carriers will not replace all network equipment with new ones when a new technology is brought up but will make changes one at a time. A new supplier should present its price offer for the new advanced equipment as well as the older ones belonging to the other vendor. Mobile carriers take advantage of this market condition to replace their old equipment in a cost-effective way.

ICTA in Turkey holds mobile carriers liable to make certain investments. These liabilities state that at least 40% of the high-technology investments containing hardware and software used in mobile networks will be acquired from suppliers established to develop R&D projects in information and communications technologies employing a certain number of engineers in their R&D centres and at least 10% of the same type of investments should be acquired from small and medium-sized enterprises founded to develop network systems and products.

3.5.3 Relevant Market for the HUAWEI Case

In terms of HUAWEI's services and the scope of the case, the subject of the investigation was the wireless network business of the telecommunications sector, excluding core networks. The TCA decided that "base station hardware and software products" and

“antenna and antenna equipment” were different market sub segments because the concerned products were used differently in 3G and 4.5G technologies, are different in their functionalities, could be manufactured by different suppliers, and mobile carriers could acquire this equipment from different vendors. As a result, the two relevant markets were defined as the “baseband station hardware and software market,” which includes baseband and remote radio units, and the “base station antenna market.”

3.5.4 Evaluation of HUAWEI’s Market Dominance

First, compared to other vendors, HUAWEI’s share in three mobile operators’ total number of base stations was analysed. Additionally, a breakdown of suppliers in mobile carriers’ remote radio and baseband units used in base stations were examined. Evaluation of these data showed that HUAWEI brand remote radio and baseband unit usage is over 50% for all three mobile carriers, more than HUAWEI’s competitors’ market shares.

In the base station antenna market, HUAWEI’s share is below 40% according to the information given by the mobile carriers. In the antenna market, there are many market players unlike in the base station market. According to the opinion letter submitted by the ICTA, in the antenna and antenna equipment market, the market share of HUAWEI that it had considerable market power. The TCA continued its investigation despite HUAWEI’s share being below 40%.

The network and equipment required to provide electronics telecommunications services contains high R&D costs and initial investment is high. After-sales services in this market are important for mobile carriers to maintain the standard level of service for consumers. Within this framework, HUAWEI is in an advantageous position according to its competitors because of its economies of scale, brand recognition, and financial strength. The fact that domestic manufacturers have been unable to gain a significant market share despite the ICTA’s requirement for mobile carriers to buy a certain amount of their equipment from Turkish suppliers showed that there were barriers to enter the market effectively. One of the main difficulties for the new market entrant is the necessity to prepare a price proposal for the new technology product as well as to submit a swap proposal for the other vendors’ existing equipment. While the swap operation is costly for the suppliers, the mobile carriers request big reductions in swap proposals. This market condition is to the advantage of current market players who have the technology for the existing equipment and to the disadvantage of the new entrants.

Another factor in assessing the dominant market position was to determine whether there was buyer power in the market. Although the mobile carriers have bargaining power over the equipment manufacturers, as switching to a different supplier in a short time is not easy in terms of cost and maintenance of existing equipment, the TCA decided buyer power was not exactly certain.

In accordance with the evaluations, the TCA decided that because of HUAWEI's market share in remote radio and base-band units, coupling with other market conditions, it could be said that HUAWEI had a dominant position in the market. In the base station antenna market, although HUAWEI's market share was below 40% and there were many other suppliers in this low-tech market, because of ICTA's market share estimate the TCA assumed that HUAWEI was in a dominant position in the base station antenna market. In conclusion, instead of determining an exact market dominance, the TCA decided to analyse HUAWEI's alleged abuse of market power with the assumption of HUAWEI's market dominance.

3.5.5 Predatory Pricing Analysis of HUAWEI Case

First, HUAWEI's base station hardware/software comprising remote radio and baseband unit, and antenna market revenues in 2017 and 2018, and their separate shares in total revenue were examined. Then the base station and antenna product groups' direct and indirect costs in 2017 and 2018 were listed. While direct costs included equipment and service costs, indirect costs included customs tax, customs inspection tests, freight, warehousing, tax, and worker benefits.

Base station indirect costs were calculated according to the below formula:

(Base Station Revenue Share in Total Revenues x HUAWEI's Total Indirect Costs including other business lines)

According to revenue and cost calculations, HUAWEI had priced its equipment and antenna over cost and incurred profits.

The TCA also analyzed HUAWEI's revenues and costs for the 3G and 4.5G network installation tenders in which HUAWEI participated in 2017 and 2018. While the indirect operating and finance costs were reflected to the relevant tenders, the below formula was used:

Total Revenue from Tender Projects x (Total Indirect operating and finance costs)
Total Revenue of HUAWEI

Indirect operating costs included rent for HUAWEI premises and depreciation of fixed assets.

The TCA specified that as it was only possible to avoid variable costs in the short-run, AAC would be equal to AVC and it preferred to use AVC for the predatory pricing analysis. In this case, fixed costs included warehouse, personnel social aid, and operating and finance costs, while variable costs included equipment, service, customs duty, customs inspection, and freight. Net profit was calculated by deducting fixed/variable costs together with corporate tax payment from net revenues. In the predatory pricing analysis, profits were calculated with respect to variable costs. According to variable

cost based on net profit calculations, HUAWEI was profitable for all its tender business.

In light of the examinations of 2017 and 2018 data, it was seen that HUAWEI was profitable in the base station and base station antenna markets in addition to its above the cost pricing in all tenders in which it participated. As a result, the TCA concluded pricing below cost condition was a must to prove the abuse of dominant market position, and this condition was not met in the HUAWEI case, proving that Article 6 of the Competition Law had not been breached.

4. Conclusion

As these five preliminary investigations show, to put forward a predatory pricing claim against dominant undertakings, even when the complainant thinks its evidence is solid, does not mean that the TCA will decide in favor of the complainants, finding that the dominant firm sold its products below cost or under average avoidable cost. The main difficulty lies in not knowing the dominant firm's costs, which would enable to calculate the dominant firm's profitability. The interesting situation was that almost all of the complainants' claims regarding the complained firms' lower prices were not substantiated. In some cases, the TCA found that the complained firms' prices were higher than the complainant firms, proving that the complainant had not prepared a solid and convincing file. For example, the complainant in the TS ISTANBUL case claimed that it was being excluded from the market by TS ISTANBUL. However, in reality, the complainant firm's sales were increasing.

In the TS ISTANBUL and HABAŞ cases, the TCA compared the selling price of the concerned products with ATC, and as the prices were above ATC, the case was concluded. In the SONY EURASIA case, although the campaign prices were below cost for some periods, because the campaign was short-run, it was enough for the TCA to decide the market practice was not predatory. While the undertaking engaged in product campaigns almost daily, the TCA opined that as each campaign was limited in scope and did not last long, even if SONY EURASIA priced its PSN below cost, it did not abuse its dominant power in the market. In the GLANBIA case, GLANBIA's positive profitability figures were enough for the TCA to decide there was no predatory pricing. In the HUAWEI case, when profits were calculated according to the variable costs, it was obvious that HUAWEI was profitable.

The TCA did not employ the LRAIC cost calculation method in either of these cases. Except for HUAWEI, the related industries of the other cases did not have high technology and R&D investment-intensive industry markets. Thus the TCA was able to use the LRAIC method for the HUAWEI case but decided to calculate AAC. As in the short-run AAC would be equal to AVC, the method chosen was variable cost based net profit calculations. In the HUAWEI case, the TCA calculated AAC by taking into account the fixed costs that could be avoided by not manufacturing the concerned products.

We hope that by reviewing the 2019 decisions, complainant firms will prepare evidence-based files when claiming dominant firms are engaged in predatory pricing market behaviours.

1.2.2. The Turkish Competition Authority's Approach to Indirect Refusal to Supply Practices: Radontek Decision

By Mustafa Ayna and Emine Bilgin

Introduction

On 1 February 2019, the TCA published its reasoned decision⁷⁹ regarding the full-fledged investigation conducted against Radontek Medikal upon a complaint submitted to the TCA by Düzey with the purpose of determining whether the relevant undertaking had violated Article 6 of the Competition Law through the abuse of its dominant position in the sales and after-sales markets for Accuracy-branded CyberKnife radiotherapy devices.

This decision is important as it is the last link in the TCA's established precedents⁸⁰ regarding the abusive refusal to supply practices in the after-sales of medical devices. Refusal to supply is one of the most debated topics in competition law as it constitutes a limit to the freedom of contract.

Radontek Medikal operates as a distributor and after-sales service provider of cancer diagnosis and treatment devices. Besides its operations in the sales and after-sales markets for CyberKnife radiotherapy device produced by Accuracy, Radontek is also the distributor of Rosa (Medtech Surgical), Mobetron (Intraop), and S 250 Proton Terapi (Mevion) products in Turkey.

The applicant, Düzey, operates in the fields of sales and after-sales of all kinds of radiology, radiotherapy, and nuclear medicine devices and systems. Düzey's customer portfolio consists of public hospitals, private hospitals, and private polyclinics. In addition to CyberKnife, the relevant undertaking also operates in the after-sales markets for Varian, Siemens, GE, and Elekta branded radiotherapy devices.

As per the complaint, the allegations are as follows:

- Radontek Medikal is in a dominant position in the sales and after-sales services markets for CyberKnife radiotherapy devices, as it is the sole distributor of the relevant product in Turkey;

⁷⁹ Decision of the TCA dated 11.10.2018 and numbered 18-38/617-298.

⁸⁰ Other such precedents include decisions of the TCA dated 18.02.2009 and numbered 09-07/128-39; dated 16.03.2010 and numbered 10-23/326-114; dated 02.06.2011 and numbered 11-33/704-217; dated 04.06.2013 and numbered 13-33/447-198.

- Radontek Medikal has implemented excessive and discriminatory pricing between purchasers with equal status by offering different terms for the same product in order to exclude Düzey from the aftersales market where Düzey competed, amongst others, with Radontek Medikal.

The Relevant Market

When dealing with the definition of relevant product markets in such cases, the TCA focuses on the question as to whether it would be appropriate to consider the sales and after-sales services concerning a product as a whole and thus within the same relevant product market. In case the TCA considers that the purchasers of a certain product do not take into consideration the conditions of aftersales services when making the initial purchase decision and they become locked in to the after-sales market following that, it prefers to define a separate and brand-specific relevant product market for the aftersales services. The TCA generally separates the sales and after-sales markets when the medical diagnostic and monitoring equipment considered and defines brand-specific markets for the latter.

In the case at hand, the TCA concluded that separate relevant product markets should be defined for the sales and after-sales services. With respect to the sales market, the TCA stipulated that the characteristics of the CybreKnife-branded linear accelerator differentiated it from all other linear accelerators to a significant extent and held that no other products constituted substitutes for CybreKnife-branded linear accelerators. Therefore, the relevant product market was defined as the market for “CyberKnife branded linear accelerator devices.”

With respect to the after-sales services, in line with its precedents in the relevant sector, the TCA stated that a separate and brand-specific after-sales market for CyberKnife linear accelerators should be defined. Thus, the after-sales markets were defined as “spare parts market for CyberKnife brand linear accelerator device” and “maintenance and repair services market for CyberKnife brand linear accelerator device.”

Assessment of the Abuse of Dominance Allegations

Analysis of Dominant Position

It is indicated that there are currently 11 CyberKnife radiotherapy devices in Turkey and that Radontek Medikal is the exclusive distributor of these devices. Hence, it is clear that Radontek Medikal holds a dominant position in the market for CyberKnife branded linear accelerators due to its rights arising from the exclusive distribution agreement with Accuray. Having said that, there are various undertakings providing maintenance and repair services for the said device.

With regard to the after-sales market, the TCA evaluated that Radontek Medikal was in a dominant position due to the following reasons; (i) Radontek Medikal’s market share

in the after-sales market was consistently higher compared to that of its competitors, (ii) Radontek Medikal is the sole spare parts supplier for the CyberKnife device although it was not the only provider in the market in practice, and (iii) no countervailing buyer power existed due to the fact that the number of alternative undertakings in the after-sales market, as well as their capacity, was limited.

In light of the foregoing, it is concluded that Radontek Medikal is in a dominant position in the markets for “CyberKnife-branded linear accelerators,” “spare parts for CyberKnife-branded linear accelerators” and “maintenance and repair of CyberKnife-branded linear accelerators.”

Excessive Pricing

Excessive pricing is an anti-competitive pricing strategy whereby a dominant undertaking consistently sets its prices “significantly” above the competitive level⁸¹. Excessive pricing may constitute a type of refusal to deal in case the dominant undertaking charges unreasonably high prices at the upstream level, which would practically render it impossible for the downstream purchasers to get access to the relevant input.

According to the precedents of the TCA⁸², the method mainly used to determine whether excessive pricing exists is the two-tiered “Economic Value Test (EVT),” which comprises of (i) the assessment of the price with the underlying costs, and (ii) comparison of the price with the prices of competing products or prices across similar markets. Within the scope of the implementation of the EVT, the TCA mainly prioritizes the comparison of the relevant price with similar markets and the price-cost analysis is conducted only if specific costs related to the service/product in question may be calculated⁸³.

In the case at hand, it was claimed that Radontek Medikal had asked for excessive prices upon the spare part request of Düzey, which is a competitor in the downstream after-sales markets. The TCA emphasized that, in the relevant sector, such practices weaken the competitors’ position in the downstream market in which it provides services through tenders organized by hospitals. Therefore, it is indicated that Radontek Medikal’s excessive pricing had exclusionary effects in the downstream market. Within this context, the TCA concluded that Radontek Medikal’s practice should be deemed as an indirect refusal to supply rather than excessive pricing, which is regarded as an exploitative conduct⁸⁴.

Having said that, the TCA first examined Radontek Medikal’s prices within the scope of the EVT in order to determine whether the price at the upstream level was high enough to be deemed as an indirect refusal to supply. As a result of the TCA’s assessment, it

⁸¹ Decisions of the TCA dated 17.01.2014 and numbered 14-03/60-24; dated 12.11.2014 and numbered 14-45/812-365.

⁸² Decisions of the TCA dated 06.04.2001 and numbered 01-17/150-39; dated 03.01.2008 and numbered 08-01/5-4; dated 17.01.2014 and numbered 14-03/60-24; dated 27.10.2016 and numbered 16-35/604-269.

⁸³ Decisions of the TCA dated 30.04.2002 and numbered 02-26/262-102; dated 26.05.2006 and numbered 06-36/462-124; dated 01.03.2007 and numbered 07-18/164-54.

⁸⁴ Decision of the TCA dated 21.10.2005 and numbered 05-71/981-270.

was stated that the price of the relevant product was deemed to be unreasonable when compared to other offers submitted to third parties, especially hospitals, by Radontek Medikal for the relevant product. Thus, Radontek Medikal's price offered to Düzey was deemed to be excessive. The TCA further held that Radontek Medikal was not able to show any reasonable justifications for such practice.

Refusal to Supply

As per the Guideline, refusal to supply is defined as “an undertaking’s refusal to supply the goods or services it produces as well as tangible or intangible business inputs in its possession to other undertakings, or its direct or indirect refusal to allow other undertakings to use thereof.”

In addition to outright refusal to supply, the same conduct may manifest itself in the form of a constructive refusal through behaviours such as undue delays in shipments, quantity restrictions, and the imposition of unreasonable conditions. It is also indicated in the Guidelines that refusal to supply may target the competitors of the dominant undertaking in the downstream market. In case the dominant undertaking is vertically integrated and its purchasers in the downstream market are also its competitors, then the refusal to supply is more likely to restrict effective competition.

When assessing the refusal to supply claims in the case at hand, the TCA examined the following conditions, which must be cumulatively satisfied for a violation to exist: (i) the refusal should relate to a product or service that is indispensable for the competition in the downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market, and (iii) the refusal should be likely to lead to consumer harm.


Regarding the first condition, it is stated that the spare parts form an essential and indispensable input in the aftersales market as they have no substitutes. It is further indicated that the undertakings operating in the downstream market have no alternative source from which they may procure spare parts on a sustainable basis.

While examining whether the refusal to supply would eliminate effective competition and lead to consumer harm, the TCA found that Radontek Medikal had gained the upper hand vis-à-vis its competitors by means of its exclusive distribution agreement, which increased the effectiveness of Radontek Medikal's practices. In parallel with the foregoing, it was stated that due to the excessive price offered by Radontek Medikal, the competitors in the downstream market were prevented from providing after-sales services for the relevant devices in time and thus the consumers who are not able to get health care service were harmed. On top of that, it was indicated that such consumer harm was of the utmost significance as human life may be at stake.

Conclusion

In the light of the assessments regarding excessive pricing and refusal to supply practices, the TCA has resolved that

- Radontek Medikal has applied excessive pricing in the upstream market, which weakened its competitors' position in the downstream market;
- Radontek Medikal's conduct should be evaluated within the scope of constructive refusal to supply practices;
- the constructive refusal relates to spare parts, which are indispensable for being able to compete in the downstream market and the refusal leads to the elimination of effective competition and to consumer harm,
- such practices constituted a violation of Article 6 of the Competition Law and an administrative monetary fine shall be imposed on Radontek Medikal.



The Output® Selected Essays is a recollection of what ACTECON Team has published throughout the year in various platforms.

It comprises a mixture of our essays, case summaries and articles on recent developments that we have selected during 2019 in competition law, regulation and international trade areas.

We hope that you refer to this book as a helpful resource. Obviously, the content is aimed to provide the reader with general information on the covered topics. We would be grateful to receive your feedbacks, opinions, updates on new developments as well as different point of views. Have a joyful and fruitful reading!

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