An Overview of Margin Squeeze in Turkish Competition Law

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I. Overview

Article 6 of Law No. 4054 on the Protection of Competition (the "***Law No. 4054***") entitled "Abuse of Dominant Position" provides a general prohibition of abuse and a non-exhaustive list of examples. Although the list does not specifically categorize margin squeeze (or price squeeze) as a form of abuse, margin (price) squeeze was listed as a form of exclusionary abuse under the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings published in January 2014 (the "***Guidelines***"). The Guidelines are based on the same principles as the Guidance on the European Commission's Enforcement Priorities in Applying Article 82 of the European Commission Treaty to Abusive Exclusionary Conduct by Dominant Undertakings ("***EU Guidance***"). According to paragraph 61 of the Guidelines, margin squeeze occurs *"when an undertaking active in a vertically related market that is dominant in the upstream market sets the margin between the prices of the upstream and downstream inputs at a level which does not allow even an equally efficient competitor in the downstream market to profitably trade on a lasting basis."* This definition and similar definitions had already been provided in the Turkish Competition Board's ("***Board***") decisions[1] before the enactment of the Guidelines.

The Board has stipulated in various decisions[2] and in the Guidelines that in order for margin squeeze to occur (i) the undertaking shall be vertically integrated in a way to engage in activities in upstream and downstream markets within the same production chain and constitute a single economic entity in the relevant upstream and downstream markets; (ii) the undertaking shall be in a dominant position in the upstream market; (iii) the input shall be an indispensable input to be active in the downstream market; (iv) the margin between the wholesale and retail prices shall be squeezed in a way to make it impossible for as-efficient-competitors to compete in the downstream market[3]; (v) the investigated conduct must lead to actual or potential foreclosure and restrict competition in the downstream market; and (vi) the dominant undertaking shall not have any objective justifications. The absence of one or more of above conditions makes it difficult to establish an infringement through margin squeeze.

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[1] See e.g. *Turk Telekom Summer Storm Campaign* decision dated 19.11.2008 and numbered 08-65/1055-411; *Turkcell GSM Campaigns* decision dated 09.05.2013 and numbered 13-27/371-172.

[2] *Turk Telekom Summer Storm Campaign* decision dated 19.11.2008 and numbered 08-65/1055-411; *Çimsa* decision dated 10.03.2011 and numbered 11-15/261-89; *Turkcell GSM Campaigns* decision dated 09.05.2013 and numbered 13-27/371-172.

[3] *"When establishing the costs of the equally efficient competitor, the Board will generally use LRAIC* [Long-Run Average Incremental Cost], *calculated for the downstream product of an undertaking dominant in the upstream market"* (Guidelines, para. 62)

This approach in the Turkish legislation is in line with the margin squeeze definition adopted in the European Union.[4] EU Guidance explains margin squeeze as follows: *"a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze')."*[5]

We discuss below the Turkish margin squeeze cases in the telecommunications sector first, as this sector has garnered most of the margin squeeze cases, and move on to the Board's decisions in other sectors.

II. Margin Squeeze in the Telecommunications Sector

a. Legislation

In the Turkish jurisprudence, margin squeeze in the telecommunications sector merits attention due to both the growing number of cases and the Board's shared competence in telecommunications. To elaborate, Law No. 4054 prohibits all practices that prevent, restrict or distort competition in markets for goods and services. The telecommunications sector is no exception to the application of Law No. 4054, evidenced by the plethora of cases in this sector. The Board analyses margin squeeze cases ex-post, i.e. after the implementation of the price tariffs at the wholesale and retail levels. Up until 2014, the Board was arguably alone in dealing with margin squeeze in the telecommunications sector, frequently receiving complaints against large players. The only involvement of the Information and Communication Technologies Authority ("***CTA***") in margin squeeze cases was under Article 7 of the Law No. 5809, which requires the Board to seek the CTA's advice before delivering any decision pertaining to telecommunications sector.

On the other hand, the Electronic Communications Law numbered 5809 ("***Law No. 5809***") empowers the CTA to take the necessary actions to ensure an effective competition in the telecommunications sector. Within the scope of Article 7 of the Law No. 5809, without prejudice to the application of Law No. 4054, the CTA is *"entitled to perform examination and investigation of any action conducted against competition in electronic communications sector, on its own initiative or upon complaint; to take measures it deems necessary for the establishment of competition and to request information and documents within the scope of its tasks."* The CTA's authority to regulate margin squeeze originates from Article 13.2(c) and Article 13.3 of the Law No. 5809. Article 13.2(c) enables the CTA to prevent operators with

[4] See O'Donoghue and Padilla, The Law and Economics of Article 82 EC, p. 303; Allison Jones, Brenda Sufrin, EU Competition Law Text, Cases and Materials, Fifth Edition, p. 426; Peter Roth QC, Vivien Rose, European Community Law of Competition, Sixth Edition, p. 993.

[5] "In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking" (EU Guidance, para. 80)

"significant market power" from implementing anti-competitive tariffs including price squeeze. Article 13.3 stipulates that *"[p]rocedures and principles pertaining to the implementation of this Article"* are to be designated by the CTA.

Under Law No. 5809, the Information and Communication Technologies Board ("***CTB***") has published the "Principles and Procedures on Identification, Elimination and Prevention of Margin Squeeze" ("***Principles and Procedures***") which entered into force on July 1st, 2014. Within this scope, the CTA is authorized to conduct margin squeeze analysis ex-ante or ex-post in the telecommunications sector, whereas the Board is authorized to intervene ex-post in all relevant markets. In terms of margin squeeze, the CTA may impose obligations only to undertakings having "significant market power". The CTA examines the margin between the prices offered at the wholesale level and retail level; however, it does not determine a specific margin.

After the entry into force of Principles and Procedures, the CTA has published only one decision regarding margin squeeze[6], where the CTB ordered Turk Telekom to comply with Article 12(2) of the Principles and Procedures which concerns the procedure to be followed when the CTB finds margin squeeze with regard to tariffs already in force (i.e. ex-post analysis). On the other hand, the Board did not intervene regarding the tariff subject to the CTB's decision. Overall, due to lack of precedents, the consequences of this shared competence are not yet evident.

b. The Board's Case Law

The first case that merits attention is the *Turk Telekom Internet Infrastructure* decision[7] of the Board, where the Board initiated an investigation against Türk Telekomünikasyon A.Ş. ("***Turk Telekom***") based on an alleged abuse of Turk Telekom in the internet access services market and imposed an administrative monetary fine of approximately TL 1.2 trillion (approx. EUR 705,972 at the time) against Turk Telekom for abusing its dominant position by determining network access tariffs so high that its competitors could not compete in the relevant upstream market, and at the same time determining internet access tariffs very low in the downstream market. Even though the allegations and the decision were not based on margin squeeze, and the Board fined Turk Telekom based on the theory of predatory pricing, as Kaya explains, the case could have been handled under the theory of margin squeeze also, which would probably have yielded similar results as to the existence of an infringement.[8]

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[6] CTB's *Turk Telekom* decision dated 08.12.2014 and numbered 2014/DK-SRD/635.

[7] *Turk Telekom Internet Infrastructure* decision dated 02.10.2002 and numbered 02-60/755-305. This decision was subsequently annulled by the Council of State due to procedural deficiency, upon which the Board reassessed the alleged abuse of dominant position of Turk Telekom with its decision dated 05.01.2006 and numbered 06-02/47-8. The Board's position did not change in the second decision.

[8] Şerife Demet Kaya, Fiyat Sıkıştırması Ekonomik ve Hukuki Açıdan Bir Değerlendirme, Rekabet Kurumu Uzmanlık Tezleri Serisi No:87, p.24.

In the *Turk Telekom Student-Teacher Campaign* decision[9] where the Board decided upon a margin squeeze claim for the first time, it rejected the complaints based on the ground that Turk Telekom's campaign in the case had already been approved by the CTA, indicating that the campaign fell outside the scope of Law No. 4054.[10] The wholesale prices of the dominant supplier had also been approved by the CTA. Interestingly, the Turkish Competition Authority's experts assigned to the case argued that the CTA had only approved the campaign based on its own legislation and this should not prevent the Board from taking the necessary measures if the campaign violated Law No. 4054. The Board appeared to maintain this approach of rejecting complaints regarding tariffs that had previously been approved by the CTA, until the Council of State started rendering decisions indicating the opposite.[11] In its famous *Telkoder* decision[12], for example, the Council of State underlined that even though the tariffs subject to the complaint had been approved by the CTA, this should not translate into inaction on the Board's part, which is the body "generally authorized" to detect and punish infringements in the telecommunications sector. The Council of State further emphasized the need for the Board to intervene when there is anti-competitive conduct by indicating that *"if these undertakings are held exempt from the application of Law No. 4054, this might lead to competition law infringements going unpunished in the sector [i.e. the telecommunications sector]."*

In decisions where the Board actually analyzed whether there was margin squeeze, it has used different methods for the margin squeeze analysis. In its *Turkcell Corporate Tariffs* pre-investigation decision[13], the Board compared the call termination fees and retail fees of the investigated undertaking, Turkcell İletişim Hizmetleri A.Ş. ("***Turkcell***") in order to decide whether Turkcell, operating in the upstream market, applies a price in the upstream market that is higher than its own retail price in the downstream market. The Board further discussed whether an efficient operator may be able to operate with a normal profit in the downstream market. As such, the Board aimed to determine whether there was a positive margin between the average retail price of the investigated undertaking and the sum of an efficient operator's call origination and call termination costs. The Board eventually found that the margin between Turkcell's retail prices in downstream market and the cost of the operators is sufficient for the downstream competitors to duly operate and compete.

The 2008 margin squeeze case against Turk Telekom[14], where the Board imposed a total administrative monetary fine of TL 12.4 million (approx. EUR 5.9 million at the time) to Turk Telekom and TTNet A.Ş. ("***TTNet***"), Turk Telekom's subsidiary, provides detailed insight

[9] *Turk Telekom Student-Teacher Campaign* decision dated 08.09.2005 and numbered 05-55/833-226
[10] Şerife Demet Kaya, Fiyat Sıkıştırması Ekonomik ve Hukuki Açıdan Bir Değerlendirme, Rekabet Kurumu Uzmanlık Tezleri Serisi No:87, p.26.
[11] See the Council of State 13th Chamber's *Borusan* decision dated 20.11.2007 and numbered E.2006/2052-K.2007/7582; *Telkoder* decision dated 08.05.2012 and numbered E.2008/14245-K.2012/960.
[12] The case was the appeal of the Board's decision dated 11.09.2008 and numbered 08-52/792-321.
[13] *Turkcell Corporate Tariffs* decision dated 04.07.2007 and numbered 07-56/634-216
[14] *Turk Telekom Summer Storm Campaign* decision dated 19.11.2008 and numbered 08-65/1055-411

into abuses through margin squeeze. The investigation was launched upon complaints from various internet service providers that Turk Telekom abused its dominant position in the wholesale broadband internet access services market through a TTNet campaign in the retail broadband internet access services market. Aside from the conditions of margin squeeze, the decision underlines three aspects of margin squeeze before moving on to the analysis of Turk Telekom's conducts: (i) in terms of the calculation of the margin, the margin between the dominant undertaking's retail price and wholesale price must first be calculated to see whether this margin is negative, and if not, whether this margin can compensate the incremental costs of an equally efficient competitor for the sales of the relevant product/service must be established, (ii) margin squeeze is different from predatory pricing and the retail prices do not need to be predatory for the finding of margin squeeze, (iii) the duration of the conduct matters, and if the discounts are applied in a short term, this can be considered an objective justification. The Board found that between November 2006-February 2008, Turk Telekom and TTNet set the monthly access fees to end users at the retail level below fees that Turk Telekom applies to other internet service providers for internet infrastructure. The decision highlights that even an as-efficient-competitor would have to be operating at loss to be able to stay in the market. When discussing the conditions of margin squeeze, the Board also referred to two decisions of from EU case law, i.e. *Telefonica*[15] and *Deutsche Telecom*.[16] This is a classic example of the Board turning to European cases when there are not many precedents in the Turkish jurisprudence regarding a certain type of infringement.

Later cases showcased various approaches to what constitutes "cost" in the calculation of the margin. In its *Turkcell GSM Tariffs* decision[17], for example, unlike the *Turkcell Corporate Tariffs* decision, the Board conducted its margin squeeze analysis by calculating the margin between Turkcell's inter-connection costs and its per minute retail prices. However, the Board went back to its approach in the *Turkcell Corporate Tariffs* decision with its *Turkcell GSM Campaigns* decision[18], using a "total call cost" criteria which was the sum of the call origination cost and the call termination cost.

A recent margin squeeze case in the telecommunications sector was, remarkably, not an investigation or a pre-investigation, but a negative clearance decision[19] where the Board granted negative clearance to TTNet's bundling of its Tivibu service (paid TV services) with its internet and telephone services. TTNet provides its internet and telephone services in a vertically integrated structure with Turk Telekom, and their practices had been questioned many times under the theory of margin squeeze, which is why margin squeeze appears to become relevant in the negative clearance notification. The decision becomes very interesting

[15] Case COMP/38.784 – Wanadoo España vs. Telefónica, 04.07.2007.
[16] Deutsche Telekom AG vs. Commission, Case T-271/03, Court of First Instance, 10.04.2008.
[17] *Turkcell GSM Tariffs* decision dated 27.01.2011 and numbered 11-06/90-32.
[18] *Turkcell GSM Campaigns* decision dated 09.05.2013 and numbered 13-27/371-172.
[19] *TTNet Negative Clearance* decision dated 05.02.2015 and numbered 15-06/74-31.

towards the end, where the Board underlines that the most important aspect to be decided upon was whether the campaign could compensate the costs. Since the campaign was not yet in force, the Board saw fit to conduct an ex-ante analysis of margin squeeze. The analysis was therefore based on certain projections in terms of the profitability of the campaign. Seeing that TTNet expected to gain profits from the campaign, the Board concluded that the campaign would compensate the costs. The Board thus granted negative clearance to the campaign, while warning TTNet at the same time that if the projections on profitability were to change, the relevant campaign could fall under Article 6 of Law No. 4054 after its implementation. The decision raises the question whether the Board has gone beyond its powers by conducting an ex-ante margin squeeze analysis. To that end, the Board explained that since the case was a negative clearance application (i.e. the Board did not act ex officio or upon complaint), the conduct had not yet taken place in the market and therefore an ex-post analysis was not applicable. On the other hand, the Board still wanted to analyze whether the campaign would restrict competition under the margin squeeze theory before granting negative clearance, seeing the vertically integrated structure of Turk Telekom and its margin squeeze track record. Therefore, the decision indicates, the Board had to apply an ex-ante margin squeeze test based on projected prices and costs.

III. Margin Squeeze in Other Sectors

Even though margin squeeze cases are generally witnessed in the telecommunications sector, there are also other sectors where undertakings faced margin squeeze allegations investigated by the Board. In the *Nuh Çimento Margin Squeeze I*[20] case, Detaş Beton Sanayi A.Ş. directed allegations to Nuh Çimento Sanayi A.Ş. ("***Nuh Çimento***") and its subsidiary Nuh Beton A.Ş. ("***Nuh Beton***"), stating that Nuh Çimento had abused its dominant position in the ready-mixed concrete market through margin squeeze and predatory pricing. The Board indicated that margin squeeze could be considered a sub-branch of refusal to supply and moved on to the analysis of whether the conditions for refusal to supply occurred. The Board then determined that another undertaking was the market leader both in capacity and in production in the relevant market, and therefore Nuh Çimento was not in a dominant position. Based on this, Article 6 of Law No. 4054 could not have been infringed. The Board concluded that an investigation against Nuh Çimento was not necessary and the complaint was rejected.

In its *Frito Lay*[21] decision, the Board analyzed the Kraft Gıda San.Tic.A.Ş.'s ("***Kraft Gıda***") allegations against Frito Lay Gıda San.Tic.A.Ş. ("***Frito Lay***") that Frito Lay had not increased its prices despite increase in costs and that this constituted margin squeeze. The Board first set the record straight by underlining that margin squeeze and predatory pricing were different types of abuse, and that for margin squeeze to occur, the undertaking in question must be vertically integrated. Accordingly, the Board assessed whether Frito Lay committed predatory pricing, but eventually dismissed this claim.

[20] *Nuh Çimento Margin Squeeze I* decision dated 10.07.2010 and numbered 10-63/1317-494.
[21] *Frito Lay* decision dated 07.07.2015 and numbered 15-28/345-115.

In the recent *Nuh Çimento Margin Squeeze II* decision[22], the Board investigated margin squeeze allegations brought against Nuh Çimento and Nuh Beton in the cement market of the Anatolian side of Istanbul (including Kocaeli). Consistent with its previous decisions, the Board evaluated whether Nuh Çimento was in a dominant position in the upstream market. Accordingly, the Board found that Nuh Çimento was not in a dominant position in the said market and without further evaluating other conditions of margin squeeze, the Board decided that Nuh Çimento had not infringed Article 6 of the Law No. 4054.

IV. Conclusion

The Board's case law regarding margin squeeze has been developing over the past decade, with the focus on the telecommunications sector. The number of margin squeeze cases outside the telecommunications sector is quite limited, and in many of these cases, the Board dismissed the allegations after having found out that the undertaking subject to the complaint was not in a dominant position. Within this scope, how the shared competence between the Board and the CTA will unravel in practice is yet to be seen. Overall, the increasing number of margin squeeze decisions well demonstrates the Board's awareness towards this type of infringement and warrants particular attention on the part of vertically integrated undertakings.

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[22] *Nuh Çimento Margin Squeeze II* decision dated 18.02.2016 and numbered 16-05/118-53.