Single Continuous Infringement Concept and the Practice of the Turkish Competition Authority

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The concept of a single continuous infringement ("***SCI***") enables competition authorities to consider a series of agreements or conducts that have the same objective to distort competition in the market as one single continuous infringement. Similar to the approach in the European Union, the Turkish Competition Authority ("***Authority***") also considers this concept while assessing a case under Article 4 of Law No 4054 on the Protection of Competition of 13 December 1994 ("***Law No 4054***"), which is akin to-if not the same as-Article 101 of the Treaty on the Functioning of the European Union ("***TFEU***").

This article aims to set out an overview of the Authority's approach on SCI concept in the Turkish Competition Board's ("***Board***") precedents based upon the key features of SCI in the EU competition law practice.

I. The Concept of a Single and Continuous Infringement in the EU

The concept of a single continuous infringement is not established by law. However, as in the case of Turkey, it is evaluated and acknowledged in case law. In the EU, the concept of SCI was first discussed in the *Polypropylene* case in 1986 where it was evaluated that an infringement of Article 101 TFEU may result not only from an isolated act, but also from a series of acts or from continuous conduct.

In *Polypropylene*, the European Commission ("***Commission***") evaluated as to whether the alleged agreements and concerted practices of 15 producers of the bulk thermoplastic

polypropylene supplying the EEC polypropylene market amounted to a cartel.[1] The Commission found that (i) the suppliers of polypropylene in the EEC had participated in a series of secret meetings on a regular basis since about the end of 1977 to 1983 in order to discuss and determine their commercial policies; (ii) set minimum prices from time to time for the sale of products, (iii) agreed on measures in order to facilitate implementation of set target prices including restriction of output, exchange of detailed information, (iv) introduced simultaneous price increases that implemented the target prices, (v) shared the market by allocating to each producer by requiring producers to limit their sales. Consequently, the Commission imposed monetary fines on the investigated producers of the bulk thermoplastic polypropylene.

Following the appeals of the several producers on the imposed fines, the General Court evaluated as to whether the alleged agreements and concerted practices amounted to a cartel and pointed out that, in view of their identical purpose, the various concerted practices and agreements concluded formed part of schemes of regular meetings, target-price fixing and quota fixing.[2] Those schemes were deemed to be part of a series of efforts made by the relevant undertakings in pursuit of a single economic objective, namely to distort the regular movement of prices on the market in polypropylene. It was thus deemed to be artificial to split up such continuous conducts, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The General Court acknowledged the Commission's definition for this series of unlawful conducts as a single continuous infringement. A similar approach was followed in several other cases as well[3].

For instance in *Cement*[4], the Court of Justice pointed out that an infringement of Article 101 TFEU may result not only from an isolated act but also from a series of acts or from continuous conducts. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When different actions form an "overall plan", as their

[1] Polypropylene Commission decision, 23 April 1986, 86/398/EEC, Case IV/31.149
[2] Hercules v. Commission, 17 December 1991, Case T-7/89; Hoechst v. Commission, 1992, T-10/89
[3] BASF v. Commission, 2007, Joined Cases T-101/05; FSL and others v. Commission, 2015, Case T 655/11; Hoechst v. Commission, 1992, T-10/89; Anic Partecipazioni v. Commission, 1999, C-49/92P; Amann& Söhne and Cousin Filterie v. Commission, 2010, T-446/05, etc.
[4] Aalborg Portland and others v. Commission, 7 January 2004, Joined Cases C-204, 205, 211, 213, 217 and 219/00P.

identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[5]

In a single overall agreement, it is not sought that each undertaking takes part in every agreement or concerted practice. The different parties in different agreements would not carry a weight so long as there is common objective to distort competition within these agreements. In order to attribute the infringement to each party, it is required that all relevant undertakings were aware of the infringement or could have reasonably foreseen it. Finally, they should be accepting the violation risk in participating such collusion (e.g. in case the undertaking did not publicly distance itself from the cartelist behavior, but tacitly consent the collusive behavior, this would be considered as knowing and accepting the risk[6]). In *International Removal Services*, the Court of Justice acknowledged the General Court's inference that three conditions must be met in order to establish participation in a single and continuous infringement, namely – as stated above - (i) the existence of an overall plan pursuing a common objective, (ii) the intentional contribution of the undertaking to that plan, and (iii) its awareness (proved or presumed) of the offending conduct of the other participants.[7]

In this regard, the General Court in *Toshiba* underlined the importance of the third factor in the following way: "*…it should be recalled that the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole. The Commission still has to establish that that undertaking was aware of the other undertakings' anticompetitive activities at European level or that it could reasonably have foreseen them…The mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice for a finding that the undertaking participated in the overall cartel.*".[8]

[5] Aalborg Portland and others v. Commission, 7 January 2004, Joined Cases C-204, 205, 211, 213, 217 and 219/00P
[6] David Bailey, Single Overall Agreement in EU Competition Law, *Common Market Law Review* 47, 2010, p.475.
[7] Team Relocations and others v. Commission, 11 July 2013, C-444/111P
[8] Toshiba Corp., v. Commission, 09 September 2015, Case T‑104/13

Defining an infringement as a single continuous infringement may cause different procedural consequences for the investigated undertakings. For instance, the statute of limitation starts to run when the SCI has ended. Therefore, statute of limitation would not be applicable to old dated evidences and, they will continue to be valid for the competition authorities to prove the continuous infringement. SCI approach prevents infringements to become time barred and therefore may result in increasing the monetary fines against investigated undertakings. In comparison, in case of a several cartel infringement, such old dated evidence might not be used due to the running of the statute of limitations. However, the undertakings might be fined from several different cartels separately whereas they are fined from one single infringement in cases of a single continuous infringement cases.

Regarding the liability from the single overall agreement, each participant of a SCI would be liable from the single overall agreement, the involvement of an undertaking is considered when determining the fine.[9] However, just because the infringement is considered as a SCI does not mean that the competition authorities can hold liable the undertaking for the whole infringement without demonstrating the participation and that the undertaking was aware of the other undertakings' activities or that it could reasonably have foreseen them.[10] In terms of the burden of proof in SCI, the Commission prefers a more holistic approach regarding the evidence. In other terms, evidences do not need to contain all of the elements of the infringement, whereas it is sufficient to assess the evidences as a whole and provide an overall scheme of the infringement. The General Court previously stated that the evidence used by the Commission must be "credible, precise and consistent"[11], enough to point out the participation into the cartel. Although it is widely accepted that proving each party's connection to the SCI is utterly difficult, the SCI concept allows a more comprehensive approach against the evidence. In other words, instead of an individual evaluation for all collected evidences, the SCI concept allows a consolidated assessment of the collected evidences in case they constitute a consistent and complimentary entirety.

[9] David Bailey, Single Overall Agreement in EU Competition Law, *Common Market Law Review* **47**, 2010, p.479.
[10] Toshiba Corp., v. Commission, 09 September 2015, Case T‑104/13
[11] Toshiba Corp., v. Commission, 09 September 2015, Case T‑104/13

II. The Authority's Approach to The Concept of SCI

The relevant provision for cartel-specific cases is Article 4 of Law No 4054, which is closely modeled on Article 101 TFEU. Within the scope of Article 4, all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof, are forbidden. Rather than providing a definition of a cartel, Article 4 prohibits all forms of restrictive agreements, which would include any form of agreement.

The Board's precedents on the concept of SCI

The SCI concept is not new to the Board. In its precedents the Board sets forth the conditions for SCI based upon EU precedents. However, while in some of them the conditions are applied consistently with the EU precedents and contain a detailed analysis; in others the reasoned decisions are not explicitly discussing the relevance between separate conducts or the common objective of the investigated undertakings.

- *SCI Conditions According to the Board:*

In *Hyundai Dealers* (*16.12.2013; 13-70/952-403*), the Board stated that the use of the concept of SCI essentially depends on the existence of three main conditions. First, there must be a framework agreement or a common objective. Second, the agreement or concerted practices that emerge in time must be complimentary in nature. In this context, the agreement or concerted practices must be executed through a common economic plan (the framework agreement) and such behavior should constitute an entirety. The third condition for a SCI is the participation of the undertakings to the agreement or concerted practices.

It must be considered that the parties of an agreement can change in time and can participate into the infringement in different times. Also, the important thing in the concept of SCI is to prove that the chain of the agreement or concerted practice serve to the framework agreement as a

whole, in other words a common objective. Therefore, there is no time limitation for analyzing the existence of SCI. Agreements that are deemed as violations do not need to have a restrictive effect on competition or end the competition in the market in order to be assessed within the scope of SCI. Any agreement between the undertakings that have as their object of prevention, distortion or restriction of competition is sufficient under Article 4 of Law No 4054.

- *Common Objective*

In its precedents, the Board sought for a common objective, which in some of its decisions referred to as a framework agreement or common economic objective. In *Kayseri Bosch Dealers* (*12.06.2012, 12-32/916-275*), it was determined that the Bosch dealers are in a price union by entering into agreements with the objective of restricting competition. The Board discovered that specifically three of the concerned undertaking sent price lists - which differ from the recommended price lists - for certain products to the rest of the undertakings via e-mail. The concerned e-mails referred to an on-going price unity between the same undertakings for a while, and thus it was determined that the concerned undertakings met periodically. In the same decision, regarding the participation or tacit approval of the concerted practice, the Board stated that there was no information or document, indicating that the recipients of those e-mails opposed to the price agreement. In this context, the Board also referred to the EU precedents and followed a parallel approach[12] by considering that the undertakings that did not oppose to the price determinations may also be held liable.

The Board stated that the EU precedents developed the concept of "a single continuing agreement" that covers the whole process of the competition law breach instead of a static approach defining the moment of consensus. The Board added that as a result of this approach all of the evidence can be evaluated as a whole. Thus, the existence and the typical characteristics of the cartel can be revealed and unless there is no evidence to the contrary, it could be assumed that all concerned undertakings participated in the whole process and are aware or could reasonably foresee the conduct.

[12] In Montecatini v. Commission, it was evaluated that an undertaking's presence at a meeting with an anti-competitive object is caught by Article 101(1) unless it has publicly distanced itself from what occurred at those meetings. (Case C-235/92 P, 1999, Montecatini v. Commission, paras. 177 to 181)

- *Participation, Awareness and Reasonable Foreseeability*

In *Ceramic (24.02.2004, 04-16/123-26),* the Board evaluated as to whether 32 undertakings active in the ceramic coating equipment and/or ceramic healthcare equipment markets violated Article 4 of Law No.4054. It concluded that there were two different relevant product markets; (i) ceramic coating equipment and (ii) ceramic healthcare equipment markets. It further held that there were two different SCIs. The Board evaluated that the infringements were conducted in the same time period. That said, the parties of the agreements were different, they did not share a common objective, and the products (ceramic coating equipment and ceramic healthcare equipment) were not substitutable. The Board therefore identified two separate infringements respectively in the ceramic coating equipment market and in the ceramic healthcare equipment market. It evaluated that the evidence gathered for both markets individually pointed out that there was a single continuous agreement starting from 1994 in each of those markets separately. In the ceramic coating equipment market, the Board evaluated that the elements of the infringement were determination of sales prices and conditions, control of supply to the market, market sharing and anti-competitive exchange of information. As per the ceramic healthcare equipment market, the Board evaluated that the elements of the infringement were determination of sales prices and conditions, and anti-competitive exchange of information.

Some of the parties argued that the old documents became time barred and cannot be used as evidence. The Board referred to the *Polypropylene* decision[13] and stated that the Commission developed the concept of "a single continuing agreement" – "complex arrangements" that covers the whole process of the competition law violation instead of a static approach defining the moment of consensus.

The Board stated that the single continuing agreement definition was developed because in the long term cartel cases, it is impossible to identify each and all of the agreements or concerted practices conducted by the concerned parties for the same common objective. It further stated that as a result of this approach, all the evidence can be evaluated as a whole and the existence and the

[13] Polypropylene Commission decision, 23 April 1986, 86/398/EEC, Case IV/31.149

typical characteristics of the cartel can be revealed. However, the Board pointed out that it will be assumed that all concerned undertakings participated in the whole process unless there is evidence to the contrary.

The Board only stated that the two separate infringements started on 1994 and continued until the investigation period. Even though the decision does not discuss the elements of SCI for each of the relevant product markets, based on the reasoned decision, it is possible to say that the Board took into account that different parties were involved in cartel in the market for ceramic coating equipment and in the market for ceramic healthcare equipment. In addition to that the products were not substitutable to each other and therefore, decided that there are two separate cartels which constituted two different SCIs.

The Board concluded that the investigated undertakings violated Article 4 of Law No.4054 through agreements and concerted practices and imposed administrative monetary fines to the investigated undertakings that are active in the ceramic coating equipment market which were calculated on the basis of their 1% to 2% of their 2001 turnovers and 0.03% of their 2001 turnovers to the investigated undertakings that are active in the ceramic healthcare equipment market. [14]

Similarly, in *Nevsehir Driving Schools* (13.06.2013, 13-36/482-212), the Board investigated driving schools for determining the sales prices and conditions and creating pools for revenue sharing through different agreements between 2006 and 2012. The Board concluded that these separate agreements form a single continuing infringement.

The Board stated that the investigated undertakings have reached agreements on several matters within the scope of ongoing meetings starting from 2004 and continued until June of 2012. The agreements were on offsetting the driving school fees and private driving lessons, determination of the payment methods, creating pools for revenue sharing between the driving schools and sharing university students equally between the driving schools. Against this background, the Board decided that the agreements were distorting competition within the meaning of Article 4 of

[14] The Ceramics decision was revoked by State Council but only on procedural grounds.

Law No. 4054. With that said, the Board added that although the parties reach to different agreements at different times, the meetings were a part of the same process and therefore the said agreements were evaluated as a single violation. The Board concluded that all of the investigated parties (except for one undertaking that went out of business in 21.09.2011) participated to the meetings and received the meeting minutes via e-mail. Therefore, the Board added that it was clear that all the investigated parties were aware of the anti-competitive decisions that were taking during the meetings. The Board also evaluated that none of the investigated parties opposed to the decisions whereas they approved the meeting minutes, thus it concluded that all the investigated parties have participated to the agreement.

The Board stated that there was a substantial overlap between the parties and the subjects of the agreement in 2006 and the agreement in 2011 and therefore concluded that the agreement covering the years 2006 and 2007 and the agreement started from November 2011 are a single continuous agreement. However, the Authority was unable to demonstrate a contact, agreement or concerted action for the years 2009 and 2010. It was also noted in the decision that there was insufficient evidence to prove that the agreement between the parties also continued in 2008. The Board nonetheless imposed administrative monetary fines to the concerned undertakings which were calculated on the basis of 3% of the concerned undertakings' 2012 turnover.

Finally, two of the earliest precedents of the Board regarding SCI, *Flakeboard I and Flakeboard II (06.09.2002, 02-53/685-278 and 25.02.2003, 03-12/135-63),* the Board evaluated as to whether the undertakings violated Law No. 4054 by determining the sales and maturity conditions of flakeboards and fiberboards and whether their conducts constitute single continuing framework agreement.

In *Flakeboard I,* the Board stated that the documents do not point out to a series of different agreements, but rather constitute a single continuous agreement. One document indicated the main anti-competitive agreement between the parties and the other documents regulated the details of the anti-competitive agreement. The Board stated that all of the documents must be evaluated as a whole. The Board also evaluated that the meetings were not independent from each other, and concluded that the undertakings were a part of a single agreement starting from

1993. According to the reasoned decision, these agreements restricted competition in the flakeboard and fiberboard markets for over 8 years.

The Board indicated that some of the parties were more active in the cartel, some of them left the cartel and then re-entered, while some of them usually participated into the meetings and some of them were only aware of the meetings. However the Board noted that for the determination of the concept of a single overall agreement, parties' participation in all of the meetings does not have any significance.

Similarly in *Flakeboard II* (involving different parties from the investigated parties in *Flakeboard I*), the Board concluded that the undertakings held meetings and determined the sales and maturity conditions of flakeboards and fiberboards, and therefore restricted the competition in flakeboards and fiberboard markets. The Board stated that there were a main framework agreement and several other agreements that could be considered as the details of the main agreement in order to determine the sales prices and other conditions. The Board did not evaluate each agreement separately but rather analyzed them as a whole. It considered flakeboard and fiberboard as two separate relevant product markets, however concluded that the cartel behavior of the investigated undertakings in these two relevant markets constitute one single continuing agreement.

In both decisions, the Board imposed administrative monetary fines to the relevant undertakings.

- *Continuous Infringement or the Lack of it?*

In *12 Banks* (*08.03.2013, 13-13/198-100*), the Board did not explicitly and consistently linked the separate conducts of the banks in the reasoned decision, but concluded that the conducts of the 12 banks formed a single continuous infringement.

In this particular case, the Board had launched an investigation to determine as to whether 12 banks violated Article 4 of Law No.4054 by a reconciliation to harmonize their trade terms for cash deposit interests, credits, and credit card fees.

During the investigation, the Authority collected evidence from 12 banks which were regarded as information exchange. According to the Board, the evidences indicated that the 12 banks are in reconciliation with regards to their trade terms for cash deposit interests, credits, and credit card fees. On the basis of the old-dated and the recent documents obtained, the Board evaluated that the reconciliation contained agreements and/or concerted practices which took place between August 21, 2007 and September 22, 2011 with the participation of 12 banks on the respective services. According to the Board, the evidences indicated that 12 banks determined their pricing strategies under a common plan. The Board further indicated that the investigated banks executed and controlled such reconciliation through a series of communications and information exchange. The Board found that even though the number of participants has changed over the course of the collusion, significant number of the investigated banks regularly participated to the majority of the arrangements. Thus, the Board concluded that the violation in question should be evaluated as a single infringement with the common object of jointly determining the loan and deposit interest rates, fees and commissions.

According to the Board, the first four documents obtained within the scope of the investigation revealed the framework agreement with the aim of determining the prices for banking services. The other documents indicated that later on, the said framework agreement continued among the banks subject to the investigation as reconciliation. Such reconciliation sometimes occurred as contacts where the parties openly expressed their incentives of reconciliation and in other occasions occurred as contacts where the future price information is shared between competitors.

The Board found that there have been numerous contacts between the managers and employees from different levels (including the general managers and deputy general managers) of the 12 banks in order to; (i) enter into agreements to jointly determine the increases, changes and strategies regarding the loan and deposit interest rates, fees and commissions and (ii) establish concerted practices through exchanging competitively sensitive information such as the pricing strategies and the purposes.

Consequently, the Board found that 12 banks violated Article 4 of Law No. 4054 through entering into agreements and/or concerted practices in order to determine the interest rates, fees

and commissions with respect to deposit, loan and credit card services and imposed administrative monetary fines on the relevant undertakings.

In this case, the Board did not analyze whether there was a detailed plan to achieve a common objective, the structure of the alleged cartel or concerted practice or the tools and mechanisms used to maintain the alleged cartel or the concerted practice. The evidences did not indicate the involvement of all 12 banks; most of the information exchange was between two or three different banks. The Board evaluated that the concerted practice had multiple parties and lasted for a long time; however the decision did not set forth a detailed analysis to prove the existence of a single continuous infringement. Instead the Board assumed and acknowledged that all of the evidence was interconnected with each other, and stated that the time gaps between the documents do not have an effect on the nature of the infringement.

With that said, the Board did not specify why it considered such exchange of information as a single continuous infringement within 12 banks where it also did not explicitly reveal how all 12 banks acted together in cash deposit interests, credits, and credit card services.

Again in 2012, in *Dogu Anadolu Cement Producers (06.04.2012, 12-17/499-140),* the Board launched an investigation to assess whether the cement producers in the Eastern and Black Sea regions of Turkey violated Article 4 of Law No. 4054 by engaging in price-fixing agreements. The common objective of the alleged agreements was indicated as parallel price increases on specific dates alleged to be agreed upon in a meeting between various cement producers. The Board based its decision on various circumstantial evidence such as documents as to the travelling of certain executives from various cement producers to where the concerned meeting was held on the same date and a hand-written note on a hotel notepad mentioning parallel price increases. It was further discovered that the investigated undertakings carried out similar price increases.

The Board discovered two documents which indicate two meetings. First one of the documents indicated a meeting on 29 March 2010 between the employees of different cement producers of Eastern region of Turkey, which is followed by a price increase in the same region. Second one

indicated meetings between 26 April 2010 and 09 November 2010 between four cement producers regarding price determination (i.e. price increase and price decrease), which is followed by a parallel price increase in the same region, along with customer allocation in June 2011.

The Board discussed that the common objective of these two cartels was to restrict competition and four cement producers were parties to both cartels, and thus there may be a single continuous infringement. However, considering that (i) the first cartel aimed for price determination and the second cartel aimed for not only price determination but also customer allocation, (ii) the time slots of both cartels do not overlap substantially, (iii) the first cartel concerns a larger region than the second cartel, (iv) the methods followed by both cartels differ, and (v) a coordination between the said cartels was not discovered, the said cartels may have constituted separate cartels.

The Board nevertheless determined that the conducts were considered as part of a single infringement considering the following: (i) the common objective of the concerned cartels was to restrict competition by engaging in illegal price-fixing agreements, (ii) the chronological process of the said meetings are concentric, (iii) the geographic regions of the said meetings are intersect, and (iv) the concerned documents do not indicate two actions that are independent from each other.

Consequently, the Board concluded that the investigated cement producers violated Article 4 of Law No.4054 and imposed administrative monetary fines to the concerned undertakings which were calculated on the basis of their 2% to 3% of their 2011 turnovers.

III. Conclusion

The Authority plays a substantial role in preserving the growing economy and competitive environment in Turkey. Therefore in order to assure a reliable and foreseeable competition environment for the enforcers and the market players, a consistent approach of the Authority has significant pertinence. Based on the precedents of the Board on SCI, although the Board is familiar with the concept, in some of its decisions it does not show a consistent approach. In

some precedents, the Board seeks to discover the common objective within the investigated undertakings, complimentary nature of the agreements or concerted practices which constitute entirety and the participation of the undertakings to the agreements or concerted practices in order to determine whether a SCI is established. However in some others, the reasoned decision does not reveal how the Board applied the criteria for SCI or how it reasoned the links or the common objective between separate conducts.

The handicap for the Authority, while linking the investigated conducts to each other, is to create a common objective that does not actually exist between the undertakings. The lack of proving the common objective was observed in *12 Banks* where the Board concluded that all 12 banks violated Law No. 4054 even though the evidence of information exchange failed to indicate a solid common objective. Similarly in *Nevsehir Driving Schools*, the Board could not demonstrate a contact, agreement or concerted action for the years 2009 and 2010, and yet still evaluated that the SCI continued for five years until 2011.

Moreover, while the Turkish competition law is closely modeled on EU competition law and the Board referred to the relevant EU precedents in its decisions, there were deviations from the EU case law. For instance in *Dogu Anadolu Cement Producers*, although there were indications of two separate cartels in separate geographic regions with partially common objectives of different parties, the Board determined that there is a single continuous infringement and did not provide further assessment. Contrarily, in *Choline Chloride*[15], the General Court evaluated that the concerned producers had committed two separate infringements of Article 101(1) TFEU and not a single and continuous infringement, since the objectives of the global and European cartels were different. The General Court pointed out that the concept of single objective cannot be determined by a general reference to the distortion of competition in the choline chloride market, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a consubstantial element of any conduct covered by Article 101(1) TFEU.

[15] BASF v. Commission, 2007, Joined Cases T-101/05.

The concept of SCI is still developing case by case in Turkey. However, the Board's precedents did not yet introduce a consistent approach when applying the facts of the case to the conditions of the single continuous infringement concept.

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