The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey

Gönenç GÜRKAYNAK

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Bu kitap ELİG Gürkaynak Ortak Avukat Bürosu adına Legal Yayıncılık A.Ş. tarafından basılmıştır.

Sincerely dedicated to my teachers and masters in the competition law field, with the hope that I am half as inspiring as they are to young competition lawyers congregating around me...

Gönenç Gürkaynak, İstanbul, March 2018

Rekabet hukuku sahasındaki öğretmenlerim ve ustalarım için. Etrafımda toplanan genç rekabet hukukçularına, bu alandaki öğretmenlerimin ve ustalarımın bana verdiğinin yarısı kadar ilham verebildiğim ümidiyle...

Av. Gönenç Gürkaynak, İstanbul, Mart 2018

FOREWORD

On the occasion of the 20th anniversary of competition law practice in Turkey, it is my great pride and pleasure to present the book you are holding in your hands, which was conceived, written and published within a six-month period as an academic publication that could make a valuable Turkish contribution to the global discussion and study of competition law issues.

I am confident that every competition law practitioner in Turkey would agree with me that, although it has had its ups and downs, competition law practice in Turkey has always been on an upwards trajectory and has progressed remarkably since its early days.

Competition law has always attracted ambitious and enthusiastic young practitioners. Moreover, our field has drawn increasingly more attention and interest, particularly from students in the field of law and economics. Private enterprises, public institutions (including the Competition Authority itself), as well as lawyers active in our field have always strived in good faith to help establish a more sophisticated competition law ethos and practice in our country.

Through their valiant efforts, competition law has changed and grown profoundly in the 20 years that it has been practiced in Turkey, and it has now evolved into a stimulating and substantive legal discipline.

Therefore, as Turkish competition law practice passes the 20-year mark, it seemed only fitting to salute the collective efforts of the past twenty years by publishing a comprehensive academic study on competition law with global relevance and appeal.

This book, which comprises twelve academic articles discussing contemporary competition law issues, was drafted by adhering to the highest standards of international academic publishing, and it is a product of the collaborative efforts of lawyers specializing in competition law at ELIG, Attorneys-at-Law, including junior associates who are novices in this field.

Thus, I believe that this book marks and represents the future of competition law in Turkey. I rest assured in the knowledge that these colleagues, who possess less than three years of experience in this specific field, will one day number among those practitioners leading and carrying competition law forward in Turkey and globally.

Therefore, even though the articles in this book also reflect my own extensive contributions and a rigorous editing process, they nevertheless reveal the extensive potential of the competition law discipline in Turkey, as well as demonstrating the individual promise and abilities of each of these young practitioners that were my co-authors.

Gönenç Gürkaynak, Esq.

ÖNSÖZ

Türkiye'deki rekabet hukuku uygulamasının 20. yıl dönümünde Türkiye'den global alana rekabet hukuku çalışmaları ihraç edebilecek düzeyde bir akademik kitap yazıp basma fikrini 6 ayda hayata geçirip elinizde tuttuğunuz kitaba nihai halini verdiğimiz için gurur duyuyorum.

Bugün Türkiye'deki her rekabet hukukçusunun şunu teyit edeceğini tahmin ederim ki, iyi günüyle, kötü günüyle, Türkiye'de rekabet hukuku uygulaması genel bir trend olarak daima ileri ve iyiye gitmiştir. Bu alana daima daha da iştahlı gençler katılmışlardır.

Bu alan, özellikle de hukuk ve iktisat öğrencilerinde, git gide daha fazla ilgi uyandırmıştır. Özel teşebbüsler de, kamu teşebbüsleri de, Rekabet Kurumunun kendisi de, bu alanda destek veren avukatlar da, daima daha sofistike bir rekabet hukuku anlayışına doğru iyiniyetle çaba göstermişlerdir.

Bu çaba sayesinde, rekabet hukuku bugüne kadar Türkiye'de uygulandığı 20 yılında hep daha ilginçleşti ve içerikli hal aldı. Dolayısıyla, Türkiye'de rekabet hukuku uygulamasının 20. yılını geçtiğimizde de tamamen akademik ve dünyanın her yerine hitap edebilir bir kitapla o 20 yılın toplu emeğine selam vermek uygun göründü.

Üst düzey uluslararası akademik yayın standartlarında kaleme alınmış 12 güncel rekabet hukuku akademik makalesinden oluşan bu kitabı, ELİG Gürkaynak Ortak Avukat Bürosu'nda özellikle rekabet hukuku alanında çalışan hukukçular arasından, bu alana en yeni girmiş olanlarıyla beraber kaleme aldık.

Yani, bu kitabın rekabet hukukunun Türkiye'deki geleceğine not düşen bir çalışma olduğunu söyleyebilirim. Rekabet hukuku alanındaki spesifik çabaları daha 3 yılı doldurmamış bu meslekdaşlarımın gelecekte bu alanı Türkiye'de ve dünyada taşıyan insanlar arasında olacaklarını biliyorum.

Benim yoğun dokunuşlarımla ve epey editörlükle nihai hale gelen bu kitap sonuç olarak hala hem şahsen onların potansiyelini hem de rekabet hukuku disiplininin Türkiye'deki potansiyelini göz önüne sermektedir.

Av. Gönenç Gürkaynak

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Gönenç Gürkaynak*
Görkem Yardım**
Gülce Korkmaz***

1. Introduction

Free and open markets are essential for a vibrant economy. In order to achieve lower prices and higher quality, and more importantly, to increase innovative efficiency, competition among sellers in a market should be ensured and preserved. Accordingly, the traditional concern of competition law rules (and authorities) has always been to preserve competition among firms by preventing them from joining together in the form of cartels to obtain the fruits of monopoly.[1]

Cartels, which have been described as "*the supreme evil of antitrust,*" in the words of the United States Supreme Court,[2] are considered to be the most serious violations of competition law, since they injure consumers by restricting supply and raising prices. Indeed, it is universally acknowledged that the harm caused by cartels to the economy (and to social welfare) is substantial. Cartels lead to goods and services becoming completely unavailable to some

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1 PHILIP E. AREEDA et al. ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES 113 (7th ed. 2013).

2 Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

purchasers and unnecessarily expensive for others,[3] and thus, they are strictly prohibited all over the world. Moreover, cartels do not offer any legitimate social or economic benefits that would justify the losses they lead to. For these reasons, cartel organizations are condemned and combated by all competition regimes worldwide. In some countries, forming or participating in cartels is even classified as a crime.[4] In most countries, competition laws stipulate the imposition of large fines against organizations who participate in cartel conduct, and these fines are imposed by public authorities.[5]

In addition to the public enforcement of competition law rules, private enforcement also plays a significant role in the general system of cartel law enforcement. Private market participants fulfill an important function by way of complaints or as third-party participants in competition lawsuits. Private enforcement of competition law rules allows the victims of the anticompetitive violation to be compensated for their injuries. Furthermore, private enforcement increases deterrence against competition law infringements.[6] Competition law regimes around the world generally provide an explicit statutory basis for action for damages. In other words, in most jurisdictions, the enforcement of damage claims in competition matters is facilitated.[7]

With regards to private enforcement, there are a number of different categories of persons and parties who might be adversely affected by antitrust violations. For instance, the competitors of cartel members, as well as the direct

[3] OECD, Cartels and anti-competitive agreements, http://www.oecd.org/competition/cartels/ (last visited Dec. 5, 2017).

[4] Norton Rose Fulbright, The Criminal Cartel Offence Around the World, Competition World Quarter 2: 2016, p. 6-9, http://www.nortonrosefulbright.com/files/ competition-world--q2-2016-141176.pdf (last visited Jan. 16, 2018).

[5] OECD - Directorate For Financial, Fiscal and Enterprise Affairs Competition Committee, Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws, DAFFE/COMP(2002)7, p.5, http://www.oecd.org/competition/cartels/2081831.pdf (last visited Dec. 5, 2017).

[6] Donncadh Woods et al., Private Enforcement of Community Competition Law: Modernisation and the Road Ahead, EC Competition Policy Newsletter Number 2 - Summer 2004, (32), http://ec.europa.eu/competition/speeches/text/2004_2_31_en.pdf (last visited Dec. 5, 2017).

[7] International Competition Network Cartels Working Group, Interaction of Public and Private Enforcement in Cartel Cases, Report to the ICN annual conference, Moscow, May 2007, p. 47, http://www.internationalcompetitionnetwork.org/uploads/library /doc349.pdf (last visited Dec. 5, 2017).

or indirect purchasers of cartel members, may be affected by their anticompetitive conduct. Another special group of persons that might be harmed by the cartel is "umbrella customers," who are the customers of an undertaking that is not party to the cartel, but who nevertheless benefits from the economic conditions of umbrella pricing, and who have suffered harm as a result of the increased market prices due to the existence of the cartel. This scenario arises from the "umbrella effects" of the cartel, which is one of the possible bases of private claims for damages. This article focuses mainly on the concept of "umbrella effects" and its relationship to the concept of "causal link" in competition law. This issue will be discussed in terms of its various practical applications within the scope of the damage claims arising from cartel activities, particularly in light of the *Kone* decision of the Court of Justice of the European Union ("***CJEU***").

In June 2014, the CJEU resolved an important debate on whether the damages arising from the "umbrella effects" of cartel actions may be claimed for compensation by umbrella customers. In its *Kone* ruling, the CJEU declared that victims of harm resulting from umbrella pricing policies have the right to pursue compensation for damages before national courts. The umbrella effect, which results from the undertakings outside the cartel raising their prices in line with the firms within the cartel, will be explained and analyzed in detail in the following sections. Accordingly, the concept of causal link will be defined and examined with its reflections in the EU, U.S. and Turkish competition law practices at first. Following this chapter, the umbrella effects will be explained in detail. Accordingly, the definition and the economic foundations of umbrella effects will be discussed. Furthermore, compensation for damages arising from the umbrella effect in the U.S. and EU law will be assessed in the following chapter. Then, CJEU's *Kone* decision will be presented and analyzed with the opinion of AG Kokott. Finally, concluding remarks and our opinions regarding the possible implications of umbrella effects for Turkish competition law practice will be presented.

2. The Concept of Causal Link within the scope of Compensation for Cartel Damages

The crucial concept of "causal link" simply refers to "causal connections between events." The main function of a causal link is to explain the occurrence of particular events, and to attribute responsibility to agents whose actions have provoked or instigated the events. Among the variety of relationships between causes and effects, only some will be considered to constitute a legally causal relationship.[8]

As explained in the EU Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("***Directive***"): *"According to the case-law of the Court of Justice of the European Union any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law."*[9] The presence of a causal link between the violation and the injury is a *sine qua non* requirement of any damage claim. In principle, recovery will be ordered where an infringing behavior has caused the damage in question.[10]

The main reason why the issue of compensation for damages arising from umbrella pricing is subject to so much controversy is the difficulty in demonstrating a causal link between the cartel and the harm resulting from the alleged umbrella pricing. As explained by Advocate General Kokott in her seminal opinion in the *Kone* case, *"from a legal point of view, the issue of whether members of cartels can also be held civilly liable for umbrella pricing hangs on the existence or otherwise of a causal link. The question is whether there is a sufficiently close connection between the cartel and the losses resulting from umbrella pricing caused by a cartel, or whether these are excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel."*[11]

Apart from its direct relationship with the phenomenon of umbrella effects, the concept of "causal link" is itself one of the most controversial issues (with respect to actions for antitrust damages) in EU competition law. This is mainly because *"proving a causal link might require complex economic analysis based on a large number of facts and economic data"*, as pointed out by the Commission Staff in one of its working papers on the subject.[12]

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8 Ioannis Lianos, Caus*al Uncertainty and Damages Claims for the Infringement of Competition Law in Europe*, YEARBOOK OF EUROPEAN LAW, (2015), at 8.

9 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Preamble, para. 11.

10 Commission Staff Working Paper - Annex to the GREEN PAPER Damages actions for breach of the EC antitrust rules, Brussels, SEC(2005) 1732, para. 273.

11 Opinion of AG Kokott, KONE AG and Others, Case C-557/12, (30 January 2014), para. 19.

12 Commission Staff Working Paper, *supra* note 10, para. 274.

With regard to EU competition law, Member States have adopted diverse approaches in terms of the legal notion of causation. The legal systems of different Member States refer to such concepts as "foreseeability," "direct cause," or "sufficient cause."[13] However, for the sake of the efficient application of EU competition policy, the European Commission has stated that, *"the application of the legal requirement should not lead to the exclusion of groups of victims of anti-competitive behaviour from recovering their losses."* Moreover, it is important to note that, in the *Courage* decision, the Court had ruled *"that the full effectiveness of the EC Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by a conduct prohibited by Articles 81 and 82 EC"*[14] (Articles 101 and 102 of the TFEU, respectively.)[15]

In U.S. antitrust law, Article 4 of the Clayton Act provides that: *"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor (...) without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."*[16] In U.S. law, several tests are possible with regards to the presence of a causal link, including "but for" causation, proximate cause, sole causation, reasonable connection, and increased possibility of harm, and U.S. courts have applied variations of all these tests in the past.[17] The Supreme Court has also explored whether a plaintiff suffers injury *"of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts*

[13] *Id.*, para. 275.

[14] Courage v Crehan, Case C-453/99, ECR I-6323, para. 26, (CJEU, 2001).

[15] In the European Union, Article 101 of the Treaty for the Functioning of the European Union ("**TFEU**") governs the legality of horizontal agreements between undertakings. Article 101 of the TFEU provides that, "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" shall be prohibited. The most common example of illegal conduct violating Article 101 is the creation of a cartel between competitors. Article 102 of the TFEU governs the unilateral conducts of undertakings abusing their dominant positions. Pursuant to Article 102, "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

[16] Clayton Act § 4, 15 U.S.C. § 15 (1964).

[17] Michael A. Carrier, A Tort-Based Causation Framework for Antitrust Analysis, Antitrust Law Journal, Vol. 7 (2011) p. 1.

unlawful"[18], in order to ensure that the plaintiff is able to show harm to "competition, not competitors."[19][20]

Within the scope of Turkish competition law, Article 57 of the Law No. 4054 on the Protection of Competition provides the "right for compensation," emphasizing, once again, that the presence of a causal link is a requirement. According to Article 57, real or legal persons (whether or not they have the nature of an undertaking) that bear losses due to the distortion of competition may recover compensation for the loss from the parties causing the loss.[21] Since the general principles of contract law are applicable for the private enforcement of Turkish competition law rules, the "sufficient causal link" theory, which is deemed as the generally applicable theory in Turkish contract law doctrine, is also in effect for the private competition law enforcement practice under Turkish law.[22] According to the "sufficient causal link" theory, if the damage can be sufficiently deemed as a result of a particular act in terms of the ordinary course of life, a causal link exists between the act and the damage. In other words, for establishing the presence of a causal link, it is not sufficient that the relevant conduct is a necessary condition for the damage to emerge; the conduct must, at the same time, be the appropriate and sufficient cause of the damage.

3. The Umbrella Effect

3.1. Definition of the Umbrella Effect

Umbrella pricing is one of the possible consequences of a cartel.[23] A loss being suffered by the customer of an undertaking that is not party to the cartel, but that nevertheless benefits from the economic conditions of umbrella pricing, due to an offer price that is higher than it would have been able to charge *but for* the existence of that cartel, is one of the possible effects of a cartel.[24] Umbrella effects arise when the price increase or quantity reduction occurring due to the existence of the cartel causes the demand to be switched to

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18 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

19 *Id.*, at 488, citing Brown Shoe Co v. United States, 370 U.S. 320, 320.

20 Michael A. Carrier, *supra* note 17, p. 1.

21 Grounds for Article 57 of the Law No.4054 on the Protection of Competition, http://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054/grounds-for-the-articles (last visited Dec. 5, 2017).

22 BUĞRA KESİCİ, REKABET HUKUKUNUN İHLALİNDEN KAYNAKLANAN HAKSIZ FİİL SORUMLULUĞU 215 (2017).

23 Kone AG and Others v ÖBB-Infrastruktur AG, Case C-557/12, para. 28 (CJEU, 2014).

24 Opinion of AG Kokott, *supra* note 11, para. 37.

substitute products. In other words, since there are often undertakings who are not a party to the cartel producing substitute products (unless the cartel covers the entire market), umbrella effects are likely to occur. As a general outcome, cartels reduce product quantities (*i.e.,* supply) and increase prices. Thus, customer demand shifts to the substitute products that are produced by the non-cartel undertakings. The increase in the demand for substitute products generally leads to higher prices for the substitute products in question. The new price levels, which only come about as a result of the increase in the demand for the substitute product arising from the cartel pricing, is known as "umbrella pricing." Accordingly, the increase in the prices of the substitute product is called "umbrella effects." In other words, as pointed out by Advocate General Kokott in her opinion in the *Kone* case, umbrella effects arise "*when undertakings that are not themselves party to a cartel, benefiting from the protection of the cartel's practices (...) set their own prices higher than they would otherwise have been able to under competitive conditions.*"[25]

3.2. The Economic Foundations of Umbrella Pricing Effects Caused by Cartels

Umbrella effects may occur in different forms depending on the particular conditions prevailing in the relevant markets. For instance, the significance and extent of the umbrella effect depends on whether the cartel outsiders behave strategically or non-strategically as price takers, and on whether the market is characterized by price (Bertrand) or quantity (Cournot) competition.[26] Furthermore, umbrella effects may occur under a broad range of circumstances, such as the market share/coverage of the cartel, the nature of the products (*i.e.,* whether they are homogenous or differentiated), and the type of competition in the market (*i.e.,* price or quantity competition), and the scope of the umbrella effects in any given market will vary accordingly. These effects will be examined under two main sections in this article: (i) umbrella effects in the same relevant market, and (ii) umbrella effects outside the relevant market.

Umbrella Effects Occurring in the Same Relevant Market

When a cartel does not comprise the entire relevant market, umbrella effects are very likely to arise. Umbrella effects occurring in the same relevant market can be observed both when the cartel outsiders (i) behave non-strategically (*i.e.,* as straightforward price takers), and (ii) act strategically (*i.e.,*

[25] *Id.,* para. 2.

[26] Roman Inderst et al., *Umbrella Effects, Journal of Competition Law and Economics* (2014) at 4.

analyzing the behavior of their competitors and considering how their own behavior would affect the market conditions).[27]

We will begin our analysis by examining umbrella effects with non-strategic cartel outsiders. If a cartel does not include all undertakings in the relevant market (*i.e.*, a non-inclusive cartel), there will be at least one undertaking which produces substitute products in that market. In the most common scenario, undertakings that form a cartel jointly raise their prices or decrease their supply for the relevant products. In that case, this price increase or supply reduction should be expected to spread throughout the relevant market, since the non-cartelist undertakings will either align their prices with the cartel members' prices or prices will rise due to the increased demand for their products. In a scenario where there is price competition between the undertakings and the products are homogenous (*i.e.*, interchangeable), the price increase for the cartel members and the non-cartelist undertakings would be expected to be the same. On the other hand, if the products are differentiated, the significance and scope of the umbrella effects would be expected to depend on the degree of substitutability between the products produced by the cartel members and by the non-cartelists.[28] On the other hand, if there is quantity competition (rather than price competition) in the relevant market, then the cartel members tend to reduce the quantity supplied to the consumers. Thus, an increase in the market price ensues as a result of the decreased supply, and the non-strategic cartel outsiders who act as price takers would increase their own supply of the product in question. However, since the cartelist undertakings would have already reduced their supply, the total quantity supplied to the consumers would be lower and the price would be higher compared to the price that would have existed in the market in the absence of the cartel. In this quantity competition scenario, a similar result would be reached in the case of both homogenous and differentiated products.[29] In both scenarios (*i.e.*, of price competition and quantity competition), the non-cartelist undertakings' response to the cartel's strategy would be perfectly natural and economically rational.

As a second possibility, the non-cartelist undertakings may choose to behave strategically when confronted with the actions of a cartel. If the non-cartelist firms possess sufficient market power in the relevant market, they would no longer be forced to accommodate the increased demand, and may

[27] Avgustina Lazarova, A Cartel's 'Umbrella Effect' and the Right to Claim Damages for Falling under its Shadow: What Does It Change for the Private Enforcement of EU Competition Law?, (Unpublished Thesis) College of Europe, Department of European Legal Studies, (9).

[28] *Id.*, p. 10.

[29] *Id.*

choose to adjust their prices optimally for the maximization of their profits. If there is price competition and the firms produce a homogeneous product, the market outcome would be the same as in a market where all the firms are price takers (*i.e.,* as in the standard Bertrand model). Consequently, in this scenario, a cartel would trigger neither a price increase nor any umbrella effects.[30] On the other hand, if the products are differentiated, the optimal response of a non-cartelist undertaking to a price increase by the cartel members would be to raise the price of its product as well.[31] However, if there is quantity competition between the non-cartelist undertakings acting strategically, then the reaction of cartel outsiders would be similar to that of price takers. Thus, if the cartelists were to decrease the quantity they produce/supply, the non-cartelist undertakings would be expected to increase the quantities they supply in the relevant market. However, since the cartelist undertakings had already reduced their supply, the total quantity supplied in the market would be lower and the price would consequently be higher compared to the price that would have prevailed in the market in the absence of the cartel. Finally, it should be noted that a similar outcome would be observed in this scenario regardless of whether the products are homogenous or differentiated.[32]

Umbrella Effects Occurring Outside the Relevant Market

Umbrella effects may also occur in situations where all the undertakings operating in the relevant market are part of the cartel. In that case, the umbrella effects would arise outside the relevant market. This is mainly because, within the scope of the said scenario, in which all the undertakings in the relevant market collectively establish and participate in a cartel, if the cartel raises the price substantially above the competitive price level in that market, then the products outside the relevant market would become substitutes. In other words, if there is a substantial price increase, products that are not a part of the relevant market will be deemed as substitutes by the demand side of the market. This would happen even if the products outside the relevant market are not similar enough to the cartel's product to serve as substitutes. Accordingly, the non-cartelists firms which may enjoy higher levels of demand will be able to raise their prices. Therefore, due to the consumer demand that shifted to those substitute products, the umbrella effect will subsequently occur.[33]

Another discussion point regarding the umbrella effects occurring outside of the market is whether the size of the umbrella effect occurring

[30] Roman Inderst et al., *supra* note 26, p. 9.

[31] Avgustina Lazarova, *supra* note 27, p. 11.

[32] *Id.*

[33] *Id.*, p. 12.

outside of the relevant market is smaller than the size of the effect occurring in the relevant product market. In this regard, the size of the umbrella effect depends on the size of the markup on the prices of the cartelists' products. The size of the umbrella effect will be determined by the size of the markup on the price of the relevant product since the products of the cartel outsiders remain more substitutes than the products of the cartelists[34]. Therefore, if the increase in the prices is huge, cartel outsiders' products will be deemed as close substitutes by the customers and the demand for these products will rise and the prices will be increased. Accordingly, the size of the umbrella effect depends on the size of the markup of the prices of the cartelist' products.

4. Compensation for Damages Arising from the Umbrella Effect

As mentioned earlier in Section 3.2, a non-cartelist undertaking observing that a price increase and/or a reduction in output was being carried out by its competitors in a coordinated manner (*i.e.*, by a cartel), would basically have a choice between either leaving its price at the below-market level and increasing its output, or raising its price to bring it in line with that of the cartel and reducing its output accordingly. Assuming that the non-cartelist undertaking would make prudent and logical commercial decisions by following rational choice theory, it would be expected to try to maximize its profits either way, whether by assuming the role of the maverick and undercutting its competitors' prices or by going along with the price raise and silently benefiting from the cartel. The non-cartelist undertaking would pick and adopt the preferable option according to its analysis of the relevant market conditions. Accordingly, the higher the total market power of the cartel members in the relevant market, the more likely the non-cartelist undertaking would be to lean toward choosing the second strategy (*i.e.*, raising its prices) and benefiting silently from the cartel. This is mainly because product homogeneity would be higher and the elasticity of supply would be lower if the cartel members possessed high market power, compared to the scenario in which the total market share of the cartel members were lower. Therefore, a non-cartelist undertaking that tends to choose the second strategy (*i.e.*, increasing its price and reducing its output) and thus benefiting from the cartel would be considered to be "under the umbrella of the cartel." This is the reason why this particular pricing structure is commonly referred to as "umbrella pricing."[35]

[34] Roman Inderst et al., *supra* note 26, p. 18.

[35] Jens-Uwe Franck, *Umbrella Pricing and Cartel Damages under EU Competition Law*, EUROPEAN UNIVERSITY INSTITUTE WORKING PAPERS, LAW 2015/18, at 1.

If undertakings that are not party to a cartel choose to act in accordance with the pricing strategy of the cartel members, and silently raise their prices and reduce their output, then their conduct does not violate Article 101 of the TFEU. Needless to say, undertakings that are not party to a cartel are not under any obligation to keep their price levels below those of the cartel members. Furthermore, it would also not be reasonable to expect the non-cartelist undertakings to increase their output quantities in response to a cartel action. Thus, since non-cartelist undertakings adjust their own pricing and output strategies according to the altered market conditions after the establishment of a cartel, and since they do not participate in the anticompetitive collusion behavior themselves, they cannot be said to infringe any competition law rules. Therefore, such non-cartelists cannot be fined or punished by a competition law authority or sued in a private lawsuit.[36] This is the reason why customers cannot claim compensation for cartel damages from undertakings that are not party to a cartel in the case of an umbrella pricing strategy being adopted by such non-cartelist undertakings.[37]

However, it is clear that umbrella pricing strategies result in allocative inefficiencies and that, as a matter of public policy, deadweight losses arising from cartel activities should be prevented.[38] Furthermore, allowing parties that are injured by umbrella pricing strategies to claim damages may increase the deterrence of anticompetitive behavior due to more widespread private actions regarding this issue. Thus, we conclude that injured parties should be compensated for the damages arising from umbrella pricing strategies, and that cartel members should be economically liable for the consequences of their anticompetitive actions if there is a causal connection between the damages suffered by the victims and the antitrust violation committed by the cartel members.

4.1. Compensation of Damages Arising from the Umbrella Effect in U.S. Antitrust Law

In the United States, compensation of damages arising from anticompetitive conducts is generally handled through private actions for damages that have an explicit punitive purpose.[39] In fact, this is so much the

[36] John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO LAW REVIEW 427 (2012), at 460.

[37] Jens-Uwe Franck, *supra* note 35, p. 2.

[38] *Id.*, p. 8.

[39] Pierre Crémieux et al., *Antitrust Private Damages Actions in the United States, Canada and the European Union*, COMPETITION POLICY INTERNATIONAL (2016), at 7.

case that private actions account for around 90% of competition enforcement actions in the U.S.[40] Since public enforcement of antitrust laws is not nearly as common as private enforcement in the U.S., private enforcement of antitrust laws is designed both for the compensation of damages and for the deterrence of anticompetitive behavior.[41] In comparison, private enforcement plays a significantly greater role in the U.S. system than in the EU competition law system, where victims of anticompetitive violations are awarded treble the amount of the actual damages suffered as compensation for damages.[42]

U.S. Courts have interpreted Section 4 of the Clayton Act as providing a private right of action (*i.e.*, antitrust standing) to anyone who has been injured as a proximate result of an antitrust violation.[43] To claim and prove damages for anticompetitive conduct in U.S. antitrust law, an injured party must demonstrate the following:

1. The antitrust violation was a material "but for" cause of its injury: An antitrust plaintiff must prove that the violation was the "but for" cause of its injury. In other words, the plaintiff must first show that the violation was a "material" cause of the injury. Moreover, if the violation "materially contributed" to the injury, the plaintiff then needs to prove that the violation contributed significantly to its injury, even if there were other factors aggregating the injury.[44]

2. The party's injury arose from the anticompetitive effects of the antitrust violation: The plaintiff seeking damages needs to prove that the injury is an "antitrust injury," which is the type of injury that the antitrust laws were intended to prevent. In other words, the injury should reflect the anticompetitive effect. In its *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* decision, the U.S. Supreme Court stated that, *"Plaintiffs must*

[40] Donncadh Woods et al., *supra* note 6, p. 37.

[41] Eda Şahin, *Şemsiye Etkisi Nedeniyle Zarar Görenlerin Tazminat Taleplerinin Avrupa Birliği Rekabet Hukuku Bakımından Değerlendirilmesi: Kone Kararının Yansımaları*, REKABET DERGİSİ (2014) 15(2): 89-126, at 97.

[42] Gregor Erbach, EU and US Competition Policies: Similar Objectives, Different Approaches, European Parliamentary Research Service, 2014, p. 1, http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf (last visited Dec. 5, 2017).

[43] Peter T. Barbur & Jonathan J. Clarke, Antitrust Standing and the New Economy, The National Law Journal, 28.11.2011, p. 1, https://www.cravath.com/files/Uploads/Documents/Publications/3320222_1.pdf (last visited Dec. 5, 2017).

[44] DAMIEN GERADIN & EINER ELHAUGE, GLOBAL COMPETITION LAW AND ECONOMICS (2nd ed. 2011) at 17.

prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations (...) would be likely to cause.''[45]

3. The link between the violation and the injury was sufficiently direct or proximate: The plaintiff seeking damages is also required to show that its injury was a sufficiently direct or proximate result of the antitrust violation. Thus, this condition generally excludes claims arising from an antitrust violation that harmed an intervening party, who subsequently passed the harm on to the plaintiff.

4. The amount of damages it suffered from the injury.

The issue of antitrust standing in U.S. competition law has continued to develop and has evolved into a fairly complex doctrine. In order to determine whether a plaintiff has antitrust standing, U.S. courts basically apply a two-step test. In the first step, as described in the *Brunswick* decision discussed above, the courts consider whether the plaintiff has suffered an antitrust injury of the type that the antitrust laws were intended to prevent and "that flows from that which makes defendants' acts unlawful." As a second step, the courts subsequently examine whether the plaintiff is the proper party to enforce a given claim by assessing the directness of the injury.[46]

In the light of the elements that need to be proven, as explained above, certain categories of injured parties, such as umbrella customers or indirect purchasers or potential customers, may fail to have antitrust standing due to the difficulty of establishing "the sufficiently direct or proximate link" between the violation and "the injury arising from the anticompetitive violation." Generally, only direct purchasers who are in a direct and unmediated relationship with the cartel members may seek compensation for damages under U.S. federal antitrust laws. On the other hand, it should also be noted that if the seller and the direct purchaser have violated antitrust rules jointly, then an indirect purchaser may have standing to sue for damages arising from the antitrust violation.[47]

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[45] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., *supra* note 18.

[46] Peter T. Barbur & Jonathan J. Clarke, *supra* note 43, p. 1.

[47] D. DANİEL SOKOL et al., GLOBAL ANTITRUST COMPLIANCE HANDBOOK (2014), at 853, para. 43.

With respect to umbrella effects, it should be stated that there is currently no consensus as to whether or not plaintiffs may recover damages arising from umbrella effects,[48] and U.S. courts are split over whether injured parties can successfully sue cartel members on the theory that the cartelists were responsible for the umbrella effects leading to their injuries.[49] It has been observed that damages arising from umbrella effects are rarely awarded in cartel cases, mainly due to the difficulties associated with proof in such cases.[50]

In the *Mid-West Paper Prods. Co. v. Continental Group, Inc.*[51] decision, rendered by the United States Court of Appeals, Third Circuit, the Court ruled that the *"direct purchasers from competitors of defendant manufacturers were not entitled to sue on a theory that defendants' anticompetitive activity made it possible for their competitors to charge higher prices and thereby injure purchasers."* In other words, umbrella customers were not allowed to seek compensation for their damages arising from the umbrella effects of the consumer bags cartel.

On the contrary, in the *Beef Indus. Antitrust Litigation*[52] decision of the United States Court of Appeals, Fifth Circuit, the Court ruled that the plaintiffs were entitled to antitrust standing with respect to the umbrella claims. In that case, *"[c]attlemen, ranchers and feeders brought private actions against 25 retail food chains, a wholesale grocer, the retail chains' national trade association and a beef industry price reporting publication alleging violations of federal antitrust laws."*[53] The Court of Appeals subsequently held that *"complaints alleging retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy stated sufficient injury to one's "property" within the meaning of the Clayton Act."*[54]

As mentioned by AG Kokott in her opinion in the *Kone* decision, *"The fact that the US case-law on 'umbrella claims' is inconsistent and that the*

[48] Emily Clark et al., Study on the Conditions of Claims for Damages in case of Infringement of EC Competition Rules - Analysis of Economic Models for the Calculation of Damages, Ashurst, 2004, p. 14. http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf (last visited Dec. 5, 2017).

[49] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, OHİO STATE LAW JOURNAL: Volume 54, Issue 1 (1993), at 10.

[50] *Id.*

[51] Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3rd Cir. 1979).

[52] Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979).

[53] *Id.*, please see: Synopsis of the case.

[54] *Id.*

United States Supreme Court has not as yet provided any clarification in this regard should not prevent the Court of Justice from addressing the issue of umbrella pricing."[55] However, it should be kept in mind, as we proceed with the rest of our analysis, that there is currently no consensus in U.S. courts on whether to allow antitrust standing in cases involving umbrella pricing.[56]

4.2. Compensation of Damages Arising from the Umbrella Effect: EU Competition Law and the CJEU's *Kone* Decision

In the EU competition law regime, it is widely accepted that *"any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."*[57] This is a well-established position, since the CJEU is of the opinion that the practical effect of the prohibition laid down in Article 101 of the TFEU would be put at risk if individuals were not allowed to claim compensation for damages caused by conduct restricting or distorting competition.[58] The EU competition law regime essentially aims to *"ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association."*[59]

The *Courage*[60] and *Manfredi*[61] cases are considered to be the landmark decisions regarding the issue of liability for cartel damages. In its *Courage* decision, the CJEU ruled that *"[t]he full effectiveness of Article 85 of the Treaty [now Article 101 of the TFEU] […] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are*

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[55] Opinion of AG Kokott, *supra* note 11, para. 89.

[56] Emily Clark, *supra* note 48, p. 14.

[57] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR I-06619 (2006), para. 61.

[58] *Id.*, para. 60-61.

[59] Article 1 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance.

[60] CJEU, 20.9.2001, Case C-453/99 Courage v Crehan [2001] ECR I-6323 (2001).

[61] Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, *supra* note 57.

liable to restrict or distort competition."[62] Thus, the CJEU envisaged that the national courts of the Member States must impose liability for cartel damages for the effective enforcement of the rights and obligations created by Article 81 of the EC Treaty (now Article 101 of the TFEU).[63]

In the *Manfredi* case, the CJEU determined that *"the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*."[64]

It is particularly noteworthy that neither the *Courage* decision nor the *Manfredi* decision specified any particular customer groups (such as "indirect customers" or "umbrella customers") that are allowed to claim compensation for damages arising from an anticompetitive conduct. Thus, in principle, anyone who has been harmed by an anticompetitive violation is considered to be entitled to claim damages under EU competition law rules.

At this point, the question arises as to "whether the objective of the effective enforcement of Article 101 TFEU requires cartelists' liability for umbrella effects."[65] The *Kone* decision of the CJEU provides the relevant answers.

4.2.1. Summary of the *Kone* Decision[66]

Kone, Otis, Schindler and ThyssenKrupp are major European manufacturers of elevators and escalators, and they are active in several Member States of the EU. These companies formed a cartel (known as the "elevator cartel") and reached anticompetitive agreements. The case was investigated by the Austrian antitrust authorities. According to their findings, the cartel agreement, which was repeatedly substantiated by the cartel members, lasted for more than twenty years (from the 1980s to early 2004). This cartel agreement's aim was mainly to share the market for elevators and escalators among the cartel participants, and the cartel distorted competition in the relevant market by taking anticompetitive actions to achieve this purpose.

As AG Kokott explained in her opinion, "*The members of the cartel sought to coordinate their activities in respect of well over half the volume of*

[62] Courage v Crehan, *supra* note 60, para. 26-27.

[63] Donncadh Woods et al., *supra* note 6, p. 31.

[64] Vincenzo Manfredi v Lloyd Adriatico Assicurazioni, *supra* note 57, para. 60-61.

[65] Jens-Uwe Franck, *supra* note 35, p. 4.

[66] Please see the summary of the case provided within the Opinion of AG Kokott, *supra* note 11.

new machinery on the market in Austria. In addition, more than half of the projects concerned were allocated to one of them by mutual consent. In all, at least one third of the market volume became the subject of specific agreements between the cartel members in this way. Approximately two thirds of the projects forming the subject of such concerted practices went ahead as planned. In the remaining third of cases, the project was awarded either to undertakings that were not party to the cartel or to a cartel member that did not adhere to the agreement but made a more favourable offer. In short, the result of the cartel members' conduct was that market prices hardly changed and their market shares remained roughly the same."[67]

The elevator cartel was uncovered by the European Commission in 2003. Following its discovery of the cartel, and due to the elevator cartel's activities in the Belgian, German, Dutch and Luxembourgian markets, the European Commission imposed fines on the cartel members. Cartel members consist of 17 subsidiaries of the Otis, Kone, Schindler and ThyssenKrupp Groups and a total of EUR 992 million monetary fine has been imposed over the relevant companies. Total fine imposed on the Kone Group's subsidiaries was EUR 142.120.00. Yet, as Kone was first to provide information about the cartel, Kone subsidiaries Kone Belgium S.A. and Kone Luxembourg S.à.r.l., received full immunity from fines under the Commission's leniency programme (in respect of the cartels in Belgium and Luxembourg). Similarly, Otis B. V. Netherlands received full immunity in respect of the Netherlands cartel whereas the total monetary fine imposed on Otis Group was EUR 24.932.950. On the other hand, the fines imposed on the ThyssenKrupp companies were increased by 50%, as it is a repeat offender and the total fine was EUR 992.312.200. These fines are known as the largest ever fines imposed by the European Commission for the cartel violations[68].

Furthermore, in Austria, the Federal Competition Authority and the Antitrust Court (*Bundeswettbewerbsbehörde* and *Kartellgericht*, respectively) investigated the elevator cartel. The Antitrust Court of Austria imposed fines and the Supreme Court of Austria (*Oberster Gerichtshof*), as the final appeals court, approved these fines in 2008.

ÖBB Infrastruktur, which is a rail infrastructure company and an important customer for elevators and escalators in the Austrian market, brought an action for damages amounting to more than EUR 8 million against the cartel

[67] Opinion of AG Kokott, *supra* note 11, para. 8, 9.

[68] European Commission Press Release, Competition: Commission fines members of lifts and escalators cartels over €990 million, http://europa.eu/rapid/press-release_IP-07-209_en.htm?locale=en (last visited Dec. 5, 2017).

members (*i.e.*, Kone, Otis, Schindler and ThyssenKrupp) before the Austrian civil court. ÖBB Infrastruktur, a subsidiary of the Austrian Federal Railways, is responsible for the construction and maintenance of railway stations throughout Austria. ÖBB Infrastruktur was both a direct and an indirect customer of the cartel members, and it was also a customer of certain undertakings that were not party to the cartel. The allegations put forth by ÖBB Infrastruktur can be summarized as follows: *"(...) as a result of the elevator cartel's practices, it paid inflated prices for the elevators which it purchased. (...) ÖBB Infrastruktur claims that an undertaking not party to the cartel, benefiting from the protection of the cartel's practices, charged it significantly higher prices than would have been possible under normal competitive conditions. ÖBB Infrastruktur estimates the loss sustained to be at least EUR 1.8 million."*[69]

On October 17, 2012, the Supreme Court of Austria, which was the referring court, issued its order and referred the following question to the Court of Justice for a preliminary ruling, concerning only that part of the action for damages by which ÖBB Infrastruktur claimed damages arising from umbrella effects:

"Is Article 101 TFEU (Article 81 EC, Article 85 of the EC Treaty) to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court of Justice of the European Union requires grant of a claim under national law?"[70]

The CJEU subsequently held that, *"The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets."*[71] Thus, in line with the AG Kokott's opinion, rather than rejecting the viability of the claims arising from the umbrella effects, the CJEU held that the customers may claim their damages and accordingly every single

[69] *Id.*, para. 11-12.

[70] Kone AG and Others, *supra* note 23, para. 17.

[71] *Id.*, para. 33-34.

case would be examined in light of its specific aspects. To that end, CJEU concluded that the victim of umbrella pricing may claim for the compensation of its damages regardless the presence of the contractual relationship between itself and the cartelist firm.

4.2.2. AG Kokott's Opinion in the *Kone* Case

In the *Kone* case, AG Kokott delivered a very detailed and comprehensive opinion with regard to the preliminary reference directed to the CJEU. In fact, the response proposed by her to the preliminary question was essentially identical to the one provided by the CJEU in its judgment. The way AG Kokott describes the issue in fact shows that CJEU will allow the damages arising from the umbrella claims to be compensated.

In her opinion, AG Kokott first discussed the issue of civil liability for umbrella pricing strategies as a matter of EU law. AG Kokott declared that the viability of claims arising from umbrella pricing is a matter of EU law, whereas the *"details of application of such claims and the rules for their actual enforcement"* should be left up to the national laws of the Member States. AG Kokott also explained that, *"A closer examination of the judgment in Manfredi and also of a number of other more recent judgments of the Court of Justice shows, however, that, as things currently stand, it is not so much the existence of claims to compensation (i.e. the question of whether compensation is to be granted) that is dictated by national law as, rather, the details of application of such claims and the rules for their actual enforcement (i.e. the question of how compensation is to be granted), that is to say, in particular, jurisdiction, procedure, time-limits and the furnishing of proof."*[72] Thus, AG Kokott emphasized the importance of the viability of claims arising from umbrella pricing, stating the risk of *"forum shopping"*. AG Kokott explained that if Member States' stances regarding the umbrella claims differ fundamentally, this would run counter to the fundamental objective of European competition law.[73]

In addition to this, AG Kokott discussed the conditions that are necessary to establish a "causal link" under EU law and examined them within the scope of the "causal link" concept. AG Kokott asserted that the concept of "causal link" should be interpreted in such a way as to prevent the unlimited liability of the cartelists to provide compensation for any losses. She pointed out that the causal link between the anticompetitive conducts of the cartel members and the damage caused by such conducts may be interpreted within

[72] Opinion of AG Kokott, *supra* note 10, para. 23.

[73] *Id.*, para. 29.

the scope of *"'conditio sine qua non' (also known as an* equivalent causal *link or a but-for causal link)."*[74]

AG Kokott also assessed the foreseeability of losses arising from umbrella effects. In her evaluation of this issue, AG Kokott emphasized that *"(…) in a market economy, it is common business practice for undertakings to keep a close eye on market trends and to take those trends duly into consideration when making their own commercial decisions. Accordingly, the fact that persons not party to a cartel set their prices with an eye to the market behaviour of the undertakings belonging to the cartel is anything but unforeseeable or surprising, whether they are aware of the anti-competitive practices of the latter or not. Indeed, it is very much in the normal way of things. (…) The stronger the cartel's position is on the market concerned, the more likely it is that the cartel will have a significant impact on pricing levels on that market as a whole and the less scope there is for an operator not party to the cartel to have any meaningful influence of his own over the market price. (…) It is very important for the success of anti-competitive agreements between the members of a cartel that the prices of non-members should also rise and come close to those of the cartel members. After all, the more prices rise as a whole, the easier it is for cartel members to impose the prices they charge themselves on the market in the long run. For this reason, too, the obvious conclusion is that cartel members acting rationally and thinking their anticompetitive practices through to their logical conclusion will not be surprised by umbrella pricing. On the contrary, they must actually expect it."*[75] Thus, AG Kokott explicitly stated that umbrella effects are not "side effects of the cartels" but a direct and foreseeable consequence. In other words, AG Kokott presumes that the cartelists can and should foresee the consequences of the cartel, including the damages that may arise from the umbrella effects. This presumption leads AG Kokott to assert that the aim of the EU competition law requires the damages arising from the umbrella effects to be compensated. This is mainly because; holding cartelists responsible from the damages arising from umbrella effects by means of monetary fines may lead them to operate in line with the rules of competition law. Secondly, compensation of the damages arising from the umbrella effects by the cartelist firms may help the customers and the total welfare harmed to be recovered.

In line with these grounds, AG Kokott proposes not to categorically reject the viability of the claims arising from umbrella effects but to evaluate them comprehensively for every single case. AG Kokott argues that the

[74] *Id.*, para. 33.

[75] *Id.*, para. 47, 84.

relevant circumstances for the relevant case should be inspected in order to determine whether the cartel in the case in question has given rise to umbrella pricing rather than to forbid the damages arising from umbrella effects to be claimed.[76] As is known, CJEU's decision is also in line with the AG Kokott's opinion.

4.2.3. Analysis of the *Kone* Decision

As a brief summary, the CJEU concluded in its *Kone* decision that national law cannot categorically exclude the possibility of compensation for injuries arising from the umbrella effects of anticompetitive cartel activities, since the European Union's interest in providing effective competition in the marketplace supersedes the national laws of the Member States on this particular subject matter.[77] In the *Kone* case, the Court rendered its judgment upon a request for a preliminary ruling from the Supreme Court of Austria. The Austrian Court had asked whether Article 101 of the TFEU prohibiting anticompetitive agreements might allow plaintiffs to claim compensation for umbrella damages from cartel members for injuries arising from the increased market prices caused by the cartel's actions, since Austrian national law categorically excluded the possibility of granting antitrust standing to the parties harmed by the umbrella effects of cartel conducts. The CJEU ended the debate on whether plaintiffs injured by umbrella prices have the right to claim damages by ruling that national laws could not exclude the possibility of seeking compensation for damages arising from umbrella pricing strategies.

At this point, the first question that should be discussed is: "How was the problem of causation addressed in *Kone*?" In its *Kone* decision, the CJEU ruled that there is no requirement that the causal link between the cartel's actions and the ensuing harm must be direct and exclusive. In other words, an individual who has no contractual relationship with a cartel member, but is nevertheless an umbrella customer (*i.e.,* who has contractual links with a non-cartel undertaking in the relevant market), may claim compensation for damages arising from the actions of the cartel. According to the *Kone* decision, this is primarily because "t*he full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto,*

[76] *Id.,* para. 84.

[77] ARIEL EZRACHI, EU COMPETITION LAW - AN ANALYTICAL GUIDE TO THE LEADING CASES 552 (4th ed. 2014).

whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets."[78]

On the other hand, the *Kone* decision should not be interpreted as permitting the legal standing of the victims of umbrella pricing in each and every case. The *Kone* decision explicitly stated that a plaintiff seeking damages for the umbrella effects of the actions of a cartel is expected to establish the following elements: (i) "*the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently,"* and *(ii) "that those circumstances and specific aspects could not be ignored by the members of that cartel."*[79]

Furthermore, the interpretation of the criterion of "reasonable foreseeability" in the *Kone* decision is crucial to understanding the intricacies of this issue and worthy of further elaboration. The "reasonable foreseeability" criterion requires the examination of the predictability of the damages caused by the cartel members. Accordingly, a detailed analysis of the specific facts of each case, taking into account the particular dynamics of the relevant market, is required. If the market is relatively more transparent and the product in question is homogenous, it would be easy (or, at least, easier) for the cartel members to foresee that market prices would be affected by their anticompetitive behavior.

As a further discussion point, it should be noted that there is the possibility of a non-cartelist undertaking, which the prospective plaintiff was in a direct relationship with, imperfectly participating in the cartel's conduct. Within the scope of this possibility, it should be asked whether non-cartelists who have raised their prices in an umbrella pricing scenario could be held responsible for closely similar or parallel actions concerning anticompetitive conduct.[80]

Furthermore, possible reflections of Kone decision on the practical applications for private claimants and undertakings that formed the cartel should be discussed. To that end, the first possible reflection of *Kone* decision is on the issue of the difficulty to meet burden of proof. Within the scope of the damages arising from umbrella effects, the injured parties face higher burden of proof compared to the other damages arising from cartels. This is mainly

[78] Kone AG and Others, *supra* note 23, para. 33.

[79] *Id.*

[80] Olmedo E. Peralta, *A Legal Approach to the Kone Decision: Does the Private Enforcement of European Competition Law Need an Umbrella*, INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (2016) 47(6), 697-722, at 10.

because the causal connection between the action of the cartelists and the damage is not strong enough in terms of the umbrella effects. *Kone*, is a milestone decision since it has introduced the viability of the claims arising from the umbrella effects and elaborated the concept of the causal link between the damage and the anticompetitive conduct of the cartelists. On the other hand, as explained in the sections above, demonstration of the umbrella effects is highly dependent on the substitutability of the products manufactured by the cartelist and non-cartelist firms. Thus, the specific conditions of every case should be examined carefully in order to determine the level of substitutability. In addition to the substitutability issue, another difficulty with regards to the compensation of the damages arising from umbrella effect arises from the possibility of the damages of each person suffered from the umbrella effects being different than the others. In the case where the buyers have bought the products from different sellers, each buyer may face different degrees of umbrella effects. Thus, quantifying the amount of the damage arising from umbrella effect may constitute an important issue.

5. Concluding Remarks and the Possible Implications of Umbrella Effects for Turkish Competition Law Practice

With its *Kone* decision, the CJEU resolved an important debate on whether the damages arising from the "umbrella effects" of cartel actions may be claimed for compensation by umbrella customers in June 2014. As pointed out by Advocate General Kokott in her opinion in the *Kone* case, umbrella effects arise "*when undertakings that are not themselves party to a cartel, benefiting from the protection of the cartel's practices (...) set their own prices higher than they would otherwise have been able to under competitive conditions.*"[81] The CJEU concluded that victims of harm resulting from umbrella pricing policies have the right to pursue compensation for damages before national courts.

When discussing "umbrella effects" with respect to Turkish competition law, the first question that arises is as follows: "Does the interpretation of the concept of "causal link" in Turkish competition law allow customers of undertakings not party to the cartel to claim compensation from the members of the cartel for the inflated prices charged by those non-cartel undertakings?"

Article 57 of the Law No. 4054 on the Protection of Competition provides the "right for compensation," emphasizing that the presence of the causal link is a requirement: *"Anyone who prevents, distorts or restricts*

[81] *Id.*, para. 2.

competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured."

According to the "sufficient causal link" theory, which is valid for and applicable to the Turkish private competition law enforcement practice, if the conduct in question is the appropriate and sufficient cause of the damage, a sufficient causal link exists between the violation and the damage. Thus, we are of the opinion that, in parallel with the principles set forth in the *Kone* decision, if a plaintiff can prove and establish the effects of umbrella pricing strategies being applied by third parties acting independently of the cartel, he may have standing to bring his claims for damages before the Turkish courts on this issue.

However, it should also be noted that the private enforcement of competition law rules is not that common or widespread in Turkey. Actions for damages arising from competition law violations have recently started to make their presence felt more and more in Turkey, especially since the finalization[82] of the decision of the Competition Board[83] regarding the 12 banks that were found to be in violation of competition law rules. The primary concerns so far have involved the questions of "when, by whom, and at which courts can actions for damages be filed?" (which are all closely related with the rules of civil procedure), as well as the separate question of "how can damages be proven?"

During the period in which the 12 banks formed (and were active in) the "banks cartel," there were 11 other banks that did not participate in the cartel in question. Nevertheless, there was an opportunity for these 11 banks to exercise umbrella pricing and charge increased prices to their customers, since their banking activities may well have been affected by increases in the interest rates of loans or decreases in deposit interest rates as a result of the cartel's activities. In this regard, if the umbrella pricing can be established and proven mathematically, we are of the opinion that the customers of those 11 non-participating banks may also seek compensation for damages arising from the umbrella effects of the cartel's actions under Turkish competition law.

To conclude, as the concept of private enforcement is new and unfamiliar to the Turkish competition law regime, we do not expect the damages arising from umbrella pricing to be claimed in Turkish law practice or pursued in Turkish courts in the near future.

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[82] The Higher State Court approved the decision of the Competition Board, and thus the Board decision has been finalized. (Please see the Turkish Higher State Court Thirteenth Chamber decision numbered 2015/2974 E. and 2015/4612 K.).

[83] The Turkish Competition Authority's *Twelve Banks* decision (March 8, 2013; 13-13/198-100).

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Competing Bits: Net Neutrality, Zero-Rating and Competition Law

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I. Introduction

The Internet has been an astonishingly useful medium and effective tool for ensuring the smooth and speedy exchange of numerous products and services, as well as information, particularly for end-users in the developed and digitalized regions of the globe.[1] One of these central issues concerning the Internet, which remains very much on the agenda after years of discussions and debates, involves the concept of "net neutrality." Broadly speaking, the debate surrounding net neutrality concerns whether Internet Service Providers ("***ISPs***") should be allowed to treat the data travelling through their Internet data routes (i.e., networks, routers, exchange points, etc.) differently or charge differentially depending on various factors, such as the characteristics of the sending and receiving parties, or discriminate by user, content, website, platform, application or method of communication.

As the Internet has become an essential tool used by billions of people every day to fulfill various needs and desires (for work, leisure and in all other aspects of life), and the debate surrounding net neutrality has grown larger and spread out to the public at large. Consequently, people around the world have made their voices heard on the importance of net neutrality by using the

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1 There are 3.81 billion active Internet users as of April 2017, according to Statista. *See Global digital population as of January 2018 (in millions)*, https://www.statista.com/statistics/617136/digital-population-worldwide/ (last visited Nov 5, 2017).

Internet to reach their governments.[2] Fittingly, the fact that citizens around the world have used the tools of the Internet itself to "defend and protect" the Internet as they know it (i.e., as the "level playing field" provided by net neutrality) is one of the greatest and clearest examples of how the Internet works as an effective social instrument and unmistakably demonstrates the value of the Internet from the perspective of regular citizens. While it may not always be possible (indeed, some might say that it is almost always impossible) to completely solve every problem surrounding a complex issue that concerns and touches the lives of billions of people every day, several public authorities in various jurisdictions seem to have already recognized the importance of this matter and have reached some answers regarding the questions that have arisen with respect to the necessity of a neutral Internet. These authorities have taken and announced certain positions regarding net neutrality, which will be provided under Section I, which may shed further light on this important topic.

It should be noted that the net neutrality debate comprises another crucial debate in itself; this debate-within-a-debate concerns "zero-rating practices," whereby the data generated by certain applications/content providers ("***CAPs***") are treated differently than others by the ISPs. The complexity of the net neutrality debate has spread to the arguments surrounding zero-rating practices as well. As illustrated under Section III, both the European Union and the United States provided certain explanations regarding zero-rating practices while not prohibiting them explicitly. As a result of this approach, citizens who have raised their voices and made themselves heard with respect to the effects of a non-neutral Internet still have serious concerns and unresolved issues regarding the zero-rating practices of the ISPs.[3]

The search for a solution to the problems raised in the net neutrality debate has, perhaps unsurprisingly, implicated and drawn in the competition law rules as well. The competence and suitability of competition law rules to dealing with and preventing/overcoming any potential infringements to the neutral structure of the Internet is a contentious subject, and therefore, this question also needs to be covered and addressed in the context of both the net neutrality rules and the zero-rating practices.

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[2] *See e.g., Save the Internet*, https://savetheinternet.eu/ (last visited Oct. 29, 2017); *We're Running out of Time to Save Net Neutrality*, https://www.battleforthenet.com/ (last visited Oct. 29, 2017).

[3] *See* Peter Teffer, *One Year Later: EU Right to Open Internet Still Virtual,* https://euobserver.com/digital/137724 (last visited Nov. 5, 2017); Lint Finley, *The FCC Oks Streaming For Free—But Net Neutrality Will Pay*, https://www.wired.com/2017/02/fcc-oks-streaming-free-net-neutrality-will-pay/ (last visited Nov. 5, 2017).

This article aims to provide a concise legal and theoretical background for the net neutrality debate and the issues surrounding zero-rating practices. Moreover, the net neutrality rules of the United States and the European Union will be briefly discussed in terms of their scope and applicability. Finally, the relationship between competition law rules and net neutrality and zero-rating practices will also be examined and addressed within this article.

II. The Net Neutrality Debate

1. The Background of Net Neutrality

The term "net neutrality" was coined in 2003 by Tim Wu, currently a law professor at Columbia Law School, in the article he co-authored with Jack Goldsmith, which was entitled "Network Neutrality, Broadband Discrimination." That being said, an exact and fully-agreed-upon definition of net neutrality, which would be very useful for setting up the terms of the debate, is unfortunately still not available.

Nevertheless, the following definition offers a useful framework for the debate by covering the requisite scope of the concept of net neutrality, and it has the further advantage of providing a concise description: "*Net neutrality prohibits Internet service providers from speeding up, slowing down or blocking Internet traffic based on its source, ownership or destination.*"[4] Accordingly, net neutrality regulations would limit certain behaviors of the ISPs vis-à-vis its users and CAPs. In particular, ISPs would be prevented from charging higher prices to CAPs for a priority delivery by way of net neutrality regulations.[5]

Both developing network technologies and the increase of the usage of the Internet placed the net neutrality debate at the driver seat for the future of the Internet. When Cisco introduced a new router in 1999 which allows ISPs to prioritize or de-prioritize certain data or even drop them,[6] it also provided a useful tool to ISPs to conduct traffic management on the Internet. The developments on the network technologies on this front allowed ISPs to change

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[4] Jan Kramer, Lukas Wiewiorra & Christof Weindhardt, *Net Neutrality: A Progress Report*, 37 TELECOMMUNICATIONS POLICY 796, 794–813 (2013); ARCEP (Autorité de régulation des communications électroniques et des postes), REPORT ON NET NEUTRALITY, 12 (2012).

[5] J Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 JOURNAL OF COMPETITION LAW AND ECONOMICS 351, 349-474 (2006).

[6] Paul Ganley & Ben Allgrove, *Net neutrality: A User's Guide*, 22 COMPUTER, LAW & SECURITY REPORT 454, 454-463 (2006).

the structure of the Internet which functions on first-come first-served basis regardless of the source or destination and type of the data.[7]

Moreover, the Internet technology has advanced at an astonishing rate, and the appearance of online materials in the virtual world have increasingly begun to resemble the objects in the real world, the amount of data that flows through the Internet (i.e., the total amount of Internet traffic) has also risen exponentially.[8] According to Sandvine, a networking equipment company, Netflix's streaming media content accounted for 35.2% of all Internet traffic on North American fixed networks as of June 2016.[9] Furthermore, the Real-Time Entertainment (e.g., channels such as Netflix, YouTube or Spotify) and Gaming categories capture 71.65% of the aggregate traffic (i.e., both downstream and upstream) on North American fixed networks. This share of Internet traffic reaches 74.82% when only downstream flow is measured. Sandvine also estimates that Real-Time Entertainment usage will surpass 80% in North America by 2020, which clearly indicates the growing importance of these categories to both Internet traffic and the daily lives of the end-users of these services. The increase of usage of data over the network structure is undoubtedly caught by radar of ISPs. A proof of incentives of the ISPs' could be understood by the statements of frontmen; Ed Whitacre as chairman of AT&T at that time stated that CAPs could not "use these pipes free"[10] and Kai Ewe Ricke as CEO of Deutsche Telekom at time being told that ''It shouldn't be the case that infrastructure providers, like Deutsche Telekom, are always making the investments, while others profit of the back of those."[11]

The CAPs which are the target of these statements also explained their side of the story by pointing out crucial points of the debate which will be further discussed under this section. As an example of these, Google made a

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7 Scott Jordan, *Layered Network Approach to Network Neutrality*, 1 INTERNATIONAL JOURNAL OF COMMUNICATION 434, 427-460 (2007).

8 Eitan Altman, Julio Rojas, Sulan Wong, Manjesh Kumar Hanawal & Yuedong Xu, *Net Neutrality and Quality of Service*, at 3 https://arxiv.org/pdf/1105.0283.pdf (last visited Feb. 10, 2018).

9 *See* Sandvine, *2016 Global Internet Phenomena*, https://www.sandvine.com/trends/global-internet-phenomena/ (last visited Feb. 9, 2018).

10 *See* Arshad Mohammed, *SBC Head Ignites Access Debate*, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html (last visited Feb. 11, 2018).

11 Mark Odell & Richard Wates, *A Two-Speed Internet? Why Network Operators Are Flexing Their Muscles*, FINANCIAL TIMES (May 20, 2006).

statement to argue that the consumers are already paying subscription fees to the ISPs and they are supporting broadband access.[12]

The "dispute" between ISPs and CAPs is not solely theoretical; in fact, the real life incidents were keeping coming to the surface. In 2004, Madison River, an ISP in North Carolina, blocked access to the services of a competing VoIP provider (VoIP is a methodology and group of technologies for the delivery of voice communications and multimedia sessions over the Internet). The investigation conducted by the Federal Communication Commission ("***FCC***") on this front is terminated due to fact that Madison River and the FCC made an agreement. Accordingly, Madison River agreed to pay $15,000 and not to block ports used for VoIP.[13]

In terms of the European side, in 2011, KPN (a Dutch telecom company) announced that it uses Deep Packet Inspection (*DPI*) which will allow KPN to analyze the content of transmitted data. To that end, KPN stated that it could ask for fees from its customers for certain mobile applications like Skype and WhatsApp.[14] Taking into account the definition of net neutrality, one can argue that such conduct would be against net neutrality. The Dutch state should have thought in same way given that on 8 May 2012 the Netherlands adopted its own net neutrality law and became the first EU member state and the country in the world that have net neutrality rules.[15]

In light of the facts and circumstances presented above, it may be said that the Internet is at a crucial turning point in its development. States will either adopt certain policies that will allow material changes to be made to the basic structure of the Internet, or they will choose to preserve the current structure to the extent that they can, so that the Internet may remain "open" in a fundamental sense. As described above, this is a highly contentious issue with plenty of differing opinions and perspectives on all sides; thus, in order to accurately and comprehensively reflect the views on both sides of the debate,

[12] *See* Alex Curtis, *Google's comments on "Broadband Extortion"*, https://www.publicknowledge.org/news-blog/blogs/googles-comments-on-broadband-extortion (last visited Feb. 11, 2018).

[13] Madison River Communications, LLC and Federal Communications Commission (Consent Decree), File No: EB-05-IH-0110, (Federal Communications Commission, Mar. 3, 2005).

[14] Erik Valgaeren & Serge Gijrath, *National Prosecutor's Office Finds That KPN's Use Of Deep Packet Inspection Is Not A Criminal Offence*, https://www.lexology.com/library/detail.aspx?g=bb560b36-c7ba-400c-a1c1-fb746d9018de (last visited Nov. 14, 2017).

[15] European Digital Rights (EDRi), *Net Neutrality*, 8 EDRi Papers 20, (2013), https://edri.org/files/EDRi_NetNeutrality.pdf (last visited Nov. 14, 2017).

we will briefly summarize the key arguments of both the proponents and opponents of net neutrality.

2. The Arguments of Net Neutrality Proponents

During the debates concerning the necessity of net neutrality rules, the main concerns of the proponents were that ISPs may corrupt competition in the digital marketplace, inhibit fair business dealings on the Internet, impede innovation, constrain user choice, eliminate openness and media pluralism (and thus harm the freedom of expression, which is a highly cherished value, particularly in the developed world).[16]

Based on the cases and explanations provided under previous heading, proponents of net neutrality claim that ISPs have a growing incentive to discriminate against competing CAPs through asking for relatively higher fees (or providing lower quality service) to those CAPs or even through denying access to them.[17] To that end, they indicate that such conducts would more likely to take place if ISPs (i) are vertically integrated into CAPs and (ii) face with limited competition from other ISPs and act against end users' interests.[18]

According to the proponents of net neutrality, innovation blossoms under circumstances provided by the neutral Internet infrastructure.[19] This basic claim is the key argument of scholars promoting the principles of net neutrality. Proponents believe that the "end-to-end" structure is the key architecture element of Internet for such innovations.[20] In the end-to-end design, the components of the network do not inquiry about the sender, the recipient or the content and solely deliver the data. In this respect, the applications which are placed at the "ends" (sending or receiving end) conduct "intelligent" parts such as blocking junk e-mails, identifying viruses while the network treats all data equally and works with every application.[21] Thus, the proponents put their faith regarding the innovation on the Internet to the CAPs which are placed on the

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[16] Andrea Renda, *Antitrust, Regulation and the Neutrality Trap: A Plea for a Smart, Evidence-Based Internet Policy*, 104 CENTRE FOR EUROPEAN POLICY STUDIES SPECIAL REPORT, Apr. 2015, at 3, 4.

[17] Gary S. Becker, Dennis W. Carlton & Hal S. Sider, *Net Neutrality and Consumer Welfare*, 6 J.C.L.& E. 501, 497–519 (2010).

[18] Andrea Renda, *I Own the Pipes, You Call the Tune the Net Neutrality Debate and Its (Ir)Relevance For Europe*, 16 CENTRE FOR EUROPEAN POLICY STUDIES, at 5 (2008).

[19] *Id.* at 3.

[20] Robert Hann & Scott Wallsten, *The Economics of Net Neutrality*, 3 Economists' Voice 3 (2006), http://courses.ischool.berkeley.edu/i205/s10/readings/week12/hahn-wallsten-neutrality.pdf (last visited Feb. 10, 2018).

[21] Ganley & Allgrove, *supra* note 6, at 456.

"ends" of this structure given that the benefits we are now enjoying are shaped within the neutral Internet structure.

The term and the scope of "quality of service ("***QoS***") should also be evaluated to provide better understanding of the arguments of the net neutrality proponents regarding discrimination between data travelling on the network pipelines. As explained above, the Internet functions on a best-effort basis and thus there are no guarantees for reliability, delay, and variation in delay or other factors of the quality of the delivery.[22] That being said, as the environment of the Internet evolved within the years and the numbers contents and applications that require more bandwidth increased, the question of whether the best effort based delivery method will be enough for such demands is included within the agenda of the debates concerning the network management, and thus the Internet.[23] In particular, applications such as multimedia streaming, online gaming, voice-over-Internet protocol ("***VoIP***") are the ones need certain level of QoS to be function properly.[24] With regard to QoS, while certain proponents argue that all forms of QoS should be prohibited, certain proponents assert that QoS could be allowed under some circumstances. Accordingly, the ones that against all forms of QoS raise that allowing ISPs to discriminate for the favor of specific applications would be still inferring end-users' choices and distorting competition among the CAPs. However, the ones that not do not have a strict approach to QoS practices claim that ISPs could be allowed to provide differentiated service to the contents or applications which are not alike with others provided that the ISP providing such differentiated service also apply same to the other contents or applications within the same category.[25]

The defenders of net neutrality claim that removing the protections afforded by these bedrock principles from the scope of Internet traffic management systems will increase the barriers to entry for CAPs, and that the provision of online contents and/or services will subsequently fall under the full and absolute control of Internet service providers.[26] According to the

[22] *See What Is QoS?*, https://technet.microsoft.com/en-us/library/cc757120(v=ws.10).aspx (last visited Nov. 27, 2017).

[23] *See* Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 55 U San Diego Public Law Research Paper (2003), http://ssrn.com/abstract=416263 (last visited Nov. 27, 2017).

[24] Robert E. Litan & Hal J. Singer, *Unintended Consequences of Net Neutrality Regulation,* 5 J. ON TELECOMM. & HIGH TECH. L. 536, 533-572 (2007).

[25] Barbara van Schewick, *Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like*, 67 STANFORD LAW REVIEW 163, 1-166 (2015).

[26] Renda, *supra* note 18, at 3.

arguments of the advocates of net neutrality, absence of net neutrality rules would limit the ability of the end users' ability to choose as per their will and thus, from welfare perspective, imposing net neutrality and limiting the ISPs would be superior choice.[27] Proponents assert that ISPs could create a "walled garden" which refers to bundling of the content itself with to service of ISPs are providing to the their customers.[28] Walled gardens could reduce the number of available CAPs for the end users as ISPs would be offering a service which does not access to the wider Internet.[29]

In terms of net neutrality proponents' long term concerns, investment incentives of the ISPs are heading the list. Accordingly, the advocates of the net neutrality argue that the ISPs' incentive to invest to the network infrastructures would reduce if the ISPs are granted with the right to discriminate between CAPs. To that end, if the net neutrality rules are discarded or weakened, and ISPs eventually reach a position in the market where they can charge CAPs for allowing access to content as a common trait of the market (i.e., in the ordinary course of their business), then the ISPs might be less inclined to invest in R&D and infrastructure improvement; rather, they might be further incentivized to horde resources and maintain scarcity with respect to the network infrastructure. Moreover, the proponents argue that even if the ISPs would might choose to invest to the infrastructure to gain more profit through the benefits of the non-neutral Internet, such investments would not be sufficient to overcome the reduce on the innovations made by CAPs.[30]

As the brief summary of the arguments of the proponents demonstrates, they demand a regulated Internet for the prohibition of ISPs' ability to ask for charges in order to deliver certain data "differently" than others. It is rather a rare case where supporters of an "open" market request for involvement of the State; however, for the case of net neutrality, advocates propose a regulated environment for the safeguarding of the Internet they know.[31] If the Internet services were completely deregulated and the net neutrality rules were cast aside, users would not be able to make their own choices regarding content consumption. Internet service providers would be completely free to determine which content to promote and encourage or to bury and discourage. Ultimately,

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[27] van Schewick, *supra* note 25, at 35.

[28] KATERINA MANIADAKI, EU COMPETITION LAW, REGULATION AND THE INTERNET: THE CASE OF NET NEUTRALITY 28 (2014).

[29] Christopher T Marsden, *Net Neutrality and Consumer Access to Content*, 4 SCRIPT-ed 413, 407-435 https://ssrn.com/abstract=1089063 (last visited Nov. 27, 2017).

[30] Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 JHTHL 381, 329-392 (2007).

[31] Ganley & Allgrove, *supra* note 6, at 459.

the Internet would be transformed into a "walled garden," in which the walls would be built, controlled and maintained by the ISPs.

3. The Arguments of Net Neutrality Opponents

The advent of broadband Internet has brought along many online services that require a lot of an ISP's bandwidth, such as online gaming portals and streaming video sites. Moreover, as explained above, some of these new services require a different handling of their traffic than others jitter is more problematic for VoIP traffic than for email packets for instance. Because of an increasing and more differentiated demand for bandwidth, ISPs have voiced a need to become more involved in how they manage their bandwidth. This involves departing from the more passive end-to-end principle, and turning managing of networks into a more active affair.[32] That being said, the opponents claim that if the ISPs were to discriminate in the non-neutral Internet they would still be losing their customers which will eventually reduce the number of their user and thus their profits.[33] Thus the opponents assert that in the absence of the net neutrality rules the ISPs would not have the incentive to discriminate against CAPs.

Another argument put forth by the opponents of net neutrality is also based on their perspective regarding the contemporary form/structure of the Internet. Since sending and receiving emails is not the sole (or even the primary) function of the Internet anymore, and because online real-entertainment platforms (e.g. Netflix, YouTube, Amazon Video)[34] are the new Internet giants, the quality and dependability of the service provided by ISPs (i.e., preventing lags and other Web inconveniences) is an indispensable necessity, indeed a *must*, in the modern Internet economy. As we discussed earlier in this section, larger and time-sensitive data actually need to be handled with certain QoS by ISPs to the end-users through the Internet. Otherwise, end-users may not be able to satisfactorily use such products; for example, if streaming videos on a video-streaming app constantly freeze while being

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[32] Jasper P. Sluijs, *From Competition to Freedom of Expression: Introducing Article10 ECHR in the European Network Neutrality Debate*, 12 H.R.L.Rev. 513, 509-554 (2012).

[33] John Windhausen, Jr. *Good Fences Make Bad Broadband*, 34 (2006), https://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf (last visited Dec. 10, 2017).

[34] According to Sandvine '2016 Global Internet Phenomena – Latin America and North America' 71% of downstream bytes during peak period are generated by real-time entertainment contents/applications for fixed networks in North America in 2016. In terms of mobile network, real-time entertainment contents/applications are responsible for bytes generated during peak period for mobile networks in North America in 2016 *see supra* note 9.

watched by subscribers, consumers would eventually stop using that particular video-streaming application. To that extent, the opponents believe that the congestion generated within the Internet by the new contents/applications could be solved through promoting the competition between the ISPs. In order to enhance this competition, the proponents submit that the entry barriers to the service providers' market should be lowered through allowing the non-neutral Internet structure and thus, increasing the ISPs incentives to invest to the network infrastructure.[35] At this point, the opponents and the proponents also differ on the point regarding the innovation rises within the Internet ecosystem. Accordingly, the opponents defend that the core of the network infrastructure (i.e., ISPs given they are transmitting the bits over the network) could also bring the innovation awaited from the Internet instead of the CAPs which are at the "end" of the infrastructure.[36]

Moreover, the opponents assert that the net neutrality rules would reduce the ISPs' incentive to invest their network infrastructure and given that they will be prevented to gain extra profits from QoS offers they can submit to the CAPs. As a result, the CAPs' incentive to develop and provide contents and applications which are QoS needy will be also reduced as they will not be able to deliver such data to the end-users in a quality they demand because of the ISPs' reduced capability on this front.

Apart from the foregoing considerations, J. Gregory Sidak (an expert in economics and a former staff member of the President's Council of Economic Advisers) has also raised a number of points that he considers not well discussed within the net neutrality debate. According to Sidak, ISPs should be able to: (i) innovate on their network, (ii) price their services unilaterally (as long as they are in compliance with competition/antitrust laws), (iii) refuse or allow carrying content or applications based on their network's security and performance, (iv) prioritize packets of data within their discretion, (v) reserve capacity on their networks within their discretion, and (vi) use the capacity of their networks in order to integrate into the provision of content or applications. Sidak believes that these rights are belonging to network operators since it has invested capital to the network infrastructure.[37]

[35] Tim Wu & Christopher Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL 585, 575-592 (2007).

[36] Kramer, Wiewiorra & Weindhardt, *supra* note 4, at 14.

[37] Sidak, *supra* note 5, at 353.

4. The Net Neutrality Rules of the United States and the European Union

Although the debate on the possible effects of the net neutrality regulations still alive, the United States of America and the European Union already took a position on this front. Accordingly, both the United States of America and the European Union have their own net neutrality rules, until December 14th, 2017. To that end, under this section this article aims to provide a summary of the road to the United States of America and the European Union's net neutrality rules and the scope of these rules.

A. The United States of America's Position on Net Neutrality

The United States have its regulation on net neutrality since 2010. FCC adopted its initial Open Internet Order (the "***Open Internet Order***") on December 21, 2010. FCC adopted new Open Internet rules and amended some of the current provisions of its "Open Internet Order", on February 26, 2015; FCC released its report and amended order on March 12, 2015.

2010 version of the Order set forth its purpose as: "*The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.*"

2015 amendment includes an insertion to the articles and as: "… permission, *and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.*"

As articulated, the Order aims to preserve and sustain competition within network markets of the United States; it does not approach to the net neutrality issue solely from telecommunication perspective.

Unlike the TSM Regulation (which is presented below), the Order limits the scope of network management only by technical measures which affect the network traffic. (8.2: *A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices.*) The Order requires legitimacy for a network management practice to be reasonable, thus allowed: "*A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.*"

The Definitions section (8.2) of the Order defines the conduct of managing internet traffic when it is reasonably needed, which is named "Reasonable Network Management", as: A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."

The Order both has (i) a broad prohibition on "unreasonable interference" on end users' internet access and (ii) three specific rules that elaborately define the prohibited conducts that it should not have been implemented in any circumstance.

The broad prohibition was not present in the 2010 version. FCC considered that even a little negligence and/or looseness on prohibition of practices undermining the open internet may cause considerable harms on virtuous cycle of the internet which assures continuous investment and innovation.[38] Thus it added such additional provision for FCC to determine with its discretionary power, whether a practice constitutes of a net neutrality breach even though it may not consist of blocking, throttling or paid prioritization.

The broad prohibition is as follows:

"***8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct.***

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule."

The only problem with the purpose of this broad prohibition is that, level of reasonableness of network managing practice is subject to human discretion. To that end, the provision may not always fulfill its goal due to false interpretations.

On another note to remark, the article also provides a direct protection for also the *edge providers*, namely content providers for internet and providers of devices which access to internet, as well as it does for end users.

The specific prohibitions regulated by the Order are described very simply and explicitly: No Blocking, No Throttling and No Paid Prioritization.

[38] In the Matter of Protecting and Promoting the Open Internet, Federal Communications Commission, *Report and Order, Declaratory Ruling, and Order*, GN Docket No. 14-28, FCC 15-24, at para. 21.

For that reason, the Commission categorized them as "Clear, Bright Line Rules" in its report.[39] These Bright Line rules actually establish the most fundamental aspects of the Order. They are the backbone of the United States' net neutrality policy. As the Bright Line Rules are quite concise and self-explanatory, it is useful to incorporate them directly in the article:

*"**8.5 No blocking:***

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

8.7 No throttling.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

8.9 No paid prioritization.

(a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

(b) "Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either;

(1) In exchange for consideration (monetary or otherwise) from a third party, or

(2) To benefit an affiliated entity.

(c) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet."

No Blocking rule is a straightforward prohibition derived from the Commission's precedents which define end users' access to network as a right. No Throttling rule's purpose is to prevent evasion of the No Blocking rule, not technically and blatantly, but by "gamesmanship".[40] No Paid Prioritization prohibits exercise of fast lanes of internet traffic for contents which ISPs favor for the incentives mentioned.

[39] Federal Communications Commission, *supra* note 38, para. 14.

[40] Federal Communications Commission, *supra* note 38, para. 17.

The Order does not forget to provide an exemption by an application claiming that the applicant's permitted practice will not harm the open nature of the Internet and it will serve for the public interest.

To sum up, especially after the revisions made in the 2015 version of the Order, the Order became concise and comprehensible even for people who do not practice in law or telecommunication sector. Blocking, throttling and prioritizing due to consideration and other undefined practices whose ultimate goal is restricting non-discriminatory ecosystem of the internet are banned throughout the United States.

After Donald J. Trump has been elected as the successor of Barack Obama, Ajit Pai, who is the chairman of the FCC and also known for his opponent position to net neutrality, initiated plans on rescinding the net neutrality rules ensuring an open internet. After signaling such plans of his by the election of Trump, Pai prepared and released a new draft order, to be voted on FCC's meeting on December 14, 2017. As it may be guessed due to Pai's political stance, he prefers deregulation to the extent it is possible.

Pai claimed in its public statement[41] dated November 21, 2017 that by its proposed order, the government of the US will not continue to micromanage the Internet and Federal Trade Commission will be authorized again to oversee the public's welfare and level of requisite competition within the network markets as it did prior 2015. Also by amending but ultimately maintaining the transparency measures, Pai asserts that end users will prefer and buy the best offered service for them.

After debates between people of United States endured for months, the FCC decided to repeal the Open Internet Order on December 14, 2017 by 3 votes in favor out of 5 Commission members. Currently, the Open Internet Order consists of only a transparency rule imposed on ISPs; all other substantive rules are removed. Proponents of the repealed order can only console themselves with the enhanced transparency rule.

No Blocking, No Throttling, No Paid Prioritization and No Unreasonable Interference for Internet Conduct rules have been abolished by the repeal. Only a single article remained regulating internet freedom, which is in context of transparency:

[41] *See Chairman Pai Circulates Draft Order To Restore Internet Freedom And Eliminate Heavy-Handed Internet Regulations,* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1121/DOC-347868A1.pdf (last visited Feb. 10, 2018).

"(a) *Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.*

(b) Broadband Internet access service is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

(c) A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."

Sub-paragraph (a) resembles quite to the previous article on transparency which are articulated in Open Internet Order 2010 and 2015, except its last sentence. It is likely to argue that the sentence is added to have a clear safeguard for enforcement of the article.

The majority of the Commission believes that a combination of the updated transparency article, state of competition through internet access services and enforcement of antitrust and consumer protection laws are sufficient enough to preserve the openness of internet; it further asserts that legislating specific prohibitions on specific conducts as in 2015 Open Internet Order and enforcing them for achieving openness has unnecessary costs and that one can achieve openness of internet without such high costs.[42] It is evidently a more liberal approach to expect market mechanism itself to prevent content foreclosures or private censorship through internet (by transparent information ensured) than regulating the mechanism prior to the anticipated inconveniences. Antitrust enforcement may also achieve the openness of the internet, but if both existence and abolishment of Open Internet Order serve to

[42] In the Matter of Restoring Internet Freedom, Federal Communications Commission, Declaratory Ruling, Report and Order, And Order, WC Docket No. 17-108, FCC 17-166 (Jan. 4, 2018). para. 239.

the same goal, then why one would select the path of not having a specific regulation for preserving internet and thus taking risk of deficiency. [43]

B. The European Union's Position on Net Neutrality

i. Historical Background of the European Union's Net Neutrality Rules

The European Union is affected by the United States of America in terms of the debates regarding the net neutrality. The European Commission (the "***Commission***") addressed the net neutrality issue within the scope of its communication regarding the Review of the EU Regulatory Framework for electronic communications networks and services.[44] The Commission referred to the debate that was going on in the United States of America at time being. The Commission stated that the debate essentially concerns whether the network act non-discriminatory or neutral to the content or whether ISPs could be able to provide different QoS to the content. The Commission also recognized that the traffic prioritization can be used to improve QoS while it has the potential to be used as a tool of an anti-competitive conduct to block or disadvantage competing services.

In terms of the relevance of the debate with the European Union, the Commission indicated that the product differentiation is generally beneficial for the markets, in particular for the markets where the large fixed and sunk costs are concerned, provided that the users have choice to access the transmission and services they prefer. To that end, the Commission stated that allowing ISPs to differentiate their services might reduce the entry barriers for CAPs and lessen the concentration in the market and thus give users' more choice. In this respect, the Commission also noted that the regulatory framework in the European Union allows ISPs to offer differentiated services while it forbids ISPs which are in dominant position to discriminate between customers in similar circumstances.[45] As a result, although for the purposes of the net neutrality the Commission offered certain articles to be implemented for the increase of transparency and putting a minimum QoS obligation on the ISPs

[43] H.Amdt.987 to H.R.5252, 109th Cong. (2006).

[44] European Commission, *Commission Staff Working Document, Impact Assessment accompanying document to the proposal for a Directive of the European Parliament and The Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 202/21/EC, proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Proposal for a Regulation of the European Parliament and the Council Establishing the European Electronic Communications Markets Authority*, SEC(2007) 1472, at 90, (2007).

[45] *Id.* 91.

in its proposal for the amendment of the universal service and users' rights relating to electronic communications networks[46], the proposal did not include any rules that can be deemed that the net neutrality will be under protection by the legislation. Within the scope of reforms regarding telecom regulations, Body of European Regulators for Electronic Communications ("***BEREC***") was also established for better functioning of the internal market for electronic communications networks and services within the EU.

The Commission launched two public consultations regarding net neutrality between (i) 30 June and 30 September 2010 and (ii) 23 July 2012 and 15 September 2012.[47] As per these public consultations and the European Parliament's calls for net neutrality rules in the European Union[48], the Commission proposed a regulation in terms of net neutrality and roaming on public mobile communications networks.[49] Eventually, the European Union adopted its net neutrality rules on 25 November 2015 which entered into force on 30 April 2016 (i.e. Telecom Single Market Regulation, the "***TSM Regulation***").[50]

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[46] European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation*, COM(2007) 698 final, (2007).

[47] *See Digital Agenda: Commission launches consultation on net neutrality*, http://europa.eu/rapid/press-release_IP-10-860_en.htm?locale=en (last visited Dec. 20, 2017) and *Digital Agenda: Commission opens public consultation on preservation of the open internet (net neutrality)*, http://europa.eu/rapid/press-release_IP-12-817_en.htm (last visited Dec. 20, 2017).

[48] EUROPEAN PARLIAMENT, REPORT ON A DIGITAL FREEDOM STRATEGY IN EU FOREIGN POLICY, (2012); and EUROPEAN PARLIAMENT, REPORT ON COMPLETING THE DIGITAL SINGLE MARKET, (2012).

[49] European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, COM(2013) 627 final, (2013).

[50] European Parliament and the European Council, *Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union*, OJ L 310/1 (2005).

ii. The European Union's Net Neutrality Rules

The TSM Regulation sets forth rules regarding net neutrality and roaming on public mobile communications. That being said, as per the purposes of this article, the TSM Regulation will be evaluated solely on net neutrality aspect.

Article 3(3) of the TSM Regulation could be deemed as the core of the net neutrality rules of the EU. As per first subparagraph of Article 3(3) of the TSM Regulation, ISPs are obliged to treat all data equally without "*…discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used*". Although the TSM Regulation prohibits such conducts of the ISPs, it also grants a right to ISPs to conduct "reasonable traffic management". As per Article 3(4) of the TSM Regulation, ISPs could implement reasonable traffic management so long as it is transparent, non-discriminatory and proportionate. Moreover, the TSM Regulation stipulates that such management should not be carry commercial concern and rather it should be based on objective technical requirements. As the TSM Regulation does not comprehensively set forth scope of the reasonable traffic managements, BEREC's guidelines on the implementation of net neutrality rules interpret the TSM Regulation to set a framework for national authorities (the "***BEREC Guidelines***").[51] According to the BEREC Guidelines, similar situations in terms of similar technical QoS requirements should receive similar treatment.[52] Moreover, the BEREC Guidelines indicates that if the ISPs implement different technical QoS requirements of specific categories of traffic, they should done this objectively on the basis of sensitivity to QoS requirements of the applications (e.g. latency, jitter, packet loss, and bandwidth).[53] The explanations of the BEREC Guidelines on this front provide that if an ISP categorizes certain contents/applications for reasonable traffic management, it should not discriminate among these applications. For example, if an ISP categorizes VoIP applications as technically different for the purposes of the reasonable traffic management, all data created by VoIP applications should be treated equally even if they can be differentiated from other contents/applications. Furthermore, the TSM Regulation prohibits reasonable traffic management that conducted in terms of a commercial relationship. Thus, it can be concluded that the TSM Regulation

[51] Body of European Regulators for Electronic Communications, *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*, BoR (16) 127, (2016).

[52] *Id.* para. 60.

[53] *Id.* para. 63.

took into account the certain concerns of the net neutrality proponents regarding QoS and prevented that ISPs gain extra profit from providing certain level of QoS for specific contents/applications. That being said, the TSM Regulation aims to protect certain level of QoS for the sake of end-users given that specific contents/applications could be used if they are provided steady and regularly.

Third subparagraph of Article 3(3) of the TSM Regulation strictly sets limits of the reasonable traffic management and in particular prohibits ISPs to use traffic management to "*...block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories...*". Moreover, third subparagraph of Article 3(3) of the TSM Regulation provides three exceptions in which ISPs could go beyond the limits of provisions of second subparagraph of Article 3(3). The first exception is concerning compliance for the EU legislation and national legislation and the second exception is about the security reasons (e.g., spywares on the network). The third exception concerns exceptional or temporary network congestion. Although the TSM Regulation grants ISPs to go beyond reasonable traffic management in terms of exceptional or temporary congestion, it still requires that equivalent categories of traffic are treated equally. Furthermore, Recital 15 indicates that if the network congestions are occurring recurrently and on a long-lasting basis, the ISPs should be focused to expand their network capacity and they should not have allowed benefiting from this exception.

Against the foregoing, the TSM Regulation clearly blocks ISPs from extracting profits from prioritizing certain contents/applications. However, the TSM Regulation does not ignore the developments on the Internet and the existence of QoS needy contents/applications. In addition, the network congestion is listed as an exceptional situation within the TSM Regulation while BEREC Guidelines provides details on that front as well. To that end, as per recitals and provisions of the TSM Regulation and interpretations within the BEREC Guidelines, it can be concluded that the arguments of the net neutrality proponents reflected within the EU's net neutrality and the EU became the one of the jurisdictions where the net neutrality rules are clearly regulated.

III. Zero-Rating Practices and Net Neutrality

One of the most discussed points of net neutrality debate is whether the zero-rating practices should be deemed as infringement of the neutral Internet. Zero-rating practices concern the data caps that are being applied by both fixed and mobile ISPs. The data cap indeed is a limit applied to the end-users. Accordingly, when an end-user consumes the data cap, the bandwidth speed is decreased or the end-user is obliged to pay for the data transmitted after the limit has been reached.

In an effort to to provide a background to demonstrate the relation between net neutrality and zero-rating practices, an example might be useful. If a CAP enters into deal with an ISP to exclude the data produced by the content/application of the CAP from the data cap of the end-user, this practice would be a very direct example of a zero-rating practice. Given the new environment of the Internet where contents/applications that requires rather huge data (e.g., real-time streaming applications) the zero-rating practices could play decisive role regarding the end-users' choice. If the hypothetical exclusion applied to a high-quality video or audio streaming content that had substitute competitors (i.e., many other videos or songs that you could watch or listen to), an end-user's decision regarding whether or not to access that particular piece of content might very well be affected by this promotion, since the end-user may use up less of the pre-determined data cap by choosing to consume the content that is excluded from the data cap.

Zero-rating practices are mostly implemented in developing or less developed countries, as the purchasing power of end-users in those countries are lower with respect to accessing the Internet at high speeds or with large data caps. In fact, research shows that a number of African countries had more than 16 zero-rated services as of February 2015. India had 38.[54] Nevertheless, the effects of zero-rating practices are still concerning developed countries as well.

At the first glance, zero-rating practices may be viewed as a highly consumer–friendly and beneficial strategy, since they increase consumers' welfare by way of reducing the costs they incur to access online content or increasing their incentive to access the contents/applications they desire. However, similar to the issue of net neutrality, a debate has surfaced with respect to zero-rating practices, raised and spurred on by criticisms regarding its potential harm to competition in particular.[55] The net neutrality rules of the EU and the USA shed light to certain effects and aspects of these practices while not prohibiting the zero-rating practices.

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[54] Jeffrey A Eisenach, *The Economics of Zero Rating, Insight in Economics*, 2, http://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf (last visited Dec. 10, 2017); *see* also https://info.internet.org/en/ which is a partnership between social networking services company Facebook and six companies (Samsung, Ericsson, MediaTek, Opera Software, Nokia and Qualcomm) that plans to bring affordable access to selected Internet services to less developed countries.

[55] Eisenach, *supra* note 54, at 1.

1. The EU's Net Neutrality Regulation on Zero-Rating Practices

The TSM Regulation, puts forth certain rules on net neutrality, does not explicitly refer to (or define) zero-rating practices. That being said, the BEREC Guidelines define "zero-rating" as a practice where an ISP chooses not to charge its customers for the data traffic generated by a particular application or category of applications. More specifically, the BEREC Guidelines emphasize that, if there is a data cap applied by the ISP, the data used through the particular application (or category of applications) that benefit from the zero-rating practice, would not be counted against the data cap applied to its customers.[56]

The BEREC Guidelines state that there is a possibility that zero-rating practices would breach net neutrality rules, which are set forth under Article 3 of the TSM Regulation.[57] To that end, in an effort to clarify whether zero-rating practices are prohibited under the TSM Regulation, the BEREC Guidelines provide interpretations regarding Recital 7 of the TSM Regulation and offer guidance for national authorities regarding the assessment of zero-rating practices. In this respect, paragraph 42 of the BEREC Guidelines takes different positions with respect to zero-rating practices that are applied to: (i) an entire category of applications, and (ii) only to certain applications. In this context, the BEREC Guidelines assert that zero-rating practices that are applied to a specific application (such as a particular music application) would be more likely to have an effect on the end-users' consumption choices than zero-rating practices that are applied to an entire category of applications. According to the BEREC Guidelines, analyzed from the perspective of the end-users, zero-rating practices that are applied to a specific application create an economic incentive to use that specific application rather than the competitor applications.[58]

As the TSM Regulation does not explicitly prohibit zero-rating practices, the BEREC Guidelines set forth certain conditions that may be taken into account when conducting a comprehensive assessment of whether net neutrality rules have been infringed through zero-rating practices. The conditions provided within Paragraph 46 of the BEREC Guidelines mainly consider the effects of zero-rating practices on both (i) the end-users' choice regarding the applications they use, and (ii) the behavior of the CAPs. In terms of the specific conditions set forth under Paragraph 46 of the BEREC Guidelines, competition law principles could be deemed as highly relevant to these assessments. Indeed, the BEREC Guidelines themselves explicitly

[56] BEREC, *sıpra* note 51, para. 40.

[57] *Id.*at para. 41.

[58] *Id.*at para. 42.

declare and explain that competition law principles should be used to determine the market positions of the ISPs and CAPs under examination. Moreover, although this is not directly stated in the BEREC Guidelines, certain competition law and economics terms and concepts (such as vertical integration, market foreclosure, and entry barriers) could be relevant when assessing whether the conditions that the BEREC Guidelines consider useful to determine the nature and permissibility of zero-rating practices have been met. The relationship between competition law rules and these conditions will be further discussed in the following section.

With regard to zero-rating practices, the BEREC Guidelines also clarify when they will be deemed to constitute an unequal treatment, and thus violate the net neutrality rules set forth under the TSM Regulation. As per Paragraph 55 of the BEREC Guidelines, zero-rating practices could constitute unequal treatment if an ISP blocks or slows down all applications once the data cap has been reached, except for the application(s) that are subject to its zero-rating practices.

The report published by the Commission on zero-rating practices in broadband markets ("***Report on Zero-rating***")[59] is another source that can be reviewed and consulted in terms of evaluating zero-rating practices, in addition to the BEREC Guidelines. The Report on Zero-rating provides a relatively more simple and straightforward definition of zero-rating practices and states that it is an exemption from usage charges that are applied to the data traffic generated by using applications or accessing certain websites subject to the zero-rating practices.[60]

It is also worth noting that the Report on Zero-rating illuminates a key point regarding all the debate on zero-rating practices. To that end, the Report on Zero-rating asserts that scholarly articles evaluate zero-rating practices as part of the issues surrounding net neutrality rather than as a competition law issue.[61] This crucial point made by the Report on Zero-rating is actually still at the heart of the debate as discussed within Section (IV) of this article.

2. Zero-Rating Practices under the FCC's Open Internet Order

Although the USA repealed The FCC, on the other hand, within its report on the Open Internet Order ("***FCC Report***"), refers to zero-rating

[59] EUROPEAN COMMISSION, ZERO-RATING PRACTICES IN BROADBAND MARKETS, (2017).

[60] *Id.* at 1.

[61] *Id.* at ii.

practices as "sponsored data plans."[62] Based on the evidence gathered by the Commission, the FCC Report indicates that consumers could benefit from these zero-rating practices, in particular within the scope of mobile Internet services. The FCC Report also reveals that some CAPs and ISPs provided the Commission with background information, arguing that zero-rating agreements are beneficial for both CAPs and consumers. According to the comments received by the Commission, through zero-rating practices, consumers could enjoy the innovations at the cutting edge of technology, while new CAPs could have a chance to survive in the marketplace and compete against the established players in the market.

Although certain commentators have argued that zero-rating practices would promote innovation and enhance consumer welfare, critics and observers on the other side of the debate have also put forth their concerns over zero-rating practices. For example, some of the commentators have forcefully argued that zero-rating practices could distort competition in the market and prevent consumers from freely choosing what content to access on the Internet. According to these commentators allowing zero-rating would give the ISPs to power to exempt certain services for favor of certain undertakings while preventing the users from to reach the services they desire.

The FCC abstained from enacting a rule in terms of sponsored data plans while acknowledging the potential benefits/advantages and costs/disadvantages of the sponsored data plans which had been brought to its attention. To that end, the FCC Report concludes that zero-rating practices should be evaluated based on the facts of each case, under "no-unreasonable interference/disadvantage" standard, the action should be taken as necessary.

In light of the foregoing discussion, it can be argued that public authorities in both the EU and the United States have so far failed to take a clear-cut position with regard to zero-rating practices. Zero-rating practices were not prohibited by legislation in either jurisdiction, and the public authorities in both the EU and the United States preferred to review such practices only when a specific issue or complaint was brought before the relevant authorities. Therefore, it could be concluded that the lawmakers and enforcement authorities in the EU and the United States have generally agreed, to some extent, with the arguments advanced by the proponents of zero-rating practices (or sponsored data plans).

[62] Federal Communications Commission, *supra* note 38, para. 151.

3. Examples of Zero-rating Practices

The Netherlands became the first Member State of the EU to implement net neutrality rules, before the TSM Regulation was introduced.[63] Aside from being the earliest Member State to act on this front, the Netherlands is also noteworthy for investigating the zero-rating practices of ISPs, even before the net neutrality rules of the EU had been adopted.

In January 2015, before the EU had adopted or implemented its own net-neutrality policy, the relevant authority in the Netherlands, known as the Authority for Consumers & Markets ("***ACM***"), fined Vodafone, a British multinational telecommunications company, on the basis of the zero-rating practices it applied to HBO-Go, a video-streaming service provided by the HBO channel.[64] This decision was subsequently reviewed by a District Court in the Netherlands, which found that the zero-rating practice with respect to HBO-Go could influence and steer customers' choices with respect to content consumption, and, therefore, violated the Netherlands' net-neutrality regulations.[65]

In a similar case, the ACM asked T-Mobile (another mobile communication company) to cease applying zero-rating practices to music streaming services, which took place after the TSM Regulation entered into force on April 30, 2016. In that case, the District Court ruled against the ACM, stating that the TSM Regulation did not prohibit zero-rating practices conducted by the ISPs.[66] Therefore, at least in the case of the Netherlands, the TSM Regulation appears to have softened the rules being applied in terms of net neutrality.

On the other hand, the United States has been dealing with the issue of zero-rating practices in a more overtly political manner. In late 2016, the FCC notified certain ISPs that their zero-rating practices were being investigated in order to determine whether they were in violation of the net neutrality rules.[67] That being said, after the FCC's new chairman, Ajit Pai, started his term of office, the FCC published a press release on February 3, 2017, declaring that all

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[63] EDRi, *supra* note 15.

[64] DLA Piper LLP, *Zero-Rating and Net Neutrality - Decisions (So Far) In the EU*, https://www.lexology.com/library/detail.aspx?g=d151d6b4-15c0-46af-a0ee-3dc69509f895 (last visited Oct. 30, 2017).

[65] Dennis Brouwer, *Zero-Rating and Net Neutrality in the European Union*, 16. http://arno.uvt.nl/show.cgi?fid=143432 (last visited Nov. 14, 2017).

[66] *Id.* at 17.

[67] Marguerite Reardon, *FCC slams AT&T and Verizon over zero-rating offers*, https://www.cnet.com/news/fcc-att-verizon-zero-rating-directv-now-go90-net-neutrality/ (last visited Oct. 10, 2017).

investigations regarding zero-rating practices had been dropped.[68] Therefore, even though the FCC Report indicated the Commission's position that a case-by-case analysis would be required for the assessment of whether zero-rating practices violated net neutrality, the FCC's newly adopted policy suggests that we are not likely to come across any new cases being launched in the United States regarding zero-rating practices, at least not in the foreseeable future.

Although there have been several cases where zero-rating practices were evaluated by the regulatory authorities in EU Member States, we still have not had the opportunity to witness and how a competition authority might approach and handle a case in line with the TSM Regulation and the BEREC Guidelines. That being said, as the EU has its own net neutrality rules, there is a chance that one of the competition authorities in the Member States of the EU, or perhaps even the European Commission itself, might delve into a competition law analysis with regard to zero-rating practices. All in all, the FCC's new policy on zero-rating practices limits the number of opportunities for the development and resolution of a case that can be used as a guideline by competition authorities in future cases that might arise from the ISPs located in the USA.

IV. Net Neutrality, Zero-Rating and Competition Law Rules

As the debates surrounding both the net neutrality rules and the zero-rating practices involve and touch on fundamental competition law concerns, such as innovation, discrimination, and consumer welfare, competition law quickly found itself embroiled in the discussions surrounding these issues. The proponents of net neutrality have suggested that the current competition law rules could not adequately address the potential problems that would arise in the absence of the net neutrality regulations. Conversely, the opponents of net neutrality contend that if the ISPs were to engage in any anti-competitive conduct in the absence of net neutrality rules, by providing advantages to their own services or the services of other third-parties, the competition authorities would detect and prevent such behavior. Accordingly, in this section, we will focus on the relationship between competition law rules and net neutrality, including zero-rating practices.,

[68] *See Statement of Commissioner Michael O'rielly on Conclusion of Zero Rating Inquiries,* https://apps.fcc.gov/edocs_public/attachmatch/DOC-343340A1.pdf (last visited Dec. 10, 2017).

1. The Effectiveness of Competition Law Rules in the Absence of Net Neutrality Rules

A. Necessity of the Net Neutrality Regulations – Opponents

While the proponents of net neutrality were advocating for the implementation of net neutrality regulations, certain scholarly articles argued that the EU might not need net neutrality rules, and contended that the existing rules would be sufficient to prevent and overcome any potential concerns that could arise in terms of the ISPs' discriminative conducts.[69] One of the main arguments on this front is the "significant market power" test introduced by the Framework Directive[70]. Recital 27 of the Framework Directive sets forth that "*…ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem…*". Recital 26 explains that significant market power is equivalent to concept of dominance. In this respect, the Framework Directive allows the member states to take *ex ante* measures against the dominant undertaking within the telecommunication sector. In this respect, the ones arguing that the net neutrality regulation is not necessary to prevent anti-competitive conducts of the ISPs given that the member states could even take *ex ante* measures in case the competition law rules are insufficient. Furthermore, there were some suggestions that the authorities should instead focus on enhancing the competition in the broadband network industry, rather than implementing net neutrality rules.[71]

As per the net neutrality opponents, the proponents indicates that "*…(i) the broadband Internet access market is inadequately competitive and will remain so indefinitely; (ii) such market concentration will give incumbent broadband providers both the incentive and the ability to discriminate against specific applications providers; (iii) such discrimination would harm consumers and not just particular providers; and (iv) any such consumer harm would exceed the costs of regulatory intervention.*"[72]

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[69] *See e.g.*, Martin Cave & Pietro Crocioni, *Does Europe Need Network Neutrality Rules?*, 1 INTERNATIONAL JOURNAL OF COMMUNICATION (2007).

[70] The European Parliament and the European Council, *Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)*, (2002).

[71] Peter Bright, *We Don't Need Net Neutrality; We Need Competition*, http://arstechnica.com/techpolicy/2014/06/we-dont-need-net-neutrality-we-need-competition/ (last visited Nov. 1, 2017).

[72] Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An*

In this respect, as the EU competition rules already address the potential concerns in terms of the restriction on customers' freedom to choose and denial of producers' access to the market.[73] The opponents of the net neutrality regulations could argue that the current competition law rules are sufficient to certain concerns of the proponents.

Furthermore, the opponents indicated that from economic perspective, the concerns of the proponents regarding the vertically integrated ISPs (i.e., ISPs which provides Internet access and has its own CAP). Accordingly, the opponents indicate that introducing the net neutrality rules would set forth that the certain practices of vertically integrated undertakings are per se illegal and this approach would not have any support in economic theory; instead it would contradict with the economic theory which provides that the vertical integration enhance the welfare.[74]

The opponents also bolster their arguments on this front by asserting that Internet is a two-sided market. Prof. Marc Rysman states that, broadly speaking, a two-sided market is one in which "… 1) two sets of agents interact through an intermediary or platform and 2) the decisions of each set of agents affects the outcomes of the other set of agents, typically through an externality."[75] Accordingly, the opponents indicates that the ISPs act as a platform within Internet and the ISPs will benefit the variety of the CAPs they offer their users while CAPs benefit the number of the subscribers that the ISPs have due the network effects.[76] In this respect, naturally the opponents indicate that the ISPs would not always have the incentive to discriminate against or block the CAPs given that their own benefit also lie on the variety of the CAPs they can offer within their network.

B. Necessity of the Net Neutrality Regulations – Proponents

Articles 101 and 102 of the Treaty on the Functioning of the European Union ("***TFEU***") stipulate and put forth the main competition law rules for the EU. While Article 101 forbids conduct that has the object or effect of the prevention, restriction or distortion of competition through an agreement or a

Institutional Perspective On The Net Neutrality Debate, 7 JTHTL 43, 19-66 (2009).

[73] Tomra Systems ASA and Others v European Commission, Case T-155/06, (General Court (European Union) Fifth Chamber, Sept. 9, 2010).

[74] Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?* 1 INTERNATIONAL JOURNAL OF COMMUNICATION, 516. 493-530 (2007).

[75] Marc Rysman, *The Economics of Two-Sided Markets*, 23 JOURNAL OF ECONOMIC PERSPECTIVES, 125, 125-143 (2009).

[76] Martin Cave & Pietro Crocioni, *Net Neutrality in Europe*, 3 Communications & Convergence Review 66, 57-70 (2011).

concerted practice between at least two undertakings, Article 102 prohibits the unilateral anti-competitive conducts of a dominant undertaking. That being said, it should be emphasized that both Article 101 and Article 102 consider applying dissimilar conditions to equivalent transactions with other trading parties to be an example of the prohibited practices in question.

That being said, the proponents of the net neutrality regulation indicate that the competition law rules would not be sufficient to overcome all the problems that can rise within the non-neutral Internet structure.

First of all, for an undertaking to be sanctioned due to its anti-competitive conducts, several different conditions should be satisfied depending on the alleged practice. Discriminative anti-competitive conducts are rarely prosecuted under Article 101, given that the existence of an agreement or concerted practice is a prerequisite for an investigation to be launched. Moreover, even if there is an agreement between an ISP and a CAP that could be subject of Article 101 investigation, the agreement could (i) benefit from *de minimis* exemption, (ii) benefit from block exemption provided for vertical agreements. All in all, the agreement could be subject to individual exemption provided under Article 101(3) of the TFEU.[77] In this respect, the proponents of the net neutrality rather have a strong argument that an “infringement to net neutrality” could be found under Article 101 in very exceptional cases and thus, the net neutrality rules are necessary.

Moreover according to the European Union case law, a refusal to deal violation occurs when (i) a dominant undertaking (ii) refuses to supply a competitor in an adjacent market or downstream market (iv) with indispensable products in order to operate its business, (v) without any objective justification and (vi) to the extent which eliminates all competition on the market on the part of that competitor.[78] To that end, if a dominant ISP blocks a CAP to reach users through its network, in order to be this conduct to be evaluated as an anti-competitive refusal to supply practice under Article 102 of the TFEU all of these conditions should be satisfied. Moreover, if a dominant ISP would not

[77] Balázs Bartóki-Göncz & Borbála Dömötörfy, *Net Neutrality and Competition Law: New Business Models and Changing Regulatory Approach in The European Union*, 11 US-CHINA LAW REVIEW 428, 416-442 (2014).

[78] Konkurrensverket v TeliaSonera Sverige AB, Case C-52/09, (Opinion of Mr. Advocate General Mazák of the European Court of Justice (First Chamber), Sept. 2, 2010); Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, Case C-7/97, (the European Court of Justice (Sixth Chamber) Nov. 26, 1998); A similar definition is articulated in Commercial Solvents Corp. v. European Commission, Joined Cases 6 and 7/73, (the European Court of Justice, Mar. 6, 1974).

provide a CAP with the bandwidth necessary for QoS needy applications or contents, the question of whether this practice constitute an anti-competitive conduct under Article 102 of the TFEU boils down on whether the CAP accesses the end-users through best effort can compete effectively with a CAP who has an assured bandwidth for delivery. If the answer of this question is positive then refusal of supply could not be deemed as an infringement under Article 102 of the TFEU. [79]

As a result, it can be concluded that the competition law may not be used as a tool to protect CAPs from foreclosure or discrimination, unless this is shown (likely) to restrict effective competition on the relevant product market.[80]

Against the foregoing, one can argue that the proponents of the net neutrality could assert that the competition law rules would not be effective as stand-alone net neutrality regulation. Indeed, a few years ago, the Commission conducted an investigation that could have provided some analysis and guidance regarding net neutrality issues, before the EU laid down its net neutrality rules. The investigation in question was conducted in order to determine whether certain ISPs had abused their dominant position by foreclosing the market to the CAPs or to other ISPs. However, the Commission decided to end its investigation on the basis of a lack of evidence indicating abuse of dominance.[81] This one example could also supplement the proponents' arguments.

2. The Competence of Competition Authorities after the TSM Regulation

The proponents of net neutrality could point to the fact that, even in the absence of the EU-wide net neutrality rules, there were cases in which an undertaking was punished for violating net neutrality regulations. For example, in the Netherlands, a service provider was fined by ACM for blocking various services, including several Internet calling services.[82] On the other hand, the

[79] Bartóki-Göncz & Dömötörfy, *supra* note 77, at 432.

[80] Maniadaki, *supra* note 28, at 156.

[81] *Antitrust: Commission Closes Investigation into Internet Connectivity Services But Will Continue to Monitor the Sector, http://europa.eu/rapid/press-release_IP-14-1089_en.htm (last visited Oct. 30, 2017).*

[82] *See, Fines Imposed on Dutch Telecom Companies KPN and Vodafone for Violation of Net Neutrality Regulations, https://www.acm.nl/en/publications/publication/13765/Fines-imposed-on-Dutch-telecom-companies-KPN-and-Vodafone-for-violation-of-net-neutrality-regulations (last visited Nov. 1, 2017).*

opponents of the net neutrality rules could conversely argue that the Netherlands had already adopted net neutrality rules, and, therefore, that the ACM case should not be relevant for the discussions regarding the absence of net neutrality rules. That being said, it could also be argued that the reasoning behind the Netherlands' decision to implement net neutrality rules itself establishes and proves the necessity of those net neutrality rules, given that the Netherlands found it necessary to implement such net neutrality rules after (and due to) previous incidents.[83]

Although the regulatory authority (ACM) in the Netherlands fined KPN for violating net neutrality rules by way of blocking various services including several internet calling services, the sanction imposed on the basis of the violation of net neutrality rules rather than the competition law rules. In this respect, although ACM is the competent authority for both implementation of net neutrality rules and competition law rules in the Netherlands, the case does not provide an insight on whether an undertaking could infringe both net neutrality rules and competition rules through one single conduct.

As explained above, within Recital 7 of the TSM Regulation, both national regulatory authorities and other competent authorities are referred to as the bodies that should be empowered to intervene against agreements or commercial practices that result in the reduction of end-users' choice. Recital 7 also indicates that these bodies should take into account the markets positions of the ISPs and CAPs that are involved in the investigated conduct, and intervene in such agreements or commercial practices. In light of the specific wording choices evinced by the TSM Regulation, such as "other competent authorities," "market positions" and "agreements," other authorities also have competence on the matters set forth under the TSM Regulation.[84]

Therefore, we contend that competition authorities should be included under the rubric of "other competent authorities," and should investigate whether net neutrality rules have been violated by an undertaking while taking into consideration the market power of the ISPs and CAPs under examination. Indeed, assessing the market power of an investigated undertaking would not be a new tool or novel challenge for the competition authorities of the Member States of the European Union. Moreover, the TSM Regulation does not provide guidance on how a competition authority (including the Commission) should act when it detects a violation of net neutrality rules. Taking into consideration

[83] Fredrik Jungermann, *Four Years (And A Net Neutrality Law) Later, Dutch Operators Foul Again,* http://tefficient.com/four-years-and-a-net-neutrality-law-later-dutch-operators-foul-again/ (last visited Nov. 1, 2017).

[84] Peter Alexiadis, *EU Net Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards*, https://antitrustlair.files.wordpress.com/2016/05/net-neutrality-article_12-may-2016_final.pdf (last visited Oct. 29, 2017).

the prohibitions set forth in Articles 101 and 102 of the TFEU, the competition authorities' investigations will be limited to specific conducts and such conduct may be reviewed by the competition authorities only if it also qualifies as a form of a practice that impedes competition in the marketplace. Furthermore, if an undertaking violates the net neutrality rules stipulated under the TSM Regulation, the question of which of the regulatory authorities (e.g., the competition authority or the telecom authority) should be the investigating body for such practices remains an open question.

With regard to zero-rating practices, the role of the competition authorities could be rather different given that paragraph 46 of the BEREC Guidelines signals that the market position of an ISP or a CAP should be analyzed in accordance with the competition law principles. In this respect within the scope of the EU net neutrality rules, it can be the case that the competition authorities are appointed as the safeguards of in terms of the harmful zero-rating practices given that the EU net neutrality rules abstained from prohibiting the zero-rating while the BEREC Guidelines opted to refer the competition law as a tool to assess the effects of zero-rating practices. Moreover, paragraph 42 of the BEREC Guidelines indicates that while applying zero-rating to an entire category of applications would not create an economic incentive to use a certain application within that category, if zero-rating is being applied only on certain applications (e.g., ISP's own services, one specific application) it could create an economic incentive for users to prefer that specific application instead of competing ones. Accordingly, given that both Article 101 and Article 102 of the TFEU give "apply dissimilar conditions to equivalent transactions with other trading parties" as an example of a potential anti-competitive conduct, it would not be too assertive to conclude that the zero-rating practices could be subject to potential investigations that will be conducted by the competition authorities within the near future.

V. Conclusion

The net neutrality debate shows that the competition law will be always under the spotlight when the topics such as consumer welfare and innovation are affected. The European Union took a clear-cut approach by its net neutrality regulation and indicated that the innovation is awaited from CAPs and they should be protected. On the other hand, the USA repealed its net neutrality regulation and pointed out that the competition between the CAPs and the ISPs would bring the innovation that it necessary and provide the users with better contents and applications along with enhanced bandwidth speeds. The different approaches within the two continents definitely result with distinct results in near future and we will witness unique case law from both competition authorities of the EU and the USA. The zero-rating practices on the other hand should have to prove that they result in innovation in terms of CAPs and give benefit to the consumers in order to enjoy freedom of non-regulation.

The after effects of the net neutrality regulation might be also seen in the merger control regime, in particular in the EU. The Commission and the national competition authorities can assess whether the net neutrality regulation lower the entry barriers to the market of the CAPs. Moreover, as the net neutrality regulation indicated that CAPs should be the innovator of Internet, the Commission and the national competition authorities might scrutinize the possible concentrations between CAPs in terms of the effects of such concentration on the innovation. In this respect, although the net neutrality regulation could be deemed a distinct legal instrument regarding the protection of Internet, the competition law regime eventually will be affected as a result of the regulation. Given the pace of the development in Internet, it is highly likely that we will take a closer look into the relationship between net neutrality and the competition law in a very short time.

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Analysis of the Collective Sale of Football Broadcasting Rights under Competition Law: Evaluation of the Widely Accepted Principles

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I. General Information on Football Broadcasting Rights

1. Importance of the Sale of Broadcasting Rights

In most countries, football media rights are the most important and lucrative part of the revenues generated from sports activities. In this regard, following the proliferation and convergence of various high-tech technologies, incomes generated from the sale of broadcasting rights have been increasing relentlessly. On this subject, del-Barrio and Pujol have noted that:

[…] the football industry has experienced a deep transformation due to technological progress. Actually, easy access to technologies and the role played by the mass media-TV broadcast, Internet etc.- permit additional consumers to join the market while increasing the interest of fans and the general public. Actually, in recent times, technological progress and deregulation have brought along substantial increases of revenues in European football, mainly through large broadcasting contracts. The share of revenues derived from broadcasting TV rights has become the main source of earnings,

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especially for some very popular teams, even if this figure varies across teams and leagues.[1]

In this regard, the "Big Five European Football Leagues," namely England, Italy, Spain, Germany, and France, generated broadcasting revenues of approximately 6.5 billion Euros in the 2015/2016 football season. The broadcasting revenues for each country was, respectively, 2.5 billion, 1.2 billion, 1.2 billion, 933 million, and 656 million Euros.[2]

Similar to Europe, revenues generated from the sale of football broadcasting rights in Turkey have also been gradually and persistently increasing. For example, Digitürk (which was acquired by beIN Media in 2016 and henceforth known as "beIN Digitürk") won the last broadcasting tender, which encompassed the football seasons between 2017 and 2022 with an offer that amounted to approximately USD 500 million (excluding VAT taxes),[3] while the previous tender had been won by Digitürk with an offer of approximately USD 321 million.[4]

To that end, it may be stated that the revenues generated from the sale of broadcasting rights is one of the principle, if not the essential, sources of financing for the football industry. On the other side of the coin, we see that these rights are also vital for TV operators in order to compete effectively in the relevant markets, given that consumers are more interested in and pay more attention to live broadcasts of football matches than any other TV content. Indeed, it was explicitly indicated by the Competition Committee in the Global Forum on Competition that, in the UK, 59% of regular sports-event watchers on TV stated that football games were a "*must-have*" for pay-TV operators. To that end, given the size of the cake and its impact on the economy, the sale of football broadcasting rights constitutes a unique topic of discussion for competition law.

[1] Pedro Garcia-del-Barrio & Francesc Pujol, *Broadcasting Revenues and Media Value in European Football*, (July 11, 2016), http://www.economics-ejournal.org/economics/discussionpapers/2016-36/file.

[2] DELOITTE, ANNUAL FOOTBALL REPORT, 9 (2017).

[3] PRESS RELEASE, BEIN MEDIA, *"BeIN MEDIA GROUP's Digiturk wins "Turkish Süper Lig" tender, once again…"* (November 28, 2016).

[4] AA, *Digitürk Wins Tender for Exclusive TV Rights of TFF Super League Games*, ANADOLU AGENCY, January 14, 2010.

2. The Relationship between Broadcasting Rights and Television Markets and an Evaluation of the Alternative Methods Used in the Sale of Football Broadcasting Rights

Live broadcasting of football matches is regarded as "*premium content*" from a competition law perspective. Accordingly, it may be stated that access to premium content acts as a crucial bottleneck and provides a significant source of market power to the players in the relevant market.[5] As stated above, consumers pay more attention to live broadcasts of football matches than other types of traditional TV content. Therefore, possessing the right to broadcast football matches is of paramount importance for pay-TV operators in order to gain an advantageous competitive position in the market due to the limited substitutability of these contents.[6] Accordingly, one may argue that those operators who manage to acquire football broadcasting rights put themselves in a more competitively advantageous position compared to other operators in pay-TV markets. Therefore, it may be claimed that the sale of football broadcasting rights has a considerable impact on competition in pay-TV markets.

As briefly mentioned above, the technological convergence in recent years and the rapid development of various high-tech tools and gadgets has had a substantial impact on the broadcasting industry. Accordingly, this development has allowed consumers to gain access to various contents through alternative platforms, such as analogue or digital terrestrial broadcasts, satellite, cable or Internet Protocol (IP).[7]

Nevertheless, even though there has been an increase in the number of alternative platforms on which the relevant content may be served to consumers as a result of this technological convergence, the supply side of the market still remains the same.[8] In other words, there is a limited number of top-quality football leagues and matches for which consumer demand/interest is high and ever increasing. Therefore, regulating the sale of football broadcasting rights is of vital importance in order to guarantee a competitive environment in the television markets.

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[5] OECD, COMPETITION ISSUES IN TELEVISION AND BROADCASTING, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE DAF/COMP/GF(2013)13, 7 (October 28, 2013).

[6] *Id.*, at 7.

[7] TURKISH COMPETITION AUTHORITY, *Sector Inquiry Report on Television Broadcasting Within the Scope of Digitalization and Convergence*, 157 (March 2017).

[8] *Id.*, at 37.

To that end, considering the importance of broadcasting rights for the football industry, football clubs and leagues are always seeking to obtain the most efficient and lucrative deal during the negotiations for the sale of their football broadcast rights. In the current situation, there are four different types of deals that are generally used in the of sale of football broadcasting rights:[9]

(i) *Individual Sale*: Negotiation by football clubs individually,

(ii) *Collective Sale* or *Joint Selling*: Negotiation by a football association, who organizes the football matches in a country and then distributes the revenues to football clubs (as is the case in Turkey, UK, France, and Italy),

(iii) *Mixed system:* Where there are matches whose broadcasting rights are determined to be negotiated by federations and there are also matches whose broadcasting rights may be sold individually by the football clubs,

(iv) Broadcasting of the football matches by the football federation (such as Chile).

Accordingly, it may be claimed that there are two ends of the spectrum in the sale of football broadcasting rights: (i) individual sales of broadcasting rights by football clubs on their own, and (ii) collective sales by football associations on behalf of the individual football clubs. In the current situation, most countries where football is the most popular spectator sport (such as UK, Germany, France and Turkey) adopt the system of collective sale of football broadcasting rights, where football federations negotiate the process of the sale of broadcasting rights directly with the operators.

In general, the collective sale of broadcasting rights, which is the primary topic of the present article, may be defined as "*the situation where sport clubs entrust the selling of their media rights to their sports association which then sells the rights collectively on their behalf.*"[10] In other words, within the scope of the collective sale or joint selling system, a governing organisation, such as the Turkish Football Federation (TFF) in Turkey, is authorized by the football clubs to bargain with the broadcasting operators and organize the sale of these rights.

To that end, the collective sale mechanism is a common practice in most countries, due to its various efficiencies compared to the individual sale system, such as: (i) increase in the sale value of the broadcasting rights, (ii)

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[9] Özgür Can Özbek, *Spor Endüstrisi ve Rekabet Hukuku Uygulamaları: Sporun "Özel" Konumu, Liglerin Hukuki Statüsü ve Yayın Hakkı Devir Sözleşmeleri*, 30 (2012).

[10] EUROPEAN COMMISSION, *Roundtable on Competition and Sports*, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE DAF/COMP/WD (2010)56, 3 (June 2, 2010).

certainty in the investments, (iii) increase in the quality of broadcasting, and (iv) allowing the weaker clubs to compete with the stronger clubs, and so on.[11] On this subject, the European Commission has stated in its *UEFA* decision that, "*Joint selling of the media rights of a football tournament provides an advantage for media operators, football clubs and viewers since it leads to the creation of a single point of sale for the acquisition of a packaged league product*."[12]

To that end, even though the collective sale system creates certain efficiencies in the sale of football broadcasting rights, as mentioned throughout this article, it might nevertheless be problematic from a competitive law perspective in various aspects. We will analyse and evaluate the problematic aspects of the collective sale system in the relevant chapters of this article.

II. Evaluation of the Collective Sale of Football Broadcasting Rights under Competition Law

1. Main Competition Law Issues Stemming from the Collective Sale of Football Broadcasting Rights

Broadcasting rights of football matches, which are offered to consumers regularly throughout every year (unlike, say, the Olympics), have unique characteristics compared to other types of TV content. First of all, football matches are an ephemeral and time-sensitive product, given that consumers generally are only interested in watching live broadcasts. Moreover, it may be plausibly claimed that there is no viable substitute product, as it is unlikely for a consumer who wants to watch a football match to be satisfied with content other than the live broadcasts of football matches. Apart from these distinctive characteristics, football broadcasting rights are currently sold and marketed centrally (*i.e.*, through a football association) in most countries, which drastically reduces the number of sellers in the relevant markets.[13]

Considering these unique characteristics of football broadcasting rights, it comes as no surprise that the collective sale of these rights routinely raises competition law issues. As background information, it is worth remembering that, in the collective sale method, football broadcasting rights are sold and marketed collectively by a sports association on behalf of the individual clubs,

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[11] *UEFA/European Commission*, Case No COMP/C.2-37.398 (EC, July 23, 2003), at 139-168.

[12] *Id.*, at 143.

[13] Torben Toft, *Football: joint selling of media rights*, Competition Policy Newsletter, 47-48 (2003).

as opposed to the marketing of these rights by the individual clubs.[14] To that end, collective sale may restrict competition in the relevant markets as it hinders price competition between individual football clubs in the sale of their own broadcasting rights.[15] Consequently, it may also impede competition between TV operators and thereby lead to a decrease in consumer choice. Furthermore, the negative effects of the collective sale of football broadcasting rights are amplified when these rights are sold on an exclusive basis for a long period of time, especially when such exclusive rights are acquired by a single TV operator. This is because, in such cases, the sale of the broadcasting rights may lead to the reinforcement of the market position held by the dominant TV operators, given that they have the financial resources to offer high (often astronomical) prices required to obtain football broadcasting rights. This naturally deters and impedes new entries into the relevant markets, as small-scale TV operators may not have the financial capabilities to offer such high prices for football broadcasting rights and ultimately reduces consumer welfare.[16]

Regarding competition law restrictions stemming from the collective sale of football broadcasting rights, the European Commission has noted in the UEFA Champions League Background Note that:

Joint selling of free-TV and pay-TV rights combined with exclusivity has an important effect on the structure of the TV broadcasting markets since football is in most countries the driving force not only for the development of pay-TV services but it is also an essential programme item for free TV broadcasters. UEFA sells all the TV rights to the whole tournament in one exclusive package to one broadcaster per Member State. Because the winner gets it all, there is a fierce competition for the TV rights whose increasing value can only be afforded by large broadcasters. This may increase media concentration and hamper competition between broadcasters. If one broadcaster holds all relevant football TV rights in a Member State, it will become extremely difficult for competing broadcasters to establish themselves in that market.[17]

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[14] EUROPEAN COMMISSION, *White Paper on Sport*, 17, (July 11, 2007).

[15] TURKISH COMPETITION AUTHORITY, *Sector Inquiry Report on Television Broadcasting Within the Scope of Digitalization and Convergence*, (March, 2017) para. 357.

[16] For the anticompetitive effects of joint selling arrangements, *see, e.g.*, *UEFA/European Commission supra* note 11, at 113-116.

[17] EUROPEAN COMMISSION, UEFA CHAMPIONS LEAGUE BACKGROUND NOTE (July 20, 2001).

To that end, even though the collective sale of football broadcasting rights may have an anticompetitive impact on the relevant markets, it is undoubtedly an established commercial practice in the current landscape, due to the efficiencies gained from the collective sale, as explained throughout this article.

In this regard, given that collective sales are likely to raise competition law issues in the relevant markets, especially when football broadcasting rights are granted to a particular incumbent TV operator on an exclusive basis for a lengthy period of time, the sale of football broadcasting rights has long been scrutinized by competition authorities around the world. Below, we will examine the landmark decisions pertaining to the assessment of the collective sale of football broadcasting rights and evaluate certain widely accepted principles that have been established and implemented to mitigate the competition law related risks relating to the collective sale of these rights.

UEFA Champions League

In *UEFA Champions League*,[18] the Union of European Football Associations ("**UEFA**") applied to the European Commission for a negative clearance or exemption from Article 101 of the Treaty on the Functioning of the European Union ("**TFEU"**) (ex Article 81 EC), with regard to the central marketing of the commercial rights of the UEFA Champions League, which is a pan-European football tournament organized by UEFA. The regulations of the UEFA Champions League grant UEFA the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the individual football clubs participating in the relevant tournament.

In this regard, the European Commission for the first time approved the collective sale of football broadcasting rights and set forth the principles which may mitigate competition-law related risks arising from the collective sale of these rights.

To that end, the primary arrangements provided by UEFA to the European Commission pertaining to the sale of football broadcasting rights initially included the sale of such broadcasting rights to a single TV operator per territory on an exclusive basis for several consecutive years. Subsequently, the European Commission issued a statement of objections, indicating that the notified joint selling arrangement regarding the sale of television broadcasting rights violated competition law rules, and stating that the joint selling arrangement was not eligible for exemption from Article 101 of the TFEU. In this regard, the European Commission noted in its statement of objections that

[18] *UEFA/European Commission*, *supra* note 11.

the joint selling arrangements about which it had been informed by UEFA prevented the individual football clubs participating in the UEFA Champions League tournament from deciding on or choosing their own commercial behaviours with regard to their TV broadcasting rights and hindered competition between football clubs with respect to supplying/selling TV broadcasting rights individually to potential buyers. The European Commission also stated that joint selling arrangements restrict competition by leading to a single source of supply with respect to football broadcasting rights. Moreover, the statement of objections also established that the potential efficiencies and benefits which may be gained from the joint selling arrangement with regard to the TV broadcasting market were negated by the commercial policies pursued by UEFA, due to the fact that the joint selling arrangement made it possible for a single large TV broadcaster per territory to acquire all TV rights pertaining to the UEFA Champions League at the expense of other TV broadcasters operating in the relevant markets.[19]

Subsequently, UEFA amended the joint selling arrangements in a manner that was intended to mitigate the competition law concerns raised in the statement of objections by the European Commission. To that end, UEFA's amendments related primarily to the following matters and modifications:

- UEFA would unbundle the media rights by splitting them into several packages that would be offered to various third parties,[20]

- Broadcasting rights agreements would not be concluded for a duration lasting longer than three years,[21]

- The award of the media rights agreements would follow an "invitation to tender," which would give all qualified TV operators an equal opportunity to bid for the rights in full knowledge of the key terms and conditions,[22]

- Football clubs would be allowed to sell certain media rights of their own on a non-exclusive basis in parallel with UEFA,[23]

- Both UEFA (with regard to all matches) and individual football clubs (with respect to the matches in which they participate) would have the right to

[19] *Id.*, at 19.

[20] *Id.*, at 32-39.

[21] *Id.*, at 25.

[22] *Id.*, at 27.

[23] *Id.*, at 34.

provide video content on the Internet one-and-a-half hours after the conclusion of the match,[24]

- Both UEFA (with regard to all matches) and the clubs (with respect to the matches in which they participate) would have the right to provide audio/video content via UMTS services, and this content would be available maximum 5 minutes after the action has taken place (*i.e.*, technical transformation delay). This content would be based on the raw feed produced for the television broadcast of the match.[25]

In this context, the European Commission's *UEFA Champions League* decision is of crucial importance, as it provides valuable insights as to how the European Commission deals with joint selling agreements. Moreover, the findings provided by the European Commission in the *UEFA Champions League* decision have been widely adopted and utilized in subsequent decisions involving the collective sale of football broadcasting rights.

FAPL

In *FAPL*,[26] the European Commission examined the Football Association Premier League's (FAPL) right to market and sell the television broadcasting rights for the Premier League's matches, pursuant to which the FAPL exclusively negotiates the media rights agreements.

In its preliminary assessment, similar to the *UEFA Champions League* decision, the European Commission noted that:

Joint selling prevents clubs from taking independent commercial action regarding the exploitation of the media rights pertaining to Premier League matches. In place of twenty clubs, each having a relatively small market share and each pursuing its own media rights policy, the arrangements result in a single (joint) sales organisation with exclusive rights, enjoying significant market share, and pursuing a single sales policy. Markets on which no-one possesses market power and whose development would typically be dictated by the demand for rights become subject to the commercial choices made by a joint sales organisation with a significant market share. Markets that would be demand-led thus become supply-driven. As a consequence, the joint sales organisation can, depending on how and to whom the rights are sold, restrict output and create foreclosure problems on downstream markets.[27]

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[24] *Id.*, at 40.

[25] *Id.*, at 44.

[26] *FAPL/European Commission*, Case No COMP/C-2/38.173 (EC, March 22, 2006).

[27] *Id.*, at 25.

In this regard, the European Commission noted that foreclosure problems may occur when broadcasting rights are sold on an exclusive basis. Moreover, the European Commission also stated that:

The FAPL has so far sold exclusive live TV rights in packages that were comparatively large in relation to that which would be sold by an individual club and to the demand from many broadcasters on the market. This is likely to create barriers to entry on downstream television markets in the United Kingdom leading to access foreclosure in these markets.[28]

To that end, the European Commission noted in its statement of objections that the FAPL's initial arrangements did not satisfy the conditions promulgated under Article 101 of the TFEU. In response, the FAPL subsequently proposed certain commitments and modifications to its scheme for the joint sales of media rights, in order to address the competition law concerns raised by the European Commission.

To that end, according to the FAPL's new proposed arrangements, the broadcasting rights would be offered in several packages through a transparent, non-discriminatory bidding procedure for television, as well as through alternative broadcasting technologies/media, such as the Internet, mobile channels, among others. Moreover, the FAPL introduced a so-called "*no single buyer"* rule, guaranteeing that no single buyer could purchase all of the broadcasting rights packages.[29] The FAPL also made a commitment that the duration of the broadcasting rights agreements would not exceed three football seasons. Therefore, the *FAPL* case adopted and incorporated the European Commission's standard approach towards the collective sale of football broadcasting rights provided in the *UEFA Champions League* decision.

Consequently, the European Commission concluded that the FAPL's commitments were appropriate and sufficient to address the competition law concerns identified by the European Commission.

Bundesliga

In the *Bundesliga* case,[30] the European Commission examined the central and joint marketing of the media rights with regard to the football matches in the first and second national football divisions in Germany (*i.e.*, Bundesliga and 2. Bundesliga).

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[28] *Id.*, at 26.

[29] *Id.*, at 37.

[30] *Bundesliga/European Commission*, Case No COMP/C-2/37.214 (EC, January 19, 2005).

In its preliminary assessment, the European Commission determined that the joint selling mechanism in Germany would raise competition law concerns, with regard to three market segments in particular, namely: (i) the upstream programme procurement market, (ii) the downstream media exploitation market related to programme procurement, and (iii) the emerging upstream and downstream markets in the new media and Internet rights.

Similar to the evaluations made in the *UEFA Champions League* and *FAPL* decisions, the European Commission held that the joint selling/marketing model prevented clubs from negotiating individually with television and radio operators and from marketing their broadcasting rights independently. The European Commission also concluded that the football clubs were prevented from making their own commercial decisions and implementing their own strategies about the price in particular, since, under the joint selling model, football associations exclusively determine the price, nature, and scope of exploitation of the relevant rights.[31] Accordingly, the European Commission held that the possible efficiencies which may derive from the joint selling mechanism, such as supporting the branding of a league-wide product and decreases in the transaction costs, would be outweighed by the restrictive effects arising from the joint selling mechanism in Germany.

After the European Commission's preliminary assessment, the German League Association proffered its commitments and modifications in an effort to address and resolve the competition law risks identified by the European Commission. To that end, the commitments provided by the German League Association may generally be summarised as follows:

- The league rights would be offered in several packages through a transparent and non-discriminatory procedure, and the duration of the agreements would not exceed three seasons,[32]

- Live broadcasts of the Bundesliga and the 2. Bundesliga would be offered by the League mainly in two packages, both for free-TV and for pay-TV programme suppliers. A third package would entitle the acquirer of the live broadcast rights to at least two Bundesliga matches and to deferred-highlight first coverage on free TV. A fourth package would comprise live games of the 2. Bundesliga and the rights to deferred-highlight first coverage on free TV. Second and third exploitation rights would be offered in a fifth package. Furthermore, packages 3 to 5 could each be sold to several exploiters,[33]

[31] *Id.*, at 22.

[32] *Id.*, at 27.

[33] *Id.*, at 28.

- Package 6 would include the right to broadcast Bundesliga and 2. Bundesliga matches live and/or near-live on the Internet. A seventh package would comprise deferred highlights coverage. Package 8 would encompass the right to broadcast Bundesliga and/or 2. Bundesliga matches live and/or near-live and/or after the event on mobile phones. Finally, package 9 would confer the right to the deferred broadcast of excerpts from Bundesliga and/or 2. Bundesliga matches on mobile phones,[34]

- Every club would be allowed to sell its home games to a free-TV broadcaster 24 hours after the conclusion of the match for one-off free-TV broadcasting of up to the full match within the European Economic Area ("**EEA**"),[35]

- One-and-a-half hours after the end of a match, every club would be permitted to provide a summary of its home and away games of up to 30 minutes on the Internet […] Every club would also be allowed to individually sell the coverage of its home games on mobile phone networks within the EEA to the operators of those networks. Every club could exploit its home games on free-to-air radio after the conclusion of the match without any restrictions. In the case of live transmissions, such exploitation could not exceed ten minutes per half.[36]

As a result of its evaluation of the commitments provided by the German League Association, the European Commission concluded that the commitments were likely to introduce competition with regard to the marketing and sale of football broadcasting rights in Germany. Moreover, the European Commission noted that:

The commitments reduce the scope and duration of future marketing deals and provide a transparent and non-discriminatory marketing procedure. They improve the accessibility and content for TV, radio and new media operators, make sure that all rights are being made available to the market and thereby contribute to innovation and dampen the concentration tendencies in the media markets.[37]

Consequently, the commitments offered by the German League Association were accepted and made legally binding by the European Commission.

[34] *Id.*, at 29.

[35] *Id.*, at 30.

[36] *Id.*, at 31.

[37] *Id.*, at 41.

Considering the European Commission's approach towards collective sale of football broadcasting rights, it may be reasonably stated that the European Commission endeavours to establish a competitive environment in the innovative markets. To that end, bringing certain principles such as a transparent bidding process and unbundling of football broadcasting rights is of importance in order to minimize the likely foreclosure effects in the television markets. Moreover, such principles are also important given that they facilitate the new entries into the relevant markets in particular with regard to the operators using alternative technologies. This is because, premium rights holders may be reluctant to sub-license their rights to alternative operators on the grounds that new platforms could destroy the value of their rights.[38] Consequently, it should be stated that local competition authorities should adopt the European Commission's general principles brought with regard to the collective sale of football broadcasting rights in view of the key role of this content with regard to the competition in the television markets.

3. Sale of the Football Broadcasting Rights in Turkey

Similar to the situation in the European Union, the joint selling of football broadcasting rights is among the Turkish Competition Board's ("**Board**") top priorities. To that end, in the early stages, the Board intervened in the sale of football broadcasting rights through its investigations.[39] After the initial phase, the Board's interventions regarding the football broadcasting rights issue remained limited to: (i) providing competition-law related opinions to the tender specifications of the sale of football broadcasting rights, and (ii) evaluating negative clearance applications related to football broadcasting rights.

Currently, the Turkish Football Federation's ("**TFF**") duties and powers are regulated under the Law No. 5894 on the Establishment and Duties of the Turkish Football Federation ("**Law No. 5894**"). To that end, Article 13 of the Law No. 5894 stipulates that the TFF is exclusively authorized to market the broadcasting rights centrally and distribute the revenue generated from the sale of football broadcasting rights to the individual football clubs in Turkey. Based on this provision, the TFF currently regulates the use/sale of football broadcasting rights through its secondary regulations.

[38] Damien Geradin, *Access to Content by New Media Platforms: A Review of the Competition Law Problems*, EUROPEAN LAW REVIEW, 17 (2005).

[39] *See, e.g.*, Turkish Competition Board Decision of October 11, 1999, Case 99-46/500-316 – *Cine 5*, and Turkish Competition Board Decision of February 6, 2001, Case 01-07/62-19 – *Teleon*.

Considering the recent decisional practice of the Board involving the central/joint sale of football broadcasting rights, it may be observed that the Board takes into consideration the findings and principles set forth in the international best practices, and also endeavours to reflect them in its decisions. In this regard, the Board provided comprehensive explanations regarding its approach and methodology towards the collective sale of football broadcasting rights in its *TFF-Digitürk 1* decision.[40] In that case, the Board evaluated the 3-year extension of the term of the broadcasting rights agreement between the TFF and Digitürk (acquired by beIN Media in 2016 and thereafter known as beIN Digitürk) through an additional agreement that had been concluded without initiating a tender procedure. Prior to the extension, the football broadcasting rights had been granted to Digitürk for 4+1 years, encompassing the football seasons between 2010-2015.

In its individual exemption analysis, the Board stated that the terms of the football broadcasting rights agreements are of paramount importance and interest to competition law authorities, as the relevant content is crucial for pay-TV operators to be able to effectively compete in this market. The Board also held that the sale of football broadcasting rights without the adoption/implementation of a tender procedure and for a lengthy period of time carried the potential to prevent the establishment of a healthy competitive structure in the relevant markets. In this regard, the Board emphasized that the acquisition of football broadcasting rights by a single operator creates a monopoly during the term of the relevant agreement and hinders new entries into the market.

Subsequently, the Board noted that, although the relevant parties claimed that the extension of the broadcasting agreements was indispensable with regard to the individual exemption criterion of "*ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,*"[41] the following alternative methods could be implemented during the sale of football broadcasting rights in order to minimize the anticompetitive risks stemming from joint selling agreements:

[40] Turkish Competition Board Decision of April 30, 2012, Case 12-23/659-181 – *Digitürk 1*.

[41] To that end, Digitürk and the TFF claimed that the match-fixing investigation initiated in 2011 had negatively affected the Turkish football landscape and economy as well. Accordingly, the parties stated that the extension of the term of the broadcasting rights agreement was essential in order to procure the necessary financial resources for the development of Turkish football.

- Sub-licensing of broadcasting rights to other TV operators and transfer of certain parts of the broadcasting rights,

- Initiating a separate bidding process for the rights relating to alternative broadcasting technologies,

- Reducing the duration of the additional agreement.[42]

Consequently, the Board concluded that the relevant agreement regarding the extension of the term of the broadcasting rights agreement did not meet the individual exemption criteria provided under Article 5 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**").

After the Board's initial decision on the extension of the duration of the broadcasting rights agreement, the parties amended the structure of the sale of the football broadcasting rights by taking into account the alternative methods indicated by the Board in its *Digitürk 1* decision. To that end, in *Digitürk 2,*[43] the Board evaluated the amended structure of the contract for the extension of the broadcasting rights agreement. In this regard, the Board conducted an individual exemption analysis with respect to the new arrangements proposed by the parties.

In that case, the Board noted that implementing the alternative methods provided in *Digitürk 1* would serve as an important factor that may mitigate the restrictive effects stemming from the collective sale of broadcasting rights in the relevant markets. In this regard, the Board stated that the sub-licensing of the broadcasting rights to other operators would eliminate exclusivity issues, which is the core competition law concern with respect to the sale of broadcasting rights. Moreover, the Board also noted that if the broadcasters who disseminate their programs by using alternative technologies (such as the Internet, mobile technologies, etc.) were allowed to acquire broadcasting rights, this would also stimulate competition in the relevant markets. Accordingly, the Board concluded that if the commercial relationship between the TFF and Digitürk was amended in a way to encompass and address the foregoing matters, competitive concerns arising from the exclusivity arrangement would be diminished.

Furthermore, the parties had agreed to reduce the duration of the additional agreement from three years to two years in accordance with the Board's proposals as set forth in *Digitürk 1*, which might mitigate the

[42] *Digitürk 1*, *supra* note 40, para. 68.

[43] Turkish Competition Board Decision of October 11, 2013, Case 13-58/821-346 – *Digitürk 2*.

competition law anxieties in the relevant markets. To that end, the Board also evaluated this proposed amendment and declared that the reduction in the duration of the agreement was a positive development with regard to the competitive environment in the relevant markets.

Consequently, the Board decided to grant an exemption to the relevant agreement that had been reached between the TFF and Digitürk, on the condition that the broadcasting rights acquired by Digitürk would be sub-licensed to competitor/alternative operators on the basis of reasonable commercial terms.

Considering the decisional practice of the Board, it may be reasonably concluded that the Board endeavours to implement widely accepted principles in the sale of football broadcasting rights in order to establish a healthy competitive environment in the television markets in Turkey. In this regard, the Board has recognized that premium content such as live broadcasts of football matches is a key parameter for the health of the competitive environment in pay-TV markets, and that the acquisition of these rights by a single operator has a restrictive effect on the competition in the television markets by creating foreclosure effects with regard to other operators and thus reduces consumer welfare. In order to eliminate (or, at least, diminish) competition law concerns arising from the collective sale of broadcasting rights, the Board imposes certain obligations on the incumbent operators, such as a sub-licensing obligation. It is important to note that the Board's approach to this issue is in accordance with the European Commission's approach towards the same subject matter. However, it should also be mentioned that, even though the Board places the utmost importance on the European Commission's approach, Digitürk has nevertheless held on to the exclusive football broadcasting rights in Turkey for approximately 20 years, which is considered to be problematic in terms of the competition in the Turkish TV markets. Therefore, one can conclude that certain competitive problems remain in the pay-TV markets in Turkey, which need to be resolved in order to stimulate competition and increase consumer welfare.

Moreover, although the European Commission has a tendency to limit the duration of the broadcasting rights agreements to a maximum of three years, football broadcasting rights are tendered for longer periods of time in Turkey,[44] which results in a decrease in consumer choice by creating entry barriers for other operators, particularly in view of Digitürk's position in the relevant market. As explained throughout this article, live broadcasts of

[44] Digitürk won the last tender on the sale of football broadcasting rights for a five-year period encompassing the 2017-2022 seasons.

football matches are one of the most attractive types of content for consumers, and thus it is of vital importance for TV operators to secure such rights in order to be able to compete effectively in the relevant markets. Accordingly, existing competition problems in Turkey should be resolved in accordance with the widely accepted principles determined and implemented by the European Commission.

III. Conclusion

As the revenues generated from the sale of football broadcasting rights grow relentlessly, it is no wonder that the sale of such rights has long been under the scrutiny of competition law authorities around the globe. To that end, while the sale of football broadcasting rights is one of the major sources of financial revenue for football clubs, obtaining the right to broadcast live football matches is equally crucial for TV operators to be able to effectively compete in the relevant markets.

In the current landscape, most countries implement the collective sale method, where individual football clubs assign their rights to a central football association, which then sells these rights on behalf of the football clubs at a later stage. In this regard, although joint selling is currently a common commercial practice, it is frequently and fiercely debated in competition law circles due to its potential harmful effects on competition in the relevant markets.

Within this framework, competition authorities endeavour to find the right balance between minimizing the anticompetitive effects that may arise from the joint selling arrangements and maximizing the benefits of such arrangements for the consumers. In this context, the European Commission's approach towards collective sales is of primary importance for national competition authorities, including Turkey's Competition Authority, in order for them to establish and maintain healthy competitive structures in the relevant markets. Accordingly, the European Commission's traditional approach suggests that the relevant associations, which are authorized to market/sell the broadcasting rights centrally, should adopt certain principles in order to sell the football broadcasting rights in a competitive manner. In this regard, the European Commission's standard approach mainly comprises three principles: (i) unbundling, which requires the unbundling of broadcasting rights into several packages in an effort to provide equal competitive opportunities for TV operators, (ii) transparent and non-discriminatory tender procedures, which requires the organization of a transparent and non-discriminatory bidding procedure for the sale of broadcasting rights, and (iii) restrictions on the duration of broadcasting agreements, which aim to limit the duration of broadcasting agreements in order to prevent exclusivity.

In Turkey, even though there are certain signs that indicate that the Board takes the global trend regarding the sale of broadcasting rights into account in its decisions, the sale of broadcasting rights is still problematic from a competition law perspective in Turkey, considering the Board's overall decisional practice. In this regard, given that the sales value of football broadcasting rights continues to steadily increase, and thus remains the driving force of competition in the television markets, the Board should exercise due care and show the utmost diligence in dealing with the sale of football broadcasting rights. In our view, the Board could best accomplish this goal by fully adopting and implementing the European Commission's approach towards this matter.

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What Standard of Competition Law Review to Ensure Healthy Competition for Talent?

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I. Introduction

The intersection between competition law and the labor market has always been subject to intense debate. Historically, labor and antitrust were considered intrinsically incompatible in their aims. In time, the approach of competition authorities has shifted towards active scrutiny of anti-competitive conduct by employers in the labor market. However, no clear consensus exists as to which standard of review should be adopted in addressing competition law concerns in the labor market. This paper will begin by examining the historical evolution of the competition agencies' approach with regard to competition law scrutiny of the labor market. It will then lay out basic economic concepts, such as the interrelated input and output markets, and how anti-competitive conduct in one affects the other, with a particular focus on labor market monopsony (*i.e.*,a market where decisions made by a large buyer in its purchasing strategy affect the purchase prices). Finally, this article will present an overview of recent and relevant developments in the case law and argue that a "rule of reason" analysis of anti-competitive behavior in the labor market is the most appropriate standard, especially for the purpose of balancing the diverging interests of various actors involved (*i.e.*, the employees/employers and the consumers/producers).

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II. A Historical Overview of Antitrust Issues in the Labor Market

From a traditional competition law perspective, issues relating to the labor market (*i.e.*, an input market where employees provide the workforce, and are utilized by employers as input to produce output) have not been construed as a potential source of antitrust concerns, as evident given the comparatively limited number of precedents relating to such issues. In fact, the historical view was that "labor" was not considered to be a typical product or service subject to antitrust rules,[1] which was reinforced with the exclusion of labor union activities from the scope of antitrust policy in many jurisdictions. This approach, in turn, resulted in a lack of attention on the part of competition policy makers and enforcers with regard to labor market competition. However, recent legislative and judicial developments indicate a shift towards an active scrutiny of anti-competitive restraints in labor markets.

Traditionally, competition law enforcement has kept its distance from labor-related issues. The main reason for this hands-off approach was that labor and antitrust were considered intrinsically incompatible in their aims.[2] As widely known, antitrust laws aim to promote competition, while one of the primary goals of labor union activity is the elimination of wage competition among all employees working in the same position in the same industry.[3] This approach both resulted in, and, in turn, was reinforced by, the exemption of labor-related issues from the scope of antitrust laws.[4] For instance, Jerry and Knebel have argued that labor market competition was not a concern of the Sherman Antitrust Act, especially considering that various federal and state

[1] Title 15, Ch.1, §17 of the Code of Laws of the United States of America ("***US Code***") grants labor organizations an exemption from antitrust laws, as "*the labor of a human being is not a commodity or article of commerce.*"

[2] Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law* (1976), VA. L. REV. 62 (1976): 603-31; available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1496&context=articles.

[3] *Id.*

[4] EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS (1978), 9-13, at 1931; *see id.*, dictum of Senator W. Jones: "*Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely […]*" and "*Trade and commerce are made up of articles or commodities; not of labor, but the products of labor*", with regard to the US Sherman Antitrust Act of 1890. A similar stance was adopted under the US Clayton Antitrust Act of 1914, see *infra* note 7.

laws aim to limit competition among employers.[5] This is because the Sherman Antitrust Act was intended to deal fundamentally with business monopolies and trade restraints, and there was no explicit policy defending or promoting competition among employers in the labor market.[6] Later, the US Clayton Antitrust Act of 1914 established an explicit exemption of the activities of labor unions from the scope of antitrust laws.[7]

However, the rigid wall of separation between labor and antitrust has gradually been reconsidered, as it became clear that the exemption of labor activities from the realm of antitrust should not mean that any anti-competitive conduct in labor markets should be allowed to go without scrutiny. As such, it was anticipated that the Sherman Antitrust Act would not deal with concerted employer conduct, as long as it was aimed at the restriction of competition only in the labor market, or having the effect thereof. Instead, the Sherman Antitrust Act would only regulate such conduct if it had anti-competitive effects on the related product market. For example, in *Union Circulation Co. v. FTC*,[8] the Court found a no-switching agreement to be unreasonable, after considering the impact of the agreement on the magazine-selling industry (the relevant output market), as well as the affected employees.

Today, this approach seems to have been abandoned in the United States, and antitrust law is held to undoubtedly apply to human resources and employment-related issues, whether they have anti-competitive effects on the output market or not. The recent US soft law,[9] inspired by the impetus of the leading case law,[10] provides some clarification as to the current stance of antitrust enforcement authorities on this matter. The US Department of Justice

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[5] Robert H. Jerry and Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW, Vol. 6 Issue 2 (1984); available at http://scholarship.law.berkeley.edu/cgi/ viewcontent.cgi? article= 1093&context=bjell.

[6] *Id.*

[7] Clayton Antitrust Act, Section 6 (codified at Title 15 § 17 of the US Code): "*The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor […]from lawfully carrying out the legitimate objects thereof […]*".

[8] 241 F.2d 652 (2d Cir. 1957). See also*California ex rel. Harris v. Safeway, Inc*. 651 F.3d 1118 (9th Cir. 2011) (en banc).

[9] US Department of Justice, Federal Trade Commission, ANTITRUST GUIDANCE FOR HR PROFESSIONALS (October 2016), available at https://www.justice.gov/ atr/file/903511/download.

[10] Case law developments leading to a shift in the labor-antitrust doctrine will be examined in detail under Section IV of this article.

and the Federal Trade Commission have recently published a guideline for human resources departments of firms ("***HR Antitrust Guidelines***").[11] The HR Antitrust Guidelines were designed to raise awareness among human resources professionals and employers regarding potential antitrust law infringements, and to draw attention to the potential consequences thereof.[12] The HR Antitrust Guidelines suggest that agreements concerning any aspect of worker compensation would potentially be considered and treated as wage-fixing.[13] Accordingly, *naked* wage-fixing or no-poaching agreements among employers would be construed as *per se* ("on its own/by its nature") illegal under antitrust laws, meaning that no assessment would be needed regarding the actual or potential competitive effects on the market of such agreements.[14] The HR Antitrust Guidelines also acknowledge that agreements restricting competition could be justified under some circumstances, such as in the scope of mergers and acquisitions. This type of justification is in line with the European Commission's "ancillary restraints" doctrine.[15]

These developments in the US serve not only as a reminder, but also as an enforcement model for lawmakers and competition law enforcers in other jurisdictions. The Hong Kong Competition Commission ("***HKCC***") recently signaled that it adheres to the recent compliance trend, and advised two of the biggest human resources management companies in its jurisdiction against publishing industry-specific salary forecasts. In fact, salary forecasts were deemed likely to raise anti-competitive issues in terms of information exchange, which is banned under the competition laws of Hong Kong.[16]

On the other hand, antitrust scrutiny of the labor market remains somewhat controversial and unfamiliar in certain jurisdictions. Under the European Union competition law regime, which serves as a model not only for

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[11] US DoJ, *supra* note 9.

[12] *Id.*

[13] Gibson Dunn LLP, Antitrust Agencies Issue Guidance For Human Resource Professionals On Employee Hiring And Compensa-Tion (January 24, 2017).

[14] *Id.*

[15] Under the ancillary restraints doctrine, the European Commission permits, for example, non-solicitation agreements under certain circumstances, such as agreements with limited duration and geographic scope.

[16] Eversheds Sutherland (International) LLP, THE DANGERS OF SALARY BENCHMARKING: HONG KONG COMPETITION COMMISSION ADVISES HR TRADE ASSOCIATIONS NOT TO PUBLISH SALARY PROJECTIONS (August 12 2016); available at https://www.lexology.com/library/detail.aspx?g=0290705d-88af-4083-af6e-a673b3d54fa8.

Member States but also for neighboring jurisdictions (*e.g.*, Turkey)[17] and for most European countries, there seems to be no clear consensus on the scrutiny of labor competition. Unlike in the United States, there is no specific guidance or enforcement focus on human resources or employment-related conduct under European Union competition law rules, and precedents dealing with such issues are rare. With that said, no-poaching and wage-fixing agreements, as well as sensitive human resources information exchanges between competitors, are likely to constitute competition law violations under the European Union regime as well.[18] Article 101 of the Treaty on the Functioning of the European Union covers all agreements that directly or indirectly fix purchase/selling prices or any other trading conditions. Therefore, *upstream* activities such as the purchase of input, including labor, would be subject to competition law scrutiny, since *upstream* activities indirectly affect prices in the *downstream* market.[19]

In light of the above developments, it appears that there is somewhat of a consensus among enforcers in leading competition law regimes that anti-competitive conduct, both unilateral and multilateral, among competitors in the labor market should be scrutinized under well-established competition law rules. For the purposes of this article, the following sections will examine the potential effects of anti-competitive conduct by employers in the market for labor in line with the ultimate goal of the competition policy – the maximization of total welfare. In order to better understand the potential implications of anti-competitive conduct in the input market for labor, this article will lay out the interconnected nature of the labor market (*i.e.*, the input

[17] Among countries with analogous competition law regimes with the European Union, such as Turkey, there are few decisions regarding competition issues linked to labor and human resources activities. The Turkish Competition Authority seems to acknowledge the employment market as being subject to competition law scrutiny; however, there are limited precedents. More information on the related case law developments will be provided under Section IV of this article.

[18] Gibson Dunn LLP, *supra* note 13.

[19] *Id.;* also see *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] 5 C.M.L.R. 1701 ("***T-Mobile***"), where the European Court of Justice dealt with the issue of information exchange with respect to an upcoming reduction of standard dealer remuneration for certain mobile tariff subscriptions. The allegations revolved around whether exchange of non-public information regarding remuneration in the input market indirectly affected the product prices in the output market. The European Court of Justice held that since the discussion among the operators at their group meeting allowed competing firms to exchange information that led to collusion on the reduction of dealer remunerations, this was in itself sufficient tfor a finding that there had been a violation of competition law.

market) and the product market (*i.e.*, the output market). Particular attention will be paid to the potential consequences of labor market monopsony on total welfare.

III.Labor Market and Monopsony

a. Input Markets and Output Markets: The Circular Flow

Understanding the relationship between interconnected input and output markets is of crucial importance, particularly when dealing with anti-competitive behavior in a given market. The input (labor) and output (product) markets are closely interrelated, since labor services supplied by households flow to firms, and goods and services produced by firms flow to households. Any given firm acts as the buyer in the labor market on the one hand, and as the seller in the product market on the other hand. Therefore, anti-competitive conduct of these firms has multi-sided effects impacting both labor and product markets, and as such, requires careful scrutiny. Before analysing the potential anti-competitive effects of such conduct, this section first will lay out the interconnected nature of the labor market and the product market, where employers hire input/workforce offered by employees, in order to produce whatever product they sell. For the purpose of this discussion, particular attention will be paid to the potential consequences of labor market monopsony on both producer and consumer welfare, which are the fundamental components of total welfare.

In producing goods or services, firms require labor, along with other types of input. The balance of how much of these input factors is used by a firm to produce its output is critical to achieving economic efficiency.[20] With regard to the input side of the market, the participants (*i.e.*, firms and workers) determine the demand and supply parameters applicable in the labor market, as well as the price of the input (*i.e.*, wages paid to workers). The constant interaction between the input market and the output market ensures that the firms' demand for input in the labor market is derived from the firms' output in the product market. In other words, when demand for the output that a firm offers in the product market is increasing, the firm's demand for input in the labor market will also increase, allowing the firm to produce more output in order to meet the increasing demand. Likewise, a decrease in demand for the output would entail a decrease in a firm/employer's demand for labor/input in the labor market. On the other hand, a rise in wages increases the costs incurred

[20] For example, at lower wages, firms will substitute less expensive labor for capital, and their costs will consequently be lower, so they can produce and sell more output. Similarly, at higher wages, firms will substitute capital for labor, and less labor will be used to produce whatever output the firm sells.

by firms for producing whatever product they sell, forcing them to raise their prices in the output market. As prices in the output market rise, the quantity of the product sold will fall. Hence, firms will reduce their output and less labor will be used in production.[21]

Economic theory dictates that the equilibrium in a competitive labor market is reached when wages equalize the quantity of labor supplied and the quantity of labor demanded.[22] The firm determines how much labor it needs by calculating the marginal revenue product of labor ("***MRP***"), which is the additional revenue that the firm reaps by employing one more single unit of labor, which is equal to the value of the marginal product of labor in a competitive labor market (assuming that the output market is also competitive).[23] This means that resources are used efficiently in the market. On the other hand, efficiency requires that the MRP of an additional unit of input employed by a firm equals the benefit to consumers of the additional output it generates. Consequently, efficiency equilibrium in a fully competitive input market will provide benefit maximization for consumers in the output market (*i.e.*, buyers of the product that the firm sells in the output market.)[24] However, in case of a monopoly or imperfect competition in the related output market, price will no longer equal marginal revenue, but instead will be higher.[25] Consequently, the value of the marginal product will be higher than the marginal revenue. As wages in the input market are determined with regard to the marginal revenue, where an employer firm has monopolistic power in the product market, employees in the labor market will accordingly be paid lower wages. Similarly, an anti-competitive market structure in the input market, welfare reducing effects may arise in both related input and output market mainly due to the allocative inefficiency, which will be further detailed in the following sections.

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[21] See https://www.economics.utoronto.ca/jfloyd/modules/sadl.html., last visited on March 8, 2018.

[22] See http://www.economicsdiscussion.net/price/factor-pricing-in-imperfectly-competitive-markets/5964., last visited on March 8, 2018.

[23] LIBBY RİTTENBERG and TIMOTHY TREGARTHEN, MICROECONOMICS PRINCIPLES (2012), pf. 14.1; available at https://2012books.lardbucket.org/pdfs/microeconomics-principles-v2.0.pdf.

[24] JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2nd. ed., 1969), Palgrave Macmillan. In his economic exploitation theory, Robinson argues that a productive factor is exploited if it is paid a price less than the value of its marginal product. A profit maximizing firm will employ a factor until the point where an additional unit adds precisely the same amount to total cost and total revenue.

[25] See *supra* note 22.

It is clearly seen that the labor and product markets are interrelated and mutually influencing, such that potentially anti-competitive conduct in one of these markets will likely affect the market structure of the other. However, competition law does not traditionally adopt a skeptical or scrutinizing approach when it comes to anti-competitive behavior by buyers in markets for input, most notably when it comes to the exercise of monopsony power. Nevertheless, as far as anti-competitive conduct in the labor market is concerned, special care must be taken when assessing interrelated competitive concerns in both labor and product markets. Welfare reducing effects of anti-competitive conduct in the labor market and its reflections on total welfare will be further detailed in the following sections, with a particular focus on monopsonistic labor markets where the buyer-side (employers) exercises considerable buyer power over the providers of input (employees).

b. Potential Effects of Labor Market Monopsony

Traditionally, anti-competitive consequences of monopoly power and conduct have always been under strict scrutiny by competition law regimes across various jurisdictions. The underlying rationale for this rigorous approach is the overall consensus that excessive market power can harm society by reducing output below the optimal levels on one hand, and artificially increasing prices on the other. Monopsony power, however, has managed to escape harsh scrutiny by competition law enforcers. Indeed, courts and competition authorities typically view buyer power as a pro-competitive constraint mechanism, acting as a check on sellers with considerable market power. Although a certain degree of buyer power has proven beneficial in restraining powerful sellers, there may be other (potentiallydetrimental) consequences of excessive buyer power.

Blair and Harrison describe monopsony as a market where decisions made by a large buyer in its purchasing strategy affect the purchase prices.[26] More specifically, monopsonist power is understood as the ability of a buyer to influence input prices by calibrating the amount purchased, ultimately lowering input prices below the competitive levels.[27] Monopsony has also been defined as the mirror image of monopoly by the United States Supreme Court in

[26] Roger D. Blair and Jeffrey L. Harrison, *The Measurement of Monopsony Power* (1992), THE ANTITRUST BULLETIN (Spring 1992), Vol. 37, No. 1, FEDERAL LEGAL PUBLICATIONS, at 133-150.

[27] *Id.*, at 134; M. J. Jacobson and G. J. Dorman, *Joint Purchasing, Monopsony and Antitrust* (1991), THE ANTITRUST BULLETIN (Spring 1991), FEDERAL LEGAL PUBLICATIONS, Vol. 36, at 5.

Weyerhauser,[28] where the Court established that similar antitrust standards should apply to anti-competitive conduct involving both monopoly and monopsony.[29] Despite diverging views set forth by some scholars,[30] recent legislative and judicial developments exhibit a tendency for stricter scrutiny of monopsonist conduct by courts and competition enforcement agencies.[31]

So far, monopsonist conduct has been more or less tolerated by courts and enforcement agencies, due to the instinctive belief that a firm would leverage its monopsony power to reduce its costs by lowering prices in the input market, which would, in turn, be reflected in lower prices in the product market. However, monopsonists do not necessarily pass on their lower input costs to consumers. Moreover, the use of monopsonist power in the input market is detrimental on the welfare of society due to allocative inefficiency it led in the input and the output markets altogether.

Economic theory relating to monopsony is based on the fundamental assumption that in an imperfectly competitive input market, the monopsonist buyer, driven by profit maximization, will have the power to influence various market parameters, such as price and demand. Such a firm will reduce its demand for input, and will seek to purchase input up to the point where the additional benefit would equal the additional cost of a single marginal unit of input. In a monopsonistic input market, this intersection point will result in not only lower levels of input purchase, but also in lower prices for the input.[32] Consequently, in a monopsonist labor market, less labor will be employed by purchasing firms, and at wages lower than the competitive level. As a result,

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[28] *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312, 320–22 (2007).

[29] *Id*.

[30] Jonathan M. Jacobson, MONOPSONY 2013: STILL NOT TRULY SYMMETRIC (December 2013), available at https://www.wsgr.com/publications/PDFSearch/jacobson-1213.pdf. Jacobson argues that, despite the superficial appeal of symmetric outcomes when it comes to assessing monopoly and monopsony, economic analysis frequently yields a different result, and that the case law over many decades has been consistent in authorizing conduct by buyers that symmetric treatment would prevent.

[31] The Organisation for Economic Co-operation and Development ("***OECD***"), POLICY ROUNDTABLES: MONOPSONY AND BUYER POWER (2008), available at https://www.oecd.org/daf/competition/44445750.pdf.

[32] R. D. Blair and J. L. Harrison (1993), MONOPSONY, ANTITRUST LAW AND ECONOMICS, Princeton University Press, 39; M. J. Jacobson and G. J. Dorman (1991) *Joint Purchasing, Monopsony and Antitrust*, THE ANTITRUST BULLETIN (Spring 1991), Federal Legal Publications, Vol 36, at 9.

there will be a welfare transfer from the seller to the buyer in the monopsonist input market.[33]

More specifically, even under a total welfare approach in which mere shifts in welfare distribution are not considered to be a reduction of total welfare, monopsonist conduct in the input market has the effect of decreasing total welfare, as it leads to a decline in the levels of input used to produce whatever product the monopsonist sells in the relevant product market. This, in turn, leads not only to lower levels of production,[34] but also to an overall reduction of economic efficiency, as input that would have been efficiently utilized elsewhere becomes idle and unused.[35] It has also been argued that monopsonist conduct may result in deadweight loss, caused by an ineffective distribution of resources due to the misallocation effects resulting from monopsony.[36] As such, welfare-reducing effects of monopsony are analougous to those of monopoly, both resulting in allocative inefficiency in the market. Additionally, a monopsonistic buyer may be inclined to discriminate among its suppliers, either by applying different terms to such suppliers, or by engaging in all-or-nothing contracting behavior, where the buyer imposes and applies its preferred terms to all its transactions in the relevant market.[37]

Although the natural impulse would be to assume that the exercise of monopsony power, resulting in lower wages in the labor market, would lead to lower prices in the output market, in reality the monopsonist does not always pass on these lower costs to consumers in the form of lower prices.[38] In fact, it

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[33] *Id*.; DENNIS W. CARLTON and JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION, (2nd ed., 1994), Harper-Collins College Publishers, at 153.

[34] ROBERT S. PINDYCK AND DANIEL L. RUBİNFELD, MICROECONOMICS (5th ed., 2001), Prentice Hall, at 358.

[35] Jacobson and Dorman, *supra* note 27, at 17.

[36] OECD, *supra* note 31; also see GÖNENÇ GÜRKAYNAK, TÜRK REKABET HUKUKU UYGULAMASI İÇIN HUKUK VE İKTISAT PERSPEKTIFINDEN ‘AMAÇ’ TARTIŞMASI (A Discussion on the Prime Objective of the Turkish Competition Law from a Law & Economics Perspective) (2003), Turkish Competition Authority; available at http://www. rekabet.gov.tr/Dosya/akademik-calismalar/14-pdf; Gürkaynak demonstrates that economic efficieny should be maximized in order to achieve total welfare, through allocative, productive and dynamic efficieny. As such, deadweight loss resulting from an ineffective allocation of resources decreases total welfare.

[37] OECD, *supra* note 31.

[38] Roger D. Blair and Jeffrey L Harrison, *Antitrust Policy and Monopsony* (1991), CORNELL LAW REVIEW 76, Issue 2, January, p. 304-305. Blair and Harrison

has been skillfully demonstrated by Blair and Harrison that as the actual price paid for labor falls, the monopsonist will be likely to sell its products at higher prices, especially where the monopsonist firm possesses market power in the output market, resulting in consumer welfare loss. On the other hand in a competitive output market, the monopsonist will be compelled to sell its products at the market price, but will be likely to reduce output in an effort to maximize its profits. Where output is reduced, the firm will reduce its demand for input in the labor market, resulting once again in consumer welfare loss. Moreover, as less input is used by the monopsonist compared to the amount of input that would have been used in a competitive labor market, the resulting decrease in efficiency will have negative effects on total welfare.[39]

In addition to the above, for the purposes of this article, it is illuminating to focus on the specific case of employees and the welfare reducing effects of monopsony on such employees. Traditional competition law analysis, restricted to the producer-consumer dichotomy, fails to address the particular case of employees with respect to the welfare reducing effects of monopsony. In fact, while employees constitute the seller/producer side of the input market for labor, they also comprise part of the consumer side in the output market.[40] A monopsonist input market is characterized by buyer conduct that is aimed at reducing input costs. In the particular case of labor market monopsony, employers try to reduce labor costs by either simply lowering wages or by rendering the labor market less fluid/competitive through agreements or joint conduct. More specifically, as previously explained, employers with monopsonist power have the ability to influence wages in the market by way of unilateral conduct (*e.g.*, by reducing the amount of labor employed). On the other hand, several types of anti-competitive agreements between employers can also have the effect of decreasing labor costs, such as wage-fixing agreements or agreements with the aim of sharing or allocating workers. Other agreements, such as no-poaching agreements, no-switching agreements, or

show that the marginal cost for the monopsonist is actually higher than the marginal cost for a firm with no monopsony power. Consequently, when the firm is active in a competitive output market, the monopsonist will actually reduce its output below the level that a seller without monopsony power would select, since the firm's output decision is driven by the marginal cost. On the other hand, when the monopsonist firm enjoys some market power in the output market, the marginal cost of production rises, despite the decrease in prices paid for input. Thus, the monopsonist's output falls, and the price charged to its customers actually increases.

[39] *Id.*

[40] Clayton J. Masterman, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law* (2016), VANDERBILT LAW REVIEW, Vol. 69:5:1387.

non-compete agreements, affect wages more indirectly by decreasing opportunities for workers to switch jobs and by strengthening monopsonist power enjoyed by employers, alone or collectively.[41]

Traditional competition law enforcement focuses on the effect of anti-competitive conduct on customers in output markets, as the effect of such conduct is to extract welfare directly from customers. We argue that, in the case of input markets for labor, anti-competitive conduct by monopsonist employers extracts welfare from employees. As such, monopsonistic restraints of trade in labor markets should not be overlooked by courts and competition authorities. Instead, they should analyze and carefully assess monopsonistic restraints of trade in labor markets to ensure healthy competition for workers, who are highly vulnerable to welfare loss as a result of such monopsonistic employee conduct. Moreover, it has also been persuasively argued by commentators that lower wages would be more likely to hurt workers to a greater extent than higher prices hurt customers.[42]

Recent developments in case law, especially in the United States, have drawn attention to the competition law concerns arising from labor market monopsonies. As it has become clearer that monopsony -through unilateral and/or multilateral conduct- enables firms to generate significantly high profits at the expense of both consumers and employees, recent leading legislative developments have come to fruition in an attempt to address such concerns. Even though it is clearly seen that anti-competitive behavior/agreements require a broader analysis that includes both the output markets where firms sell final goods and the input markets where those firms purchase labor, no clear-cut rule exists with respect to the appropriate standard of review for protecting employees from anti-competitive harm. The subsequent sections of this article will lay out a detailed assessment of the relevant case law, and contend that a "rule of reason" analysis is the most suitable standard for assessing and balancing the diverging interests of employers and employees, from a total welfare point of view.

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[41] Jacob Mincer and Boyan Jovanovic, *Labor Mobility And Wages* (1981), STUDIES IN LABOR MARKETS 22, 37–42; ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (1st ed., 2013), 179 (describing how non-compete agreements are associated with lower salaries).

[42] Masterman, *supra* note 40.

IV. What Standard of Review to Deal with Monopsonistic Labor Markets?

As previously explained, there is a growing trend on the part of competition policy makers and enforcement authorities to examine multilateral anti-competitive conduct by employers in monopsonistic labor markets. Indeed, such scrutiny is evidently necessary, considering the ineffective distribution of resources due to the misallocating effects of anti-competitive conduct in labor market.[43] Moreover, such scrutiny is in line with the ultimate goal of competition policy, which is a long and intensely debated topic in itself.[44] Although we forthrightly argue that antitrust policy ultimately aims at the maximization of total welfare - the sum of consumer and producer welfare - our approach in the present discussion is based on the fact that, whether assessing total welfare or consumer welfare, competition policy fundamentally aims -in any case- at some sort of welfare maximization through economic efficiency. That would eventually lead to an increase in the overall welfare of society, as economic efficiency ultimately benefits consumers. It is also worth noting that the welfare of wage earners is of paramount importance, as they constitute a large and significant part of society.

In light of the above, the standard of review to be applied by competition law enforcers in dealing with anti-competitive behavior in the labor market should not overlook or neglect the welfare of wage earners, and should also strive to preserve the welfare of employers/producers. For the purposes of this article, (i) the *per se* rule/object analysis, and (ii) the rule of reason/effects analysis will be further examined, through a breakdown of the relevant case law relating to each standard of review.

The *per se* rule and the "rule of reason" analysis are not novel concepts in the competition law literature. In fact, these concepts which have debuted under the US antitrust law regime have been adopted and applied by numerous jurisdictions for decades. Comparing the two, we first observe that the *per se* rule is used mostly with regard to anti-competitive practices that have the restriction of competition as their object, with no reasonable justification or explanation. The essential legal criterion in determining whether an agreement/concerted practice is *per se* restrictive of competition (known as "restriction by object" under EU competition law) is the finding that such an agreement reveals restraints that are so "manifestly anticompetitive" and lacking in "any redeeming virtue".[45] Such agreements are deemed anti-

[43] OECD, *supra* note 31.

[44] RİCHARD POSNER, ANTITRUST LAW, (2d ed., 2001), at 9–32.

[45] *Leegin Creative Leather Products., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); for the EU approach to object restrictions see Case

competitive by their very nature, and hence do not concede any (and, in fact, cannot be) justification as to their potential pro-competitive outcomes, or their effects on competition in the relevant market. The rule of reason analysis, on the other hand, focuses on the reasonable justifications regarding the conduct in question, by analyzing its actual effects on the market as well as examining its pro-competitive outcomes. Both of these concepts were originated and developed in the United States by way of an interpretation of the Sherman Antitrust Act, and found their reflection in the EU competition law regime as the object analysis and the effect analysis, respectively. In its landmark *Consten and Grundig*[46] decision, the European Court of Justice established that object and effect restrictions are two separate categories of violations under Article 101 of the TFEU. In case a violation is determined to restrict competition by its object, EU courts do not assess its actual or potential effects on competition.[47]

Historically, the rule of reason analysis was first established by the US Supreme Court in its landmark decisions of *Standard Oil*[48] and *Chicago Board of Trade*[49], in order to avoid costly and lengthy litigation, and to avert judicial inefficiency. The US Supreme Court articulated four categories of agreements that would receive *per se* treatment:[50] (i) horizontal price fixing, (ii) market-division agreements[51], (iii) group boycotts, and (iv) tie-in sales. However, such categorization remains controversial among commentators.[52] Falling between the rule of reason analysis and the *per se* rule, the "quick look" analysis may be used when "an observer with even a rudimentary understanding of economics

C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU :C :2014 :2204, pf. 57.

[46] *Établissements Consten S.à.R.L.* and *Grundig-Verkaufs-GmbH v Commission of the European Economic Community*. Joined cases 56 and 58-64.

[47] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW, (7th ed., 2012) Oxford University Press, at 120.

[48] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[49] *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

[50] Subsequently, the US Supreme Court included vertical market divisions to the *per se* restrictions list in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). However, vertical market divisions no longer seem to be considered or treated as a *per se* restriction.

[51] *Leegin*, *supra* note 45, at 886: "*Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets*."

[52] Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535 (2009), Hastings College of Law.

could conclude that the arrangements in question could have an anti-competitive effect on customers and markets."[53]

Considering the ever-changing structure and complexity of markets, it is reasonable to conclude that the rule of reason analysis is better suited for taking all economic factors into consideration. Despite the additional time, expense and judicial resources required, the number of cases in which the *per se* test is applied has decreased over time, and that has opened up the door to more frequent use of the fact-specific, case-by-case evaluation required under the rule of reason standard.[54]

Legislative practices of competition lawmakers and enforcers in leading jurisdictions, with regard to the standard of review adopted in assessing and evaluating various types of employer conduct in the labor market, will be examined in detail in the following sections.

a. Scrutiny under the *per se* rule/object analysis

In its historic and landmark *Mandeville Island Farms v. American Crystal Sugar Co.* decision,[55] which concerned an agreement between three sugar processors in California on fixing the prices paid to sugar beet farmers, the US Supreme Court found that the buyer cartel, (*i.e.*, a collusive monopsony) was illegal *per se*, without considering whether consumers had suffered actual or potential harm.[56] *Mandeville Island Farms* triggered serious debate over what standard of review should be applied to monopsonistic markets, following which the number of cases where the *per se* rule was applied decreased significantly. With that said, the increasing enforcement trend for the scrutiny of the anti-competitive effects of labor market monopsonies has given rise to recent examples where *per se* illegality was determined. Among these recent cases, the alleged conspiracy among major Silicon Valley firms in 2010 is particularly worthy of examination. The scandal starting in 2010 involved a number of high-tech Silicon Valley companies, and was followed by a number of class action lawsuits against tech giants as the controversy unfolded. The allegations focused on the naked bilateral no-poaching agreements (also known as “do not cold call” agreements) that the firms had entered into with one another, restricting the mobility of their

[53] *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999).

[54] Weg, *supra* note 52.

[55] 334 U.S. 219 (1948).

[56] Laura Alexander, *Monopsony and the Consumer Harm Standard* (2007), GEORGETOWN LAW JOURNAL, Vol. 95:1611, at 1611; available at http://georgetown.lawreviewnetwork.com/files/pdf/95-5/ALEXANDER.pdf.

employees in the market for high-tech employees. The firms involved in the alleged conduct included high-tech giants such as eBay, Pixar, Lucasfilm, Adobe Systems, Apple, Google, Intel, and Intuit. Against this factual background, in *United States v. EBay, Inc.*,[57] the US Department of Justice ("***DOJ***") argued that eBay's non-solicitation/no-hire agreement with Intuit is *per se* unreasonable because it amounts to a naked market allocation that distorts the competitive recruiting process for skilled high-tech employees. Despite the fact that the Court did not decide on which standard of review should be applied and that the case was subsequently settled, the Court nevertheless found that the DOJ has sufficiently pled the existence of the type of restraint that may fall under the ambit of either the *per se* rule or the quick look analysis.[58] This approach deviates from the DOJ's previous stance, where, in *United States v. Adobe Systems, Inc. et. al.*[59] and *United States v. Lucasfilm Ltd.*,[60] it had assessed non-solicitation agreements under the *per se* rule. The follow-up class actions and private litigation lawsuits in the Silicon Valley scandal ended with settlements and the courts did not have the opportunity to address or take a position as to the issue of the proper standard of review that should be applied to such agreements. Consequently, there appears to be no judicial consensus as to which standard of review is applicable to no-poaching/non-solicitation agreements.

Similarly, in *Leilani Deslandes v. McDonald's USA,*[61] in which the franchisees of McDonald's allegedly agreed not to recruit or hire each other's, McDonalds' or its affiliates' employees, restraining their ability to secure better compensation, wages, benefits, and working conditions, the US District Court found that McDonald's had violated the Sherman Antitrust Act by restricting trade, and declared that hard-core no-poaching/non-solicitation agreements are deemed *per se* unlawful. Similarly, in *United States v. Council of Fashion*

[57] 968 F.Supp.2d 1030 (E.D. Cal. 2013).

[58] The DOJ only alleged *per se* and quick look violations and did not pursue claims under the rule of reason analysis. The Court warned the DOJ that should the court ultimately find that the DOJ cannot maintain a *per se* or quick look claim, the DOJ will then be without recourse to the rule of reason and its case will be dismissed. See *Texaco*, 547 U.S. at 7, n. 2, 126 S.Ct. 1276 (reversing the Ninth Circuit's holding that the defendants' particular horizontal price fixing agreement constituted a *per se* violation but declining to review the claim under the rule of reason because the plaintiffs had not pled such a claim).

[59] *United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar*, 1:10-cv-01629.

[60] 1:10-cv-02220-RBW.

[61] 1:17-cv-04857.

Designers of America,[62] the US Federal Trade Commission clearly established that the fashion trade organization representing a large number of fashion designers had attempted to fix/reduce modeling fees, as well as their compensation, which was akin to price-fixing in the output market, and thus should be treated as illegal under the *per se* standard.

Finally, in *Singapore v. Employment Agencies*,[63] the Competition Commission of Singapore found that sixteen employment agencies had violated competition law rules by object (akin to a per se illegality under the US competition law regime), through fixing the monthly salaries of workers, and consequently imposed a fine on the employment agencies.

As illustrated above, in case courts find that the alleged employer conduct in the labor market can be expected to produce “manifestly anti-competitive” effects lacking in "any redeeming virtue" in the labor market or elsewhere (in the case of wage-fixing or no-poaching agreements),[64] the restraint in question will be considered illegal per se and will not require any "elaborate industry analysis" otherwise required under the rule of reason.[65] . Despite the decline over the years in the number of cases handled under the *per se* standard of review, it should be noted that the recent US HR Antitrust Guidelines consider and treat wage-fixing and no-poaching/no-switching agreements as *per se* illegal under competition law rules.

b. Scrutiny under the rule of reason/effects analysis

Under the rule of reason analysis, all circumstances surrounding the case at hand are taken into consideration in order to determine whether the pro-competitive effects of a given restraint of trade outweigh its anti-competitive consequences. Within this context, it is worth mentioning the *United States v. eBay*[66] decision, which was part of the Silicon Valley cases discussed in the previous section. While the DOJ found that no-poaching and no-switching agreements were illegal *per se* in other Silicon Valley cases, in *United States v. eBay*, it determined that non-solicitation agreements, which has the similar effect of limiting employee mobility, could be assessed under a quick look analysis, despite also stating that there was no need for a complete rule of reason analysis.

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[62] *United States v. Council of Fashion Designers of America*, FTC File No. 941 0007.

[63] *Singapore v. Employment Agencies, The Competition Commission of Singapore,* CCS 500/001/11.

[64] *Leegin, supra* note 45.

[65] *Nat'l Soc. of Prof. Eng'rs v. United States,*435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

[66]*United States of America v. eBay Inc.*, 12-cv-05869-EJD.

In this context, another important case is *Cason-Merenda v. Detroit Medical Center*,[67] where the allegations involved a conspiracy among eight hospitals in Detroit, which was allegedly aimed at reducing the compensation paid to registered nurses through exchanges of non-public human-resources information. The Court held that the evidence provided by the plaintiffs had failed to establish a *per se* illegality, and thus, a rule of reason analysis was applied. Similarly, in *United States v. Utah Society for Healthcare Human Resources Administration*,[68] the DOJ brought a lawsuit against a the Utah Society for Healthcare Human Resources Administration, the Utah Hospital Association, and eight individual hospitals in Utah, alleging that they had conspired to restrain wage competition among themselves through an exchange of non-public current and future information relating to the wages of entry-level registered nurses. The court assessed the effects of the conspiracy in the market and found that it deprived registered nurses of free and open competition in the purchase of their services and resulted and smaller wage increases. The court accordingly prohibited the defendants from exchanging or facilitating the exchange of wage data.

In addition, in *Todd v. Exxon Corporation*,[69] the allegations concerned the exchange of sensitive human resources information regarding compensation paid to employees. The Court found that such information exchanges should be assessed under the rule of reason analysis, and examined the effects of the alleged behavior in the relevant market. In the end, the Second Circuit Court of Appeals found that the alleged behavior was a violation of the Sherman Antitrust Act. Moreover, in the *Dutch Hospital Case*,[70] the Appellate Court of the Netherlands found that fifteen hospitals had violated competition law by entering into non-solicitation and no-poaching agreements, restricting competition in the labor market for anesthesiologists. Although the hospitals argued that this arrangement was necessary to ensure the quality of care for patients, the Court held that the said agreements restricted competition in the market for anesthesiologists, by examining the effects of the agreements on competition in the relevant market.

In light of the above, the ancillary restraints doctrine with respect to mergers and acquisitions, (*i.e.*, a concentration) is also worth mentioning.

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[67] *Cason-Merenda v. Detroit Medical Center*, 862 F.Supp.2d 603 2012-1 Trade Cases P 77, 893 (2012) (E.D.Mich.).

[68] *U.S. v. Utah Soc. for Healthcare Human Resources Admin*., 1994-2 Trade Cases (CCH) 70795, 1994 WL 729931 D. Utah (1994).

[69] *Todd v. Exxon Corporation* 126 F.Supp.2d 321 (2000), vacated and remanded by *Todd v. Exxon Corp.* 275 F.3d 191 (2d Cir. 2001).

[70] LJN: BM3366 (Court of Hertogenbosch) HD 200,056,331.

Under the European Union competition law regime, ancillary restraints are defined as agreements or covenants which are deemed necessary to achieve the aims of a given concentration.[71] According to this doctrine, no-switching agreements, and more specifically non-solicitation/no-hire covenants, between competitors might be justified as ancillary restraints because of their pro-competitive effects. As such, certain 'non-solicitation/no-hire' covenants are allowed under competition law rules, as long as they are "directly related and necessary to the implementation of concentration."[72] For example, in *KingFisher/Wegert*,[73] which involved the acquisition of the German company Wegert-Großlabor GmbH by KingFisher Plc., the transaction agreement contained non-solicitation obligations for two managers of the target company. The European Commission construed the non-solicitation covenants as ancillary restraints, and thus gave clearance to the transaction. Similarly, in the *Eichorn v. AT&T Corp.* case,[74] where AT&T prohibited the target company's qualified employees from being solicited or rehired by AT&T for eight months following the sale of the target to Texas Pacific Group, former employees of the target company alleged that there was a conspiracy aimed at preventing them from obtaining their pension benefits, and that the transacting parties had engaged in price-fixing practices in violation of the Sherman Antitrust Act. The Court, however, considered such restrictions to be ancillary restraints, and gave clearance to the transaction accordingly. Lastly, in *Reed Elsevier Inc. v. TransUnion Holding Company, Inc.*,[75] where the parties had entered into an agreement restricting TransUnion's right to hire members of Reed Elsevier's senior management team for a given period of time, the Court determined that the restrictive covenants covered a period longer than two years, and found that no legitimate business interest justified the restrictions imposed.[76]

c. Analysis

In light of the legislative precedents detailed above, it is clear that there is no clear-cut rule applied by the courts and competition agencies in assessing which standard of review is applicable to a given type of labor-related anti-

[71] ALISON JONES and BRENDA SUFRIN, EU COMPETITION LAW, TEXTS, CASES AND MATERI-ALS, Oxford University Press, (4th ed., 2014), at 1244.

[72] European Commission, COMMISSION NOTICE ON RESTRICTIONS DIRECTLY RELATED AND NECESSARY TO CONCENTRATIONS, OJ C 188 (04 July 2001), 2001/C 188/03 [20].

[73] Case No IV/M.1482 – *Kingfisher/Großlabor* (12 April 1999) [24].

[74] *Eichorn v. AT&T Corp*. 248 F 3d 131, 136 3rd Cir. (2001).

[75] *Reed Elsevier, Inc. v. TransUnion Holding Co.*, No. 13–cv-8739(PKC), 2014 WL 97317.

[76] Note that the plaintiff sued for breach of contract rather than an antitrust violation.

competitive conduct.[77] Ensuring vigorous competition in the labor market should be of great importance to competition authorities, as there is no doubt as to the potentially distortive effects of monopsony power on the competitive market structures of both input and output markets. This article argues that the rule of reason/effects analysis is better suited to address competition issues arising from labor market monopsonies, given that the scrutiny of monopsony power in the labor market requires a nuanced approach due to its specific effects on both consumers/employees and on producers/employers. Indeed, a case-by-case analysis under the rule of reason approach has been proven to be more appropriate over the years, given the increasing complexity of market structures and in light of the interconnected nature of various economies, despite the additional time and cost that such case-by-case analysis necessitates.

Given that under a rule of reason analysis, the anti-competitive and pro-competitive effects of a restraint of trade are weighed against each other, the governing welfare standard has a crucial role to play in such assessments.[78] In line with the ultimate goal of competition policy, which is the maximization of total welfare through economic efficiency, we believe that the traditional and moderate approach of judicial and enforcement authorities to monopsonistic conduct in input markets should be abandoned.

We suggest that courts and competition agencies should recognize and acknowledge that the anti-competitive effects of monopsony power are analogous to those of monopoly power, only this time the harm is mainly suffered by workers instead of consumers. Although employee welfare does not fit neatly into the traditional consumer-producer dichotomy, this article argues that employees can be construed and treated both as a class of consumers (in the output market) and as a class of producers (in the input market). As such, employee welfare requires and deserves special attention, even under a total welfare standard, since monopsonistic anti-competitive behavior not only harms employees in the input market, but also reduces the overall welfare of society, as illustrated by this article. In fact, labor-related antitrust issues have started to draw increasing attention from the courts and enforcement authorities in leading jurisdictions worldwide, ensuring better protection not only of workers' welfare, but also of economic efficiency.

From a more practical perspective, bilateral/multilateral agreements (*e.g.*, wage-fixing, no-poaching and no-switching agreements), employee-

[77] An exception could be the case of wage-fixing agreements, which are construed and treated as cartel-like price-fixing arrangements.

[78] Masterman, *supra* note 40.

related information exchanges, or unilateral monopsonistic conducts (*e.g.*, discriminating among employees) should be subject to a deeper, more rigorous, case-by-case analysis under well-established and specific competition law rules, with the ultimate purpose of maximizing economic efficiency. At this point, it is also worth mentioning the ancillary restraints doctrine, according to which non-solicitation and no-hire covenants may be justified by their pro-competitive effects. The application of the ancillary restraints doctrine to any given transaction primarily requires a case-by-case assessment, similar to a rule of reason analysis. The key point with respect to our analysis is that the ancillary restraints doctrine has recognized that certain restrictions cannot be assumed to have solely anti-competitive effects, and should be assessed as a whole, together with the transaction for which such restrictions may be deemed necessary.

All in all, considering (i) the intricate and interconnected nature of labor (input) and product (output) markets, (ii) the potential negative effects of monopsony power on total societal welfare, and (iii) the case of employees, which requires particular attention, it is reasonable to conclude that the appropriate standard of review in assessing anti-competitive conduct in the labor market is the rule of reason analysis, or, at the very least, the quick look standard . The use of the *per se* rule could only be preferable as an exception in the case of wage-fixing agreements. This is because wage-fixing agreements are deemed to be the mirror image of price-fixing agreements in the product market, and it has generally been accepted that they are hardcore restrictions which produce severe anti-competitive effects in any given market.

V. Conclusion

In order to determine what standard of review the courts should apply in order to ensure healthy competition in the market for talent, this article began by laying out the historical evolution of the competition agencies' approach to the scrutiny of the labor market under competition law rules. We then proceeded to demonstrate how anti-competitive conduct in the labor market may have welfare reducing effects on society as a whole. As such, this article first established and explained the interrelated nature of input and output markets, and then focused on the potential welfare reducing effects of labor market monopsony under a total societal welfare approach. Lastly, we presented an overview of the relevant legislative developments relating to the competition law scrutiny of employer conduct in the labor market. As a result of our analysis, we conclude that a rule of reason standard is best suited and most appropriate for such scrutiny, especially for the purpose of weighing and balancing the divergent interests of the various actors involved in these markets, including both the employees/employers and the consumers/producers.

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Collective Bargaining Under Competition Law Review

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I. Introduction

A careful examination of modern labor relations indicates that what can be characterized as early competition laws have often been used to prohibit or limit workers' unionization and collective bargaining rights. For instance, the Le Chapier Act of 1791 in France, which was followed by the British Combination Act of 1799,[1] were both used as tools to restrain, curb and prevent unionization. In the United States ("***U.S.***"), the same goals were achieved by the Sherman Antitrust Act of 1890[2] ("***Sherman Act***"), until the subsequent enactment of the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932.

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[1] Pietro Ichino, *Collective Bargaining and Antitrust Laws: An Open Issue*, 17/2 INTL J. OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 185 (2001).

[2] The U.S. Supreme Court, in the *Danbury Hatters* case (Loewe v. Lawlor (208 U.S. 274)) in 1908, held that labor unions enjoy no special immunity from the Sherman Act. In that case, the U.S. Supreme Court found that the United Hatters Union of North America had violated the Sherman Act when it combined with the American Federation of Labor in boycotting the manufacturer's hats and the businesses of those who dealt with them as wholesalers or retailers, so as to force all fur manufacturers to unionize their shops. As a result, the U.S. Supreme Court held that the combination had created a restraint of trade or commerce among several states under the Sherman Act. (Sam P. Burford Jr., *Antitrust and Labor - Union Liability*

However, with the advent of the Industrial Revolution, several movements for the advancement of workers' coalitions and for collective bargaining rights regarding working conditions (including wages) originated in Europe and in the U.S.[3] These movements eventually lead to the reformation of laws in various jurisdictions, so much so that these legal systems now formally recognize and grant legal protections to labor coalitions and to collective bargaining practices.[4]

The applicability of competition laws to collective bargaining has long been debated in the law literature of the U.S. and the European Union ("***EU***").[5] The competition laws, playing a major role in national economic policy, are designed in a way to "regulate the structure and conduct of markets and to promote competition"; meanwhile, collective bargaining can also be considered to be among the primary forces shaping the economy.[6] The relationship between collective bargaining and competition, therefore, is an issue of great importance and relevance to economic policies and policymakers.

Bearing all this in mind, we aim to explore the relationship between competition laws and collective bargaining throughout this article. Under Section II, we will discuss the emergence of collective bargaining in the industrial landscape, as the historical development of collective behavior in

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under the Sherman Act, 19/3, SMU L. REV. 613 (1965). <http://scholar.smu.edu/smulr/vol19/iss3/7> (last visited 2 February 2018.)

3 With industrialization, mass employment emerged and so did unionization. In fact, it is stated by Sauer and Matrix that the first railroad union was formed as a product of industrialization. See FN Sauer and FS Matrix, *Union Workers' Greatest Enemy: The Collective Bargaining Agreement*, BUSINESS INSIDER (Jun. 2011), <http://www.businessinsider.com/union-workers-greatest-enemy-the-collective-bargaining-agreement-2011-6> (last visited 31 January 2018).

4 Ichino *supra* note 1, at 185.

5 See also Ralph K. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L. J. 14 (1963); *The Antitrust Laws and Labor*, 30 FORDHAM L. REV. 759 (1962).http://ir.lawnet.fordham.edu/flr/vol30/iss4/5 (last visited 2 February 2018); Burford Jr. *supra* note 2; Ichino *supra* note 1, at 185; Stein Evju, *Collective Agreements and Competition Law: The Albany Puzzle, and van der Woude*, 17/2 INTL J. OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 165, 184 (2001); Daniel S. Frost, *Labor's Antitrust Exemption*, 55 CAL. L. REV. 254 (1967) <http://scholarship.law.berkeley.edu/californialawreview/vol55/iss1/6> (last visited2 February 2018); Franz Traxler & Bernd Brandl, *The Economic Effects Of Collective Bargaining Coverage: A Cross- National Analysis* (ILO Publications 66 (GURN discussion paper; no. 10)) 9, (2009).

6 Winter *supra* note 5, at 16.

labor activities was triggered by the immense changes in the industrial world and the emergence of mass employment.[7] Under Section III, we will refer to and examine the application of competition laws to collective bargaining activities. Under Section III, we will also discuss the approaches taken with respect to this issue in the U.S. and in the EU, and analyze the relevant legal landscape in terms of Turkish competition law. Under Section IV, we will delve into yet another aspect of the discussion, which revolves around efficiency considerations.

II. What is Collective Bargaining?

According to the International Labor Organization ("***ILO***") Convention of 1981, the term "collective bargaining" refers to the negotiations that take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers organizations, on the other, so as to determine the working conditions and terms of employment, to regulate relations between employers and workers, as well as to regulate relations between employers or their organizations and a workers' organization or workers' organizations.[8] The objectives of collective bargaining include: (i) finding the middle ground between the employers' and the employees'[9] economic and work-related interests, (ii) ensuring predictability by establishing uniform conditions, (iii) promotion of workplace harmony, and (iv) institutionalization of dispute resolutions within the workplace.[10]

Historically, the concepts of mass employment and mass production appeared with the rapid industrialization of economies throughout the world

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[7] Maria-Stella Vettori, *Alternative Means to Regulate the Employment Relationship in the Changing World of Work*, (2005), <https://repository.up.ac.za/bitstream/handle/2263/29308/04chapter4.pdf?sequence=5> (last visited 2 February 2018).

[8] International Labour Organization Convention Concerning the Promotion of Collective Bargaining 1981 (No. 154) (Entry into force: 11 August 1983) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C154:NO> (last visited 2 February 2018). See also Camilo Rubiano & Shlomit Ravid, *Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts, and Entertainment Sectors* SSRN ELECTRONIC J., 6 (2012)<https://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf > (last visited 2 February 2018).

[9] For the purposes of this article, the term "employee" is used in light of the definition provided by ILO, and is defined as persons "*who get a basic remuneration not directly dependent the revenue of the employer*." <http://www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/status-in-employment/current-guidelines/lang--en/index.htm> (last visited 2 February 2018).

[10] Omosolape Olakitan Owoseni, *Collective Bargaining as a Veritable Tool for Resolving Conflicts*, 6/13 EUR. J. BUSINESS AND MANAGEMENT (2014).

during the Industrial Revolution.[11] Since containing, controlling and resolving conflicts within small groups of employees was comparatively easier before the advent of mass industrialization, unions were not commonly recognized by employers before workplaces grew much larger and industrial organizations became vastly more complex.[12] Along with the development of mass production, mass employment and mass consumption, the need for synchronized conduct in terms of resolving employment conflicts increased as well.[13] Therefore, the industrial revolution paved the way for the emergence of unions and collective bargaining, since collective bargaining was widely perceived and accepted as the most practical way to solve potential conflicts that resulted from mass production and mass employment.[14]

Bearing this history in mind, it should also be noted that the evolution of the right to bargain collectively has differed for each national system, and the specific rules regarding collective bargaining have been particular to the jurisdiction in which they arise. Furthermore, the differences in the underlying social, moral and economic values of each country plays a significant role in the variety of laws and regulations regarding collective bargaining.[15] For instance, at the early stages of the emergence of collective bargaining in the U.S., collective bargaining was perceived as criminal conduct by the courts and was seen as a way for employees to artificially fix their salaries, and was thus deemed to be contrary to the natural economic laws of supply and demand by which the workers' salaries should be determined.[16] In other words, the natural desire of workers to join together in order to negotiate as a larger and stronger collective unit was shot down and rejected by the state courts, which claimed that such conduct would violate the natural supply and demand structure of the market.[17] As subsequent cases lead the courts to evolve their views towards a more labor-friendly approach and the need for federal legislation became impossible to ignore, unionization came to be accepted and recognized as a natural consequence and byproduct of the freedom of association as well. Furthermore, the right to bargain collectively also came to be viewed as the

[11] Vettori *supra* note 7.

[12] Owoseni *supra* note 10.

[13] Vettori *supra* note 7.

[14] *Id.*

[15] RICHARD N. BLOCK & PETER BERG, *Collective Bargaining in Context: Comparing the United States and Europe*, in BARGAINING FOR COMPETITIVENESS: LAW, RESEARCH, AND CASE STUDIES 1-12 (2003).

[16] Lance A. Compa, *An Overview of Collective Bargaining in the United States*, ILR COLLECTION, Cornell University ILR School 92, 3 (2014).

[17] *Id*. at 91.

only feasible way for employees to enjoy a certain amount of bargaining power against their employers[18] in determining fair work conditions, and was eventually recognized as a fundamental human right. Accordingly, collective bargaining began to be regulated within the labor law framework through various pieces of legislation in several jurisdictions.[19]

In terms of the EU, considering that the legal system of the community was established in the 1950s by a group of nations, it can be regarded as relatively "young" in terms of the unified adaptation of union freedoms and safeguards for the practice of collective bargaining.[20] In addition to international sources, the Member States have their own legislative and constitutional tools for regulating the practice and procedures of the right to collective bargaining. However, the regulations of the individual Member States on collective bargaining have been influenced deeply by the fundamental right presented in the Community Charter of the Fundamental Social Rights of Workers of 1989.[21]

Whereas in Turkey, although Articles 53 and 54 of the Turkish Constitution affirm the right of workers to "*conclude collective bargaining agreements"* and "*to strike if a dispute arises during the collective bargaining process,*"[22] the development of the right to bargain collectively and the right to strike can actually be traced back to the Turkish Syndication Law of 1947, which lead to the founding of the first well-established unions in Turkey. These unions from various sectors would later organize a meeting that laid the foundation of the Turkish Confederation of Workers' Unions,[23] the largest

[18] Irish Congress of Trade Unions, Collective Bargaining Is a Human Right, <https://www.ictu.ie/download/pdf/collective_bargaining_rights.pdf.> (last visited 2 February 2018).

[19] Railway Labour Act of 1926 and National Labor Relations Act of 1935.

[20] Ichino *supra* note 1, at 187.

[21] The right to collective bargaining in the EU is based upon Article 28 of the Charter of Fundamental Rights of the European Union (2000), which is based, in turn, on Article 6 of the European Social Charter that declares "the right to bargain collectively" to be a fundamental right and on Article 12 of the Community Charter of the Fundamental Social Rights of Workers, in addition to the International Labour Organization Convention No. 98 of 1949, Right of Collective Bargaining (Eurofound, 29 Nov. 2010), Eurofound.europa.eu (2018), <https://www.eurofound.europa.eu/ observatories/eurwork/industrial-relations-dictionary/right-of-collective-bargaining> (last visited 31 January 2018).

[22] European Trade Union Confederation, Turkish Trade Unions and Industrial Relations, 3 (Apr. 2010) <https://www.etuc.org/IMG/pdf/TURKISH_3.pdf > (last visited 2 February 2018).

[23] The Turkish Confederation of Workers' Unions was established in 1952, and has

confederation in Turkey.[24] With the subsequent social and economic evolution of Turkish society, along with the impact of political developments in Turkish history on labor relations and unionization, the regulations on collective labor rights passed through both liberal (the Law No. 274 on labor unions and the Law No. 275 on collective bargaining of 1963)[25] and restrictive phases (particularly, the period following the coup of 1980, in which strikes were banned and prior permission was required for establishing unions),[26] while unionization continued to grow and participation in unions increased dramatically. Turkey ratified the ILO Convention No. 98 in 1952. In due course of time, several new confederations[27] were formed and several laws on collective bargaining[28] and unions were passed.[29] Eventually, in 2012, a comprehensive piece of legislation, known as the Law No. 6356 on Trade Unions and Collective Labor Agreements ("***Law No. 6356***"), was enacted. With the Law No. 6356, the framework agreement and the collective group labor agreement were introduced to the Turkish industrial landscape for the first time.[30] In the drafting process of the Law No. 6356, the concurrent problems of workers, the latest academic debates regarding labor issues, and the relevant EU legislations were all taken into account.[31] Due to this inclusive and comprehensive method of drafting, the Law No. 6356 has been more

mainly been concerned with the organization of public workers and the mediator approach. (Demet Şahende Dimler, *Trade Unions in Turkey*, FRIEDRICH EBERT STIFTUNT, (Dec. 2012), <https://www.igmetall.de/FES_Laenderbericht_Tuerkei_d59ec85d3b1af938695d17f0fc28f8a5cadabc63.pdf> (last visited 2 February 2018)

[24] European Trade Union Confederation Publication *supra* note 22.

[25] Toker Dereli, *The Benefits of Freedom of Association for Development*, 68 SOSYAL SIYASET KONFERANSLARI DERGISI, at 188 (2017).

[26] European Trade Union Confederation Publication *supra* note 22.

[27] For instance, see Confederation of Nationalist Workers' Unions (MİSK), HAK-İŞ. (Dimler *supra* note 23).

[28] See the Collective Bargaining Agreement, Strike and Lockout Act No. 2822 of 1983.

[29] See Trade Unions Act No. 2821 of 2003.

[30] Ali Ercan Su & Dilek Yüksel & Medeni Can Akin & Gizem F. Çetin & Şeniz Özmert Koçera, *A New Era in Turkish Labour Relations: Law on Trade Unions and Collective Labour Agreements No. 6356*, (Ed. Ali Aybey) Republic of Turkey, Ministry of Labour and Social Security (Mar. 2013), <https://www.csgb.gov.tr/media/2999/6356. pdf > (last visited 6 February 2018)

[31] Alper Uzun, *Turkey: Law of Trade Unions and Collective Bargaining Agreements Has Entered into Force*, Mondaq.com, Erdem & Erdem Law, (2012), <http://www.mondaq.com/turkey/x/213386/employee+rights+labour+relations/Law+Of+Trade+Unions+And+Collective+Bargaining+Agreements+Has+Entered+Into+Force> (last visited 2 February 2018.)

highly in accordance with the principles of a liberal and democratic society than previous legislation on this issue.[32] Unlike the relevant provisions in the Constitution of 1982, which may rightly be characterized as "not-so-liberal" with respect to union activities,[33] with the Law No. 6356, Turkey has moved closer to the international norms[34] and standards, as well as to ILO conventions[35] and the Revised European Social Charter,[36] in terms of the promotion of union activities, the freedom of association, the right to bargain collectively,[37] the functioning of unions, labor agreements and the settlement of labor disputes.

Notwithstanding the different paths that the development of collective bargaining has taken in various jurisdictions, the main aim of collective bargaining has always been to reach a collective agreement that regulates the terms and conditions of employment.[38] The collective nature of the union and the concerted actions of the represented employees are the key factors that define any labor bargain as "collective bargaining."[39] In the collective bargaining framework, both employees and employers are expected to make compromises in reaching an agreement. Therefore, a negotiation process takes place between an employer and the legal representative of the employees.[40] Accordingly, collective bargaining has also been perceived and regulated as a process of rule-making that would lead to joint regulations.[41]

(i) Collective Bargaining as a Fundamental Social Right

Collective bargaining as a negotiation system cannot be separated from its original and essential status as a fundamental social right. The freedom of

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[32] Uzun *supra* note 31.

[33] Aybey *supra* note 30, at 19-20.

[34] ILO (International Labour Organization) and the European Social Charter.

[35] ILO Conventions No. 87 and No. 98 were taken into account in regulating the union rights and freedoms and the process of liberal collective bargaining *supra* note 31.

[36] Mainly Articles 5 and 6 of the Law No. 6356.

[37] Aybey *supra* note 30.

[38] Owaseni *supra* note 10.

[39] Block & Berg *supra* note 15, at 4.

[40] Sriyan de Silva, *Collective Bargaining Negotiations*, ILOACT/EMP PUBLICATIONS (1996) <http://www.ilo.org/public/english/dialogue/actemp/ downloads/ publications/srscbarg.pdf> (last visited 6 February 2018).

[41] Eurofound, Collective Bargaining, (04 Sep. 2017), (Eurofound, 04 September 2017) Eurofound.europa.eu <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/collective-bargaining> (last visited 2 February 2018).

association, which ensures the realization and fulfillment of collective bargaining rights, can be categorized as being among "the first generation of human rights" and must be recognized as one of the fundamental constituents of democratic societies, much like the freedom of speech and the right to vote.[42] This is because the goals of a democratic society can best be realized if different groups (with varying opinions and interests) are all represented in an interactive and multifaceted social environment.[43] It can be stated that the most important consequence of exercising the freedom of association and collective bargaining rights for employees is the ability to form unions that negotiate the terms and conditions of employment collectively with the employers, instead of doing so on an individual basis, and the ability to enforce and preserve such rights through strikes and other labor activities.[44]

Although the development of the right to unionize and bargain collectively followed different paths in different countries, collective bargaining has gained international recognition and has been granted various legal protections due to its vital role in creating more democratic, civilized and humane societies. Starting with the ILO Constitution in 1919 and the ILO Declaration of Philadelphia in 1944, the freedom of association and collective action, which ensure that employees and employers can negotiate and mutually determine the framework of their work relations, are legally protected. The freedom of association is also proclaimed and set forth as a fundamental right in the Universal Declaration of Human Rights of 1948.[45] The right to bargain collectively can be categorized and interpreted under the wider freedom of association, with some additional protections provided by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[46]

In terms of the process of collective bargaining, it consists of two steps: (i) the negotiation, and (ii) the conclusion of an agreement. The actors involved

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[42] Robert Creamer, *Why Collective Bargaining Is a Fundamental Human Right*, THE BLOG, (07 Sep. 2014), https://www.huffingtonpost.com/robert-creamer/why-collective-bargaining_b_5570047.html (last visited 2 February 2018).

[43] Rubiano & Ravid *supra* note 8, at 6.

[44] Eurofound, Collective Bargaining Autonomy, <https://www.eurofound.europa.eu/efemiredictionary/collective-bargaining-autonomy> (last visited 2 February 2018)..

[45] International Labour Standards on Freedom of Association, <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm > (last visited 7 February 2018).

[46] Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights, as amended) (ECHR) art 11<http://www.echr.coe.int/Documents/Convention_ENG.pdf> (last visited 7 February 2018).

and the results of the bargaining process are both regulated under Article 28 of the Charter of Fundamental Rights of the European Union. On the other hand, Article 6 of the European Social Charter also describes the right to collective bargaining, in addition to setting out the parties' obligations.

(ii)The Discussion on Collective Bargaining from a Competition Law Perspective

The conflict between competition laws and labor laws has long been one of the fundamental topics of discussion with regard to economic and political policies.[47] Indeed, the issue of whether to apply competition law regulations to unions for acts relating to collective bargaining is essentially a question of policy choice for legislators.

In several jurisdictions, collective bargaining activities, such as forming unions or joining together to negotiate wages and terms and conditions of employment, are exempt from the scrutiny of competition law authorities.[48] This exemption can be viewed as targeting to counterbalance "*the superior economic power and bargaining position which most firms/employers have vis-à-vis individual workers,*"[49] as well as preventing any risk of labor exploitation.[50]

As will be discussed in detail below, collective bargaining agreements can have a significant impact on third parties and may lead to restrictions on competition in markets other than the labor market.[51] Therefore, it is no surprise that there have been various instances[52] in the U.S. and in the EU that have raised the central question of whether collective agreements and collective bargaining activities fall within the scope of competition laws and whether they

[47] Winter *supra* note 5, at 17.

[48] R. Shyam Khemani, UN Report, *Application of Competition Law: Exemptions and Exceptions*, 27 (2002). <http://unctad.org/en/Docs/ditcclpmisc25_en.pdf> (last visited 6 February 2018).

[49] *Id*.

[50] *Id*.

[51] Evju *supra* note 5.

[52] See *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965) cases in the U.S. and the CJEU's *Albany* (C-67/96; EU:C:1999:28), *Brentjens'* (C-115/97 to C-117/97, EU:C:1999:434), *Drijvende Bokken* (C-219/97; EU:C:1999:437), *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:428), *van der Woude* (C-222/98; EU:C:2000:475), *AG2R Prévoyance* (C-437/09; EU:C:2011:112), and *FNV Kunsten* (C-413/13; EU:C:2014:2411) judgments.

constitute restrictions on competition. Accordingly, the question of whether collective bargaining hinders competition remains a worthwhile topic of discussion from a legal standpoint, as well as a valuable debate in terms of social welfare and economic efficiency.

III. Collective Bargaining Through the Prism of Competition Law

(i) Is Collective Bargaining within the Scope of Competition Laws?

It is common for most jurisdictions to shelter collective agreements between management and employees from the reach of competition enforcement authorities, in line with their labor law policies.[53] Indeed, in terms of EU competition law, Article 101 of the Treaty on the Functioning of the European Union ("***TFEU***") prohibits agreements which affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.[54] The safeguard of competition extends to goods, services and capital markets, and, therefore, is not applicable with respect to the labor market, where free competition among workers, as well as the free movement of workers, is protected.[55] Although no explicit clause refers to an exemption under EU regulations, as a result of the Court of Justice of the European Union's ("***CJEU***") interpretation of the fundamental principles establishing the EU, as well as the social objectives stipulated in the TFEU, the autonomy/exemption of collective bargaining from competition law has been recognized under EU law.[56] In its renowned *Albany* decision, the CJEU affirmed that, although competition restrictions are inherent in terms of collective bargaining, "*the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty[[57]] when seeking jointly to adopt measures to improve conditions of work and employment.*"[58] The CJEU also referred to the social policy

[53] Evju *supra* note 5, at 166.

[54] VIVIEN ROSE & DAVID BAILEY, EUROPEAN UNION LAW OF COMPETITION IN BELLAMY AND CHILD: EUROPEAN UNION LAW OF COMPETITION (7th Edition) at 12 (March 2013).

[55] Ichino *supra* note 1, at 189.

[56] Evju *supra* note 5, at 166.

[57] Currently, Article 101(1) of the TFEU.

[58] *Albany* decision, para. 59. In his opinion, Advocate General ("***AG***") Jacobs states that there is nothing in the Treaty Establishing the European Community ("***TEC***") that expressly excludes the social field from competition laws. Indeed, according to AG Jacobs' opinion, the CJEU has already accepted the principle that the competition rules apply to the social field, and in particular to employment and to

objectives of the TFEU and focused on the provisions concerning the objective of social dialogue and collective bargaining between employers and workers at the EU level, and thus confirmed in its ruling that collective agreements entered into within the framework of collective bargaining between employers and employees do not fall under the scope of Article 101(1).[59]

Similarly, in terms of evaluating whether collective agreements can be subject to competition law rules in the U.S., the Sherman Act (which sets forth the essential regulations for the protection of commerce in the U.S.) should be read concurrently with the Clayton Act and the Norris-LaGuardia Act. The Clayton Act makes it clear that workers do not need to compete among themselves, but can join together in order to improve their working conditions. Therefore, Section 1 of the U.S. Sherman Act,[60] which outlaws "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce*" shall not be so construed as forbidding the "*existence and operation of labor, agricultural, or horticultural organizations instituted for the purpose of mutual help.*"[61] Furthermore, under Section VI of the Clayton Act, the unionization of workers is exempted from antitrust regulations, as the labor of a human being is not considered to be a commodity or article of commerce.[62] Moreover, the Norris-LaGuardia Act can be deemed as a

pensions (para. 127 of AG Jacobs' opinion). Moreover, AG Jacobs has also stated that collective bargaining does not qualify as a fundamental right. AG Jacobs argued that collective agreements should be: (i) made within the formal framework of collective bargaining, (ii) concluded in good faith, and (iii) dealing with core subjects of collective bargaining, such as wages and working conditions, and not directly affect third parties or markets. AG Jacobs also asserted that every collective agreement between management and labor is an implied agreement between undertakings on the employers' side. (para. 244 of AG Jacobs' opinion).

[59] See para. 53-58 of the *Albany* decision. This approach has also been reaffirmed in the CJEU's *Brentjens'* (C-115/97 to C-117/97, EU:C:1999:434), *Drijvende Bokken* (C-219/97, EU:C:1999:437), *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:428), *van der Woude* (C-222/98, EU:C:2000:475), *AG2R Prévoyance* (C-437/09, EU:C:2011:112) and *FNV Kunsten* (C-413/13; EU C: 2014: 2411) judgments.

[60] 15 U.S.C. §§ 1-7

[61] P. 325 U.S. 808.

[62] *"The labor of a human being is not a commodity or article of commerce. Nothing contained in the* antitrust laws *shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint*

reassertion of the original purpose of the Clayton Act,[63] and serves as a statutory basis for collective bargaining's exemption from antitrust regulations.

In terms of Turkish competition law, the relevant legislation setting the ground and providing the framework for the applicable competition law principles is the Law No. 4054 on the Protection of Competition of 1994 ("***Law No. 4054***"). The Law No. 4054 does not openly address or assert any competition law exemption for collective bargaining activities. However, in the preamble of Article 3, the Turkish legislator has clearly stated its intention to keep the labor market out of the scope of competition rules, which was defined as "*the contest between undertakings in markets for goods and services, which enables them to take economic decisions freely*."[64] According to the preamble of Article 3 of the Law No. 4054, a service shall mean "*intellectual or physical activities or activities that have been undertaken for a price or benefit*"; however, according to the same article, these services shall not extend to the labor market, where the principle of collective bargaining is recognized.[65] To that end, in terms of the application of competition law in Turkey, the labor market, and therefore collective bargaining, have been granted an exemption from competition law rules.

To sum up, it can be clearly observed that collective bargaining is generally exempted from the application of competition laws in many jurisdictions. Although the case law on whether collective bargaining is within the *ratione personae* scope of the competition laws has yet to be developed,[66] the regulations passed in accordance with the policy choices of legislators offer a shelter from competition law rules to the collective bargaining activities between employers and employees.

(ii) Collective Bargaining: Does it Really Prevent Competition?

Despite the fact that collective bargaining has been taken out of the scope of competition law in many jurisdictions, collective agreements and union activities can nevertheless be considered as restraints of competition, since they may reduce or eliminate competition in the final product market, as well as in the labor market.

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of trade, under the antitrust laws*."* (See 15 U.S. Code § 17).

[63] Frost *supra* note 5, at 254.

[64] Article 3 of the Law No. 4054.

[65] *Id.*

[66] The case law on the application of competition laws to collective bargaining does not provide a clear view on whether unions are considered as "undertakings" by the courts.

Competition law regimes generally function as a means to protect competition in free market economies.[67] To that end, competition laws are implemented and enforced to prevent competition from being distorted and to protect effective and vigorous competition in the marketplace. With that said, horizontal agreements have always been closely scrutinized under competition laws due to their propensity to create agreements in restraint of competition through price fixing, market allocation, concerted refusals to deal, and so forth.[68] In this sense, collective bargaining which ensures that negotiations and agreements for determining the terms of employment are applicable to all employees, may appear to be restricting the price competition between employees as well as employers.[69]

An employee union undertakes to engage in salary negotiations on behalf of all its members, this is to say, the “price” of the employees’ endeavors are decided upon as a singular amount (for the equal amount of work undertaken by such employees) in the labor market. Such conduct can be interpreted as going against the demand and supply balance of a competitive market. For instance, in case of an industry-wide union’s demands for “one wage and working conditions” which would be applicable to an entire industry, the acceptance of such demands would also cause the same end result as a price-fixing case in the labor market.[70]Moreover a multi-employer collective bargaining case, where an employee union and an employer group engage in collective bargaining activities, may also lead to increased discussion among employers within the bargaining group with respect to the industry prices, production costs, and output, thus resulting in an exchange of information between competitors regarding various market variables.[71] In this respect, it is not far-out that collective bargaining be viewed as analogous to price fixing and information exchange between competitors and so restrictive of competition in nature in terms of labor market.

Furthermore as a result of the right to bargain collectively and the freedom of association, competition in the product market can be negatively affected if activities in the majority of an end product market discontinue due

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[67] Competition and Democracy, Global Forum on Competition, OECD Directorate for Financial and Enterprise Affairs Competition Committee (2017), <https://one.oecd.org/document/DAF/COMP/GF/WD(2017)1/en/pdf> (last visited 6 February 2018)

[68] Bruce F. Kennedy, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN L. REV. 684, 687 (1968).

[69] Rubiano & Ravid *supra* note 8, at 9.

[70] *The Antitrust Laws and Labor*, 30 FORDHAM L. REV. 763 (1962). Available at: <http://ir.lawnet.fordham.edu/flr/vol30/iss4/5> (last visited 6 February 2018).

[71] Kennedy *supra* note 68.

to the stance of employees.[72] Depending on the extent of the union organization, a union-sponsored boycott can cause serious distortions in competition in the product market. Such is the case of the collective action of professional athletes[73], leading to a lockout reaction of the employer - the team owners - resulting in the loss of a whole season. There have been numerous strikes and lockouts in National Football League ("***NFL***"), National Basketball Association ("***NBA***") and National Hockey League that resulted in the cancellation of several games in the league or the season.[74] The most recent example may be that of 2011 where the league (i.e. NFL) locked certain players and their teammates out due to the antitrust suit filed by said employers as a reaction to the draconian measures proposed in the new drafted agreements after the expiration of NFL's collective bargaining agreement. This issue was solved as a judge[75] invalidated the lockout and a new collective bargaining agreement was agreed upon shortly.[76]

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[72] See *United States v. Milk Drivers & Dairy Employees Union* in order to protect drivers' commissions, the union, together with a group of dairies and stores prevented store sales of milk at unfair prices. This created price effect on the final product. (153 F. Supp. 803, 808 (D. Minn. 1957) as cited in Bernard D. Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws* The Journal of Law and Economics 6, no. 152, at 171 (1963))

[73] William B. IV Gould, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 Comp. Lab. L. & Pol'y J. 283, 312 (2007).

See CNN, *Pro Sports Lockouts and Strikes Fast Facts*, CNN LIBRARY (last update May 26, 2017) <https://edition.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html > (last visited 7 February 2018.)

[74] In 1994, due to the owners' attempt to cap salaries, the union organized a strike and the players walked out, with seven weeks left in the season. The issue could not be resolved until the next season which meant that 1994, in terms of the NBA league consisted of "*de facto* exhibition games" only. (Cliff Concoran, *The Strike: Who Was Right, Who Was Wrong and How It Helped Baseball* (2014), SPORTS ILLUSTRATED < https://www.si.com/mlb/2014/08/12/1994-strike-bud-selig-orel-hershiser> (last visited 8 February 2018.). See also

David A. Latzko, *Who Won the Major League Baseball Strikes*, Department of Business and Economics, Wilkes University. 7.

[75] Namely U.S. District Judge Susan Richard Nelson.

[76] Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On* 32/1 J. National Association of Administrative Law Judiciary (2012),**. S**ee also CNN Library *supra*. That being said, there is also research creating doubt in terms of the impact of such major league labor issues to economies, suggesting that professional sports teams do not necessarily have as significant an impact on local economies as believed. (See

Additionally, in monopolistic markets where the only employer in the market has the ability to pay higher wages, employees with no fundamental conflict or disagreement with such an employer would have no particular desire or incentive to change their current work situation. This would naturally result in an entry barrier to the market for new firms, as finding employees looking to change their current working arrangements and willing to work on a cost-basis would be difficult, not to say an insurmountable barrier to entry into the market. Needless to say, entry barriers, in whichever form they may arise, are not praised or looked upon kindly by competition authorities, as they are not considered to be beneficial for healthy competition in the market. Unions, which are well aware of these market dynamics, may seek to exploit the situation[77] and try to apply greater pressure on the employer to gain favorable employment terms for its members, as all employment is subject to a single, specified collective agreement, instead of facilitating or reaching for new entrants into the market or seeking a diversification of employers.

Therefore, as already explained above, the exemptions recognized in different jurisdictions safeguard collective bargaining activities from the application of competition laws, even though it is possible, in theory, for collective bargaining and related union actions to prevent and hinder competition. Consequently, the courts in the U.S. and in Europe have been forced to counterbalance the effects of collective bargaining and reconcile competing interests and outcomes.[78]

As such, for instance, the U.S. Supreme Court has carved out certain union activities from the general exemption from competition laws, in addition to the statutory exemption provided by the Clayton Act and the Norris-LaGuardia Act.[79] Under U.S. jurisprudence, certain union acts were found not to be exempted from competition laws, and these acts were also determined to be hindering competition. For instance, in *Allen Bradley*,[80] the U.S. Supreme Court found that it is crucial to determine whether a labor union acts alone or in combination with business groups in order to assess whether a labor union's

Robert A. Baade and Robert Baumann and Victor A. Matheson, *The Economic Consequences of Professional Sports Strikes and Lockouts: Revisited*, Working Paper Series, Paper No. 06-09, International Association of Sports Economists, (2006) at 11.)

[77] Khemani *supra* note 48, 28.

[78] Kemper C. Powell, *Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process*, 14 TEX. REV. ENT. & SPORTS L. 147, at 150 (2013).

[79] *Id*. at 149.

[80] Allen Bradley *supra* note 52.

activities violate the Sherman Antitrust Act. In *Pennington*[81] and *Jewel Tea*,[82] the U.S. Supreme Court affirmed that a collective bargaining act of a union concerning wages, hours and working conditions could be exempt from competition law, so long as the collective bargaining and agreement were not undertaken in combination with non-labor groups, such as large operators/players in a given market.[83]

Similarly, the Court of Justice of the European Free Trade Association ("***CJEFTA***"), in a more recent decision, stated that, although certain restrictions of competition were inherent in collective agreements, social policy objectives pursued by these agreements would be impaired if such agreements were prohibited due to their effects on competition.[84] With this in mind, the CJEFTA, by also referring to the CJEU's approach in the *Albany* case, concluded that not all collective agreements can be excluded from the reach of competition law rules,[85] since collective agreements "*must have been entered into following collective bargaining between employers and employees*" and they *"must pursue the objective of improving conditions of work and employment.*"[86] In light of these principles, the CJEFTA found that, as the collective agreement and the boycott in question served the purpose of protecting only union workers to the detriment of other non-union workers, the case at hand "*appears to differ from those at issue in the Albany line of case law*"[87] and, therefore, decided that the collective agreement could not benefit from the EEA competition law exemption, which is equivalent to the competition rules in the EU.[88]

(iii) Employee or Self-Employed: Does the Difference Really Matter?

As explained in detail above, the collective bargaining activities of individuals who would be defined as "employees" are generally exempted from the scope of competition law. However, this protection from the realm of

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[81] Pennington *supra* note 52.

[82] Jewel Tea *supra* note 52.

[83] Frost *supra* note 5, at 257.

[84] Holship Norge AS v Norsk Transportarbeiderforbund (E-14/15), para. 40. <http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2015/14_15/14_15_Judgment_EN.pdf> (last visited 6 February 2018).

[85] *Id*. para. 41.

[86] *Id*. para. 42.

[87] *Id*. para. 52.

[88] *The EEA Competition Rules and the Role of the Authority*, EFTA, <http://www.eftasurv.int/competition/competition-rules-in-the-eea/> (last visited 6 February 2018).

competition law differs when it comes to self-employed individuals. Indeed, in terms of competition enforcement, the distinction between an "employee" and a "self-employed person" leads to separate outcomes, since if an individual is self-employed, (s)he assumes the commercial risks of his/her activities, whereas an employee is not subject to such risks and responsibilities,[89] but rather performs work or services under certain conditions in return for remuneration from the employer.[90] In other words, an employment relationship requires a set of obligations to be fulfilled by an employee (for instance, following the employer's instructions, the duty to be loyal and to not disclose confidential information of the employer, etc.), which differ significantly from the working conditions of a self-employed person.

The distinction between "employee" and "self-employed person" is especially evident in terms of the EU competition law.[91] In the *Albany* case, the CJEU accepted that "*a collective agreement concluded between organizations representing employers and workers*"[92] does not, by reason of its nature and purpose, fall under the scope of Article 101(1) of the TFEU. The Court also noted that if management and workers were subject to Article 101(1) of the TFEU when seeking jointly to improve the conditions of employment, the social objectives pursued by the European Community and Member States would be seriously undermined.[93] The Court reiterated its stance in

[89] This has also been reaffirmed by AG Jacobs' opinion in the *Albany* case, where he stated that "*Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community 104 or national law*." [Opinion of AG Jacobs — Case C-67/96, Joined Cases C-115/97, C-116/97 and C-117/97 and Case C-219/97, para. 215].

[90] ILO, Employment Relationship, ILO, <http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm> (last visited 6 February 2018).

[91] Though the view of the CJEU has also been accepted and implemented in other jurisdictions, such as Singapore. The Competition Commission of Singapore ("***CCS***") adopted a similar view on the difference between "employees" and "self-employed" (TOH HAN LI, PROMOTING COMPETITION, PROTECTING HUMAN RIGHTS PAPER, OECD GLOBAL FORUM ON COMPETITION, DAF/COMP/GF (2016) 13, at 3, para. 5. <https://one.oecd.org/document/DAF/COMP/GF(2016)13/en/pdf > (last visited 5 February 2018).

[92] Albany decision *supra* note 52, para. 64.

[93] *Id.* para. 59.

International Transport Workers' Federation and Finnish Seamen's Union[94] and in *3F* v *Commission.*[95]

However, when it came to the self-employed, the CJEU held that although a self-employed worker may perform the same activities as an employee, given that they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal, self-employed workers would be considered as 'undertakings' within the meaning of Article 101(1) of the TFEU.[96] Therefore, as also accepted and reiterated by the Court in *FNV Kunsten*, when it comes to collective labor agreements concluded by "*an employees' organization in the name, and on behalf, of the self-employed service providers who are its members,*" the collective agreement does not constitute the result of a collective bargaining between employers and employees, and therefore cannot be excluded, by reason of its nature, from the scope of Article 101(1) of the TFEU.[97] With that said, the Court also noted that such a formalistic classification of employers under national laws does not actually prevent an individual from being classified as an employee for the purposes of EU law. Indeed, according to the Court, it is possible for the independence of a self-employed person to be merely notional; in other words, the employment relationship may be disguised as self-employment when, in fact, the individual is "*false self-employed.*"[98] In that case, according to the Court's finding, a collective agreement, which sets the terms of employment for the "false" self-employed service providers, by reason of its nature and purpose, does not fall within the scope of Article 101(1) of the TFEU.[99]

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[94] International Transport Workers' Federation and Finnish Seamen's Union (C-438/05, EU:C:2007:772), para. 49.

[95] 3F v Commission (C-319/07 P, EU:C:2009:435), para. 50.

[96] *FNV Kunsten* (Case C-413/13) *supra* note 52, para. 27.

[97] *Id*. para. 30.

[98] *Id*. para. 31 and 35. According to AG Wahl, "false self-employed" are "*employees who are disguised as self-employed in order to avoid the application of some specific legislation (for example, labour or fiscal regulations) which is considered unfavourable by the employer. Another example is the case of self-employed persons who are economically dependent on a sole (or main) customer*." (See AG Wahl's opinion, para. 52. Available at: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dcc5c34b1e340244c2b928890dac207014.e34KaxiLc3qMb40Rch0SaxyNaN10?text=&docid=157529&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=814144> (last visited 6 February 2018).

[99] *FNV Kunsten* (Case C-413/13) *supra* note 52, para. 41.

To that end, although the Court's characterization of the false self-employed in this case can be praised as discerning and insightful, one fair piece of criticism that can be directed at the decision is that distinguishing "self-employed" workers from "employees" and exposing the collective bargaining activities of the self-employed to the realm of competition rules and regulations may actually contravene the nature of the protection granted under ILO Conventions. This may be the case especially for ILO Conventions No. 87,[100] No. 98, and No. 154,[101] whereby workers and employers, without any distinction whatsoever, have the right to establish and to join their organizations, as well as to engage in negotiations for determining the working conditions and terms of employment, and regulating the relations between employers and workers. It may be argued that although no definition of "self-employed" is provided in the ILO Conventions concerning collective bargaining,[102] Article 4 of the ILO Convention No. 98, which provides that appropriate measures "*to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements,*"[103] can be viewed as also extending and granting the right of free

[100] Articles 2, 3(1), 3(2) and 8(2) of the Convention No. 87.

[101] Articles 2 and 5 of the Convention No. 154.

[102] However, a definition of self-employment is provided by ILO's Resolution concerning the International Classification of Status in Employment ("***ICSE***"). The ICSE classified persons by virtue of their actual and potential relations with their jobs. The persons are grouped as "employees," "employers," "own-account workers," "members of producers' cooperatives," "contributing family workers," and "workers not classifiable by status." These groups are defined with reference to one or more aspects of the economic risk and/or the type of authority which the explicit or implicit employment contract gives to the incumbents or to which it subjects them. (Resolution concerning the International Classification of Status in Employment (ICSE), adopted by the Fifteenth International Conference of Labour Statistician, 1993 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/norma-tiveinstrument/wcms_087562.pdf> (last visited 6 February 2018). In this regard, ILO defines self-employment jobs as "*those jobs where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods or services produced (where own consumption is considered to be part of the profits).*" (Current Guidelines, ILO. <http://www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/status-in-employment/current-guidelines/lang--en/index.htm> (last visited 6 February 2018)).

[103] C098 - Right to Organise and Collective Bargaining Convention (1949) No. 98. Available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB: 12100:0::NO::P12100_INSTRUMENT_ID:312243> (last visited 6 February 2018).

and voluntary collective bargaining to the self-employed. Therefore, one may conclude that subjecting collective bargaining of the self-employed to the competition law regimes does not conform to the protections foreseen under ILO Convention No. 98.

As a result, although it is evident that the competition in a product or labor market can be affected and distorted by the collective bargaining activities of unions, such collective bargaining activities are offered a statutory exemption from the application of competition laws. The policymakers and the courts in various jurisdictions, in an effort to promote collective bargaining as a fundamental social right and to fulfill their social policy objectives, have provided a shield to protect collective bargaining activities from the application of competition laws. In this context, collective bargaining can be considered as an essential union activity, since the terms and conditions of employment can thereby be jointly determined by employees and employers.

IV. Efficiency Considerations for Collective Bargaining

In evaluating the relationship between collective bargaining and competition law, it is also necessary to take into account how total welfare is affected, since the primary objective of competition law is the maximization of total welfare, and not the protection of competition in itself.[104] That is to say, competition law is only a tool and a means to an end, which can be defined as the maximization of total welfare.[105]

Maximizing total welfare, from an overarching point of view, can be defined as pursuing the goal of attaining the highest aggregate gain for the consumers and the producers taken together.[106] In other words, the gain of both the consumers and the producers carry significant weight in terms of maximizing total welfare, and what ultimately matters most is combining the two results to achieve the highest total societal gain. Competition law's primary tool for maximizing total welfare is achieving economic efficiency.

Generally speaking, laws promoting collective bargaining were designed so as to limit industrial conflict (which is deemed as detrimental to economic

[104] GÖNENÇ GÜRKAYNAK, *Türk Rekabet Hukuku Uygulaması İçin "Hukuk ve İktisat" Perspektifinden "Amaç" Tartışması* [A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective] (Rekabet Kurumu Yayınları [The Turkish Competition Authority Press], (2003).

[105] *Id*. at 3.

[106] *Id*. at 2.

efficiency), and thereby increase economic efficiency.[107] However, collective bargaining's actual impact on economic efficiency remains controversial and is a highly debated subject among commentators.[108]

In terms of allocative efficiencies, although it is suggested by the standard neo-classical economic theory that wage effects caused by collective bargaining can lead to the misallocation of resources and therefore cause allocative inefficiencies, in practice, collective bargaining does not appear to reduce the number of persons employed in a given market.[109] Therefore, the allegations that collective bargaining leads to a reduction in the number of employees and the quantity of goods produced are rather baseless and trivial,[110] and require no further elaboration.

As for the issue of productivity, empirical evidence suggests that the positive effects of collective bargaining outweigh its negative effects.[111] It can be argued that the reward for effort is reduced as a result of collective bargaining, and that management's ability to efficiently utilize its workforce is limited and turnover rates are expected to be lower; however, given that voice[112] is used instead of resorting to exit option,[113] more information is

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[107] Guy Davidov, *A Purposive Approach to Labour Law*, Vol. 20, INTL. J. OF COMPA-RATIVE LABOUR LAW AND INDUSTRIAL RELATIONS, 81, at 94 (2004).

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] "Voice" is the process of employees' direct communication with the employers in terms of the proposed conditions of employment. The appointed representative delivers the collective voice of the employees to improve said conditions and adapt and revise them according to the desires of the employees. See Tissya Mandal, *Collective Bargaining: A Law and Economic Critique*, SSRN at 7, (20 Apr. 2011) <http://dx.doi.org/10.2139/ssrn.1815802 > (last visited 6 February 2018). See also Toke Aidt & Zafiris Tzannatos, *Unions and Collective Bargaining Economic Effects in a Global Environment*', Directions in Development, The World Bank: Washington D.C., at 25 (2002) <http://documents.worldbank.org/curated/en/831241468740 150591/Unions-and-collective-bargaining-economic-effects-in-a-global-environment>(last visited 6 February 2018).

[113] "Voice" and "exit" terms are used in reference to usage in Hirschman's "Exit, Voice, and Loyalty Responses to Decline in Firms, Organizations, and States" where voice option is used to express dissatisfaction directly to management and exit option as to leave the establishment/organization. (ALBERT O. HIRSCHMAN,

expected to flow between workers and from workers to management, and therefore morale (and so, presumably motivation) is often higher.[114] Moreover, firm-specific investments are expected to rise and management is expected to act more rationally as well as a result of collective bargaining activities.[115] Thus, it can be confidently stated that collective bargaining's effects on improving the efficiency of labor management should not be ignored or overlooked.[116]

With that in mind, we observe that collective bargaining also has an impact on productivity growth, which can be considered as an indicator of a society's standard of living and can be manifested with dynamic efficiencies. It is true that collective bargaining will tend to increase wage costs,[117] leading to an increase in the costs of production. As a result, with higher costs of production and a competitive market that would constrain firms from simply increasing the sale prices of their products, an effective system of collective bargaining could possibly lead to lower investments in research and development.[118] With that said, according to an empirical study, the evidence at hand suggests that collective bargaining does not actually hinder technological change.[119] Bearing in mind the improvement in communication between employees and management as a result of collective bargaining, technological changes and improvements can be organized and implemented in a manner that would maximize the benefit of such changes for both the firm and its employees.[120] Contrary to widespread belief, a higher level of productivity can be achieved in union firms than in non-union firms.[121]

EXIT, VOICE, AND LOYALTY RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES, 4 HARVARD UNIVERSITY PRESS (1970))

[114] Guy Davidov, 'Collective Bargaining Laws: Purpose and Scope', International Journal of Comparative Labour Law and Industrial Relations (2004) Vol. 20, 81, 93. See also Aidt & Tzannatos *supra* note 112, at 25.

[115] Davidov *supra* note 107, at 93.

[116] Mandal *supra* note 112, at 6. See also Aidt & Tzannatos *supra* note 112, at 26.

[117] David M. Winch, *Collective Bargaining and the Public Interest: A Welfare Economics Assessment*, MQUP (1989), at 71.

[118] Davidov *supra* note 107, at 94.

[119] L. MISHEL & P. B. VOOS, J. H. KEEFE, *Do Unions Hinder Technological Change?,* in UNIONS AND ECONOMIC COMPETITIVENESS, ARMONK, 41, at 95 (1992).

[120] Aidt & Tzannatos *supra* note 112, at 26. See also Mandal *supra* 6.

[121] Mandal *supra* note 112, at 6.

Economists have also assessed collective bargaining in terms of its costs[122] and benefits, examining it from a purely economic point of view. In evaluating the economic efficiency and equity of collective bargaining, the purely economic benefits and costs should be compared and weighed against each other.[123] One of the costs of the labor market that is considered in such analyses is the negotiation costs. The negotiation costs associated with several individual labor contracts would be much higher than the negotiation costs associated with a single agreement that sets the terms and conditions of employment for a large number of employees and the employer.[124] Therefore, the process of collective bargaining can reduce transaction costs and improve both the administration and the enforcement of workers' rights by way of ensuring information sharing, which would help employees to overcome certain barriers to negotiating with the employers.[125]

As a result, it is clear that the process of collective bargaining has some efficiency enhancing effects as well as leading to certain inefficiencies; however, by granting the employees the ability to join forces and collectively confront and offset the greater bargaining power of the employer, collective bargaining ensures that the right to free speech with respect to employment terms and conditions can be attained and secured for both parties. In this regard, the main purpose of collective bargaining is more of a social nature, which involves the elimination of competition between employees and aims at creating a more democratic and civilized society that would protect and implement fair working conditions for employees, who possess only their bargaining power as leverage against their employers. Therefore, in light of these social policy goals, it is not unreasonable or unjust that collective bargaining is regulated and protected as a fundamental social right and not merely viewed as an economic strategy, and is thus sheltered from economic analysis within the context of competition law policies.

V. Conclusion

Collective bargaining has the power to affect competition in the market, and it is not rare that it actually does influence the competitive environment in a given market. Indeed, the competitiveness of firms regarding price,

[122] Costs of collective bargaining can be evaluated under three separate parts: (i) organizing campaigns through publication, (ii) negotiating a collective agreement, which involves various costs (mostly if there is a loss in production due to a strike or a lockout), and (iii) enforcing the collective agreement through arbitration/litigation accounts. See also Mandal *supra* note 112, at 6.

[123] Mandal *supra* note 112, at 6.

[124] Aidt & Tzannatos *supra* note 112, at 25.

[125] Davidov *supra* note 107, at 95-96.

innovation, effectiveness of their methods and allocation of their resources, among other elements, are influenced by the labor market. Similarly, the number of workers in search of employment in the relevant labor market, the skills, knowledge and experience required for the available positions, and, above all, the strength of unions and the terms and conditions of collective agreements are all important factors affecting the competition in the relevant final product market.

With that said, while competition law rules aim to maximize total welfare through increasing and maintaining economic efficiency, collective bargaining's main purpose does not revolve around economics and is not focused on the activities of firms in the product markets. Indeed, collective bargaining, stemming from the freedom of association and serving as an integral constituent of a democratic society, is one of the fundamental human rights. Collective bargaining, at its core, is recognized, enforced and protected not merely as an economic strategy, but as an essential social right. Although it is clear that there may be substantial costs to pursuing social objectives (such as potential production inefficiencies, market barriers, or misallocation of resources), the recognition of collective bargaining actually serves the purpose of strengthening the democratic features and characteristics of a given society. In this sense, one should always keep in mind that there is no alternative to the process of collective bargaining that does not create its own social and economic costs.

To that end, although competition can be distorted and affected by the collective bargaining activities of unions, the policy choices of legislators in various jurisdictions to exempt collective bargaining from competition laws cannot be viewed as unjustified or without a cause. Indeed, the widespread exemption of collective bargaining from competition law rules is based on a solid legal and social foundation and is aimed at maximizing total societal welfare. Therefore, at the end of the day, the only remaining question is how to find the proper balance between treating collective bargaining as a labor policy priority and ameliorating the anti-competitive effects created as a result of collective bargaining activities.

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Excessive Pricing Enforcement In Dynamic Sectors: Should You Stop Reading Now?

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I. Introduction

Excessive pricing is regulated as an abuse of dominant position under Article 102(a) of the Treaty on the Functioning of the European Union ("**TFEU**"). Similarly, in Turkish competition law, even though there is no explicit regulation that specifically concerns the excessive pricing behavior of undertakings, such behavior is considered as an abuse of dominant position pursuant to Article 6 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), which prohibits abusive behavior by dominant undertakings.

It is understandable that competition authorities may wish to regulate and assess the pricing behaviors of undertakings that possess market shares approaching a monopoly in static, "old economy" markets in which there are high barriers to entry. This is because, otherwise, there is a risk that dominant undertakings, which can retain their dominant positions in a market through many decades, may be able to charge excessive prices to the detriment of consumers who do not have demand substitutability. On the other hand, interfering with the free-market dynamics due to a finding of excessive pricing

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in markets where there are no (or low) barriers to entry may harm the consumer welfare more than the high prices themselves, due to the effect of such interference on the undertakings' incentives to innovate.[1] Thus, this article aims to argue that an effort to regulate excessive pricing is both practically difficult and particularly hazardous with regards to dynamic industries. To illustrate this point, it highlights the difficulties with regards to determining whether a price can be considered excessive, particularly within the context of dynamic industries and their specific characteristics, which are different than traditional, old economy sectors. For instance, as will be explained in detail in Section IV of this article, in dynamic industries (i) fixed costs are high and marginal costs are low, (ii) the products and services exhibit network effects, (iii) rates of return are high but prolonged, and (iv) competition is dynamic. In these markets, undertakings constantly try to innovate to be able to compete with new entrants or current competitors based on the quality of their products or services. On the other hand, in old economies, (i) marginal costs may be as high as the fixed costs, the products and services do not exhibit network effects, (iii) rates of return are adjusted for risk, and (iv) firms compete with each other on the basis of offering the lowest price.

Accordingly, it is evident that these industries differ to a great extent and therefore the behavior of undertakings active in these industries, including their pricing strategies, is shaped according to different parameters. In light of the foregoing, in this article we will explain that (i) the legal tests applied in excessive pricing cases are insufficient and flawed inherently and (ii) application of these insufficient and flawed tests in dynamic sectors is even more hazardous for the reasons which will be explained below.

II. The Concept of Excessive Pricing

Even though excessive pricing is considered to be an abuse of dominant position and explicitly regulated by competition authorities, there is, perhaps surprisingly, no generally accepted definition of it in the European Union ("**EU**") or Turkish competition law lexicon. For instance, while it has been defined as "*a price which bears no relation to the "economic value" of the product supplied*"[2] by the Court of Justice ("**CJEU**"), according to

[1] David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 0416 CEMFI WORKING PAPER, Sept. 2004, at 99.

[2] United Brands Company and United Brands Continentaal BV v Commission of the European Communities, CJEU, C: 27/26, EU:C:1978:22, (Feb. 14, 1978), at para. 250.

O'Donoghue and Padilla, excessive pricing occurs when a dominant undertaking charges prices that are above the competitive pricing level.[3]

Economists, on the other hand, try to explain the term with reference to perfectly competitive market conditions. For instance, for modern economists, excessive prices are "*those which are set significantly and persistently above the competition level.*"[4] For neo-classical economists, prices are excessive if they are above the equilibrium price, which stems from and is determined by the interaction between demand and supply in a competitive market.[5] However, there are also difficulties in defining a fair price with regards to a competitive market. This is because, in a perfectly competitive market, it is assumed that resources are optimal and price is equal to the marginal cost of production.[6] In this hypothetical and perfectly competitive market, there are many undertakings which supply identical goods and services and consumers possess complete information about the product being sold and the prices charged by each undertaking.[7] In addition, all undertakings are price-takers with relatively small market shares and other undertakings may easily enter into or exit the market.[8] Consequently, in a perfectly competitive market, which only exists in an ideal world, the "competitive price" is found at the intersection of the demand and supply curves, which corresponds to the marginal cost of production.[9] Thus, undertakings do not have the power to determine or maintain prices above the marginal cost of production.

As evident from the foregoing discussion, there are many different approaches to the definition of "excessive pricing," which are all imprecise and ambiguous. In addition, some of these definitions aim to define fair pricing within the scope of a perfectly competitive market, which is generally only an ideal that does not resemble the actual markets in the real world.[10] Therefore, we recognize and take into account the fact that excessive pricing definitions that are determined according to the conditions of a perfectly competitive

[3] ROBERT O'DONOGHUE & A.JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 82 EC (2011) at 603.

[4] *Id*. at 605.

[5] *Id*. at 604.

[6] Çiğdem Ünal, *Aşırı Fiyat Kavramı ve Aşırı Fiyatlama Davranışının Rekabet Hukukundaki Yeri* [Concept of Excessive Pricing and Place of Excessive Pricing Conducts in Competition Law], REKABET KURUMU: UZMANLIK TEZLERI SERISI 123 (2009) at 4.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] O'DONOGHUE & PADILLA, *supra* note 3 at 607-608.

market are unrepresentative of actual markets, where fair price is determined according to several conditions and limitations.

In most actual markets, competition is rarely static and the undertakings active in the market need to take into consideration numerous factors for their long-run efficiency and profitability. In real markets, and especially in dynamic sectors which will be explained and discussed in detail below, factors such as high fixed costs, low marginal costs, and the need to compensate or account for risky investments all play crucial roles in determining how undertakings endure and cope with the market conditions.[11] Therefore, in actual markets, prices are generally above competitive levels, although this does not necessarily indicate, let alone prove, that such prices are unlawful or excessive.[12]

III. Legal Tests Applied for Excessive Pricing Assessments

In light of the difficulties associated with defining excessive pricing, and in order to explain and illuminate this vague concept, complex and impractical legal tests such as (i) the two-stage test, and (ii) the economic value test have been devised.

(1) The Two-Stage Test

The two-stage test was introduced by the CJEU to determine whether a price charged to consumers by the United Brands Company was excessive in the *United Brands* judgment, which is considered to be the leading case on excessive pricing.

In the *United Brands* decision, firstly, the European Commission ("**Commission**") examined the conduct of the United Brands Company in order to assess whether it had abused its dominant position in the relevant market. It was alleged that the United Brands Company had been imposing excessive prices for Chiquita bananas for its customers in Belgium, Luxembourg, Denmark, and Germany.[13] In its assessment, the Commission focused on the price differentials between several countries, and used the prices charged in Ireland as a benchmark to determine that the United Brands Company's prices in other countries were considerably higher, sometimes almost twice as high.[14] Based on this evidence, the Commission decided that the United Brands Company had imposed excessive prices in countries other than Ireland, and concluded that, since the United Brands Company could sell

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[11] I*d*. at 622-623.

[12] *Id*. at 620.

[13] United Brands Company, *supra* note 2, at para. 36.

[14] *Id*. at para. 239.

its bananas for prices that were as low as what it charged in Ireland and still turn a profit, the prices charged in other countries were excessive.[15]

However, after the United Brands Company appealed the Commission's decision, the CJEU assessed the Commission's findings and, by applying the two-stage test, annulled the Commission's decision.[16] According to the CJEU, the two-stage test involves determining "*whether the difference between the costs actually incurred and the price actually charged is excessive, and if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products*."[17] Thus, in accordance with the first limb of the test, the prices and the actual costs of the product or service should be compared. In other words, the difference between the selling price of the product or service and the actual cost of production (*i.e.*, the profit margin) should be determined. In its judgment, the CJEU held that the Commission had failed to analyze the United Brands Company's production costs, and therefore, had also failed to satisfy the first limb of the test on excessive pricing assessment.[18] If this price-cost comparison results in an excessive rate, then, as the second limb of the test, it should be determined whether the price is excessive in itself or when compared to the competing products. For this purpose, prices should be compared as follows: (i) geographically, (ii) over time, and (iii) across competitors' prices.

(i) Price-Cost Comparisons

Competition authorities have indicated that the first stage of the two-stage test, namely the price-cost comparison, is satisfied if the difference between the sale price of a product and its cost is excessive, since "*this excess (...) would disclose the amount of the profit margin*."[19] However, such a static approach often causes practical difficulties in the application of the test and leads to significant inaccuracies, as will be further discussed in Section V. For instance, in order to be able to apply a price-cost comparison, an appropriate cost measure must be determined along with what constitutes a reasonable profit margin, and determining an appropriate cost measure and a reasonable profit margin may be quite tricky and difficult in many instances, since both are dependent on a number of different factors.[20] What is reasonable to one, may

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[15] Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, NYU LAW AND ECONOMICS WORKING PAPERS (2004), at 31.

[16] United Brands Company, *supra* note 2, at para. 256.

[17] *Id*. at para. 252.

[18] *Id*. at para. 256.

[19] *Id*. at para. 250-251.

[20] O'DONOGHUE & PADILLA, *supra* note 3 at 614.

not be reasonable to another and applying these subjective criteria in order to determine whether an undertaking charges "excessive" prices will inevitably lead to inaccurate results.

Despite these difficulties, we observe that this price-cost comparison is always carried out in excessive pricing cases, and it was also applied in the seminal *British Leyland* case.[21] British Leyland was a company with a legal monopoly for issuing national certificates of conformity for vehicles in Great Britain. In the judgment, it was stated that British Leyland had charged prices for the issuance of certificates for left-hand drive cars that were six times greater than the prices for right-hand drive cars, even though the cost of inspection was almost identical for left- and right-hand drive cars.[22] Therefore, as a result of the price-cost comparison between inspections for right-hand and left-hand drive cars, the CJEU concluded that the price was excessive, since the higher prices charged for left-hand cars could not be justified by any objective reason or economic fact.

Another key example of price-cost comparisons in EU precedents is the *General Motors* decision. In this case, the Commission decided that General Motors had abused its dominant position in the market through excessive pricing, since it charged the same price for vehicle-conformity inspections of imported European vehicles as American vehicles, even though the cost of inspection for European vehicles was much lower.[23] Although the CJEU agreed that General Motors' behavior amounted to excessive pricing, it did not impose any fines on the company, on the basis that it was not common or customary for General Motors to provide vehicle-conformity inspections for imported European vehicles, and because it was only an occasional service.[24]

(ii) Geographic Comparisons

If the first limb of the two-stage test is satisfied, then the prices charged by the undertaking in different regions and at different times must be compared, along with a comparison of its competitors' prices, in order to determine whether the price is unfair in itself. This is the second limb of the two-stage test.

[21] British Leyland Public Limited Company v Commission, C: 226/84, EU:C:1986:42, (Nov. 11, 1986).

[22] *Id*. at para. 28.

[23] General Motors Continental NV v Commission of the European Communities, C:26-75, EU:C:1975:150, (Nov. 13, 1975) at para. 16.

[24] *Id.* at para. 17-18.

Both the Commission and the Turkish Competition Board ("**Board**") often apply the geographic comparison test in order to assess whether the second limb of the two-stage test is satisfied. For instance, in *United Brands*, as explained above, the price differentials between different countries were examined, and it was observed that the prices charged for bananas in Denmark were 138% higher than the prices charged in Ireland. As observed in the decision, the banana prices in Ireland (which were the lowest prices charged by the company) were used as a benchmark for the international price comparisons.[25] However, although it was argued that the United Brands Company could sell its bananas elsewhere for the low prices that it charged in Ireland, we contend that this assertion is arguably insufficient to conclude that the United Brands Company was applying excessive prices in other countries, since there may be several perfectly valid reasons for an undertaking to charge different prices in different countries.

Yet, in the *Lucazeau* case,[26] discotheque operators had argued that the musical copyright management society in France ("**SACEM**") had charged higher royalty rates compared to other Member States in the European Union. Despite SACEM's contentions, which will be analyzed in more detail below, the CJEU held that a comparison with other Member States could provide useful signs or indications regarding the possible abuse of a dominant position.[27]

The Board has taken a similar approach in its *Fuar* decision.[28] In that case, it was alleged that Congresium had charged excessive prices in its lease agreements in the market for the management of international exhibition and fairgrounds. After determining that Congresium was indeed in a dominant position in the relevant market, the Board used the two-stage test to assess whether the prices charged were excessive. Accordingly, following a price-cost comparison, the Board compared Congresium's prices with the prices of other undertakings in the market, and with prices in different geographical markets. Consequently, it held that its prices had not been consistently higher and could not be characterized as excessive pricing.

As evident both from the Commission's and the Board's decisional practice, the competition authorities tend to compare the prices of the same

[25] O'DONOGHUE & PADILLA, *supra* note 3,at 619.

[26] Lucazeau and Others v Sacem and Others, Joined C: 110/88, 241/88, 242/88, EU:C:1989:326, (July 13, 1989).

[27] *Id*. at para. 30.

[28] Turkish Competition Board Decision Ankara *Uluslararası Kongre ve Fuar İşletmeciliği Merkezi A.Ş. and GL Events Fuarcılık A.Ş.*(October 27, 2016; 16-35/604-269).

undertaking in different countries/regions or to compare the prices of other dominant undertakings in different geographical locations for the same product or service in their excessive pricing assessments.

(iii) Comparisons Over Time

In addition to the geographic comparison, the second limb of the two-stage test may also be satisfied if it is determined that the dominant undertaking increased its prices substantially over time.[29] It has been argued that such behavior constitutes proof that the dominant undertaking has the power to behave independently from competitive pressures in the market to an appreciable extent. It has also been argued that if an undertaking can behave independently from competitive pressure, it can profitably increase its prices to the detriment of consumers.[30]

(iv) Comparisons Across Competitors

The second limb of the two-stage test may also be satisfied if it's established that the dominant undertaking imposed higher prices compared to competing products or services. However, in the EU and Turkish precedents, very little guidance can be found as to how much excess would be considered as excessive pricing. For instance, in the *United Brands* decision, the CJEU asserted that the fact that the dominant undertaking's prices were 7% higher than its competitors' prices could not be regarded as an excessive price difference.[31]

(2) The Economic Value Test

It can be plausibly argued that, in an effort to determine whether a product's price is excessive, the competition authorities also choose to assess the economic value of a product compared to its costs, due to the flaws of the two-stage test. Accordingly, even if the price-cost comparison reveals high profit margins, "*the conclusion should not necessarily be drawn that the price is unfair, provided that this price has a reasonable relation to the economic value of the product/service supplied*."[32] We contend that a comparison of this type is flawed, since the economic value of a product is not always easily or

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[29] Organization for Economic Co-Operation and Development [OECD], *Excessive Prices Background Paper*, (October 2011), http://www.oecd.org/regreform/ sectors/ 49482277.pdf

[30] Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings at para. 8.

[31] United Brands Company, *supra* note 2 at para. 266.

[32] Commission Decision No. COMP/A.36.568/D3 (Scandlines Sverige AB v Port of Helsingborg) 2004, at para. 228.

straightforwardly determined. This is arguably due to the fact that the economic value of a product or service depends on many factors, some of which are not related to costs, such as demand for the product/service and its quality.[33]

Due to the clear necessity of assessing several different factors in order to determine the economic value of a product, the economic value test has been further developed in the *Port of Helsingborg* decision. While assessing the economic value of the Port of Helsingborg, the Commission considered other non-cost factors, such as substantial investment costs, the intangible value of the port itself, and the opportunity costs that were not reflected in the annual accounts.[34] The Commission also explained the relevance and importance of demand for a product or service, by stating that, "*customers are notably willing to pay more for something specific attached to the product/service that they consider more valuable. This specific feature does not necessarily imply higher production costs for the provider*."[35] This is especially true for products and services in dynamic industries, as will be further explained later in this article.

Accordingly, we observe that both the Commission and the CJEU have applied certain legal tests that were riddled with inaccuracies and various pitfalls in an effort to determine and regulate the excessive pricing behavior of undertakings.

Similar to the approach taken by competition authorities in the EU, pursuant to Article 6 of the Law No. 4054, excessive pricing practices are examined as an abuse of dominant position under Turkish competition law. Having said that, it is important to note that, in order for a particular conduct to be considered as an abuse of dominant position under Article 6 of the Law No. 4054, two cumulative conditions must be satisfied: (i) the undertaking engaged in the conduct must have a dominant position in the relevant market, and (ii) the conduct itself must be abusive in nature.[36] Since excessive pricing is acknowledged and treated as an exploitative abuse of dominant position under Article 6 of the Law No. 4054, the undertaking allegedly charging excessive prices must first be determined to be in a dominant position in the relevant product market.

Arguably, due to the substantial risks associated with penalizing excessive pricing behavior which will be explained in detail below, the Board

[33] *Id.* at para. 232.

[34] Michel Lamalle & Lenita Lindström-Rossi & Antonio Carlos Teixeira, *Two Important Rejection Decisions on Excessive Pricing in the Port Sector*, COMPETITION POLICY NEWSLETTER No. 3 (2004), at 42.

[35] Scandlines Sverige AB v Port of Helsingborg, *supra* note 32 at para. 227.

[36] Guidelines, *supra* note 30, at para. 7.

only examines and regulates the pricing behavior of an undertaking as excessive if the undertaking is a monopoly or has a market share approaching a monopoly position in the relevant product market which is protected by high and non-temporal barriers to entry.[37] Moreover, according to the Board, excessive pricing must cause and result in a direct loss in consumer welfare or hinder the undertaking's competitors' ability to compete in the relevant market, since it is considered and regulated as an exploitative abuse.[38]

We think it is likely that the Board's rationale for setting forth such strict conditions for excessive pricing is its desire to avoid interfering in the free market economy or acting as a price regulator. The existence of high and non-temporal barriers to entry is laid down as a condition for excessive pricing, because if there are no or low entry barriers in the market, there is a risk that regulating the pricing behavior of undertakings may cause a market failure, since high profit margins normally attract new entrants to the market, causing a decrease in the market prices as a result.[39]

As in the EU precedents discussed above, the Board examines several factors in its excessive pricing cases, such as the following: (i) the ratio between the cost and price of a product or service, (ii) whether the undertaking's price is excessive in itself, and (iii) the relationship between the "economic value" of the product or service and the price charged for the product or service. However, it can be reasonably argued that, unlike what we observe in the EU precedents, the Board places a greater emphasis on whether the price charged by the dominant undertaking is unfair in itself, instead of focusing on the difference between the price and the cost of the product or service. This may be due to the difficulties associated with accurately calculating production costs, as stated above.[40] Having said that, the question of

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[37] Turkish Competition Board Decision *Belko Ankara Kömür ve Asfalt İşletmeleri Sanayi ve Ticaret Ltd. Şti* (Apr. 6, 2001; 01-17/150-39); Turkish Competition Board Decision No. *Türkiye Petrol Rafineri A.Ş. (TÜPRAŞ) v Türkiye Özel Sektör Havacılık İşletmeleri Derneği* (Nov. 4, 2009; 09-52/1246-315); Turkish Competition Board Decision No. *Soda Sanayii A.Ş.* (Apr. 20,2016; 16-14/205-89 2016); Turkish Competition Board Decision No. *Ankara Uluslararası Kongre ve Fuar İşletmeciliği Merkezi A.Ş. and GL Events Fuarcılık A.Ş* (Oct. 27, 2016; 16-35/604-269).

[38] Turkish Competition Board Decision No. *Türkiye Petrol Rafineri A.Ş. (TÜPRAŞ) v Türkiye Özel Sektör Havacılık İşletmeleri Derneği* (Nov. 4, 2009; 09-52/1246-315); Turkish Competition Board Decision No. *Soda Sanayii A.Ş.* (Apr. 20,2016; 16-14/205-89 2016).

[39] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (7th ed. 2015) at 719-720.

[40] Ünal, *supra* note 6 at 68-69.

how much of a difference in these comparisons constitutes excessive pricing remains ambiguous in Turkish precedents, where the Board evaluates excessive pricing allegations on a case-by-case basis.

For instance, in the *Belko* decision,[41] in order to determine whether Belko had abused its dominant position by excessive pricing, the Board assessed the prices charged by Belko to consumers. Belko was a legal monopoly in the distribution of coal in Ankara, due to the exclusive right granted to the company by the government. Prior to the excessive pricing assessment, the Board first evaluated the market conditions, and highlighted the fact that Belko was a legal monopoly in the relevant market, since the market was strictly closed to new entrants and the elasticity of demand in the relevant market was low due to the absence of a substitutable product.[42] In its assessment, the Board compared Belko's coal prices with the coal prices charged by other undertakings in different regions in Turkey. As a result of this geographic comparison, the Board determined that Belko's prices were 50-60% higher than the prices of other undertakings in different regions.[43] In addition, the Board also examined and analyzed the production costs of Belko, and determined that, even though Belko's prices were high, its profit margins were low, due to its high production costs resulting from production inefficiencies.[44] However, after conducting a geographic comparison, the Board decided that Belko had abused its dominant position in the relevant market by charging excessive prices.

Another important excessive pricing case in Turkish competition law is the *Tüpraş* case,[45] in which the Board investigated allegations brought against Tüpraş for charging excessive prices for jet fuels. Tüpraş was considered to be a dominant undertaking in the relevant market by reference to a previous decision of the Board in which the Board had determined that Tüpraş held a dominant position in the relevant market.[46] In the case under discussion, the Board stated that Tüpraş's market share and position had not changed since its earlier decision. Similar to its evaluations in the *Belko* decision, the Board examined the market conditions before assessing whether the prices charged by Tüpraş were excessive, and declared that the market prices of jet fuels were

[41] Turkish Competition Board Decision *Belko Ankara Kömür ve Asfalt İşletmeleri Sanayi ve Ticaret Ltd. Şti* (Apr. 6, 2001; 01-17/150-39).

[42] *Id*. at 60.

[43] *Id*.

[44] *Id*. at 59.

[45] Turkish Competition Board Decision No. *Türkiye Petrol Rafineri A.Ş. (TÜPRAŞ) v Türkiye Özel Sektör Havacılık İşletmeleri Derneği* (Nov. 4, 2009; 09-52/1246-315).

[46] *Id*. at 2.

strongly correlated with raw petroleum prices.[47] In its assessment of the excessive pricing allegations, the Board first examined Tüpraş's prices over time, and determined that Tüpraş had charged higher prices during the first six months of 2009 compared to its prices in previous time periods.[48] In addition, the Board applied a price-cost comparison, and observed that jet fuel prices had increased as a result of changes with respect to its production costs, which included the increase in raw petroleum prices.[49] The Board admitted that it was quite difficult to establish an excessive pricing behavior by an undertaking and decided that, in this particular case, Tüpraş had not abused its dominant position by engaging in excessive pricing.

The *SODA* case[50] represents yet another important decision of the Board with respect to excessive pricing. SODA is a public company held under the ŞİŞECAM Group and active in the production of chemicals that are used as an input in the glass, detergent, leather, and pharmaceutical industries. In that decision, the Board evaluated the allegation that SODA had abused its dominant position by charging excessive prices to local leather producers. Accordingly, the Board evaluated the allegation that SODA was the only undertaking that produced chromium sulphate in Turkey, and held that the company was in a dominant position in the basic chromium sulphate market. In its assessment of the excessive pricing allegations, the Board conducted several comparisons in order to decide whether the prices charged to local leather producers were excessive. For instance, the Board compared the prices of SODA with its competitors' prices. In addition, the Board conducted several comparisons to determine whether SODA's prices were excessive in themselves. Accordingly, the Board compared: (i) SODA's prices with its competitors' prices, (ii) its domestic sales prices with its export prices, (iii) its domestic sales prices with its profit-margin ratios, and (iv) its export sales prices and profit-margin ratios.[51] As a result, the Board observed that SODA's prices and profit margins for domestic sales had been higher than its prices and profit margins for export sales for the last five years.[52] According to the Board, the lower profit margins in export sales were due to the higher costs of exports and to the strategic commercial decisions of the undertaking.[53] As a result of its

[47] *Id*. at 5.

[48] *Id*. at 4.

[49] *Id*. at 6.

[50] Turkish Competition Board Decision No. *Soda Sanayii A.Ş.* (Apr. 20,2016; 16-14/205-89 2016).

[51] *Id*. at 20.

[52] *Id*. at 22.

[53] *Id*. at 23.

assessment, the Board ultimately decided that SODA had not abused its dominant position through excessive pricing. In this decision, the Board once again acknowledged that, in some instances, competition authorities would be unable to determine whether the prices charged by an independent undertaking were significantly above the competitive level in the relevant market.

In light of the Board's decisions with regards to excessive pricing, it is evident that the Board applies several different legal tests to determine the excessive pricing behavior of an investigated undertaking, while also admitting that it is not always possible to assess whether the prices charged by an undertaking are excessive, even in "old economy" industries. Accordingly, it can be rationally argued that, practically speaking, it is not possible to determine whether a price is excessive in dynamic industries due to the specific nature and characteristics of such industries, as we will discuss in further detail below.

IV. The Nature of Dynamic Sectors

Despite the fact that there is no commonly accepted or explicit definition of "dynamic industries,"[54] which usually include information technology companies,[55] this concept generally refers to industries that encompass rapid technological changes and which require significant fixed costs, such as investments in intellectual property, research and development ("**R&D**") and labor. This is because undertakings usually need to invest heavily in their products until they gain brand recognition in these industries, and their work force is often well-educated, and equipped to develop the intellectual property and the know-how underlying their products.[56]

In dynamic industries, the fixed and initial costs may be significant, and some of these investments can be considered highly risky, since they may involve substantial startup losses.[57] Having said that, sometimes "*(...) the preparations for entering the market can be completed relatively fast and*

[54] Also commonly known as "new economy" industries.

[55] Although the authors are well aware of other industries which have the characteristics of dynamic industries, such as biotechnology and pharmaceuticals, this article will focus primarily on information technology industries.

[56] David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries, Innovation Policy and the Economy*, http://www.nber.org/chapters/c10784.pdf (last visited Nov. 19, 2017) at 9.

[57] O'DONOGHUE & PADILLA, *supra* note 3 at 622.

therefore such initial investment costs do not require financial power."[58] This is exemplified by the fact that some of the biggest companies active in dynamic industries have initially been start-ups which were created in college bedrooms.[59] However, a common feature in dynamic industries is that, once a company undertakes the financial risks associated with the costs of such initial set-up, investment and R&D, the marginal costs down the line are usually low(er), since it does not take much in terms of financial resources to keep such companies up and running.[60] It is also usually relatively easy for an undertaking to develop its product or expand and enhance the services or products delivered in these dynamic industries.

In addition, the undertakings in these industries usually charge prices exceeding their marginal costs.[61] Therefore, if a static price-cost comparison is applied in the context of a competition law investigation, the prevailing prices in these dynamic industries would inevitably seem excessive. In fact, it can be reasonably argued that the dynamic pricing mechanism in these industries is actually pro-competitive, since it is essentially due to the fact that undertakings in dynamic industries manage to reduce their costs significantly in the long term, as they gain more and more experience, brand value, and organizational efficiency.[62]

Although it can be argued that the sizeable initial investment amounts required to enter dynamic markets and the lengthy time-horizon and often-prolonged wait for returns may render these industries unattractive to investors and entrepreneurs, entry in to these markets is often rapid and attractive, since investments usually lead to uncommonly high returns. Thus, the competition in such dynamic markets is often fierce, and current market players are forced to innovate and develop new and better products constantly. Therefore, these dynamic sectors, as the name suggests, continually evolve and undertakings active in these sectors face relentless competition from other undertakings. It can even be argued that it is the ever-present threat of the emergence of rivals and the willingness to take risks in order to achieve high returns that creates and sustains this dynamic competition. According to some commentators, this

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[58] Turkish Competition Board Decision *Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San. ve Tic. A.Ş.* (Jun. 9, 2016; 16-20/347-156).

[59] ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW: TEXT, CASES AND MATERIALS (6th ed. 2016) at 344.

[60] Christian Ahlborn, *Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?*, 5 ECLR 156, (2001) at 159.

[61] Evans & Schmalensee, *supra* note 56 at 13.

[62] O'DONOGHUE & PADILLA, *supra* note 3 at 622.

is in fact the precise reason why competition authorities should not interfere in these dynamic sectors. That is, a dynamic market finds its balance naturally due to its particular characteristics.[63]

Due to the omnipresent threat of new entrants or rapid innovation by competitors that may render an undertaking's own products and services less desirable or even obsolete, undertakings active in these dynamic industries strive to invest in their business models and improve their products constantly. Therefore, the lifespan of a product is usually short in dynamic industries. This is because even a well-positioned, market leading undertaking active in such an industry will typically need to develop, update or revise its products in order to be able to compete with the products that are being introduced to the market by its competitors or new entrants. Consequently, in contrast to old economy sectors where competition is mainly based on price, it can be argued that, in dynamic industries, undertakings compete with their competitors and new entrants on the one hand, and earlier versions of their own products on the other.[64] Accordingly, in order to withstand and survive this relentless competition, one must innovate unceasingly in these sectors.

In fact, the competitive pressure from competitors and new entrants in dynamic industries is so substantial that it may cause an undertaking to rapidly go out of business and vanish from the market for good. Accordingly, in practical terms, it is very difficult to claim that an undertaking active in a dynamic sector can ever maintain its market position for a long time. For instance, the introduction of Apple's first iPhone hit several rival phone companies very hard and severely damaged their commercial prospects, including Blackberry, Nokia and Motorola. BlackBerry Ltd., which "*was one of the leaders in advanced phone space, releasing the BlackBerry 850 in 1999, which had email capability*" was significantly damaged by the iPhone, and "*after the disappointing response to its new Curve model and the hype around the new Apple iPhone, its share price more than halved in the second half of 2008…*"[65] Thus, according to Evans and Schmalensee, in these sectors "*market leadership may nevertheless be contestable as a result of the constant threat of drastic innovations by rivals*."[66]

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[63] Hilal Yılmaz, *Yenilik (İnovasyon) Yeni Ekonomi ve Rekabeti [Innovation New Economy and Competition in New Economy]* (2003), https://www.rekabet.gov.tr/Dosya/uzmanlik-tezleri/44-pdf at 21.

[64] Ahlborn, *supra* note 60 at 159.

[65] Aaron Hankin, *Three Companies the iPhone Killed* (June 30, 2017), http://www.investopedia.com/news/three-companies-iphone-killed/.

[66] Evans & Schmalensee, *supra* note 56 at 1.

Another key characteristic of these dynamic industries, which distinguishes them from old economy industries, is that they contain and exhibit "network effects." Simply put, the concept of "network effects" means that the value of a product is dependent upon, and rises with the number of its users. If the value of a product or service increases in tandem with an increase in the number of users, then demand-side network effects are said to exist, and if the costs associated with a service or product decrease when the number of users increases, then supply-side network effects exist.[67] Demand-side network effects usually exist for the products or services in which customers or users interact bilaterally.[68] For instance, a software program is more valuable both to the undertaking which launched it and to its users, when more users choose to use it. If the network (*i.e.*, the software program) does not have a sufficiently large user base, then it would be difficult for it to cope with the constant threat posed by its competitors and new entrants. However, in traditional, "old economy" industries, the network effects have only a limited effect on the value of the product or on the customers since "*no one enjoys Perrier more because you drink it too.*"[69] On the other hand, a computer program or messaging application becomes more and more valuable to its customers and to its owner depending on the number of people who subscribe to or use it.

Moreover, in these industries, the extent of the customers' willingness to pay for a certain product changes rapidly due to these network effects. The more people use a certain product, the more valuable it becomes to its consumers, which affects their willingness to pay, and thus influences the pricing strategy of the producing undertakings. Therefore, the pricing strategy of an undertaking active in a dynamic sector is more dependent on this rapid change in its customers' payment preferences and price elasticity. On the other hand, even though the prices are determined by the level of the customers' willingness to pay in the traditional, "old economy" sectors as well, such willingness does not depend on the network effects as much as it does in the dynamic sectors. Thus, the prices in the traditional sectors are determined mainly according to the production costs and other factors, rather than the rapid change in customers' willingness to pay a certain amount of money for a particular product. Therefore, it is evident that the pricing motivation of the undertakings in dynamic sectors is different than the equivalent pricing motivation of undertakings in traditional, "old economy" sectors.

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[67] Yılmaz, *supra* note 63 at 23.

[68] *Id*. at 25.

[69] Ahlborn, *supra* note 60 at 159.

Thus, it is also clearly observed that these dynamic industries differ greatly from traditional and static sectors (such as steel, automotive, aluminum, etc.), where physical products are produced, competition depends primarily on the product's price, quality and service, and network effects are low.[70]

Accordingly, it can be plausibly argued that traditional and static methods of both economic analysis and antitrust analysis may fall short and be inadequate for determining anti-competitive behavior in dynamic industries, especially when it comes to excessive pricing allegations.

V. Practical Difficulties in Applying the Tests

In both traditional and dynamic industries, it is generally quite difficult to determine exactly which competitive level must be used in assessing whether a price is excessive. This is primarily due to the fact that, in addition to the complexity of defining what constitutes an excessive price, there are also difficulties that stem from the impracticality of applying the legal tests outlined in Section III to concrete, real-world situations.

The difficulty arises mainly because these tests depend heavily on some basic assumptions, as explained in detail above in Section III, which are not suitable or applicable to dynamic industries due to their unique characteristics.[71] Furthermore, some commentators have argued that these tests are imprecise and vague, which makes them inapplicable in practice.[72] Therefore, it is generally difficult to obtain accurate and useful results from applying these various legal tests with respect to excessive pricing.

In both traditional and dynamic markets, whether or not a price is actually excessive remains the central question with regards to excessive pricing allegations. Accordingly, as evident from both the precedents of the Board and the EU, competition authorities tend to apply these various legal tests in order to determine whether an undertaking's prices are excessive when evaluating excessive pricing allegations. However, as some commentators have observed, "*there is no well-specified standard of application.*"[73]

It can be argued that the two-stage test, which aims to compare the price of a product or service with its costs, and then examine whether the price is excessive in itself, is highly inadequate for this purpose. The first and foremost difficulty in applying this test is that it requires the determination of a cost

[70] Yılmaz, *supra* note 63 at 29.

[71] Ariel Ezrachi, *Sponge*, WORKING PAPER CCLP (L) 42, https://www.law.ox.ac.uk/sites/files/oxlaw/cclpl42.pdf (last visited Feb. 3d, 2018) at 20.

[72] O'DONOGHUE & PADILLA, *supra* note 3 at 621.

[73] *Id.* at 614.

measure, because accurately assessing the underlying cost structure of an undertaking in order to establish the competitive price is difficult.[74] This is because a price-cost comparison necessitates the identification and measurement of the incremental cost of production, which is generally difficult to accomplish, as explained above in Section III.[75] Therefore, it is usually tricky and problematical for companies to allocate costs between various products, and there is no unique or foolproof way of accomplishing this task or carrying out such an exercise for the purposes of an excessive pricing test.[76]

The application of these tests in dynamic industries creates additional difficulties. For instance, as explained in detail throughout this article, fixed costs are generally high and marginal costs are relatively low in dynamic industries. Due to this specific feature of dynamic industries, it is usually natural (and expected) for undertakings in dynamic industries to have high price-cost margins.[77] It can even be argued that such high profit margins are a regular and common feature of sectors that are characterized by their long-term capital costs and the importance of intellectual property to their businesses, which is the case in dynamic sectors.[78]

Considering these elevated capital costs and low marginal costs, if undertakings in dynamic markets are forced to charge prices equal to their marginal costs, then it would be very difficult for them to recover their past investments in their businesses, including their initial investments, which can be extremely high in some instances. Therefore, it is quite natural that these undertakings choose to price their products and services above their marginal costs—up to a level which their customers are willing to pay—in order to be able to continue operating and to avoid incurring losses. In fact, the Commission has already acknowledged, in its *Port of Helsingborg* decision, that undertakings do not only consider their production costs when determining their prices and that they may charge higher prices in order to account for and recoup their initial investments.[79]

Due to the reasons outlined above, it is only natural that the prices charged in dynamic industries seem excessive when a static price-cost comparison test is applied. Considering the high rates of return and low

[74] ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES, (4th ed. 2014) at 245.

[75] WHISH &BAILEY, *supra* note 39 at 719.

[76] O'DONOGHUE & PADILLA, *supra* note 3 at 614.

[77] *Id.* at 607.

[78] *Id*. at 620.

[79] Scandlines Sverige AB v Port of Helsingborg, *supra* note *32,* at para. 224.

marginal costs in such industries, profits would appear to be excessive if prices were compared only with marginal costs.[80] Moreover, as seen in the Commission's and the Board's precedents, it is not even clear what kind of costs should be included and what the appropriate measure of costs might be when making such a price-cost comparison, as explained in Section III of this article. Therefore, as some scholars have argued, it can even be asserted that competition authorities do not possess the resources or the know-how to conduct such price-cost analyses, which generally require complex formulations. In fact, according to O'Donoghue and Padilla, "*even regulators with sector-specific knowledge, staff accountants and detailed information, often struggle to undertake exercises of this kind*."[81] Therefore, it is difficult to identify a competitive price by mere reference to cost in dynamic industries.[82]

In addition to the foregoing, it is also quite difficult to apply the second limb of the two-stage test in dynamic industries, which includes price comparisons across competitors, geographical regions and different time periods, in order to determine whether the price is excessive in itself. Using a flawed or inaccurate benchmark leads to the risk of obtaining an inaccurate view of the market and reaching the erroneous conclusion that the prices charged are excessive. Since establishing an accurate benchmark is almost always unfeasible (and perhaps impossible) in dynamic markets, it can be said that applying these flawed tests with the goal of obtaining accurate and reliable results is only an illusion.

Firstly, where an undertaking's prices are compared with its competitors' prices, it is unclear and hard to determine which products and which competitors must be taken into account. Arguably, for a comparison of this kind to be useful, the products compared must be analogous, and since that is not feasible or even possible in most real-world instances, the test falls far short of offering reliable results. This is because it is practically and realistically impossible to compare analogous products of competitors in dynamic industries, since different undertakings' products are inherently equipped with different functions, specifications, and distinctive brand perceptions in almost all cases. Due to this unique characteristic of dynamic sectors, comparing the prices of, say, an iPhone 8 with a Samsung Note 8, just because Apple and Samsung are competitors in the market for smartphones, will not yield healthy or useful results.

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[80] Ahlborn, *supra* note 60 at 164.

[81] O'DONOGHUE & PADILLA, *supra* note 3 at 621.

[82] EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES, *supra* note 74 at 245.

Secondly, when an undertaking's prices for its products are compared over different time periods, there is a significant risk that changes in prices due to legitimate reasons may be overlooked or brushed aside. This is especially the case in dynamic industries, since undertakings usually charge prices (i) to account for their capital costs (particularly startup costs), and (ii) in accordance with their customers' preferences, which can change rapidly due to the network effects that these industries exhibit, as explained in detail throughout this article. Therefore, it is only natural that undertakings active in dynamic industries change their pricing policy in line with their customers' behavior and expectations. In addition, since dynamic sectors inherently embrace and are characterized by constant innovation and R&D, undertakings may change their pricing policies at certain times as a result of significant improvements to their products or services, which stem from their continuous innovation and R&D activities.

Thirdly, comparing prices charged by undertakings in different geographic markets can also often lead to inaccurate and misleading results, since different laws and regulatory rules are applied to their activities in different geographic regions. Even the CJEU, in its *United Brands* judgment, acknowledged that across different countries or regions, price changes may arise due to various factors, including differences between market conditions, transportation costs, taxation systems, customs duties, the wages of the labor force, countervailing buyer power of the consumers, demand elasticity, or brand recognition of the product or service.[83] For instance, in the *Lucazeau* judgment,[84] SACEM argued that it would not be possible to compare the royalty fees charged to discotheque operators in France with the royalty fees charged in other Member States, mainly because the royalty fees in France were calculated based on the turnover of the discotheque, whereas, in other countries, they were calculated based on the floor area of the discotheque.[85] Accordingly, it is not realistic or logical to expect an undertaking to charge the same or similar prices in several different regions or countries, and it should be recognized and accepted that "*a dominant firm is not obliged to adopt uniform pricing in each Member State.*"[86]

Furthermore, when conducting such geographic price comparisons, a problem inevitably arises as to determining which countries' prices must be used as the benchmark for the comparison. If the prices in the benchmark

[83] United Brands Company, *supra* note 2 at para. 228.

[84] Lucazeau, *supra* note 26.

[85] *Id*. at para. 23.

[86] United Brands Company, *supra* note 2 at para. 228.

country are relatively high or low (compared to the other countries or regions subject to the comparison), this may lead to an inaccurate and misleading picture, where the prices charged in a certain country may seem excessive or predatory.[87] For instance, in the *United Brands* judgment, the prices charged in Ireland were used as a benchmark in the comparison of banana prices charged by the United Brands Company in various geographic regions. Such a comparison inevitably resulted in a somewhat distorted picture of the market, where the price differences in Ireland (which had the lowest prices) and Denmark (which had the highest prices) were seen as extreme (*i.e.*, 138%) and the prices in Denmark hence appeared to be excessive or predatory.[88]

Therefore, if the chosen indicator or benchmark is deficient in itself, then such geographic comparisons could result in flawed, inaccurate and, in fact, erroneous conclusions and lead competition authorities to conclude that the prices charged by an undertaking are excessive. In addition, even if it is assumed that the selected benchmark for a geographic comparison is accurate in a particular case, it would nevertheless be extremely impractical and unrealistic to expect a dominant undertaking to apply the same prices in all regions and geographies, which have different rules, regulations, and clientele.[89] Accordingly, it can easily be observed that this second limb of the two-stage test is highly subjective, and thus removes legal certainty and predictability for undertakings that are active in dynamic industries.

Even if we assume, for the sake of argument, that the price of a particular product or service is excessive, according to the precedents of the Board and the Commission, it should also be proven that the price bears no relation to the economic value of the product before considering sanctions for excessive pricing. Accordingly, when evaluating whether a price charged is excessive in itself, the relationship between the price charged and the "economic value" of the product should be carefully assessed.[90] However, it can be argued that determining the economic value of a product through these tests is also imprudent and ill-advised and falls short of achieving its stated purpose, particularly since it is not at all clear what the "economic value" of a product consists of, especially with regards to dynamic industries.

For instance, as explained above in detail, network effects play a major role in determining the value of products or services in dynamic industries. Therefore, considering that "*customers are notably willing to pay more for*

[87] O'DONOGHUE & PADILLA, *supra* note 3 at 619.

[88] United Brands Company, *supra* note 2 at para. 213.

[89] O'DONOGHUE & PADILLA, *supra* note 3 at 622.

[90] *Id*. at 612.

something specific attached to the product/service that they consider more valuable,"[91] it can almost always be plausibly argued that the price of a product has a reasonable relationship to its economic value in dynamic industries. This fact alone indicates that the application of the economic value test to products and services in dynamic sectors is ineffective, and renders the use of this test null and void for its intended purpose. In these dynamic industries, an undertaking may employ marketing and sales strategies in order to charge higher prices for its products than its competitors, due to its brand value, consumer demand and the higher quality of its products. Accordingly, simply comparing the cost of a product with its economic value will be inadequate and insufficient to prove that a price is excessive in itself.[92] Therefore, these faulty legal tests carry the serious risk of leading to inaccurate and misleading economic analyses.

In addition, as rightfully argued by Whish, "*a legal rule condemning exploitative pricing needs to be cast in sufficiently precise terms to enable a firm to know on which side of legality it stands*."[93] In dynamic industries, which are the engines of innovation and advanced technology in the modern economy, using these subjective tests to resolve excessive pricing allegations is even more hazardous, since such tests remove legal certainty to a great extent, and may result in innovative undertakings being found guilty of violations of competition law rules. Consequently, undertakings that are active in dynamic sectors may refrain from innovating or may cut back on developing their products, due to the understandable fear of facing excessive pricing allegations and having their pricing policies subjected to various legal tests, which are not even equipped to reflect and take into account the particular nature of their sectors.

In conclusion, the legal tests that are used by competition authorities to determine excessive pricing are vague, subjective and inadequate to the task, since they are based on short-term considerations and compel undertakings to "*ensure that, any given point in time, the margin between cost and price is not too great*."[94] In dynamic industries, therefore, the application of these tests is far from sufficient, accurate, or definitive. It can even be argued that it is not possible to devise any test which would accurately determine that an undertaking charges excessive prices in a dynamic industry, which is an argument that we will take up in the next section.

[91] Scandlines Sverige AB v Port of Helsingborg, *supra* note 32 at para. 227.

[92] United Brands Company, *supra* note 2 at para. 250.

[93] WHISH & BAILEY, *supra* note 39 at 718.

[94] O'DONOGHUE & PADILLA, *supra* note 3 at 622.

VI. Are Excessive Pricing Allegations Absurd with Regards to Dynamic Industries?

It is considered that, through excessive pricing, a dominant undertaking uses its position to "*reap trading benefits that it would not have reaped if there had been normal and sufficient effective competition*."[95] Therefore, excessive pricing allegations can only be put forward against dominant undertakings, since their behavior may directly result in a loss of consumer welfare and harm their customers. Moreover, the determination of the market power of an investigated undertaking, in and of itself, is essential when it comes to assessing excessive pricing. However, in dynamic industries, it is extremely difficult to determine a market share close to a monopoly. This is because, as will be explained below in detail, such a determination can only be made after considering all the characteristics of the market and whether there are legal barriers to entry. In other words, "*just because Google is many people's go-to online search engine does not mean that the company has market power - and that the same applies for Amazon in online shopping*."[96]

Dominant position is usually defined as market power enabling an undertaking to apply prices "*above the competitive level over a significant period of time*."[97] Pursuant to Articles 10 and 11 of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines on Dominant Position**"), when assessing dominant position, what is examined in principle is the extent to which an undertaking can act independently of competitive pressures in the relevant market and the position of the undertaking in the relevant market is primarily indicated by its market share.

In order to assess dominant position and determine the market share of an undertaking, a relevant product market must first be defined. Then, the market share of the undertaking is determined by making mathematical calculations based on the undertaking's sales figures in the relevant market.[98] High market shares generally indicate and account for high market power. For instance, in energy sectors, where there are usually natural and legal barriers to entry and price competition is of paramount importance, high market shares may constitute strong evidence of a dominant undertaking. Such undertakings may retain their dominant market positions for decades, since an undertaking

[95] United Brands Company, *supra* note 2 at para. 249.

[96] Charles McConnell, *Google and Amazon lack market power, says FTC economist,* (Jan. 26 2018) https://globalcompetitionreview.com/article/usa/1153117/google-and-amazon-lack-market-power-says-ftc-economist at 1.

[97] JONES & SUFRIN, *supra* note 59 at 346.

[98] Ahlborn, *supra* note 60 at 161.

wishing to enter into such a market must invest heavily in tangible assets, licenses, equipment, and manpower. Accordingly, in such traditional industries, competition with direct competitors is limited, and unlike in dynamic industries, the risk of ruin is much more negligible.

Having said that, even in traditional industries, a strict "market definition-market share" analysis may lead to inaccurate and misleading conclusions with respect to determining a dominant position, since it is important, in all industries, to assess the dynamics of the market as a whole. Accordingly, when evaluating the dominant position of an undertaking, numerous factors, such as the structure of the market, entry barriers, switching costs for consumers, and the undertakings' ability to act independently from the countervailing buyer power of its consumers[99] must be assessed in line with Article 10 of the Guidelines on Dominant Position.

For instance, in the *Tüpraş* decision, the Board stated that, although Tüpraş was the only refinery in Turkey, there were no legal entry barriers for petroleum product importation, and several undertakings were, in fact, importing petroleum products to Turkey. Therefore, despite the fact that the imports were not at a level that would threaten Tüpraş's dominant position in the relevant market, the Board held that the market structure showed that Tüpraş was not a legal or natural monopoly in the jet-fuel supply market. This decision clearly demonstrates how difficult it would be to accurately determine the market share of a "monopoly" in dynamic industries since, in this case, despite the fact that Tüpraş was the only refinery operating in Turkey, after carefully considering all the features and specific characteristics of the market, the Board refrained from finding that Tüpraş was a monopoly in the relevant market.

Thus, it is evident that the conditions and dynamics of the relevant market must be assessed in evaluating the dominant position of an undertaking and its pricing behavior, and the particular conditions of the relevant market take on even more importance in dynamic sectors. Therefore, it can be argued that a static market share analysis conducted by competition authorities is even more detrimental and misleading in dynamic industries, due to their nature and

[99] Turkish Competition Board Decision *Doğan Yayın Holding A.Ş., Hürriyet Gazetecilik ve Matbaacılık A.Ş., Doğan Gazetecilik A.Ş., Bağımsız Gazeteciler Yayıncılık A.Ş., Doğan Daily Nevs Gazetecilik ve Matbaacılık A.Ş. v Habertürk Gazetecilik ve Matbaacılık A.Ş.* (Mar. 30, 2011; 11-18/341-103); Turkish Competition Board Decision *Turkcell İletişim Hizmetleri A.Ş.* Jun. 6, 2011; 11-34/742-230) ; Turkish Competition Board Decision *Opak Lens San. ve Tic. Ltd. Şti.* (Aug. 13, 2013; 13-47/639-278).

their unique features.[100] An examination of market conditions that reaches beyond mere sales figures and an evaluation of the specific conditions in the relevant market are even more crucial in these dynamic industries. This is because, if a static market definition is adopted in a dynamic sector, it could erroneously lead the competition authorities to defining the market too narrowly, and thus assessing higher market shares than is warranted by the facts, or even cause them to mistakenly conclude that an undertaking is dominant.[101]

For instance, as some commentators have argued, the SNIPP test,[102] which is a static test that is used to define the relevant product market by economists, is also not useful or suitable in dynamic industries. This is mainly because the SNIPP test assumes that: (i) the products are homogenous, and (ii) competitors compete through prices. Accordingly, it is clear that the SNIPP test is inapplicable in dynamic industries, where undertakings compete with their competitors on the basis of their products (which depend on innovation and R&D), rather than on the basis of price. In other words, performance competition is more important than price competition in these industries.[103] Therefore, in dynamic industries, the current and potential threats to the position of an investigated undertaking must also be assessed,[104] which "*may be difficult to capture and predict through static analysis.*"[105] Accordingly, as Corley rightfully argues, "*in markets where products change rapidly, general economic analysis will not be sufficient to determine the relevant product market*"[106] and, therefore, to assess a position of dominance.

Furthermore, we contend that an excessive pricing allegation should only be evaluated when the undertaking in question not only has a market share close to a monopoly in the relevant product market, but also when there are high permanent barriers to entry. For instance, in the *National Cad* decision,[107] while evaluating whether National Cad had abused its dominant position through excessive pricing, the Board stated that (i) National Cad was not

[100] Evans & Schmalensee, *supra* note 56 at 16.

[101] Yılmaz, *supra* note 63 at 36.

[102] SSNIP: Small but Significant and Non-transitory Increase in Price.

[103] Yılmaz, *supra* note 63 at 38.

[104] Evans & Schmalensee, *supra* note 56, at 18.

[105] Ezrachi, *Sponge*, supra note 71 at 20.

[106] Yılmaz, *supra* note 63 at 44.

[107] Turkish Competition Board Decision *Ulusal Cad ve GIS Çözümleri Mühendislik Bilgisayar Eğt. Tic. A.Ş., Netcad Yazılım Bilgisayar Eğitim Hizmetleri Proje Mühendislik Ticaret A.Ş., Ak Mühendislik Bilgisayar Ticaret Ltd. Şti.* (May 5, 2012; 12-25/729-209).

enjoying a dominant position due to high entry barriers, (ii) customers could switch to alternative software products for lower prices, (iii) customer preferences did not constitute high barriers to entry, and (iv) accordingly, the price difference between National Cad's product and its competitors' products did not amount to excessive pricing.

In light of this decision, and considering that dynamic industries inherently lack high barriers to entry, we observe that it is practically very difficult to condemn an undertaking's pricing behavior as excessive in a dynamic market. Although there may be high initial costs related to setting up the physical infrastructure which is followed by marketing expenses for creating customer loyalty and brand recognition, it can convincingly be argued that these initial costs do not constitute barriers to entry due to the high rate of returns in such markets.

Low marginal costs, high returns, and the fact that there are no barriers to entry are strong incentives for new players to enter dynamic sectors, and therefore, there is a constant threat of competitor entry in dynamic markets. Accordingly, the market power of an undertaking active in a dynamic sector invariably fluctuates.[108] Thus, even if it is assumed for a moment that an undertaking is in a dominant position in its market at a certain point in time, such a position is unsteady and likely to be short-lived. Even though the undertakings may seem persistent, their position in the market may change over a short period of time, as was demonstrated in the case of Blackberry. In other words, in the context of dynamic industries, an undertaking may be dominant one day and not dominant the next, due to the nature and characteristics of such industries, as explained earlier in Section IV. Therefore, we argue that an undertaking's dominant position is always fragile in dynamic industries,[109] and although not specifically with reference to excessive pricing cases, there are instances where even the Board has admitted such fragility.

For instance, in its *Akakce.com* decision,[110] the Board evaluated allegations that Akakce.com (a Turkish online comparison shopping portal) had abused its dominant position in the "price searching/comparison engine markets." While concluding that the investigated undertaking was not in a dominant position, the Board emphasized that internet has a dynamic structure and that the market players in this sector could face swift rises or declines in

[108] JONES & SUFRIN, *supra* note 59 at 345.

[109] *Id.* at 345.

[110] Turkish Competition Board Decision *Kasım Koray Karataş- (Akakce.com)* (Mar. 8, 2012; 12-10/327-97).

their market shares (*i.e.*, their fortunes could change in short periods of time) and that brand recognition and reputations could change rapidly.[111]

Similarly, in the *THY* decision,[112] it was alleged that Turkish Airlines ("**THY**") was in a dominant position in the market for Istanbul-based domestic and international flight routes and in the scheduled passenger carriage market. It was also alleged that THY had abused its dominant position by preventing one of its competitors, Pegasus, from entering into new flight routes and by applying special prices in flight routes in which Pegasus already had operations, in an effort to undercut Pegasus' prices and obstruct Pegasus' commercial activities. The Board suggested that, if THY had actually abused its dominant position, Pegasus should have encountered difficulties in their activities and suffered a decrease in its market share. However, the Board emphasized that the exact opposite had happened in the relevant market, and that Pegasus had actually increased its market share. Therefore, the Board ultimately held that THY had not violated Article 6 of the Law No. 4054.

In addition to the points mentioned above, it is worth noting that it is also hard to assess demand and supply substitution in dynamic industries, generally due to the existence of network effects and the countervailing buyer power of the consumers. Therefore, it is difficult for competition authorities to determine whether an undertaking holds a dominant position in the relevant market or evaluate the impact of an undertaking's pricing behavior on the consumer welfare accurately. This is usually because "*in industries exhibiting strong network effects [such as dynamic markets], consumer demand depends critically on expectations about future purchases.*"[113] Therefore, it is generally difficult to understand and assess how consumers will behave in the future,[114] since even the undertakings themselves usually do not know how their customers will react to certain marketing and pricing strategies. Coupled with the fact that dynamic industries generally comprise products with highly technical features and attributes, we submit that it is extremely difficult for economists, lawyers and judges (who do not possess the necessary technical expertise) to determine whether demand substitution exists in these industries.[115]

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[111] *Id*. at 3.

[112] Turkish Competition Board Decision *Türk Hava Yolları A.O. v Pegasus Hava Taşımacılığı A.Ş.* (Dec. 25, 2014; 14-54/932-420) at para. 180.

[113] Commission Decision No. COMP/C-3/37.792 (Microsoft) 2004 at para. 438.

[114] Ezrachi, Sponge, *supra* note 71 at 20.

[115] Yılmaz, *supra* note 63 at 39.

It is also a difficult and complicated task to assess the effects of undertakings' behavior on both total welfare and consumer welfare, even though increasing welfare is arguably the main purpose of competition law rules, rather than increasing competition itself. Although it is generally accepted that increasing consumer welfare is the fundamental goal of competition law rules,[116] it can also be argued that the protection of economic and total welfare, economic effectiveness, and the competitive process are also key purposes of competition law.[117] Economic welfare is achieved when "*the consumer surplus and the producer surplus are pulled to the maximum limit*"[118] through effective distribution, production and dynamics. Therefore, in light of the emergence of these new dynamic industries and their rapid growth in recent years, we assert that competition authorities must place sufficient importance on preserving dynamic efficiency, rather than focusing solely on effective distribution and production. Having said that, commentators have also observed that the Commission and the Board usually "*place a greater value on short-run allocative and productive efficiency than on long-run dynamic efficiency*."[119] However, if a static approach is adopted, and a pure effective distribution and production analysis is conducted in dynamic sectors, the primary purpose of competition law rules could not be served, whether that purpose is defined as a rise in consumer welfare or increasing total and economic welfare.

On the contrary, the application of such a static approach could even lead to a decline in both economic welfare and consumer welfare. In dynamic industries, it is hard to ascertain a decline in the consumer welfare merely because prices are high, since the customers in these industries have high countervailing buyer power. Furthermore, consumer welfare is not dependent solely on low prices, and it may certainly increase through innovation in dynamic industries. Accordingly, if the competition authorities interfere with the pricing behavior of undertakings in dynamic industries, potential new entrants may lose their incentives and motivation for entering such markets, which may in turn prevent consumers from accessing different, original and innovative products and services. This could in itself result in a decline in consumer welfare. We acknowledge that, in a market where there are high

[116] WHISH & BAILEY, *supra* note 39 at 19.

[117] *Id*. at 20.

[118] GÖNENÇ GÜRKAYNAK, TÜRK REKABET HUKUKU UYGULAMASI İÇİN "HUKUK VE İKTİSAT PERSPEKTİFİNDEN "AMAÇ" TARTIŞMASI (2003), http://www.rekabet.gov.tr/Dosya/akademik-calismalar/14-pdf (last visited Nov. 18, 2017) at 24.

[119] O'DONOGHUE & PADILLA, *supra* note 3 at 622.

barriers to entry, the application of excessive prices by undertakings which have monopoly market shares may indeed result in a decline in consumer welfare. However, in dynamic sectors, where there are no barriers to entry, interfering with the pricing behavior of undertakings (which does not result in a decline in consumer welfare) would be contrary to the fundamental purpose of competition law in and of itself.

In addition, penalizing undertakings for their pricing behavior in dynamic sectors may seem counterproductive and discouraging, as undertakings would be punished for a fragile market power that they can only gain through constant innovation and investment.[120] Unfortunately, this may lead to a decline in producer welfare as well. Consequently, such interference may result in the decline of both consumer and economic welfare. Therefore, in light of the foregoing arguments, we conclude that even the allegation of excessive pricing with regards to dynamic industries is absurd and contrary to the central purpose of competition law.

VI. Conclusion

We certainly agree that, for the enhancement of both economic and consumer welfare, effective competition must be maintained both in the traditional "old economy" and in dynamic "new economy" industries. Accordingly, the excessive pricing practices of monopolist undertakings in markets where there are high barriers to entry should be carefully examined and prohibited by the competition authorities where appropriate.

To achieve this purpose, and with an aim of preventing significant harm to consumers, competition authorities have created various legal tests to determine whether a price charged by a dominant undertaking is excessive. However, in dynamic industries, simply due to their unique characteristics and rather complex nature, all these tests and analyses become futile, and "*naturally, these models do not portray facts, but predict an outcome based on partial resemblance to the market*".[121] Accordingly, it can even be said that, "*the disparity between the court's capacity and economic complexity increases the likelihood for mistakes and error costs*"[122], all the more so in dynamic sectors.

Furthermore, interfering with undertakings' pricing practices in dynamic sectors is even more risky than interference in old economy industries, due to the high rates of return and the constant innovation offered in such dynamic

[120] *Id.* at 625.

[121] Ezrachi, Sponge, *supra* note 71 at 20.

[122] *Id.* at 20-21.

sectors. If the independent pricing behaviors of undertakings that are active in dynamic industries are closely and unfairly scrutinized by competition authorities, there is a risk that "*innovators who succeed in the marketplace will often face all sorts of complaint for anticompetitive behavior*."[123]

In light of these complaints, and in an effort to determine whether the prices charged by a dominant undertaking are excessive, competition authorities will inevitably apply legal tests that are mainly based on several comparisons (such as geographic, among competitors, and over time). Thus, the prices of the undertaking subject to the complaint will inevitably seem excessive in a dynamic sector, mainly due to the particular features and nature of dynamic sectors. Consequently, the investigated undertaking may risk facing huge fines on the basis of a violation of Article 102(a) of the TFEU or of Article 6 of the Law No. 4054, which can hinder its willingness to innovate, develop its products or offer better services to consumers for slightly higher prices. This regulatory approach can also pose a significant challenge and be a source of discouragement for potential new entrants into the market. Therefore, since it is important for competition authorities to only punish behavior that is proved to be to the detriment of consumers,[124] we contend that interference by the competition authorities based on vague legal tests may harm consumers more than high prices, due to the risks associated with such interference.

Accordingly, and in line with the main aim of competition law, which is enhancing total economic welfare, undertakings must be allowed to determine a pricing strategy that enables them to obtain sufficient returns on their investments. Since it is not practically possible in dynamic sectors to determine whether an undertaking is dominant and whether the prices charged by an undertaking are excessive, we contend that interference with prices in dynamic sectors by competition authorities must not be uncritically welcomed, in light of the rapid innovation and numerous welfare enhancements offered by firms in these industries. For the sake of both consumers and economic welfare, competition law authorities would be well advised to tread lightly when it comes to assessing or punishing excessive pricing in dynamic markets.¤

[123] Ahlborn, *supra* note 60 at 167.

[124] *Id*.

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The Relationship between Trade Policy and Competition Policy: The Interface Between Predatory Pricing and Anti-Dumping Regulations

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1. Introduction

The regulatory framework of international trade and competition policies are ultimately interrelated, regardless of their differing objectives or underlying rationales. The globalization of the market economies and the blooming of international trade in recent years have further cemented the relationship between domestic competition legislations and international policies directed towards the prevention of unfair competition in imports, such as anti-dumping measures.

The intersection of the two practices has been examined before, and, in light of the complex and multifaceted nature of the topic, there is understandably much room for controversy. For example, some commentators have questioned whether there is even a need for separate anti-dumping regulations when competition laws and regulations may serve to fulfill the same role, while others have claimed that the two practices should be better aligned. Regardless, there are observable similarities and differences between the two policies that are worth examining in detail.

This article will revolve around and try to illuminate the theoretical framework of competition and anti-dumping policies. In this regard, following the general overview provided in the next section, the third section will

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encompass a comprehensive discussion concerning the interaction between trade and competition policies. In this regard, an in-depth analysis on the interaction of the two policies will be provided with a focus on the similarities and differences between the doctrine concerning domestic price discrimination (*i.e.*, predatory pricing) and price discrimination in international trade (*i.e.*, dumping) The final section will include discussions on the potential policy options for interaction between competition and anti-dumping policies in light of the options suggested by different commentators. The article will conclude with our final remarks.

2. Brief Background on Competition and Trade Policies

In the second half of the 20th century, the liberalization of commercial policies gained speed and ultimately culminated in a significant worldwide acceleration. This trend of global liberalization arose primarily from the increase in trade between nations in the relatively settled, stable and peaceful international atmosphere following the conclusion of the two world wars. Indeed, war-torn countries throughout the world sought to resurrect their heavily damaged economies largely by engaging in extensive international trading. At the same time, developing countries with different social, political and economic backgrounds all set their sights on participating more actively in the globalizing trade environment. Indeed, it can be said that full participation in the globalized modern economy through extensive trade became the common and overarching goal of most developing countries. The combination of all these motives led to a significant increase in the volume of commercial interactions between countries, which naturally gave rise to the critical need for a legal framework that would serve to unite, synchronize and regulate the activities of various participants in international trade and, consequently, revealed the necessity of more contemporary trade policies.

As a result, the General Agreement on Tariffs and Trade ("***GATT***"), signed initially by 23 countries in 1947, was substantially revised in 1994. GATT's overall goal and primary purpose was to promote international trade by reducing or eliminating barriers to trade, such as tariffs or quotas. The preamble to GATT indicates that it was directed towards the "*substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.*"[1] GATT consisted of multiple rounds of negotiations[2] between the participating countries, which are

[1] Preamble to the General Agreement on Tariffs and Trade, Apr. 15, 1994, Paragraph 4, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/preamble_e.pdf.

[2] Such as the Kennedy Round, the Tokyo Round, the Uruguay Round, and the Doha Round.

still ongoing today. The negotiations started off with the spotlight on the issue of the reduction of tariffs. Anti-dumping, along with other trade barriers, became a primary concern and topic of discussion in the mid-1960s.[3]

GATT would later shapeshift into an intergovernmental organization, known as the World Trade Organization ("***WTO***"), which was established in 1995 to deal with, implement and regulate the global rules of trade between nations. WTO sought to establish a unified regulatory structure for the participant countries that included a framework for negotiating trade agreements, as well as a dispute resolution process. Most of the WTO's focus has remained on the issues raised during previous trade negotiations, especially in the Uruguay Round (1986–1994).

One of the most prominent and significant outcomes of the Uruguay Round was the Agreement on Implementation of Article VI of the GATT 1994, also known as the "***Anti-Dumping Agreement.***"[4] The Anti-Dumping Agreement includes detailed provisions regarding the determination of dumping and the criteria for implementing measures. On the other hand, each member state also has its own domestic anti-dumping provisions, covering the principles and procedures of anti-dumping measures.

Competition laws, which can similarly be traced back to the period of economic liberalization in late 19th century (starting with the enactment of the Sherman Antitrust Act[5] in the United States), are more established in terms of theory, legislation, interpretation and practice.

The main aims of competition policy include: (i) promoting competition to ensure technological innovation, which stimulates dynamic efficiency in various markets, and (ii) fostering effective price competition between suppliers.

The interaction between competition policy and international trade is seen as one of the "new trade issues," which should be considered by WTO member countries at an international level and taken into account in their negotiations and in the implementation of their agreements.[6] Indeed, there is a rising concern among commentators and in some participating countries about

[3] The GATT Years: From Havana to Marrakesh, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htmZ (last visited Jan. 8, 2018).

[4] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994.

[5] 26 Stat. 209, 15 U.S.C. §§ 1–7.

[6] Bernard M. Hoekman & Peter Holmes, *Competition Policy, Developing Countries and the WTO*, WORLD ECONOMY, 1999, at 1.

the potential anti-competitive effects of anti-dumping measures. This apprehension has mostly emerged from the view that anti-dumping measures, when used as a trade policy instrument, are at odds with the fundamental objectives of competition policy. The relationship between trade and competition policy is highly complicated, due to the overlapping effects of these multifaceted policies. In the next section, we will attempt to shed some light on the interaction between the two policies.

3. Interaction between Competition and Trade Policies

Trade and competition policies aim to provide an incentive for market participants to increase the efficiency and effectiveness of their economic activities, and thereby seek to produce more competitive markets. In particular, the main goals of such policies can promote market efficiency and boost productivity growth.[7] Furthermore, trade liberalization policies can generate substantial welfare gains if markets are competitive and if capital is allowed to move freely among trade partners.[8]

Additionally, the combination of trade and competition polices may have a significant effect on economic efficiency and overall growth. The positive effects of this combination can best be captured through the alignment of various policy measures. For example, the potential positive effects of trade liberalization on a given market would not be as great as desired if the market in question was overwhelmed by the anti-competitive effects of abuse of dominance by an undertaking. On the other hand, the domestic industry in a given market may be gravely injured if a foreign monopolist is allowed to dominate the market through dumping.

According to Bartok and Miroudot, in order for countries to obtain all of the benefits associated with free trade and increased competition, trade and competition policies must be aligned in such a way as to target the same economic and developmental achievements.[9]

Moreover, Guasch and Rajapatirana have asserted that, "*from a normative standpoint, trade and competition policy share the common economic objective of attempting to reduce barriers to the competitive process and thus ensuing market access and presence, promoting efficiency. But, in*

[7] Willemien Denner, *The Possible Interaction between Competition and Anti-Dumping Policy Suitable for the Southern African Customs Union (SACU)*, STELLENBOSCH UNIVERSITY, 2013, at 25.

[8] Csilla Bartok & Sébastien Miroudot, *The Interaction Amongst Trade, Investment and Competition Policies*, OECD TRADE POLICY WORKING PAPER NO. 60, 2008, at 4.

[9] Id. at 12.

practice, however, when other objectives are introduced from pressures from interest groups, there could be considerable friction in the trade and competition policy nexus."[10]

In a narrow sense, competition policy seeks to regulate the behavior of undertakings and establish the general structure of the industry, with an aim to promote efficiency and maximize welfare. On the other hand, trade policy is typically focused on removing trade barriers and increasing market access for market participants. The similarities and differences between the objectives of competition and trade policies will be evaluated in further detail below.

3.1. Differences and Similarities between the Objectives of Competition and Trade Policies

It seems that the main distinction between trade and competition policy arises from the diverging objectives of the two frameworks. National competition policy can be defined as "the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position."[11] The main underlying objective of competition policy is the maximization of welfare, defined as either the overall national welfare or the consumer welfare, through the efficient allocation of resources. According to the World Bank,[12] the primary objective of competition policy is to maintain competition by removing or preventing the unreasonable restriction of the competitive process. A secondary objective of competition policy may be the encouragement and promotion of allocative and dynamic efficiencies in the market.

On the other hand, trade policies are generally aimed towards the facilitation of market access through tariff reductions and the elimination of barriers to investment in order to increase output, encourage efficiency and competition, while still maintaining some form of protection for troubled domestic industries.[13]

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[10] Jose Luis Guasch, & Sarath Rajapatirana, *Anti-dumping and Competition Policies in Latin America and Caribbean: Total Strangers or Soul Mates?,* POLICY RESEARCH WORKING PAPER SERIES 1958, 1998, at 1.

[11] Bernard M. Hoekman & Petros C. Mavroidis, *Anti-trust-based Remedies and Dumping in International Trade*, CEPR DISCUSSION PAPERS 1010, 1994, at 1.

[12] WORLD BANK, A FRAMEWORK FOR DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY 3 (1998).

[13] Denner, *supra* note 7, at 27.

According to Hoekman and Mavroidis,[14] governments pursue trade policy goals with multiple different objectives, including increasing revenues through tariffs, protecting emerging industries from mature competitors, and limiting the consumption of specific foreign goods in the domestic market (through various tools, such as quotas, licenses, etc.)

To that end, it is possible to assert that trade policy, which is international in nature, regulates the implementation and elimination of trade barriers imposed by national governments, while competition policy aims to remove certain barriers to effective competition that are usually temporary in nature.

Finally, a further distinction may be drawn between competition and trade policy, in that trade policy mostly tends to target or promote a specific industry, sector or region. In this regard, trade policy has the potential to create artificial barriers to foreign competitors through the utilization and implementation of various measures, including anti-dumping measures. According to some commentators,[15] this illustrates the dual nature of trade policy, in that it can either promote or impede the economic goals associated with competition policy.

Anti-dumping policy is an important part of trade policy, which is applied in the case of unfair trade practices. According to the GATT, anti-dumping measures are utilized to address the exportation of a product at an export price below the normal value/price of the same product in the domestic market of the exporting firm. Therefore, it is clearly seen that anti-dumping policy is, in a way, used to address and prevent predatory pricing in the importing market.[16]

Anti-dumping policy is aimed towards protecting the domestic undertakings in a specific industry against their foreign, albeit more efficient, counterparts by redistributing revenues, often in an inefficient way. In this context, various commentators have highlighted the fact that competition policy protects healthy competition, whereas anti-dumping policy protects individual competitors, and that, as a result, competition and trade policy are

[14] Hoekman & Mavroidis, *supra* note 11, at. 2.

[15] Guasch & Rajapatirana, *supra* note 10, at 4.

[16] Pedro de Abreu e Lima Florencio, *What kind of Interaction Between Anti-dumping and Competition Policies is Desirable within Mercosur?,* LATIN AMERICAN AND CARIBBEAN LAW AND ECONOMICS ASSOCIATION (ALACDE) ANNUAL PAPERS, 2007 at 19.

often at odds with each other.[17] In contrast, anti-dumping rules are limited in terms of the conduct that they prohibit. Anti-dumping laws only prohibit dumping when it causes or threatens to cause material injury to the domestic industry. In order to determine whether there is sufficient justification to implement anti-dumping measures, the investigating authority only considers the harm to the domestic producers, thus protecting solely the welfare of the domestic producers, rather than the competitive environment in general.[18]

In comparison, the overarching objective of national competition policy is to promote and preserve the competitive environment in the domestic market. In other words, competition policy seeks to regulate all market phenomena that may harm competition, such as abuse of an undertaking's dominant position in the market, concentrations through mergers and acquisitions, and collusion among undertakings.

Competition policy prohibits anti-competitive behavior that can lessen or harm consumer welfare in the domestic market.[19] However, injury and causal link investigations in anti-dumping cases fail to take certain competitive principles into account, including the efficiency (or inefficiency) of the complainant firm or the market power of the exporting firm.[20] Moreover, in anti-dumping cases, there is also a lack of consideration during the investigation process with regards to any queries about other significant factors, such as the industry configurations, the existence of entry barriers, market power, and other conditions of competition in either the domestic or the export market.

Another area in which there is a clear distinction between competition and trade policies is in the manner in which these policies are enforced. Anti-dumping policies are implemented and enforced under the assumption that the domestic industry is facing a foreign monopolist who is causing harm to the domestic industry. However, during an anti-dumping investigation, this assumption does not get tested or verified, and the data collected during the investigation process is limited to import figures, price comparisons, and the

[17] Olivier Cadot, Jean-Marie Grether, & Jaime De Melo, *Trade and Competition Policy: Where Do We Stand?*, JOURNAL OF WORLD TRADE 34 (3), 2000 at 1-20; Hoekman & Mavroidis, *supra* note 11, at 12.

[18] Denner, *supra* note 7, at 30.

[19] Kevin Harriott, *Antidumping and Competition Law in Conflict*, FAIR TRADING COMMISSION JAMAICA, 2010, at 2-6.

[20] Rokiah Alavi & Haniff Ahamat, *Predation and Public Interest in the WTO Anti-Dumping Duty Determination: a Malaysian Case*, JOURNAL OF ECONOMIC COOPERATION 25(4), 2004 at 80.

performance of the domestic industry. During an anti-dumping investigation, there are no provisions or procedures in place to consider factors such as barriers to entry, market power and other conditions of competition in the domestic and foreign markets. The investigation process relating to an anti-competitive behavior differs significantly in this respect, in that the starting point in any competition rule investigation is the proper definition of the relevant market and the identification of the conditions of competition.[21]

On the other hand, Hoekman and Holmes,[22] Jenny,[23] and Merrett[24] all claim that there is also a certain degree of complementarity between competition and trade policies. In particular, it has been argued that a liberal trade policy is concurrently the most effective competition policy instrument for a government to protect and promote the competitive process, so that any excess profits can be eliminated through competition among firms. This is due to the fact that competition in the import market is deemed to be of vital importance for the economy, especially in highly concentrated markets that are observed in some countries.

Accordingly, trade and competition policies share a common theoretical foundation, since both the theory of free trade and perfectly competitive markets are aimed towards the achievement of maximum economic efficiency through effective resource utilization. The complementarity between these policies is based on their common objectives of eliminating or reducing barriers to entry and distortions of domestic markets.[25] According to Merrett, the reduction and elimination of tariffs and non-tariff barriers is the most natural example of complementarity between trade and competition policies.[26]

Moreover, some commentators have pointed out that the central objective of competition policy is consistent with the main aims of trade

[21] José Tavares de Araujo, *Legal and Economic Interface Between Anti-Dumping and Competition Policy*, CEPAL-SERIE-COMERCIO INTERNACIONAL, 2001 at 7-8; Denner, *supra* note 7, at 33.

[22] Hoekman & Holmes, *supra* note 6, at 10.

[23] FRÉDÉRIC JENNY, GLOBALISATION, COMPETITION AND TRADE POLICY: ISSUES AND CHALLENGES, IN ZACH, R. (ED.), TOWARDS WTO COMPETITION RULES (1999).

[24] Alexandra Merrett, *The Intersection Between International Trade and Competition Policy: as Illustrated by an Australian/American FTA*, BOND LAW REVIEW 15(2), 2003 at 242-255.

[25] Denner, *supra* note 7, at 28.

[26] Merrett, *supra* note 24, at 242.

policy.[27] Trade policy allows for the possibility of increased competition, while competition policy ensures that private stakeholders in the market do not distort the competitive environment. The complementarity between trade policy and competition policy stems from the similarity in their ultimate objectives: trade policy aims to remove government-imposed barriers to international trade, while competition policy aims to eliminate barriers created by private businesses in the market, which can affect market access conditions underlying and supporting trade liberalization.[28] According to some commentators,[29] the potential benefits of trade liberalization cannot be fully attained if any anti-competitive behavior exists in a domestic or international market, and the fundamental objectives of both trade and competition policy allow for the competitive process to improve the efficiency of the economies of the countries that are subjected to (and affected by) these policies.

Thus, we observe that there are both clear similarities and important differences between the objectives and consequences of competition and trade policies. In attempt to further substantiate the similarities and differences of the two policies, it would be beneficial to provide a particular example. In this regard, a particularly illuminating example of the interaction between competition and anti-dumping policies is the relationship between predatory pricing and dumping practices. Therefore, the two concepts will be examined and discussed in detail below.

3.2. Price Discrimination in International and Domestic Markets: Predatory Pricing vs. Dumping

As indicated above, the objectives of anti-dumping policy and competition policy are sometimes deemed to be at odds with one another; while competition policy aims to protect the consumer by limiting and preventing anti-competitive behavior by firms and governments, the ultimate goal of anti-dumping measures is to protect domestic firms and other factors of production employed in the domestic industry.

Dumping is mainly associated with one particular form of anti-competitive behavior: predatory pricing. In order for dumping to exist in the first place, the firm in question must be able to segment the international market into separate categories according to the willingness of customers in those markets to pay different prices. Furthermore, the firm must be able to

[27] Jenny, *supra* note 23, at 10.

[28] Denner, *supra* note 7, at 28.

[29] Hoekman & Holmes, *supra* note 6, at 11; Jenny, *supra* note 23, at 14; Merrett, *supra* note 24, at 246.

charge a higher price in its domestic market and a lower price in the foreign market, based on the disparity in the elasticity of demand between the two markets. In the case of predatory pricing, the undertaking must have the intent and ability to price its product low enough in the foreign market to eliminate all competitors, and thus deter any new entrants into the market in order to establish a monopoly.[30]

3.2.1. Price Discrimination in Domestic Trade & Competition Legislations: Predatory Pricing

A decrease in prices is deemed to be positive for consumers, as it is generally considered to be a natural result of competition law rules and competitive market practices. Although an undertaking's intention or attempt to decrease its prices seems favorable for consumers at first, it may eventually harm consumers and result in allegations regarding an abuse of dominant position. When a dominant undertaking exercises predatory pricing, even though consumers may initially enjoy lower prices, the implementation of this strategy may lead to undesirable consequences for the consumers in the long term. Therefore, the implementation of predatory pricing is prohibited and undertakings that enact or apply predatory pricing strategies are subject to legal sanctions.

Predatory pricing can be defined[31] as an anti-competitive pricing strategy, whereby an undertaking endures incurring losses in a particular market by setting an artificially low sale price in the short term, in exchange for long-term profits, in order to drive one or more of its actual or potential competitors out of business or to impede their competitive behavior to such a degree that the competitive process is damaged and consumer welfare is subsequently reduced.

It is difficult to determine or prevent predatory pricing for two main reasons: firstly, the predatory pricing strategy entails low prices and this is generally assumed to increase consumer welfare, which is one of the principal aims of competition law, and thus deemed to be desirable for consumers; secondly, it is difficult to distinguish between pro- and anti-competitive low prices from a competition law point of view. From a conceptual perspective, pricing is typically condemned and penalized as predatory under these standards when a firm: (i) temporarily charges prices below some appropriate measure of its cost, and (ii) thereby maintains the capacity to subsequently raise prices to the detriment of consumers.

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[30] Denner, *supra* note 7, at 28.

[31] Turkish Competition Authority's Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position, Jan 29, 2014, Para. 50.

In order to determine predatory pricing, an undertaking's costs can be assessed in various ways. Depending on the facts of a particular case, some of these methods may be more highly exposed to intervention errors (*i.e.*, to the perils of over- or under-enforcement) than others, and some assessment methods are also harder to implement than others.

Appropriate criteria for identifying predatory pricing are, by and large, set out in the legislation itself, promulgated through various regulations or guidelines, or established through agency practices and/or court decisions.[32] While allegations of predatory pricing and investigations regarding such allegations may be widespread, complaints on this basis are frequently dismissed by the regulatory agencies due to their ingrained reluctance to micromanage pricing behavior. Despite the fact that pricing is normally condemned or criticized as predatory only if the alleged predator charges prices that are below some appropriate measure of its costs, applying such price-cost tests is usually a complex and resource-intensive exercise.[33] As in most other investigations, an investigation into predatory pricing activities requires an assessment of the relevant product market and a determination as to whether the alleged predator is dominant (or has "monopoly power") within that market. When surveying or assessing dominance in a given market, the potential ease of new firms entering that market requires particular consideration. If entry into a given market is relatively easy, it is unlikely that the dominant firm would be able to effectively exclude new competitors from entering the market and recoup its losses from its predatory pricing activities.

High evidentiary standards are usually applied for bringing forth predatory pricing claims. The requirements for the determination of predatory pricing can be categorized as follows: (a) dominance, (b) price-cost relationship, and (c) market structure.

a) Dominance: The undertaking that is accused of engaging in predatory pricing should be dominant within the relevant product market.

Large market share is an important element in the assessment of dominance. However, high market share does not constitute a decisive indicator of dominance on its own. Other factors are also taken into consideration to determine dominance. For the purposes of this article, we suggest that a market power determination that is sufficient to allow a finding of predatory pricing needs to include various factors, such as high market

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[32] BARIŞ EKDİ, GÜMRÜK BİRLİĞİ ÇERÇEVESİNDE DAMPİNG VE YIKICI FİYAT UYGULAMALARI 11-13 (2003).

[33] Id. at 6.

shares, extensive financial resources, and high capacity, among others. For the application of predatory pricing rules, the alleged predator has to sell its products below cost until it forces its competitors to pull out of the market, or prevent potential competitors from entering the market in the first place. Naturally, a predator firm would have to possess sufficient financial resources in order to withstand incurring losses for an indefinite period of time. As mentioned above, high market shares and ample financial resources are not sufficient by themselves for the determination of dominance. Some other firm-specific factors may also have to be taken into consideration, such as the variety of its know-how, the extent of its IP rights, its commercial portfolio, and the financial resources of the incumbent firm, as well as the efficiency of its competitors' activities, among others.

b) *Price-cost relationship*: Price competition is a fundamental characteristic of market economies and competitive pressures in these markets cause prices to drop down to a level closer to their costs. On the other hand, as a distinctive feature of monopolistic markets, prices in markets with a dominant firm can often remain above the marginal costs. In this regard, both under a perfectly competitive market structure and under a monopolistic market structure, it would not be economically rational for any undertaking to sell its products for a price below its marginal costs, considering that all firms seek to maximize their profits. Therefore, such a below-cost pricing strategy of a dominant undertaking would presumably have other purposes, the most plausible/likely of which is predatory pricing. In this regard, competition policy instruments and enforcement authorities often regard the prices charged by a dominant undertaking that are determined to be below short-term marginal costs or short-term variable costs, to be an indication of predatory pricing strategies (as long as such prices are equal to or higher than the average total costs).

c) *Market structure*: With respect to market structure and predatory pricing, the key point to remember is that the probability of a predatory pricing strategy to succeed is higher if the relevant market has particularly high barriers to entry and exit.[34]

3.2.2. Price Discrimination in International Trade: Dumping

Dumping has been defined in the Webster dictionary as "*to sell in quantity at a very low price; specifically to sell abroad at less than the market price at home*."[35] Furthermore, Article VI of the GATT recognizes dumping in

[34] Id. at 13.

[35] WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/dump (last visited Jan. 5, 2018).

cases where "*products of one country are introduced into the commerce of another country at less than the normal value of the products.*"[36] Therefore, we can assert that dumping is, by and large, a circumstance of international price discrimination, where the price of a product is lower in the importing country than its price in the domestic market of the exporting country.[37] In theory, comparison of prices in two different markets is sufficient for the assessment of a dumping strategy. However, in practice, defining dumping is more complicated since it requires a series of complex analytical steps, such as the determination of the appropriate price in the market of the exporting country (*i.e.,* normal domestic value) and the appropriate price in the market of the importing country (*i.e.,* normal export price) in order to make the relevant comparison.[38]

The fact that the "element of injury" is indirectly mentioned in Article VI of the GATT has raised the question of whether the "injury" element is required for a finding of dumping (*i.e.*, in order to determine that dumping has occurred in a particular case). Dirikkan suggests that dumping investigations should be conducted in two separate stages, namely: (i) the determination of dumping practices, and (ii) taking preventive measures against dumping. Dirikkan also contends that the acceptance of injury as a condition or prerequisite for the determination of dumping would excessively narrow the scope of the dumping concept.[39] In light of this view, the difference between the normal (domestic) value and export price of a product is sufficient to determine whether dumping exists. Consequently, the element of injury should only be utilized in order to determine whether taking measures against anti-dumping is necessary.

Article VI of GATT and the Anti-Dumping Agreement set out the relevant criteria for the assessment and determination of a dumping practice. For the purposes of this article, we will categorize these criteria as follows: (i) the existence of two different markets (*i.e.*, domestic and foreign market), and (ii) sales in the foreign market at a price lower than the normal value. Other factors mentioned in the GATT and the Anti-Dumping Agreement will be

[36] General Agreement on Tariffs and Trade, Article VI, 1994.

[37] İzak Atiyas, *Türkiye'de Anti-Damping Uygulaması Üzerine Birkaç Not*, REKABET FORUMU, (2007) at 1-2.

[38] https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#dumping (last visited Jan5, 2018).

[39] HANİFE ÖZTÜRK DİRİKKAN, KARŞILAŞTIRMALI HUKUK AÇISINDAN DAMPİNG VE ANTİDAMPING ÖNLEMLER 20-21 (1996).

discussed under the second criterion (*i.e.*, sales at a price below the normal value), since those factors are all ultimately related to price.[40]

(i) *Two Different Markets:* A comparison between the normal value and the export price of a product in two different markets (*i.e.*, domestic and foreign markets) is necessary in order to determine the existence of a dumping practice.

(ii) *Sales at a Price Lower than the Normal Value:* As previously mentioned, dumping occurs when a product is sold in the importing country at a price that is lower than its price in the domestic market of the exporting country. For the determination of whether the price in the foreign market is lower than the normal value of the product, we should analyze and evaluate four interrelated elements, such as: (a) normal (domestic) value, (b) export price, (c) fair comparability of the export price with the normal value, and (d) calculation of the dumping margin:

a) *Normal Value:* Article VI of the GATT defines "normal value" indirectly as follows: *"a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another*

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."

Therefore, as a general rule, normal value is defined as the regular price of the product in the market of the exporting country (*i.e.*, domestic market). In order to acknowledge and use that price as the "normal value" of the product, the following conditions should also be fulfilled: (1) the presence of a like product in the domestic market, (2) sale in the ordinary course of trade, and (3) suitability of a proper comparison with the export sales.[41]

[40] Ekdi, *supra* note 32 at 47-49.

[41] CLIVE STANBROOK & PHILIP BENTLEY, DUMPING AND SUBSIDIES: THE LAW AND PROCEDURES GOVERNING THE IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY 33 (1996).

1) "Like product" is a product that is similar to the product under evaluation in terms of its appearance, consumer substitutability, function, purpose of use, and physical-chemical qualities, among others. Under the Council Regulation (EC) No. 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries Not Members of the European Community ("***Regulation***"), "like product" is defined as "*a product which is identical i.e. alike in all respects, to the product under consideration, or, in the absence of such product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.*"[42]

2) "Sale in the ordinary course of trade" means products that sold by sellers to consumers at their market value on an arm's length basis for a certain period of time .[43]

3) With respect to the "suitability of a proper comparison with the export sales," a proper comparison is not possible in cases where the amount of domestic sales is insufficient compared to the amount of export sales.[44] For a proper comparison, the amount of sales intended for domestic consumption should constitute 5% or more of the sales of the product exported. However, in practice, there is another test that is used, where such loss-making sales are disregarded in cases where they amount to 20% or more of total sales.

If the general rule (*i.e.*, treating the price of the product in the domestic market of the exporting country as the normal value) is not applicable, then the price of the product sold to third countries or its constructed value constitutes a usable measure for the normal value. If the price of the product sold to third countries will be used as a measure, all the considerations regarding (i) comparability and (ii) sales in the ordinary course of trade continue to apply in the same way that they apply to the domestic sales. As mentioned above, another alternative measure is to use a "constructed value" method. When using this method, the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits are taken into consideration in determining "normal value."[45]

b) Export Price: The Regulation defines export price as the *"price actually paid or payable for the product when sold for export from the*

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[42] Council Regulation 384/96/EC on Protection against Dumped Imports from Countries Not Members of the European Community, 1995, art. 1(4).

[43] Ekdi, *supra* note 32 at 48.

[44] Council Regulation 384/96/EC, *supra* note 42, art. 2(3).

[45] Stanbrook & Bentley, *supra* note 41, at 38-46.

exporting country."[46] In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, according to the Regulation, *"the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis."*[47]

c) Fair Comparability of the Export Price with the Normal Value: A fair comparison should be made between the export price and the normal value. This comparison should be made: (i) at the same level of trade, (ii) in respect of sales made at the same time, and (iii) with due account taken of other differences that affect price comparability.[48]

d) Calculation of the Dumping Margin: Dumping margin is simply the difference between the normal value and the export price. To calculate the dumping margin, the following methods can be used[49]: (i) comparison of the weighted average normal value to the weighted average of all comparable export prices, (ii) transaction-to-transaction comparison of normal value and export price, or (iii) determination of the weighted average normal value and its comparison to the export prices of individual transactions.

The first method is simple and straightforward, because it is comparatively easy to determine the difference between the normal value and the export price within the same period; however, this method is inadequate for addressing certain problems, such as negative dumping margin where export price exceeds the normal value[50]. The second method is more complex, because it requires the determination of the normal value and the export price separately for each transaction. However, it is suitable for transactions involving capital goods and transactions where prices vary considerably between different periods. The third method is used in cases where export activities take place during a long period of time and where different receivers and diverse geographical regions are involved.[51]

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[46] Council Regulation 384/96/EC, *supra* note 42, art. 2(8).

[47] Id. art. 2(9).

[48] Id. art. 2(10).

[49] Stanbrook & Bentley, *supra* note 41, at 71-74.

[50] Ekdi, *supra* note 32 at 47-51.

[51] Ekdi, *supra* note 32 at 47-51.

Under Article VI of the GATT, and Article 3 of the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures if a determination is made that: (a) dumping exists, (b) the domestic industry is suffering an injury, and (c) there is a causal link between the dumping activities and the injury to the domestic industry. Therefore, in addition to the assessment of the dumping activity, the existence of injury must be observed and substantiated in order to apply certain anti-dumping measures.

(a) For the determination of the existence of dumping, please refer to the discussion above in earlier sections.

(b) Injury is defined as: (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of such an industry.[52] Furthermore, the determination of material injury involves an objective examination of the following two factors: (i) a significant increase in the volume of dumped imports, either in absolute terms or relative to production or consumption, and (ii) a decreasing effect on prices of the dumped imports in the market for like product.[53] Finally, the effect on the domestic production line in terms of actual and potential decline in sales, profits, output, market share, productivity, investments, and utilization of capacity, as well as factors affecting domestic prices and the magnitude of the margin of dumping, and actual or potential negative effects on cash flow, employment, wages, growth, ability to raise capital or investments are taken into consideration when determining material injury.[54]

(c) Under Article 3.5 of the Anti-Dumping Agreement[55], "*[i]t must be demonstrated that the dumped imports are (…), causing injury within the meaning of this Agreement.*" Therefore, injury incurred by domestic producers must be the result of dumped products in order to necessitate or qualify for anti-dumping measures. In cases where the injury to the domestic industry is

[52] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade Apr. 15, 1994, art. 3.1; Determination of Injury in Anti-Dumping Investigations: Turkey's Side of the Story, April 18, 2017, http://www.mondaq.com/turkey/x/586666/Antitrust+Competition/Determination+Of+Injury+In+AntiDumping+Investigations+Turkeys+Side+Of+The+Story, at 2; Ekdi, *supra* note 32 at 52.

[53] Council Regulation 384/96/EC, *supra* note 42, art. 3(2); Ekdi, *supra* note 32 at 52-53.

[54] Determination of Injury in Anti-Dumping Investigations: Turkey's Side of the Story, *supra* note 52, at 2.

[55] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 3.5

caused by a decrease in customer demand or consumption changes and is not caused by dumped imports, anti-dumping measures should not be implemented.[56]

As aforementioned, if it is determined that dumping has occurred and the existence of a material injury to domestic industry and a causal link between the dumping activities and the material injury to domestic industry has been demonstrated, then anti-dumping measures can be imposed.

3.2.3. Comparison of Various Concepts and Measures Regarding Predatory Pricing and Anti-Dumping

Even though predatory pricing and anti-dumping—together with the measures taken against them—bear certain similarities, they are, in their essence, considerably different concepts.

First of all, dumping is a term that's native to international trade, and it is not possible to talk about dumping in the context of a domestic market. On the other hand, predatory pricing is a concept originating in competition law that may be present under any market definition and only requires the existence of a single market. In this regard, two different (domestic) markets are required for dumping; however, a single market is sufficient for predatory pricing. In other words, while predatory pricing is applicable on an international basis, the concept of dumping is not applicable on a national basis (*i.e.*, in a purely domestic market).

As per the GATT and the Anti-Dumping Agreement, dumping may only concern trade of goods and may not be applicable in case of provision of services. This is not the case for predatory pricing.

Additionally, in order for an undertaking to be able to impose predatory prices, it needs to have a considerably high market share and capacity that enables it to affect market prices, as well as sufficient financial resources (or operations in another market where it has extreme profits) to allow it to compensate for/sustain the losses throughout the implementation period of its predatory pricing strategies. In terms of dumping, if there are no below-cost sales and the firm can still make a profit, then there is no need for the firm to be able to influence market prices in the target market. Therefore, dominant position is not a requirement for the implementation of a dumping strategy, whereas it is the essential underlying reason that an undertaking is able to impose predatory prices. Indeed, in various jurisdictions (including the US and the EU), an undertaking's dominance in the relevant market, or at least its

[56] Ekdi, *supra* note 32 at 53; Determination of Injury in Anti-Dumping Investigations: Turkey's Side of the Story, *supra* note 52, at 3.

possession of sufficient market share and power to achieve its objectives, is deemed as a prerequisite for predatory pricing, while it has no effect on the determination of dumping.

An undertaking implementing predatory pricing initially aims to drive existing competitors out of the market and to prevent potential competitors from entering the market, or at least to intimidate competitors in order to dissuade them from engaging in price competition, which would eventually allow the undertaking to obtain monopoly profits in the highly concentrated market structure.

Similarly, the objective of a firm implementing dumping may be to eliminate its competitors in the relevant market or to prevent new ones from entering the market. However, by engaging in dumping activities, the firm may simply be seeking to enter a new market successfully, to prevent its market share from shrinking, to dispose of excess goods or large quantities of stock, or to benefit from state aids provided by its national government for increasing exports. In this regard, when the possible purposes of the two strategies are compared, it appears that dumping can be implemented to achieve different objectives than predatory pricing.

Accordingly, while the implementation of predatory pricing would be rational when there are significant barriers to entry in the relevant market (given the higher probability of obtaining monopoly profits in the aftermath), the implementation of dumping would be more sensible and logical if the domestic market in the country of origin has import quotas preventing products from returning, and if the market in the target country has significant entry barriers, ensuring monopoly profits.

Whereas a finding of predatory pricing requires the price of the product to be below its costs (either marginal or average variable costs), the export price in a dumping case does not need to be lower than its cost for the determination of dumping. In other words, there is no requirement for the export price to be below the average variable or total cost for a determination of dumping to be made. In fact, it is even possible, in certain cases, for a product sold at a monopolistic price to qualify as dumping.

Therefore, the price/cost relationship in dumping cases is substantially different from the price/cost relationship in predatory pricing investigations. Predatory pricing analysis seeks to find out whether the investigated undertaking is planning to drive its competitors (which are at least as effective as the undertaking) out of the market by lowering its prices and tries to assess how rational the behavior of the undertaking is and whether it deviates from the objective of profit maximization. From this point of view, it can be quite rational for an undertaking to conduct price discrimination in the international arena (which is classified as dumping) in order to maximize its profits based on the differences between the consumers' price elasticities in the two markets. In this case, the dumping price applied by the firm must also be above its marginal cost and even its total cost. In such a scenario, there would be no problem in terms of competition law (except for extraordinary cases of price discrimination). The injury/harm to other companies in the relevant market would be considered as a sign of their ineffectiveness and their exclusion from the relevant market would be regarded as a natural consequence of vigorous competition in the marketplace.[57]

However, in the abovementioned scenario, the firm in question would be exposed to dumping charges and anti-dumping measures (and, in fact, would be likely to be subject to them). This means that the implementation of anti-dumping measures would allow domestic companies to be isolated and protected from the competition provided by more efficient and effective foreign companies, resulting in possible compromises in terms of the protection and promotion of competition.

In summary, predatory pricing requires an undertaking to: (i) be dominant in the relevant market, (ii) act with the intention of eliminating competition from the market, (iii) adversely affect competition in the market, and (iv) charge prices that are below its costs. On the other hand, dominance is not a requirement for anti-dumping; however, dumping must cause or threaten material injury to the domestic industry of the like product, and the sales/export price must be below the normal value in the domestic market.

3.3. Overlap and Potential Harmonization

In the configuration of trade relationships between countries, the utilization of anti-dumping policies can have a significant impact on the competitiveness of the trading environment. Some commentators have deemed anti-dumping rules to be inefficient and to cause serious disadvantages to producers, exporters, importers and consumers.[58] These sources have emphasized that anti-dumping rules lead to anti-competitive effects due to the manner in which these rules are implemented. Due to the potential negative effects of anti-dumping measures on welfare, some commentators[59] have even

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[57] Ekdi, *supra* note 32, at 59.

[58] Bernard M. Hoekman, *Free Trade and Deep Integration: Anti-Dumping and Antitrust in Regional Agreements*, POLICY RESEARCH WORKING PAPER SERIES 1950, 1998 at 2.

[59] J. Michael Finger & Andrei Zlate, *WTO Rules that Allow New Trade Restrictions: the Public Interest is a Bastard Child*, UNITED NATIONS MILLENNIUM

called for the abolishment and replacement of anti-dumping policies with competition rules.

Accordingly, the concern for international competition has led to two different approaches with respect to integrating trade and competition policies. The first approach is to use trade policy measures to protect international competition by encouraging trade liberalization in order to promote competition. Trade policy authorities can also incorporate some competition principles into their existing trade policies. The second method is to promote competition by utilizing multilateral competition rules. This second method would rely on the coordination of national competition policies and the harmonization of policies among countries, or on a multilateral agreement regarding internationally acceptable competition rules.[60]

According to Wooton and Zanardi, the combination of anti-dumping and competition policies and the degree of coordination or harmonization among national policies would depend on the degree of bilateral or regional integration that the participating countries would want to achieve.[61]

According to the existing literature on this issue, there are four possible options in terms of how anti-dumping policy and competition policy can function in unison. The first is the elimination of anti-dumping measures and the harmonization or coordination of national competition policies to address dumping practices;[62] the second is the simultaneous implementation of competition and anti-dumping policies;[63] the third is using competition principles in anti-dumping investigations;[64] and the last option is to use anti-dumping measures as a regulatory/enforcement mechanism of last resort.[65]

PROJECT TASK FORCE ON TRADE, 2003 at 153-166; Dean Spinanger, *Rtas and Contingent Protection: Are Anti-Dumping Measures (Adms) Really an Issue?,* INSTITUTE OF WORLD ECONOMICS, 2002 at 2; Tania Voon, *Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements,* GEORGETOWN BUSINESS, ECONOMICS & REGULATORY LAW RESEARCH PAPERS, 2010 at 5.

60 Denner, *supra* note 7, at 18; Bilal & Olarreaga, *supra* note 59, at 17.

61 IAN WOOTON & MAURIZIO ZANARDI, ANTI-DUMPING VERSUS ANTITRUST: TRADE AND COMPETITION POLICY 33 (2002).

62 Hoekman, *supra* note 58, at 10; Florencio, *supra* note 16, at 18.

63 DOUGLAS R. NELSON & HYLKE VANDENBUSSCHE, THE WTO AND ANTI-DUMPING, VOLUME II 127-130 (2005).

64 Florencio, *supra* note 16, at 19; Harriott, *supra* note 19, at 6.

65 Hoekman & Mavroidis, *supra* note 11, at 25.

3.3.1. Replacing Anti-dumping Policy with Competition Policy

According to Messerlin[66] the suggested solution for the increased dissatisfaction with the manner in which anti-dumping actions have been implemented is to replace anti-dumping policies with competition rules. However, elimination of anti-dumping policies in favor of competition policies would require competition rules to be implemented and enforced beyond the borders of a specific country. The basic premise of substituting competition policy for anti-dumping measures is that once anti-dumping measures are eliminated, there should be a piece of common legislation to counteract any restrictive practices which may arise. If there is no such common competition rules, countries will have to rely on the extra-territorial application of national competition policies to address any restrictive business practices among the member countries.

However, Florencio[67] also claims that if competition rules are diverse among different countries it can cause imbalance and disruptions to the integration efforts. In addition, according to Vautier and Lloyd[68] many of the anti-dumping actions currently undertaken will not be possible if competition policy is substituted for anti-dumping policies.

Hoekman and Mavroidis[69] give three conditions which are needed to fully eliminate the use of anti-dumping measures by guarantying market access and maintain the conditions of competition in the regional market: (i) free trade and the freedom of investment; (ii) the existence of disciplines for governments to be able to assist firms and industries in their own territory, and (iii) existing and enforceable competition legislation.

3.3.2. Simultaneously Implementing Competition Policy and Antidumping Policy

According to Messerlin[70], this option requires competition and anti-dumping investigations to be launched for the same case simultaneously. The process may follow this sequence[71]:

[66] Messerlin, *supra* note 63, at 354.

[67] Florencio, *supra* note 16, at 21.

[68] KERRIN M. VAUTIER & PETER J. LLOYD, INTERNATIONAL TRADE AND COMPETITION POLICY: CER, APEC AND THE WTO 13 (1997).

[69] Hoekman & Mavroidis, *supra* note 11, at 25.

[70] Messerlin, *supra* note 63, at 366.

[71] Hoekman & Mavroidis, *supra* note 11, at 18.

1. With the request of an anti-dumping investigation, the antidumping authority needs to inform the competition authority of the request for the investigation.

2. The competition authority will then investigate the conditions of competition in the exporter's home market and the contestability of the relevant domestic market, investigating the prevailing market conditions, extent of competition and regulatory environment and whether the exporting firm is engaged in anti-competitive behavior or has abused its dominant position.

3. The anti-dumping investigating authority will have to be kept fully informed on all the findings of the competition authority and be given all the available information.

However, due to the differences between anti-dumping and competition rules this approach is seen as being high unlikely[72]. The possibility exists that there will be a significant difference in the time periods required for the two investigation processes, mainly due to the constraint of confidentiality. Any confidential information used in respect of the anti-dumping action cannot be utilized during the anti-competitive investigation and vice versa. This can result in firms being cooperative in the anti-dumping investigation while reluctant to cooperate and provide information on the situation of their domestic market for the anti-competitive investigation[73]. Accordingly, it appears difficult for this option to be utilized effectively.

3.3.3. Utilizing Competition Principles in Anti-dumping Investigations

This option would require the gradual use of competition principles in anti-dumping proceedings. However, this does not require that all cases of dumping be investigated as predatory pricing or price discrimination. Rather than that, in terms of conforming anti-dumping policy with competition policy there are some important competition concepts which need to be incorporated into anti-dumping law, the most important being that of defining the market and dumping[74]. Indeed, competition principles are an important part of anti-dumping proceedings because the applicable remedies can have a significant impact on the competitive conditions in the market. The gradual utilization of competition policy in anti-dumping investigations would be expected to

[72] Denner, *supra* note 7, at 88.

[73] Messerlin, *supra* note 63, at 366.

[74] Harriott, *supra* note 19, at 17.

promote a concern of the different public policy objectives and the importance of competitive conditions in both the domestic and international markets[75].

Hoekman and Mavroidis[76] claim that by incorporating competition principles into anti-dumping policy, the focus can be moved away from determining the injury to the domestic industry as competitors, towards the injury to domestic competition. This can lead to anti-dumping duties only being implemented after a cost-benefit analysis reveals that the advantage for the domestic economy of imposing anti-dumping duties outweighs the potential disadvantages of higher duties. In this regard, if can be utilized properly, this option would result in a more pro-competitive anti-dumping policy implementation and would contribute to the market competition overall by reducing the gap between the two policies.

3.3.4. Applying Anti-dumping Measures only as a Last Resort

In order for this option to be utilized, there needs to be an arrangement among the countries that allow any allegation of dumping first be investigated by the competition authority. The objective of the initial investigation would be to establish whether the exporting firm is able to dump in the importing market either through engaging in anti-competitive behavior or due to benefits received from government created or supported barriers to entry. If the anti-competitive behaviour is found, Hoekman and Mavroidis [77] claim that the standard competition remedies will apply; and only if the competition authority finds the existence of barriers to entry, an anti-dumping investigation would be initiated. However, it is difficult to assess when it would be sufficient for a competition law driven investigation to remedy the dumping, and it is unclear when anti-dumping measures would be necessary. The jurisdictional area of the relevant competition and anti-dumping authorities would be hard to determine and there is the risk of assessing the investigated practice in a wrong manner, resulting either in over-sanctioning or under-sanctioning the investigated practice. Thus, this option does not appear to be as viable as other options.

4. Conclusion

In this article, we have focused on the interaction between trade policy and competition policy, with a particular emphasis on the relationship between anti-dumping and predatory pricing rules. Accordingly, we have attempted to explore the differences and similarities between the two policies, based on the varying objectives of these policy instruments, the measures used to enforce

[75] Florencio, *supra* note 16, at 26.

[76] Hoekman & Mavroidis, *supra* note 11, at 22.

[77] Hoekman & Mavroidis, *supra* note 11, at 26.

them, and the role that trade and competition policies currently play in the international trading system. In this context, we have also examined the relationship between anti-dumping law and competition policy, especially the overlapping areas between these policies, and briefly touched upon the theoretical policy options available for the effective interaction and collaboration of anti-dumping and competition policies. Finally, various aspects of predatory pricing and anti-dumping were explored in detail.

In conclusion, trade and competition policies appear to be at odds with one another, while also sharing certain complementary characteristics. Trade policy deals primarily with trade barriers, is negotiated on a multilateral and bilateral level, and is enforced by both national and international law. Competition policy, on the other hand, addresses issues pertaining to competition in domestic markets, deals with temporary competition violations, and operates mainly under national laws. Nevertheless, the goals of competition policy and trade policy can be deemed as complementary to some extent. Trade policy allows for the possibility of increased competition, while competition policy ensures that private stakeholders do not distort competition in the international trade arena.

Whereas the two policies appear to be at odds with each other for the most part, there are multiple options suggested for ensuring positive interaction between competition and anti-dumping policies. In this scope, four suggestions in terms of how anti-dumping policy and competition policy can function in unison were examined. The suggestions were the elimination of anti-dumping measures and the harmonization or coordination of national competition policies to address dumping practices; the simultaneous implementation of competition and anti-dumping policies; the utilization of competition principles in anti-dumping investigations; and the utilization anti-dumping measures as a regulatory/enforcement mechanism of last resort. In this respect, although all of the relevant options have obstacles before them, the most realistic and applicable option appears to be utilization of competition principles in anti-dumping investigations. Accordingly, adoption of this option would allow competition policy to ensure the anti-dumping implementations take into account competition parameters, allowing for anti-dumping investigations to promote the importance of competitive conditions.

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Contemporary Competition Law Issues in the Turkish Airline Industry

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I. Introduction

Unlike other industries, significant changes in the airline industry have not mainly occurred due to technological changes, but rather as a result of developments in the applicable legal framework and various institutional reforms.[1] As a consequence of the deregulation wave which dates back to liberalization of airline sector in the United States in 1978, the airline sector has gone through drastic changes. Today, worldwide air travel has grown to accommodate a record of 3.7 billion[2] passengers. Low air fares, higher living standards with a growing middle class in large emerging markets, and the growth of tourism and travel are all driving forces behind global the demand for air travel.[3] With that said, weak worldwide economic growth due to the Global Financial Crisis, increasing oil prices, uncertain impacts of Brexit and

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[1] ALESSANDRO CENTO, *THE AIRLINE INDUSTRY: CHALLENGES IN THE 21ST CENTURY* (Physica-Verlag Heidelberg, 1ST ED., 2009), 13.

[2] European Commission, *Annual Analyses of the EU Air Transport Market 2016: Final Report* (March 2017) 8, <https://ec.europa.eu/transport/sites/transport/files/2016_eu_air_transport_industry_analyses_report.pdf> (last visited 12 February 2018).

[3] BOEING, *Current Market Outlook 2017-2036*, ,7 <http://www.boeing.com/resources/boeingdotcom/commercial/market/current-market-outlook-2017/assets/downloads/2017-cmo-6-19.pdf> (last visited 12 February 2018).

security concerns looming over the tourism pose uncertainties in terms of international demand.[4]

Bearing these dynamics in mind, certain procedures and practices pertaining to the airline sector, including the pricing strategies of airlines, global airline alliances, code-sharing and aircraft lease agreements, structural barriers to competition (such as the allocation of slots), and issues relating to the consolidation of airline operators have frequently been reviewed by various competition law authorities. As expected, the Turkish Competition Board ("***TCB***") has also examined a number of cases concerning these issues within the scope of Article 4 (regarding anti-competitive agreements and concerted practices) or Article 6 (regarding abuse of dominant position) of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***")[5].

In this article, we aim to shed light upon certain contemporary issues with respect to pricing strategies, allocation of slots and aircraft lease agreements that have been subject to review or investigation by the TCB, in the hope that we can illuminate certain competition law issues relating to the airline sector in Turkey. In Section II, we will first present a brief history of airline liberalization and deregulation in the United States ("***U.S.***"), European Union ("***EU***"), and Turkey. In Section III, we will then delve into pricing strategies, allocation of slots, and aircraft lease agreements and provide an in-depth examination of the TCB's investigative history and decisional practice relating to these issues. We will finish our analysis by offering some concluding remarks.

II. Deregulation of Air Transportation in Turkey

"*Whenever competition is feasible it is, for all its imperfections, superior to regulation as a means of serving the public interest*."[6]

Alfred Khan

As of the 1944 Chicago Convention,[7] the airline industry was heavily regulated and under complete governmental control on an international basis.

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[4] Federal Aviation Administration, *FAA Aerospace Forecast Fiscal Years 2017-2037*, 15 <https://www.faa.gov/data_research/aviation/aerospace_forecasts/ media/FY 2017-37_FAA_Aerospace_Forecast.pdf> (last visited 12 February 2018).

[5] Law No. 4054 on the Protection of Competition. [Published in Official Gazette No. 22140 dated 13 December 1994].

[6] Competitive Enterprise Institute, *Alfred E. Kahn Discussion Series*, <https://cei.org/ events/alfred-e-kahn> (last visited 8 February 2018).

[7] The Convention on International Civil Aviation, also known as the Chicago Convention, was signed on 7 December 1944 by 52 States. As a result of the Chicago Convention, the legal structure of modern international aviation was

Indeed, in the Chicago Convention, air transport capacity and frequency, airfares, freight levels and "air freedoms" were discussed and regulated, and the International Aviation Organization ("***ICAO***") was established as the inter-governmental agency responsible for the coordination of worldwide technical and operational standards, for the purpose of coordinating and regulating these matters at the international level.[8]

The first country to repeal regulations in the airline industry was the United States with the enactment of the Airline Deregulation Act in 1978.[9] Until deregulation, the airline industry in the U.S. was far from being competitive and it was subject to comprehensive and wide-ranging governmental regulations, as was the case in every other country in the world. During the 1960s and 1970s, certain economists[10] began to explore and

established. Technical and operational aspects of civil aviation was regulated at the Chicago Convention and economic and commercial aspects were left to sovereign states to decide on the basis of bilateral negotiations. Chicago Convention established ICAO which is a specialized agency of the United Nations charged with coordinating and regulating international air travel. ICAO was "*tasked with developing the 'principles and techniques' of international air transportation, but it was also obligated to do such things as '[p]revent economic waste caused by unreasonable competition' and to make sure 'every contracting State has a fair opportunity to operate international airlines*". (See Stephen D. Rynerson, *Everybody Wants to Go to Heaven, but Nobody Wants to Die: The Story of the Transatlantic Common Aviation Area,* 30 DENV. J. INT'L L. & POL'Y 421, at 424 (2002); ICAO, *Convention on International Civil Aviation - Doc 7300,* <https://www.icao.int/publications/pages/doc7300.aspx> (last visited 12 February 2018); Hubert Horan, *Double Marginalization and the Counter-Revolution against Liberal Airline Competition,* 37 TRANSP. L.J. 251, at 262 (2010).

[8] Cento, *supra* note 1, at 14.

[9] Airline Deregulation Act, Pub. L. 95–504, 49 U.S.C. § 1371 et seq. Approved 24 October 1978.

[10] Notably, Alfred Khan, the former Chairman of the Civil Aeronautics Board ("***CAB***") emerged as the most important voice for the deregulation of the airline sector. The Civil Aeronautics Act ("***CAA***") of 1938 led to the establishment of CAB, which was the authority responsible for the regulation of the airline sector. CAB's duties and responsibilities included controlling new entries to the market, regulating routes and fares, investigating plane accidents, awarding subsidies, controlling mergers and acquisitions, and awarding certificates to aircraft pilots (MATT ANDERSSON, *THE NEW AIRLINE CODE: WHY THE INDUSTRY MUST BE PROGRAMMED TO A PUBLIC-PRIVATE INTEGRATION,* 62 (IUNIVERSE, 2005), 62). The air transportation industry consistently developed under the regulation of CAB and the Federal Aviation Administration ("***FAA***"), an entity established in 1958 to specifically handle aviation safety issues. (Federal Aviation Act of 1958, Pub. L. No.

scrutinize the costs and benefits of deregulation and, as a result of their examination of the industry, began to lean in favor of the idea of deregulating the airlines. They were driven to this conclusion primarily by the studies on the performances of less heavily regulated intrastate air carriers in California and Texas, which determined that onerous economic regulation resulted in high fares for consumers and a net economic loss to society at large.[11] Certain economists argued that CAB regulation (i) caused airfares to be considerably higher than they otherwise would be, (ii) resulted in a serious misallocation of resources, (iii) encouraged carrier inefficiency, (iv) denied consumers the range of price/service options they would prefer, and (v) created a chronic tendency towards excess capacity in the industry.[12] Moreover, the proponents of deregulation suggested that, if the airline industry were freed from government regulations, it would eventually become a successful and highly competitive industry. Grounding their arguments on the contestable market theory,[13] these economists believed and argued that the monopolist market would ultimately become competitive and that market participants would have to price their products at cost, due to the constant threat of new entrants into the market.[14] Eventually, following particularly the initiatives of Alfred Khan, the U.S.

85-726, pg. 301, 72 Stat. 744 (codified as amended at 49 U.S.C. App., pg. 1341 (1982))

[11] Andrew R. Goetz & Paul Stephen Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air* 54 J. Air L. & Com. 927, at 930 (1989), <http://scholar.smu. edu/cgi/viewcontent.cgi?article=1865&context=jalc>, (last visit-ed 9 February 2018).

[12] See generally Alfred Kahn, *The Theory and Application of Regulation* ,55 ANTIT-RUST L.J. 177, at 178 (1986); Alfred Khan, *Transportation Deregulation … and All That*, ECON. DEV. Q. 91, at 92 (1987).

[13] According to Bailey and Baumol, a market is perfectly contestable if " *firms can enter it and then, if they choose, exit without losing any of their investment*" and if "*no price in that market can be in equilibrium when its magnitude is such as to enable an entrant to undercut it and nevertheless earn a profit. Thus, a market that is protected by substantial entry barriers is clearly not contestable, because the barriers permit an equilibrium involving monopoly prices and monopoly profits."* (Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets,* 1 YALE J. ON REG. 111, at 113 (1984), <http://digitalcommons.law.yale.edu/yjreg/ vol1/iss2/2> (last visited 12 February 2018).

[14] PAUL S. DEMPSEY, *FLYING BLIND: THE FAILURE OF AIRLINE DERE-GULATION*, 7(1990), as cited in Amy Hunt, *Assault on the Airline Industry: Private Antitrust Litigation and the Problem of Settlement*, 59 J. AIR L. & COM. 983, 983 (1994), <http://scholar.smu.edu/jalc/vol59/iss4/6>, (last visited 8 February 2018).

Congress passed the Airline Deregulation Act, and former U.S. President Jimmy Carter signed it into law in 1978.

Due to the nationalized and government-based character of European aviation, European countries were initially more resistant to the wave of deregulation than the U.S., which already had roughly 20 major airlines in operation at the time, and thus had a more laissez-faire (not to say oblivious) attitude to the fate of any one of them.[15] However, European authorities eventually acceded to the deregulation wave in the U.S. and followed its lead in deregulating the airline industry. However, deregulation in Europe, contrary to the U.S., necessitated a step-by-step process and took a period of 5 years to complete. Before deregulation, air transportation was perceived to be a national project for each country, and was thus considered to be a tool for national development within the Member States of the EU. Almost every European nation had a state-owned airline that would operate both domestically and as the nation's designated international carrier. On the other hand, Articles 74 to 84 of the Treaty establishing the European Economic Community ("***TEEC***") [16] regulated transportation on road, rail, and inland waterways. How and to what extent these provisions were also applicable to air and sea transport was subject to the unanimous decision of the Council of Ministers.[17] Hence, back then, the veto of a single state could have hampered any deregulation attempts regarding air transportation.

With this in mind, the process of deregulation in Europe began with the renowned *Nouvelles Frontières*[18] judgment of the European Court of Justice

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[15] Paul S. Dempsey, *European Aviation Law*, KLUWER LAW INTERNATIONAL,41 (2004)

[16] Also known as the Treaty of Rome.

[17] Isabella Henrietta Philepina Diederiks-Verschoor, M. A. Butler (legal adviser), *An Introduction to Air Law* KLUWER LAW INTERNATIONAL (2006).

[18] See Joined Cases 209-13/84 *Ministère Public v. Asjes* [1986] ECR 1425, [1986] 3 CMLR 173. A French travel agency, known as "Nouvelles Frontières," was charged with selling airline tickets at prices that were not compatible with the prices approved by the French Minister for Civil Aviation. When the case came before the Tribunal de Police de Paris (local criminal court), the tribunal considered whether the competition rules of the Treaty were applicable to concerted actions between the airlines. To that end, the tribunal decided to stay the proceedings and referred the case to the ECJ for a preliminary ruling on that issue. (See *Nouvelles Frontiers* decision, para. 5) The ECJ's concluding remark was that, as per the letter of the TEEC, air transport was only exempt from Articles 74 to 84 regulating transport, but was subject to the general rules set out in the TEEC, including the provisions on competition. This ruling clarified the powers of the European Commission to enforce competition rules with respect to air transport as well, and paved the way to deregulation in the airline sector in Europe (Dempsey, *supra* note 15, at 34).

(“***ECJ***”). Prior to the *Nouvelles Frontières* case, although it was clear that air transportation was exempt from Articles 74 to 84 of the TEEC, there was no consensus as to whether this exemption also prevented competition law regulations from being applied to the air transportation sector. With the *Nouvelles Frontières* judgment, the ECJ affirmed that Articles 85 and 86 of the TEEC (now incorporated as Articles 101 and 102 of the Treaty on the Functioning of the European Union (“***TFEU***”)) also applied to air transportation.[19] The ECJ’s interpretation of the TEEC was later followed by the implementation of the first package by the Commission in 1987.[20] The first package allowed any licensed European carrier to operate flights between any two points in the Member States and, most importantly, conferred the European Commission with the authority to enforce the competition rules of the TEEC effectively, and to grant block exemptions if necessary. As a direct result of this legislation, there were 80 new airlines—many low-cost—operating in the EU by 1993.[21]

Later on, in 1990, the second package with two subsequent legislations was introduced. The first legislation[22] withdrew the Member States’ authority to establish fares and to intervene in the pricing strategies of airline operators, as long as the airline operators in question did not engage in market violations, such as predatory pricing. Subsequently, the second legislation[23] removed the capacity restrictions on intra-European operations. Thus, any European airline would thereafter be allowed to operate flights between Member States with as many passengers as it wished to do so. Finally, the airline deregulation process in the EU was completed in 1992 with the launch of the third package[24] by the European Council. Today, a flag-carrier airline from an EU Member State can operate a cabotage flight between any two European cities[25] by virtue of the Council Regulation introduced by the third package.

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[19] Dempsey, *supra* note 15, at 12.

[20] Council Decision 87/602/EEC, <https://publications.europa.eu/en/publication-detail/-/publication/85c46fce-e9a4-41a7-bf52-096b9fd66fd0> (last visited 8 Febru-ary 2018).

[21] Richard Pinkham, *European Airline Deregulation: The Great Missed Opportunity?*, THE SAIS EUROPE JOURNAL (1999) < http://www.saisjournal.org/posts/ european-airline-deregulation> (last visited 12 February 2018).

[22] Regulation (EEC) Number 2342/90, <http://eur-lex.europa.eu/legal-content/EN/ TXT /HTML/?uri=CELEX:31990R2342&from=EN>(last visited 8 February 2018).

[23] *Id*.

[24] Regulation (EEC) Number 2408/92, <http://eur-lex.europa.eu/LexUriServ/Lex Uri-Serv.do?uri=CELEX:31992R2408:EN:HTML> (last visited 8 February 2018).

[25] For instance, Lufthansa, the German flag-carrier airline, is permitted to operate a flight between Vienna and Paris, even though neither city is located in Germany.

Following the global trend, the liberalization of the airline sector in Turkey began in 1983 with the enactment of the Law No. 2920 on Turkish Civil Aviation ("***Law No. 2920***"),[26] regulating the domestic market. On the other hand, the international air transport market in Turkey was regulated by bilateral agreements between States and by ICAO legislation and advisory decisions.[27] Therefore, competition law issues in the Turkish airline sector mostly emerged in the domestic market regulated by the Law No. 2920. Even though the Law No. 2920 had not granted airlines the right or ability to act independently on matters such as establishing flight schedules and determining airfares without the consent of the Ministry of Transport, it had nevertheless permitted non-state-owned (*i.e.*, private) airlines to enter the domestic market. However, this freedom eventually forced numerous airlines to exit the market due to financial troubles and even bankruptcies.[28] In 1996, the Directorate General of Civil Aviation limited entry into the domestic market only to those markets in which Turkish Airlines (the nation's flag-carrier) did not operate a flight or was not able to satisfy demand on a given route or date. Towards the end of 2003, the Ministry of Transport revoked this decision as it hindered competition in the air transportation market and enhanced Turkish Airlines' already established position in the market [29] and eventually paved the way for a more competitive environment in the domestic air transport market. By virtue of the amendment in 2003, passengers in the Turkish market today have numerous options (such as Turkish Airlines, Pegasus, Atlasjet, SunExpress, Borajet, Onur Air etc.) when flying domestically on a given date and route.

III. Contemporary Competition Law Issues Regarding Air Transportation in Turkey

As mentioned above, due to the liberalization of air transportation in recent decades, drastic changes have occurred in terms of the competition between airlines operating in Turkey. Thus, the issue of airline competition has gained substantial importance and attracted the attention of Turkish

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[26] Law No. 2920 on Turkish Civil Aviation [Published in Official Gazette No. 18431 dated. 19 October 1983].

[27] Hülya Göktepe, *The Implementation of Competition Law in the Air Transport Sector*, ANADOLU UNIVERSITY JOURNAL OF SOCIAL SCIENCES, VOL. 7, ISSUE 1, 213, at 226 (2007).

[28] For instance Toros, Talia, Tur Avrupa, Akdeniz, Bosphorus, Boğaziçi, THT, Sunways, GTI, Haliç Havayolları, Tayfun Air, Green Air, Nobel Air, Birgen Air, Holiday Air, Suntan Air, VIP Air, İstanbul Havayolları can be given as examples (See Ahmet İzer Doğan *Air Transportation Policy of European Union and Turkey*, (Postgraduate thesis, Marmara University 2002) 113, as cited in Göktepe, *supra* note 27, at 226).

[29] *Id*. at 227.

competition authorities as well. Indeed, developments in the global air transportation industry necessitate fresh and up-to-date interpretations of competition law rules. This is also true for Turkey, where the development of the airline industry followed (and often adapted) the developments in the rest of the world.

A. Pricing Related Enforcement Issues in the Turkish Airline Industry

Pricing is an important factor in competition law, effecting consumer choice as well as product supply.[30] The objectives of a pricing policy adopted by an undertaking in the airline industry are mainly derived from the basic goal of yield management.[31] With this in mind, airlines follow "dynamic pricing" policies (rather than static policies), which may lead to price discrimination among consumers.[32]

(i) Competition Law Aspects of Dynamic Pricing in the Aviation Sector

The notion of applying different prices to different individuals for the same goods/services may appeal to undertakings that operate in industries with inherently high fixed costs.[33] This is the case for the airline industry as well. Indeed, the airline industry is an exemplary sector in this regard, where dynamic pricing can be persistently observed, as airlines tend to follow a dynamic pricing strategy depending on the time of the booking and on supply and demand for a particular route at a given time.[34] Dynamic pricing strategies are used by airlines in order to maximize their profits as well as to fill the seats

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[30] Drago Pupavac, *Dynamic Pricing: The Future of Retail Business* (16th International Scientific Conference Business Logistics in Modern Management – 13 October 2016, Osijek, Croatia), 119-20.

[31] R. Preston McAfee & Vera te Velde, *Dynamic Pricing in the Airline Industry*, 1 (2007) <http://mcafee.cc/Papers/PDF/DynamicPriceDiscrimination.pdf> (last visited 8 February 2018)

[32] Robert M. Weiss & Ajay K. Mehrotra, *Online Dynamic Pricing: Efficiency, Equity and the Future of E-commerce*, 6 VA. J.L. & TECH. 11, at 11-2 (2001). However, although there are many reasons why the firms choose to resort to price discrimination, the first and foremost among them is reaching "maximum current profit." (Penelope Papandropoulos, *How should price discrimination be dealt with by competition authorities?*, CONCURRENCES N◦3 34, at 34 (2007))

[33] Weiss & Mehrotra, *supra* note 32, at 14.

[34] OECD, *Airline Competition*, (OECD Directorate For Financial and Enterprise Affairs Competition Committee Note by India, June 18-19, 2014), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)71&docLanguage=En> (last visited 8 February 2018)

on their planes as much as possible (*i.e.*, increase their yield), since unlike most other products, an empty plane seat is worthless to the airline after take-off as it cannot be sold to another customer later on.[35]

The economic literature supports the view that dynamic pricing plays an important role in airline pricing.[36] It should be noted that, prior to the wave of deregulation in the airline industry, intricate and complex regulations adopted by each government controlled prices and kept them relatively stable.[37] However, following worldwide deregulation, airlines established their own pricing policies, which involved intertemporal price discrimination and incorporated dynamic adjustments to meet the stochastic demand.[38] Nowadays, airlines generally charge higher prices for seats booked close to the date of travel, as the passengers who would be booking at the last minute are assumed to be business travelers who have no choice but to travel at short notice, and airlines aim to capture "*their high willingness to pay*" through price discrimination.[39] Moreover, airlines change their prices on a daily (and sometimes hourly) basis, depending on the seat capacity and demand as well. For instance, airlines sometimes adjust their fares upward so as to avoid selling out flights too far in advance, or they might lower their fares when demand turns out to be lower than expected.[40] Similarly, in Turkey, airlines determine their prices dynamically rather than charging a uniform price. According to the TCB's *Turkish Airlines* decision,[41] prices in the airline sector vary depending on demand, seasonality, and proximity to the departure date, among other factors.[42]

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35 Jenny Schrader & Efthymios Constantinides, *Price Discrimination in Online Airline Tickets: The Role of Customer Profiling*, 13th International Marketing Trends Conference 2014 - Venice, Italy (2014).

36 For instance, Escobari (2012) and Alderighi, Nicolini, and Piga (2012) provide "*evidence that airlines face stochastic demand and prices respond to remaining capacity*." (Kevin R. Williams, *Dynamic Airline Pricing and Seat Availability*, Cowles Foundation Discussion Paper No. 3003, at 2 (2017)).

37 Weiss & Mehrotra, *supra* note 32, at 11-2.

38 Williams, *supra* note 36, at 1.

39 *Id*.

40 Collectively, these pricing behaviors can be considered as dynamic pricing (Williams, *supra* note 31, at 1). In line with the suggested definitions in the literature, the TCB has confirmed that dynamic pricing can be described as ticket pricing that changes depending on the demand, the season and the date of travel (TCB's *Turkish Airlines* (December 25, 2014; 14-54/932-420) and *İstanbul Deniz Otobüsleri* (May 31, 2012; 12-29/854-254) decisions).

41 TCB's *Turkish Airlines* decision, *supra* note 40, para. 437.

42 *Id*.

As a general rule, dynamic price discrimination by dominant firms in a given market causes competition concerns. Firstly, price discrimination by dominant firms may reduce total consumer welfare by exploiting consumer surplus (*i.e.*, exploitative price discrimination).[43] Secondly, price discrimination may also have an exclusionary impact on a dominant firm's rivals or its downstream customers.[44] With that said, dynamic price discrimination is considered to be economically important and valuable[45] for both airlines and for consumers. By engaging in dynamic price discrimination, airlines are able to provide their services to a larger number of travelers, while also optimizing their profits. Due to the divergent valuations of airline tickets by various customer groups with different price elasticities (*e.g.*, business travelers with lower price sensitivity and high willingness to pay, as opposed to leisure travelers who are likely to be more price sensitive), price discrimination allows airlines to take advantage of these differences, and hence extract maximum value from their customers and increase their profits.[46] This could ultimately be beneficial for consumers as well, as it may pave the way for increasing the airlines' long-term incentives to invest in R&D.[47]

As well as increasing firms' profits, it is also possible for price discrimination to have positive effects on welfare. Indeed, price discrimination's effect on consumer welfare can also vary, depending on demand and market structure.[48] For instance, compared to monopolistic markets, it is conceivable that consumers do not benefit as much from price discrimination in competitive markets.[49] Moreover, given that ticket prices are determined (and constantly adjusted) in the airline industry according to numerous variables, such as time, capacity and demand under a dynamic pricing strategy, from a competition standpoint, it is not likely that the firms will stabilize their airfares or commit to future prices. To that end, it can be argued that there are valid and rational economic justifications underlying dynamic price discrimination in the airline sector.

Therefore, the potential exploitative nature of price discrimination in a dynamic context and its possible impact on welfare are highly dependent on the particular characteristics of consumer demand and the market position of a

[43] Papandropoulos, *supra* note 32, at 34.

[44] *Id*.

[45] McAfee & Velde, *supra* note 31, at 1.

[46] Papandropoulos, *supra* note 32, at 35.

[47] *Id*. at 36.

[48] *Id*. at 36.

[49] *Id*. at36.

given undertaking.[50] To that end, we believe that a cautious approach should be adopted towards regulating dynamic pricing and that a *per se* ban on dynamic pricing should be avoided, as a ban on dynamic pricing can arguably give rise to "*a commitment device which typically leads to higher prices*"[51] for downstream customers.

(ii) Evaluating Predatory Pricing Claims in the Airline Industry

Following the liberalization and deregulation of the airline sector globally, and with new competitors entering the market, competition has become significantly stiffer in the industry. Hence, allegations of predatory pricing have begun to be voiced all over the world, as major airlines have sought to respond to the entry of competitors and to gain a competitive advantage with their pricing policies.[52]

Predatory pricing has been defined as "*pricing below an appropriate measure of cost for the purpose of eliminating a competitor.*"[53] In order for predatory pricing to occur and succeed as a rational investment, the predator that is already in a monopolistic position must set "*its prices so low…that its competitors leave the market and others are deterred from entering*"[54] for an

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[50] *Id*. at 34.

[51] *Id.* at 34.

[52] OECD, *Airline Competition*, (Annex to the Summary Record of the 121st Meeting of the Competition Committee Held On 18-19 June 2014, Executive Summary of the Discussion on Airline Competition), 7 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2014)2/ANN4/FINAL&doclanguage=en> (last visited 8 February 2018).

[53] *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 483 (1st Cir. 1988), as cited in James L. Robenalt, *Predatory Pricing in the Low-Fare Airline Market: Targeted, Discriminatory, and Achieved with Impunity*, OHIO STATE LAW JOURNAL 68:64 641, at 642 (2007). Under Turkish competition law, predatory pricing is described as "*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 behavior*" (Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings, para. 50).

[54] OECD, *Predatory Pricing*, (OECD Report, 1989) <http://www.oecd.org/competition/abuse/2375661.pdf> (last visited 8 February 2018) [hereinafter referred to as "*OECD Report 1989*"]. Moreover, *"[T]he predator essentially "bites the bullet and forgoes present revenues to drive a competitor from the market. Its intent, of course, is to recoup lost revenues through higher profits when it succeeds in making the environment less competitive."* (*Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc.*, 845 F.2d 404, 407 (2d Cir. 1988) (citing *Ne. Tel. Co. v. AT&T*, 651 F.2d

indefinite period of time. According to the traditional view on predatory pricing, in order for this conduct to be a rational investment/strategy for the dominant undertaking, *"there must be some expectation that these present losses (or foregone profits), like any investment, will be made up by future gains. This in turn implies that the firm has some reasonable expectation of gaining exploitable market power following the predatory episode, and that profits of this later period will be sufficiently great to warrant incurring present losses or foregoing present profits."*[55] Therefore, in predatory pricing cases, the predator is expected to set "*prices sufficiently low so as to reduce its competitors' ability or incentives to compete effectively or to exclude them*"[56] in a given market.

In terms of the airline sector, "standby fares"[57] are a classic example of predatory pricing. Standby fares generally refer to the price charged when a passenger travels on a flight without a prior reservation for that specific flight (*e.g.*, because of a missed flight, or when a passenger wishes to take an earlier flight than the one (s)he has been ticketed for, or when a flight is overbooked.) Another form of predatory pricing can be observed in the low-fare airline market, where a major airline that operates from its hub airport (which are used by airlines to concentrate passenger traffic and flight operations and serve as transfer or stop-over points to get passengers to their final destinations), responds to the entry of a low-fare airline into that market by aggressively lowering price[58] and capacity dumping.[59] In such cases, competition law

76, 85 (2d Cir. 1981), as cited in Robenalt, *supra* note 53, 642).

[55] OECD Report 1989, *supra* note 54.

[56] Gönenç Gürkaynak & Esra Uçtu, *An Overview of the Turkish Competition Law Regime Applying to Pricing Policies in Light of the Turkish Competition Board's Recent Decisional Practice*, (*Mondaq*, 27 March 2017) <http://www.elig.com/docs/6fbfc-an-overview-of-the-turkish-competition-law-regime-.pdf> (last visited 8 February 2018).

[57] An airline standby fare can be construed as a predatory pricing scheme under the classical approach. It should be noted that harmless standby fares would not be interpreted as predatory if and when they are not intended, nor do they have the effect of monopolizing a certain airline passenger market or excluding another airline, but rather aim at maximizing revenues and utilizing excess capacity. Moreover, considering that these fares are generally priced above costs, the economic rationale behind standby fares generally would not support allegations of predatory pricing (Robenalt, *supra* note 53, 642-3).

[58] Clinton V. Oster & John S. Strong, *Predatory Practices in the U.S. Airline Industry* , (United States Government Publishing Office 15 January 2001) <https://permanent.access.gpo.gov/lps40376/predpractices.pdf> (last visited 8 February 2018) as cited in Robenalt, *supra* note 53, at 643. For instance, the case of *Spirit Airlines v.*

enforcement authorities generally focus on whether the airline's pricing strategy could have any objective justifications besides deterring entry into the market or excluding competition.[60]

Although most jurisdictions recognize the potentially harmful effects of predatory pricing, there is no consensus on the applicable legal test for detecting predatory pricing.[61] Areeda and Turner's average variable cost ("***AVC***") test is generally accepted and implemented by competition enforcement authorities in different jurisdictions in order to identify predatory pricing schemes.[62] According to the United States Supreme Court's *Brooke Group Ltd.* decision, a plaintiff in a predatory pricing case must prove: *(1) "that the prices complained of are below an appropriate measure of its rival's costs," and (2) the defendant had a "dangerous probability of recouping its investment in below-cost prices."*[63] However, in terms of Turkish competition law, akin to EU competition law practice, the average avoidable cost ("***AAC***") test is utilized by the TCB in order to determine whether the dominant firm "*undergoes incurring losses in the short-term*" and whether *"an equally efficient competitor would not be in a position to operate in the relevant market without incurring losses."*[64]

Northwest Airlines is a frequently encountered example. In the 2005 case before the Court of Appeals for the Sixth Circuit, Spirit Airlines, which is a small low-fare airline, argued that Northwest Airlines had engaged in predatory pricing on two routes (Detroit to Boston and Detroit to Philadelphia) in which both airline companies competed in the mid-1990s. As Spirit experienced success in its operations on these two routes, Northwest allegedly reduced its fares and increased its daily non-stop flights in response to Spirit's success. Northwest's low-fare flights soon forced Spirit to exit the market. (*Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 924–25 (6th Cir. 2005), as cited in Robenalt, *supra* note 53, at 643.

[59] Capacity dumping can take place when an airline excludes its competitors in a given market by "*increasing airplanes' size and /or number of flights*" (OECD Report 1989, *supra* note 54, at 7).

[60] *Id*.

[61] *Id*.

[62] *"Many courts initially adopted the Areeda-Turner test with little qualification."* (E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS, at 342 (2003), as cited in Robenalt, *supra* note 53, at 650).

[63] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993), as cited in Robenalt, *supra* note 53, 649.

[64] Gürkaynak & Uçtu, *supra* note 56, at 7.

An "avoidable cost" can be defined as a cost that the predator undertaking could have avoided by deploying its assets in a different way.[65] The airline industry presents a perfect case in point for this test, as an airline can deploy its assets differently by using its aircraft on different routes that may generate higher profits for the company.[66] On that note, if an airline intentionally avoids flying on a given route that would produce higher profits and instead chooses to fly on a different route just to exclude its competitors on that second route, the AAC test might determine such behavior to be predatory pricing.

While the details of the AAC test are beyond the scope of this article, we should briefly note that the AAC test looks to and scrutinizes a specific source of profit that the company foregoes in order to charge a lower price, instead of calculating marginal cost and revenue in the abstract.[67] In one case, the TCB evaluated whether Turkish Airlines had engaged in predatory pricing through its pricing policies by utilizing the AAC test.[68] In its evaluation, the TCB considered whether the below-cost pricing strategy was systematically adopted by Turkish Airlines so as to (allegedly) exclude its competitors. Evaluating Turkish Airlines' pricing strategies on a route-by-route basis, although the TCB found that Turkish Airlines had obtained income below the avoidable cost on certain routes, it nevertheless concluded that Turkish Airlines' below-cost pricing could not be labelled as predatory pricing as a result of its detailed economic analyses, and consequently, did not impose any administrative fines on Turkish Airlines.[69]

Predatory pricing cases constitute a serious policy dilemma for competition enforcement agencies, as it is quite difficult to distinguish predation from vigorous competition.[70] Given the challenges associated with identifying predatory conduct, "*the positive payoff from constructive intervention*" and "*the negative payoff from obstructive interference*" pose too

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[65] Herbert Hovenkamp, PREDATORY PRICING UNDER THE AREEDA-TURNER TEST, University of Iowa Legal Studies Research Paper No. 15-06 (2015), 14.

[66] According to Hovenkamp, "*the AAC test provides a tool for evaluating behavior in situations where fixed cost assets are readily transferable from one market to another.*" (Hovenkamp, *supra* note 65, at 14).

[67] *Id*.

[68] TCB's *Turkish Airlines* decision, supra note 40.

[69] *Id*.

[70] Kenneth G. Elzinga & David E. Mills, *Predatory Pricing in the Airline Industry: Spirit Airlines v. Northwest Airlines*, (JOHN E. KWOKA AND LAWRENCE J. WHITE (EDS.), THE ANTITRUST REVOLUTION, 5TH ED. (OXFORD: OXFORD UNIVERSITY PRESS, 2008), 4 (2005).

much of a risk/uncertainty in the early stages of a price-cutting competition.[71] Although the best time to spot a predator company may be before the new competitor leaves the market, the evidence at that time may not be sufficient to compel interference by the competition enforcement authorities. Therefore, predatory pricing allegations should be subject to detailed economic analysis and regulatory and judicial scrutiny.

B. A Structural Barrier Affecting Competition: Allocation of Slots

Growing use of air transportation and airspace has led to major capacity problems, which have entailed delays in transportation, caused significant economic losses and damaged the industry's reputation. Considering that air transportation has been growing relentlessly in modern times and is expected to grow in the years to come, unless the congestion problem is addressed soon, it is likely that structural problems in the air transportation market will continue to hold back the industry and prevent the true potential of the sector from being realized. The efficient allocation of slots,[72] which refers to the bundle of rights allowing airlines to use and operate airport infrastructure (such as runways, terminals, aprons, gates, etc.) for landing or take-off, can be one useful way of addressing the congestion problem.[73]

Since limited infrastructure is one of the fundamental problems faced by the fast-growing airline industry, the issue of how to effectively use the limited capacity of airports[74] has become a significant factor for competition in this

[71] *Id*.

[72] An airline slot is basically "a permission given by a coordinator to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off." (See Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l24085&from=FRN> (last visited 8 February 2018)). According to the Turkish Competition Board, "slot allocation" is defined as the allocation of the limited airport capacity to airline carriers in a way to maximize the benefits and ensure efficient use (See the TCB's *Evaluation of Slot Allocation* decision (April 10, 2008; 08-28/322-106).

[73] Although not explicitly established, it is argued that the right to a slot does not bestow ownership status to the airline using the slot since slots are allocated to airlines with "permission" to make use of the infrastructure (for an indefinite period). This position appears to apply in terms of the established practice in the EU, US and in Turkey.

[74] The term "capacity" has not been defined under Council Regulation 95/93. To that end, it is suggested that "capacity" refers to the "physical" capacity that is available at the airport (for instance, the availability of sufficient runways and ramp surface, among others.) (Pablo Mendes de Leon, *A Multifunctional Approach Towards Slot Allocation*, 62 ZLW 553, at 556 (2013)).

market.[75] In a sector as dynamic as the airline sector, access to take-off and landing slots at any given airport, and especially at congested airports, can be a key factor in determining the competitive environment, as slots can be considered as a "*key input into the downstream provision of air travel services.*"[76]

In the European Union, Member States can designate any airport as a 'coordinated airport,' provided that the capacity to handle actual or planned airline operations is insufficient. The task of slot allocation at coordinated airports is generally assigned to an independent national coordinator, since the limited number of available landing and take-off slots are expected to be "*used efficiently and distributed in an equitable, non-discriminatory and transparent way*"[77] for effective competition.[78] The national coordinator is required to allocate slots to applicant air carriers to use the airport's infrastructure for landing and take-off during the requested period.[79] Once this period concludes, the carrier retains a historical right to continue using the same slot in the next equivalent period. The right of carriers that have used the same slot for at least 80% of the time during a particular traffic season to be entitled to continue using the same slot in the subsequent equivalent traffic season is known as "grandfather rights."[80] This "use-it-or-lose-it" quality of slot rights necessitates the carriers to operate at least 80% of slots in a given slot series, which

[75] Muhammed Gündoğdu, *Türk Havayolu Taşımacılığı Sektöründe Adalet Problemi: Slot Tahsisleri* [The Fairness Problem in Turkish Air Transportation Sector: Slot Allocation], Turkish Competition Authority, <www.rekabet.gov.tr/tr/Sayfa/ Yayinlar/ diger-calismalar/rekabet-yazilari?icerik=316384c7-076d-41a3-98a0-331 ae9687714> (last visited 8 February 2018).

[76] John Pheasant, *EU slot trading*, (November 1, 2007) <http://globalcompetiti-onreview.com/article/1038346/slot-trading-in-the-eu> (last visited 8 February 2018).

[77] Council Regulation (EEC) No 95/93, *supra* note 72.

[78] According to the EU Regulation, the same coordinator may be appointed for more than one coordinated airport. For instance, in the United Kingdom, Heathrow, Gatwick, Stansted, Manchester, London Luton and London City are coordinated airports; meanwhile, Airport Coordination Limited is the national coordinator assigned to the allocation of slots in these airports. (Andrew Haylen & Louise Butcher, *Airport Slots*, House of Commons Briefing Paper Number CBP 488, June 12 2017, at 4 < http://researchbriefings.files.parliament.uk/ documents/SN00488/ SN00488.pdf> (last visited 9 February 2018).

[79] Pheasant, *supra* note 76.

[80] John Balfour, *Airline Competition* (OECD Expert Paper, June 18-19, 2014) DAF/ COMP(2014), at 22 < http://www.oecd.org/officialdocuments/publicdisplay documentpdf/?cote=DAF/COMP(2014)22&docLanguage=En> (last visited 8 February 2018).

comprise at least five slots having been requested for the same time on the same weekday for consecutive weeks.[81]

The efficient and fair distribution of slots is crucial to the promotion of competition in the airline industry, as the scarcity of slots can impede competition between airlines by way of (i) erecting entry barriers, (ii) creating a competitive advantage for incumbents, (iii) creating an oligopolistic market structure, and even (iv) leading to considerations under "abuse of dominant position" provisions.[82] Indeed, in markets such as the airline industry where entry barriers are so difficult to overcome, potential competition which would be created by new entrants is prevented and the possibility of collusion by market players is increased.[83] In this sense, the current allocation process can be criticized for leading to excessive inflexibility in slot allocation (due to the effects of the "grandfather clause"), and therefore, for allowing incumbent airlines to "*artificially maintain market power*."[84] Due to the administrative methods and mechanisms that allow incumbents to easily circumvent the "use-or-lose-it" rule by operating unprofitable services or by reducing aircraft sizes in certain slots, new entrants are denied the opportunity to gain effective access to the market. [85]

In Turkey, the slot allocation mechanism, which regulates the use of landing slots by domestic and foreign airlines for scheduled, charter and planned technical flights, began operating in 1993.[86] Similar to the EU, under the General Directorate of State Airports Authority's ("***GDSAA***")[87] Instructions for Slot Allocation ("***Instructions***"),[88] certain airports (namely Istanbul Ataturk Airport [for both summer and winter] and Antalya Airport [summer]) were designated as coordinated airports.[89] Parallel to the practice of the International Air Transport Association ("**IATA**"), according to the Instructions, historic slot

[81] Victoria Seabra Ferreira, *The Anticompetitive Effects of Slot Allocation in the EU*, 14(1) ISSUES AVIATION L. & POL'Y 51, at 55 (2014).

[82] *Id.* at 52.

[83] *Id.* at 53.

[84] *Id.* at 56.

[85] *Id.* at 56.

[86] Gündoğdu, *supra* note 75.

[87] GDSAA is a state-owned economic enterprise entrusted to oversee management of Turkish airports, regulation and control of Turkish airspace (GDSSA, <http://www.dhmi.gov.tr/DHMIPageEN.aspx?PageID=34#.WmmRYq5l_IU> (last visited 8 February 2018)).

[88] GDSAA's Instructions for Slot Allocation <http://www.dhmi.gov.tr/kanunyonet-melik.aspx#.WmmWxq5l_IV> (last visited 8 February 2018).

[89] *Id.* Article 16.

rights and slots for scheduled and regular charter flights were recognized as priorities in the slot allocation scheme instituted by the GDSAA.[90] Similarly, airline carriers are required to operate at least 80% of slots in a slot series in a given traffic season for scheduled and charter flights in order to secure their landing slots at these two airports.[91]

The current slot allocation method used in Turkey constitutes a structural barrier for new entrants into the airline market.[92] Particularly, seeing that the current mechanism allows incumbents to retain their slots at Istanbul Ataturk Airport and at Antalya Airport, based on the "grandfather rights" principle, unless there is any overriding reason for them to voluntarily return their slots to the pool for reallocation, the incumbents can continue to enjoy their slot positions and new entrants are precluded from entering the market. For instance, in terms of the Istanbul (Ataturk Airport)-Ankara route, which can be regarded as the most important and congested route in Turkey, Turkish Airlines is considered to have an established presence. This is due to the fact that Turkish Airlines retains the historic slot right and other airline carriers will not be able to compete with Turkish Airlines on this route due to the grandfather clause.[93]

Bearing in mind that a growing number of passengers are using Istanbul Ataturk Airport each year, the congestion problem evinced at Istanbul Ataturk Airport cannot really be considered as unexpected or surprising. In fact, according to the official statistics, 63.7 million passengers passed through Istanbul Ataturk Airport[94] in 2017, corresponding to approximately one-third of all passengers using the airports within Turkey.[95] Taking this sobering fact into account, it is no surprise that most airline carriers face slot shortages at Istanbul Ataturk Airport.[96] indicate that the current congestion and slot scarcity

[90] TCB's *Turkish Airlines* decision, *supra* note 40.

[91] GDSAA's Instructions for Slot Allocation, *supra* note 88, Article 11.

[92] TCB *Turkish Airlines* decision, *supra* note 40, para. 101.

[93] *Id.* para. 131.

[94] Istanbul Ataturk Airport Official Statistics <http://www.ataturkairport.com/tr-TR/havayollari1/Pages/istatislikler.aspx>(last visited 8 February 2018).

[95] Press Release of the Minister of Transport, Maritime Affairs and Communications (January 5, 2018) <http://www.udhb.gov.tr/aciklama-111-%60turkiye--yakin-zamanda-bolgenin-havacilik-merkezi-haline-gelecek%60.html> (last visited 8 February 2018).

[96] Uncredited Author, *Seven flag carriers halt Istanbul flights amid demand slump, rise in Turkish carriers*, HÜRRIYET DAILY NEWS (Istanbul, December 18, 2017) <http://www.hurriyetdailynews.com/seven-flag-carriers-halt-istanbul-flights-amid-demand-slump-rise-in-turkish-carriers-124326> (last visited 8 February 2018).

problems at Istanbul Ataturk Airport are not likely to disappear on their own.[97] Although a competition enforcement decision cannot overcome the existing market dynamics that were created as a result of primary slot allocation mechanisms,[98] considering that slots can be viewed as valuable assets,[99] there

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[97] We duly note that with the new airport in Istanbul, our current findings and evaluation of the slot allocation in Ataturk Airport can be subject to change. This is due to the fact that, with the new Istanbul Airport which is expected to start its operations on October 29,2018, is estimated to be the world's largest terminal, with a gross floor area of nearly 11 million square feet and the ability to serve 90 million passengers a year. According to the press statement by Minister of Transport, Maritime Affairs and Communications, starting on October 30, 2018, all incoming flights will be directed to the new airport from the existing Atatürk Airport as to the new Istanbul Airport and by this the transition to the new Airport is expected to be completed in 48 hours. Moreover according to the same press statement, the new Istanbul Airport is planned to be large enough for 114 planes to dock at the same time and would be in a condition to serve 3,000 flights on a daily basis and therefore new slot positions will be available for airline carriers. With that said, although with the new Istanbul Airport, Ataturk Airport is not expected to continue its operations, the current slot allocation mechanisms employed in airline sector in Turkey are not expected to change. According to the estimations with the completion of all stages, the new Istanbul Airport is expected to serve 150 million passengers and to provide opportunities for flights to more than 350 destinations for nearly 100 airline companies. Therefore we argue that unless structural problems of the current slot allocation mechanisms are addressed, the competitive outlook and current concerns in the airline sector will not differ from the current scene despite of the fact that the large capacity of the new Istanbul Airport will address the congestion problems temporarily. (See Press Release of the Minister of Transport, Maritime Affairs and Communications (January 5, 2018), supra note 95; Press Statement of the Minister of Transport, Maritime Affairs and Communications (February 10, 2018) < http://www.dhmi.gov.tr/ haberler.aspx?HaberID=3399&yl=-1&rowType=1#. WoFJl SXFLIV> (last visited 12 February 2018); Uncredited Author, *Istanbul's 3rd airport to welcome 1st plane by Feb 2018, official opening to be on Republic Day*, HÜRRIYET DAILY NEWS (Ankara, October 6, 2017) < http://www.hurriyet dailynews.com/istanbuls-3rd-airport-to-welcome-1st-plane-by-feb-2018-official-opening-to-be-on-republic-day-120474>(last visited 12 February 2018); Uncredited Author, *New Istanbul airport to open in October, transport minister says*, DAILY SABAH WITH REUTERS (Istanbul, February 10, 2018) < https://www. dailysabah.com/business/2018/02/ 10/new-istanbul-airport-to-open-in-october-transport-minister-says>, (last visited 12 February 2018); Uncredited Author, *Istanbul's new airport 73 percent complete, ready to operate in October 2018*, DAILY SABAH WITH REUTERS (Istanbul, November 17, 2017) < https://www.dailysabah.com/business/2017/11/18/istanbuls-new-airport-73-percent-complete-ready-to-operate-in-october-2018>(last visited 12 February 2018))

[98] The TCB's *Turkish Airlines* decision (July 24, 2008; 08-47/668-262), para. 130.

are a few administrative options that can be adopted in the airline sector as a method of managing scarce slots, such as secondary slot trading, congestion pricing, slot lotteries, slot caps and auctions.[100] Under its Instructions, the GDSAA currently allows air carriers to engage in secondary trading,[101] but does not provide for an auction system.[102] However, current market dynamics and the structural entry barriers created by the primary slot allocation mechanisms remain highly problematic, as the current slot allocation system in Turkey enables incumbents to easily retain their slots and their market positions and does not incentivize carriers to make unused (or underused) slots available for the most efficient use. To that end, it may be argued that any solution that fails to address the problems caused by the primary slot allocation mechanism will only make a trivial difference in terms of overcoming the structural barriers faced by new entrants into the air transportation market in Turkey, and thus will be inadequate for resolving the competitive issues in the Turkish airline industry.

Another issue which may require regulatory attention in Turkey is whether slots are distributed in a way that upholds and implements the principles of neutrality, transparency, and non-discrimination. The GDSAA, which is a state-owned enterprise, has been entrusted with the duty to coordinate slot allocation in Turkey since 2010. The Slot Coordination Center under the GDSAA operates as the organization responsible for slot allocation and for the assessment of slot demand.[103] The majority of available and commercially profitable slots in Turkey are currently held by Turkish Airlines.[104] At this time, the Turkey Wealth Fund, which is a sovereign wealth

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[99] Pheasant, *supra* note 76.

[100] *Id*.

[101] The GDSAA's Instructions for Slot Allocation, *supra* note 88, Article 12.

[102] Savaş S. Ateş & Mevlüt Üzülmez, *Airport Slot Coordination System: An Implementation at Ataturk Airport*, GLOBAL BUSINESS RESEARCH CONGRESS (GBRC-2016), VOL. 2 99, at 103 < http://dergipark.gov.tr/download/article-file/237660> (last visited 8 February 2018). Slot auctions are not supported by IATA, whereas the European Aviation Package recommends secondary slot trading as a mechanism for combatting slot allocation problems. There are some authors who argue that secondary slot trading, which enables airlines to swap the slots that they have been given the right to use, indeed increases efficiency. (IATA, *The dangers of slot auctions* (March 8, 2017) <http://airlines.iata.org/analysis/the-dangers-of-slot-auctions> (last visited 8 February 2018).

[103] GDSAA's Instructions for Slot Allocation, *supra* note 88, Article 4.

[104] The TCB's *Turkish Airlines/Türkiye Garanti Bankası* (September 9, 2009; 09-41/994-251) and *Turkish Airlines* (February 18, 2009; 09-07/126-37) decisions.

fund that was incorporated under Turkish laws in August 2016 and operates under the Prime Ministry of Turkey,[105] owns 49.12% of Turkish Airlines.[106] Thus, the Turkish government is currently in the position of both a significant shareholder in a domestic airline and in control of coordinating slot allocations at Istanbul Ataturk Airport and Antalya Airport. As a result, it could be reasonably argued that this mechanism (and the Turkish government's conflicting roles as both a shareholder in the largest domestic airline and the coordinator in charge of slot allocations) has the potential to hinder effective competition in the airline sector in Turkey.[107] Although the risk posed to competition by this arrangement is lower than it was in 2012,[108] it may still prove beneficial to establish a quasi-independent body or to entrust the slot coordination duty to an independent/outside company (for instance, a company like Airport Coordination Limited in the UK), in order to ease any concerns and dispel any questions regarding the effectiveness of competition in the Turkish air transportation market.

C. Aircraft Lease Agreements: A Concentration or a Restrictive Agreement?

As an investment, air transportation has traditionally required substantially high funds for market entry, though sufficient financing has always been available to underwrite the initial startup costs.[109] Given that in 2017 some high profile airlines in Europe collapsed into bankruptcy,[110] aircraft

[105] The Law No. 6741 on Establishing the Turkey Wealth Fund and Amending Certain Other Laws [Published in the Official Gazette No. 29813 dated 26 August 2016] <http://www.resmigazete.gov.tr/eskiler/2016/08/20160826-1.htm> (last visited 8 February 2018).

[106] Turkey Wealth Fund <http://turkiyevarlikfonu.com.tr/EN/Portfoy/5> (last visited 8 February 2018).

[107] This conclusion has also been affirmed in Muhammed Gündoğdu's 'Türk Havayolu Taşımacılığı Sektöründe Adalet Problemi: Slot Tahsisleri' (Gündoğdu, *supra* note 75.).

[108] Until 2012, the General Director of GDSAA had been a member of the Board of Directors of Turkish Airlines. This state of affairs inevitably caused concerns regarding the proximate relationship between GDSAA and Turkish Airlines. In 2012, the former General Director of GDSAA resigned from his post on the Board of Directors of Turkish Airlines. (See the TCB's *Turkish Airlines* decision, supra note 40, at 28).

[109] Alex Kons, *Understanding the Chaos of Airline Pricing*, THE PARK PLACE ECONOMIST, VOL. VIII, 2. (2000) <https://digitalcommons.iwu.edu/parkplace/vol8/iss1/11>(last visited 8 February 2018).

[110] For instance Britain's Monarch and Germany's Air Berlin, as well as Italy's Alitalia. (See Victoria Bryan (Ed. Kirsten Donovan), *Airlines body eyes bankruptcy law review to reduce stranded passengers*, (Berlin, February 9, 2018) < https://www.　　reuters.com/article/us-airlines-bankruptcy/airlines-body-eyes-

leasing which is an alternative for financing airlines, has become significant for airline carriers in terms of continuing operations in a highly competitive market. Indeed, airlines can also choose to use lease agreements as a means of acquiring aircrafts, spare parts, and ground support equipment from their competitors.[111] By leasing their aircrafts, they can expand their fleets and facilities, and remain competitive at the same time.[112] The circumstances that lead to aircraft leasing do not always involve insufficient funds, but may rather arise due to attractive rental terms, which make leasing a viable and appealing alternative to ownership.[113]

There are two kinds of aircraft lease agreements that are practiced globally: (i) Wet Lease Agreements, whereby an aircraft including the cockpit and cabin crew is leased, and (ii) Dry Lease Agreements, through which only the aircraft (*i.e.*, excluding the pilots and cabin crew) is leased.

Although wet lease agreements enable the lessor's aircraft and crew to be utilized by the lessee for commercial purposes, under Turkish competition law, such agreements do not constitute a concentration. Indeed wet lease agreements, which ensure that one airline (lessor) operates the flights by providing the aircraft and crew to another airline (lessee),[114] are evaluated under Article 4 of the Law No. 4054, which prohibits agreements between competing undertakings. When the TCB had the chance to evaluate wet lease agreements from a competition law standpoint in *Turkish Airlines/Güneş Express,*[115] it decided to grant a negative clearance to the wet lease agreement

bankruptcy-law-review-to-reduce-stranded-passengers-idUSKBN1FT27F>(last visited 12 February 2018). ; James Politi & David Keohane, *Air France in talks with Alitalia to acquire carrier*, (Rome and Paris, January 21, 2018) < https://www.ft.com/content/ee7cb92a-fe91-11e7-9650-9c0ad2d7c5b5>(last visited 12 February 2018)).

111 David I. Johnston, *Legal Aspects of Aircraft Finance (Part II)*, 29 J. AIR L. & COM. 299, at 299 (1963) <http://scholar.smu.edu/jalc/vol29/iss4/3>(last visited 8 February 2018).

112 *Id*.

113 *Id*.

114 European Commission, *Establishment of unrestricted wet-lease arrangements between the EU and the U.S. through a wet-lease agreement between the parties*, DG MOVE/E.1, March 7, 2016 <http://ec.europa.eu/smart-regulation/roadmaps/docs/ 2015_move_117_wet_lease_agreement_en.pdf> (last visited 8 February 2018).

115 The TCB's *Turkish Airlines/Güneş Express* decision (April 12, 2012; 12-20/517-153) < http://www.rekabet.gov.tr/Karar?kararId=e2555459-e40d-4346-b382-c08e2e6983 d5> (last visited 8 February 2018).

between Turkish Airlines and Güneş Express, whereby Turkish Airlines had leased its aircraft and crew to Güneş Express in accordance with the Turkish Civil Aviation General Directory's Directive on Aircraft Leasing.[116] In that case, the TCB found that since the agreement did not (i) contain any provision restricting parties from making their commercial decisions independently, (ii) have any provision or mechanism leading to coordination between the parties, (iii) have the object or effect (or likely effect) of the prevention, distortion or restriction of competition, or (iv) result in abuse of dominance, the agreement did not violate competition rules and would be granted a negative clearance.[117]

To that end, given that airline financing is possible (and more commercially feasible) by taking advantage of the lower initial costs associated with leasing aircraft for short periods,[118] lease agreements are an important tool for airlines to continue and expand their operations in the air transportation market. Although the TCB's jurisprudence does not include many instances in which it has examined wet lease agreements from a competition law perspective, its existing approach does not object to or prohibit wet lease agreements from being implemented in Turkey.

I. Conclusion

Following deregulation and the subsequent entries into the market, the airline sector in Turkey shifted from an industry consisting solely of a long-established state-owned flag carrier (*i.*e., Turkish Airlines) to a dynamic and competitive market.[119] The remarkably high number of passengers benefitting from lower fares and new destination routes can be illustrated simply by examining the number of passengers taking advantage of air transportation in

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[116] The Civil Aviation General Directorate's Instructions for Aircraft Lease [*Hava Aracı Kiralama Usul ve Esasları Talimatı (SHT - Kiralama)*], <http://web.shgm.gov.tr/documents/sivilhavacilik/files/mevzuat/sektorel/talimatlar/2017/SHT-KIRALAMA.pdf>(last visited 8 February 2018).

[117] The TCB's *Turkish Airlines/Güneş Express* decision, supra note 115. In addition to the *Turkish Airlines/Güneş Express* decision, there are some merger cases in which the TCB defined the relevant product market as aircraft leasing (wet leasing). However, these decisions do not directly involve wet leasing but actually concern the acquisition of undertakings that are active in wet leasing. (See *International Lease Finance Corporation/Aero Turbine* (August 25, 2011; 11-46/1121-390), *Air Berlin/Ihy İzmir Havayolları* (June 26, 2012; 12-35/995-308), *Dubai Aerospace/Carmel* (June 8, 2017; 17-19/292-129)).

[118] Kons, *supra* note 109.

[119] Resul Aydemir & Cihad Haytural, *The effects of low cost carrier entry in the Turkish Airline industry*, EURASIAN ECON. REV. 6:111, at 121 (2016).

Turkey, which has quadrupled in the last decade.[120] Bearing this extraordinary expansion of the market in mind, the implementation and enforcement of competition laws that can ensure effective competition in the market have become ever more significant.

In this article, we have tried to offer an overview of certain issues that have arisen in the Turkish airline industry in terms of competition law rules and enforcement. We dare not claim that the issues relating to competition law are limited to those mentioned in this article, and acknowledge that we have merely provided a glimpse of the complicated issues relating to this industry. We rather conclude with the observation that the airline industry, which is a complex market that incorporates various different parameters, plays a significant role in the everyday lives of consumers, and is therefore worthy of careful and thorough evaluation with respect to its competition law implications.

[120] *Id.*

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Imposing Administrative Monetary Fines on Employees: Fair or Foul?

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I. INTRODUCTION

The competition enforcement policies of public authorities aim to prevent infringements against competition law rules, and therefore, the sanctions imposed against anti-competitive behavior seek to punish and deter such behavior. However, sanctions against undertakings are usually inadequate on their own to deter anti-competitive conduct. Corporate sanctions against anticompetitive conduct are believed to not present an optimal level of deterrence due to their limited affect to prevent illegal conduct, and so the sanctions against individuals (*i.e.*, natural persons) have become more frequently used in order to complement corporate sanctions and provide further deterrence.[1]

Without sufficient individual penalties against anti-competitive conduct, infringements often seem rather advantageous and beneficial for undertakings.[2]

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[1] European Commission, *Fines for Breaking EU Competition Law*, EUROPEAN COMMISSION (2011), http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf (last visited 21 January 2018).

[2] For instance, the Organization for Economic Co-operation and Development ("***OECD***") analyzed the price increases imposed by a group of cartels and found them to be around 15 to 20%.

When determining the sanctions to be imposed in a particular case, the profits achieved from the anti-competitive conduct have to be taken into account in order for the punishment to provide an adequate level of deterrence. Penalties against undertaking rarely achieve the necessary level that would enhance the level of deterrence and prevent future infringements. It would also provide further motivation for corporate managers to carefully supervise the activities of their employees and to prevent them from engaging in anti-competitive acts.[3]

The theory of optimal deterrence[4] suggests that the purpose of sanctions should be to deter inefficient offenses. In other words, if the anti-competitive conduct would create social gain that exceeds social cost, then the violator should commit the offense; however, the violator should still be penalized.[5]

Several countries impose monetary penalties against individuals for anti-competitive actions, particularly for cartel conduct. These countries include the United States (maximum fine of USD 1 million), Canada (maximum fine of CAD 10 million per count for conspiracies), Greece (fines ranging between EUR 200,000 to EUR 2 million), Spain (up to EUR 60,000 per offence), Germany (administrative fine up to EUR 1 Million or three times the additional

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The Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, OECD COMPETITION COMMITTEE (2002), http://www.oecd.org/competition/cartels/2081831.pdf (last visited 21 January 2018).

[3] The Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, *Cartel Sanctions against Individuals*, OECD COMPETITION COMMITTEE (2003), http://www.oecd.org/daf/competition/cartels/34306028.pdf (last visited 21 January 2018).

[4] The theory of optimal deterrence (sanctions) according to William Landes is explained as *"The rule for determining the optimal fine or damage award is simple to state: the fine should equal the net harm to persons other than the offender."* Furthermore, the theory of optimal deterrence does not concern itself with the type of the sanction applied. Thus, the sanction can be in the form of damages or criminal or administrative monetary fines. The important point is to provide sanctions which balance the net harm caused and to not cause over- deterrence which would prevent actions that improve social welfare.

William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U.CHI.L. REV. 652, 655 (1983), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi? referer= https://www.google.com.tr/&httpsredir=1&article=2543&context=journal_articles

[5] Harry First, *The Case For Antitrust Civil Penalties*, NEW YORK UNIVERSITY SCHOOL OF LAW, NELLCO LEGAL SCHOLARSHIP REPOSITORY, WORKING PAPER NO. 148 (2008), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1152&context=nyu_lewp (last visited 21 January 2018).

profit from the cartel realized by the natural person (and not the enterprise)).[6] In most of the countries where individuals are penalized for anti-competitive conduct, the violation is considered as "criminal in nature."

With respect to the imposition of monetary fines on individuals, EU and Turkish regulations differ in an important aspect: Turkish antitrust enforcement allows for individuals to be penalized both criminally and administratively, whereas only the undertakings are administratively penalized in EU antitrust enforcement systems. Similarly, the UK and the US also allow individuals to be penalized for anti-competitive conduct; in fact, the US goes a step further and awards damages to the victims of anti-competitive conduct.[7]

On the other hand, it is possible for penalties against undertakings to be sufficient on their own to deter anti-competitive conduct. However, there are several difficulties that arise from a system in which only the undertakings are penalized. If the optimal penalty calculated is too heavy for the undertaking to bear, this punishment would force the undertaking to exit the market, and thus, decrease the level of competition—which would defeat the purpose of the punishment. To avoid this problem, most of the competition authorities settle for fines that are not optimal (i.e. fines which do not balance the net harm caused by the offender). In this context, penalties against individuals become beneficial when they are used to complement the non-optimal penalties against undertakings.

Another advantage of imposing administrative monetary penalties against individuals is to enhance the efficiency and attractiveness of the leniency programs. When undertakings engage in anti-competitive conduct, such as cartel activities, the co-operation of natural persons against the investigated party (which can be secured through the threat of an individual fine and the subsequent promise of the leniency program) becomes a crucial part of the investigation.

[6] Florian Wagner-von Papp, *Compliance and Individual Sanctions in the Enforcement of Competition Law*, COMPETITION LAW COMPLIANCE PROGRAMMES: AN INTERDISCIPLINARY APPROACH, SPRINGER INTERNATIONAL PUBLISHING (2016), https://papers. ssrn.com/sol3/papers.cfm?abstract_id=2771289 (last visited 21 January 2018).

[7] European Parliamentary Research Service, *EU and US Competition Policies*, EUROPEAN PARLIAMENT (2014) http://www.europarl.europa.eu/RegData/bibliotheque/ briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf (last visited 21 January 2018).

II. ENFORCEMENT IN TURKISH JURISDICTION

Article 16 of the Law No. 4054 on the Protection of Competition stipulates that if monetary fines are imposed on undertakings or associations of undertakings, an administrative fine up to 5% of the penalty imposed on the undertaking or association of undertakings shall be imposed on the managers or employees of the undertaking or association of undertakings who are determined to have had a decisive influence or role in the infringement.

In this context, some of the key decisions of the Turkish Competition Authority in which the Board decided to impose administrative monetary fines on the managers of undertakings engaged in anti-competitive conduct are summarized below:

In the *White Meat* decision,[8] the Board stated that 27 undertakings operating in the white meat sector had had an agreement to determine the prices of chicken meat and determined that the Poultry Meat Producers and Breeders Association ("***Besd-Bir***") had violated Article 4 of the Law No. 4054 by facilitating the previously-stated acts in restriction of competition. It was found that the Chairman of the Board of Directors of Pak Tavuk Gıda Sanayi ve Ticaret A.Ş. ("***Pak Tavuk***"), and the President of Besd-Bir, Zuhal Daştan, had had a decisive role in the formation and execution of the anti-competitive association in the chicken meat sector, and this conclusion was based on Zuhal Daştan's letters to white meat producers, suggested price increases to the producers in her letters and e-mails, statements and documents during the investigations. The Competition Board concluded that Zuhal Daştan's initiatives were in a position to increase prices or to increase the prices in cooperation with enterprises in the chicken meat market, and that Zuhal Daştan had had a decisive influence in ensuring the continuity of the cartel and its activities, as they had been laid out as a result of the investigation. Therefore, Pak Tavuk Chairman and President of Besd-Bir Zuhal Daştan, who, in the light of the evaluations made by the Competition Board, was determined to have had a decisive effect on the formation of the cartel and the competition between the undertakings operating in the white meat sector, was individually penalized with a fine amounting to 3% of the monetary fine imposed on Pak Tavuk.

In the *Sodium Sulphate* Decision,[9] the Board determined that the relevant undertakings had violated Article 4 of the Law No. 4054 by determining the prices of powdered sodium sulphate and crystalline sodium sulphate and by dividing the customer base among themselves (*i.e.,* market allocation.) In its

[8] Turkish Competition Board's *White Meat* decision (25 Nov. 2009, 09-57/1393-362).

[9] Turkish Competition Board's *Sodium Sulphate* decision (03 May 2012, 12-24/711-199).

Reasoned Decision, the Board determined that the agreement between Otuzbir Kimya ve Sanayi Türk Ltd. Şti. ("***OKS***") and Sodaş Sodium Sanayi A.Ş. ("***Sodaş***"), had been carried out mainly between Sodaş General Manager Serdar Salancı and OKS Director Halit Kunter. In other words, said managers of the related undertakings were found to have had a decisive influence in the formation of the cartel, and documents relating to various correspondences, meetings and negotiations were provided as evidence within this context.

Furthermore, (i) the documents obtained during the on-site inspections showed that Sodaş Domestic Sales Manager Mustafa Özdemir and OKS Marketing Executive Gönül Boran had attended multiple meetings with regards to sharing their customer base; (ii) that these documents raised suspicions about whether these persons had had a decisive influence on the formation of the cartel, (iii) however, considering the logic behind the business system, the communication between these persons were deemed as interactions between middle-level managers who were merely obeying and fulfilling the instructions given to them by their superiors, and therefore (iv) it was concluded that Mustafa Özdemir and Gönül Boran could not have had a decisive influence on the formation of the cartel.

Within the scope of the explanations above, the Board decided that: (i) OKS Manager Halit Kunter should be penalized for an amount equal to 3% of the monetary fine imposed on OKS, taking his active co-operation during the investigation into account, and (ii) Sodaş CEO Serdar Salancı should be penalized for an amount equal to 3% of the monetary fine imposed on Sodaş, but this amount was decreased by half due to his admission of responsibility with respect to the infringement and his active co-operation throughout the investigation period.

III. THE ENFORCEMENT OF INDIVIDUAL SANCTIONS IN THE EUROPEAN UNION

According to Article 3 of the Council Regulation (EU) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union ("***Regulation No 1/2003***"), substantial differences shall remain between the laws of the Member States regarding merger control, but the laws regarding anti-competitive conduct are considered to be a part of the convergence goal of the Regulation. However, individual sanctions were not covered by the Regulation and it was stated that relevant sanctions may differ between Member States' jurisdictions.[10] To that end, corporate sanctions against

[10] Florian Wagner-von Papp et al, *Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges*, CONCURRENCES REVIEW N° 2-2016,

anticompetitive conduct are determined by the EU regulations whereas the sanctions against individuals for anticompetitive conduct differentiate between each Member State which will be explained in more detail below.

While determining fines, the European Union regulations consider the gravity and duration of the anti-competitive conduct that constitutes a violation. The maximum level of monetary penalties is set at 10% of the company's annual turnover.[11] However, Regulation No 1/2003 emphasizes that these penalties are not "of a criminal law nature"[12] and only cover undertakings. Since the fines and sentences applied by the European Commission only cover undertakings and not individuals, the Commission cannot order imprisonment sentences or impose monetary penalties on individuals. Therefore, the punitive effect of the penalties must be carried out solely through the penalties imposed on the undertakings.

However, in the OECD report on *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes,* the Commission recommends the implementation of sanctions against individuals, and even the imposition of criminal sanctions in cartel cases. This report also discusses certain difficulties potentially arising from the implementation of individual sanctions, should the Member States decide to introduce them. The type and efficiency of individual sanctions, the determination of the "optimal" level of sanctions, and the co-existence of criminal and administrative sanctions in cartel cases seem to be the most challenging factors with respect to individual sanctions.[13]

Many of the Member States have begun to institute individual penalties for competition law infringements recently, most of them being of a criminal law nature. France, Germany, the Netherlands, Spain, Denmark, Greece, Ireland, Italy and Poland are known to have established monetary sanctions against individuals for anti-competitive conduct—mostly for cartel activities. Although currently in negotiations to leave the EU, the United Kingdom can be counted amongst the Member States that penalize anti-competitive conduct with penalties against individuals. However, individual penalties are not a

ART. N° 78515, PP. 14-44; GWU LAW SCHOOL PUBLIC LAW RESEARCH PAPER NO. 2016-26, GWU LEGAL STUDIES RESEARCH PAPER NO. 2016-26, http://ssrn.com/abstract=2782090 (last visited 21 January 2018).

[11] *Supra* note 5

[12] Regulation No 1/2003, Article 23(5).

[13] *Second Report by the Competition Committee on Effective Action Against Hard Core Cartels*, (OECD, DAFFE/COMP (2003), at 2.

common occurrence in EU jurisdictions, and the regulations are not known to have much notable or strict enforcement.[14]

In the following subsections, we will discuss the policies of certain Member States that are noteworthy for applying monetary penalties against individuals for competition law infringements.

1. United Kingdom

The regulations of the United Kingdom consider the involvement of individuals in cartels as criminal violations, and these violations involve activities such as price fixing, market allocation, bid rigging, limitation of supply or output, among others. These violations are subject to a maximum of 5 years imprisonment and an unlimited monetary fine (*i.e.*, with no maximum limit), while also being subject to administrative sanctions, such as disqualification from serving as a director for up to 15 years.[15] However, if an individual is prosecuted for money laundering in a cartel case, the maximum imprisonment sentence rises up to 14 years and the monetary sanctions imposed against that individual tend to be relatively higher compared to other types of cartel offenses.

In the UK, participation in a successful cartel is not essential or even a prerequisite for prosecution. Attempting to commit a cartel offense or even conspiring to establish a cartel or commit cartel offenses is a criminal offense. The legal basis for individual monetary sanctions in the UK is the Enterprise Act, which was first established in 2002 and amended in 2013. The Competition and Markets Authority ("***CMA***") has summarized the relevant provision as follows:

"*A person commits the offence if he or she agrees with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely price fixing, market sharing, bid rigging, and limiting output. The offence is subject to certain exclusions and defenses. The maximum penalty on conviction on indictment is five years imprisonment and/or an unlimited fine*."[16]

[14] *Supra* note 6, at 9.

[15] *Id*, at 10.

[16] Competition and Markets Authority, *Cartel Offence Prosecution Guidance*, COMPETITION AND MARKETS AUTHORITY (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_Offence_Prosecution_Guidance.pdf (last visited 21 January 2018).

One of the most notable examples of individual monetary sanctions in the UK is the *Marine Hose Cartel* case. In the *Marine Hose Cartel*[17] case, the European Commission penalized five marine hose producers (namely Bridgestone, Dunlop Oil & Marine, Manuli, Trelleborg, and Parket ITR) for bid rigging, and imposed a monetary fine of EUR 131,5 million. The Commission focused on the investigation carried out against undertakings and cooperated with US and UK authorities for the individual sanctions. Robert L. Furness, the former president of Manuli was sentenced to 14 months in prison by UK authorities, as well as receiving a monetary fine of USD 75,000, and the manager of Parker ITR signed a plea agreement in which he agreed to pay a monetary fine of USD 20,000. Bryan Allison and David Brammar, of Dunlop Oil & Marine Ltd., had pleaded guilty and Allison was sentenced to pay a USD 100,000 criminal fine whereas Brammar was sentenced to pay a USD 75,000 fine. Another arrested executive, Peter Whittle was sentenced to pay EUR 100,000 criminal fine. Allison, Brammar and Whittle were prosecuted and charged with cartel offenses in both US and UK.

2. Germany

German regulations treat bid-rigging as a criminal violation, but other anti-competitive conducts, such as price fixing, market allocation or restrictions, are considered to be administrative violations. However, Article 81 of the German Act against Restraints of Competition expressly states that administrative violations are subject to administrative fines, which are applicable to both individuals and undertakings. Consequently, German laws allow for individuals to be penalized by administrative monetary penalties for their anti-competitive conduct, contrary to Regulation No 1/2003. In addition, if an individual is found to have neglected his duties to prevent a competition law violation of the undertaking, he can also be held accountable under Provision 130 of the German Administrative Offenses Act ("***OwiG***").

German law allows for individuals to be penalized up to EUR 1 million for competition law infringements,[18] although there aren't any notable examples of the imposition and enforcement of such a severe monetary penalty. Data obtained from the German Federal Competition Authority (*Bundeskartellamt*) suggest that the average amount of fine per individual was thought to be EUR 56,000 between the years 1993 to 2010. However, the

[17] Maurits Pino, *The Marine Hoses Cartel*, COMPETITION POLICY NEWSLETTER, NO. 2 (2009), http://ec.europa.eu/competition/publications/cpn/2009_2_12.pdf (last visited 27 January 2018).

[18] The maximum limit of EUR 1 Million can be exceeded in cases where it is necessary to recover unlawful gains.

maximum fine amount for individuals was set at EUR 1 million in 2005; and, in large cartel cases, the individual sanctions are as high as EUR 250,000.

A notable example of individual monetary sanctions in Germany was observed in the case against five brewery companies[19]. Initially, five major beer companies, namely Bitburger, Krombacher, Veltins, Warsteiner and Anheuser-Busch and seven individuals were found guilty of illegal price fixing between the years 2006 and 2008. Soon after, the Bundeskartellamt sentenced 6 additional companies as well as 7 other individuals to monetary fines, which amounted to EUR 338 million combined. The fourteen individuals who were engaged actively in the price fixing scheme were fined EUR 3.6 million for their illegal conduct.

3. France

The earliest provisions that foresee monetary sanctions against individuals in France date back to the French Criminal Code of 1810. The subsequent regulations all provide for individual sanctions in various forms. In 1986, the *Conseil de la Concurrence*[20] was established, whose mission was to regulate competition and to preserve the financial system. Furthermore, this council also maintained the practice of individual sanctions, which, together with the system of sanctions against undertakings, complement and strengthen each other.

The French Commercial Code sets forth that: "*If any natural person fraudulently takes a personal and decisive part in the conception, organization or implementation of the practices referred to in Articles L. 420-1 and L. 420-2, this shall be punished by an imprisonment of four years and a fine of 75,000 euros.*"[21] The grammatical interpretation of the text suggests that, for an individual to be penalized, the part they take in the anti-competitive conduct should be: (i) fraudulent, (ii) personal, and (iii) decisive. Therefore, the individual act in question must play a significant role in the establishment of the anti-competitive conduct and it must also fulfill the "fraudulent intent" requirement in order to be punishable by law. Fraudulent intent must be established by proving that the person had acted in bad faith.

[19] Bundeskartellamt, Fallbericht Bußgelder gegen Brauereien, *Summary Case Report on the decisions of 27 December 2013 and 31 March 2014, Case B10-105/11*, http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B10-105-11.pdf?__blob=publicationFile&v=2

[20] Predecessor of the *Autorité de la concurrence* (French Competition Authority).

[21] French Commercial Code, Article L.420-6

IV. UNITED STATES

US antitrust enforcement is "infamous" for the criminal sanctions, in the form of both monetary fines and imprisonment that are imposed against individuals. With the enactment of the Sherman Act in 1890, cartel activity in the United States became a misdemeanor punishable by up to 1 year in prison.[22]

Pursuant to the Sherman Act, an individual who takes part in a cartel in the US can face imprisonment for up to 10 years. (The maximum prison sentence for individuals who have been convicted of cartel activities were increased to 10 years in 2004.)[23] In fact, in 2011, some 35 to 40 individuals were sentenced to imprisonment for partaking in cartel activities, with an average prison sentence of 17 months.[24] Therefore, it is clear that the US focuses on individuals as well as undertakings for their infringements of competition law, in stark contrast to the EU, where the Commission is only empowered to sanction undertakings. As indicated by Alexander Italianer[25] during the Annual Conference of the International Bar Association,[26] "*the EU enforcement system is, by contrast, an administrative one, built around financial sanctions against undertakings, not individuals.*"

According to a presentation by lawyers from the Antitrust Division of the U.S. Department of Justice, "[...] *participation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly*."[27] Thus, the viewpoint of the US leads cartel activity to be treated as a serious crime. This strict approach in the US is based on and justified by the legal theory that imprisonment serves as a strong disincentive for individuals to participate in a cartel, as long as the punishment is proportional to the crime, since monetary fines do not adequately serve the purpose of deterrence. Therefore, the sanctions imposed on cartel participants

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[22] The Sherman Act does not only prohibit cartel activity. Section 1 of the Sherman Act prohibits all unreasonable restraints on competition effected through concerted conduct. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Section 2 of the Sherman Act prohibits certain single-competitor exclusionary conduct. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

[23] The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA).

[24] Marco Slotboom, Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield, COMPETITION LAW BLOG (2013).

[25] Former Director-General for Competition, European Commission.

[26] Annual Conference of the International Bar Association, Boston, MA, (9 Oct. 2013).

[27] https://www.justice.gov/atr/file/518936/download (last visited 21 January 2018).

in the US must produce sufficient harm/cost to outweigh what the participants expect to gain from the cartel activity.[28] In other words, "*the driving force (or belief) behind the criminalization is a recognition that the threat of sanctions against an individual could be a more effective deterrent than the threat of corporate sanctions*".[29] Therefore, the risk for personal punishment (by imprisonment instead of merely monetary liability), could provide sufficient incentive for individuals to resist corporate pressure to participate in unlawful activity.[30] It is also argued that criminal penalties against individuals could spread the word with respect to the severity of consequences of engaging in cartel activity faster for those involved (or on the precipice of being involved) in anti-competitive actions, since they would garner more attention and create bigger headlines in the media.[31]

The average prison sentence for competition law infringements in the US has been 24 months in the fiscal years between 2010 and 2015,[32] increased from an average of 8 months in the 1990s. Also, the highest sentence ever imposed in the US was 5 years imprisonment.[33] The table below provides statistics on individual sentencing in cases handled by the Antitrust Division of the U.S. Department of Justice between 2010 and 2015.[34]

	2010	2011	2012	2013	2014	2015
Individuals Sentenced	37	39	55	39	35	15
Sentences of Incarceration	29	21	45	28	21	12
Average Days of Incarceration	898	502	747	750	787	402

In light of the above, one could reasonably argue that the risk of going to prison in the United States is the primary key to stopping collusion and cartel

[28] https://www.justice.gov/sites/default/files/atr/legacy/2009/01/09/240611.pdf (last visited 21 January 2018).

[29] Wouter P.J. Wills, *Is Criminalization of EU Competition Law the Answer?*, WORLD COMPETITION: LAW AND ECONOMICS REVIEW, VOL. 28 NO. 2 (2005).

[30] *Supra* note 3.

[31] Keith R. Jones and Farin Harrison, *Criminal Sanctions: An overview of EU and national case law*, E-COMPETITIONS BULLETIN NO 64713 (2014) at 3.

[32] Wagner-von Papp, *Compliance and Individual Sanctions*, at 41.

[33] *United States v. Frank Peake*, No. 14-1088 (14 Oct. 2015).

[34] https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/sanctions_united_states.pdf (last visited 21 January 2018).

activities at the national borders of the United States,[35] even though the US market is probably highly profitable for the cartelists. Therefore, the criminalization of anti-competitive activities for individuals might be making the United States a safe port or even an oasis for fair trade, at the cost of turning a blind eye to the morality and proportionality arguments.

V. EVALUATION

In line with the regulations and cases discussed above, we observe that several countries, including the US, Germany, France and the UK, have implemented individual monetary sanctions against anti-competitive conduct besides Turkey. Although the Member States of the EU apply individual sanctions, we clearly see that there is not a uniform approach to this matter within the EU regulations. While Regulation No 1/2003 does not prohibit the implementation of individual monetary sanctions, the actual enforcement of such sanctions is not very common, and the number of precedents for individual monetary sanctions is relatively low.

However, it should be remembered that anti-competitive acts of undertakings do not emerge from out of the blue; rather, they result from the acts of individuals who act as representatives of undertakings. Consequently, individual accountability provides the necessary incentive for individuals to refrain from participating in anti-competitive conduct, and thus, monetary penalties against individuals enhance and strengthen the enforcement of competition laws against anti-competitive conduct.

Without the threat of monetary penalties against individuals, the profits of anti-competitive conduct are weighed on the basis of a cost/benefit analysis for the undertaking, and the conduct itself may be deemed as a “business risk worth taking.” However, if this risk assessment includes the employee’s personal risk of facing monetary sanctions, it would be more difficult to coerce individuals into engaging in anti-competitive activities on behalf of the company. Thus, the possibility of facing monetary penalties would enhance the individual’s resistance against corporate pressure to participate in anti-competitive conduct. Furthermore, an undertaking may be hesitant to risk losing its own managers or executives due to anti-competitive acts and would

[35] Belinda A. Barnett, *Criminalization of Cartel Conduct – The Changing Landscape*, ANTITRUST DEVISION, U.S. DEPARTMENT OF JUSTICE (2009) at 1. (“*In many cases, the Division has discovered cartelists who were colluding on products sold in other parts of the world and who sold product in the United States, but who did not extend their cartel activity to U.S. sales.*.”).

include this risk in its cost/benefit analysis of engaging in anti-competitive conduct.[36]

It has been argued that monetary fines should be determined by considering the illegal gains from engaging in the relevant anti-competitive conduct[37]. However, it should also be noted that this determination may not always match the optimal level of deterrence. The OECD Competition Committee has stated that optimal fines against cartels would sometimes have to be as high as 6 times the amount of the cartel gains, and this amount is very impractical since it could bankrupt the relevant undertakings.[38] However, implementing monetary fines against natural persons (*i.e.,* individuals) to complement corporate sanctions would pose a similar problem, since the optimal level of fines against individuals may constitute or reach amounts that could not be borne by individuals, and may very well bankrupt them. Thus, individual monetary sanctions would also require optimal calculation parameters. In a report by the United Kingdom Department of Trade and Industry, imprisonment has been suggested as the ideal sanction against engaging in cartel activities and administrative monetary sanctions againstindividuals were not supported[39]. The reasoning behind this solution is that monetary fines against individuals can always be reimbursed by their employers and a prohibition against reimbursement may constitute an unlawful tampering with the freedom of enterprise and choice in employment relations. Even if the reimbursement of monetary fines can be prevented to a certain extent, undertakings may still find a way to compensate their employees for the monetary fines they pay for anti-competitive conduct, by, for example, increasing their salaries. Thus, the effectiveness of administering monetary fines against individuals may be diminished by the fact that reimbursement schemes are, practically speaking, unavoidable and unpreventable.[40]

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36 Organization for Economic Co-operation and Development. *Cartels: Sanctions against Individuals*, OECD PUBLISHING (2005), at 7.

37 Organization for Economic Co-operation and Development, *Report on The Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD PUBLISHING (2002) at 12-14.

38 Organization for Economic Co-operation and Development, Competition Committee. *Fighting hard-core cartels: Harm, effective sanctions and leniency programmes*, OECD PUBLISHING (2002) at 89.

39 Department of Trade and Industry, *A World Class Competition Regime*, DEPARTMENT OF TRADE AND INDUSTRY (2001) at 37-45.

40 Organization for Economic Co-operation and Development, *Report on The Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD PUBLISHING at 7.

Thus, a strong argument against administering monetary fines to individuals is the possibility of unavoidable reimbursement schemes. If monetary penalties against individuals are thought to be ineffective due to the reimbursement schemes of the employers, then alternative sanctions that are more cost effective than imprisonment sentences, should be implemented to complement the monetary fines imposed on undertakings. Some countries, including the US, Germany and the United Kingdom, apply additional sanctions, such as suspending the employers/directors of undertakings that engage in anti-competitive conduct and prohibiting them from ever again holding a similar position, in order to enhance the deterrence effect of the penalties. However, such sanctions become inapplicable and ultimately futile when the person engaging in the anti-competitive conduct does not serve as a director/employer of the undertaking, as is often the case. Other types of penalties against anti-competitive conduct that could be considered include the revocation of licenses, the public announcement/declaration of anti-competitive conduct, and community service.

In addition to its crucial deterrent effect, monetary sanctions against individuals create a compelling incentive for cooperation in investigations. A person who is reluctant to share information about a wrongdoing unless he is threatened with punishment can be more easily persuaded to cooperate and provide details regarding the anti-competitive conduct in question. Consequently, imposing monetary fines on individuals would increase the efficiency of leniency programs as well. For individuals, the chance to avoid being sanctioned with monetary fines proves to be a very sound incentive to cooperate with competition authorities and help with the investigation against the undertaking.

The opportunity to avoid administrative and monetary sanctions through cooperation would be advantageous and valuable to an individual even after the cartel investigation had started. Furthermore, individuals with competing and divergent interests can be set against one another, strengthening the competition authority's bargaining position and increasing the plausibility and probability of cooperation for various individuals. The effectiveness of individual monetary sanctions to constitute a sufficient motive for cooperation is affected by certain factors, such as the transparency of the leniency program, and the ability to lower the sentence or offer immunity based on the extent of the individual's cooperation with the investigation. If there is not a single administrative body enforcing and conducting the leniency program, the various administrative bodies involved in the effort should act in unison to ensure the success of the program.[41]

Double jeopardy and *non bis in idem* (literally, “not twice in the same [thing]”) principles, which ensure that an individual shall not be prosecuted for the same conduct after a valid conviction, are not recognized by international laws.[42] Thus, anti-competitive conducts that have multi-jurisdictional effects may lead to multiple trials and sentences. This may constitute a problem in EU jurisdictions, where an anti-competitive conduct is investigated by both the Commission and the relevant Member State’s competition authority, and possibly even in the US, due to extradition laws. [43]

However, the concept of limiting corporate liability for offenses that are explicitly defined for legal persons was abandoned in 2004, and this created an enforcement issue for Article L. 420-6 with respect to legal persons. The grammatical interpretation of the text of the Article indicates that this provision unequivocally concerns and applies to individuals and not to undertakings, but since that approach was abandoned in 2004, undertakings have been liable in the same manner as individuals for all crimes and offenses.

Although the concept has been abandoned, the issue of whether Article L. 420-6 of the Code of Commerce could apply to antitrust infringements of a criminal nature, even if it is expressly directed to a “natural person” (“*personne physique*”), and the consequences of this application regarding the *non bis in idem* principle are still unresolved and remain a subject of discussion among practitioners.

VI. CONCLUSION

Although monetary penalties against individuals are not the only possible mechanism to prevent anti-competitive conduct, we believe that optimal sanctions cannot be achieved through fines imposed only on undertakings. Employees should feel as responsible as the undertakings in terms of adopting, embracing and obeying competition law and should adapt their daily business practices to competition law rules. Therefore, a more

[41] Organization for Economic Co-operation and Development. *Cartels: Sanctions against Individuals*, OECD PUBLISHING (2005) at 9.

[42] *Ibid*.

[43] *Supra* note 6 (“*…where an international cartel has substantial and intended effects in the United States or, if import commerce is not affected, the cartel has direct, substantial and foreseeable effects in the US and gives rise to a claim in the US, US law applies (United States v. Nippon Paper), and the United States have made clear that they will aggressively enforce their laws against foreigners as well as against US nationals.*”)

prudent and effective approach could be to combine various types of sanctions in order to reach a level of optimal deterrence. However, this optimal level may vary from country to country, as can be seen from the regulations that have already been implemented in different jurisdictions. In order to decide how these different types of sanctions can be used most effectively to complement each other, different elements of the competition law enforcement regime should be analyzed and evaluated. These elements include the power of the competition authority, the efficiency of the courts and their relationship with the competition authorities, the country's legal background regarding competition policies, and the enforcement of sanctions against anti-competitive conduct. By doing so, competition authorities could achieve their purpose of preserving competition in every market, and to ensure adequate deterrence against individuals, since the employees are the main players that carry out the anti-competitive actions of undertakings.

We believe that full compliance with competition law rules could be achieved solely by speaking softly but carrying a big stick; in other words, by making employees aware of the fact that they could also be fined monetarily due to their anti-competitive actions, even if at a fraction of the fines imposed on the undertaking. However, competition authorities must walk a fine line when applying these sanctions and they must abide by the principle of proportionality and the fairness doctrine at all times.

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A Critical Analysis of the Turkish State Aid Law

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1. Abstract

The concept of state aid and the question of whether it serves or distorts the healthy competitive environment within the markets has been a controversial issue amongst different jurisdictions.

"*State aid*" can be defined as a concept that is utilized by States to support certain organizations, and thus grant a level of advantage to such organizations over their competitors. To that end, while there is a possibility for this kind of aid to distort the competition in the marketplace by providing a certain level of advantage to the assisted organizations (and therefore, a risk of damaging the social welfare), it might also be necessary and justified to provide state aid where there is a market failure. In other words, state aid that addresses a market failure and eliminates distortion within the market might offset the negative effects that state aid may have on competition, and therefore, such state aid is generally considered as permissible in certain jurisdictions, such as the European Union ("***EU***").

The legislations of the United Kingdom ("***UK***") and the EU strictly regulate the rules with regard to state aid in order to ensure that the state aid provided would seek only to eliminate the distortion within the market and would not have any anti-competitive effects. Within the framework established by legislation, it is aimed that the undertakings which receive advantages from

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the state would not become overly reliant on the received aid, and could thus remain incentivized to innovate and increase their economic efficiencies.[1] Nevertheless, the 'State Aid' issue, particularly in the context of Article 107 of the Treaty on the Functioning of the European Union ("***TFEU***"), continues to be one of the most controversial topics within the EU, due to the ultimate and overarching purpose of European competition law, which is to establish a well-functioning internal market by protecting and promoting a competitive market economy.

On the other hand, from the perspective of Turkish legislators, pursuant to the Association Council's Decision No. 1/95, the only driving motivation behind regulating state aid is to harmonize Turkish competition law legislation with the European competition law regime. However, according to the 2016 Progress Report for Turkey, published by the European Commission ("***Commission***") with regard to the European Enlargement Policy, even though the primary legislation of the Turkish competition law regime regarding state aid is mainly harmonized with the EU, the lack of secondary legislation for the implementation of this regime has not yet been rectified and remains a significant problem.

In addition, the establishment of the Board for Monitoring and Controlling State Aid ("***Board for State Aid***") exhibits legally controversial aspects. For instance, according to Article 2(4) of the Law No. 6015 on Monitoring and Controlling the State Aids, ("***Law No. 6015***"), the vast majority of the Members of the Board for State Aid are assigned by the ministries that provide the aid in the first place. Furthermore, the President of the Board for State Aid, who is also the General Director of State Aid, is directly assigned by the Under-secretariat for the Treasury. In this regard, in spite of the fact that the Board for State Aid theoretically appears to be independent, the independence and credibility of the Board are brought into question, given that its composition makes the Board for State Aid functionally dependent on the ministries and other authorities who appoint the Members of the Board.

In this regard, the purpose of this article is twofold: (1) to analyse the differences between the EU legislation on state aid (primarily Article 107 of the TFEU) and Turkish legislation (*i.e.,* Law No. 6015) by providing a conceptual examination of EU state aid law, and (2) to propose recommendations for

[1] *State Aid: The Basics Guide*, Department for Business, Innovation and Skills (Ed.). (2015), 3-4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf (last visited Nov. 1, 2017)..

further developments to Turkish state aid rules within the scope of the fundamental principles of competition law.

2. State Aid from a Competition Law Perspective

2.1. Historical Background

The European Coal and Steel Community ("***ECSC***") Treaty sets forth a strict prohibition against state aid in its Article 4(c).[2] That article prohibits all "*subsidies or state assistance, or special charges imposed by the State, in any form whatsoever*," due to the fact that it considers such actions as incompatible with the goals and purposes of the common market. It is a widely held theory that the ECSC Treaty was aimed at replacing the national governments of the Member States in terms of providing support and assistance to the coal and steel industries, and thus adopted a strict approach to the issue of state aid. Accordingly, the Council was highly involved with respect to the development of the state aid policies during the relevant era. Furthermore, Article 54 of the ECSC Treaty declared that the High Authority, which was the executive branch of the ECSC, could impose fines on firms that received state aid. However, this strict legislation was not considered to be a realistic approach, and therefore it was altered during the establishment of the European Community.

The Treaty Establishing the European Community ("***EC Treaty***") adopted a different approach in terms of state aid, by clearly setting forth the conditions for making state aid compatible with the goals and principles of the common market. In this regard, the EC Treaty declared that:

The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.[3]

However, similar to the ECSC Treaty, the EC Treaty also failed to provide a specific and explicit definition of the concept of "State Aid." The European Council's role with regard to the development of the state aid policy was limited, and the legislation with regard to state aid neither included any

[2] Treaty Establishing the European Coal and Steel Community, (1951), 261 U.N.T.S. 140, as amended in Treaties Establishing the European Communities (EC Official Pub. Off. 1987).

[3] The EC Treaty, Article 92(2).

block exemptions nor put forth any procedural regulations. In other words, the ruling with respect to state aid was still considered to be "general" guidance, while the case law created and outlined the specific procedures.

However, by the end of 1990s, the European Council had adopted the Procedural Regulation in an attempt to formalize the case law of the Commission.[4] With this development, the European Community abandoned the approach of relying on "discretion," and rather opted for clear-cut "regulation."

The European Council further adopted the "Regulation on the Application of Articles 92 and 93 of the Treaty Establishing the European Community to Certain Categories of Horizontal State Aid" in May 1998, which has since been replaced by the "Council Regulation on the Application of Articles 107 and 108 of the TFEU to Certain Categories of Horizontal State Aid ("***General Block Exemption Regulation***" or "***GBER***") in July 2015. The General Block Exemption Regulation is the main secondary law in terms of state aid and its competition law aspects, and intends to draw the line between "good state aid" and "bad state aid" (*i.e.,* anti-competitive state aid).

The GBER is generally viewed as a liberal reform, and widely considered to be a milestone in terms of the State Aid Modernisation ("***SAM***") agenda of the EU. The GBER sets forth the conditions that are necessary to ensure that the undertaking which is the recipient of state aid will definitely undertake a project and/or activity that it could not have undertaken without the state aid in question. In other words, the GBER aims to ensure that state aid is only granted to undertakings when (i) efficiency gains are expected to result from such state aid, and (ii) the aid is an absolute necessity for the relevant efficiency gains to be realised.

2.2. Concepts of State Aid and Services of General Economic Interest under EU Law

Even though state aid is one of the most controversial subjects covered under EU Law, there is no explicit or specific definition of state aid provided by any EU legislation. However, Article 107(1) of the TFEU specifies the conditions for the prohibition of state aid, from which the conceptual scope of state aid can be inferred. According to this general rule,

…any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring

[4] Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, (2013), OJ L-204/15.

certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Pursuant to this definition, four main criteria are set forth for a Member State's measure to be interpreted and categorized as state aid: (i) the measure at hand must be granted by a Member State or through State resources (the notion of *state aid*), (ii) the measure must favour (the notion of *advantage*) a certain undertaking or the production of certain goods (the notion of *selectivity*),[5] (iii) the measure in question must distort or threaten to distort competition (the notion of *distortion of competition*), and (iv) the measure must affect trade between Member States (the notion of *effect on trade between Member States*).

To that end, the four main criteria that describe the scope and establish the framework of an applicable state aid under EU law will be further elaborated within the sections below.

(i) The Notion of Aid Granted by a Member State or through State Resources

The proper meaning of the notion of aid granted by a Member State or through state resources was first discussed in the *Steinike and Weinlig* case.[6] In that seminal case, the Court of Justice of the European Union ("***Court***") did not distinguish between these two concepts and interpreted the term "*state resources*" as referring to all private or public providers of state aid.[7] To that end, the Court found that the origin of an aid is not vitally important to the assessment of whether it has been granted through State resources; rather, the decisive element in determining whether this criterion has been satisfied is the result of the action taken by a public authority.[8] Furthermore, in the *Italian Textile* case, the Court emphasised that if the funds granted by institutions distinct from public authorities are financed through compulsory contributions imposed by State legislation, then the provisions of that legislation fall within

[5] The second criteria can actually be separated into two different criteria: (i) the notion of advantage, and (ii) the notion of selectivity. Even though these two criteria have different meanings and, accordingly, different concerns may arise with respect to each one, they are significantly linked to each other due to the nature of the definition of state aid. Separation between these notions would have unnecessarily constrained the ensuing discussion and impeded the flow of the article. Therefore, these two conditions are unified under a single condition and discussed jointly hereafter.

[6] Firma Steinike und Weinlig v. Federal Republic of Germany, C:78/76, (22 March 1977).

[7] Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, OXFORD SCHOLARSHIP ONLINE (2015).

[8] Steinike und Weinlig, *supra* note 6, at par. 22.

the scope of the application of state aid rules.[9] In this context, the aid granted by a Member State or through State resources should be understood as any form of action taken by a public authority which results in the distortion of competition by favouring certain undertakings or the production of certain goods, so long as it affects trade between Member States.

According to Paragraph 41 of the Commission Notice on the Notion of State Aid ("***Notice***"), as referred to in Article 107(1) of the TFEU (2016/C 262/01), the fact that a measure or action is taken by a public undertaking is not *per se* sufficient for a measure to be interpreted as an aid imputable to the State. However, due to the close relations between the State and public undertakings, there is a serious risk that state aid might be granted in a tacit and disguised manner through public undertakings. Moreover, in case a public authority or public undertaking provides goods or services at a lower price than market rates, or invests in an undertaking in a manner that is inconsistent with regular market movements, this kind of market activity can also be interpreted as constituting state aid.[10]

(ii) The Notion of Advantage

The second criterion concerns the granting of an advantage by a State measure or through State resources. While investigating or determining the existence of an advantage granted by a Member State to an undertaking, only the effect of the measure on that undertaking is taken into account. In other words, the cause or the objective of the State intervention is irrelevant to the assessment conducted within the scope of Article 107(1) of the TFEU.[11]

The notion of advantage is one of the more controversial topics in EU state aid law, since it is agreed that the financial situation of the undertaking in question should be evaluated in the assessment of whether the measure in question favours a certain undertaking, as will be discussed by considering different judgements of the Court below.

In the assessment of state aid, the notion of advantage can be perceived and analysed either in a positive or a negative way. To find out whether a positive advantage has been granted, it should be ascertained whether or not the

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[9] Government of the Italian Republic v. The Commission, C:173/73 (2 July 1974), par. 16; The Court supports this view in The Commission v. French Republic (the Poor Farmers), C:290/83, by stating that "…aid need not necessarily be financed from State resources to be classified as State aid." (par. 14).

[10] Commission Notice on the Notion of State Aid, as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (2016), 2016/C 262/01, par. 52.

[11] *Id.*, at par. 67.

measure confers an advantage that the beneficiary would not have gained under normal market conditions without State intervention.[12] The evidence for a negative advantage lies in determining whether the beneficiary of a measure has been relieved of a burden that it would normally have had to bear under regular market dynamics.[13] The latter is a fairly broad category, since the burden in question covers any form/type of cost that is included in the budget of an undertaking. Thus, even an argument declaring that the benefit granted by the State was not directly related to market activities and did not go beyond compensation for a cost deriving from the imposition of a regulatory obligation would not exempt the measure in question from the application of state aid rules. Therefore, it is apparent that, under EU state aid law, the notion of advantage is interpreted in a broad and comprehensive manner. The only exception to this basic principle is compensation for costs incurred to provide a service of general economic interest ("***SGEI***"), arising from the wording of Article 106(2) of the TFEU, for which the conditions were cumulatively set forth in the *Altmark* judgement of the Court.[14]

The *Altmark* judgement is a milestone both in the Court's case law and in the decisional practice of the Commission on state aid, particularly with respect to the key concept of SGEI. In its decision, the Court clearly indicated that,

where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, … those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them.[15]

However, within the judgement, it is stated that to benefit from this exemption, four cumulative conditions must be satisfied: (i) the recipient undertaking must actually be assigned to discharge public service obligations, and these obligations must be clearly defined,[16] (ii) the parameters on the basis of which the compensation will be determined and paid must be established

[12] Francesco De Cecco, . *The Many Meanings of 'Competition' in EC State Aid Law*, CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES, 111-132 (2006). www.heinonline.org (last visited Sept. 28, 2008), 113.

[13] *Id.*

[14] Altmark Trans GmbH and Nahverkehrgesellschaft Altmark GmbH, C:280/00, (23 July 2003), referred to the Court for a preliminary ruling by the Bundesverwaltungsgericht (the Federal Administrative Court, which is one of the five federal supreme courts of Germany).

[15] *Id.*, at par. 87.

[16] *Id.*, at par. 89.

beforehand in an objective and transparent manner,[17] (iii) the compensation should not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,[18] and (iv) the undertaking to discharge public service obligations in a specific case should not be chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost.[19]

The level of the compensation needed must be determined on the basis of an analysis of the costs that a typical and well-run undertaking, adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, also taking into account the relevant receipts and a reasonable profit for discharging the obligations.[20] Furthermore, the Court also emphasised that if a State measure does not meet one of the conditions above, then the measure in question must be regarded as state aid and will fall within the scope of the provisions of Article 107(1).

Since the *Altmark* judgement, the Commission has broadened and elaborated on its understanding of these conditions by specifying the components of State acts. Under the Communication from the Commission on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest, the public service task must be assigned by way of an act (or series of acts) which must, at a minimum, specify the following: (i) the content and duration of the public service obligations, (ii) the undertaking and, where applicable, the territory concerned, (iii) the nature of any exclusive or special rights assigned to the undertaking by the authority in question, (iv) the parameters for calculating, controlling and reviewing the compensation, and (v) the arrangements for preventing and recovering any overcompensation.[21]

Another important point which must be addressed with respect to the notion of advantage is that competing with the undertakings that are solely active in other Member States does not require the measure in question to be

[17] *Id.*, at par. 90.

[18] *Id*, at par. 92.

[19] *Id*.

[20] *Id.*, at par. 93.

[21] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, (2012), (2012/C 8/02), par. 52.

ruled out for the undertaking benefitting from that measure, since the notion of advantage is based on an assessment of whether the financial situation of an undertaking is favoured in its own legal and factual context.[22] For instance, in the *Italian Textile* judgement, although the reduction in social charges provided by an Italian law (*i.e.*, Article 20 of the Law No. 1101) had the effect of reducing labour costs only in the Italian textile sector, the Court nevertheless ruled that since "the Italian textile industry is in competition with textile undertakings in other Members States", thanks to the reduction of the social charges in question, any change in production costs for the undertakings active in the Italian textile industry would necessarily affect trade between the Member States.[23] Therefore, it was decided that the aid in question had to be disallowed. In the same way, in its *PRI* judgement, the Court argued that even if the financial aid provided by public bodies in Spain (*i.e.*, special interest rates for the loans granted by public bodies to small- and medium-sized enterprises in Spain) were only valid within the territory of Spain, it could not be exempted from the application of Article 107 of the TFEU, due to the fact that the aid in question artificially changed the conditions of competition between the undertakings conducting market activities in different Member States, including the undertakings established in Spain.[24] The Court also rejected the argument that the disadvantages of the measure in question for the undertakings established in Member States other than Spain was already offset by the low rates of interest charged in other Member States, on the grounds that the main concern of the Court was not just the actual impediment on competition, but also an artificial/potential restriction on competition and the overall effect of state aid on trade between the Member States.[25]

As previously indicated, and as can clearly be seen from the judgements of the Court, the notion of advantage is one of the more controversial topics in EU state aid law, since it is agreed that the financial situation of the undertaking in question should be evaluated in the assessment of whether the measure in question favours a certain undertaking. However, as the Court asserted in the *Adria Wien Pipeline* case, whether the situation of a presumed beneficiary undertaking is better or worse in comparison with the situation under the law before the adoption of the measure is irrelevant to this analysis. The only question to be answered is, "whether, under a particular statutory scheme, a state measure is such as to favour 'certain undertakings or the

[22] The Notice, *supra* note 10, at par. 72.

[23] Case C-173/73, *supra* note 9, at par. 18-19.

[24] Confederación Española de Transporte de Mercancías (CETM) v. Commission of the European Communities, T:55/99, (29 September 2000), par. 84-86.

[25] *Id.*, at par. 85.

production of certain goods' in comparison with other undertakings which are in a comparable legal and factual situation."[26] Therefore, even if it is established beyond doubt that an effect-based analysis should be conducted to determine whether a measure adopted by a Member State or through State resources grants an advantage to a certain undertaking, the relevant analysis relates directly to the effects of the State measure itself, and not the real effects on the undertaking which is the recipient of the state aid.

For instance, in *Hellenic Republic v. Commission*, the Court ruled that an argument pointing out that the situation prior to the aid was creating a more uncompetitive environment in the relevant marketplace, and emphasising the positive economic effects of the state measure in question on the competitiveness of Greek exports (even if such gains in competitiveness were achieved by way of granting an advantage to certain undertakings) was irrelevant to its decision.[27] Moreover, in another decision, the Court evaluated the argument of the Belgian government contending that the State measure in question, which was limited only to manual workers whose working hours exceeded a certain number of hours, and thus, did not actually affect the competitive structure of the market. The Court found this argument to be unpersuasive, since the actual effect of the State measure was deemed as insufficient to conclude that it did not constitute state aid within the meaning of Article 107 of the TFEU.[28]

In this respect, it can be concluded that the main concern of Article 107 of the TFEU with respect to determining the notion of advantage is the *potential* of the State measure in question for artificially distorting competition, rather than its *actual* effect on competition. Nevertheless, the Court's approach in the *Adria Wien Pipeline* case appears to be unnecessarily broad since, in its judgement, the Court paved the way for the Commission to intervene in Member State measures which do not grant a real and financially tangible advantage to the beneficiary undertaking. Moreover, this approach may also affect the assessment of whether the measure distorts (or threatens to distort) competition within the relevant marketplace. As it will be covered in a subsequent section of this article, in determining whether there is distortion of

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[26] Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, C:143/99, (8 November 2001), referred to the Court by Verfassungsgerichtshof (the Austrian Constitutional Court) for a preliminary ruling, par. 41.

[27] Hellenic Republic v. The Commission of the European Communities, C:57/86, (7 June 1988)., par. 8-10.

[28] Kingdom of Belgium v. The Commission of the European Communities, C:75/97, (17 June 1999), par. 26-29.

competition, the competitive position of the beneficiary undertaking will be analysed in comparison with its position before the adoption of the measure in question.

From another perspective, it can also be argued that the Court itself is aware of the conceptual and practical difficulties deriving from the previous interpretation of state aid rules. Therefore, it may be said that the Court has chosen to apply different tests to solve legal problems relating to state aid law.

Market Economy Operator/Investor Principle (MEOP/MEIP)

Within the scope of EU state aid law, the possibility for public authorities in any of the Member States to conduct private economic activities, including investments, is not overlooked; however, in such cases, these activities would undoubtedly be subject to EU state aid rules.[29] Accordingly, the determination of whether such activities could be deemed as an aid prohibited under Article 107 of the TFEU, due to the fact that they grant an advantage to the beneficiary undertaking and distort (or threaten to distort) the competition, depends to a great extent on the objective test of whether a rational private market player, investor, creditor or vendor (as the case may be) might have entered into the transaction on the same terms, (i) having regard to the foreseeability of obtaining a return, and (ii) leaving aside all social and policy considerations.[30] In this respect, a Member State, arguing that the decision subject to a state aid investigation was one that an independent (private) market operator might have entered upon, must prove such facts on the basis of evidence demonstrating that, in accordance with the economic evaluations conducted with the information available at the time of the decision, a rational market player would have carried out the same business decision.[31] Furthermore, for the purposes of applying this test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken.[32] In this respect, the best possible evidence for the MEOP/MEIP is generally that, at the time of the decision to carry out the market activity in

[29] The Notice, *supra* note 10, at par. 73.

[30] Neue Maxhütte Stahlwerke GmbH v. European Commission, Joined Cases T:129/95, T:2/96 and T:97/96, (21 January 1999), par. 131-133; C1/2014/2726, Sky Blue Sports & Leisure Limited v. Coventry City Council, the Court of Appeal (Civil Division) on Appeal from Queen's Bench Division Administrative Court in Birmingham, C1:2014/2726, (13 May 2016), par. 16(iv).

[31] *Id.*, at par. 16(vi).

[32] European Commission v. Électricité de France, C:124/10, (5 June 2012), par. 105.

question, there was actually such a business operation making and carrying out the same business decision on the same terms.[33]

"Market economy investor or operator principle" is a term that implies an inclusive approach, and a number of different tests are covered by this concept, such as: (i) market economy lender principle, (ii) market economy creditor principle, and (iii) market economy guarantor principle, among others. The difference between these tests depends solely on the nature of the transaction realised by the Member State as a private market operator. Therefore, for the purposes of this article, there is no need to delve further into the details of these tests.

(iii) The Notion of Selectivity

The other condition specified under Article 107(1) of the TFEU, which is interpreted jointly with the notion of advantage, refers to the notion of selectivity. In this context, a measure is considered to be selective if it does not apply to all economic operators in a given sector, but creates a discriminative position in favour of particular undertakings or economic sectors.[34] However, even interventions that apply to undertakings in general might be regarded and treated as state aid if the public body granting the aid enjoys a degree of latitude which enables it to choose the beneficiaries of the aid or the conditions under which the financial assistance is provided.[35]

The Commission distinguishes between two types of selectivity, known as material and regional selectivity. Material selectivity implies that the measure applies solely to certain undertakings or specific sectors of the economy in a given Member State, whereas regional selectivity refers to the fact that measures with a regional or local scope of application may not be regarded as selective if certain requirements are fulfilled.[36] However, the existing case law on this issue so far only covers tax measures.[37]

These requirements were defined by the Court, in its *Azores* judgement, as a set of three cumulative criteria: (i) the authority issuing the measure

[33] Ben Slocock, THE MARKET INVESTOR PRINCIPLE COMPETITION POLICY NEWSLETTER, http://ec.europa.eu/competition/publications/cpn/2002_2_23.pdf (last visited Nov 23, 2017) 23.

[34] De Cecco, *supra* note 12, at 115.

[35] Déménagements-Manutention Transport SA (DMT), C:256/97, (29 June 1999), referred to the Court by the Tribunal de Commerce (Brussels) in preliminary ruling, par. 27.

[36] The Notice, *supra* note 10, at par. 143.

[37] *Id.*

adopted for a given province or region must have a political and, more importantly, legal status that is separate from the central government, (ii) the authority must enjoy procedural autonomy; in other words, the central government should not have the right to intervene in the content of the regional measure in question, and (iii) the authority must also possess financial autonomy, which would give it the opportunity to provide financial aid without the contribution of financial inputs from the central government or from any other regions.[38] The financial autonomy mentioned in the *Azores* decision was subsequently clarified in the *UGT-Rioja* decision. In *UGT-Rioja*, the Court stated that financial transfers between central governments and relevant regional authorities do not rule out financial autonomy of the regional authority in and of themselves, to the extent that such transfers compensate the regional authority for the consequences of a given tax measure adopted by the regional authority.[39]

With regard to material selectivity, it should be noted that uncertainty might arise if the selectivity criterion is *de facto* established. Such selectivity is related to the imposition of conditions or barriers by public authorities, which prevents certain categories of undertakings from benefitting from a given measure.[40] Assessing the aims or causes behind the State measure in question is not required to determine whether there is *de facto* selectivity.[41] Therefore, even if the public authorities adopting certain measures that confer an advantageous position on undertakings within certain categories do not intend to provide unequal treatment, distortive consequences arising from such measures with respect to competition between undertakings is sufficient for the measure to fall within the scope of Article 107(1).

(iv) The Notion of Distortion of Competition

A State measure should distort or threaten to distort competition in order to be evaluated as a state aid prohibited under Article 107(1) of the TFEU. However, the distortion of competition that must be established in order to apply state aid rules is noticeably different than the notion of distortion of competition as it relates to EU competition rules. In fact, the meaning of

[38] Portuguese Republic v. The Commission of the European Communities, C:88/03, (6 September 2006), par. 58.

[39] Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v. Juntas Generales del Territorio Histórico de Vizcaya and Others, Joined Cases C:428/06 to C:434/06 (11 September 2008), Judgement of the Court for Preliminary Ruling, par. 123-135.

[40] Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, 2 WROCLAW REVIEW OF LAW, ADMINISTRATION & ECONOMICS 10 (2012).

[41] *Id.*, at 9.

competition as it is used in this context is actually closer to the approach defined above with respect to the notion of advantage. According to the Commission, a State measure is considered to be anti-competitive when it is liable to improve the competitive position of the beneficiary undertaking compared to the other undertakings competing with the beneficiary.[42]

As stated above, in the *Adria-Wien Pipeline* case, the Court argued that what really matters in the assessment of state aid is whether a measure favours certain market players as compared with others.[43] Even if this approach might lead to some controversies due to its broad interpretation of the notion of distortion of competition, it nevertheless appears to be compatible with the notion of advantage explained above. The reasoning underlying this approach stems from the objective of the state aid rules. When Article 107(1) is analysed in its proper context and its role within the overall scheme and purpose of the TFEU is taken into account, it can be easily discerned that EU legislation on state aid intends to avoid changing or altering the competitive positions of undertakings that compete with each other or distorting the market structure through State intervention. However, since a State providing aid would be affecting the competition as an external factor which enjoys *de jure* superiority to all market players, it can reasonably be argued that there is no need for a further effect-based market analysis regarding a measure granted by a Member State. From this point of view, granting an advantageous position to an undertaking would be sufficient on its own to distort competition within the meaning of Article 107(1).

In accordance with this approach, the Court explicitly stated in its *Keller SpA* decision that, "the Commission (while determining whether a state aid exists in a case) is not required to demonstrate the real effect of illegal aid on competition and trade between Member States."[44] It is an indisputable fact that, in certain situations, a State measure might lead to so-called hardcore restrictions on competition, such as State measures authorizing horizontal price-fixing or State regulations facilitating resale price maintenance.[45] However, the primary objective of EU state aid law is to establish a well-functioning internal market by taking State interventions that distort or threaten

[42] *Id.*, at 15.

[43] Gianni Lo Schiavo, *The Role of Competition Analysis under Article 107 paragraph1 TFEU: the emergence of a "market analysis" assessment within the selectivity criterion?,* 34 EUROPEAN COMPETITION LAW REVIEW 404 (2013).

[44] Keller SpA v. Commission, T:35/99, (30 January 2002), par. 85.

[45] Alexander R. Collins, *Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework?,* 16(2), EUROPEAN BUSINESS LAW REVIEW, 390 (2005).

to distort competition under control. EU state aid law achieves this goal by prohibiting such state aids, since anti-competitive State measures granting advantages to certain undertakings or certain product markets cannot be caught or prevented by EU competition law. Therefore, to some extent, this type of broad interpretation of the notion of distortion of competition might be rational and necessary where an internal market that has been established by several states exists. In this context, EU state aid law "appears to prohibit measures that cause undue or unnecessary distortion"[46] rather than a real or actual distortion of competition.

Furthermore, in accordance with the interpretation of the Commission and the Court with respect to the notion of distortion of competition, even slight or insignificant distortions of competition could fall under the scope of Article 107(1) of the TFEU,[47] and a *de minimis* rule could not be said to apply to state aids in this context, as it does under EU competition law. That being said, with the adoption of the Commission Regulation declaring certain categories of aid to be compatible with the internal market in application of Articles 107 and 108 of the Treaty (651/2014, 17.06.2014) ("***De Minimis Regulation***"), small aid amounts now fall outside the scope of EU state aid control, given that they are considered to have no impact on competition and trade in the internal market. In this regard, the state aid measures that satisfy the criteria of the De Minimis Regulation are not regarded as "state aid" within the framework of the EU law regime, and thus, a notification to the Commission for approval would not be required.

It has also been argued by Bishop that the competitive analysis conducted by the Commission should focus on the actual effects of state aid on competition in the sector in which the beneficiary undertaking(s) operates.[48] It would not be too bold to say that, by adopting the *de minimis* approach, the Commission has provided more legal certainty with regard to the application of state aid rules. Furthermore, the effects of State measures granting an aid to certain undertakings with respect to the functioning of the internal market could thus be openly and more thoroughly examined, and a better balance might consequently be struck between the costs and benefits of such State actions.[49]

[46] Phedon Nicolaides, *Distortion of competition in the field of state aid: from unnecessary aid to unnecessary distortion*, 31 EUROPEAN COMPETITION LAW REVIEW 402–409 (2010)..

[47] *Id.*, at 403.

[48] Simon Bishop, *The European Commission's policy towards state aid*, 18(2), EUROPEAN COMPETITION LAW REVIEW, 85 (1997).

[49] *Id.*, at 86.

(v) Effect on Trade between Member States

The final criterion for the determination of the existence of state aid under Article 107(1) of the TFEU is the effect of the examined actions on trade between Member States. This "effect on trade" criterion is, in fact, a jurisdictional criterion which defines the scope of application of EU competition law,[50] in particular Articles 101 and 102 of the TFEU. However, by way of analogy and taking the shared ultimate goal of EU competition law and state aid law into consideration, a similar interpretation would be plausible in the assessment of the "effect on trade" criterion in Article 107 of the TFEU. In line with this interpretation of the Commission, the concept of "trade between Member States" involves three separate criteria in itself: (i) the concept of "trade between Member States," (ii) the notion of "may affect," and (iii) the concept of "appreciability."

Accordingly, the concept of trade is interpreted in a broader manner than the traditional definition of trade, which covers the exchange of goods and services across borders. In this context, the concept of "trade between Member States" includes "all cross-border economic activity including establishment."[51] The reasoning behind this broad interpretation is based solely on the objective of promoting the *four freedoms* within the EU, which comprise the free movement of goods, services, persons and capital.[52]

The criterion regarding the notion of "may effect" implies that the State actions in question must have an impact on cross-border economic activity involving at least two Member States. To assess the extent of the impact on cross-border economic activity, the Court of Justice has developed a "pattern of trade" test, according to which the following three criteria must be satisfied in order the determine the existence of an impact: (i) a sufficient degree of probability of impact on the basis of a set of objective factors, (ii) an influence on the pattern of trade, and (iii) proof of a direct or indirect, actual or potential influence on cross-border economic activity.[53] In this respect, the actual effect of an aid does not necessarily have to be established in the assessment and determination of state aid. If the aid is liable to affect trade between Member States, this possibility is sufficient to cause the actions in question to fall within the scope of Article 107(1).[54]

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[50] Commission Notice on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, (2004), (2004/C 101/07), par. 12.

[51] *Id.*, at par. 19.

[52] *Id.*, at par. 20.

[53] *Id.*, at par. 21–24.

[54] The Notice, *supra* note 10, at par. 190.

The concept of appreciability is a vague and imprecise notion with respect to EU state aid law, since its main objective is to limit the jurisdiction of the EU to agreements and practices that are capable of having an appreciable effect within the meaning of Articles 101 and 102. Moreover, for state aid law objectives, the notion of appreciability is highly dependent on the notion of "distortion of competition." As discussed above, since the understanding and examination of these matters through the lens of "distortion of competition" should not be narrowed down for state aid issues, the requirement for a quantitative element would not be reasonable in the assessment of the existence of "effect on trade between Member States."

2.2.1. Is the Enforcement of the Legislation Feasible and Satisfactory?

Murray N. Rothbard has famously stated that, "Since production must always precede predation, the free market is anterior to the state."[55] From this perspective, in order to maintain efficient production, innovation and perfect competition within the market, the state should refrain from interfering with the undertakings in the marketplace in any way. This viewpoint is closer to the approach that was adopted (and widely criticized) during the ECSC era, and that still has supporters to this day. State aid and its effects on competition, and the possibility of achieving and maintaining a free market, have been fervently discussed throughout the years, and these fundamental issues will continue to be discussed and debated for the foreseeable future.

While government intervention in the economy by providing state aid may have beneficial aspects, such intervention inevitably affects and interferes with the functioning of the free market and, in any case, distorts competition in the marketplace. Therefore, it is not too bold to question whether it is possible to support a free-market economy and free and vigorous competition while also encouraging or supporting the interference of the government in the market to a certain extent. The negative effects of state aid could be enumerated under a number of separate headings, such as: (i) negative costs, (ii) negative externalities, (iii) negative effects from political interaction with state aid policy, and (iv) the distortion of competition to some degree.

State aid is always paid out from the government's budget, and thus, comes from the revenue received from the taxes paid by the community. Therefore, even in cases where the state aid is targeted and deemed to be necessary to bring about an increase in efficiency, the costs of the governmental subsidy might exceed its benefits. Furthermore, in terms of negative externalities, as mentioned above, a state aid that distorts the

[55] MURRAY N. ROTHBARD, ANATOMY OF THE STATE 6 (1974).

competition within the national market might also produce unwanted effects on the cross-border markets through international trade. However, state aid measures are planned and implemented nationally, and thus, they fail to take into account the effects of such measures on other Member States within the EU.

With regard to the negative effects of state aid on political interactions, it can be generally stated that, as long as the State is involved in the market in one way or another, the political affairs and political conditions of the nation will also be closely involved with the market. This is a highly controversial feature of state aid. Both the primary and the secondary legislation of the EU draw the framework and establish the limits of permissible and applicable state aid in order to maintain effective competition within the markets. However, the crucial question of whether any legislation could successfully prevent political influence from interfering with the competitive landscape of the market should also be asked and examined carefully.[56]

As stated above, the distortion of competition is the chief and most widespread negative effect of state aid, which ineluctably raises the question of whether any legislation could prevent the distortion of free competition within the markets by state aid. Even if the aid in question is provided to a failing firm which is expected to create significant efficiencies in the market, by providing state aid, the government inevitably alters normal market conditions and distorts the market in some way. Furthermore, it should also be kept in mind that if the aid were not to be provided to the relevant firm, the firm could have kept trying to compete by finding or increasing dynamic or economic efficiencies in order to be able to survive in the market, and such activities would undoubtedly contribute to total public welfare.

Another factor which has been criticized with regard to the implementation of state aid policy in the EU is the supranational nature of this policy. Due to the high number of Member States within the EU and the heavy workload of the Commission, it has been argued that the state aid cases have been resolved rather (too) quickly without the necessary deliberation, and that the Commission has thus failed to deliver high-quality decisions. In its Report on Competition Policy for 1998, the Commission indicated that, "Given the high number of aid measures the Commission has to assess, it must inevitably concentrate on major cases involving large amounts of aid or new legal issues."[57] Furthermore, yet again due to the complex structure and convoluted

[56] Georgios Kamaris, *A Critical Analysis of the European Union's State Aid Policy Implementation* (unpublished master's thesis), 2012, 35.

[57] COMMISSION'S XXVIIITH REPORT ON COMPETITION POLICY 22 (1998).

institutional mechanisms of the EU, the primary, secondary and soft law (*i.e.*, the guidelines, policy declarations, or codes of conduct which set standards of conduct) that were intended to be implemented with regard to state aid and the laws of other EU institutions and the Member States were contradictory. In this regard, as we have indicated above, the Commission has adopted the De Minimis Regulation in 2017 and further established its perspective.

3. State Aid from the Perspective of Turkish Competition Law

3.1. Historical background

(i) Developments after the Establishment of the Customs Union between the EU and Turkey

A Customs Union was initially contemplated to be established by the Agreement establishing an Association between the European Economic Community and Turkey ("***Ankara Agreement***"), which was signed on March 6, 1995. The Customs Union was expected to occur within the "final phase" of the three phases of the integration process of Turkey to the European Community.

In this regard, for the purpose of harmonizing Turkey's competition policy with the corresponding policies and regulations of the EU, state aid was a central issue in the relevant development process, along with the merger control and antitrust regulations. To that end, during the final phase of the integration process, the Law No. 6015 entered into force in an attempt to harmonize the Turkish state aid legislation with the comparable EU state aid legislation. The Law No. 6015 established the Board for State Aid within the Under-secretariat of the Treasury for the monitoring and supervision of all state aids.

However, as mentioned before, given that (i) the members of the Board for State Aid are assigned by the ministries who are also in charge of providing state aid, and (ii) the President of the Board for State Aid (who is also the General Director of State Aid) is directly assigned by the Under-secretariat of the Treasury, which is dependent on and accountable to the Prime Ministry, the independence, autonomy and objectivity of the Board for State Aid is a controversial and highly problematic issue.

3.2. Harmonisation with the EU Legislation: The Concept of State Aid in Turkey

Under Article 16 of the Ankara Agreement, the Parties agreed that the principles on competition, taxation and harmonisation of legislation, which had been set forth under the Treaty of Rome establishing the European Economic

Community,[58] would be applied to the association between Turkey and the EU. Pursuant to Article 39(1) of the Association Council Decision No. 1/95 ("***Decision No. 1/95***"), which was adopted by the Association Council established according to the Ankara Agreement and the Additional Protocol, Turkey was obliged to harmonize its legislation on competition in compliance with the *Acquis Communautaire* (which is the accumulated body of EU law and obligations from 1958 to the present day), and to ensure the effective application of those rules. Following this development, under Article 39(2/c-d) of the Decision No. 1/95, Turkey committed itself to harmonizing its state aid rules in accordance with the EU's state aid legislation.

As it has been explained above, the primary objective of EU state aid rules is to establish a well-functioning internal market by protecting competition (which is a *sine qua non* element of the EU internal market) from the distortive effects of beneficial measures granted by Member States to certain undertakings or products. To that end, similar protective measures were necessary and implementing those measures was set as a legislative goal within the context of the association relationship between the EU and Turkey. However, it is difficult to overlook or deny the numerous difficulties faced by Turkey, as a State which is not a member of the European Union, with respect to the harmonisation process for state aid rules. Thus, the harmonisation of Turkey's state aid rules and regulations with the corresponding EU legislation has been a controversial and thorny subject since the very beginning of the association.

In addition to the foregoing factors, since Turkey and the EU are both members of the World Trade Organization ("***WTO***"), they are also obliged to adapt their legislation and act in accordance with various WTO Agreements. Therefore, the Agreement on Subsidies and Countervailing Measures, which includes provisions relating to state subsidies granted to undertakings or products in the export or import activities of WTO members, is also applicable to measures affecting trade between Turkey and the EU. Thus, this agreement had to be taken into consideration as well in the harmonisation process discussed above.

[58] At the time of the signing of the Ankara Agreement, the Treaty of Rome was in force as the founding treaty of the European Economic Community. However, for the sake of concurrency, all the relevant articles will be referred to and discussed in the form in which they were transmitted to the current founding treaties of the EU, which are the Treaty on the European Union and the Treaty on the Functioning of the European Union.

In light of these international agreements, and after long-lasting efforts, the Law No. 6015 was adopted by Turkish lawmakers on October 13, 2010. Pursuant to Article 1, the objective of this law is to regulate state aids in compliance with the agreements signed between Turkey and the EU, and to specify the fundamental principles on monitoring and controlling state aids by adopting the obligation to notify and inform the competent public authorities about the state aids in question.

In its substance, the Law No. 6015 is akin to, if not the same as, Articles 107–109 of the TFEU. However, one significant difference is that the Law No. 6105 is not applicable to state aids granted in agriculture, fisheries and service sectors, according to Article 1(2). In line with the definition provided under Article 107(1) of the TFEU, the Law No. 6105 defines state aid under Article 2(1/b) as

aid in any form granted by the State or through State resources, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain products, and which grants financial advantage to the beneficiary, in so far as it affects trade between Turkey and the EU.

The concept of state aid is defined almost identically as it is in the EU legislation but differs from the EU legislation in an important way, as it sets forth the additional condition of *financial* advantage accruing to the beneficiary. Indeed, even in the EU, the notion of advantage generally refers to financial advantage, as has been explained previously in this article. However, the EU legislation itself does not explicitly narrow down the scope of an advantage granted by a State measure. In contrast, according to Turkish law, the advantage granted to the beneficiary of a State measure must necessarily be a financial advantage in order to fall under the scope of Turkish state aid rules.

The Law No. 6015 established the Board for State Aid, whose members are assigned by the Ministry of Finance, the Ministry of Industry and Commerce, the Under-secretariat of the State Planning Organization, the Under-secretariat of the Treasury, the Under-secretariat of Foreign Trade and the Competition Authority. The Board for State Aid performs its assigned functions under the presidency of the General Director of State Aid. The assignment procedure for the members of the Board for State Aid is quite controversial, since almost all ministries assigning the members also play an important role in the actual granting of state aids. In light of these facts, the Board for State Aid does not appear to be operationally independent, as will be further discussed in Section 3.3 below.[59]

[59] COMMISSION STAFF WORKING DOCUMENT, (2016), TURKEY 2016 REPORT, 2016 COMMUNICATION ON EU ENLARGEMENT POLICY, 22 COM (2016) 715 final.

Pursuant to Article 5(1) of the Law No. 6015, the Board for State Aid is responsible for the following functions: (i) specifying the principles of state aids and preparing related legislation in compliance with the agreements between Turkey and the EU, (ii) analysing, monitoring and controlling the compliance of state aids with the Law No. 6015, (iii) obtaining the results of applications for state aids and notifying the Commission and other relevant public bodies of these results.

3.3. Controversial Aspects of Turkish State Aid Law in Terms of the Competition Law Regime

3.3.1. General Overview

While the regulation with regard to state aid has been implemented in Turkey pursuant to and in accordance with the integration process with the EU, the Turkish state aid law has nevertheless been acutely criticized by the EU in recent years. Within the Commission's 2015 Progress Report for Turkey, it was indicated that Turkey had not shown any progress in terms of its state aid policy.[60] The secondary law, which had been contemplated to enter into force, has been delayed, a comprehensive state aid inventory has not yet been established, and the action plan with regard to harmonisation with the EU law has not been completed. Similarly, in the 2016 Progress Report for Turkey, the Commission criticized Turkey in an even harsher, more severe manner. The main focus of the relevant section of the Report was, once again, the improvement of the Law No. 6015 and the need for passing secondary legislation. As the Report has also indicated, the fourth delay on the secondary legislation's entry into force is inconvenient both for the harmonisation process of Turkey and for the process toward the establishment of an applicable, reliable and well-founded law. To that end, it would be prudent and helpful to accelerate the legislative action plans with regard to the secondary legislation.

The state aid policy of Turkey can be examined under three separate headings: (i) the legislative framework, (ii) the institutional framework, and (iii) the implementation framework. In this context, while the legislative framework is akin to, if not the same as, the EU legislation, the Turkish state aid legislation lacks secondary law that would set forth the actual scope and limits of the applicability of state aid, so that it can be deployed without distorting the competition in the marketplace. In other words, although there is limited secondary legislation that has entered into force, such as the Regulation for the Transfer of Data to the State Aid Database ("***Data Regulation***") and the

[60] COMMISSION STAFF WORKING DOCUMENT, (2015), TURKEY 2015 REPORT, 2015 COMMUNICATION ON EU ENLARGEMENT POLICY, 33 COM(2015) 611 final.

Regulation for Duties and Authorities and Working Principles and Foundations of the Board for Monitoring and Controlling State Aid ("***Regulation for the Board***"), the relevant regulations only set forth procedural rules and principles without defining the actual scope or delineating the limits of the applicability of the state aid rules.

3.3.2. Legislative Framework

Article 1 of the Law No. 6015 indicates that the objective of said law is to regulate state aids in compliance with the agreements between Turkey and the European Union, and to specify the principles and procedures for monitoring and controlling state aids. Before the adoption of the Law No. 6015, none of the laws regarding this issue referred directly to harmonisation with the agreements signed between Turkey and the European Union as an objective.[61] This reference might potentially create legal uncertainty in the future for the reasons discussed below.

First of all, harmonisation, by its very nature, requires a long-term internalisation of the fundamental principles and foundational norms with regard to the subject of the law in question. For instance, if a State is obliged to harmonise its national competition law with EU competition law, it should first construct and organize the structure of its antitrust legislation as a whole in accordance with the principles and foundations of EU law. Obviously, it is not necessary or obligatory to copy all the provisions of the relevant EU legislation into national laws to achieve this purpose.

Furthermore, after the adoption of necessary legislation at the national level, the new legal structure implemented by the legislation is expected to stay in effect until its abolition. In this context, putting a special emphasis on the ultimate objective of harmonisation with EU law based on the agreements between the EU and Turkey may harm the permanent characteristic and reliability of the Law No. 6015. In other words, "to regulate state aids in compliance with the agreements between the EU and Turkey" is, by itself, an obligation imposed pursuant to the agreements between the EU and Turkey, and it cannot be put forth as an objective of a national law which is applied at the national level.

The logic that underlies this understanding stems from the legal nature of "objective provisions" of laws, which is different from the ultimate political objective for passing legislation with respect to a particular issue. Provisions specifying the objectives of laws aim to provide both insight and guidance for authorities implementing the rules set forth under that law and for persons

[61] *The Opinion of TUSIAD (Turkish Industry and Business Association) on the Draft Law on Monitoring and Controlling State Aid*, (2010), 1 (TS/ŞİB/10-17).

(natural or legal) who are obliged to act in compliance with the law. That being said, when "harmonisation with the EU law" is presented as an objective of a law, enforcement authorities will inevitably take this political objective into consideration when challenging an issue or practice related to state aid. This might create unavoidable legal uncertainty at some point in the future. Therefore, harmonisation of the laws should have remained an ultimate fundamental political objective behind the legislation process of the Law No. 6015.

Under Article 1(2) of the Law No. 6015, the provisions of the Law No. 6015 do not apply to State measures with respect to agriculture, fisheries or service sectors. This exclusion seems contrived and unnecessary, since there is no equivalent sector-based distinction made within the EU state aid law.[62] Furthermore, this exclusion indicates that the sole motivation for state aid regulation in Turkey is to provide the bare minimum amount of harmonisation required under the agreements with regard to the establishment of a customs union between Turkey and the EU. However, both in theory and practice, such an artificial sector-based exclusion might create legal uncertainty in terms of interpreting the compatibility of a State measure with the Law No. 6015.

In today's modern economies, different sectors of the economy are highly integrated with each other. In fact, most economic activities embrace both industrial and service sector operations and combine them together. Therefore, it would be pointless to exclude service sectors from the scope of application of the Law No. 6015. In theory, it might be argued that a company, which is active both in industrial production and in the service sector, might benefit from a financial aid that is provided merely for its industrial production activities. However, this would not be a realistic approach since the aid would eventually benefit the general financial situation of the company in question, and it would potentially affect the market position of that company in the service sector as well. Furthermore, keeping the legal understanding attached to the customs union between Turkey and the EU as a framework for the Law No. 6015 harms the desired progress for state aid law in Turkey. In other words, this exclusion decreases the effectiveness of the Law No. 6015 by unnecessarily narrowing down the scope of its applicability.

3.3.3. Institutional Framework

Article 4 of the Law No. 6015 established the Board for State Aid, which is responsible for monitoring and controlling State measures granting financial advantages to certain undertakings or products. In accordance with Article 4(9) of the Law No. 6015, the general working principles, administrative structures

[62] *Id.*

and ruling procedures are specified under the Regulation for the Board. Under Article 4(11) of the Law No. 6015 and Article 5 of the Regulation for the Board, it is explicitly and clearly stated that the Board for State Aid is an independent governmental body, and thus, no governmental institutions, organizations or persons can give orders or instructions to the Board for State Aid in order to affect its decisions. However, this legal guarantee is inadequate to alleviating the concerns with respect to the independence of the Board for State Aid due to its composition, which is specified under Article 4(2) of the Law No. 6015.

According to this provision, the Board is composed of six members, who are assigned by the Ministry of Finance, the Ministry of Industry and Commerce, the Under-secretariat of the State Planning Organization, the Under-secretariat of the Treasury, the Under-secretariat of Foreign Trade and the Competition Authority. Within the framework of this provision, the State becomes the provider of the measure in question and acts as the controlling authority at the same time. All the State institutions included in the composition of the Board for State Aid also potentially provide state aid within the meaning of the Law No. 6015. Therefore, such composition brings the independence and autonomy of the Board for State Aid into serious doubt.[63]

From a different perspective, it might also be argued that since a certain degree of expertise is needed in the assessment of whether a certain measure is compatible with the Law No. 6015, the Board members who are familiar with the activities of the institutions regarding the sectors for which a state aid is provided would be sufficiently competent and qualified for their positions. In this context, the composition of the Board for State Aid could be justified in the light of practical considerations.

On the other hand, when harmonisation with EU law is taken into account as a fundamental political objective, the composition of the Board for State Aid undoubtedly opens the institution up to significant criticism. Unsurprisingly, in the Commission’s 2016 Progress Report for Turkey, the composition of the Board for State Aid was singled out for particular criticism, and it was argued that, in spite of the fact that the Board for State Aid theoretically appears to be an independent institution, its composition makes the Board for State Aid functionally dependent on the ministries and other authorities who appoint the Members of the Board.

3.3.4. Implementation Framework

Akin to the EU law on state aid, Turkish law also sets forth mandatory notification for state aid measures to the Board for State Aid. The Board for

[63] *Id*, at 3.

State Aid does have the authority to evaluate the state aid's permissibility or its compliance with the obligation not to adversely affect free competition within the market. The Board for State Aid is authorized to conduct its review on state aid measures through two distinct routes: (i) by its own initiative, or (ii) via an external complaint. However, while the relevant provisions are set forth within the law, the implementation of these provisions is yet to be operational, due to the lack of required secondary legislation that would draw the framework for the implementation and applicability of the existing state aid legislation.[64]

Furthermore, unlike the Law No. 4054 on the Protection of Competition, the Law No. 6015 does not assign any duty for the Board for State Aid to present its opinion to legislative bodies on draft legislations or any other form of legislative acts with regard to state aid law. Therefore, this lack of advisory opinion from the Board for State Aid makes the legislative process deficient in terms of including and incorporating expert and practitioner opinion on this issue.

All in all, the most vital and immediate problems regarding Turkish state aid policy, which must be resolved with the utmost urgency, are the following: (i) the lack of functional independence and autonomy for the Board for State Aid, and (ii) the lack of secondary legislation to set the framework for the proper application and enforcement of the Law No. 6015. Without the adoption of a comprehensive and applicable secondary legislation to draw the line between permissible state aid and prohibited state aid (*i.e.*, state aid that would distort the competition by granting an unfair advantage to certain undertakings), and also in light of the fact that the Court's precedents do not have legal effect on the implementation of Turkish state aid rules, it would not be possible to provide legal certainty in the area of state aid law. Accordingly, given that state aid law is a complementary discipline to competition law, it would be exceedingly difficult to achieve the ultimate objective of competition law in the absence of legal certainty for state aid rules.

3.4. State Aid Network as a Potential Solution

Pursuant to Article 108(1) of the TFEU, the Commission has jurisdiction over "all systems of aid existing in the Member States" with regard to reviewing the compatibility and compliance of such measures with the EU state aid rules. By nature of this provision, and in light of the founding treaties of the EU, the Commission does not exercise jurisdictional power in Turkey in so far as such power is delegated to the Commission regarding state aid issues by the

[64] Commission Staff Working Document, *Turkey 2016 Report*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 55 COM(2016) 715 final.

Association Agreement or by the Additional Protocols. Therefore, even if Turkey, as a candidate state for accession to the EU, is obliged to harmonize its state aid law with the *Acquis Communautaire,* the lack of a common enforcement mechanism may potentially undermine the objective of protecting the common market within the EU and Turkey.

Under current legislation, as explained above, the Board for State Aid has the authority in Turkey to monitor and review the aid measures adopted by the State. To some extent, the establishment of a control mechanism at the national level might be a reasonable approach since state aid control and supervision mainly concerns selective measures that distort (or threaten to distort) competition by favouring certain undertakings operating in national industries.[65] However, from the perspective of EU state aid law, the ultimate objective of this regime is to establish and protect a well-functioning internal market within the borders of the EU. In this context, any competition law concerns based on state measures and related control mechanisms should be related to the common market, and accordingly, involve trade between Member States. Leaving this sort of control and enforcement mechanism solely to national authorities would inevitably give rise to a potential conflict of interest between the EU and the Member States, and it would also create legal uncertainty for undertakings operating in different Member States.[66] To prevent these kinds of concerns from materialising, in cooperation with national authorities, the Commission was authorized to review and monitor the compatibility of State measures with the protection of the common market at the EU level.

That being said, state aids in Turkey do not fall under the jurisdiction of the Commission. Therefore, although there is a common objective in harmonizing Turkish state aid rules with the EU legislation, the lack of a common control and enforcement mechanism could still jeopardise the achievement of this objective. Therefore, we believe that it would be appropriate at this point to discuss the possibility of setting up an inter-governmental state aid network with the involvement of Turkey. As suggested by Negenman, this network could be instrumental in: (i) serving as a platform to exchange views on important general policy issues and creating a forum to discuss how to align state aid policies of the States that are a part of the internal market or have customs union agreements with the EU, (ii) assisting individual national governments with the design of state aid measures by publishing non-binding guidelines on how to apply state aid rules, organizing workshops and

[65] Monique Negenman, *A State Aid Network?*, 10 EUROPEAN STATE AID LAW QUARTERLY 622–626 (2011).

[66] *Id.*, at 623-624.

trainings for national authorities, etc., and (iii) acting as a platform that would enable national authorities to learn from the experiences of different States which have been confronted with similar issues.[67]

CONCLUSION

Given that the state aid rules and legislations in Turkey have been developed as part of the harmonisation process with the European Union, in order for the problems within the state aid regime in Turkey to be resolved, action should be taken, first and foremost, with regard to the legislative framework of the state aid regime. In other words, the fundamental principles of the EU state aid legislation should be completely adopted and incorporated by the Turkish state aid rules.

Furthermore, although secondary legislation exists to a certain extent, the relevant legislation only provides limited procedural rules and principles without setting forth the actual scope and limits of the applicability of the state aid rules. As a result, country-specific implementation of the secondary legislation has failed to occur for Turkey so far. To that end, a robust secondary legislation which would specify the framework for the implementation of the state aid rules is required. In accordance with the agreements between the EU and Turkey and within the scope of the harmonisation process, the relevant secondary legislation should be based on the EU state aid law, including and incorporating the case law of the Court.

In order to achieve the goals of (i) harmonising the state aid legislation of Turkey with the EU, and (ii) enabling the implementation of the state aid rules as a complementary discipline to competition law, a feasible solution would be to establish a state aid network which includes Turkey, especially with the participation of the EU Member States and institutions, so that it would be possible to further develop and implement the state aid legislation of Turkey and finally bring them into full and effective harmonisation with the European Union’s state aid laws, rules and principles.

[67] *Id.*, at 626.

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Competition Law Consequences of Artificial Intelligence

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Introduction

Technology, whose etymology derives from Aristotle's "*techne*," (which means "craftsmanship" or "art") represents one of the most primal instincts and distinctive features of human beings, which is the ability to use tools to increase one's quality of life. In fact, today we can observe the astonishing growth of the digitalized economy, and the emergence (and rapid adoption) of various novel commercial activities that are enabled by new technologies, such as data collection or multi-sided markets, which have resulted in significant enhancements in total welfare. Following the emergence and rapid development of computer sciences, artificial intelligence ("***AI***") has become an increasingly important part of our daily lives. As a matter of fact, the tendency of companies to utilize various algorithms to offer their products and services to consumers (both online and offline) and to make strategic business decisions has become a necessity rather than a luxury, due to the fast-changing competitive landscape in the modern global economy.

In terms of competition law issues, some commentators now fear that algorithms might facilitate coordination among undertakings, especially through the widespread availability of real-time online data on competitors' algorithms, which gives them the unprecedented ability to detect, process and act on the same information. The projected advent of machine and deep learning technologies, where human intervention is not necessary, can add an extra layer of skepticism and suspicion about the future effects and potential dangers of AI. These risks should certainly not be

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overlooked or disregarded altogether, since there is a genuine potential for algorithms to be used as tools to facilitate coordination between undertakings, and to further exacerbate existing competition law concerns. As with any other area in which AI has been introduced and is increasingly used (such as data protection, insurance, intellectual property, labor law, etc.), the potential risks posed by AI in terms of competition law need to be carefully examined and closely scrutinized by governments, competition enforcement authorities, and academic commentators.[1] In doing so, the pro-competitive effects of AI, as well as its greater benefits with respect to total welfare should not be neglected or disregarded, as the hindrance of technological improvement would contradict the very nature of competition law and hinder its fundamental goals.

Rather, AI must be perceived and treated as a tool for improving products, services and life conditions in the relevant product markets. Indeed, algorithms would be best understood as the ultimate dynamic efficiency tool of the 21st century, as they create a more efficient and transparent marketplace, help suppliers to customize their services, assist in predicting various market trends, and in consequence, increase consumer and total welfare. In this context, this article seeks to identify algorithms' potential effects and outcomes, examine and assess various competition law approaches to the issues raised by AI, and propose certain recommendations with respect to the most suitable and appropriate regulatory/judicial postures toward AI that we believe should be adopted at the current stage of its development.

Section I of this article will provide general explanations on algorithms, mainly on a theoretical basis, by explaining the basic mechanisms of machine learning algorithms and deep learning algorithms. **Section II** will summarize the non-exhaustive potential collusive effects of algorithms.[2] In this regard, this article will first focus on the definition of price-fixing algorithms and evaluate the collusive impact of these algorithms on the relevant markets, such as (i) *agreements* and *concerted practices*, and (ii) *tacit collusion*, which are considered to be especially challenging for competition authorities. **Section III** will focus on algorithms' efficiency and assess their ability to generate total welfare by (i) *creating a more efficient and transparent marketplace*, (ii) *aiding suppliers to customize their services*, and (iii) *helping to predict market trends.* Last but not least, **Section IV** will give a brief overview of the possible solutions offered by scholars and other commentators, which can mainly be categorized as follows: (i) *an institutional approach*, (ii) *a targeted regulatory approach* (iii) *a market-oriented approach*. We will finish the article by offering our Concluding Remarks.

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[1] For an interesting and comprehensive approach with respect to the regulation of AI, *see* Nicolas Petit., *Law and Regulation of Artificial Intelligence and Robots - Conceptual Framework and Normative Implications*, (2017). Retrieved from: SSRN: https://ssrn.com/abstract=2931339 (last accessed 18.02.2018).

[2] To that end, this article will only take into consideration the most-debated and controversial potential horizontal collusive effects of algorithms. Accordingly, certain other important discussions related to big data and dominance, hub and spoke scenarios, or vertical restrictions will not constitute the subject of this article and will not be analyzed any further.

I. Algorithms: Key Concepts

Algorithms are often seen and described as highly complex mathematical components. However, algorithms have actually existed in our lives long before computers were invented in the second half of the 20th century. In fact, an algorithm simply reflects the exact order of a procedure to attain a specific goal. For example, the recipe for a cake is actually an algorithm, since it puts forth every single step of the cake-making process and provides these steps in an exact order. Put differently, as Wilson and Keil have stated, "*an algorithm is an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects (e.g., configurations of chess pieces, numbers, cake ingredients, etc.). The initial state of the tokens is the input; the final state is the output.*" [3] Algorithms may appear in different forms and use different means. When an algorithm is able to execute every aspect of the computational process as a whole, it is defined as "monolithic."[4] When other algorithms may execute a part of the computational process, such algorithms are described as "sequential" or "distributive," depending on the means of design.[5]

Artificial Intelligence ("***AI***") represents an "intelligent agent" capable of carrying out significantly difficult tasks.[6] After the proliferation and rapid development of computers, algorithms have come to replace humans for the performance of repetitive tasks, mainly for data processing and complex calculations.[7] Up until very recently, only science-fiction books and movies portrayed various AI applications, such as face recognition, self-driving cars, personality classifications or defeating humans in strategic games or encounters. Today, all of these AI applications have become regular features of our modern world that are used to facilitate and improve our daily lives.

Many commentators date the breakthrough of AI into public conscience to 1997, when Deep Blue, an AI machine developed by IBM, unexpectedly defeated Gary Kasparov, the reigning world champion, at chess. More recent examples of significant AI-related achievements include the DARPA Grand Challenge, where AI-based self-driving vehicles drove autonomously for 131 miles in 2005, or when Google's AlphaGo beat legendary Go player Lee Sedol 4-1 in 2016. In the development of AI technology, scientists have tried to imitate human behavior by incorporating the ability to *learn* into their algorithms. Consequently, AI technology has developed rapidly and has become capable of conducting numerous different tasks, thus finding a vital place for itself in various industries. AI can be used to carry out a wide range of tasks; therefore, it has different branches and segments to tackle different problems in order to execute various kinds of assigned tasks and duties. These branches are differentiated from one another by their form, treatment and usage of AI technologies, such as (i)

[3] ROBERT A. WILSON, & FRANK C. KEIL, THE MIT ENCYCLOPEDIA OF THE COGNITIVE SCIENCES, 31(1999).

[4] *Ibid*.

[5] *Ibid*.

[6] Prakhar Swarup, *Artificial Intelligence*, IJCCR, (2012). Retrieved from: http://www.ijccr.com/ july2012/4.pdf. (last accessed on 18.02.2018).

[7] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, 9 (2017).

Machine Learning, and (ii) Deep Learning. In fact, there are many other algorithmic types; however, for the purposes of our article, only Machine Learning Algorithms, Deep Learning Algorithms, and Price Fixing Algorithms will be taken into consideration.

1. Machine Learning Algorithms

Tom Mitchell defines Machine Learning as "*the study of algorithms that improve its performance at some task with experience*."[8] Machine Learning constitutes a branch of AI, and is best described as an algorithm that repeatedly learns from data and experience.[9]

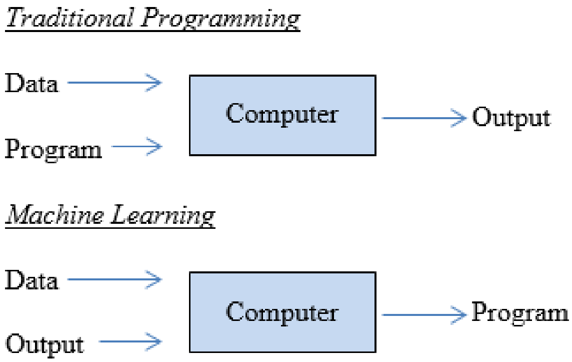
According to Anitha, Machine Learning is further divided into three main categories based on the algorithms' learning patterns.[10] The first category is *supervised learning*, where algorithms use a sample of labeled data to learn a general rule that maps inputs and outputs. The second is *unsupervised learning*, where the algorithm attempts to identify hidden structures and patterns from unlabeled data. Finally, the third category is *reinforced learning*, where the algorithm performs a task in a dynamic environment, such as driving a vehicle or playing a game (like chess or Go), which illustrates its ability to learn through trial and error. A typical example of a Machine Learning Algorithm is Google's AlphaGo algorithm, which was developed to play the board game "Go." (Go is an abstract strategy board game for two players, in which the aim is to surround more territory than the opponent. It was invented in ancient China more than 2,500 years ago and is believed to be the oldest board game continuously played today.) AlphaGo was programmed to first watch and learn from the moves of human players, then to play against itself, and finally, after it had improved sufficiently, to play against human players. The first stage of the development of this AI, which consisted of the careful observation of human players, was essential, since it uploaded significant amounts of knowledge about the game into the algorithm and thus enabled the algorithm to become, in a sense, *intelligent*. At the second stage, the algorithm incorporated and reinforced its knowledge by playing against itself and learning from its wins and losses. Finally, the algorithm was able to compete against human players, and its gradual improvement at the game of Go ultimately led to AlphaGo's stunning victory against the World Champion Lee Sedol. The main difference between traditional programming and Machine Learning, as seen in the diagram below, is related to the input and output systems of the algorithms.[11]

[8] Tom M. Mitchell, *Machine learning*, BURR RIDGE, IL, 2-17 (1997).

[9] OECD, *supra note 7*, at 11.

[10] P. Anitha, G. Krithka & M. D. Choudhry, *Machine Learning Techniques for learning features of any kind of data: A Case Study*, IJARCET, 4324-4331 (2014).

[11] Eric Eaton, *Introduction to Machine Learning*. Retrieved from: http://www.seas.upenn.edu/~cis519/fall2017/ lectures/01_introduction.pdf (last accessed 21.02.2018).



Machine Learning algorithms are effective in recognizing patterns (*i.e.*, medical images, facial identities), generating patterns (such as motion sequences), recognizing anomalies (such as unusual credit card transactions) and predictions (for example, future stock prices or currency exchange rates).[12] Machine Learning is currently used in numerous different areas, such as the automotive sector, education sector, healthcare industry or financial services. For instance, in the United States, the states of Nevada, Florida, California and Michigan have already legalized autonomous cars. [13] Furthermore, since 2012, at least 41 states and D.C. have considered legislation related to autonomous vehicles and 21 states—Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Michigan, New York, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Vermont—and Washington D.C. have passed legislation related to autonomous vehicles.[14] Although Machine Learning's ability to learn constitutes an important distinction from traditional programming, it also imposes certain constraints with regard to the ability to extract features from raw databases relevant to the task at hand. Since the size of a raw database can be very large, AI scientists are often faced with the task of devising ways to extract features from an immense database that are related to the task that the Machine Learning algorithm is supposed to perform. This is known as "feature engineering."[15] Feature engineering is an expensive, challenging and time-consuming process for AI scientists. If the knowledge, information or extracted features are not loaded and incorporated into the algorithm, then the result will merely be a traditional algorithm instead of a Machine Learning algorithm.

[12] *Ibid*.

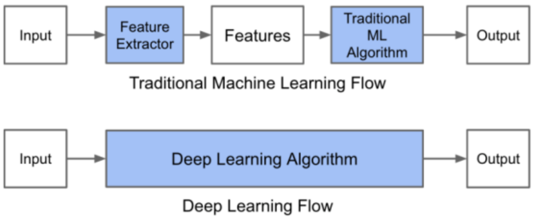
[13] The National Conference of State Legislatures, *Autonomous Vehicles/Self-Driving Vehicles Enacted Legislation*. Retrieved from: http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx. (last accessed 18.02.2018).

[14] *Ibid*.

[15] Yann LeCun, Yoshua Bengio & Geoffrey Hinton, *Deep Learning*, NATURE, 436-444 (2015).

2. Deep Learning Algorithms

A Deep Learning algorithm belongs to a sub-category of Machine Learning algorithms. The main difference between the two is that Deep Learning algorithms possess the ability to extract features from a raw database and identify the features that are related to the underlying problem of the assigned task. Goodfellow et al. underline the difference between Machine Learning and Deep Learning by pointing out the linear quality of the Machine Learning process compared to the Deep Learning process, which comprises a hierarchy of increasing complexity and abstraction. [16] To that end, Deep Learning gives computers the opportunity to learn faster and more accurately,[17] as indicated in the chart below:



Source: Moujahid (2016)[18]

In this context, the ability of Deep Learning to extract features from raw databases introduces the problem of "used source" to the Deep Learning process. The "used source" problem refers to the fact that, since Deep Learning identifies and extracts the relevant features without any outside intervention, it is not possible for humans to know or determine which features or characters were used by the computers to obtain the output that emerged at the end of the process. Therefore, companies often prefer to use Deep Learning alongside Machine Learning in order to be able to understand the decision-making process and to identify the particular features used to obtain the results.

II. An Overview of Potential Horizontal Collusion Scenarios

As stated above, algorithms are composed of computational codes that are set to provide an output. The output offered by an algorithm depends to a significant degree on the purposes of its programming. As a matter of fact, one type of algorithm that is highly relevant to competition law issues is known as a "Pricing Algorithm," which is an algorithm that is programmed to automatically set prices to maximize the profits of a particular product or service. Pricing algorithms, by evaluating large amounts of data (such as supply conditions, customer profile, market demand, capacity constraints and

[16] IAN GOODFELLOW, YOSHUA BENGIO & AARON COURVILLE, DEEP LEARNING, 716 (2016).

[17] *Ibid.*

[18] Adil Moujahid, *A Practical Introduction to Deep Learning with Caffe and Python*, (2016). Retrieved from: http://adilmoujahid.com/posts/2016/06/introduction-deep-learning-python-caffe/ (last accessed on 18.02.2018).

competitors' prices), are capable of setting prices at the most suitable and effective level to maximize a company's profits. Moreover, due to their ability to process data quickly and efficiently, such pricing algorithms enable companies to react immediately to various changes in market conditions, and thus allow them to implement continuous price changes, which is referred to as "dynamic pricing."[19]

Profit maximization is best achieved when undertakings avoid competition and are able to set non-competitive or monopolistic price levels.[20] In order to do so, competitors in a given market might seek to collude with one another; that is to say, to reach an agreement with the objective of raising their profits to a higher level than what they could achieve at the non-cooperative market equilibrium.[21]

There is no doubt that the use of pricing algorithms within the scope of agreements or concerted practices between competitors with the object to restrict competition is prohibited by Article 101 of the Treaty on the Functioning of the European Union ("***TFEU***"). The General Court (European Union) clearly set forth in its *Bayer* judgment that an agreement within the meaning of Article 101 TFEU requires the existence of a meeting of minds or a concurrence of wills between competitors with the intention to restrict competition, and that the parties need to feel bound by the said agreement.[22] Furthermore, the concept of "concerted practice" has been defined by the European Court of Justice as "*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,*" through any direct or indirect contact which may influence market conduct of an undertaking's competitors or disclose its own prospective market conduct.[23] However, the Court of Justice also recognizes that Article 101 TFEU does not outlaw firms' parallel behavior that might be the result of their individual and *intelligent* adaptation to the existing and anticipated market conditions, namely tacit collusion.[24]

We observe that EU judicial precedents have so far preferred to avoid adopting rigid definitions for greater flexibility and to preserve the courts' ability to proceed on a case-by-case basis. The use of pricing algorithms by competitors, either to achieve anti-

[19] OECD, *supra note* 7, at 14.

[20] George J. Stigler, *Theory of Oligopoly*, J. POL. ECON. 44 (1964).

[21] OECD, *supra note* 7, at 17.

[22] Bayer AG v Commission of the European Communities, T-41/96, § 69 (October 26, 2000): ("(…) *the concepts* of a*n agreement within the meaning of Article 85(1) of the Treaty* [now Article 101(1) TFEU], *as interpreted by the case-law, centers around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.*")

[23] Imperial Chemical Industries Ltd. v Commission of the European Communities, C-48/69, § 69 (July 14, 1972) and Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, C-40/73, §26 and §174 (December 16, 1975).

[24] *Suiker Unie*, *supra* note 23, §174.

competitive goals or to implement parallel behavior, would fall within the boundaries of the three *collusion* notions mentioned above (*i.e.* anticompetitive agreements, concerted practices and tacit collusion). This section will aim to provide examples of potential competition law concerns with respect to coordination between undertakings that might be emphasized or amplified by the algorithmic landscape.

1. Use of pricing algorithms within the scope of horizontal anti-competitive agreements and/or concerted practices

As stated above, in case pricing algorithms are used to facilitate the establishment or continuation of anti-competitive agreements or concerted practices, they will naturally arouse the suspicion and scrutiny of competition law enforcement authorities. In this context, one may be reminded of Assistant Attorney General Bill Baer's famous quote on the subject, stating that the Department of Justice "*will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms,*" which he uttered within the scope of a case where a former e-commerce sales executive pleaded guilty to conspiring to fix the prices of posters sold online.[25] However, pricing algorithms may fog up the scene and make it more difficult for competition enforcers to detect anti-competitive behavior in this context .

Issues related to the "burden of proof" are already highly problematic with respect to the detection of standard anti-competitive agreements. The first set of complications arise from the practical difficulties associated with collecting tangible and material evidence in order to prove/establish the existence of an anti-competitive agreement; hence, it became necessary to introduce the concept of "concerted practices" within the competition law setting. Cartelists are prone to discover (and invent) various new methods to destroy evidence of their meetings, conversations, e-mail messages, or any other means of communication. This invariably leads investigation teams to rely on market-based circumstantial evidence to substantiate or prove the existence of anti-competitive agreements, which brings up the second problem related to the interaction between the requisite standard of proof and the presumption of innocence.[26]

As stated above, in order to consider and treat an agreement as falling within the scope of Article 101 TFEU, competition enforcement authorities need to demonstrate the existence of a "meeting of minds" between the parties with the motivation or aim of

[25] U.S. Department of Justice, Office of Public Affairs, *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*, (April 6, 2015) (Press Release), https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace. (last accessed on 18.02.2018).

[26] On the necessity for competition enforcers to define the appropriate standard of proof, *see e.g.* Maria J. Melicias, *Did They Do It: The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations*, World Competition, 471 (2012).

achieving an anti-competitive effect.[27] Under the scenario in which competition agencies are equipped with concrete evidence establishing a "concurrence of wills" between the competitors to restrict competition, the existence or use of pricing algorithms would not pose any additional problems with respect to the enforcement of competition law rules. Proving the existence of a concertation between the parties would suffice for punishment under Article 101 TFEU, and the particular means of implementation (*i.e.,* the use of pricing algorithms) would not have any impact on the identification of anti-competitive agreements. However, even in this scenario, if the anti-competitive agreement was reached through one single contact between competitors, and its continuation was ensured solely through the use of algorithms, then it will be considerably more difficult for competition enforcement authorities to collect the necessary (and sufficient) material evidence with respect to the meeting of the minds between the undertakings. This problem may become even thornier in the case of deep learning algorithms, due to the algorithms' ability to instantaneously identify competitors' prices without displaying/indicating which features or characteristics were used to obtain the output. In cases like this, the lack of direct evidence on the concurrence of wills is likely to force/lead competition enforcers to seek circumstantial evidence in order to establish the existence of concerted practices. However, the possibility of these evidentiary problems and difficulties arising in such cases should never be allowed to imperil the prevalence of the presumption of innocence.

Another scenario that would rouse the suspicion and ire of competition law authorities would involve the use of pricing algorithms as a tool for price signaling to competitors. Once again, although the detection of such methods might be quite difficult for competition law enforcers due to their current material/evidence collecting capabilities, if price signaling through AI is the result of conscious human decision, any such practice would theoretically fall within the scope of Article 101 TFEU. However, if we assume that algorithms may also generate concerted practices through signaling prices solely due to their autonomous ability to decode and anticipate rival algorithms' behavior (which would improve with frequent and recurring interactions), then legal problems may arise as to whether such behavior would still fall within the scope of Article 101 TFEU.[28] On the one hand, it is possible to assert that a "*contact between operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt"* would be established by such algorithmic behavior.[29] However, in the absence of any overt signaling, algorithms may also be, in line with *Suiker Unie* judgment, *adopting themselves intelligently to the existing and anticipated conduct of their competitors* through the mere observance of online data. The anticipated complication would arise from the abovementioned gray area, which is generated by the competition enforcement authorities' adoption of elastic

[27] *Bayer, supra note* 22, § 69.

[28] OECD, *Algorithms and Collusion - Note from the European Union,* 7-8 (2017).

[29] *Suiker Unie, supra note* 23, § 26.

definitions and would result in legal uncertainties from the market operators' perspective.

Another complexity that might arise due to the new algorithmic landscape in pricing strategies is the resulting online structure where ensuring the stability and continuation of the collusive behavior would potentially be easier for the undertakings. In fact , if concluding and executing price-fixing agreements was not prohibited by competition law rules, all competitors would crave and endeavor to form cartels and thus maximize their profits.[30] The criteria for the profitability and viability of a pricing agreement are the participants' ability to (i) monitor competitors' prices, (ii) detect deviation in a timely manner, and (iii) implement credible punishment mechanisms.[31] In this context, it is vital for a cartel to be able to detect deviation and non-cooperation, since it will quickly result in shifting consumer behavior due to the discount offered by the cheating cartelist, which will increase the profits of the company that violates the agreement to the detriment of all the other undertakings in the cartel. For conventional cartels, although companies can share monopoly profits without much difficulty, monitoring and punishment mechanisms are likely to be costly and challenging to implement from a practical point of view. Therefore, a cartel must undertake the significant burden of constantly monitoring prices and trying to detect/prevent deviation and non-cooperation, which further increases a company's incentive to deviate. With the unprecedented ability of pricing algorithms to detect and analyze colossal amounts of real-time online data in a very short period of time, and the negligible costs of such analysis compared to the monitoring costs of traditional cartels, it is highly likely that such pricing algorithms would constitute a valuable facilitating tool for the detection of deviations.[32]

Additionally, the ability of pricing algorithms to react immediately to the deviator's new pricing policies is likely to be considered as a *credible threat of retaliation*, making the cartel scheme's punishment mechanism more effective compared to traditional cartels.[33] Moreover, in case a deviating price algorithm reduces an undertaking's prices, its competitors' algorithms can immediately readjust their prices to match the deviator's price, which will render the deviator's attempt to gain a competitive advantage by price cutting completely ineffective. If we reasonably assume that the potentially deviating algorithm would be able to foresee this possibility, and calculate the probability of the abovementioned chain of events, thus taking into account the likely effects of its own deviating actions, then it will no longer have an incentive to deviate, since it will realize that any effort at price deviation is likely to be unsuccessful and futile.[34]

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[30] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, 577 (2015).

[31] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE, 140 (2004).

[32] Michal S. Gal, *Algorithmic-Facilitated Coordination: Market and Legal Solutions*. Competition Policy International, 2-4 (2017).

[33] *Ibid*.

[34] Freshfieds Bruckhaus Deringer, *Pricing algorithms: the digital collusion scenarios*, 4 (2017). Retrieved from: https://www.freshfields.com/globalassets/our-thinking/

2. Tacit Collusion and the Oligopoly Problem

Tacit collusion occurs in oligopolistic market structures in which companies are interdependent and where competing undertakings do not necessarily enter into anti-competitive agreements or concerted practices (within the meaning of Article 101(1) TFEU); however, companies are driven to behave in a parallel manner and to benefit from their collective market power.[35] This effect is due to the particular characteristics of these markets, in which companies are aware of their competitors' presence, and are thus compelled to coordinate their market strategies involving production, capacity or prices with one another.[36]

As opposed to competitive markets, companies that succeed in operating in oligopolistic markets due to their parallel behavior and interdependence will not be inclined or motivated to independently change their prices. This is due to the presence of only a few firms operating in such oligopolistic markets and the rapid awareness of other companies in the event of a unilateral price change. Any undertaking that increases its prices independently or unilaterally will see its customers shift entirely to its rivals. In this context, the parallel behavior of undertakings in oligopolies, which is a result of the scale and structure of these markets and the undertakings' ability to act interdependently without any overt communication, are not assumed to constitute concerted practices, and thus they are not sanctioned under Article 101(1) TFEU. However, this does not mean that Article 101(1) TFEU cannot be applied to parallel behavior. Article 101(1) TFEU is seen as applicable to "facilitating practices" or, put differently, to the "plus effect," which refers to practices that ease or assist a company's realization and attainment of the benefits of tacit collusion.[37] One example of a facilitating practice can be the exchange of information between undertakings that renders the market more transparent, and consequently promotes tacit collusion. In the meantime, since EU judicial authorities have so far preferred to avoid adopting rigid definitions in their precedents for greater flexibility and to preserve the ability to proceed on a case-by-case basis, all "facilitating practice" claims should be examined within the context of the relevant market structure, as it may vary significantly from case to case.

In order to constitute tacit collusion, the behavior of undertakings in a given market must satisfy four main criteria, as follows: (i) *sharing a common understanding*, (ii) *detecting deviations*, (iii) *credible threat of retaliation*, and (iv) *high entry barriers*.[38] According to these factors, oligopolies must first reach an understanding

campaigns/digital/mediainternet/pdf/freshfields-digital---pricing-algorithms---the-digital-collusion-scenarios.pdf.

[35] WHISH & BAILEY, *supra note* 30, at 594.

[36] WHISH & BAILEY, *supra note* 30, at 596.

[37] WHISH & BAILEY, *supra note* 30, at 605.

[38] STIGLER *supra note* 20, at 44; Dale K. Osborne, *Cartel problems*, AMERICAN ECONOMIC REV 835–838 (1976); DENNIS. A. YAO & SUSAN. S. DESANTI, GAME THEORY OF INDUSTRIAL ORGANIZATION, 247 (1988) (as cited in Nicolas Petit, *The Oligopoly Problem in EU Competition Law*, 7 (2012)).

regarding certain business conditions, such as the quantity, quality or price of the products; secondly, the companies must detect deviations from the established agreement in order to ensure coordination and to prevent cheating; thirdly, there must be a credible threat of retaliation against cheating and non-cooperating competitors to dissuade firms from deviating; finally, the companies must implement and guarantee high entry barriers in order to discourage new competitors from entering the market and partaking in the high profits (and thereby diluting and diminishing the profits of the companies that are already active in the relevant market).

If all of these conditions are met, then the existence of a tacit collusion may be considered. However, with the arrival and increasingly widespread use of various algorithms, it is foreseen that, if programmed correctly, algorithms may facilitate tacit collusion beyond oligopolistic markets.[39] As a matter of fact, due to the ability of algorithms to monitor and quickly detect changes in prices in a given market, it is predicted that algorithms may, at least in theory, facilitate collusion even in large-scale markets as a result of the increased foreseeability of the behavior of other companies operating in a given market. In the conventional sense, it is well established and widely accepted that tacit collusion can only occur in oligopolistic markets, due to the inability of firms in competitive markets to quickly detect deviations from the established rules (*i.e.*, concerted practice) and set credible threats of retaliation. However, the highly developed algorithms that are currently in use (and whose capacities are expected to increase exponentially in the future) may enable companies to coordinate in large-scale markets, due to their technological ability to permit the detection of deviations and cheating behavior, and to enable companies to respond quickly and effectively to such deviations. Consequently, some commentators have stated that algorithms may facilitate tacit collusion beyond oligopolistic markets, which inevitably leads to the question of whether the parallel behavior of all firms as a result of their intelligent adaptation to the existing and anticipated market conditions might ultimately be seen as tacit collusion and thus considered to be prohibited by Article 101 TFEU.

In any case, we must also consider the possibility that algorithms may not engender the ability to consistently facilitate tacit collusion. In fact, some commentators have argued that, although algorithms are widely used by companies, specific market conditions may prevent/undermine tacit collusion in a given market. As a matter of fact, these market conditions may comprise numerous different factors, such as (i) the variance of cost structures due to product heterogeneity, (ii) the difficulty of effective coordination due to the large number of companies active in the relevant market, or (iii) the rise in the incentive to deviate due to various coordination challenges, which will make effective/credible retaliation against deviators more difficult.[40] As Nicolas Petit points out, although tacit collusion seems easier to accomplish when oligopolists use similar or homogenous algorithms, if oligopolists display asymmetries in costs, investments, firm structures or market shares, then tacit

[39] OECD, *Algorithms and Collusion: Note from BIAC*, 3 (2017).

[40] *Ibid.*

collusion will be less feasible and harder to achieve.[41] For instance, the more customer-tailored products are offered with customer-specific prices, the less attainable tacit collusion will become, in light of the companies' cost structures and their differentiated products. In consequence, it can be argued that the use of algorithms may not always (or definitely) cause or even facilitate tacit collusion due to the asymmetries in the market. Moreover, by monitoring rivals' prices, algorithms may set disruptive prices in order to undercut their rivals' prices or even choose to set prices below-cost in order to generate more competition in the market, to grow sales, or to exclude a company's rivals.[42] Needless to say, none of these behaviors would amount to tacit collusion.

In light of the foregoing, although at first glance algorithms seem to facilitate tacit collusion, it is imperative to investigate the particular market structure and the details of the use of algorithms in each specific case. It may even be rationally argued that, until the ability of algorithms to facilitate collusion is conclusively proven by empirical data, no further regulations, beyond closely monitoring any issues related to the development of algorithms, should currently be adopted. At this stage, algorithms are only expected to exacerbate current competition law disputes, and it is not guaranteed or assured that they actually will cause new complications or worsen existing problems. However, regulating algorithms before fully observing their behavior and its effects would almost certainly set a barrier to and impede innovation.

III. Algorithms, the ultimate dynamic efficiency of the 21st century

Technological innovation has always provoked a certain amount of fear and trepidation in human beings, due to its ability to radically change customs, traditions, and commercial practices as we know it. Hence, as mentioned above, even though the collusive behavior and anti-competitive effects of algorithms have not yet been proven by empirical data, there are various scenarios in which algorithms could be perceived as a collusive tool that will modify the competitive landscape as we know it. This chapter aims to establish that algorithms will indeed change the competitive landscape as we know it, but that they will do this, contrary to established wisdom, in a pro-competitive sense. In fact, we contend that AI can be considered as the ultimate dynamic efficiency tool of the 21st century, since algorithms can (i) *generate more efficient and transparent marketplaces*, (ii) *help suppliers to customize their services*, and (iii) *predict market trends*, and consequently, improve consumer welfare and total welfare.

1. Algorithms generate transparent marketplaces which enable undertakings to improve their pricing models

The use of algorithms by undertakings not only generates supply-side efficiencies, but also contributes to the total welfare.[43] It is widely recognized that algorithms, by virtue of their self-learning nature, their ability to find patterns and to create data trends, are tools that assist business operations and also generate and

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[41] Nicolas Petit, *Antitrust and Artificial Intelligence: A Research Agenda*, JECL & PRACT (2017).

[42] OECD, *supra note* 40, at 4.

[43] OECD. *Supra note* 7, at 15.

improve commercial strategies more efficiently than ever. As a matter of fact, by using patterns and data trends, suppliers are able to respond more rapidly than ever to their customers' needs, which results in significant improvements in the allocation of resources, and thus lowers production costs and generates supply-side efficiencies. In turn, this supply-side efficiency allows companies to lower their prices, and therefore leads to the creation of consumer welfare.

Moreover, algorithms' ability to find patterns in a large stack of data and to learn through trial and error also enables companies to regulate their prices based on available inventory, competitors' prices, anticipated demand and other market conditions. In this regard, prices offered by companies become increasingly more dynamic, personalized and differentiated.[44] As a result, consumers, producers and sellers are able to detect changing prices and act accordingly, and to offer new or differentiated products in order to compete with each other more effectively.

2. Algorithms help suppliers to customize their services and hence provide better products and services to customers

Algorithms are able to detect, identify and categorize the most relevant results in immense datasets, and thus offer the desired product or service (as indicated by the particular query) to the consumer by constantly monitoring and learning from consumers' search queries and online actions (*i.e.*, "clicks"). For example, some algorithms use consumer behavior data, such as browsing history, past purchase information or even personally identifiable information, to recommend customized products and services that might interest a particular consumer. This mechanism allows suppliers to improve, refine, develop and elevate their products and services, which quickly leads to improvements in product quality.[45]

Indeed, as pointed out by Commissioner Terrel McSweeny in a recent speech, algorithms are a contribution to modern society that make more products available to a larger number of consumers. As a matter of fact, firms will respond to changes in the market detected by such algorithms and those responses will generally benefit consumers, since algorithms will increase the speed of the collection and processing of data and thus allow companies to respond faster to changing consumer needs and desires.[46] Consequently, it has been recognized that, by taking into account various considerations and factors (such as stock availability, capacity or competitors' prices),

[44] The Economist, *Flexible Figures, A Growing Number of Companies are Using "Dynamic" Pricing* (2016). Retrieved from: www.economist.com/news/business/21689541-growing-number-companies-are-using-dynamic-pricing-flexible-figures (last accessed on 18.02.2018).

[45] OECD, *supra note* 7, at 16.

[46] Commissioner McSweeny, T. Algorithms and Coordinated Effects. University of Oxford Centre for Competition Law and Policy (22 May 2017). [Remarks as prepared for delivery]. Retrieved from: https://www.ftc.gov/system/files/documents/public_statements/1220673/mcsweeny_-_oxford_cclp_remarks_-_algorithms_and_coordinated_effects_5-22-17.pdf (last accessed on 18.02.2018).

algorithms can pave the way for companies to adjust almost immediately to supply conditions and to changes in market demand, and thus generate consumer benefit by offering better products and services to their customers. This, in turn, increases both consumer welfare and total welfare, which is the ultimate goal of competition law policies as well.

3. Algorithms encourage innovation by predicting market trends

Algorithms do not merely assist companies to improve their pricing models and help suppliers to customize their services, but they also allow companies to improve their decision-making processes by predicting market trends, and thereby trigger innovation. In fact, by allowing customers to compare prices and product quality, algorithms significantly shorten the decision-making process for customers. Consequently, since consumers' awareness of the inquired/desired product or service increases, companies' ability to generate or take advantage of consumer biases decreases, which interrupts and neutralizes the manipulative marketing strategies employed by undertakings. Accordingly, the use of algorithms in various product and service markets substantially strengthens the buyers' power in those markets and prompts companies to create differentiated products, and thus increases their incentives to innovate. For this reason, companies are forced to abandon their customary routines (*i.e.*, relying on various marketing strategies to increase sales and profits), and are compelled to compete by creating cheaper and higher-quality products and services. If companies fail to innovate, the existence and behavior of algorithms can potentially lead to consumers switching to other products/services, and therefore increase competitive pressure on suppliers.[47] Indeed, it can be easily observed that the algorithms' ability to force companies to innovate will eventually result in lower prices, better products and wider choices for consumers, which are the ultimate outcomes that are sought and welcomed by competition law authorities.

IV. An Overview of Potential Remedies

AI is a powerful tool that generates an increase in total societal welfare; however, as stated above, the risks that it may harbor and pose with respect to potential competition law concerns (such as anti-competitive agreements, concerted practices and tacit collusion) should not be disregarded. Many competition law enforcement authorities and academic commentators are currently seeking new solutions and enforcement methods to tackle the potential problems that algorithms may cause. The main approaches to this vexing issue revolve around the adoption of new institutional systems, targeted regulatory measures, and pro-active measures to be adopted by the undertakings. Although the necessity of further guidance for operating firms is apparent, the same cannot be said for the adoption of any further measures with respect to algorithms at the current stage of their development, as we mentioned above. In thinking about potential remedies, one should also carefully consider the effectiveness of existing competition law tools as well as intrinsic solutions that might be offered by the algorithms themselves.

[47] OECD, *supra note* 7, at 17.

1. An Institutional Approach

One of the intriguing solutions offered by academics is the adoption of an institutional approach. For instance, Gawner recommends the establishment of a "global digital regulator," which would be an independent and central agency responsible for coordinating and supervising the different regulatory aspects of the Internet and data-related issues.[48] On that note, the Federal Trade Commission's ("***FTC***") Bureau of Consumer Protection has already created a new Office of Technology Research and Investigation in the United States, which is bound to conduct independent studies and provide some advice and guidance on algorithmic transparency.[49]

Matthew U. Scherer has put forward a comprehensive institutional system for handling the competition law concerns presented by AI, based on the following three pillars: (i) the Artificial Intelligence Development Act, (ii) the Agency, and (iii) the role of the Courts.[50]

Accordingly, Scherer recommends the adoption of an Artificial Intelligence Development Act ("***AIDA***"), which would be a statute that would codify the general principles for AI and create a bifurcated tort liability system. Under this system, the main purpose of the AIDA would be to establish an "Agency," which would be responsible for certifying new and existing AIs as safe, secure and controllable by humans. Furthermore, undertakings, AI designers and manufacturers that adopt Agency-certified AIs would be subject to limited tort liability, whilst the owners, designers and manufacturers of uncertified AIs would face strict joint and several liabilities. Without banning uncertified AIs, the AIDA would aim to encourage and direct designers and manufacturers to audit their AI by putting them through the certification process and to thereby limit their burden of liability. This would foster the development of AI in a safe, secure and controllable environment in order to minimize competition law related risks.

In this view, the Agency would be an independent administrative authority that is composed of AI experts. The Agency would have a bifurcated structure, consisting of the policymaking and certification departments. The policymaking department would comprise a Board of Governors, which would be responsible for the rulemaking process and for reviewing proposed rules and amendments in public hearings. Furthermore, the Board of Governors would have the duty to set pre-certification testing rules in order to permit and enable the certification department's evaluation of AI systems. Moreover, the scope of the Agency's jurisdiction would be based on the definition of AI. Therefore, one of the most important tasks of the policymaking

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[48] OECD, *Big Data: Bringing Competition Policy To The Digital Era – Note by Annabelle Gawner* (2017), https://one.oecd.org/document/DAF/COMP/WD(2016)74/en/pdf

[49] Commissioner Terrel McSweeny, *supra note* 46.

[50] Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*. HARV. J.L. & TECH, 393-397 (2016).

department would be to periodically update its definition of AI and ensure its ratification through legislation, since AI technology changes rapidly and is often revolutionized through technical developments in the industry. The certification department's key task would be to evaluate the applications for certification and to test and assess AI systems. For the certification process, the Board of Governors would promulgate standards under which applications for AI certification would be examined and judged. Companies, designers and manufacturers would have to disclose all relevant information regarding their AI systems for these evaluations, including the source codes, the performance of the AIs during the certification tests, and information regarding the safety of the AIs.

Finally, the Courts would be responsible for examining and assessing harms arising from AIs, which would be evaluated by the judicial system through individual tort claims. The judgment of the Courts would be based on the AIDA and on whether the AI system in a particular case was certified or uncertified. For uncertified AI systems, the most critical part of the judgment would involve the allocation of responsibility among the designer, the manufacturer and the operator of the AI with respect to the harm caused by the AI in a particular case.

Scherer's approach is noteworthy for offering a comprehensive and structured institutional system. This institutional system might at first appear to (i) encourage AI developers to incorporate safety measures, (ii) reduce the risks generated by AI, and (iii) offer a balanced solution between a coercive regulatory regime and an entirely unregulated approach. However, serious questions remain regarding the cost of establishing and running the Agency, the duration of the drafting and ratification processes of the AIDA, the timing of the creation and launching of the Agency, as well as issues relating to ensuring effective coordination between various competent government bodies, such as the Agency and various competition authorities. Moreover, a time-consuming certification process may not be the best fit for the fast-developing and rapidly changing AI landscape, and might counteract the goals of competition law by impeding the incentive of undertakings to innovate.

2. Targeted Regulatory Measures

The adoption of targeted regulatory measures (*i.e.*, measures that are specific to AI), with the intention of preventing potential anti-competitive effects has also been envisaged and discussed by regulators and academic commentators. In this regard, one of the proposed solutions entails imposing an obligation on operators to disclose their source codes to ensure greater transparency and accountability. Moreover, Scherer proposes the implementation of "*AI sunshine laws*," under which designers and operators would have to publicly disclose the codes and specifications of their AI systems in order to allow the public to scrutinize their AI systems and raise any concerns that might constitute a public risk.[51] In this context, Scherer puts forth the example of Wikipedia, a multilingual, web-based, free-content encyclopedia based on a model of openly editable content, where the members of the community are able to

[51] *Ibid.*

identify the errors in articles and amend the entries themselves.[52] This view might bring to mind German Chancellor Angela Merkel's call to companies to publicly disclose their algorithms in order to allow citizens to inform themselves about the possible risks of search engines and their algorithms.[53]

On the other hand, Bruno Salcedo has offered a potential remedy regarding the firms' ability to decode their rivals' algorithms and to thereby establish a tacit collusion. Salcedo recommends an *ex-ante* supervision mechanism, in which companies would be allowed to adopt algorithms that would mask the source code of algorithms. In this regard, the concealment of the source codes of the algorithms would prevent companies from decoding their rivals' algorithms and thus debilitate and prevent tacit collusion.[54] It should be noted that this suggestion could also be categorized as an example of an institutional approach, since it would also require the establishment of a supervisory body. Furthermore, Dylan I. Ballard and Amar S. Naik have proposed another solution, which would encourage companies to adopt only certain types of algorithms that are specifically programmed not to communicate in any form with the algorithms and employees of other companies.[55] The main purpose of this approach would be to outlaw algorithms that have the ability to disclose competitively and commercially sensitive data.[56]

As a more targeted measure, Ezrachi and Strucke have suggested the implementation of a *deceleration* process, where the speed and frequency of the price adjustments by the sellers in a market would be reduced.[57] The authors explain that, although algorithms would still monitor their competitors' pricing and business decisions on a continuous basis, they would be subject to a time delay, and thus firms' incentive to deviate from a collusive arrangement would not be diminished, since deviators could still commercially benefit from a consumer shift due to lower prices. However, Ezrachi and Strucke also point out that this measure carries the risk that any such intervention in the market could also discourage sellers from offering discounts to their consumers.

Firstly, we observe that solutions based on the transparency and accountability of algorithms appear to be extremely burdensome, difficult to implement, and

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[52] *Ibid.*

[53] Harriet Agerholm, *Angela Merkel says internet search engines are "distorting perception" and algorithms should be revealed.* Independent, (Oct. 27, 2016) Retrieved from: www.independent.co.uk/news/angela-merkel-says-internet-search-engines-endangering-debate-algorithms-should-be-revealed-a7383811.html (lastaccessed on 18.02.2018)

[54] Bruno Salcedo, Pricing Algorithms and Tacit Collusion (2015) (Manuscript).

[55] Dylan. I. Ballard & Amar. S. Naik, *Algorithms, Artificial Intelligence, and Joint Conduct*, Cpi Antitrust Chronicle, 6 (2017).

[56] *Ibid*

[57] OECD, *Algorithmic Collusion: Problems and Counter-Measures - Note by A. Ezrachi & M. E. Stucke*, 28 (2017).

unsuitable for digital marketplaces in general. This approach has been subject to some valid criticisms. For example, the public disclosure of pricing algorithms is quite unthinkable, as they reflect undertakings' price-making policies and strategies, which they would be highly reluctant to share with their competitors and the general public. Besides, such a requirement would generate unintended problems related to intellectual property law and it would also have the side effect of greatly reducing firms' incentive to innovate. [58] Other proposed remedial measures, such as the masking of the source codes of algorithms or the deceleration process, would also introduce various drawbacks to the fast-developing AI landscape. In fact, such measures would constitute a direct intervention by regulatory agencies on the development of technology. Considering the fact that neither the collusive effects of algorithms nor the effectiveness of these solutions have been definitively proven, any premature or hasty intervention would greatly endanger innovation.

3. A Market-Oriented Approach and Algorithms' Projected Intrinsic Solutions

It is also possible for operating firms to take pro-active measures themselves in order to avoid AI-related competition law infringements. In fact, even under the scenario in which the introduction of algorithms would have anti-competitive effects, the dissuasive/deterrence effect of the punishment tools of competition enforcement authorities would not simply disappear. The ambiguities and enforcement difficulties that might emerge under tacit collusion scenarios have already been discussed earlier in Section II. However, other types of competition law violations will remain within the scope of the competition law regime, and the introduction of algorithms will merely result in the aggravation or intensification of pre-existing competition law infringements. For instance, the imposition of monetary fines (as well as the effect of such punishments on companies' public reputations) will continue to function as effective dissuasive tools for companies making use of algorithms in their business decisions and strategies. It is thus foreseeable that firms may adopt pro-active solutions in order to avoid potential infringement scenarios with respect to competition law concerns.

In this regard, during the 18th Conference on Competition held in Bundeskartellamt, Berlin, Commissioner Vestager stated that algorithms' outcomes depend on the purpose of their creation; for instance, if algorithms are designed to raise prices without limit or to help consumers find the lowest prices, they will deliver those outcomes.[59] Therefore, in the Commissioner's view, competition enforcement authorities do not need to be suspicious of every company that uses an automated system to make pricing decisions. In her speech, Commissioner Vestager strongly underlined that:

"*Companies can't escape responsibility for collusion by hiding behind a computer program. That means pricing algorithms need to be built in a way that*

[58] OECD, *supra note* 7, at 5.

[59] Bundeskartellamt 18th Conference on Competition, Berlin, (16 March 2017), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/ anno-uncements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en (last accessed on 18.02.2018).

doesn't allow them to collude. (...) And businesses also need to know that when they decide to use an automated system, they will be held responsible for what it does. So they had better know how that system works. (...) We certainly shouldn't panic about the way algorithms are affecting markets. But we do need to keep a close eye on how algorithms are developing."[60]

Since algorithm designing processes are still being developed and improved, and the capabilities of algorithms have not yet been fully discovered, any pro-active solutions that could possibly be adopted by undertakings are also mostly based on hypothetical scenarios, similar to the speculations surrounding the potential anti-competitive effects of algorithms.

The first and most obvious pro-active solution would be coding algorithms in a way that would prevent them from enabling collusion with other firms. This might, for example, include a prohibition for algorithms with respect to decoding the algorithms of competitors or the introduction of a deceleration process. The difference between such pro-active measures and the regulatory approach discussed above is that leaving companies free to undertake such decisions would not reduce their incentive to innovate; furthermore, if an implemented solution reveals itself to be inefficient or insufficient, firms may adopt a different innovative solution to avoid infringing on competition law rules, instead of having to obey and follow ineffective and mandatory rules (as in the regulatory approach.)

For *deep learning* scenarios, in which algorithms are projected and expected to make decisions independently based on their previous knowledge, the incorporation/inclusion of competition law sensitivities into the learning process of the algorithms might provide a useful solution. For instance, even when they discover or ascertain that collusion would maximize profits, algorithms might be taught (similar to humans) that the infringement of competition law rules, by any means, is prohibited and that they shouldn't take those collusive steps even if they would maximize profits.

One should also consider the effects of potential interventions, either by incorporating them into algorithmic codes or even through the actions of competition enforcers, so that algorithms will learn from their mistakes that an anti-competitive behavior is indeed harmful for the firm in the long run, even if it maximizes profits in the short run. In assessing potential risks, we consider algorithms' ability to calculate the potential risks of deviating from anti-competitive agreements; the same might also apply for their incentive to avoid collusion if they are programmed to be able to calculate the potential risks (*e.g.*, profit loss due to monetary fines or reputational harm to the firm) of being caught by competition law enforcement authorities.

Moreover, we should keep in mind that algorithms will also become available to competition enforcement authorities and to consumers. Although there is a risk with respect to algorithms complicating or thwarting the detection of collusive practices due to their ability to conceal their behavior (and hence, limit the ability of competition enforcement authorities to gather material evidence of collusion), it is also likely for

[60] *Ibid.*

competition enforcers' algorithms to monitor and detect such behavior, for instance, by detecting suspicious price variations. Similarly, the increasing availability of algorithms for consumers might help them to identify the products of new entrants in the market and stay clear of collusive firms and their inflated prices.

Concluding Remarks

As Gal and Koren have remarked, "*we are standing on the verge of a brand-new world with respect to how we buy and sell.*"[61] As a matter of fact, algorithms will change the competition landscape as we know it by enabling undertakings to improve their pricing models, by helping suppliers to provide better products and services to their consumers, and by predicting market trends to encourage and spur innovation. Indeed, the ability of algorithms to monitor the market, accelerate companies' decision-making processes, and push suppliers to produce differentiated, innovative and fresh new products can be seen as a "switch button" for the current competition parameters since these capabilities will result in dynamic efficiencies, thus increasing consumer and total welfare. Although some commentators point out and highlight the potential collusive consequences of algorithms, these consequences are yet to be borne out by empirical data.

The efforts of academics and institutional organizations to devise and propose remedial measures at this early stage of AI development should be welcomed. However, conceiving and examining potential AI scenarios under the assumption that undertakings would be acting in pure bad faith (*i.e.*, using their algorithms to collude) would constitute a grave and manifest error. Too much skepticism and a lack of trust in innovation-based solutions that could be implemented by operating firms would lead to premature and burdensome regulations, which might endanger the development and encouragement of AI technologies. In fact, a rush in policymaking, including legislative efforts, might ultimately prove to be inadequate or plainly useless. Regulation should only be used as a last resort and potential remedial measures should be based on empirical data and *very* carefully designed.

On that front, as suggested by Ezrachi and Strucke, the most effective approach might be the pre-assessment of projected countermeasures that are based on experiments aiming to detect the responses of pricing algorithms within the scope of various potential scenarios.[62] Operating firms might also rely on and utilize this data in implementing and improving their algorithms.

Instead of viewing competition enforcement autrities and undertakings as adversaries, we should aim to establish cooperation between the two in understanding, devising and realizing the most suitable approach toward AI technologies. On the basis of such mutual cooperation, we could finally illuminate the potential gaps in the enforcement of competition law rules with respect to AI technologies and thus implement effective solutions to achieve the fundamental goals of competition law.

[61] Michal S. Gal & Niva Elkin-Koren, *Algorithmic consumers*, HARV. J.L. & TECH, 44 (2016).

[62] OECD, *supra note* 57, at 28.

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Data Room Practices in Competition Law: Right to Access to File and the Right to Defense in Cartel Cases

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"*Judgment does not come suddenly; the proceedings gradually merge into the judgment.*"[1] Franz Kafka

I. INTRODUCTION

The scope of competition law is wide-ranging, considering that it is applicable to each level of production and sale in the economy, simultaneously affecting consumers far and wide and protecting the competitive balance in the marketplace, and maintaining the uncertainty of commercial competition on an equal playing field. Therefore, the enforcement procedures of competition law require significant attention and care, not only to ensure that the rule of law is applied equitably, but also to strike a balance between the wills and needs of both the consumers and the undertakings. Therefore, it goes without saying that the implementation, execution and enforcement of competition law rules should proceed in a fair and transparent manner, not disadvantaging any of the respective parties involved in the process.

In line with the significant duties and substantial role bestowed upon them, competition authorities around the world can act on broad authority and collect extensive information in order to prepare their cases as they conduct their investigations. Along the same lines, the undertakings being investigated are also granted the right to access to file in order to fully grasp the grounds on which they are being accused of competition law violations, and thereby

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[1] FRANZ KAFKA & IDRIS PARRY, The Trial (2015).

effectively exercise their right to defense. As a result, in the event of a lengthy cartel investigation, where numerical data and detailed analyses of evidence are both common and fundamental, the enforcers are required to allow the undertakings to obtain sufficient information about the extent of the claims brought against them. However, the relevant rights of the defendants must be balanced with the competition authorities' obligation to protect the confidentiality of the business secrets of all undertakings.

To that effect, data rooms have emerged as an effective procedural tool in cartel investigations. With this tool, investigated parties in cartel investigations have the opportunity to access the unsealed investigation file without the other undertakings having due concerns regarding the confidentiality of the evidence that they provide to the investigating authorities. However, with respect to minimizing the concerns regarding the crucial balance between confidentiality and transparency, the use of data rooms is not uniform throughout jurisdictions with well-established competition law enforcement regimes. Some jurisdictions, including Turkey, do not encompass data room practices within their legislations, while, on the other hand, the European Union's established data room practice has room for significant improvements.

Taking the foregoing into consideration, this article seeks to address data room practices to build a bridge between the right to access to file and the right to defense, comparing the EU jurisprudence and applications of the Turkish practices. In this regard, the concepts of the right to defense and the right to access to file will be explored in detail. Therein, the practical aspects of the data room system will also be examined for both jurisdictions.

II. THE PROTECTION OF THE RIGHT TO DEFENSE

The right to defense, and all that it entails, constitute a pillar of any legal proceeding that has the slightest claim to fairness or impartiality. It is a notion found in natural law, and transmitted into written form with positive law in modern legal practice.[2] Within the precedents set by the European Court of Human Rights ("***ECHR***"), it is clear that the relevant rights set out in the European Convention on Human Rights do not apply only to natural persons, but also to companies that fall under the umbrella of the "non-governmental organizations" categorization.[3] Within a competition law context, the right to

[2] MARTA MICHAŁEK, *Right to Defence in EU Competition Law: The Case of Inspections,* Textbooks and Monographs, University of Warsaw (2015).

[3] DANIEL MUHEME & NORMAN NEYRINCK & NICOLAS PETIT, *Procedural Rights in EU Antitrust Proceedings,* http://lup.lub.lu.se/luur/download?func= download File&recordOId=8894473&fileOId=8896966 (draft last visited Feb. 12, 2018).

defense is primarily raised in cartel cases, where the data room practice is most prominent and widespread. Therefore, the examination of this fundamental right is a prerequisite for the effective analysis of data rooms and the right to access to file.

For a legal proceeding to be conducted on an equal playing field, the accused (and, in the case of antitrust proceedings, the undertaking/controlling party or responsible individual) must primarily be allowed to have: (i) the right to be heard, (ii) the right to counsel, (iii) the right to access to file, (iv) the privilege against self-incrimination, (v) the right to good administration, and (vi) the right to be presumed innocent. These elements are interconnected and complete each other in the sense of providing an individual/entity the ability to exercise its right to defense in full capacity.

1. *Right to be Heard*

"*…the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*"[4]

The right to be heard (*audi alteram partem*, literally "listen to the other side") is derived from natural law, and its scope is expanded by jurisprudence. In administrative law proceedings, it is important to bear in mind that the individual/legal entity is facing the claims of an integrated branch of the administrative network of the State. Therefore, it is only natural that the private individual or entity should be granted a reasonable amount of time and all relevant information regarding the case against it, as to prevent the private entity from being disadvantaged by the fact that the administrative authority is on a procedural high ground, having extensive resources, personnel and a wide scope of investigative powers.[5]

As for competition proceedings, initially, the right to defense in antitrust proceedings requires the competition authority that expresses competitive concerns to voice its concerns clearly and formally. In other words, the competition authority must inform the undertaking in question about the charges it faces without omitting or hiding any element of its case. Then, as an equal playing field would require, the undertaking must be given the opportunity to provide its responses and put forth its defenses, be it in writing or orally or both. The European Union has put forth, in many levels of its legislative pyramid, regulatory rules regarding the right to be heard, such as the

[4] Article 41, Charter of Fundamental Rights, Official Journal of the European Union C 303/17, (2007).

[5] Folke Bernadotte Academy and Office for Democratic Institutions and Human Rights, *Handbook for Monitoring Administrative Justice* (2013).

following: "*The right to be heard is reaffirmed in several of the Council regulations which give effect to the principles laid down in Articles 85 and 86 of the Treaty. The Commission is there required to give the persons, undertakings and associations of undertakings concerned the opportunity of making known their views on the objections against them. Where other parties are affected by the action or agreement in question, the Commission must hear them too, provided they can prove a sufficient interest*."[6]

2. *Right to Counsel*

Undertakings are allowed to seek and acquire the assistance and guidance of a legal representative, whether it is in-house counsel or external representation provided by independent lawyers. Especially for antitrust proceedings, the inclusion of lawyers in the investigation process is crucial for safeguarding the confidential information of competitors. Furthermore, as legal privilege applies to antitrust matters, the undertakings are allowed to consult their counsels and receive their legal opinions, and the relevant communications would be exempted from becoming the topic of an antitrust proceeding initiated by the enforcers, including on-site inspections and dawn raids. Nevertheless, discussions concerning the issue of in-house lawyers occasionally being regarded as falling outside the umbrella of legal privilege are still on-going among academicians and practitioners in the field.[7]

3. *Privilege against self-incrimination*

"(*...) a person accused of a criminal offence cannot be forced to give evidence against himself or to confess his guilt. The concept of criminal accusation applies both in penal and in administrative proceedings***.**"[8]

The privilege against self-incrimination (also known as "the right to remain silent") is a vital element of modern legal proceedings. However, this privilege is not absolute or bulletproof in proceedings of competition law, where the investigated entities are obligated to actively cooperate with the authorities within the scope of an investigation.[9] The law's obligation to provide the investigated undertakings with the privilege against self-

[6] European Commission, *The Right to be Heard in Competition Proceedings,* http://europa.eu/rapid/press-release_IP-94-957_en.htm (draft last visited on Feb. 12, 2018) (2017).

[7] BARTOSZ TURNO & AGATA ZAWŁOCKA-TURNO, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, Yearbook of Antitrust and Regulatory Studies, 5(6) (2012).

[8] Orkem v Commission of the European Communities Case 374/87 (Oct. 18, 1989)

[9] Turno, & Zawłocka-Turno, *supra* note 7.

incrimination is balanced with the requirement of active cooperation, and antitrust enforcers cannot compel an undertaking to confirm/admit/give evidence in regards to a breach of antitrust jurisprudence.

4. *The Right to Good Administration*

It is within the undertakings' rights to have their proceedings before the administration handled "*impartially, fairly and within a reasonable time*"[10] in addition to being provided with reasonings for the decisions that relate to them. This is especially important for antitrust proceedings, where bodies like the European Commission ("***Commission***") and the Turkish Competition Board ***("Board" or "Competition Board")*** are bestowed with three inter-related duties: they investigate, prosecute and adjudicate at the same time.[11] Therefore, the right to good administration is an overarching concept, a metaphorical "roof" over the execution and practice of other rights included in the right to defense, ensuring that the enforcer does not take advantage of its threefold position as an administrative body within a competition law proceeding.

III. THE RIGHT TO ACCESS TO FILE: A KEY ELEMENT IN TRANSPARENCY FOR CARTEL PROCEEDINGS

Contemporary competition law regimes provide the right to access to file to undertakings that are being subjected to cartel investigations (and, in some cases, extend this right to the complainants.) As mentioned above, parties are *de jure* entitled to have access to the case file after they are provided with a notification of the competition law objections against them (*i.e.*, after they are presented with a statement of objections in EU competition law or an investigation report in the Turkish competition law regime). However, the right to access to file still remains a controversial subject in this field, since the need to protect confidential information and the undertakings' need to access such information must be carefully balanced in order to allow the right to defense to be effectively exercised without compromising the undertakings' business secrets.

Competition authorities are in a position to oversee and ensure the investigated undertakings' right to be heard and other rights of defense in accordance with the principles of subsidiarity and proportionality, as set out in Article 5 of the Treaty on European Union.[12] The Commission, in its decisions, has declared that the right to access to files in competition proceedings is one

[10] Charter of Fundamental Rights (2007) *supra* note 4.

[11] JEAN-NICOLAS MAILLARD & AGAPI PATSA, *Rights of defence in EU antitrust proceedings* (2015).

[12] TFEU. art. 5(3).

of the procedural guarantees intended to safeguard the undertakings' rights of defense.[13] Likewise, the confidentiality of information exchanged during the proceedings of the case should also be carefully safeguarded. This, in particular, makes the subject matter itself contentious.

The right to access to file is considered to be of fundamental importance on the basis that the undertakings subject to a cartel investigation must be able to exercise their right to examine the information and documents on which the relevant competition authority or enforcer has based its allegations, and thereby have the opportunity to vigorously contest these allegations. Accordingly, the undertakings would be in a position to express their views on the preliminary conclusions reached by the relevant authority and put forth a meritorious defense.[14] To this end, access to file is one of the procedural guarantees that was formulated and developed to apply the principle of "equality of arms" (*i.e.*, an equal playing field) and to protect the rights of the defense, as also articulated in the *Commission Notice*.[15][16]

Though it goes without saying, it should nevertheless be remembered that the competition authorities have full access to the case file, including all the responses that the rivals and/or related firms in the relevant market have given, as well as the documents obtained and gathered during on-site investigations. Therefore, the investigated undertakings must be provided with the same opportunity to examine these documents in order for the undertakings to be able to prepare pertinent and comprehensive defenses in response to the allegations and findings of possible cartel violations set forth by the competition authority. In other words, the investigated undertakings must be offered the opportunity to make their views and objections known regarding the veracity and relevance of the allegations made in the investigation.

[13] BPB Industries and British Gypsum v. Commission Case T-65/89, para. 30, (1993); Solvay v. Commission Case T-30/91, para. 59, (1995); Cimenteries CBR and Others v. Commission T-10/92, para. 38, (2000).

[14] Commission Notice on the Rules for Access to the Commission file, OJ C 325/7 (2005), para. 10.

[15] *Id*, para. 1.

[16] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 (2001). Case T-30/91 *Solvay v. Commission*, ECR II-1775, para. 59 (1995), Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others v. Commission* ECR11-2667, para. 38 (1992), Case T-65/89 *BPB Industries and British Gypsum v. Commission* ECR 11-389, para. 30 (1993).

For this purpose, the undertakings in a competition law investigation are granted access to documents in the case file, which include all forms of information support, including electronic data storage devices.[17] Naturally, there are certain documents that undertakings cannot have access to, including the following: (i) internal documents, (ii) business secrets of other undertakings, or (iii) other confidential information.[18] These documents comprise the exceptions to the right to gain access to the authority's investigation file.

(i) *Right to Access to File in the EU*

The Commission has far reaching powers to enforce penalties for infringements of Article 101(1) of the Treaty on the Functioning of the European Union ("***TFEU***"). In this context, the Commission might conduct on-site inspections and take statements from the investigated undertakings or other relevant undertakings in the relevant market. The undertakings are also obliged to provide all the necessary information that the Commission requests as a part of its investigation.

Furthermore, it should be kept in mind that the Commission may also *de jure* impose vast amounts of administrative monetary fines on undertakings and instigate serious reputational/career consequences for those against whom an investigation is initiated. To that effect, the enormous consequences of an enforcement decision by the Commission are of vital importance in the consideration and examination of the investigated undertakings' procedural protections.

Article 27 of the Council Regulation 1/2003 and Article 15 of the Commission Regulation 773/2004163 are the fundamental provisions granting the right to access to file to the investigated parties. Furthermore, the Commission Notice on the rules for access to the Commission file[19] provides that access to file shall be granted upon request for cases carried out under Article 101(1) TFEU to persons, undertakings or associations of undertakings to which the Commission addresses its objections.[20] This right stems from the fact that the Commission is obligated to give the parties the opportunity to make their views known on the objections against them.[21] This specific right, outlined in the foregoing, is distinct from the general right to access to

[17] Commission Notice, *supra* note 14, para. 9.

[18] *Id.*, para. 10.

[19] *Id.*

[20] *Id.*, para. 7.

[21] *Id.*, para. 1.

documents under Regulation (EC) No. 1049/2001,[22] which is subject to different criteria and exceptions, and pursues a different purpose.

The Commission's Directorate General for Competition ("***DG***" or "***DG Competition***") made noteworthy efforts to render its procedures more transparent and a topic of greater internal scrutiny, by way of introducing the publication of Best Practice Guidelines[23] for competition proceedings, and publishing an explanatory note regarding its inspection authorizations, as well as an Antitrust Manual of Procedures.[24] As explained above, the right to be heard constitutes the core of the right to defense, which includes "*the right to access to the Commission's investigation file*" according to the European legal framework.[25] The European Court of Justice emphasized this link in its *Thyssen Stahl* decision, where it stated that, "*An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defense had there been no error, for example because it would have been able to use for its defense documents to which it was denied access during the administrative procedure.*"[26] As evident in the above reasoning, the European Court of Justice attaches great importance to the notion of an investigated party being "*better able to use its defense,*" pursuant to the principle of "the equality of arms." The ECHR clearly sets forth that it is not necessary to prove that the final outcome of the case would have been different in order to establish that the right of defense had been violated.

Similarly, the ECHR concluded that the applicant's right to a fair trial (ensured and protected by Article 6 of the European Convention on Human Rights) had been violated, due to not being granted access to file during the preparation process of its defenses in *Foucher v. France*.[27]

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[22] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission documents, OJ L 145 (2001). Verein für Konsumenteninformation v. Commission Case T-2/03, (2005).

[23] Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, DG Competition (2010).

[24] Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, European Commission (2012).

[25] Procedural Fairness and Transparency, OECD, Competition Committee (2012).

[26] Thyssen Stahl v Commission, C-194/99 P, para 31 (2003).

[27] Foucher v. France, ECHR, Application no. 22209/93, Reports 1997-II, at 12 (Mar. 18, 1997).

In order to fully maintain the effective exercise of the rights to defense of parties to whom a statement of objections has been addressed, as well as to ensure the protection of the confidential information of the undertakings (or natural persons), a particular set of procedures has been adopted in the European Union.

In essence, if the Commission and the investigated undertakings (or other parties) cannot agree on the issue of access to file, the Hearing Officer ("***Hearing Officer***") is empowered and charged with the responsibility of resolving the issue in competition proceedings.[28] To that end, the role of the Hearing Officer is to safeguard the effective exercise of procedural rights throughout the proceedings before the Commission for the implementation of Articles 101 and/or 102 TFEU and under Council Regulation (EC) No 139/2004,[29] pursuant to Decision 2011/695/EU of the President of the European Commission of October 13, 2011, on the function and terms of reference of the hearing officer in certain competition proceedings.[30] When such disputes arise, the Hearing Officer delves into the situation by way of conducting oral hearings and acting as an independent arbiter, after the Directorate-General for Competition has failed to resolve the dispute. Furthermore, the Hearing Officer may have decision-making or reporting powers, along with its powers of recommendation, when carrying out its duties.

Most importantly, the Hearing Officer has the power to decide: (i) that parts of the file shall be made accessible to the party requesting access in a restricted manner, and (ii) the limits of the use of the information being accessed.[31]

In the *VISA MIF* investigation,[32] which was subject to the Article 101 TFEU procedure, one of the addressees of the statement of objections, Visa Europe, had requested access to the file. This request of the addressee included a study which had been requested by the Commission in order to gather more information and further elaborate on the costs and benefits to merchants of

[28] Decision 2011/695/EU of the President of the European Commission on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings, OJ L 275 (Oct. 10, 2011).

[29] Council Regulation on the Control of Concentrations Between Undertakings No. 139/2004, OJ L 2, at 1-22 (2004).

[30] *Supra* note 28.

[31] ANNE-MARIE VAN DEN BOSSCHE & JACQUES DERENNE & PAUL NIHOUL & CHRISTOPHE VERDURE, SOURCEBOOK ON EU COMPETITION LAW (Vol. 1) (2015).

[32] VISA MIF, Case AT.39398 (Feb. 26, 2014).

accepting different payment methods. DG Competition rejected the addressee's request for access to file. The DG further stated that these documents did not form part of the Commission's file. Later on, Visa Europe brought the issue of access to file to the Hearing Officer pursuant to Article 7 of Decision 2011/695/EU, and the Hearing Officer held that the set of documents did actually form a part of the Commission's file under paragraph 8 of the Access to File Notice, on the basis that the study in fact referred to the proceedings against Visa Europe. Therefore, the Hearing Officer ruled that Visa Europe was entitled to gain access to those documents to the extent that they did not constitute confidential information or internal documents.[33]

In this context, one should also mention that one of the two practical routes to resolving such disputes, where undertakings would otherwise need to redact their submissions since those redacted submissions are considered to be confidential information, is the data room procedure. Under this procedure, the Commission's file (including confidential information) is assembled in a room on the Commission's premises, as it will be explained in detail below.

(ii)*Right to Access to File in Turkey*

The right to access to file has two legal bases in the Turkish competition law regime: (i) Law No. 4982 on the Right to Information ("***Law No. 4982***"), and (ii) Communiqué No. 2010/3 on the Regulation of the Right to Access to File and the Protection of Commercial Secrets ("***Communiqué No. 2010/3***"). Pursuant to Article 5(1) of the Communiqué No. 2010/3, the right to access to the case file is granted upon the written requests of the parties within due period during the investigations. The right to access to file can be exercised pursuant to a written request at any time until the end of the prescribed period for submitting the final written statements. This right can be exercised only once so long as no new evidence has been obtained within the scope of the investigation.

On the other hand, the Law No. 4982 does not have any similar restrictions in terms of timing or scope. Access to the case file enables the applicant to get access to information and documents in the case file that do not qualify as: (i) internal documents of the Competition Authority, or (ii) trade secrets of other firms or trade associations. It should be noted that the Law No. 4982 provides for similar limitations.

These two different means of obtaining access to information in competition law related cases, are realized through the following: (i) a petition for access to file on the basis of the Communiqué No. 2010/3 of the Board

[33] VISA MIF, Final Report of the Hearing Officer of 19 February 2014 in Case AT.39398, OJ C 147, at 6, para. 9 (May 16, 2016).

related to the right of access to file, bearing in mind that the scope of this Communiqué only covers on-going proceedings pursuant to Article 8(3), and (ii) a petition on the basis of the general "right to access to information" as guaranteed by the Law No. 4982 for cases where the procedure has already been completed (which, as a result, means that the information sought does not fall under the scope of Communiqué No. 2010/3).

Article 10 of the Law No. 4982, which regulates the right to access information from the state institutions and organizations and professional organizations with public institution status, states that: *"(...) Where the information or the document is not appropriate for copying or may cause damage to the original copy, the institution and agency shall provide the applicant with the necessary means;*

a) to examine the original document and take notes for those that are published or written,

b) to listen to the material that are in the form of sound recordings,

c) to watch the material that are in the form of visual recordings."

This Article clearly demonstrates that the Turkish practice leans heavily toward disclosing the needed documents for investigated parties in the proceedings of cartel cases to provide the applicant with the necessary means to formulate and present their own defenses as per their rights of defense. However, it does not satisfactorily clarify or enumerate the procedure or the tools that will be used to attain these means, unlike the specific regulations set forth in the EU practice.

Furthermore, Article 19 of the Law No. 4982 provides that: "*Information that is related to an administrative investigation conducted by the authorized units of the institutions and organizations and that may jeopardize the protection of the investigation if it is revealed or revealed prematurely is outside the scope of this Law."*

Although the Authority has a certain discretion in determining what falls under the concept of documents "*that may jeopardize the protection of the investigation,"* that discretion is in fact not an absolute one,[34] and is properly

[34] FIRUZ DEMIR YAŞAMIŞ, *Anayasa Hukuku Ve İnsan Hakları Açısından Bilgi Edinme Hakkı,* Türk İdare Dergisi at 24 (2004); CEMIL KAYA, İDARE HUKUKUNDA BİLGİ EDİNME HAKKI at 281 (2005); MEHMET SEMIH GEMALMAZ & HAYDAR BURAK GEMALMAZ, *ULUSALÜSTÜ İNSAN HAKLARI STANDARTLARI IŞIĞINDA TÜRKİYE'DE BİLGİ EDİNME DÜŞÜNCE-İFADE VE İLETİŞİM MEVZUATI,* at 257 (2004).

exercised when an objective approach is maintained and a suitable balance is struck between the respective interests of the authority subject to the request and the requesting parties, which is a natural consequence of the principle of proportionality.[35] In other words, such discretion should not be exercised in a way that would end up damaging the very essence of the right to information within the scope of the Law No. 4982.[36]

The principle of proportionality requires that the means, tools and measures used by the administration to take an action/decision should be proportionate to the objectives pursued through the implementation of this action/decision.[37] As also stated above, this principle is firmly embedded in the legal order of the European Union. Therefore, the principle of proportionality encompasses a universal principle of administrative law throughout the world and, as such, should strengthen its position within the Turkish legal order as well.[38]

For the principle of proportionality to be respected and fully complied with, every aspect of a given case should be taken into account and examined through the lens of the principle of proportionality.[39] In other words, the administrative authority should strike a balance between the impact of its decision on each side's interests (*i.e.,* the private/moral persons' interest on the one hand and the public interest on the other hand) when a conflict arises between: (i) the rights and/or liberties that are guaranteed to private or moral persons, and (ii) the administration's or public order's interests. The solution adopted and implemented by the authority should be reasonable, fair and should not cause disadvantages that are disproportionate to the aim pursued;[40]

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[35] KEMAL GÖZLER, İDARE HUKUKU, at 281 (2003).

[36] MEHMET ALI ZENGIN, TÜRK HUKUKUNDA BILGI EDINME HAKKININ SINIRLARI, at 151- 157 (2012).

[37] YÜCEL OĞURLU, *İlk Örneklerinden Günümüze Danıştay'ın Ölçülülük İlkesine Yaklaşımı,* at 137.

[38] YÜCEL OĞURLU, *İngiliz ve Türk İdare Hukuklarında İdari Faaliyetin Denetlenmesinde Ölçülülük İlkesinin Rolü Hakkında Bir değerlendirme,* at 175 (2000).

[39] Plenary Session of the Administrative Law Divisions Decision No:1979/271, 25.05.1979, File No:1978/940; High State Court, 8th Chamber Decision No: 1997/3928, 11.12.1997, File No: 1995/3680.

[40] YÜCEL OĞURLU, *A Comparative Study on the Principle of Proportionality in Turkish Administrative Law* (2003).

in other words, private/moral persons' rights should not be restricted in a disproportionate manner.[41]

In this regard, the 2nd Administrative Court of Ankara ("***Court***") annulled the Authority's decision in a noteworthy case, whereby the Authority had dismissed the application of an undertaking requesting access to information contained in the Authority's file based on the Law No. 4982, in an attempt to obtain information relating to a pre-investigation process of the Authority that had been closed several years earlier.[42] To that end, the undertaking presented its request for access to information based on the general "right to access to information" as guaranteed by the Law No. 4982.

The relevant application for access to information was filed to help prepare the undertaking's defense in an on-going lawsuit that a purchaser of the undertaking had brought against it. The Authority rejected the undertaking's request for access to information. Following the rejection of the request for access to information, the undertaking appealed the case to the Court in order to contest the legality of the Authority's decision, primarily by arguing that the contested decision lacked a proper legal basis, since it did not provide any explicit reasoning as to why granting access to the requested information and documents had been deemed "inappropriate" under the scope of both Article 22 and Article 26 of the Law No. 4982. On that note, the undertaking also challenged the unrestrained discretionary power that the Authority had used when rejecting its application. The undertaking contended that the dismissal of its request was, in fact, contrary to the principles laid down under the provisions of the Law No. 4982, as well as the standards of the Council of Europe and the case law of the European Union regarding the right to information.

The Court, in its judgment, held that the principal/preferred option was to provide access to information, whereas the exception was, in fact, to protect the confidentiality of the documents in the Competition Board's file. Based on this principle favouring access to information, the Court determined that it was a meaningful or hold an adequate justification to merely state that the requested information was considered "internal documents" and dismiss the request without providing any other justification or reasoning. The Court further emphasized that acceptance of the opposing view would be tantamount to admitting that the communication of information and documents that are within the scope of the right to access to information according to the Law can be

[41] JÜLIDE GÜL ERDEM, *Ölçülülük İlkesinin Kullanımının İdarenin Takdir Yetkisinin Kullanımındaki Yeri,* AÜHF L. REV at 984-992 (2013).

[42] 2nd Ankara Administrative Court (2015/1033, 2015/1861).

refused to the applicants solely on the basis of the administration's discretionary power and without providing any justification or reasoning.

The Court also observed that: (i) the applicant's request did not relate to the content of any communication, but rather was aimed at obtaining factual information concerning the existence of certain communications between the Authority and the purchaser, and (ii) that the relevant information would be used within the scope of the right of defense for the on-going litigation. As a consequence, the Court concluded that the rejection of the request had been contrary to the Law. Based on the foregoing, the Court decided to annul the challenged decision of the Authority.

The judgment of the Court is a watershed instance on the right to access to file in Turkish jurisprudence. It is a ground-breaking decision in terms of redrawing the line between the boundaries of the discretionary power of administrative bodies and the interests of counterparts that could be negatively affected as a result of administrative acts. Furthermore, it has the merit of clarifying the principles of applying for requests to access to file and laying out the strict boundaries of the discretionary powers that administrative authorities may use, namely that such discretionary powers may only be used within the scope of the general legal principles and merely by providing a clear and sufficient reasoning for their decision if they decide to reject the applications for access to information.

In light of the foregoing, it can be asserted that the new order in Turkish jurisprudence puts more weight and importance on the right to access to file. Yet, it can also be said that this progress is still inadequate, on the basis that there are neither sufficient legislations nor the necessary procedures in place to protect and ensure the full implementation of the right to defense; and that the discretionary power of the Competition Board, as an administrative body, is measureless. Furthermore, a considerable number of decisions[43] exist where the Board did not grant access to file to undertakings in proceedings of cartel investigations based upon its excessive discretionary power, which is also not grounded by any secondary legislation on this end. In those cases, the Board clearly weighed up the respective interests in favor of protecting the confidentiality of information, by way of either refusing to grant access to the documents or by allowing a limited amount of access without any specific legislation on the subject. Consequently, it can rationally be concluded that the Competition Board may not be providing enough guidance to undertakings and

[43]Turkish Competition Board (03.11.2015, 15-39/648-227); (30.03.2016, 16-12/188-83); (18.05.2016, 16-17/290-133); (13.03.2017, 17-10/120-55); (23.03.2017, 13.03.2017); (10.02.2016, 16-04/79-34).

competition law practitioners in its practice or exhibiting sufficient coherence and consistency in its decisions.

II. OVERVIEW OF DATA ROOM PRACTICES IN THE EU AND IN TURKEY

1. *Data Room Practices in the EU*

As mentioned above, following the notification of the objections to parties subject to the cartel investigation, the investigated parties should be allowed to see the extent of the investigation file in an open and transparent manner, subject to the limit that the confidential information of undertakings must be respected and their confidentiality must be protected. On that note, data rooms have emerged as an efficient and useful procedural tool within the EU competition law regime. This practice is provided by the European Commission, the EU's antitrust sentinel, and implemented under the right to defense, and thus, the right to access to file.[44]

As stated in the Antitrust Manual of Procedures of the European Commission,[45] "*the purpose of this procedure is to provide access under strict rules to sensitive data constituting business secrets from third parties in order to verify the Commission's methodology and conclusions drawn from the data, economic or otherwise underlying the reasons behind the Statement of Objections whilst still maintaining the necessary confidentiality*."

In particular, the EC has published a "Best Practices" document[46] on the disclosure of information in data rooms with regards to the access to file in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation ("***Data Room Best Practices***"), which provides practical guidance on when and how to use data rooms to disclose business secrets and other confidential information in a restricted manner. Indeed, the aim of the document is to increase the transparency and predictability of the process within the existing legal and procedural framework, thereby enhancing the efficiency of antitrust and merger investigations.

Moreover, Paragraph 47 of the Data Room Best Practices Staff Working Paper provides that, "*when granting access to the file, the Commission may provide upon request the data and codes underlying its final economic analysis*

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[44] Maillard and Patsa, *supra* note 11.

[45] Antitrust Manual of Procedures of European Commission, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (Mar. 2012).

[46] Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, DG Competition.

or, to the extent that they have been made available to the Commission, that of third parties on which it intends to rely or take into account. Where necessary to protect the confidentiality of other parties' data, access to the data and codes will be granted only at Commission premises in a so-called data room procedure,[47] subject to strict confidentiality obligations and secure procedures.[48] Third parties or complainants are equally expected to submit all the underlying data used in the analysis. They are also expected to authorise the Commission, where appropriate, to offer data room access to the parties upon request."[49]

Firstly, it should be remembered that a data room is a physical room within the Commission's premises. The legal counsel or economic advisor[50] of the undertakings is granted access to this physical room. It must also be noted that the entire process is carried out under the supervision of the Commission's personnel.[51] Therein, the counsels allowed into the data room gain access to and use the indispensable information needed to build their case, but are legally bound to keep this information from their client.

However, the use of the data room procedure is not a requirement for each and every cartel case. It is within the discretion of the Commission to initiate the data room procedure if it finds it suitable for the case at hand.[52] This assessment is made in consideration of the confidentiality level of the information, whether it is procedurally feasible and legally necessary to disclose the information, and in assessment of the scenario where the

[47] Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102, para. 97 and 98.

[48] As the relevant footnote of the Data Room Best Practices provides, "*Similarly, the Commission will endeavour to organise access to a data room, normally to the parties' economic advisors and external counsel, if necessary to ensure their rights of defence are fully respected.*"

[49] Commission Staff Working Paper, Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, Accompanying the document (Oct. 17, 2011)

[50] 'External Advisor only'.

[51] Discussion on How to Define Confidential Information – The European Union, Working Party No. 3 on Co-operation and Enforcement, Organisation for Economic Co-operation and Development (2013).

[52] Annex A: Standard Data Room Rules to Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, European Commission, Competition DG.

information could not be contained (*i.e.*, after considering the consequences of information leaks).[53]

Furthermore, Article 8(4) of the Terms of Reference of the Hearing Officer provides that the data room procedure shall be used in those limited cases in order to balance the effective exercise of a party's rights of defense with the legitimate interests of confidentiality, and also adds that, "*the hearing officer may decide that parts of the file which are indispensable for the exercise of the party's rights of defense will be made accessible to the party requesting access in a restricted manner, the details of which shall be determined by the hearing officer*."

Indeed, in the *VISA MIF* decision discussed above, DG Competition intended to grant access to the responses of the survey by using a data room procedure. Certain restrictions were imposed on the data room that was planned to be established for this purpose. One, in particular, was that the external lawyers of Visa Europe would be allowed to have access only to the qualitative data, and Visa Europe's external economists would be granted access only to the quantitative data. Visa Europe subsequently brought the subject matter to the Hearing Officer. The Hearing Officer concluded that the restrictions imposed for the use of the data room were not justified in the name of protecting confidential information under Article 7 of Decision 2011/695/EU, and that it was essential for Visa Europe's economic and legal advisers to be able consult with each other on the documents that they were given access to.[54]

If the data room is deemed feasible when scrutinized against the necessity of protecting the confidentiality of an undertaking's business secrets, the practice commonly involves the raw data being altered in a way that cannot be traced back to the relevant undertaking. This is achieved by numerous means, such as changing currencies, redaction, translation, removing document IDs, and, overall, creating an anonymous likeness of the document.[55] Moreover, data which do not have "*evidentiary value*"[56] or are "*not necessary for the exercise of the rights of defense*"[57] will not be provided within the data room for similar reasons.

[53] *Id*. para. 11.

[54] VISA MIF, Final Report of the Hearing Officer of 19 February 2014 in Case AT.39398, *supra* note 33, para. 8.

[55] *Id*. para. 17.

[56] Data which can be disclosed through other methods.

[57] European Commission, *supra* note 52.

On a separate but related note, it must be highlighted that, in line with the Commission's mandate on protecting the business secrets of other undertakings, external advisors are not allowed to remove any data, in electronic or physical form, from the data room. Documents brought into the data room and the documents and/or notes drafted or replicated within the data room are required to be destroyed at the end of the data room procedure. Furthermore, any of the documents within the data room may be reviewed by officials at any time. In addition to these security measures, external counsels are not allowed to communicate from the data room using any means or mediums, which is a reasonable precaution. [58]

Thus, it is clearly seen that the sole purpose of the utilization of the data within the data room is to prepare the Data Room Report. This Report would have to be approved by the Commission's officials prior to its communication to the parties. Furthermore, the Data Room Report cannot reveal, by expression or implication, any information that is confidential. What constitutes confidential information that cannot be communicated by implication or expression within the Data Room Report is assessed on a case-by-case basis. The whole process can also be observed by the legal counsel(s) of the party(s) that furnished the information provided in the data room,[59] thus eradicating the questions and concerns regarding credibility, transparency, and confidentiality.

In this regard, one can declare that the end result and ultimate goal of the data room procedure is to produce the Data Room Report. And, as evident above, the Data Room Report is the only source material of the entire procedure that could be used to exercise and strengthen the right to defense. The Data Room Report encompasses the findings and conclusions of the counsel who have had access to the data room and can only be disclosed to the clients if approved by the DG Competition. Needless to say, the Report may not include any confidential information or reveal any commercial secrets.

In light of the foregoing, it could be argued that the EU practice, which could be developed further by granting undertakings more time in the data room or more continuous access to information, nevertheless establishes a fair groundwork for data room practices around the world. The data room procedure in the EU is made available to the undertakings in a cartel investigation under clear-cut rules and regulations, and although one may argue that it is quite strict and circumscribed (and perhaps unreasonably so), it

[58] Annex B: Non-disclosure Agreement to Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation European Commission, Competition DG.

[59] European Commission, *supra* note 52.

currently enables cartel investigations to be conducted on fair terms, thus strengthening the credibility of the competition enforcement regime in the EU.

2. *Data Room Practices in Turkey*

In Turkey, the right to defense and the right to access to file, similar to the jurisprudence of the European Union, are also recognized by law, international agreements and the secondary legislation of the Turkish Competition Board. Nevertheless, although the Board most commonly follows the EU approach on numerous matters of competition law, the data room practice is wanting and relatively inadequate in Turkey, as secondary legislation does not provide such structure, which brings up the question of whether established practice constitutes a legal gap in terms of the rights of defense of undertakings and their ability to fend for themselves in a cartel investigation.

In this regard, and in acknowledgement of the importance of the matter at hand, the Board has issued the Communiqué No. 2010/3. The purpose of the Communiqué No. 2010/3 is to establish the procedures and principles concerning the exercise of the right to access to file. On that note, Article 6 of the Communiqué No. 2010/3 provides that, "*Within the scope of the right of access to the file, the parties can have access to any document that has been drawn up and any evidence that has been obtained by the Competition Authority concerning them, except for intra-authority correspondences and those that include trade secrets and other confidential information about other undertakings, associations of undertakings and persons.*"

The Board has applied this article in a number of cases, although the approach of the Board could be easily perceived and described as rather conservative, which supports the argument that data room practices should be introduced in Turkey, since it is not yet an option for the defense in Turkey, regardless of the legislative similarities between Turkey and the EU.

In its recent *Trakya Cam* decision[60] on the right to access to file, the Board allowed the counsels of Trakya Cam to access in-house documents that included allegations and/or incriminatory statements against Trakya Cam on the premises of the Turkish Competition Authority, without allowing them to create any recordings or copies of the information contained in the documents. Although it is legally feasible to do so, from the wording of the decision, it could be seen that in practice this could lead to the counsel of the undertaking in question to be allowed into the Authority's premises for a limited amount of time, and be permitted to only read the relevant documents, without being

[60] Trakya Cam, Turkish Competition Board, 17-22/352-157 (Jul. 13, 2017)

allowed to prepare a report or take notes, not even under the supervision of the Authority's officials, as is the prevailing practice in the EU. Moreover, one can contend that, in the case at hand, the Board overreached uses its discretion by taking on a conservative approach for restricting data and providing minimal information. There should have been certain guidelines allowing the Board to conduct what is, in reality, an administrative process that has direct consequences on the undertakings' stance and on the course of their defense during a cartel investigation.

In simple terms, as it is evident from the decisions that note taking is not an option, the counsel of the investigated undertaking is only given the option of having to try and memorize/remember the evidence at hand, which could easily be vital to the preparation of the defense of the undertaking in question. Therefore, the lack of a tool such as a data room could affect the integrity of the defense and could bring the fairness of the whole investigation into question. A similar approach was taken by the Board in a number of recent decisions, where undertakings were denied the chance to make copies or prepare a report, even under the supervision of the Authority officials.

VI. IMPROVEMENTS AND SOLUTIONS

It is evident that the right to access to file and the full and unfettered application of this right are essential in order for an undertaking to fully exercise its right to defense. Nevertheless, the right to access to file may not be employed in full capacity as a number of elements might undermine its application in practice.

Firstly, we must consider the limitations of timing, as the official counsels of the undertakings are allowed to examine a great number of numerical evidence/data within a very limited amount of time. Especially in some jurisdictions, this is an impractical application of the right to access to file, going so far as to render the right non-exercisable. A similar point could be made about European Commission's practice, compared to various European jurisdictions where, it can be seen that, within antitrust proceedings in some Member States (*i.e.,* Spain, France and Italy), the parties are included within the process very early on and have continuous access, as required.

Secondly, regardless of the time allowance, since the counsels are not allowed to make copies (or, not even permitted to draft a report that could be subjected to the competition authorities' clearance), they end up relying on their understandably limited recollection of, in most cases, numerical data and evidence. This is indisputably inefficient (and insufficient) for the practice of the right of defense, as an individual's skills of memory should obviously not play a role in an undertaking's fate in a cartel investigation, let alone in any other administrative proceedings. This could easily be deemed as a violation of the right to good administration by competition authorities that are usually obligated by law to provide the undertaking with the legally feasible access to the investigation file and required not to narrow the scope of a right granted to the undertaking by legislation.

Seeing that the procedure could easily be remedied with the counsel of the undertaking being allowed to take notes and being granted a reasonable amount of time with the relevant evidence (under the supervision of the competition authorities), this would be a step closer to the ideal procedures for allowing the exercise of the right to defense and the right to good administration.

In regards to the legislation, and in light of the practice currently being established by different enforcers in different jurisdictions (which usually sets out to follow the jurisprudence of the Commission), the exception on the use of data rooms could be redeemed, for *i.e.* in Turkey, with the Authority revising its secondary legislation, which is a power within its mandate, to provide consistency between the two jurisdictions and to bolster the credibility of its cartel decisions in line with the right to a fair trial. This could also be deemed feasible as most of the secondary legislation is akin to the European Union's secondary antitrust legislation, thus providing consistency and compatibility. In addition, the expansion of the secondary legislation to cover data room-like practices, if not data rooms themselves, could also cover and resolve confidentiality issues that could arise from what could be defined as vague practices that the Board uses today. This could be achieved by lining out a straightforward approach, which would also enable the defendants to seek judicial remedies for these pre-determined rules and limits, providing legal predictability. As a result, when attention is finally given to this important matter, a balance could be reached between the legitimate interests of an investigated undertaking and the protection of the confidentiality of business secrets, similar to the established practice within the EU. In short, by changing the legislation, the competition enforcers could better a system that leaves some aspects of a cartel proceeding in the gray area, and therefore, relieve the undertakings from the uncertainty of what constitutes a trade secret and whether and how will they be granted an access to file.

VII. CONCLUSION

The right to access to file is a fundamental part of the right of defense and a cornerstone of antitrust enforcement. As undertakings attempt to utilize their right to defense, a small but significant procedure such as data rooms becomes vital for enabling the full exercise of that right and for turning around an antitrust case that could easily end with significant fines or penalty payments.

As explained above, the right of defense, the right to good administration and the right to access to file, are three interrelated and essential elements for any legal procedure to be viewed as credible and fair, even if the case involves undertakings and not individuals. Furthermore, as the antitrust laws were devised not only to punish undertakings but for the protection of competitive markets and consumer-friendly economies, the application of antitrust rules illustrate and provide vital proof of how the system is set up to achieve these goals. Therefore, disregarding the improvement capacity of a proceeding and failing to implement data room procedures would be a crucial step backward for the integrity of the entire system, considering once again that, as Kafka wisely remarked, "*the proceedings gradually merge into the judgment.*"

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