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Reassessment by Turkish Competition Board after Administrative Court's annulment decision in predatory pricing case

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Introduction

In February 2022, the Turkish Competition Board (the Board) concluded a preliminary investigation process that it had reinitiated upon the Ankara 17th Administrative Court's (the Administrative Court's) annulment judgment⁽¹⁾ of the Board's initial preliminary investigation decision⁽²⁾ regarding allegations against Toypa Mağazacılık Ticaret AŞ (Toypa). The allegations were that Toypa had violated article 6 of Law No. 4054 on the Protection of the Competition⁽³⁾ (Law No. 4054) by abusing its dominant position within the retail toy sales market through predatory pricing practices.

The Board decided against a full-bodied investigation.⁽⁴⁾ The decision created an important precedent embodying the Board's approach towards abuse of dominance analyses.

This article presents an overview of the circumstances leading to the second preliminary investigation process concerning Toypa by examining:

- the Board's first decision in 2019, which indicated that the alleged conduct adopted by Toypa did not violate article 6 of Law No. 4054 without conducting an analysis of its dominant position within the relevant product market;
- the Administrative Court's decision, which nullified the Board's first decision due to the lack of analysis concerning Toypa's dominant position and discount practices; and
- the Board's second decision in 2022, which once again concluded that Toypa had not violated article 6, having taken into consideration all the necessary parameters for a comprehensive evaluation this time around.

Facts

In May 2019, Armağan Oyuncak Sanayi ve Ticaret AŞ (Armağan) claimed that Toypa had violated article 6 of Law No. 4054 by abusing its dominant position and implementing predatory pricing. The allegations stated that Armağan competed with Toypa on the brick-and-mortar and online sales channels within the toy specialty retail market. Armağan submitted supporting data from 2018, which showed that there were 28 undertakings active in the toy specialty retailing market. Based on the number of brick-and-mortar stores, Toypa had the dominant position in this market, while Armağan was the second biggest player.

Armağan claimed to have a significant number of stores located in as many common shopping centres as Toypa's stores. According to Armağan, Toypa started applying discounts on Hasbro, Lego, Mattel and GP branded products at its Toyzzshop stores in May 2018, all of which have high market shares and low profit margins. Toypa allegedly advertised these discounts as a "20% discount on popular brands". Armağan stated that upon observing Toypa's discount practices, it had to apply unplanned discounts on its own products in May 2018, and that while Armağan had reverted to the recommended retail prices in early June 2018, Toypa had continued its 20% discount prices on these brands, which led Armağan to reapply discounts on certain products sold in common locations as those of Toypa and deemed to be of "high risk". Armağan claimed that these discounts, which were made under the competitive pressure of Toypa, led Armağan to suffer losses.

Armağan further claimed that Toypa's predatory and restrictive regional discount practices had:

- forced Armağan to sell its products below the profit margin;
- imposed losses on Armağan, as it could not effectively compete with Toypa's prices; and
- obstructed entry to and development of the relevant market.

Toypa's practices were also claimed to violate article 9 of the Law on the Regulation of Retail Trade, which prohibits businesses applying discounts for undetermined durations.⁽⁵⁾

The claims included that Toypa's alleged predatory pricing practices were only enforced in Toyzzshop stores located in the same shopping centres as Armağan's stores, and that the stores which were not in close proximity to those of Armağan had no sales discounts.

First preliminary investigation

Analysis regarding the relevant market

When determining the relevant product market, the Board argued that there were no barriers to entry in the investigated market due to:

- the applicable regulations;
- intellectual and industrial rights;
- advanced technology and activities;
- vertical integration;
- access to primary commodities;
- advertising;
- brand recognition;
- product variation; and
- financial and economic power of the retail market.

The Board also pointed out the presence of multiple players, both in traditional and online channels, and indicated that toys sold under so-called brand names could be sold in a variety of stores, such as local or chain stores, or toy specialty stores. Another reason supporting this argument was that revenue data collected from competing undertakings within this market indicated an upward trend each year, which is a strong indicator of a developing market possessing availability when it comes to new entrants.

The Board determined that many players within the "retail toy sales market" carried out their activities via both traditional and online channels. The evidence suggested that while local stores primarily utilised traditional routes for their sales (such as toy stores or stationery shops), chain stores frequently utilised both traditional and online sales channels.

The Board observed that online sales channels have created competitive pressure over traditional sales channels as internet usage becomes widespread and consumers view online sales channels as a substitute of traditional channels. That in mind, although Toypa's sales were carried out over both traditional and online sales channels, as the case at hand concerned sales and discount practices implemented within physical stores located in shopping centres, the Board chose not to include online channels in its analysis for the relevant product market.

Upon examining previous Board decisions concerning undertakings that sold products most like those at hand, the Board stated that it was possible to define the relevant product market rather widely or narrowly, depending on the circumstances and based on a case-by-case approach. The Board referred to its *Nezih Kitap*⁽⁶⁾ decision where the relevant product market was defined as the "retail market where books, music, movies, electronics, stationery, toys and various souvenirs are sold in the same store". The Board noted that although this decision did not necessitate the segmentation of downstream markets, a division could be determined where warranted. Similarly, the Board noted its *D&R* decisions where wider relevant product market definitions were made for the recorded music products and home video sales market,⁽⁷⁾ and the retail book sales market.⁽⁸⁾

On the other hand, the Board also referenced its *Tesco Kipa* decision,⁽⁹⁾ where it held that although Tesco Kipa Kitle Pazarlama Ticaret ve Gıda Sanayi AŞ had a wide product selection, the relevant product market had to be defined as the "retail mobile phone sales services" because the allegations concerned anti-competitive practices relating to mobile phone retail.

In light of this, the Board found it appropriate to define the relevant product market for the case at hand as the "retail toy sales market" since Armağan's complaints focused on Toypa's toy products, while also highlighting the difficulty in detecting Toypa's competitors in other product categories.

As for the relevant geographic market, the Board emphasised that while some of its previous decisions⁽¹⁰⁾ concerning retail markets defined the relevant geographic markets based on cities, other precedents⁽¹¹⁾ adopted a district-based⁽¹²⁾ approach. Considering how the case at hand concerned Toypa's predatory pricing practices in its stores located in common shopping centres as Armağan's stores, the Board listed 31 shopping centres at which Toyzzhop and Armağan's stores both made sales. The Board believed that while it was possible to define a relevant geographic market for each of the shopping centres within a certain isochronal⁽¹³⁾ or to cover the city in which each shopping centre was located, defining a relevant geographic market would not affect the evaluations for the case at hand, and therefore was not necessary.

The Board's evaluation

Article 6 of Law No. 4054 states that abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country, on their own or through agreements with others or through concerted practices, is illegal and prohibited.⁽¹⁴⁾ Further, as per paragraph 7 of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (the Guidelines on Abuse of Dominance),⁽¹⁵⁾ for a behaviour that is investigated within the scope of article 6 of Law No. 4054 to constitute a violation, the investigated undertaking must be in a dominant position in the relevant market, and the behaviour must constitute abuse. Both conditions must exist for an article 6 violation to be found. As such, if the Board finds that the investigated undertaking is not in a dominant position, it may choose not to analyse the other factors and decide that the investigated undertaking is not in violation of article 6. Based on this, the Board's analysis did not include an evaluation of Toypa's dominant position, and instead focused on whether Toypa had abused its dominant position by implementing predatory pricing.

The Board stated that one of the abusive behaviours investigated under article 6 of Law No. 4054 is predatory pricing. The Board referred to the definition of predatory pricing in the Guidelines on Abuse of Dominance, which reads as follows:

predatory pricing is an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behaviour.

The Board stated three main criteria for predatory pricing to constitute a violation in terms of competition law:

- The predatory pricing scheme is employed by a dominant undertaking.
- The dominant incurs losses in the short-term with its below cost pricing practice (sacrifice).
- The conduct in question is likely to lead to market foreclosure for an equally efficient competitor.

The Board's analyses in terms of predatory pricing are generally in line with the EU approach adopted in the *AKZO* decision.⁽¹⁶⁾ In *AKZO*,

the Court of Justice of the European Union (CJEU) held that prices below average variable cost⁽¹⁷⁾ (AVC) by a dominant undertaking will be presumed abusive, while prices below average total cost⁽¹⁸⁾ (ATC) but above AVC will be regarded as abusive if they are part of a strategic plan to eliminate competitors. According to the *AKZO* test,⁽¹⁹⁾ there are two separate criteria for determining whether the prices in a particular case are predatory. If the price that the investigated undertaking imposes is below its AVC, then it is presumed that the undertaking is abusing its dominant position, since each item produced and sold entails a loss for the undertaking. In such a case, there is no need to establish any conceivable economic purpose for the pricing strategy other than the elimination of a competitor. As to the second criterion, the CJEU concluded that if the price that the undertaking imposes is above its AVC but below its ATC, and an intention on the part of the undertaking to eliminate the competition through its pricing strategy is proved, then the undertaking violates competition law rules.⁽²⁰⁾

Considering the foregoing, the Board evaluated that, given Toypa's wide product portfolio, it would not be possible to compare unit retail prices and ATCs of Hasbro, Lego, Mattel and GP branded products sold by Toypa. Therefore, the Board's price-cost analysis substituted unit retail price with the revenue generated from each relevant product group (10 best-selling products of each brand), and ATC with the total cost incurred to generate the revenue from 10 best-selling products of each brand.

The Board initially compared the revenue generated from the sale of Toypa's 10 most demanded products from each of the Hasbro, Lego, Mattel and GP brands and the total cost incurred to generate this revenue from these products for the period between January 2018 and June 2019. Based on this, the Board observed that the revenue generated from each relevant product group did not fall below the total cost incurred to generate such revenue for this period. Moreover, it was assessed that the revenue generated from each relevant product group was consistently above the total cost incurred to generate such revenue during this period. Based on this data, the Board concluded that Toypa had not enforced predatory pricing practices.

In addition to the above analysis, the Board stated that the data pertaining to the total revenue generated by Toypa and Armağan through their in-store toy sales in the 31 shopping centres in which they were both located did not indicate any loss suffered by Armağan. The total revenues Armağan had generated from its sales at these shopping centres from January 2018 to June 2019 were assessed to be in parallel with the total revenues Toypa had generated during the same period and at the same store locations.

Based on these evaluations, the Board concluded that Toypa had not implemented predatory pricing for its Hasbro, Lego, Mattel and GP branded products within the retail toy sales market, and that an investigation was not necessary as Toypa had not breached article 6 of Law No. 4054.

Administrative Court

Subsequent to the Board's decision, Armağan applied to the Administrative Court on the basis that the Board's conclusion was contrary to Law No. 4054 due to the lack of analysis on Toypa's dominant position. Armağan's appeal request also included objections based on the claim that the Board's evaluation solely included an analysis regarding predatory pricing and the Board had not evaluated whether there were other ways of abusing dominance.

Armağan claimed that the Board had only focused on the fact that Toypa's revenues had not fallen below its incurred costs, and that this alone did not eliminate the possibility of an article 6 violation. It further reinstated that Toypa had applied discounts in bad faith on brands with high market shares and low profit margins in its stores in the same shopping centres as Armağan's stores, instead of the approximately 200 stores it had in other locations. Armağan also claimed that, even though the allegations took place over a 12-month period, the Board's analyses had incorrectly included an 18-month period, which led to sales data relating to relatively higher average prices.

Upon evaluating the Board's decision and Armağan's claims, the Administrative Court first outlined the definition of predatory pricing practices. According to the Administrative Court, "predatory pricing" can be defined as anti-competitive pricing strategies that an undertaking in a dominant position employs at the expense of suffering short-term losses by setting below-cost prices to exclude the competitor from the market, disciplining a competitor or otherwise restricting the competitive behaviours of its current or potential competitors in order to protect or strengthen its own market power. The Administrative Court further stated that recoupment attempts by undertakings relying on their economic superiority to exclude their competitors through below-cost sales are also categorised as predatory pricing. Four conditions were listed for an undertaking to have implemented predatory pricing:

- The undertaking must have a dominant position in the relevant market.
- The discount that is part of the predatory pricing practices and aims to put competitors at a disadvantage must be unreasonably low – that is, the price must fall below the cost.
- The circumstances under which the predatory pricing practices arose must be scrutinised. Here, it must be determined whether the practices took place as a part of a systematic plan aiming to exclude competitors. It must be noted that raising prices after excluding competitors from the market through predatory pricing practices is considered an auxiliary factor in revealing the strategic nature of the undertaking's pricing policy.
- The undertaking must raise its prices again after effectively disabling its competitors through price drops. This is known as "recoupment" and it is the end goal of predatory pricing practices.

The Administrative Court stated that discounts applied by an undertaking in a dominant position may have intentions of market foreclosure or exclusion of competitors by creating enhanced customer loyalty, even without below-cost pricing. Therefore, the lack of below-cost pricing could not automatically mean a lack of predatory pricing practices. The Administrative Court also explained that the fact that Toypa's discounts were for an undetermined amount of time created pressure on competitors to follow the same pricing practices and suffer losses.

The Administrative Court additionally stated that the Board had only focused on the evaluation of whether Toypa had implemented practices abusing its dominant position without a dominant position analysis, and that this abuse of dominance evaluation only consisted of an analysis of predatory pricing practices in light of Armağan's complaint. It was explained that out of the four conditions necessary to prove a violation of competition law through predatory pricing, the Board only examined whether below-cost pricing existed – namely, the second condition. The Administrative Court further stated that the Board had concluded that Toypa's prices were not below its costs and, without considering the remaining three conditions, had held that the alleged misconduct did not constitute a predatory pricing practice.

As explained above, the Board first focused on the evaluation of whether Toypa had implemented practices abusing its dominant position without a dominant position analysis. According to the Board, for an "abuse of dominance" to take place:

- the undertaking must have a dominant position; and
- there must be an abuse of dominance.

Either one of these conditions could be evaluated first. Indeed, this assessment was based on paragraph 7 of the Guidelines on Abuse of Dominance, which reads as follows and which also reflects the settled case law of the Board:⁽²¹⁾

In order for a particular conduct examined under article 6 of the Act to constitute an infringement, the undertaking engaged in the conduct must hold dominant position in the market and the conduct itself must be of an abusive nature. Where the absence of one of these fundamental factors may be demonstrated, the Board may choose not to perform analysis concerning the remaining factor.

On the other hand, the Administrative Court held that a dominant position analysis should have been conducted first, and that the question of whether that dominant position had been abused could have been determined only after concluding that Toypa indeed had a dominant position within the relevant product market. The Administrative Court also highlighted that a conduct may lead to foreclosure effects by enhancing customer loyalty without being categorised as a predatory pricing conduct and therefore the absence of below-cost pricing would not imply the absence of destructive pricing (ie, pricing schemes leading to market foreclosure).

The Administrative Court also stated that the Board should have evaluated whether the alleged misconduct was enforced as part of a systematic plan aiming to disable competitors or had the potential to do so. The Administrative Court emphasised the importance of intention by stating that it must be determined whether the intention of an undertaking in the dominant position is destructive.

Moreover, the Administrative Court found that it was possible for Toypa's practices to be exclusionary towards its competitors as the discounts were applied in the same locations as Armağan's stores. When all of the above was considered, the Administrative Court stated that a more detailed evaluation was needed to determine whether Toypa's practices were purely competitive or had the intention of undermining its competitors and abusing its dominant position. Lastly, the Administrative Court highlighted that the period to be assessed had to begin from May 2018 instead of January 2018 since Toypa's discounts began in May 2018, affirming Armağan's concerns that scrutinising an 18-month period was misleading.

Considering these explanations, the Administrative Court held that the Board had to repeat the preliminary investigation process.

Second preliminary investigation

Following the Administrative Court's annulment decision, the Board reinitiated its preliminary investigation with a more comprehensive evaluation on Toypa's dominant position and discount practices in the retail toy sales market in order to comply with the Administrative Court's judgment. Although the Board only evaluated an abuse of dominant position without conducting an analysis on Toypa's dominant position in its initial preliminary investigation decision, Toypa's dominant position was scrutinised as per the Administrative Court decision in the Board's second decision. Similar to its initial preliminary investigation decision, the Board proceeded with the same relevant product market definition of "retail toy sales market" and once again found it redundant to define a geographical market.

Analysis concerning Toypa's dominant position

To assess the dominant position, the Board referred to definitions provided in article 3 and article 6 of Law No. 4054. As per article 3, "dominant position" is interpreted as:

the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers.⁽²²⁾

The Board highlighted that while considering the dominant position, it is vital to determine the undertaking's power to behave to an appreciable extent independently from competitive pressure. Within this context, the Board reviewed the criteria provided in the Guidelines on Abuse of Dominance and considered Toypa and its competitors' positions in the various alternative markets, barriers to entry and expansion in the relevant market, and the bargaining power of the buyers in order to determine to what extent the undertaking could act independently of competitive pressure. Accordingly, the Board examined a myriad of information⁽²³⁾ and also requested further specific data on the four brands brought forward in the complaint made by Armağan to examine Toypa's dominant position in the market.

Based on Toypa and its competitors' three-year average market shares for the four specified brands in the period between 2018 and 2020, the Board assessed that it was not possible for Toypa to have significant market power regarding the Hasbro, Lego, Mattel and GP branded products considering the dispersed market shares and other financially powerful competitors in the market, such as Armağan, Migros Ticaret AŞ and Ceren Kırtasiye İnş Rest ve Gıda Paz San ve Tic Ltd Şti. Therefore, the Board concluded that Toypa's market power could not restrict competition and therefore would not be able to behave independently from its consumers and competitors to an appreciable extent.

Further, the Board compared the total sales turnover of Toypa and Armağan with the turnover acquired exclusively through the sales of Hasbro, Lego, Mattel and GP branded products in 2018 and 2020 to determine Toypa's market power in the shopping centres where both Armağan and Toypa had stores. When examining the results, the Board observed that Toypa and Armağan had similar fluctuations in total incomes between 2018 and 2020, although Toypa obtained higher revenue through these years. The Board attributed the decrease in income that occurred both for Toypa and Armağan in 2020 to the covid-19 pandemic, due to which several precautions such as lockdowns were effectuated. According to the narrower data regarding the products in question, the Board observed that the fluctuation in the revenues obtained through the sales of these products held a consistent pattern, highlighting that Armağan's income in certain months was in excess of Toypa's. The Board also stated that, although Armağan obtained a higher income in 2018, Toypa obtained a higher income in 2019 and 2020 through the sales of these brands.

The Board concluded that Toypa and Armağan had adjacent revenue values generated from the sales of Hasbro, Lego, Mattel and GP products between 2018 and 2020. The Board added that the fact that Toypa had generated a higher income than Armağan in these years was not relevant to the sales of these products as Toypa and Armağan had a comparable total income during the period in question. Accordingly, the Board concluded that both Toypa and Armağan would have close market share values in the sales of the four mentioned brands simultaneously with the proximity of total generated incomes. The Board also noted the number of stores in which Toypa and Armağan had generated similar levels of revenue when considering the 31 shopping centres in which both Toypa and Armağan owned stores.

The Board resumed its evaluations concerning whether the market had any barriers to entry and expansion. From the information and data obtained, the Board eventually determined that there was a low probability of any undertaking, including Toypa, to hold a dominant position in the market due to the structure of the market. When considering solely the sales of the four mentioned brands, the Board determined that the market:

- had a low condensation level; and
- featured some financially powerful competitors that could impose competitive pressures over Toypa and therefore the final consumers had easily replaceable alternative supply sources.

The Board highlighted that even where other competitors were excluded from the market, Toypa and Armağan would still have comparable market shares. Consequently, the Board determined that Toypa did not hold a dominant position in any market for the purposes of the case at hand.

The Board's evaluation considering Toypa's pricing practices

Although the Board remarked that there was no need for an analysis on abusive conduct as one of the two requirements to establish abuse of a dominant position was not fulfilled, an additional analysis concerning Toypa's pricing schemes within the theoretical framework of predatory pricing including market foreclosure effects was conducted in accordance with the Administrative Court's reasoning in its annulment judgment.

When explaining the theoretical framework of predatory pricing, unlike its previous judgment, the Board also referred to the perspective adopted by the European Commission (EC) in the Guidance on the Commission's enforcement priorities in applying article 82⁽²⁴⁾ of the EC Treaty on abusive exclusionary conduct by dominant undertakings,⁽²⁵⁾ and also to the approach adopted in the Board's *Çiçek Sepeti*⁽²⁶⁾ decision in which the Board concluded that the sales value and period of sales of promotion goods were insufficient to result in anticompetitive foreclosure. The Board also considered the factors set by the Guidelines on Abuse of Dominance⁽²⁷⁾ in the examination of anticompetitive foreclosure.⁽²⁸⁾ As such, the Board evaluated Toypa's pricing schemes (ie, discount practices) for market foreclosure effects as per the judgment of the Administrative Court.

Ultimately, the Board drew parallels to its previous decision and resolved that:

- Toypa did not hold a dominant position in the market; and
- Toypa's pricing activities did not result in market foreclosure to the detriment of Armağan and therefore did not constitute abuse of dominance.

Therefore, the Board concluded that it would not initiate an investigation.

Turkish Competition Authority's request of appeal

As per the annulment decision of the Administrative Court, the Board reinitiated the preliminary investigation phase and, at the same time, made an appeal to the 8th Ankara Regional Administrative Court (the Regional Administrative Court), asserting that the decision of the Administrative Court was against the law. The Authority requested the rescission of the decision and the dismissal of legal action. Subsequent to its review, the Regional Administrative Court declined the Authority's appeal.

Comment

The Administrative Court's decision highlights the importance of dominant position analyses when determining whether there is an article 6 violation. Further, it reinstated that evaluations solely based on below-cost pricing are not sufficient when determining abusive pricing practices, and that the market foreclosure analysis based on the intention of pricing strategies employed carry considerable weight when determining whether an undertaking has abused its dominant position. In this respect, both the Administrative Court and the Regional Administrative Court remarked on the necessity to include the analysis pertaining to the motive behind the implementation of discounted prices and required the Board to deliver an analysis based on whether these practices emerged as a consequence of competitive pressure in the market or whether they were applied with the intention of foreclosing competitors from the market, as a part of a systematic plan.

It is also beneficial to note how the Board rehandled the case and reconstructed and extended its analysis by involving dominant position analysis in a predatory pricing case upon the annulment decision. Although the Authority remarked on the requirement of coexistence of both conditions in its reassessment, in accordance with the Administrative Court's and the Regional Administrative Court's judgments, how the Board's interpretation involving the requirement of determination of dominant position would impact the forthcoming decisions presents itself as an intriguing factor.

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Endnotes

(1) Administrative Court, *Toypa*, 26 April 2021, E: 2020/1242; K: 2021/748.

(2) First *Toypa* decision, 14 November 2019; 19-40/664-285.

(3) Law No. 4054.

(4) Second *Toypa* decision, 10 November 2022; 22-08/116-46.

(5) Article 9 of the Law on the Regulation of Retail Trade.

(6) *Nezih Kitap*, 22 April 2010; 10-33/529-188.

(7) First *D&R* decision, 6 April 2012; 12-17/465-136.

(8) Second *D&R* decision, 6 November 2013; 13-62/865-371 and third *D&R* decision, 2 August 2018; 18-24/428-201.

(9) *Tesco Kipa*, 27 June 2010; 10-44/772-254.

(10) *Carrefour/Gima*, 17 June 2005; 05-40/557-136; *Kiler/Canerler*, 4 May 2006; 06-32/392-102; *Migros/Yonca*, 18 December 2008; 08-73/1158-452; and *Migros/Egeden*, 15 April 2010; 10-31/483-180.

(11) *Migros/Tansaş*, 31 December 2005; 05-76/1030-287; *Kiler/Güler*, 6 July 2006; 06-47/632-180; *Makromarket/Nazar*, 5 April 2007; 07-30/293-110; *Kiler/Yimpaş*, 15 July 2009; 09-33/728-168; *Migros/Greens*, 23 February 2011; 11-10/186-62); and *Kipa/Ardaş*, 9 February 2012; 12-06/185-47.

(12) "District" is used to reflect the meaning of a "sub-province".

(13) "Isochronal" means denoting a line connecting points at which a particular event occurs or occurred at the same time, or a diagram depicting such lines. Within this context, it means "the area which falls in the diameter of a driving distance" as explained by the Board in its first *Toypa* decision.

(14) Article 6 of Law No. 4054.

(15) *Guidelines on Abuse of Dominance*.

(16) Case C-62/86 *AKZO Chemie BV v Commission*.

(17) The costs of supply, which vary with changes in output (eg, the costs of raw materials or distribution), averaged over the number of units produced.

(18) The combination of variable costs and fixed costs of production (eg, monthly rental of premises), which remain constant irrespective of changes in output, averaged over the number of units produced.

(19) *Ibid*, paras 70-72.

(20) G Gürkaynak, A Kağan Uçar and Z Buharalı, "Data-Related Abuses in Competition Law", in *Frédéric Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust*, Vol I, N Charbit and S Ahmad, eds (New York: Concurrences, 2019), pp 293–310, p 305.

(21) *Doğan Group TV Channels*, 8 December 2010 and 10-76/1569-604; *Domino's Pizza*, 4 November 2020 and 10-69/1458-557; *GE Jenbacher*, 17 November 2011 and 11-57/1471-528.

(22) Law No. 4054, see footnote 1.

(23) The Board analysed data such as:

- the market share of *Toypa* and its competitors;
- the fluctuation of the market shares throughout the years;
- the number of competitors in the market;
- the financial and economic power of the undertakings;
- brand recognition; and
- differentiation of the offered goods.

(24) Following the amendment of Treaty on the Functioning of the European Union, article 82 was renumbered as article 102.

(25) European Commission, *OJ C 45*, 24 February 2009, p 7-20.

(26) *Çiçeksepeti*, 8 March 2018, 18-07/111-58.

(27) *Guidelines on Abuse of Dominance*, see footnote 17.

(28) As per article 26 of the *Guidelines on Abuse of Dominance*, these conditions are set as:

- the position of the dominant undertaking;
- the conditions in the relevant market;
- the position of the dominant undertaking's competitors;
- the position of the customers or suppliers;
- the scope and duration of the conduct examined;
- possible evidence of actual foreclosure; and
- direct or indirect evidence of exclusionary strategy.