GUIDELINES ON THE ASSESSMENT OF EXCLUSIONARY ABUSIVE CONDUCT BY DOMINANT UNDERTAKINGS

1. INTRODUCTION

(1) Article 6 of the Act no 4054 on the Protection of Competition (Act) prohibits the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, while the second paragraph of the same article lists certain instances of abuse as examples.

(2) In the application of article 6 of the Act, it is not in itself an infringement for an undertaking to hold dominant position, and undertakings are allowed to become more prominent competitively as a result of their internal efficiencies. However, the Act prohibits any practice of dominant undertakings that may reduce consumer welfare by exploiting the advantages of the market power they enjoy. In this respect, dominant undertakings are considered to have a "special responsibility" not to allow their conduct to restrict competition.[1]

(3) Preventing an undertaking holding dominant position in a market from abusing that dominance assists in the better functioning of the markets and the competition process to the benefit of businesses and consumers. However, in many cases, identifying the line between abusive and competitive conduct calls for detailed examination and assessment. These Guidelines were published in order to describe the factors the Competition Board (Board) shall take into consideration when assessing exclusionary abusive conduct by dominant undertakings under article 6 of the Act, to increase transparency, and thus to minimize the uncertainties that may arise in the interpretation of the article by the undertakings. To that end, the Guidelines are intended to be instructive not only for dominant undertakings in a market, but also for other undertakings such as their competitors, customers and suppliers.

(4) Even though article 6 of the Act prohibits the abuse of dominant position by one or more undertakings on their own or through agreements with others or through concerted practices, these Guidelines only include explanations concerning abusive conduct committed by undertakings holding single dominant positions.

(5) Abuses of dominant position are generally categorized in three groups: exclusionary, exploitative and discriminatory abuses. Article 6 of the Act no 4054 does not include such a categorization concerning types of abuse. As well, in practice it is not possible to completely separate such conduct from each other for every case under examination. In other words, a conduct examined by the Board may serve as an example for more than one item listed in paragraph 2 article 6 of the Act, or it may carry the characteristics of more than one category of abuse. The main focus of Board examinations is to determine, in an economic perspective, whether article 6 of the Act was violated; the

[1] See the Cine 5 decision of the 10th Chamber of the Council of State, numbered 2001/355 E., 2003/4245 K., as well as the Karbogaz decision of the Board numbered 05-80/1106-317.

conduct does not necessarily need to comply in full with one of the examples given in the article.

(6) The scope of the Guidelines are limited to only exclusionary abuses at this stage. Examples of abuse given in the Guidelines include those principles which will provide guidance for undertakings based on the most frequent cases of abuse; they are not intended to be comprehensive. It should be noted that the principles set out in the Guidelines shall be implemented on a case by case basis, in light of the specific circumstances of each file.

2. DOMINANT POSITION

(7) In order for a particular conduct examined under article 6 of the Act to constitute an infringement, the undertaking engaged in the conduct must hold dominant position in the market and the conduct itself must be of an abusive nature. Where the absence of one of these fundamental factors may be demonstrated, the Board may choose not to perform analysis concerning the remaining factor[2].

(8) The concept of dominant position has been defined in article 3 of the Act no 4054 as "The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". Within the framework of this definition, an undertaking with the power to behave to an appreciable extent independently from competitive pressure is considered to hold dominant position. Thus, an undertaking which can behave independently from competitive pressure is capable of profitably increasing its prices above the competitive level and maintain them at that level for a certain period of time.[3] In addition, such an undertaking would also be able to keep other factors including the level of production and distribution, the variety and/or quality of goods and services and the level of innovation below the competitive level to its own advantage and to the detriment of consumers.

2.1. Market Definition

(9) In order to determine whether an undertaking holds dominant position, first it is necessary to define the relevant market (or markets). The definition of relevant market constitutes the basis for the assessment concerning whether the examined undertaking has the power to behave, to an appreciable extent, independently from competitive pressures in the market. The identification of relevant market has two dimensions: product and geographical region. "Guidelines on the Definition of Relevant Market"[4], offer guidance concerning the definition of relevant market within the framework of the

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[2] See the Board's Doğan Group TV Channels decision numbered 10-76/1569-604, Domino's Pizza decision numbered 10-69/1458-557, and GE Jenbacher decision numbered 11-57/1471-528.

[3] While for the purposes of determination of dominant position the relevant period of time can vary depending on the characteristics of the product and market under examination, it is generally accepted that a two-year period would be sufficient.

[4] Guidelines on the Definition of Relevant Market, 10.01.2008, http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz5.pdf

application of the Act. Therefore, the Guidelines herein shall include the criteria to be used in determining dominant position concerning an undertaking in a relevant market defined in accordance with the aforementioned Guidelines, and shall not address details concerning relevant market definition.

2.2 Determination of Dominant Position

(10) When assessing dominant position, what is examined in principle is to what extent the undertaking examined can act independently of competitive pressure. In this assessment, the specific facts of each case are taken into account. The main factors taken into consideration in dominant position assessment are the positions of the undertaking examined and its competitors in the relevant market, barriers to entry and expansion in the market, and bargaining power of buyers.

Market positions of the undertaking examined and its competitors:

(11) For many relevant markets, the position of the undertaking examined in the relevant market is primarily indicated by the market share held by the undertaking. Depending on the nature of the activities under examination, market share is generally calculated based on the monetary value of sales or on sale volume. In its assessment, the Board can determine market share by taking the above criteria into account, together with one or more indicators such as capacity and reserve amounts depending on the characteristics of the market examined.

(12) There is no specific market share threshold that proves an undertaking is dominant. However, the established practice of the Board, in the absence of any indication to the contrary, is to accept that undertakings holding less than 40% of the market share are less likely to be dominant[5], and more detailed examinations are conducted for undertakings with a higher market share.

(13) In the first stage of this examination concerning actual competition, in addition to the market share of the undertaking concerned, the stability of this market share in time and the number and market shares of competitors operating in the relevant market are also taken into consideration. The larger and more stable the market share of the undertaking concerned, and the larger and more stable the differences between the market share of the undertaking concerned and those of its competitors, the less likely it will be for its current competitors to put competitive pressure on the undertaking concerned.

(14) However, since market shares of undertakings are in constant fluctuation in tender markets, fast-growing markets and newly-established markets, it is not always possible to talk about market share stability and therefore market shares may cease to be a reliable indication for the market position of the undertaking. On the other hand, market shares are stronger indicators for saturated markets, which have an opposing structure.

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[5] See the Board's Mediamarkt decision numbered 10-36/575-205, Pepsi Cola decision numbered 10-52/956-335 and Egetek decision numbered 10-62/1286-487. However, the Board acknowledges that an undertaking with less than 40% market share may also hold dominant position depending on the specifics of the market under examination. See Electricity Distribution Privatization decision numbered 10-78/1645-609.

Barriers to entry and expansion:

(15) The above-listed indicators concerning the existing state of competition in the market are not, by themselves, sufficient to determine dominance. Within that framework, the second step in dominant position assessment is to examine whether there are barriers to entry into the market for new undertakings or whether there are barriers to expansion for undertakings already operating in the market. This is because the likelihood of expansion of undertakings operating in the market or of entry into market by new undertakings can also exert competitive pressure on the behavior of the undertaking examined. However, in order to be able to talk about such a pressure, expansion or entry must be likely, it must be timely and it must be sufficient.

(16) For entry or expansion to be likely, it must be sufficiently profitable for the relevant undertaking, taking into account factors such as the reactions of the undertaking examined and other competitors operating in the market, as well as the risks and costs of failure. For expansion or entry to be timely, it must be sufficiently swift to make it useless for the undertaking examined to exercise its economic power and deter the undertaking from exercising said power. For expansion or entry to be considered sufficient, it must be of such a magnitude as to be able to prevent any attempt to increase prices by the undertaking under examination. These conditions can only be realized when there are no barriers to entry or expansion in the market.

(17) Barriers to entry or expansion may stem from the characteristics of the relevant market or from the characteristics or behavior of the undertaking examined. Barriers stemming from the characteristics of the relevant market can take the form of legal and administrative barriers such as state monopolies[6], authorization and licensing requirements[7] and intellectual property rights, or they can be in the form of economic barriers such as sunk costs, economies of scale and scope, network effects, and switching costs faced by customers.

(18) Barriers stemming from the characteristics of the undertaking in question include those cases where the undertaking possesses key inputs and access to special information, spare capacity, a vertically integrated structure, a strong distribution network and a large product portfolio, high brand recognition, and financial and economic power. Such characteristics of the examined undertaking can make market entry or expansion by competitors harder by providing advantages to the undertaking over its actual or potential competitors.

(19) In addition to the characteristics of the undertaking concerned, its conduct in the market can also present barriers to entry for potential competitors or to expansion for actual competitors. Examples to such conduct include the undertaking making large-scale investments which existing or potential competitors would have to match and concluding long-term contracts which may lead to appreciable foreclosure effects in the market.

[6] See the Board's Belko decision numbered 01-17/150-39.

[7] See the Board's Turkcell decision numbered 11-34/742-230.

(20) The existence of any of the factors listed as examples for barriers to entry and expansion may not be considered, by itself, an indicator for dominance. In dominant position analysis all such factors must be evaluated together, with the relevant market examined to see how suitable it is for entries by new undertakings as well as for expansion of existing ones, and how much competitive pressure would potential entries and expansions place on the conduct of the undertaking examined.

Buyer power:

(21) Factors affecting the conduct of an undertaking within the relevant market are not restricted to actual and potential competitors. In case customers of the undertaking examined are relatively large, sufficiently informed about alternative sources of supply and capable of switching to another supplier or creating their own supply within a reasonable period of time, then these customers may be said to have bargaining power, i.e. buyer power. In this case, buyer power of the customers will present as a competitive factor restricting the conduct of the undertaking examined and may prevent determination of dominant position for the undertaking. However, buyer power may be considered not to form sufficient competitive pressure if it only ensures that a limited segment of customers is shielded from the market power of the dominant undertaking.

3. ABUSE

(22) For a particular conduct examined under article 6 of the Act to be considered an infringement, not only the undertaking concerned must hold dominant position, but the conduct in question must have an abusive nature. Abuse may be defined as when a dominant undertaking takes advantages of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare. Abuse of dominant position by a dominant undertaking can lead to result that may harm consumer welfare including increases in prices, decreases in product quality and innovation level, and reduction in the variety of goods and services. This reduction in consumer welfare may emerge at the resale level or at the final consumer level.

(23) Exclusionary abuses negatively affect efficient competition in the market and therefore lead to a decrease in consumer welfare. Such abuses may lead to foreclosure for rival undertakings as a result of the actions of the dominant undertaking against its competitors, and it may also lead to the exclusion of a certain portion of downstream undertakings from the market as a result of the actions of the dominant undertaking towards those of its customers which are not its competitors.

(24) In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well. Such effects may emerge in the market where the undertaking is dominant, or they may emerge in other related markets[8].

(25) The basis of the Board evaluation on exclusionary conduct is the examination of whether the behavior of the dominant undertaking leads to actual or potential anti-competitive foreclosure. Anti-competitive foreclosure is the obstruction or prevention of

[8] See the Board's Türk Telekom decision numbered 12-10/328-98.

access to sources of supply or markets for actual or potential competitors as a result of the conduct of the dominant undertaking, to the detriment of the consumers. Harm to consumers may occur in the form of increased prices, decreased product quality and level of innovation, and reduced variety of goods and services.

(26) When examining the presence of anti-competitive foreclosure, the Board, in general, takes the following points into account. The importance to be attached to the factors in question may vary on a case by case basis, depending on the nature of the conduct under examination.

- *The position of the dominant undertaking:* In general, the stronger the dominant position, the higher is the likelihood of the conduct resulting in anticompetitive foreclosure.

- *The conditions in the relevant market:* High barriers to entry and expansion increases the likelihood of the conduct under examination to foreclose the market. In that context, presence of entry and expansion conditions, such as economies of scale and/or scope and network effects are important. In case economies of scale exist, foreclosure of a significant part of the market by the dominant undertaking could make it harder for competitors to enter the market or stay in it. Similarly, abusive conduct may also allow the dominant undertaking to direct a market with network effects to its own advantage or in a way that would reinforce its own position. As well, high barriers to entry in the downstream and/or upstream markets may make it harder for competitors to overcome a potential foreclosure through vertical integration.

- *The position of the dominant undertaking's competitors:* In some cases even a competitor with a relatively low market share can place competitive pressure on the dominant undertaking. For instance, a competitor whose products are close substitutes for the products offered by the dominant undertaking, who has an innovative reputation or who can cut prices systematically may be in such a position. Another factor to consider when assessing the positions of the competitors of the dominant undertaking is whether it is likely for the competitors in question to develop counterstrategies that may render the conduct of the dominant undertaking ineffective.

- *The position of the customers or suppliers:* Another factor to examine in anticompetitive foreclosure analysis is whether the practice of the dominant undertaking has a selective nature. In some cases the dominant undertaking may target the practice under examination only to those customers or suppliers which have particular importance for the entry or expansion of competitors. Customers which can respond to offers from alternative suppliers, which have distribution methods suitable for new entrants, which are situated in a geographical region well-suited for new entry, or which are likely to affect the behavior of other customers may be considered to have particular importance. In terms of suppliers, those who can be considered within this group are the suppliers with whom the dominant undertaking concluded exclusive agreements, or those who are more likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or those who manufacture the product type or in the region that is most suitable for a new entrant.

- *The scope and duration of the conduct examined:* In general, the higher the percentage of sales affected by the conduct within the total sales in the relevant market, the longer its duration, and the more regularly it has been applied, the greater is the likelihood of market foreclosure.
- *Possible evidence of actual foreclosure:* If the conduct has been maintained for a certain period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalized or may have exited, or potential competitors may have tried to enter and failed.
- *Direct or indirect evidence of exclusionary strategy:* The intent of the dominant undertaking when it engaged in the conduct under examination may also be taken into consideration. Basically, the intent may be identified through indirect evidence gathered as a result of deductions from the conduct in question, as well as through the use of direct evidence. Direct evidence includes internal documents of an exclusionary strategy, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Direct and indirect evidence may be used in a complementary manner when analyzing the intent.

(27) In certain cases, abuse may emerge through the pricing practices of the dominant undertaking. Even though strong price competition is beneficial for consumers in the short term in general, there is a chance of anti-competitive foreclosure as a result of certain pricing practices of dominant undertakings. When evaluating any such foreclosure, the Board examines whether it is likely for a hypothetical competitor that is as efficient as the dominant position (equally efficient competitor) to be foreclosed as a result of the conduct under examination. This assessment examines economic data on costs and sale prices and, in particular, whether the dominant undertaking has engaged in below-cost pricing. While conducting the examination in question, primarily the costs of the dominant undertaking are taken into consideration. In case no reliable data on these costs is available, then cost data of competitors or other comparable reliable data may be utilized.

(28) If, using these data, the Board determines that an equally efficient competitor can effectively compete with the pricing practices of a dominant undertaking, in principle it will not intervene based on the consideration that the practice in question does not have a negative effect on effective competition, and thus on consumers. However, if the analysis of the aforementioned data shows that the pricing of the dominant undertaking has the potential to foreclose equally efficient competitors, then the Board will integrate this determination in its general assessment of anti-competitive foreclosure, taking into account other relevant quantitative and/or qualitative evidence.

(29) On the other hand, recognizing that in certain exceptional circumstances a less efficient competitor may also gradually achieve a position to exert competitive pressure on the dominant undertaking by utilizing demand-related advantages, such as network and

learning effects, the Board may also assess the (potential) effect of the pricing practice on these undertakings.

4. JUSTIFICATION

(30) In the application of article 6 of the Act, the Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified. Claims of justification examined by the Board may be classified under the categories of objective necessity and efficiency.

(31) When assessing an objective necessity justification, the Board will first see whether the conduct protects a legitimate benefit and whether the conduct is indispensable for achieving the relevant benefit. As well, in order to consider the examined conduct objectively necessary, this conduct of the dominant undertaking must be caused by external factors (such as health and safety requirements set out by relevant public authorities) and the undertaking must not restrict competition more than necessary when protecting the benefit in question. The burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking.

(32) When assessing the efficiency justification put forward by the undertaking under examination, the Board will expect the undertaking to prove that all four conditions listed below are fulfilled:

– the efficiencies should be realized or likely to be realized as a result of the conduct.

– the conduct should be indispensable to the realization of those efficiencies

– the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets

– the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition.

(33) Examples of justification for each type of abuse listed below are given separately in the relevant section.

5. FORMS OF ABUSE

(34) When assessing claims of abuse of dominant position, in addition to the general approach explained above, the Board will take the following factors concerning the conduct under examination.

5.1. Refusal to Supply

(35) In competition law practice, it is acknowledged, in principal, that any undertaking, whether dominant or not, have the right to freely choose the undertakings with which they will do business and dispose of the assets under their ownership. Nonetheless, in certain exceptional circumstances, a refusal to supply by a dominant undertaking may be considered an behavior with restrictive effects on competition, and the dominant undertaking may be placed under an obligation to supply, within the framework of competition law.

(36) Introducing an obligation to supply on dominant undertakings will generally lead to short-term benefits for consumers by increasing the number of undertakings active in the market. However, by preventing undertakings from receiving compensation for their investments and innovations, such an obligation imposed on dominant undertakings may pose the risk of causing a reduction in incentives for investment and innovation for both dominant undertakings and other undertakings and of leading to results to the detriment of consumers in the long-run.

(37) Consequently, in its analysis concerning a refusal to supply by a dominant undertaking, the Board will take into account the short and long term effects of an obligation to supply together.

(38) An undertaking's refusal to supply the goods or services it produces as well as tangible or intangible business inputs in its possession to other undertakings, or its direct or indirect refusal to allow other undertakings to use thereof are considered instances of refusal to supply. Within this framework, physical products in the nature of raw materials, infrastructure necessary for the provision of certain services, product distribution systems and intangible business inputs or information protected or unprotected by intellectual property rights as well as other assets which undertakings may demand can be counted among the goods, services or inputs mentioned above.

(39) Refusal to supply can take the form of halting an ongoing supply relationship concerning the goods, services or inputs, or it can be in the form of refusing the demands of potential customers for supply.

(40) Refusal to supply may occur as unconditional or conditional refusal to supply. If the dominant undertaking refuses to supply without attaching any conditions, this is considered unconditional refusal. On the other hand, if it imposes certain conditions on the undertaking requesting the supply, such as not competing with the dominant undertaking in the downstream market or not dealing with an undertaking competing with the dominant undertaking, this is considered conditional refusal. Conduct under the scope of conditional refusal is generally an instrument for other competition infringements such as tying and exclusivity, and are therefore examined within the framework of those infringements. This section of the Guidelines will only deal with unconditional refusals.

(41) Refusal to supply can be in the form direct refusal through the dominant undertaking refusing the request for supply without citing a reason, or in the form of "constructive refusal" through behavior including undue delays, restriction of product supply and imposition of unreasonable conditions.

(42) As well, the practice of refusal to supply may be aimed at those undertakings which are rivals to the dominant undertaking in the downstream market, or at those customers are not in competition with it. In this instance, the concept of "downstream market" refers to the market for which the input demanded is needed for manufacturing a product or providing a service. In case the dominant undertaking is in competition with the undertaking it refused to supply in the downstream market, then the refusal to supply practice is more likely to lead restrictive effect on competition.

(43) When assessing claims of refusal to supply, Board looks for the presence of all of the following three conditions in order to find a violation.[9] Within this framework,

- the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market,
- the refusal should be likely to lead to the elimination of effective competition in the downstream market,
- the refusal should be likely to lead to consumer harm.

(44) When evaluating the indispensability condition, the Board tries to determine if the refused input is objectively necessary in order to compete effectively in the downstream market. This is the case where there is no actual or potential substitute for the refused input on which competitors in the downstream market could rely so as to counter – at least in the long term – the negative effects of the refusal. When assessing whether there are actual or potential substitutes for the relevant input, the Board considers whether the competitors of the dominant undertaking could effectively duplicate the input in question in the foreseeable future. In general, if the relevant input is the result of a natural monopoly, if there are significant network effects, or in case of information that can be acquired from a single source, it is generally concluded that the input in question is impossible for the competitors to duplicate. Nonetheless, the Board takes the dynamic structure of the market and the sustainability of the market power provided by the relevant input into account separately for each file.

(45) The criteria listed in paragraph 43 apply both to cases of disruption of previous supply relationship and to refusals by the dominant undertaking to supply a good, service or input which has not previously provided. However, an infringement is more likely in case of the disruption of a current supply arrangement. For instance, specific to the supply relationship established with the dominant undertaking, the customer may have made an investment to use the input it would procure under the arrangement concerned. This would be taken into account as an important factor in identifying the relevant input as indispensable. Also, the fact that the dominant undertaking previously supplied the input in question may be considered an indication that supplying the product does not constitute a risk that the undertaking would be unable to receive sufficient compensation for its initial investment.

(46) Where it is established that the refused input fulfills the indispensability condition, the Board evaluates whether a refusal to supply by the dominant undertaking is likely to eliminate effective competition in the downstream market immediately or over time. The larger the share of the dominant undertaking in the downstream market, the greater the likelihood of elimination of effective competition in the downstream market will be. In addition, if the dominant undertaking has less capacity-constraints relative to competitors in the downstream market and if the goods or services it produces are close substitutes for those of its competitors in the downstream market, the likelihood for elimination of competition in the downstream market will increase. This is due to the fact

[9] See the Board's Digiturk decision numbered 12-24/710-198.

that, in this case, the proportion of competitors affected by the refusal to supply will increase, as will the level of demand that will shift from the foreclosed competitors to the dominant undertaking.

(47) In examining the likelihood of a refusal to supply to lead to consumer harm, it is examined whether, for consumers, the negative consequences of the refusal to supply in the relevant market outweigh the negative consequences to be created over time by imposing an obligation to supply. For instance, consumer harm may be likely where, as a result of the dominant undertaking's refusal to supply, competitors are prevented from bringing innovative goods or services to market and/or where the refusal behavior stifles follow-on innovation. This may be particularly the case where the competitor which requests supply does not intend to limit itself to the goods or services already offered by the dominant undertaking, but aims to produce new or improved goods or services for which there is potential demand or where the competitor is likely to contribute to technical development. Similarly, in assessing consumer harm, it is also taken into consideration whether a refusal to supply would allow the dominant undertaking to gain more profits in the downstream market than it would normally do.

(48) In addition to the co-existence of the three conditions listed above, the Board will also consider claims of justification put forward by the undertaking. Issues which may be considered objective necessity include those cases where the undertaking requesting supply lacks commercial credibility, where the supply is temporarily or permanently halted due to capacity constraints, or where certain safety requirements could not be met.

(49) On the other hand, the claim that the dominant undertaking would not realize adequate returns sufficient to compensate its investment in case it agreed to supply, that the dominant undertaking would need to exploit the input refused for a certain period of time in order to continue its investments or otherwise the incentives to invest would be negatively affected can be evaluated within the context of the efficiency defense.

5.2. Predatory Pricing

(50) Predatory pricing is an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behavior. In predatory pricing, even though consumers enjoy low prices in the short-term, competition constraints can lead to undesired consequences in the mid- and long-term, such as high prices, low quality and a decrease in consumer choice.

(51) In predatory pricing analysis, which compares the price implemented by the dominant undertaking with the costs incurred with respect to the conduct under examination, the Board evaluates whether the conduct in question is likely to lead to market foreclosure for an equally efficient competitor[10].

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[10] For exceptions see paragraph 29.

(52) The first phase of the predatory pricing analysis of the Board is the assessment of whether the dominant undertaking sacrificed in the short-term with its pricing practice. If, by charging a lower price for all or a particular part of its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided, this will be considered a sacrifice. Accordingly, the criterion of average avoidable cost (AAC)[11] may be used in determining whether a dominant undertaking incurred avoidable losses as a result of its conduct under examination.

(53) If the dominant undertaking sets a price below AAC for all or part of its output, it is incurring a loss that could be avoided by not producing that output. Therefore, failing to meet AAC indicates that the dominant undertaking sacrificing in the short-term and suggests that an equally efficient competitor would be unable to serve the targeted customers without incurring losses.

(54) Another cost criterion that can be used by the Board in predatory pricing assessment under certain exceptional circumstances in light of the conditions of the relevant market is the long-run average incremental cost (LRAIC). [12] LRAIC is generally higher than AAC because unlike AAC (which only includes fixed costs incurred within the examined period), LRAIC also includes fixed costs related to the product under examination, incurred in the period before the asserted abusive conduct. Where LRAIC is used as the relevant cost criterion, failing to meet LRAIC shows that the dominant undertaking did not recoup all costs concerning the production of the good or service in question and an equally efficient competitor can be foreclosed. Where the price is above LRAIC, the conduct of the dominant undertaking will not be considered predatory pricing, since equally efficient competitors will be able to continue their operations without incurring losses.

(55) In assessing the existence of sacrifice in the dominant undertaking's conduct, it may be possible to rely upon direct evidence such as a detailed plan belonging to the

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[11] AAC may be defined as the costs an undertaking would avoid or save if had not produced a discrete amount of output. When calculating AAC, the sum of all variable and fixed costs directly related to production can be taken into account in order to calculate all costs incurred by the business for the production under examination. Since it is only possible to avoid variable costs in the short-term, in most cases AAC and average variable cost (AVC) will be the same. However, in cases where the dominant undertaking must make additional investment in capacity in order to implement the conduct under examination, the fixed costs in question are also taken into account in cost calculation. In such cases AAC is a more suitable criterion than AVC.

[12] LRAIC, on the other hand, is the average of all (fixed and variable) costs a firm incurs to manufacture a product. Average total cost (ATC) and LRAIC are good proxies for each other. In fact, these two types of costs are the same for single product firms. On the other hand, for multi-product firms, LRAIC may be below ATC for each individual product, where economies of scope are a factor. In the case of multiple products, any costs that could have been avoided by not producing a particular product cannot be considered common costs. However, in situations where common costs are significant, such costs may also be taken into account in the assessment concerning the exclusion of an equally efficient company. It may be said that LRAIC is a more suitable criterion for those markets with very low variable costs and very high fixed costs, such as network industries, technology markets and markets that require high R&D investments.

undertaking in question to sacrifice, which aims to exclude a competitor, to prevent entry or to pre-empt the emergence of a market.

(56) In predatory pricing analysis, when evaluating whether the pricing practice of the dominant undertaking is likely to lead to anti-competitive foreclosure, factors other than those listed in paragraph 26 may be examined, in addition to the establishment of short-term sacrifice. For instance, if the dominant undertaking is better informed about cost or other market conditions, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor's performance so that its access to further financing may be undermined. In addition, if the conduct and likely effects are felt on multiple markets and/or when there are various attempts at entry, the dominant undertaking may be said to be seeking a reputation for predatory conduct within the market.

(57) It is necessary for competitors to have actually exited the market for the Board to conclude that there has been anti-competitive foreclosure through predatory pricing. The possibility should not be excluded that the dominant undertaking may prefer to prevent the competitor from competing efficiently and instead have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining conduct avoids the risk of driving competitors out of the market, in particular the risk that the assets of the competitor are sold at a low price, allowing a new entrant into the market with low costs.

(58) Generally speaking, if the dominant undertaking is expected have greater market power after it concludes its predatory conduct than it did before the conduct in question, then the undertaking is considered to be in a position to benefit from the sacrifice and thus consumer harm is likely. However, this does not mean that the Board will only intervene if the dominant undertaking gains the ability to increase its prices above the level persisting before the conduct. For instance, it is sufficient for the identification of consumer harm that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred.

(59) Since selectively targeting only certain customers for below-cost prices would limit the losses incurred by the dominant undertaking, it may be easier for it to engage in predatory conduct in this way.

(60) In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section 4 are fulfilled, the Board will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale and ensure efficiencies related to expanding the market.

5.3. Price/Margin Squeeze

(61) Price squeeze is when an undertaking active in vertically related markets that is dominant in the upstream market sets the margin between the prices of the upstream and downstream products at a level which does not allow even an equally efficient

competitor in the downstream market to trade profitably on a lasting basis[13]. The undertaking dominant in the upstream may cause margin squeeze by increasing the price for the upstream product, by decreasing the price for the downstream product, or by doing both simultaneously. Thus, the dominant undertaking is able to transfer its market power over the upstream product to the downstream market and lead to the restriction of competition.

(62) In determining the likelihood of the conduct under examination leading to anti-competitive foreclosure by price squeeze, the Board takes the following factors into account, in addition to those listed in paragraph 26:

- *Structure of the undertaking:* The undertaking must be active in upstream and downstream markets that are connected to each other in a production chain; i.e., it must have an integrated structure and form a single economic entity.
- *Nature of the product:* The upstream product must be indispensable for operating in the downstream market.[14]
- *Position of the undertaking in the relevant market(s):* The undertaking must hold dominant position in the upstream market. On the other hand, even though the Board does not look for dominance in the downstream market, this may be taken into consideration as a factor that compounds the restrictive effects of the price squeezing behavior on competition.
- *Margin between prices:* The margin between the upstream and downstream products must be so low as to ensure that a competitor that is as efficient as the undertaking dominant in the upstream market would be unable to profit and operate in the downstream market on a lasting basis. When establishing the costs of the equally efficient competitor, the Board will generally use LRAIC, calculated for the downstream product of an undertaking dominant in the upstream market[15].

(63) The Board considers justification claims put forward by the vertically integrated undertaking concerning the price squeeze. Within this context, in particular, claims that the asserted strategy is caused by market conditions, that the margins shrunk due to changes in the upstream supply and downstream demand, and/or that the lower-priced product is newly-launched may be taken into consideration as justifications.

5.4. Exclusivity/Single Branding Agreements

(64) Exclusivity agreements are agreements which place a buyer under an obligation to purchase the entirety or a significant portion of its demand for a product or group of

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[13] See the Board's TTNET price squeeze decision numbered 08-65/1055-411.

[14] For indispensability criteria see para. 46.

[15] When calculating the aforementioned LRAIC, it is assumed that that undertaking dominant in the upstream market uses its upstream product at the same price it sells that product to its competitors downstream.

products only from a single supplier[16]. These agreements may be examined under article 6 of the Act if the supplier holds a dominant position[17]. In this context, a written agreement between the dominant undertaking and the buyer including an exclusivity provision is not necessary; oral agreements and/or dominant undertaking practices which may lead to de facto[18] exclusivity (such as various obligations placed on the buyer or indirect provisions in agreements) are also evaluated within this framework.

(65) Agreements with exclusive provisions may have positive effects on competition. The first of these pro-competitive effects is the elimination of the free-riding problem. For instance, any inclination of a supplier to provide training for the personnel of its distributor in order to increase its sales and/or make its distribution chain more efficient may be eliminated if it is likely that its competitor might take unfair advantage of that training (free-riding problem). However, if the distributor were to sell the products of the supplier exclusively, this problem would disappear. Another positive effect of exclusivity is that it ensures a regular product flow for the buying undertaking while providing a steady sales channel for the supplier. As well, exclusivity agreements increase the likelihood of the supplier making investments specific to the trade relationship. This is because exclusivity contributes to the return of investment process for the supplier as well as to the elimination of the hold-up problem[19], especially as its duration extends[20]. In addition, exclusivity agreements may contribute to the competitive process and consumer welfare by focusing the buyer on a single product/brand and allowing it to make more effective promotions, by establishing a more robust inter-brand competition environment, and thus by ensuring an increase in product and service quality.

(66) On the other hand exclusivity agreements signed by a dominant undertaking also have restricting effect on competition. By preventing the access of (actual and potential) competitors to necessary channels, exclusivity agreements foreclose relevant market(s) and thus may restrict the likelihood that other firms might emerge as an efficient competitor for the dominant undertaking.

(67) Even though factors listed in paragraph 26, such as the positions of the dominant undertaking and its competitors and the duration of the conduct examined[21], are

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[16] As the definition implies, exclusivity agreements are concluded between undertakings operating at different levels of the production chain (production, input supply, wholesales, distribution, retail sales, etc.). The commercial relationship with the end-user/consumer is not addressed within this framework. In addition, exclusivity agreements also include agreements a buyer holding dominant position signs with an input supplier, which places that input supplier under an obligation to make the entirety or a significant portion of its sales to the dominant undertaking.

[17] Exclusivity agreements may be addressed under the scope of article 4 of the Act.

[18] See the Board's Turkcell decision numbered 11-34/742-230.

[19] For detailed information on the hold-up problem, see the Guidelines on Vertical Agreements, p.32.

[20] For an example to the Board decisions assessing investments specific to the trade relationship, see the Karbogaz decision numbered 05-80/1106-317.

[21] See the Board's Karbogaz decision numbered 05-80/1106-317 and Frito Lay decision numbered 06-24/304-71.

important in identifying (potential) anti-competitive foreclosure effects stemming from exclusive agreements, other factors considered during the assessment are as follows:

- *The scope of the conduct under examination:* Foreclosure effects of exclusive agreements increase as the exclusive portion of the dominant undertaking's sales within the total sales in the market, i.e. tied market share, increases. In particular, anti-competitive effects increase if tied market share is sufficiently high to prevent a competing firm from operating efficiently by taking advantage of economies of scale However, if the dominant undertaking implements exclusivity only for important (in that they are financially strong or their place of business is critical in terms of location) buyers (that is to say, in case it selects important buyers), anti-competitive foreclosure effects may still arise even in the absence of significant tied market share.
- *The level of trade:* A dominant undertaking introducing exclusivity arrangements for a buyer at the retail level may lead to more anti-competitive foreclosure effects in comparison to the situation where the buyer is at the wholesale level. In other words, the closer the level of trade with exclusivity to the end-user, the more likely it will be for the relevant market to be foreclosed to actual or potential competitors.
- *Barriers to entry*: The harder it is for rival suppliers to access alternative buyers and/or create new buyer channels, the more severe will be the foreclosure effect of the dominant undertaking's exclusive arrangements in the market. Barriers to entry also gain importance for the assessment since they make it more difficult for potential competitors to emerge as efficient competitors.
- *The importance of the dominant undertaking for customers and the duration of exclusivity:* If the dominant undertaking and its rivals can compete for the entirety of each consumer's demand under equal conditions, it is not considered likely for exclusive purchase provisions to have negative effects on competition. However, in such cases, a long duration of exclusivity may negatively affect competition by making it harder for customers to switch suppliers. On the other hand, if the dominant undertaking is an unavoidable trading partner for a significant part of the customers' demand[22], even a short-term exclusivity provision may lead to anti-competitive foreclosure.

(68) Claims of justification put forward by the dominant undertaking in regard to exclusivity agreements are considered by the Board in its assessments. Within the framework of exclusivity, the presence of relationship-specific investments, the reductive effect of exclusive arrangements on costs or their positive contribution to innovation, etc. may be taken into consideration as claims of justification.

5.5. Rebate Systems

(69) Rebate systems refer to the discounts in price offered to customers in return for them engaging in a certain purchasing behavior. Under the dynamic conditions of commercial

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[22] In case a customer is obligated to make a portion of its purchases from the dominant undertaking under any circumstances, then the dominant undertaking is considered an unavoidable trading partner for the customer in question.

life, rebate systems can be encountered in many different forms and they may vary depending on their structure, function and effect.

(70) The most fundamental distinction in the classification of rebate systems is between single-product rebates and package rebates. If, in a rebate system, discounts are tied to the purchase of a single product, such rebates are considered to be "single-product rebates". However, if the purchasing obligation of the rebate system covers more than one product or market, then the rebates in question are referred to as "package rebates"[23]. Rebate systems are also classified into retroactive rebates and top-slice rebates, depending on the scope of the discount. Rebate systems in which the customer can get discounts for all of its purchases from the undertaking offering the rebate within the relevant period if it hits the rebate target are called "retroactive rebates," while rebate systems in which the customer can only get discounts for its purchases over the rebate target are called "top-slice rebates".

(71) Rebate systems may include standard purchase target(s) applicable to all customers, or they may include purchase targets individualized depending on the demand of each customer[24]. If a purchase target applicable to all customers serves the same function as an individualized purchase target for a certain group of customers, the target in question is considered to be individualized for those customers.

(72) Rebate systems, which see common use in commercial life, can have effects that can increase efficiency and consumer welfare, such as ensuring price drops, increasing level of output and product variety, reducing transaction costs stemming from the separate sale of products, and preventing free-riding by ensuring that resellers focus on the products of the supplier. On the other hand, when offered by dominant undertakings, the rebates in question may also lead to anti-competitive foreclosure.

(73) When assessing whether a rebate system implemented by a dominant undertaking is likely to cause anti-competitive foreclosure, the Board will consider the following factors, in addition to those listed in paragraph 26.

Single-Product Rebates

(74) The typical characteristic of single-product rebates is that the purchase condition included in the rebate system must be fulfilled within a certain period (reference period). In such rebates, no discount is awarded if the purchase condition required for the rebate is not fulfilled within the relevant reference period. Whereas, in rebate systems which do not limit the purchase condition to a certain period, buyers do not face the risk of losing

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[23] In package rebates known as multi-product rebate or mixed packaging, the products may be offered for sale separately, however when they are bought separately the total price of the products adds up to more than the package price. Rebates which are offered depending on the customer purchasing at least two distinct products or purchasing a certain amount from the market in a certain time period are also considered package rebates.

[24] Individualized purchase targets may be formulized in various ways. For instance, such a purchase target may be a quantity target identified depending on the total demand of the customer in a certain period, or it may be identified as a portion of the purchases the customer will make in a certain period or as a portion of the purchases the customer made in a reference period in the past.

the discount due to the expiry of the reference period. Therefore, buyers can always switch to rival suppliers offering more attractive deals than the dominant undertaking, so long as the system does not turn into predatory pricing. Within this framework, the Board will examine those rebate systems which include a certain purchase condition but do not limit the fulfillment of that condition to a certain reference period in light of the above clarifications on predatory pricing.

(75) It is more likely for retroactive rebates to cause anti-competitive foreclosure where rebate targets are individualized, where the rebate percentage and rebate target constitute a significant part of the total demand of the consumer within the relevant reference period, and particularly where the competitors of the dominant undertaking are unable to compete with it under equal conditions for the entirety of each customer's demand

(76) If any customer must meet a part of its demand in the reference period from the dominant undertaking in any case, then the competitors will not be able to compete with the dominant undertaking under equal conditions for the entirety of the demand of the customer in question. By offering a retroactive rebate to such a customer, a dominant undertaking can prevent equally efficient competitors from selling to the said customer without dropping its prices below its costs.[25] The basis of the Board's assessment concerning retroactive rebates is the examination of whether, in response to the rebate, equally efficient competitors would be able to effectively compete with the dominant undertaking for the contestable portion of the customer's demand.

(77) Within this framework, if it is established that, in response to a retroactive rebate offered by the dominant undertaking, the price competitors would have to offer in order to attract the contestable portion of the customers (effective price) is above LRAIC, it will be concluded that, for the customers in question, equally efficient competitors will be able to effectively compete with the dominant undertaking. However, in case it is established that the effective price is below AAC, then the conclusion is that the rebate system implemented excludes equally efficient competitors from competing for the customers in question. In case the effective price is established to be between AAC and LRAIC, the Board examines whether the rebate system has negative effects on the entry or expansion of equally efficient competitors. In this context, the Board examines whether competitors have realistic and effective counter-strategies to counter the rebate system

[25] That is to say, even if, in response to the rebate implementation of the dominant undertaking, competing undertakings were to offer the customer, who must fulfill the non-contestable portion of its demand in the relevant period from the dominant undertaking in any case, rebates for the contestable portion of its demand equal to the discounted prices of the dominant undertaking, the customer would continue to purchase from the dominant undertaking in order not to lose the rebates for its purchases, at least until it hits its rebate target. In this case, in order to convince the customer to buy from them, competing undertakings would, within a relatively limited sales volume, need to offer a price that would meet the dominant undertaking's rebate for the relevant units and that would, at the same time, compensate the amount of rebates the customer would lose due to buying from them instead of the dominant undertaking. Consequently, to be able to sell to a customer in a retroactive rebate system, competing undertakings must offer a price that is sufficiently below the discounted price of the dominant undertaking.

implemented. For instance, strategies which allow the competitors to counter the discounts of the dominant undertaking without resorting to below-cost pricing, by utilizing the non-contestable portion of their own customers' demand may be considered within this framework. If the Board finds that competing undertakings are unable to put such a counter-strategy into effect, it concludes that the rebate system under examination excludes equally efficient competitors.

(78) It is possible to address top-slice rebates as a pricing strategy where low prices are implemented only for a portion of the sales. In examining such discounts, the Board looks at whether equally efficient competitors are excluded from competition for the units above the rebate target. This examination is conducted based on the price-cost analysis given in paragraph 77.

Package rebates

(79) The Board's assessments concerning the restrictive effects of package rebates on competition may vary depending on the package offered by the dominant undertaking, and on whether competitors can (either alone or together with other competitors) compete by offering a reasonable alternative package. Restrictive effects on competition which are likely to emerge where competition between packages is possible would be similar to predatory pricing.

(80) Where the rebate implemented for the whole package is attributed to any individual product within the package, if the effective price for the product in question[26] is lower than LRAIC for the same product, it is concluded that equally efficient competitors are excluded from competition by the rebate implementation.

(81) When assessing rebate systems, the Board considers justification claims put forward by undertakings, such as increasing output level and product variety, reducing transaction costs stemming from buying the products separately, and preventing free-riding by ensuring that reseller are focused on the products of the supplier.

5.6. Tying

(82) Tying usually refers to situations where customers that purchase one product (the tying product) from the dominant undertaking are required also to purchase another product (the tied product) from the same undertaking as well. Tying can be implemented by integrating what may be recognized as two separate products (technical tying) or through contracts (contractual tying).

(83) In most cases tying is a common commercial practice with no restrictive effects on competition. Both dominant undertakings and others may engage in tying in order to present better products to their customers or to offer less costly choices.

(84) On other hand, a dominant undertaking can harm consumers by causing foreclosure in the tied market. This is because through tying, the dominant undertaking can drive

[26] In package sales, effective price for the relevant product is calculated by subtracting the rebate offered for the whole package from the individual sale price of the product concerned.

existing competitors from the market by reducing the number of potential customers and create new barriers to entry for its competitors in the tied market.

(85) Foreclosing the tied market would allow the dominant undertaking to make higher profits from that market, and it would also strengthen or maintain its dominant position in the tying market.

(86) When assessing whether the practice of an undertaking with dominant position in the tying market is in violation of the Act, the Board looks for the presence of two factors: i) the tying product and the tied product should be distinct, and ii) it should be likely for the tying practice to lead to anti-competitive foreclosure.

(87) If, in the absence of the tying practice, a significant portion of the customers would purchase or would have purchased the tying product without purchasing the tied product, the Board considers these products to be distinct. When determining whether the tied and tying products are distinct, the Board may use direct evidence showing that customers buy the products separately when given a choice, or it may use indirect evidence such as the presence of undertakings in the market which are specialized in the production or sales of the tied product without the tying product.

(88) As stated above, tying may lead to anti-competitive foreclosure in the tying market, in the tied market, or both. When determining the likelihood of a tying practice implemented by the dominant undertaking to lead to anti-competitive foreclosure, the Board will take the following factors into consideration in addition to those listed in article 26.

(89) The risk of anti-competitive foreclosure stemming from the conduct is greater where the dominant firm makes the strategy in question a lasting one. Technical tying, which is costly to reverse, may be given as an example to this.

(90) In some tying cases the undertaking may have dominant position in more than one product. As the number of such products subject to tying increases the likelihood of anti-competitive foreclosure increases as well.

(91) Where the production of the tied product benefits from economies of scale, it may become likely for competitors in the tied product market to lose customers which purchase the tying product and fail to achieve sufficient sales to realize economies of scale. This, in turn, would indicate that anti-competitive foreclosure is more likely, for the purposes of the assessment of the Board.

(92) If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.

(93) If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

(94) The Board may consider and include in its analysis arguments of the dominant undertaking engaging in the tying conduct, which claim that the practice ensures production and distribution savings to the benefit of customers, that it reduces transaction costs for customers who otherwise would have to buy the bundled products

separately, and that it allows the supplier to pass on to the consumers any efficiencies stemming from the production or purchase of the tied products in large numbers.