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Bahadır BALKI, LL.M[♣]

Abstract

Anti–competitive agreements are made confidentially and the parties involved in a cartel put forth a great effort to suppress evidence. Therefore, in cases where no clear proof of collusion exists, detailed economic analyses become the decisive factor to determine the violation of law. The presumption of concerted practices in Article 4 / (3), (4) of the Act on the Protection of Competition enables Competition Authority to reveal cartels through utilization of economic analyses even in the absence of other proof. Hence, like its counterparts created by the European Court of Justice, the presumption of concerted practices is a remarkable weapon against secret cartels. However, in each case, to prevent false convictions, its utilization requires investigation of market conditions in detail. The application of the presumption of concerted practices without detailed market investigation in oligopolistic markets could lead undertakings to produce market strategies not to maximize profits but to prevent the appearance of tacit coordination.

Keywords: *Presumption of concerted practice, oligopoly, parallel behaviours, proof of concerted practice, market investigation.*

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Öz

Rekabete aykırı anlaşmalar gizli şekilde yapılmakta ve bir kartele dahil olan taraflar delilleri gizlemek için yoğun çaba sarfetmektedirler. Dolayısıyla danışıklığın açık delilinin bulunmadığı vakalarda, detaylı ekonomik analizler kanunun ihlal edildiğinin tespitinde belirleyici etken olmaktadır. Rekabetin Korunması Hakkında Kanun'un 4. maddesinin 3. ve 4. fıkralarında yer alan "uyumlu eylem karinesi" Rekabet Kurumu'nun, diğer delillerin yokluğunda dahi yalnızca ekonomik analizlerden yararlanmak suretiyle kartelleri ortaya çıkarmasını mümkün kılmaktadır. Bu yüzden Avrupa Topluluğu Adalet Divanı tarafından oluşturulan emsalleri gibi, uyumlu eylem karinesi de gizli kartellere karşı çok önemli bir silah görevini görmektedir. Fakat karinenin kullanımı hatalı cezalandırmaları önlemek amacıyla her vakada pazar koşullarının detaylı bir şekilde incelenmesini gerektirmektedir. Detaylı pazar incelemesi olmadan uyumlu eylem karinesinin kullanılması oligopolistik pazarlarda teşebbüslerin karlarını en yüksek seviyeye çıkarmak amacıyla değil zımni danışıklığın ortaya çıkmasını önlemek için pazar stratejileri üretmelerine sebep olabilecektir.

Anahtar Kelimeler: *Uyumlu eylem karinesi, oligopol, paralel davranışlar, uyumlu eylemin delili, pazar incelemesi.*

1. INTRODUCTION

Turkey's competition law regime was established on 13.12.1994 by the begining of enforcement of the Act on the Protection of Competition (hereinafter referred to as "Turkish Competition Act")[1]. There were three main bases for establishing the competition law regime in Turkey. First, according to Article (hereinafter referred to as Art.) 167 of the Constitution of the Republic of Turkey[2], "The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets." Art. 167 of the Constitution of the Republic of Turkey entrusts the state with the formation of the competition law regime to ensure and protect the competitiveness of national markets.

Second, even if there were not a constitutional obligation, the formation of the competition law regime in itself is an economic obligation for Turkey. Today, Turkey's economy is strongly dominated by modern industry. Economic growth and national industrial development can be ensured by the proper

[1] Published in the Official Gazette numbered 22140 dated 13.12.1994, Law No. 4054.
[2] Available at http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm, last visited on 26.02.2009.

operation of free market economy. Powerful undertakings operating in conformity with the conditions of international trade can only be established under a market structure where equality of opportunity in the market is ensured and enforced by the competition law regime.

The final basis for establishing a competition law regime and the building structure of this paper is the Decision No. 1/95 of the European Community (hereinafter referred to as EC) – Turkey Association Council on the implementation of Customs Union established between the EC and Turkey (hereinafter referred to as "Customs Union Decision")[3]. The remarkable feature of the Customs Union Decision for this paper is that Turkey fully adopted the views of EC competition law and policy. According to Art. 39 / (1); *"with a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the EC, and is applied effectively."* Art. 39 / (2)(a) detailed the obligations undertaken by Turkey, stating that *"Turkey shall: ..., adopt a law which shall prohibit behaviours of undertakings under the conditions laid down in Art. 81 and 82 of the EC Treaty"*. It shall also ensure that, ..., "*the principles contained in block exemption regulations in force in the Community, as well as in the case law developed by EC authorities, shall be applied in Turkey*".

In this framework generated by the Customs Union Decision, Turkish competition law regime has been established pursuant to the principles of EC competition law. Turkish and EC competition laws can therefore be regarded as alike to a great extent. Nevertheless, this likeness seems to disappear, not because of its existence, but because of its interpretation, in Art. 4 / (3), (4) of the Turkish Competition Act known as the presumption of concerted practices[4].

As will be scrutinized in detail, the literal construction of Art. 4 / (3) allows that the parallel behaviours observed can in themselves be regarded as furnishing proof of concertation. Consequently, based merely on the demonstration of parallel behaviours, the burden of proof can be shifted and must be overcome by the defendants.

Even though such a "presumption" is not specified by the legislation in the field of EC competition law, the European Court of Justice (hereinafter referred to as "ECJ") also created legal tests concerning whether parallel

[3] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213(01):EN:NOT, last visited on 07.03.2009.

[4] Available at http://www.rekabet.gov.tr/word/ekanun.doc, last visited on 01.03.2009.

behaviours would amount to furnishing proof of concerted practices and clearly drew the conditions of their utilization by the case law. Contrary to the literal construction of Art. 4 / (3), the ECJ does not regard the mere demonstration of parallel behaviours as furnishing proof of concertation.

Until 2005, the Turkish Competition Board (hereinafter referred to as "TCB") had not merely relied on the literal construction of "the presumption of concerted practices" in its decisions and followed the case law of the ECJ. However, in 2005, the TCB changed its interpretation and application by invoking a literal construction of "the presumption of concerted practices", which contradicts its intended use. In the case of Bread Yeast III[5], the TCB explicitly emphasized that without the support of a detailed market investigation or any other evidence, the mere demonstration of parallel behaviours observed in an oligopoly can in themselves be regarded as furnishing proof of concertation among the investigated undertakings.

This paper will first deal with the position of parallel behaviours in the concept of concerted practices established by the case law of the ECJ. Second, it will explain the "presumption of concerted practices" in the Turkish Competition Act. The decisions of the TCB on the utilization of the presumption of concerted practices will then be analyzed under the principles established by the ECJ. Finally, the conclusions drawn will be presented to the reader.

2. PARALLEL BEHAVIOURS AND THE CONCEPT OF CONCERTED PRACTICES ESTABLISHED BY THE ECJ

2.1. Definition of Concerted Practices

An anti competitive behaviour could easily come into existence without a full fledged agreement between the parties to the cartel or even without originating sole evidence. Therefore, the effective protection of competition requires prohibitions applied not only to agreements, but also to every form of anti–competitive behaviours falling short of an agreement, in order to block attempts of undertakings ensuring a way–out of being punished[6]. This is why Art. 81 of the EC Treaty includes the concept of concerted practices.

[5] The decision of TCB, "Bread Yeast III", referenced no. 05–60 / 896–241, dated 23.09.2005.
[6] VAN BAEL, I. and J. F. BELLIS (2005), Competition Law of the European Community, Fourth Edition, Kluwer Law International, p. 51, GOYDER, D. (2003), EC Competition Law, Fourth Edition, Oxford University Press, p. 71, JONES, A. and B. SUFRIN (2004), EC Competition Law, Second Edition, Oxford University Press, p. 150.

In the "Dyestuffs" case[7], the ECJ held that a concerted practice is *"a form of coordination between undertakings which, without having reached the stage where an agreement properly so–called has been concluded, knowingly substitutes practical cooperation for the risks of competition"*[8]. It futher added that *"... a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviours of the participants*"[9].

The definition of concerted practice was broadened in the "Sugar"[10] case. The ECJ stated that concerted practice *"refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market"*[11]. It should be noted that the reference to "normal conditions of the market" is not an innovation for the definition of concerted practices. It had already been stated by the ECJ in the Dyestuffs case in considering whether parallel behaviours in themselves are sufficient to prove concerted practices[12]. Besides, the ECJ, in both the Dyestuffs and the Sugar cases, ruled that concerted practice is never established as long as the undertakings independently configure their course of conducts in the market. This independence naturally provides the undertakings with the right to realign their own conducts intelligently to the present and anticipated conducts of their rival undertakings[13]. The ECJ recalled this principle in the Sugar case by adding an innovation to the definition of concerted practices. The ECJ introduced that an actual plan among the participants of the concertation concerned is not required to conclude that there is a concerted practice[14]. It further held that *"any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to*

[7] Case 48 / 69, ICI v. Commission (1972) ECR 619.
[8] Ibid., para. 64.
[9] Ibid., para. 65.
[10] Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663.
[11] Ibid., para. 26.
[12] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[13] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 118, Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 173 and 174.
[14] Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 173, WHISH, R. (2005), Competition Law, Fifth Edition, Oxford University Press, p. 100, Jones and Sufrin 2004, p. 154.

disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"[15] is strictly precluded by Art. 81.

Another remarkable point stated by the ECJ, both in the Dyestuffs and the Sugar cases, is that contacts between members of the cartel shall ensure "the prior elimination of all uncertainty" related to the future conducts of the competitors[16]. This condition was, in particular, strenghtened by the ECJ in the Woodpulp case[17] as a condition establishing concertation between the competitors[18].

In the Züchner case[19], it ruled that if an information exchange is established among competitors, the information exchange alone could amount to a concerted practice. In such a case, the existence of contacts among the competitors is no longer required in establishing the concertation[20].

Especially, in light of Dyestuffs and Sugar, elements establishing the definition of concerted practice are as follows[21]:

- Undertakings concerned must establish "a collusive form of coordination or practical cooperation", which does not require an "actual plan" among the competitors but eliminates the risks of competition
- A direct or indirect contact ensuring *"a collusive form of coordination or practical cooperation"* must be accomplished between the undertakings concerned.
- The purpose or the result of such contacts must affect the course of conduct of the undertakings concerned on the market and in particular eliminate all uncertainty about the future conduct of the rival undertakings in advance.

[15] Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 174.
[16] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 118, Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 180.
[17] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I – 1307.
[18] Please refer to section 2.3.3. for the discussion of this issue.
[19] Case 172 / 80, Züchner v. Bayerische Vereinsbank, (1981) ECR 2021.
[20] Ibid., para.21, SOAMES, T. (1996) "An Analysis of the Principles of Concerted Practices and Collective Dominance: A Distinction Without a Difference?", European Competition Law Review (hereinafter referred to as E. C. L. R.), Volume 2, p. 26, VAN GEVREN, G. and E. NAVARRO VARONA (1994), "The Woodpulp Case and The Future of Concerted Practices", Common Market Law Review (hereinafter referred to as C. M. L. R.) Volume 31, p. 591.
[21] Van Bael and Bellis 2005, p. 52.

2.2. Market Conditions Enabling Oligopolistic Interdependency and Parallel Behaviours

Because this paper is mostly related to parallel behaviours and their value for standard of proof in the concept of concerted practices, market conditions enabling parallel behaviours must be identified before considering the case law of the ECJ regarding parallel behaviours under the scope of concerted practices.

"Where related conduct by the parties did not result from an agreement that could be proved that conduct could nevertheless be viewed as constituting a concerted practice"[22]. This sentence from a decision of the Commission of the EC (hereinafter referred to as Commission) was proof of efforts to deal with the oligopolistic interdependence in the concept of concerted practices. The essence of the problem is that competitors operating on an oligopolistic market have to engage in tacit coordination, which is a key requirement for the successful operation of their businesses, by monitoring the market concerned. The price rigidity or joint price increases in an oligopoly, therefore, do not directly prove a continuing concertation among the competitors concerned[23].

The oligopoly is a market structure which enables rival undertakings to align their conduct and ascertain a price at a supra–competitive level. In a perfectly competitive market, reduction in price does not have a deep impact on the market strategy of rival undertakings and the reduction in question is not necessarily followed by rivals. However, especially in a homogeneous, or pure, oligopoly, if an undertaking cuts its price, this reduction must immediately be matched by its competitors. Otherwise, customers would prefer the lower–priced production as the only differentiation between competitors' productions is their price. The competitor would face the same risk if it increased its price and the price increase was not followed by the rivals. This theory is the core of the oligopolistic interdependence[24].

Considering the competitors' immediate reaction to match the reduction in price in an oligopoly, undertakings are much less willing to engage in price competition because the initial profit obtained by the new reduced price is neutralized by a price war which will be to everyone's disadvantage in long term. However, oligopolists also aim at maximizing their own profits. Because there are only few competitors operating on an oligopolistic market, after some period of

[22] Polypropylene Decision (1986) O. J., L 230/1, (1988) 4 C. M. L. R. 347, judgment T–7 / 89, (1992) 4 C. M. L. R. 84, ALESE, F. (1999), "The Economic Theory of Non–Collusive Oligopoly", E. C. L. R., Volume 20 No. 7, p. 379.
[23] Alese 1999, p. 379.
[24] Whish 2005, p. 507.

repeated actions, a market player would be aware of the pricing and output policy of the others. It could then consciously implement, without the need to enter into an anti–competitive agreement or concerted practices, its own conduct in accordance with the anticipated reactions of its rivals. As the pricing and output policies of an undertaking influence the conduct of its competitors, these policies could be matched by merely monitoring the market concerned and implementing the repeated parallel behaviours to avoid the loss of customers in case of the alteration of market policy by a competitor. In such a case, the factor creating parallel behaviours is not the intention of concertation among the competitors, but the regular consequence of the market structure. These repeated non–collusive parallel behaviours, which are called tacit coordination and regarded as legitimate, could enable the competitors to increase the prices towards the level of supra–competitive profits by taking advantage of the oligopolistic market structure, particularly its interdependence and heightened awareness of competitors' strategies[25].

As oligopoly, not absolute monopoly or perfect competition is the prevailing market structure in many sectors, market conditions enabling the appearance of oligopolistic interdependency must be clarified. This issue is crucial for determining whether parallel behaviours observed on the market are the result of oligopolistic interdependency or concertation among the undertakings. Before separately considering the market conditions enabling oligopolistic interdependency and paralel behaviours, none of the conditions taken into account individually can precisely lead to a high probability of oligopolistic interdependency. On the other hand, oligopolistic interdependency and lawful conscious parallelism can be observed if there are a limited number of undertakings operating with high market shares, barriers to entry into the market are sufficiently high, the products are homogeneous and the market is transparent[26].

Where there are a few undertakings operating with high market shares in a given market, the probability of oligopolistic interdependency is heightened because these few undertakings can easily monitor each competitor's behaviour. As a result of the heightened awareness of the strategies followed by competitors through monitoring, the undertakings concerned have the possibility of matching their own conduct to the anticipated strategy of the rival undertakings[27]. Once the

[25] Whish 2005, p. 507, Jones and Sufrin 2004, p. 818.
[26] OECD (1999), Oligopoly, DAFFE / CLP(99)25, available at http://www.olis.oecd.org/olis/1999doc.nsf/LinkTo/NT00002AE6/$FILE/10E91728.PDF, p. 21, last visited on 26.02.2009, Van Gevren and Navarro Varona 1994, p. 603.
[27] OECD 1999, p. 21–22.

number of undertakings operating in a given market is increased, the incentive of undertakings concerned to follow each other's conduct is decreased due to the possible differentiation in the market strategy of the newcomer undertakings, especially in terms of costs, manufacturing, and sales. Therefore, more undertakings operating in a given market cause difficulty in monitoring the market conditions. It is obvious that low barriers to entry into a market prevent concentration on the market on the ground that competition would be increased by newcomer undertakings trying to steal market shares[28].

The symmetry in the undertakings' sizes is another condition facilitating the appearance of oligopolistic interdependence. When market shares, sales volumes, manufacturing capacity and cost structures of the undertakings concerned are similar in a given market, prediction of competitors' strategies is facilitated and may result in lawful conscious parallel behaviour[29].

Product differentiation is one of the biggest barriers for the existence of oligopolistic interdependency because product differentiation results in differentiation in terms of sales. This is the case in particular where the price of production concerned is determined by considering the high degree of product customization[30]. Product homogeneity would be established if the shape, nature, quality and function of the products manufactured by different undertakings are equivalent. In such a case, cost, manufacturing and sales conditions could be matched on the market without collusion between the rival undertakings through product homogenity[31]. On the other hand, still, a certain degree of product differentiation can leave the door open for the consideration of product homogenity and lawful conscious parallelism in a case where there are clear references or focal points on production concerned. These focal points ensure the possibility of predicting the price of competitors' production[32].

Product homogeneity would generally be seen in conjunction with a lack of product innovation. If product technology has already matured and stabilized, it is not plausible for an oligopolist to sacrifice a vast amount of money for the purpose of product innovation to steal a competitor's business. In such a case, the

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[28] Ibid., p. 23.
[29] Ibid., p. 25.
[30] BRIONES–ALONSO, J. (1995), "Oligopolistic Dominance. Is There A Common Approach In Different Jurisdictions?", available at http://ec.europa.eu/comm/competition/speeches/text/sp1995_036_en.html, last visited on 26.02.2009, para. 30.
[31] CENGİZ, D. (2006), Türk Rekabet Hukunda Uyumlu Eylem ve Bu Eylemin Hukuki Sonuçları, First Edition, Beta, p. 182.
[32] Briones-Alonso 1995, para.28.

undertakings, which cannot gain a competitive advantage through technological developments and product innovation, would prefer to avoid active price competition in conformity with their mutual advantage. Thus, the lack of product innovation provides the stability of parallel behaviours by blocking unpredictability and aggressive moves on the market that quickly steal a competitor's business[33].

A market with inelastic demand where there are no possible substitutes outside the market concerned is also an appropriate condition for engaging in parallel behaviour. Price competition in such a market would be much more harmful for the undertakings involved than price competition in a market with elastic demand, as the loss of revenue incurred by the reduction in prices could not be recovered. Because inelasticity of demand does not depend on the prices, but on the special features belonging to the product concerned, the reduction in prices in a market with inelastic demand does not lead to increased sales, and the price competition results in decreasing overall profits[34]. Therefore, the inelasticity of demand discourages the competitors from engaging in price competition and could ensure the stability of parallel behaviours on the market.

The decisive condition enabling efficient monitoring and tacit coordination in a given market is market transparency. The lack of market transparency, therefore, removes the probability of oligopolistic interdependency[35]. The essence of market transparency is the accessibility of information on prices and sales among oligopolists[36]. Market concentration, product homogenity, the existence of market statistics and of focal points for prices, and the essence of commercial relations with consumers are decisive elements in determining whether or not the market concerned is transparent[37]. The crucial issue regarding market transparency is whether the transparency is the nature of the market concerned or artificially created by the competitors with a view to facilitating exchange of information through coordination[38]. One method resorted in creating an artificial transparency is to directly provide competitors with information on cost and sales conditions in advance, particularly through price announcements. The establishment of trade associations or publishing of a trade press with a view to collecting and disseminating information are also efficient ways of creating an artificial transparency. Competitors may also opt to

[33] Ibid., para. 29, 31, 48.
[34] Ibid., para. 34
[35] TOY, O. Y. (2004), Rekabet Hukunda Uyumlu Eylem, Turkish Competition Authority, p. 35.
[36] Briones-Alonso 1995, para 42.
[37] Ibid., para 44.
[38] ASLAN, İ. Y. (2005), Rekabet Hukuku, Third Edition, Ekin Press, p. 149.

indirectly inform each other through third parties. In this case, competitors are sure about the fact that the information revealed will be attained by the others with the assistance of third parties[39].

As explained above, the oligopoly means neither a market structure in which only few undertakings operate in a given market[40] nor one in which any parallel behaviour observed is regarded as collusive. Rather it means a market structure in which there is interdependency among few undertakings holding market power. Without engaging in explicit coordination such interdependency enables competitors through parallel behaviours to decrease the volume of production and/or to increase the prices prejudice to customers. In this manner competitors tacitly coordinate their operations, following their mutual interest, namely profit maximization, and thinking that other market participants also follow this interest[41].

It must be borne in mind that market conditions enabling oligopolistic interdependency also facilitate the implementation of collusive behaviours between competitors. Therefore, oligopoly is just on the border between lawful conscious parallelism and concertation[42]. The utilization of parallel behaviour in itself as circumstantial evidence of concerted practice requires a detailed investigation of market conditions in order to avoid unfair and unlawful penalization of the undertakings concerned.

2.3. Case Law of the ECJ Regarding Parallel Behaviours

Discussions of the evaluation of conscious parallel behaviours implemented by the oligopolists in the concept of concerted practices got their start with the Dyestuffs case and were finalized by the Woodpulp case. In this part of the paper, the process on the issue will be detailed by considering the Dyestuffs case, the Sugar case, the Züchner case and the Woodpulp case.

2.3.1. The Dyestuffs Case

The definition[43] of concerted practices made by the ECJ in the Dyestuffs case seems, prima facie, as if it includes conscious, but non–collusive, parallel behaviours in the scope of concerted practices. However, after establishing the definition concerned, the ECJ excluded conscious, but non–collusive, parallel

[39] OECD 1999, p. 27–29.
[40] Whish 2005, p. 507, 512.
[41] KAHRAMAN, Z. (2008), Rekabet Hukuku Açısından Oligopolistik Bağımlılık, First Edition, Beta Publishing, s. 46.
[42] Jones and Sufrin 2004, p. 818.
[43] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 64–65.

behaviour from the scope of concerted practices, stating that even though parallel behaviour cannot in and of itself be regarded as concerted practice, it may be considered *"strong evidence of concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market"*[44]. This quotation indicates the market conditions under which parallel behaviours can be utilized as indirect evidence of alleged concerted practices, and, at the same time, indicates that non–collusive parallel behaviour stemming from oligopolistic interdependency is not regarded even as evidence of alleged concerted practices. Because those criteria, namely *"the nature of the products, the importance and number of the undertakings and the size and nature of the said market"*, are conducive market conditions to differentiate the oligopoly from other market structures, and accordingly, to distinguish between the conscious, but non–collusive, parallel behaviours stemming from oligopolistic interdependency and collusive parallel behaviours[45] on the ground that the oligopoly provides the competitors with the most appropriate market structure for tacit coordination.[46] Furthermore, the ECJ approved the right of each undertaking to realign their own conduct intelligently to the present and anticipated conducts of their rival undertakings. According to this right, concerted practice is never established as long as the undertakings independently configure their courses of conduct in the market[47]. The right in question clearly strengthens the fact that conscious, but non–collusive, parallel behaviours arising from oligopolistic interdependency are excluded from the concept of concerted practices. In addition, by means of this right, the ECJ clarified that the concept of concerted practices only prohibits coordinated course of actions created by collusive cooperation of competitors with a view to removing in advance all uncertainty regarding the future conduct of competitors and making the market concerned artificially transparent. Accordingly, the differentiation between the concept of conscious, but non–collusive, parallel behaviours resulting from oligopolistic interdependence and the concept of concerted practices was constructed on the basis of collusive cooperation among the competitors[48].

Nevertheless, the evaluation of the ECJ on advance price announcements was in contradiction with the differentiation between the concept of conscious, but

[44] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[45] Cengiz 2006, p. 234.
[46] Please refer to section 2.2. for a detailed discussion of this issue.
[47] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 118.
[48] Ibid., Cengiz 2006, p. 234–235.

non–collusive, parallel behaviours and the scope of concerted practices. According to the ECJ, the advance price announcements concerned showed the competitors' will to increase prices and enabled them to monitor one another's conduct on the market and to realign themselves accordingly[49]. The ECJ added, without evidence of concertation, that the advance price announcements concerned therefore ensured the prior elimination of all uncertainty regarding their future conduct and the risk of changing the conditions of competition between the competitors[50]. However, to reach such a conclusion on advance price announcements, the ECJ had to establish concertation among the competitors. Non–collusive advance price announcements cannot eliminate all uncertainty as to the future conduct of competitors because responses of the competitors to movement of prices are ambigious for the undertaking making price announcement. For instance, an announced price could not be followed by the competitors and this nonreactive stance could be an opportunity for them to entice away customers. Accordingly, advance price announcements could simply result in customer attrition for the undertaking making a price announcement in advance[51].

It can be inferred from the evaluation of the ECJ that by means of these announcements, monitoring one another and the intention of increasing prices by adapting own conduct to competitors' conduct, which could also be characteristic signs of non–collusive parallel behaviour, are sufficient conditions to eliminate all uncertainty as to the future conduct of competitors. Under these conditions, in a given case, advance price announcements, which are a form of non–collusive parallel behaviors resulting from oligopolistic interdependency, could in themselves be considered as concerted practices. Because the ECJ did not make a differentiation between unilateral, independent parallel price announcements implemented in accordance with oligopolistic interdependency and anti–competitive parallel price announcements implemented by collusive cooperation of competitors within the scope of concerted practices[52]. In this framework, even an advance price announcement made to customers that increases the risk of competition would be regarded as a concerted practice. However, to establish concerted practices, the competitors must form a contact ensuring collusive cooperation against the risk of competition and the prior elimination of all

[49] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 100.
[50] Ibid., para. 101.
[51] İKİZLER, M. (2005), Rekabet Hukunda Uyumlu Eylemler, First Edition, Seçkin Publishing, p. 130–131, OSTI, C. (1994), Information Exchanges in the Obscure Light of Woodpulp, E. C. L. R, Volume 3, p. 179.
[52] Cengiz 2006, p. 235–236.

uncertainty as to the future conduct of competitors[53]. As a result, the ECJ, by not making this differentiation, clouded the concept of conscious, but non–collusive, parallel behaviours emanating from oligopolistic interdependency by causing uncertainty as to whether advance parallel price announcements are a prohibited form of conscious parallelism among competitors in the scope of concerted practices[54].

Also, the broad definition[55] of concerted practice complicates making a clear differentiation between the concept of lawful conscious parallelism and the scope of concerted practices. The word "knowingly" in the definition concerned definitely excludes unconscious parallel behaviours from the scope of concerted practices[56]. On the other hand, the scope of the meaning of "knowingly" cannot be clearly differentiated from the conscious, but non–collusive parallel behaviours implemented by the oligopolists, who are well aware of each other's oligopolistic interdependency with the purpose of increasing their common profit[57].

Without relying on clear evidence of concertation, the ECJ concluded that there had been concertation among the competitors involved merely on the basis of parallel price announcements and parallel price increases. Although the ECJ did not take them into account, the Commission had also found meeting minutes drawn up by the competitors concerned and instructions in similar wordings sent to their subsidiaries regarding advance price announcements and price increases. In fact, those documents and meeting minutes had been clear corroborative evidence of concertation among the competitors in question[58]. Nevertheless, in this case, it is impossible to reach the conclusion that the conscious parallel behaviours implemented in accordance with oligopolistic interdependency in themselves were regarded as concerted practices. Although the ECJ contradicted its own principle[59] on weighing the legal nature of parallel behaviours by failing to examine the market conditions concerned in detail, the dyestuffs market was not transparent on the grounds that customers from different member states were not aware of the prices of the product charged in other member states and the products manufactured by the undertakings were not homogeneous[60]. Therefore, it

[53] JOLIET, R. (1974), "La' Notion De Pratigue Concertee Et L'Arret ICI Dans Une Perspective Comparative", Cahiers De Droit European, p. 267–271.
[54] Cengiz 2006, p. 236.
[55] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 64–65.
[56] Soames 1996, p. 26.
[57] BLACK, O. (1992), "Communication and Obligation in Arrangements and Concerted Practices", E.C.L.R, Volume 5, p. 199.
[58] Van Bael and Bellis 2005, p. 56.
[59] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[60] Goyder 2003, p. 72–73, Van Gerven and Navarro Varona 1994, p. 603.

was safe to assume that parallel price announcements and parallel price increases in question had not been non–collusive parallel behaviours resulting from oligopolistic interdependency.

2.3.2. The Sugar Case and the Züchner Case

In the Sugar case, recalling the principles specified in the Dyestuffs case, the ECJ reemphasized that the conscious, but non–collusive, parallel behaviours arising from oligopolistic interdependency are not contained in the scope of concerted practices[61]. Nonetheless, the reference made in paragraph 174 of the Sugar case to "indirect contact"[62], which either results in or aims at eliminating in advance the uncertainty regarding future conduct of the competitors, resumed discussions that lawful conscious parallelism such as advance price announcements and price leadership in an oligopoly could be defined as illegal in the ambit of concerted practices[63]. However, according to economic theory, in a non–collusive oligopoly, market strategies are independently implemented without establishing any forms of contact among competitors. A contact among competitors simply turns the non–collusive oligopoly into a collusive market. Therefore, there is not room for the word "contact" in the concept of non–collusive oligopoly. As a result, the word "contact" stressed by the ECJ, whether it is direct or indirect, excludes the conscious, but non–collusive, parallel behaviours arising from oligopolistic interdependency, and only indicates collusive cooperation among competitors. In other words, rational parallel behaviours implemented independently in an oligopoly, such as advance price announcements or price leadership do not fall within the scope of concerted practices[64]. On the other hand, it would not be plausible to confine the concept of concerted practices to direct contacts among competitors because many forms of indirect contact facilitating collusive cooperation could be easily formed by the competitors.

The Züchner case followed the principles[65] held in the Dyestuffs case and the Sugar case. The ECJ added that in establishing concerted practices there must be a contact or, at least, exchange of information among competitors[66]. In light of this, in defining parallel behaviours as concerted practices, they must arise out of collusive cooperation established among competitors[67].

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[61] Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 26, 173–174, Van Gerven and Navarro Varona1994, p. 590–591.
[62] Cases 40 / 73 etc, Suiker Unie v. Commission (1975) ECR 1663, para. 174.
[63] Van Gerven and Navarro Varona 1994, p. 591.
[64] Alese 1999, p. 381–382.
[65] Case 172 / 80, Züchner v. Bayerische Vereinsbank, (1981) ECR 2021, para. 12–13–14.
[66] Ibid., para. 21.
[67] Ibid., para. 22.

2.3.3. The Woodpulp Case

The judgment in the Dyestuffs case had casted a doubtful light on the fact that advance price announcements, which could appear in a form of non–collusive parallel behaviour caused by oligopolistic interdependency, could in themselves amount to a concerted practice among competitors[68]. In the Woodpulp case, the ECJ made the scope of lawful conscious parallelism definite by differentiating unilateral, independent price announcements from anti–competitive price announcements implemented by collusive cooperation of competitors. In addition to the criteria determined in the Dyestuffs case, it also adjudged on the value of parallel behaviours as circumstantial evidence of concerted practices and finalized the issue[69].

The detailed economic evaluation of the woodpulp market drawn up by economic experts played a decisive role in the Woodpulp case. In fact, such an economic approach was the requirement of the principle[70], precisely ruled but not precisely fulfilled by the ECJ in the Dyestuffs case, stipulating the detailed analysis of market conditions to determine whether parallel behaviours in question were legitimate or not.

The economic experts stated that, even though there were more than a few number of manufacturers, purchasers, and types of woodpulp, the market in question was oligopolistic. According to the experts, groups of oligopolies had been formed by a few manufacturers (woodpulp suppliers) and a few purchasers (paper manufacturers). They had lived in dependence within their own groups as each group dealt with only one type of woodpulp. In addition, the interdepence in each group was reinforced by the long term contracts signed by members of the group concerned[71]. As a matter of fact, in fostering these long term contracts guaranteeing the security of supply and demand between producers and customers, the advance parallel price announcements in question had been made to customers at the instance of customers themselves. Moreover, the advance parallel price announcements in question were vital for the customers (paper manufacturers) in predicting their costs and ascertaining their pricing[72]. These explanations were clear economic justifications. They proved that the advance parallel price announcements in question had not been implemented by woodpulp

[68] Please refer to section 2.3.1. for a detailed discussion of this issue.
[69] Van Gerven and Navarro Varona 1994, p. 575–576.
[70] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[71] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I – 1307, para. 76, 102, Van Gerven and Navarro Varona 1994, p. 584.
[72] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para 77, Van Gerven and Navarro Varona 1994, p. 584.

suppliers with a view to rendering the pulp market artificially transparent. In the absence of evidence of concertation, these economic justifications substantiated the assertion that the advance parallel price announcements concerned were simply independent and rational market behaviours[73].

The ECJ determined the criteria as to whether parallel price announcements would be regarded as concerted practices or conscious, but non–collusive parallel behaviours. If they are not made to customers and there is no economic justification for the price announcements in question, they simply amount to information exchange among the competitors and sufficient proof of concertation[74]. If, as in the Dyestuffs case, there exist market conditions making tacit coordination impossible, parallel behaviours arising from advance price announcements cannot be observed in an independent and unilateral form. In such a case, after a detailed investigation of the market structure concerned, it is safe to conclude that parallel price announcements are a result of collusive cooperation among the competitors which aim at creating an artificial transparency in the market concerned[75].

Contrary to the Dyestuffs case, in Woodpulp, the ECJ exactly approved that non–collusive parallel price announcements do not diminish uncertainty as to the future conduct of the competitors. Because at the time when an undertaking announces its price for an upcoming period of time, responses of the competitors on movement of prices are ambigious for the undertaking making the price announcement[76]. As a result, the ECJ found that the advance parallel price announcements in question were not in themselves regarded as concerted practice.

Experts' reports specified that the structure of the woodpulp market was appropriate for tacit coordination by reason of oligopolistic interdependency and inherent transparency. According to the judgment of the ECJ, all justifications submitted on market transparency[77], in conjunction with the oligopolistic structure of the woodpulp market, made the implementation of simultaneous, parallel price announcements concerned possible without concertation among competitors[78]. In other words, concertation did not correspond to "the only plausible explanation"

[73] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 126, Van Gerven and Navarro Varona 1994, p. 595.
[74] Van Gerven and Navarro Varona 1994, p. 595.
[75] Ibid., p. 603.
[76] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 64, İkizler 2005, p. 130–131, Osti 1994, p. 179.
[77] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 83–88.
[78] Ibid., para. 126.

for parallel behaviours observed on the woodpulp market. Therefore, parallel behaviours did not amount to sufficient proof of concerted practices.

While reaching this conclusion, the ECJ developed the legal test[79], which had been established in the Dyestuffs case, to determine whether parallel behaviours in themselves could amount to sufficient proof of concerted practices. The ECJ, in the Dyestuffs case, had controversially excluded the conscious, but non–collusive, parallel behaviours caused by oligopolistic interdependency from the scope of concerted practices[80]. Moreover, it had regarded parallel behaviours that do not fall within "the normal conditions of the market" as "a strong evidence of concerted practices"[81]. However, references to "the normal conditions of the market" and "strong evidence" led to the uncertainty. In fact, it is almost impracticable in an oligopoly to determine a certain definition of the normal conditions of the market[82]. In addition, the Dyestuffs test also had not indicated the conditions under which parallel behaviours defined as "strong evidence" would be sufficient proof of concerted practices[83].

The legal test created in the Woodpulp case cannot be defined as innovative, since both the Woodpulp and Dyestuffs tests regulate the criteria for the utilization of parallel behaviours as evidence of concerted practices[84]. Nevertheless, it was definitely a reformulation. The ECJ adjudged that *"... parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct"*[85]. Furthermore, it added the key requirement of the Dyestuffs test into the Woodpulp test, stating that in determining whether there is a plausible explanation inferred from parallel behaviours to indicate the absence of concertation, *"the nature of the products, the size and the number of the undertakings and the volume of the market in question"* must be taken into account[86].

First, by means of this legal test, the ECJ eliminated the uncertainty caused by the reference to "strong evidence". The reference to "furnishing proof" finalized that parallel behaviours themselves amount to sufficient evidence of concerted practices if and only if there is no reasonable and legitimate

[79] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[80] Please refer to section 2.3.1. for a detailed discussion of this issue.
[81] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66.
[82] Alese 1999, p. 380.
[83] Cengiz 2006, p. 280.
[84] Van Gerven and Navarro Varona 1994, p. 601–602.
[85] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 71.
[86] Ibid., para. 72.

justification indicating the absence of concertation among competitors[87]. Second, the reference to "the only plausible explanation" abolished the ambigious reference of the Dyestuffs test to "the normal conditions of the market" and also broadened the scope of legitimate parallelism. The essence of the test was no longer to determine "the normal conditions of the market" but to establish whether parallel behaviours can be defined in a manner other than concertation among competitors[88]. In addition, by means of this reference, along with lawful conscious parallelism resulting from oligopolistic interdependency, parallel behaviours having an economic and legitimate justification would, in case by case form, be regarded as within the scope of lawful parallelism[89]. Finally, also in the Woodpulp case, the ECJ reapproved the legitimacy of conscious, but non–collusive, parallel behaviour arising from oligopolistic interdependency, stating that *"Art.81 of the EC Treaty does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors"*[90].

2.4. Burden of Proof by Utilizing Parallel Behaviours in the Absence of Proof of Concertation

The decisive factor establishing concerted practices is the submission of proof of contact among the competitors. The Commission must prove that the information that is the subject of the contact is deliberately, directly sent to the competitors or directed into an area where members of the cartel can knowingly reach it[91]. Contact among competitors can be established through proof of meetings or the minutes of a meeting held, exchange of information or any documentary proof indicating that the practices concerned resulted from concertation. If parallel behaviours appear along with even one of these forms of corroborative proof, such behaviours undoubtedly amount to sufficient proof of concerted practices.[92]

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[87] Cengiz 2006, p. 284

[88] ALLENDESALAZAR, R. (2006), "Oligopolies, Conscious Parallelism and Concertation" available at http://www.iue.it/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Allendesalazar.pdf, last visited on 27.02.2009, p. 5.

[89] For example CRAM and Rheinzink case, Cases 29 and 30 / 83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, (1984) ECR 1679. It would fall within this concept. The allegation of the Commission on the prevention of parallel imports was rebutted by a business justification of the undertakings concerned. Indeed, the reason of the termination of deliveries to Belgium was antecedent debts of Belgian distributor to the undertakings concerned.

[90] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 71.

[91] Goyder 2003, p. 74.

[92] RITTER, L., D. BRAUN and F. ROWLINSON (2000), European Competition Law: A practitioner's Guide, Second Edition, Kluwer Law International, p. 88.

Nevertheless, by means of legal tests[93] created in the Dyestuffs and Woodpulp cases, if a high standard of proof going well beyond their mere demonstration can be fulfilled, parallel behaviours themselves can also correspond to furnishing proof of concerted practices, even in the absence of evidence of concertation[94].

It is clear that the standard of proof designed in the Dyestuffs test is different from the standard designed in the Woodpulp test. As mentioned above, the reference of the Dyestuffs test to "strong evidence" caused uncertainty on the standard of proof. The ECJ found that in establishing concerted practices, according to the Dyestuffs test, it is sufficient to demonstrate parallel behaviours as strong, but accordingly not conclusive, evidence of concerted practices. Obviosly, the standard of proof designed had been based on the balance of probabilities. Therefore, it had not required proof beyond reasonable doubt that parallel behaviours only indicate the existence of concertation. For instance, in a market where conditions are almost, but not fully appropriate for tacit coordination, there are still some low barriers to the emergence of tacit coordination. In such a market, parallel behaviours could amount to strong evidence of concerted practices even if there were other explanations regarding the absence of concertation. Because signs indicating both the existence and the absence of concertation can be seen together. In such a case, if the probability of the existence of concertation inferred from parallel behaviours is more preponderant than the probability of its absence, concerted practices have been established in light of the Dyestuffs test.

The Woodpulp test abolished this uncertain standard of proof by referring to "only plausible explanation". This reference clearly requires conclusive evidence to establish concerted practices. As a result, the new standard of proof designed by the Woodpulp test is that of "beyond reasonable doubt".

As both tests prescribe, conditions of the product market in question must be examined in detail by the Commission**.** Nonetheless, this examination should not be the only duty of the Commission to adjudge the illegality of parallel behaviours in question. The Commission must enable the undertakings to raise their objections to the results of the examination, then adress their objections, which could result in new plausible explanations to counter the accusation[95]. This procedure, which has to be entirely fulfilled by the Commission under its own initiative, is the requirement of executing a "fair trial" resulting from Art. 6 of the

[93] Case 48 / 69, ICI v. Commission (1972) ECR 619, para. 66, Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I–1307, para. 71, 72.
[94] Allendesalazar 2006, p. 5.
[95] Van Gerven and Navarro Varona 1994, p. 605.

European Convention on Human Rights[96]. Therefore, it is impossible to infer from the tests concerned that the mere demonstration of parallel behaviours is a sufficient condition in shifting the burden of proof from the Commission to the undertakings.

As a matter of fact, in light of the principle of the "presumption of innocence" resulting from Art. 6 / (2) of the said convention, the burden of proof is on the Commission. In the absence of evidence of concertation, the Commission must prove its allegations on the basis of conclusive and precise justifications resulting from the parallel behaviours in question. This procedure will be justified in the next three paragraphs by the application of the case law of the ECJ.

The ECJ ruled in the CRAM and Rheinzink case[97] that the presumption established by the Commission did not have a solid basis as the proof submitted by the undertakings had been disregarded by the Commission[98]. Though the Commission had not established a presumption having a solid basis in the absence of evidence of concertation, it had established concerted practices between the undertakings concerned. Hence, the decision was annulled by the ECJ. It approved that the undertakings have a right to submit their own rational or economic justifications ***"****which cast the facts established by the Commission in a different light and which thus allow another explanation"* indicating the absence of concertation among competitors[99]. It further added that the Commission is obliged to consider them on its own initiative[100]. This right attributed to the undertakings shall never be considered to mean that the Commission is no longer required to search alternative explanations[101]. It means neither shifting the burden of proof to the undertakings nor lightening the burden of proof of the Commission[102].

As the ECJ ruled in both the CRAM and Rheinzink case[103] as well as the Woodpulp case[104], "the evidence must be firm, precise and coherent" to conclude

[96] Please refer to http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf, for the full wording of Art. 6 of the European Convention on Human Rights.
[97] Cases 29 and 30 / 83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, (1984) ECR 1679.
[98] Ibid., paras. 17, 19–20.
[99] Ibid., para 16.
[100] Ibid., para.17.
[101] Allendesalazar 2006, p. 8.
[102] Van Bael and Bellis 2005, p. 57.
[103] Cases 29 and 30 / 83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, (1984) ECR 1679, para. 20.

that parallel behaviours result from concerted practices among competitors. The mere demonstration of parallel behaviours without the examination of market conditions in detail does not fall within this formula, since there is a possibility that conscious parallel behaviours in a given oligopoly could appear in a non–collusive form[105]. At that point, the Woodpulp test must be considered in light of "the presumption of innocence". The ECJ approved[106] in the Hüls case[107] that "the presumption of innocence", which appears in Art. 6 / (2) of the European Convention on Human Rights, is a part of Community legal order and a fundamental right, which also protects an undertaking in the procedure regarding the competition rules of the EC[108]. Therefore, as Advocate General Darmon stressed in the Woodpulp case, the Commission must establish "a degree of certainty that goes beyond any reasonable doubt"[109], at least "beyond the point of proving parallel behaviours"[110], in securing "the principle of the presumption of innocence" and concluding that *"concertation constitutes the only plausible explanation for parallel behaviours"*.

Though the ECJ never explicitly held that the mere proof of parallel behaviours is not sufficient to shift the burden of proof from the Commission to the undertakings, the applicability of the principle of the "presumption of innocence" to the competition rules, the clear standard of proof established by the Woodpulp test, and the procedure followed by the ECJ in the Woodpulp case clearly solved the problem. In the absence of evidence of concertation, the ECJ did not shift the burden of proof to the defendants for the alleged concertation upon the mere proof of parallel behaviours by the Commission. The ECJ took into account the objections of the defendants and, as prescribed in the Dyestuffs test, examined conditions of the woodpulp market in detail before reaching a conclusion.

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[104] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I – 1307, para. 70.

[105] Please refer to section 2.2. for a detailed discussion of this issue.

[106] Sanctions regulated in the EC competition law have an administrative nature. However, due to the fact that they are punitive and deterrent, they fall within the scope of Art. 6 of the European Convention on Human Rights and are deemed as criminal in nature. (Please refer to the judgments of the European Court of Human Rights on the evaluation of administrative sanctions in the scope of Art. 6 of the said Convention, Case of Öztürk v. Germany, Application no. 8544 / 79, dated 21.02.1984, Case of Lutz v. Germany, Application no. 9912 / 82, dated 25.08.1987)

[107] C–199 / 92, Hüls v. Commission (1999), ECR I–4287.

[108] Ibid., paras. 149–150.

[109] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I – 1307, Opinion of Advocate General Darmon, para. 195.

[110] Van Gerven and Navarro Varona 1994, p. 605.

After carrying out this procedure, if the Commission can establish well–grounded presumptions going beyond any reasonable doubt that the parallel behaviours observed do not indicate the existence of any legitimate alternative explanation rebutting the alleged concertation, such parallelism amount to furnishing proof of concerted practices. However, it must be noted that the reference to "the only plausible explanation" ensures that the establishment of concerted practices among competitors is nearly impossible in the absence of evidence of concertation[111].

It is safe to assume that the mere demonsration of parallel behaviours in an absolute oligopoly or in a perfectly competitive market are excluded from the scope of the Woodpulp test. In an absolute oligopoly like the woodpulp market, parallel behaviours are inherent and are a regular outcome of the market's operation. The undertakings operating in such a market have complete information on each other's market strategy. Thus, in an absolute oligopoly, in the absence of evidence of concertation, the parallel behaviours in question always have an alternative plausible explanation indicating the absence of concertation.

Furthermore, coordination is impossible in a perfectly competitive market. There would be lots of barriers banging the door on coordination and the appearance of parallel behaviours. Even if the rivals engage in concertation somehow, they cannot distort the competition.

Even if the market concerned is not an absolute oligopoly, it could have a structure that is appropriate for tacit coordination among the competitors. In such a case, a detailed investigation of the market conditions could not give a definite answer as to whether parallel behaviours have arisen from collusive cooperation among competitors or they simply amount to conscious, but non–collusive, parallelism implemented in the ambit of oligopolistic interdependency. Hence, in cases where no proof of concertation exists, due to the fact that the question of whether concertation constitutes the only plausible explanation for parallel behaviours cannot be definitely answered, in light of the principle of the "presumption of innocence", the Commission must drop the case.

It is safe to allege that the Woodpulp test can detect the parallel behaviours observed in an almost perfectly competitive market. In fact, coordination in such a market is rarely established through concerted practices; it generally requires anti–competitive agreements among the competitors. Nevertheless, if they establish coordination through concerted practices, a detailed market investigation would only indicate the existence of concertation. Parallel

[111] Van Gerven and Navarro Varona 1994, p. 608, Alese 1999, p. 383.

behaviours can hardly be justified by the conditions observed in a market including a large number of market participants, product differentiation, non–existent transparency, and advanced product technology.

2.5. The Question of Whether a Concerted Practice is Necessarily Implemented Through Parallel Behaviours on the Market

From the Dyestuffs case to the Polypropylene cases[112], the ECJ dealt with concerted practices implemented through parallel behaviours of the undertakings concerting with each other. In this period, the ECJ answered the question of whether concerted practice can be inferred from parallel behaviours having anti–competitive effects on the market. Therefore, concerted practices not introduced through parallel behaviours on the market were not discussed by the ECJ, and "concertation plus parallel behaviour" was the prevailing view in the concept of concerted practice[113].

However, according to the Commission's view in the Polypropylene cases, because Art. 81 does not include any legal differentiation between the treatment of concerted practices and agreements, the concertation between undertakings must be caught by Art. 81, even if no parallel behaviours or anti–competitive effects exist on the market. Accordingly, the Commission put forward that it makes no difference whether or not the undertakings involved have entered into an agreement or a concerted practice, or in other words, whether or not an anti–competitive behaviour stems from an agreement or a concerted practice. In the words of Art. 81, both terms aim at preventing the coordinated behaviour of the undertakings[114].

As was the fact in the Polypropylene cases, complex cartels exhibit the systematic anti–competitive behaviours formed by both agreements and concerted practices. Such behaviours could appear simultaneously or follow one another in a very long period between various undertakings contributing to the cartel itself in a different manner or efficiency in different time periods[115]. In the Polypropylene cases, it was obvious that the concertation concerned had characteristics of both

[112] C–49 / 92P, Anic v.Commission (1999), ECR I–4125, C–51 / 92P, Hercules v. Commission (1999), ECR I–4235, C–199 / 92, Hüls v. Commission (1999), ECR I–4287, C–200 / 92P, ICI v. Commission (1999), ECR I–4399, C–227 / 92P, Hoechst v. Commission (1999), ECR I–4443, C–234 / 92P, Shell v. Commission (1999), ECR I–4561, C–235 / 92P, Montecatini v. Commission (1999), ECR I–4539, C–245 / 92P, Chemie Linz v. Commission (1999), ECR I–4643, C–5 / 93, DSM v. Commission (1999), ECR I–4695.

[113] Cengiz 2006, p. 111.

[114] Whish 2005, p. 101.

[115] FAULL, J. and A. NIKPAY (1999) " The EC Law of Competition", First Edition, Oxford University Press, p. 79

agreements and concerted practices. However, because the components or results of all agreements and concerted practices put into effect in a complex cartel were fully affiliated with each other, it was difficult to make sure the starting point of an agreement or a concerted practice or to differentiate the results of each agreement or concerted practice[116].

Due to the framework of this difficulty, according to the Commission, in the case of a complex cartel, Art. 81 does not require the precise classification of whether the infringements stemmed from agreements or concerted practices. As a result, the Commission held that since there is no need to specifically classify the infringements as agreements or concerted practices and since Art. 81 does not include any legal differentiation between the treatment of concerted practices and agreements, the concept of concerted practices does not require the implementation of concertation creating anti–competitive effects on the market. Hence, the concertation can be punished based on merely its anti–competitive object.

The appellant undertakings alleged that although an agreement would be punished regardless of its effect by the mere reason of its anti–competitive object, a concerted practice caught by Art. 81 requires, besides the proof of its anti–competitive object, subsequent conduct ensuring the implementation of concertation in the market[117]. In the Hüls case[118], one of the Polypropylene cases, the ECJ verified the appellants' argument, stating that *"the concept of concerted practice, ... implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two"*[119]. Nonetheless, it ruled that *"a concerted practice is caught by Art.81, even in the absence of anti–competitive effects on the market"*[120] and it is *"prohibited, regardless of their effect, when they have an anti–competitive object"*[121]. Once the Commission proves that the undertakings contacting each other have the purpose of restricting competition, it does not have to submit further proof regarding the subsequent conduct of the concertation and effects of the conduct on the market since there is a presumption that the concertation has been followed by the parallel behaviour of the undertakings concerned[122].

[116] Faull and Nikpay 1999, p. 79–80, Jones and Sufrin 2004, p. 151.
[117] Jones and Sufrin 2004, p. 152.
[118] C–199/92P, Hüls AG v. Commission (1999), ECR I–4287.
[119] Ibid., para. 161.
[120] Ibid., para. 163.
[121] Ibid., para. 164.
[122] Ibid., para. 167, Van Bael and Bellis 2005, p. 52, Whish 2005, p. 102.

The reason for the creation of this presumption[123] was that when the undertakings concert with each other on a regular basis over a long period of time, they take into account the information exchanged with their competitors with a view to determining their conduct on the market[124]. In view of this presumption, the undertakings concerned must prove the absolute nonexistence of the contemplated course of action, and that their own conduct on the market was not affected in any form whatsoever by the information gained through concertation[125].

As a result, the ECJ held that, contrary to the Commission's view, the concept of concerted practice differs from the concept of agreement on the ground that the former is formed by both concertation and anti-competitive parallel behaviours on the market. In light of this principle, it would easily be assumed that the parallel behaviour implemented in accordance with the concertation is the essential element of the concept of concerted practice. However, through the above mentioned presumption, the ECJ has put this essential element out of operation because it seems ambigious to establish the conditions in which the conduct of the undertaking was not affected in any form whatsoever by the information gained through concertation. According to the ECJ's view, the only and decisive question to be considered, if the undertakings concerned cannot prove the contrary to the presumption, is whether or not the undertakings concerned have engaged in a concertation. Therefore, the distinction between the concepts of agreement and concerted practices is left on the paper. Parallel behaviours are not regarded by the ECJ as a necessary element to establish concerted practices among competitors[126].

3. THE PRESUMPTION OF CONCERTED PRACTICES IN THE TURKISH COMPETITION ACT

Art. 4 / (3) of the Turkish Competition Act states that *"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 undertakings are engaged in a concerted practice"*. According to Art. 4 / (4) *"each of the parties may*

[123] Please refer to p. 33–34 and p. 35–36 for the discussion of how the presumption established in the Hüls case provides guidance for the utilization of presumption of concerted practices in the Turkish Competition Act.

[124] C–199/92P, Hüls AG v. Commission (1999), ECR I–4287, para. 162.

[125] Van Gerven and Navarro Varona 1994, p. 599, Jones and Sufrin 2004, p. 152.

[126] WESSLEY, T. W. (2001), "Polpropylene Appeal Cases", C. M. L. R., Volume 38, p. 764–765, Jones and Sufrin 2004, p. 153.

relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts"[127]. Art. 4 / (3), (4), known as the presumption of concerted practices, aim at dealing with parallel behaviours observed in oligopolistic markets, especially in the absence of proof of concertation among competitors.

As it exists in a competition law regime, which follows both the primary and secondary legislation of EC competition law as well as the case law of the ECJ in the framework of Art. 39 of the Customs Union Decision[128], at first sight, the presumption of concerted practices in the Turkish Competition Act would seem a disparity from EC competition law. Such a presumption is not explicitly specified by the legislation in the field of EC competition law. However, the Woodpulp test and Dyestuffs test can be defined as counterparts of the presumption of concerted practices in the Turkish Competition Act, since they are utilized in EC competition law in determining whether parallel behaviours can be regarded as furnishing proof of concerted practices in the absence of proof of concertation among the competitors[129]. As a matter of fact, the official reasoning of the presumption of concerted practices is granted as *"in a legal system in which agreements limiting competition are prohibited, such agreements are made secretly and proving their existence becomes very hard and sometimes impossible...It has been aimed that the Law does not become inoperative due to difficulty of proof"*[130].

Since the tests created by the ECJ and the presumption of concerted practices in the Turkish Competition Act serve the same legal purpose, conditions of the utilization of the presumption of concerted practices should be consistent with the application of the case law of the ECJ. However, in 2005, the interpretation of the presumption of concerted practices made by the TCB in the case of "Bread Yeast III"[131] led to an artificial disparity between EC and Turkish competition law regime.

Parallel behaviours covered by Art. 4 / (3) regarding price changes, balance of supply and demand and partition of the areas of activity are initially

[127] Available at http://www.rekabet.gov.tr/word/ekanun.doc, last visited on 01.03.2009.
[128] Please refer to section 1. INTRODUCTION.
[129] Please refer to section 2.3.1 and 2.3.3 for a detailed discussion of this issue.
[130] Reasoning of Art. 4 of the Turkish Competition Act, "Record Book of Grand National Assembly of Turkey", 10.05.1993. Please refer to http://www.cade.gov.br/Internacional/OECD/DAF_COMP_GF_WD(2006)17_ENG.pdf for its official translation, p. 4.
[131] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23.09.2005.

considered before dealing with the controversial interpretation and the proper utilization of the presumption of concerted practices.

3.1. Parallel Behaviours Triggering the Utilization of the Presumption of Concerted Practices

3.1.1. Market Conducts Regarding Price Changes

According to Art. 4 / (3) of the Turkish Competition Act, price changes in a given market trigger the utilization of the presumption of concerted practices in cases where the price changes in question resemble those observed in an anti–competitive market. The TCB must prove the price changes that are deemed anti–competitive by demonstrating[132]

- predatory price cutting or price increases collectively introduced by the competitors at the same date or substantially contemporaneous, and/or at the same percentage or at very similar percentages, or
- price rigidity in a given market during given periods of time, or
- the same modalities of payment or the same installment plan introduced by the competitors.

3.1.2. Market Conducts Regarding Balance of Supply and Demand

- Decrease of manufacturing capacity collectively put into effect on the same date or on very close dates by the competitors, or
- the limitation of supply introduced synchronously and collectively by the competitors

fall within Art. 4 / (3) of the Turkish Competition Act as types of anti–competitive market conducts, which must be demonstrated by the TCB[133].

3.1.3. Parallel Behaviours Regarding Partition of the Areas of Activity

Proving anti–competitive market conduct regarding the partition of the areas of activity among competitors is much harder than proving such conduct as to the balance of supply and demand or price changes. When deciding on the alleged market partitioning, it is hard to benefit from a tangible, measurable, comparable, or supportable instrument such as prices or the statistics obtained from inside the undertakings concerned. As a result of the absence of such an instrument, the

[132] GÜRKAYNAK, G. (2001), "The Presumption of Concerted Practice in Turkish Competition Law: An Institution of Legal Uncertainty With an Uncertain Future", available at www.geocities.com/gonencgurkaynak/Research.html., last visited on 28.02.2009, p. 5, İkizler 2005, p. 312.
[133] İkizler 2005, p. 312.

TCB shall answer the question of whether some of the competitors prudently behaved by withdrawing from the market concerned or abstaining from engaging in competition. To do so, it shall consider the distribution capacity of the undertakings, reasons for changing the areas of distribution and their activity, and whether the market share can be increased by remaining active in that market[134].

Types of anti–competitive market conduct observed among competitors in a shared market are as follows[135]:

- collective rejection of establishing distributorships in a given territory or each other's territory, or
- collective rejection of supplying to given territories or collective rejection of demands coming from customers operating in a given area.

All market conducts in each group listed above in light of Art. 4 / (3) of the Turkish Competition Act, prove that the subject matter in each group consists of parallel behaviours collectively introduced on the same date or on very close dates. In this framework, in the absence of evidence of concertation, the presumption of concerted practices aims at inferring concertation among competitors from only parallel behaviours if such behaviours bear resemblance to those observed in anti–competitive markets[136]. Indeed, the reference to similarity with an anti–competitive market in the presumption of concerted practices clearly corresponds to the criteria of "the normal conditions of market"[137] established by the ECJ in the Dyestuffs case[138]. However, the ECJ has already departed from the utilization of the Dyestuffs test by establishing the Woodpulp test and the criteria of "the only plausible explanation". Therefore, the TCB should follow the Woodpulp test in deciding on the legality of parallel behaviours in question since the ECJ requires different standards than the Dyestuffs test[139].

3.2. Literal Construction of the Presumption of Concerted Practices Exercised by the Turkish Competition Board

A decision[140] made by the TCB demonstrated that, in the absence of proof of concertation, the mere demonstration of parallel behaviours observed in a given market and in a given period is a sufficient tool in establishing the presumption of concerted practices. Then, according to Art. 4 / (4) of the Turkish Competition

[134] Gürkaynak, G. 2001, p. 6–7.
[135] İkizler 2005, p. 312–313.
[136] Ibid., p. 313.
[137] Case 48/69, ICI v. Commission (1972) ECR 619, para. 66.
[138] İkizler 2005, p. 313.
[139] Please refer to section 2.3.3. and 2.4. for a detailed discussion of this issue.
[140] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005.

Act, the TCB shifted the burden of proof to the undertakings involved and expected economic and rational justifications that parallel behaviours had not arisen from collusive cooperation of the competitors but from their own independent and unilateral market strategies[141].

Indeed, the literal construction of the presumption of concerted practices allows such an application. Due to its uncertain scope, the reference to "the similarity with anti–competitive markets" can catch all types of parallel behaviours[142] specified in Art. 4 / (3) of the Turkish Competition Act. Because such behaviours are inherent in a market where conditions of imperfect competition prevail, and the operation in imperfect competition could lead to an effect on that market which could also be observable on an anti–competitive market. Under these circumstances, it is clear that such an interpretation of the presumption of concerted practices does not differentiate between the concepts of concerted practices and lawful conscious parallelism and, therefore, contradicts with the case law of the ECJ[143]. Because, by means of the utilization of its literal construction, the TCB does not bear the burden of proving either that "concertation constitutes the only plausible explanation for parallel behaviors" or that such behaviours caused the restriction of competition in the market concerned.

According to Art. 40 of the Turkish Competition Act, "*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"*. As a result of Art. 40, an investigation shall not be initiated without serious doubt relating to an infringement of law. Therefore, proper initiation of an investigation requires findings strengthening the seriousness of the alleged violation and the probability of being punished[144]. At that point it must be noted that in competition law, the mere proof of parallel behaviours, without making a detailed market investigation, is never regarded as a convincing finding since such behaviours could appear in a non–collusive form by means of oligopolistic interdependency. Because of this economic reason, in the absence of a detailed market investigation, the mere demonstration of parallel behaviours is not a sufficient legal base to directly initiate an investigation. Therefore, the TCB should firstly initiate an inquiry report for the case based on merely parallel behaviours. It is clear that it is not possible to utilize the presumption of concerted practices with a view to shifting

[141] The wording of the presumption of concerted practices is provided above under section 3.
[142] Please refer to section 3.1. for a detailed discussion of this issue.
[143] Please refer to section 2.3. for a detailed discussion of this issue.
[144] Gürkaynak 2001, p. 19.

the burden of proof to the undertakings concerned in the absence of proof of concertation and a detailed market analysis made by the TCB. Besides, Art. 27 of the Turkish Competition Act[145] compels the TCB to carry out a research regarding alleged violations of this Act. The existence of such a presumption shall not negate this duty of the TCB. As being the only and fully authorized body, its decision shall not be based on only the arguments submitted by the investigated parties[146]. Accordingly, it is clear that even though the literal construction of the presumption of concerted practices allows this controversial utilization, it is not lawful to activate the presumption concerned upon the mere demonstration of parallel behaviours. In addition, because of the absence of a tangible instrument, parallel behaviours regarding partition of the areas of activity can never be proved without examining the economic interests of the undertakings. If this examination were not carried out, there would not be any findings other than suppositions adducing market sharing[147].

The main unlawful result of this interpretation is the violation of "the presumption of innocence" specified in Art. 6 / (2) of the European Convention on Human Rights[148] and Art. 38 / (4) of the Constitution of the Republic of Turkey[149]. Since the ECJ recognized the "presumption of innocence" in the Hüls case for the undertakings, which may incur a fine at the end of the proceedings due to the violation of competition rules, it is also applicable before the TCB and the Council of State on the ground that "case law of the ECJ shall be applied in the Republic of Turkey" under Art. 39 / (2), (a) of the Customs Union Decision[150].

On the other hand, even if Turkish competition law regime were not absolutely bound with EC competition law, the principle of the "presumption of innocence" would be applicable to the proceedings with respect to the violations of the Turkish Competition Act since the Republic of Turkey is also a contracting state of the European Convention on Human Rights[151].

According to Art. 18 of the Turkish Competition Act, sanctions imposed on the undertakings have administrative character. However, according to case law of the European Court of Human Rights, the application of said convention is

[145] Available at http://www.rekabet.gov.tr/word/ekanun.doc, last visited on 01.03.2009.
[146] Gürkaynak 2001, p. 21.
[147] İkizler 2005, p. 313.
[148] Please refer to footnote 95.
[149] Please refer to footnote 2.
[150] The wording of Art. 39 of the Decision on implementing the final phase of the Customs Union between Turkey and the EC is provided above under section 1. INTRODUCTION.
[151] It was ratified by the Republic of Turkey on 18.05.1954.

not confined to sanctions placed in criminal law of the contracting states. The main issue is whether or not the sanction in question has penal character from the perspective of the European Convention on Human Rights, regardless of the seriousness of the penalty concerned. Those administrative sanctions regulated in the Turkish Competition Act threaten the undertakings to be incurred fines or periodic penalty payments. In addition to paying fines, the commercial prestige of the undertakings would be affected on the market. Therefore, due to their punitive and deterrent character, they also have a criminal nature in the ambit of Art. 6 of the European Convention on Human Rights and make the principle of the presumption of innocence applicable before the TCB and the Council of State under the case law of the European Court of Human Rights[152].

At first, it is possible to assume that the presumption of concerted practices obligates the undertakings involved to bear the burden of proving a negative. Because the undertakings shall prove the absence of concertation among each other without the existence of conclusive proof submitted by the TCB on alleged concertation. However, in most cases, the presumption of concerted practices would be a rebuttable one through proof of positive. The undertakings concerned can submit market–based justifications, such as oligopolistic interdependency, pursuance of the price leader, or cost–based justifications, such as runaway inflation, movement in foreign exchange rates or prices of raw material, etc. in order to overcome the burden of proof. However, even if it is a rebuttable presumption, its utilization by the TCB shall be compatible with the case law of the European Court of Human Rights under Art. 6 of the European Convention on Human Rights. The utilization of a presumption in the scope of Art. 6 of said convention shall be constrained within reasonable limits[153] and based on proper weighing of the evidence in question[154]. It prohibited the direct utilization of a presumption relied upon without carrying out "the power of assessment on the basis of the evidence adduced"[155]. If the TCB shifts the burden of proof to the undertakings upon the mere demonstration of parallel behaviours without engaging in a detailed investigation of market conditions and undertakings' possible justifications, the undertakings involved incur the burden of disproving the existence of concertation. In which case it is impossible to allege that the TCB fulfilled its power of assessment and the presumption of concerted practices is utilized within reasonable limits, since the burden of disproving an

[152] Case of Özturk v. Germany, Application no. 8544/79, 21.02.1984, para. 53, Case of Lutz v. Germany, Application no. 9912/82, 25.12.1987, para. 55.
[153] Case of Salabiaku v. France, Application no. 10519/83, 07.10.1988, para. 28.
[154] Case of Pham Hoang v. France, Application no. 13191/87, 25.09.1992, para. 36.
[155] Case of Salabiaku v. France, Application no. 10519 / 83, 07.10.1988, para. 30.

essential element of concerted practices – the existence of concertation – shall be borne by the undertakings in the absence of proof beyond reasonable doubt established by TCB.

At this point, it must be restated that according to the Woodpulp test, the Commission shall carry out its "power of assessment" by examining the market concerned in detail and taking into account objections and explanations of the undertakings. Moreover, the reference to *"unless concertation constitutes the only plausible explanation for such behaviours"* clearly requires the Commission, on the basis of proof beyond reasonable doubt, to establish the essential element of concerted practices called concertation.

In light of the precedents of the European Court of Human Rights, such an interpretation of the presumption of concerted practices, which does not require the TCB to carry out its power of assessment on the legality of parallel behaviours and establish the concertation, simply amounts to illegal direct utilization of a presumption. It illegally places the undertakings concerned under the burden of proof, violating "the presumption of innocence".

As a result, the literal interpretation of the presumption of concerted practices contradicts with legislative intent. The purpose of establishing such a presumption was to catch unlawful parallel behaviours, which is well–preserved under the cover of the difficulty of providing evidence of concertation. However, by means of the literal interpretation, it serves illegality by violating the presumption of innocence and threatening lawful conscious parallelism with being punished. The threat imposed by literal interpretation of the presumption in question would constitute a barrier impeding the natural operation of a non–collusive oligopoly. In such a case, the undertakings would produce market strategies not to maximize profits but to prevent the appearence of tacit coordination[156].

3.3. Interpretation of the Presumption of Concerted Practices in the Framework of Fitness for the Desired Purpose

In the absence of proof of concertation, the most appropriate application of the presumption of concerted practices would result from the interpretation ensuring a synthesis between its wording and the application of the case law of the ECJ. The CRAM and Rheinzink case[157] serves as a guide, even if this case did not specify

[156] ATİYAS İ. and G. GÜRKAYNAK (2006), "Presumption of Concerted Practices: A Legal and Economic Analysis", available at http://myweb.sabanciuniv.edu/izak/files/2008/10/atiyas-gurkaynak-concerted-practice-may-2006.pdf, p. 13–14.

[157] Cases 29 and 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, (1984) ECR 1679.

shifting the burden of proof to the undertakings. In this case, the undertakings avoided liability by proof that could not have been noticeable by the Commission. Indeed, they justified their refusal to supply on the ground that their distributor had not made payments for previous deliveries[158]. In light of this case, in making the presumption of concerted practices fit for its purpose, it would be fair to allege that the TCB shall deal with noticeable facts in detail, begining with market conditions and possible alternative explanations resulting from market conditions. However, after detailed examinations, only if there is not a noticeable justification rebutting the alleged concertation, the TCB can trigger the presumption of concerted practices by utilizing parallel behaviours. The burden of proof would then be shifted to the undertakings to provide a justification which may be only they have knowledge[159]. The TCB must accurately analyze explanations and proof submitted by the undertakings to overcome the burden of proof.

It is safe to assume that this interpretation does not contradict the application of the case law of the ECJ and the desired purpose of the presumption. Because by means of a detailed market investigation, and taking into account all noticeable alternative explanations, lawful conscious parallelism cannot be included in the concept of concerted practices.

The interpretation of the presumption of concerted practices is a controversial subject in cases where there is no proof of concertation. However, its utilization would be beyond dispute in cases where there is documented evidence that cannot clearly establish concertation among the competitors, but indicates its signs. In such a case, if the documented evidence were seen as the trigger of parallel behaviours observed in a given market, the presumption of concerted practices should be activated and the burden of proof should be shifted to the undertakings concerned upon the proof of parallel behaviours without a need of further examination. The document first regarded as a sign of concertation would serve as furnishing proof of concertation upon the demonstration of parallel behaviours[160] since in light of the Polypropylene cases, there is a presumption that the concertation has been followed by the parallel behaviour of the undertakings concerned[161].

[158] Ibid., para. 18.
[159] İkizler 2005, p. 341–342.
[160] Atiyas and Gürkaynak 2006, p. 20–25.
[161] C–199/92P, Hüls AG v. Commission (1999), ECR I–4287, para. 161, 163, 164, 167.

4. THE EVALUATION OF DECISIONS OF THE TCB ON THE UTILIZATION OF THE PRESUMPTION OF CONCERTED PRACTICES

4.1. Previous Decisions Avoiding the Utilization of the Literal Construction of the Presumption of Concerted Practices

The common feature of the decisions[162] made in this period is that the TCB did not apply to the presumption of concerted practices by relying on parallel behaviours in the absence of proof of concertation. Before reaching a decision, in order to determine the legality of parallel behaviours, it regularly carried out detailed market investigations and dealt with alternative explanations resulting from those investigations. In accordance with the case law of the ECJ[163] the TCB approved that parallel behaviours resulting from oligopolistic interdependency do not fall within the concept of concerted practices in the absence of proof of concertation.

In 2000, the TCB initiated an investigation against bread yeast manufacturers[164]. It alleged that the undertakings concerted with each other to increase the factory sales price and dealer sales price of the bread yeast.

In the course of spot inspections, the TCB did not find documented evidence related to the alleged concertation on factory sales price. As a result of the detailed market investigation, the TCB found that there were a small number of equally large manufacturers manufacturing a homogeneous production. There was no brand dependence on the market, and more than one brand was used by the same bakery at the same time. Therefore, customers did not depend on only one manufacturer and could easily decide to purchase from other manufacturers. In addition, frequent contacts between manufacturers and customers heightened awareness and ensured transparency of the market in question. According to the TCB, these findings demonstrated the oligopolistic structure of the bread yeast market. It added that an undertaking operating in an oligopoly must take into account the probable reactions of its competitors because the success of each undertaking depends on monitoring the other's reactions. As a result, in such a market, the appearance of parallel behaviours was the regular result of the natural operation of the undertakings. Accordingly, the TCB approved that oligopolistic

[162] Decisions of the TCB; "Turkcell–Telsim", referenced no. 99–57/614–391, dated 14.12.1999, "Milk", referenced no. 00–11/109–54, dated 23.03.2000, "Bread Yeast I", referenced no. 00–24/255–138, dated 27.06.2000, "Bread Yeast II", referenced no. 02–46 / 557–227, dated 01.03.2002, "PMSA–JTI", referenced no. 02–80/937–385, dated 24.12.2002.

[163] Please refer to section 2.3. for a detailed discussion of this issue.

[164] Decision of the TCB "Bread Yeast I", referenced no. 00–24/255–138, dated 27.06.2000.

interdependency could result in non–collusive, legitimate parallel behaviours. It held that even though the parallel price increases in question were not connected with cost factors, they did not emanate from concerted practices. Due to the facts that the oligopolistic interdependency on the bread yeast market enabled the undertakings to follow one another regarding price increases, that there was not a direct or indirect contact removing the uncertainty among the competitors, and that the parallel price increases observed were under the consumer price index announced by the State Statistic Institute in the course of time period investigated, alleged concerted practices on factory sales price against the undertakings were dismissed[165].

In this case, the TCB clearly excluded the conscious, but non–collusive, parallel behaviours resulting from oligopolistic interdependency from the scope of concerted practices, stating that although they form important findings of concerted practices, conscious parallel behaviours resulting from oligopolistic interdependency cannot by themselves be regarded as collusion without being reinforced by corroborative evidence. It is clear that the application of the TCB was compatible with the application of the ECJ. The TCB carried out a detailed market investigation and considered oligopolistic interdependency as an economic justification of parallel behaviours. This decision, however, is still open to criticism. The undertakings concerned had activated their price increases through parallel price announcements made to customers. In its decision, the TCB did not deal with the question of whether the parallel price announcements had constituted an indirect contact among the competitors and made the market in question artificially transparent, or whether announcements concerned had an economic or rational justification[166].

In the same investigation, the TCB found documentary evidence demonstrating concertation among competitors with a view to increasing dealer sales prices. The content of those documents was clearly anti–competitive. Exchange of mail and meetings held among the competitors revealed the existence of bargains on dealer sales prices. The TCB, upon the proof of anti–competitive objects of contacts, established concerted practices among the competitors without proving subsequent conducts of the undertakings. This application of the TCB was fully compatible with the presumption established by the ECJ in the Polypropylene cases[167]. According to this presumption, the undertakings concerned have the burden of disproving the anti–competitive content of the documents found. One of the undertakings alleged that it had not attended the

[165] Ibid., p. 32–33.
[166] Toy 2004, p. 60.
[167] Please refer to section 2.5. for a detailed discussion of this issue.

meeting with an anti–competitive intent; however, contents of the documents did not justify this allegation, since its agent actively participated in bargains on dealer sales prices. The common defense of the undertakings was that concertation had not been followed by subsequent conduct. This allegation was justifiable, but not sufficient to disprove the accusation because there existed some documents proving the continuous effort of the undertakings to increase the dealer sales prices, even though they had not succeeded in increasing the price. As a result, they were not able to prove that their own conduct on the market had not been affected in any form whatsoever by the information gained through concertation[168].

In the Newspaper decision[169] of the TCB, parallel price increases introduced at the same date and the same percentage were the subject of the investigation. This case involved three biggest newspapers in Turkey. The TCB found that these newspapers constituted a submarket in the newspaper market because their market shares, prices, ad revenues, net sales, and editorial staffs differed from the other newspapers operating on the market. The submarket in question was inherently transparent due to the constant contact between the distribution channels of the undertakings concerned and newspaper stalls. Although the production was not homogeneous, but highly substitutable, the TCB accepted the oligopolistic structure of the submarket concerned[170]. In this case, the TCB defined elements of concerted practices as follows[171]:

- *"There must have been positive contacts between the parties such as meetings, discussions, exchanges of information, which are generally expressed orally or in writing,*
- *such contacts must have been aimed at influencing the market behaviour and especially eliminating the uncertainty of an undertaking's future competitive behaviour in advance,*
- *they must have influenced or changed the commercial behaviour of the undertaking concerned in a manner that cannot fully be explained with reference to competitive effects."*

These elements were clearly formed in parallel with elements established by the case law of the ECJ. Besides, it is clear from the illustration of the positive contacts that the point of origin of the elements determined by the TCB was collusion.

[168] Atiyas and Gürkaynak 2006, p. 24–25.
[169] Decision of TCB, "Newspaper", referenced no. 00–26/291–161, dated 17.07.2000.
[170] Ibid., p. 6, 22.
[171] Ibid., p. 15, Atiyas and Gürkaynak 2006, p. 23.

The Newspaper decision of the TCB has special feature regarding the utilization of the presumption of concerted practices. It ruled that to activate the presumption concerned in an investigation held in an oligopoly, *"it is not sufficient to claim that prices were set in a manner similar to price–setting in markets where competition is restricted. In addition to this, it is necessary to prove the existence of a relationship between the undertakings that would not have existed under competitive conditions and that prevented them from acting independently"*[172]. Accordingly, it is clear that the TCB rejected the utilization of the presumption of concerted practices upon the mere demonstration of parallel behaviours implying the restriction of competition. Therefore, it is approved that in the absence of proof of concertation the detailed economic findings resulting from explanations of market conditions must prove beyond reasonable doubt the existence of relation between competitors. The presumption of concerted practices can be triggered only if this process is fulfilled by the TCB. The undertakings should then come up with a justification rebutting the existence of concertation.

In addition to the above, the criteria established shed fresh light on the utilization of said presumption in cases where the existence of a relationship is proved but its content or object remain ambigious. In light of the interpretation made by the TCB on the utilization of said presumption, if there existed some documentary findings, which do not clearly prove concertation among competitors but demonstrate the existence of relationship, upon the proof of parallel behaviours on the market concerned, the presumption of concerted practices shall be activated and the undertakings shall disprove the alleged concertation among each other.

When the criteria established in the Newspaper decision on the utilization of the presumption of concerted practices and the reference to "positive contacts" regarding the elements of concerted practices are considered together, it was evident that the TCB definitely excluded the conscious, but non–collusive, parallel behaviours from the scope of concerted practices. "Positive contacts" can be defined as the main element differentiating lawful conscious parallelism from the scope of concerted practices. In this case, the undertakings alleged that simultaneous parallel price increases can be explained by market transparency. The TCB also confirmed the transparent structure of the submarket concerned. However, during down raids, the TCB found documentary evidence demonstrating the exchange of information on prices and promotions contemplated. Indeed, simultaneous parallel price increases had been observed on

[172] Decision of TCB, "Newspaper", referenced no. 00–26/291–161, dated 17.07.2000, p. 15, Atiyas and Gürkaynak 2006, p. 23–24.

the market immediately following meetings held among the undertakings. Therefore, transparent market structure did not enable the undertakings concerned to justify parallel price increases due to the existence of documentary evidence demonstrating clear anti–competitive objects of the undertakings concerned.

In the PMSA–JTI[173] decision, parallel behaviours resulting from oligopolistic interdependency were considered within the framework of price leadership. Parallel price increases in the cigarette market introduced on the same date or on very close dates were subject of the investigation. Market analyses carried out by the TCB demonstrated that the market concerned was a concentrated oligopoly involving three undertakings, one of which was the state–controlled price leader. Due to relevant legislation regulating the cigarette market, the state–controlled price leader was entitled to oversee the manufacturing of the respondent undertakings. Direct inside information obtained by the price leader from the respondent undertakings made the market transparent. In addition, the state–controlled price leader was in a dominant position in the market concerned and able to put pressure on the prices charged. As a result, the market structure obliged the respondents to follow the price leader. Even though in the course of dawn raids, the TCB found documents demonstrating the existence of a relationship between the respondents, it was clear that the documents did not indicate any anti–competitive object between the undertakings concerned. Accordingly, they were excluded from the investigation. As a result the only finding at hand was observed parallel behaviours in an oligopoly[174]. The TCB held that because the market concerned has a concentrated oligopolistic structure with high transparency, the undertakings concerned constantly and easily monitor one another and therefore can gain information regarding each other's conduct, in particular on the price movements of rivals. In a market where a few undertakings are active, interdependency arises, resulting in an influence on rivals' price strategies. Therefore, the market structure in question constitutes a balance among a few undertakings in pursuance of the price leader. When a follower increases the price, all others are informed and catch the new trend in price[175]. It concluded that *"there is no sufficient evidence to prove that the price parallelism established during the investigation is the result of concerted practices"*[176].

Although the literal construction of the presumption of concerted practices allows its utilization upon the mere demonstration of parallel

[173] Decision of TCB, "PMSA–JTI", referenced no. 02–80/937–385, dated 24.12.2002.
[174] Ibid., p. 21.
[175] Ibid., p. 22.
[176] Ibid., p. 23.

behaviours, the TCB did not rely on said presumption. Instead it followed the principle established in the case of Newspaper that the mere proof of parallel behaviours is not a sufficient condition in triggering the presumption of concerted practices. Then, in accordance with the case law of the ECJ, it examined whether or not price leadership resulting from oligopolistic interdependency exists between the competitors as an economic justification of the appearance of parallel behaviours.

This settled application of the TCB related to the treatment of parallel behaviours resulting from oligopolistic interdependency and the utilization of the presumption of concerted practices was changed in 2005. The decision of the TCB illustrating an aggressive literal construction of said presumption will be adressed next.

4.2. Decision of the Turkish Competition Board Illustrating the Literal Construction of the Presumption of Concerted Practices

Parallel price increases observed on the bread yeast market were, for the third time, the subject of investigation in the absence of proof of concertation[177]. In the case of Bread Yeast III, the TCB reapproved its tight oligopolistic structure. Indeed, there existed a small number of undertakings operating on a transparent market without product differentiation and brand loyalty. The undertakings in question were not able to create competition by advertising or product development. Therefore, the only competitive element on the bread yeast market was the price. Nonetheless, due to the absence of product differentiation and brand loyalty, the customers were continuously in contact with all bread yeast suppliers. To obtain the lowest price, the customers disclosed the prices set by the other competitors to each manufacturer. Therefore, the prices charged by the rivals had been easily gathered from the customers. As a result, a heightened awareness of prices had inherently emerged among the competitors[178].

The TCB stated that in an oligopoly where a homogeneous product is sold under high market transparency, an undertaking has to monitor and take into account its rivals' conduct. Such observation would result in realignment among the competitors in accordance with trends in the market. Therefore, the natural operation of an oligopoly could lead to non–collusive parallel behaviours, in particular parallel price movements, among the competitors. Nonetheless, as correctly pointed out by the TCB, even if there exists high market transparency and product homogeneity, it would still remain to be established whether the

[177] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005.
[178] Ibid., p. 5.

parallelism in question stems from oligopolistic interdependency or anti–competitive conduct of the competitors[179]. However, in this case, such a differentiation was not clearly established before punishing the undertakings concerned as the criterion determined to clarify this differentiation was whether or not the parallel price increases in question can be explained by the increase in inflation rate.

Indeed, parallel price increases were not explainable by the increase either in inflation rate or in cost. At that point, the decision of "Bread Yeast I"[180] must be evaluated. In that case, parallel price increases were also not connected with cost factors, as in the third investigation initiated against the same manufacturers. Nonetheless, the price increases had remained below the increase in inflation rate. Hence, the parallelism in question was also justified as a response to the increase in inflation rate.

As a result of the first investigation, on the basis of oligopolistic interdependency, the TCB had held that the appearance of parallel behaviours is the regular result of the natural operation of the undertakings in the bread yeast market. Therefore, it is clear that the only differentiation between these two investigations initiated under the same market conditions is that the parallel price increases in "Bread Yeast III" were considerably higher than the increase in the inflation rate[181]. Under the circumstances, contrary to its previous precedents, the TCB activated the presumption of concerted practices and shifted the burden of proof to the undertakings concerned. As a result it imposed fine merely by relying on proof of parallel behaviours in the absence of a detailed market investigation and evidence of concertation among the undertakings operating in a tight oligopoly.

It is impossible to evaluate "Bread Yeast III" without taking into account the previous precedents of the TCB and the case law of the ECJ. In the "Newspaper" decision, the TCB rejected the utilization of the presumption of concerted practices in an oligopoly upon the mere demonstration of parallel behaviours implying the restriction of competition[182]. However, in the view of the TCB, in "Bread Yeast III", it also established concertation among the competitors on the ground that there was no alternative explanation other than the concertation for parallel price increases initiated much above the increase in inflation rate[183].

[179] Ibid., p. 4.
[180] Decision of the TCB "Bread Yeast I", referenced no. 00–24/255–138, dated 27.06.2000.
[181] Parallel price increases in question were approximately thirty times bigger than the increase in inflation rate.
[182] Decision of TCB, "Newspaper", referenced no. 00–26/291–161, dated 17.07.2000, p. 15.
[183] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005, p. 39.

Supposedly, this form of wording is compatible with both the Woodpulp test created by the ECJ and the interpretation established in the Newspaper decision by the TCB. However, the content of the decision in question was in contradiction with both principles formed.

First, the TCB confirmed the tight oligopolistic structure of the bread yeast market, but did not evaluate the oligopolistic interdependency among the competitors in detail. Its decision was merely based on the high rate of parallel price increases over the increase in inflation rate. At that point, the test established in the Woodpulp case is clear. It determined that concerted practices cannot be established *"unless concertation constitutes the only plausible explanation for parallel behaviours"*[184]. In this framework, if there was a noticeable alternative justification, such as the probability of oligopolistic interdependency as was the case in Bread Yeast III, the concertation cannot be established beyond reasonable doubt until the existence of this alternative is disproved[185]. Since oligopolistic interdependency was not taken into account as an alternative explanation for the appearance of parallel behaviours in "Bread Yeast III", according to the Woodpulp test, concertation was not established by the TCB. Therefore, it is not possible to utilize the presumption of concerted practices in light of the principle established in the Newspaper decision.

In fact, if the TCB had carried out a detailed market analyses, it would have been possible to confirm the existence of oligopolistic interdependency among the undertakings concerned. The decision in question covered the price movements initiated in only a ten–month period. As a result of inadequate analyses of price movements in a very limited time period, the TCB overlooked the fierce price competition on the bread yeast market which had been terminated prior to the time period under investigation. At that time, bread yeast was sold under cost price. It is obvious that continuation of such a price trend would have been unbearable for the undertakings in question. In accordance with oligopolistic interdependency, lossmaking undertakings operating in this tight and highly transparent oligopoly had to take into account the price increases initiated by the competitors. As a result, this monitoring simply brought about the increase in prices. Under these circumstances, parallel price increases resulting from oligopolistic interdependency amounted to a business justification[186].

[184] Cases C–89, 114, 116 to 117, 125 to 129 / 85, A. Ahlstroem Osakeyhtiö and others v. Commission (1993), ECR I – 1307, para. 71.
[185] İkizler 2005, p. 337.
[186] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005, Dissenting Opinion of Mehmet Akif Ersin, p. 41.

Therefore, as the TCB established in Bread Yeast I, if the market investigation proves that parallel behaviours result from oligopolistic interdependency, undertakings concerned cannot be penalized unless documented evidence proves the concertation among the competitors. It should be pointed out that the Woodpulp test also supports this previous interpretation of the TCB[187].

Even though the first two charges against the same undertakings had been dismissed, the TCB in Bread Yeast III implied, by violating the presumption of innocence, the existence of a long–lasting cartel structure on the market in question. It stated that although these undertakings were investigated three times in the last six year, even a sole piece of documented evidence establishing the concertation on the parallelisms between factory sales prices was not found and it will not be brought to light without intercepting their phone calls[188].

The decision was mainly based on the fact that the rate of parallel price increases implemented had been considerably higher than the increase in inflation rate[189]. The TCB, without carrying out a detailed market investigation and duly taking into account three expert reports submitted by the undertakings in question[190], only made a simple comparison between the rate of parallel price increases and the inflation rate in establishing concerted practices and shifting the burden of proof. By doing so, the TCB did not exercise its power of assessment on the market conditions. It also did not deal with alternative explanations submitted by the undertakings. Such an application was a clear illustration of a direct utilization of the presumption of concerted practices and of the violation of the presumption of innocence under the case law of the European Court of Human Rights[191].

The decision of "Bread Yeast III" clearly demonstrated that the utilization of the presumption of concerted practices based on the mere proof of parallel behaviours contradicts the purpose of the presumption of concerted practices and the case law of the ECJ, since it places the conscious, but non–collusive, parallel behaviours resulting from oligopolistic interdependency under the scope of concerted practices.

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[187] Please refer to section 2.4. for a detailed discussion of this issue.
[188] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005, p. 38, para. 1500.
[189] Please refer to footnote 179.
[190] Decision of the TCB, "Bread Yeast III", referenced no. 05–60/896–241, dated 23. 09. 2005, Dissenting Opinion of Mehmet Akif Ersin, p. 41.
[191] Please refer to section 3.2. for a detailed discussion of this issue.

5. CONCLUSION

In competition law, in which economic data looms large, it is impossible to exclude economic findings resulting from market conditions. In particular, in cases where no clear proof of concertation exists, detailed economic analyses become the decisive factor to determine the violation of law. Because anti–competitive agreements are made confidentially and the parties involved in a cartel put forth an effort to suppress evidence. Hence, the presumption of concerted practices, like its counterparts created in Dyestuffs and Woodpulp, is a remarkable weapon against secret cartels.

Bread Yeast III was the first decision the TCB established concerted practices among competitors in the absence of proof of concertation. Unfortunately, reversing in part the decision in question, the Council of State affirmed the utilization of the presumption of concerted practices without examining whether market investigation in detail has been fulfilled[192]. Finally in its decision in which Bread Yeast III was reexamined[193] upon the judgments of Council of State the TCB demonstrated that Bread Yeast III will be a precedent in cases where there is no proof of concertation.

On the one hand, in the absence of proof of concertation, drawing a clear line between secret cartels and parallel behaviors observed in an oligopoly is one of the most difficult issues in competition law. Removal of this difficulty is not legally possible by regarding the mere demonstration of parallel behaviours as furnishing proof of concerted practices, since such an unreasonable standard of proof exercised by the TCB violates the presumption of innocence and places non–collusive courses of conduct of the undertakings under the threat of punishment.

On the other hand because it is an absolute legal power, it shall be invoked – in the absence of documented evidence – in light of economic findings demonstrating the concertation. Therefore the existence of other evidence in addition to parallel behaviours shall not be necessary to activate the presumption of concerted practices because proof of concertation plus parallel behaviours already amount to concerted practices without any necessity of utilizing the presumption concerned. Such a standart would make the presumption a useless/ineffective legal power. As long as the TCB carries out, going well beyond the mere demonstration of parallel behaviours, a detailed market

[192] Judgments of the Council of State, decree no 2008/4389 – docket no 2006/1381, decree no 2008/4390 – docket no 2006/1031, decree no 2008/4391 – docket no 2006/1521, decree no 2008/4392 – docket no 2006/1150, dated 23.05.2008.

[193] Decision of the TCB, referenced no. 08–63/1050–409, dated 12.11.2008.

investigation and deals with possible market-based explanations before activating the presumption of concerted practices, it remains as a remarkable legal power against cartels, "the supreme evil of antitrust"[194].

[194] The U.S Supreme Court has referred to cartels in the case of "Verizon Communications Inc. v. Law Offices of Curtis V Trinko.

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