For Official Use **DAF/COMP/WP3/WD(2006)42**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **29-May-2006**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2006)42
For Official Use

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON TECHNIQUES AND EVIDENTIARY ISSUES IN PROVING DOMINANCE/MONOPOLY POWER

-- Turkey --

7 June 2006

This note is submitted by the delegation of the Turkey to WP3 FOR DISCUSSION at its forthcoming meeting to be held 7 June 2006.

English - Or. English

JT03209602

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

1. Dominant position has been defined in Article 3 of the Law on the Protection of Competition No: 4054 (the Turkish Competition Law) 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*".

2. Case law of the Turkish Competition Authority (the TCA) provides that independence and consequentially the power to prevent competition substantially appears as the most important condition for the existence of dominant position.[1] However, it is also important that there is no need for an absolute independence and therefore it is not compulsory that competition is totally eliminated in the market where an undertaking is in a dominant position. Rather, it is enough for the existence of a dominant position that the position should enable the undertaking to determine the conditions in which competition will develop or enable it to have substantial influence on these conditions. Moreover, dominance should last long enough based on the market structure. Generally, this period is the period required for the undertaking to be able to affect and change the conditions of competition in the market.

3. While determining whether an undertaking satisfies the conditions of the definition of dominant position and is therefore dominant in the market, it is usually taken into account the market characteristics, market shares of the undertakings in question, duration of the market position of the undertakings in question, market shares of the competitors, economic and legal entry barriers etc. There are no market share thresholds constituting presumption of dominance in the Turkish Competition Law and case by case analysis becomes important.

4. The TCA's assessment of market shares in dominance cases is well illustrated in its *Turkcell*[2] decision. According to the decision, although market share alone is not sufficient to establish a dominant position, it is always more important compared to other factors and a very high market share is a strong indication of existence of a dominant position. Moreover, market shares remaining constant for a certain and long period of time express market power of the undertakings in the market and it can be accepted that an undertaking that has preserved its high market share for a long time holds a dominant position. A table comparing the market share of an undertaking with those of its closest competitors might play a role in establishing a dominant position and to the extent that market share of the allegedly dominant undertaking is obviously much larger than its competitors, it can be a significant indication for deciding a dominant position.

5. As mentioned above, although market shares are an important element in determining the existence of dominant position, it is obvious that it could be wrong to consider only high market shares and the concentration degree in the market as conclusive. Rather, *Cisco*[3] decision overtly provides that all market characteristics should be taken into consideration and barriers to entry and potential competition are important elements. Therefore, in merger context of *Cisco* decision, the TCA did not conclude that increase in concentration degree and market share of the acquiring undertaking in the router market through acquisition of intellectual property rights of IBM by Cisco Systems Inc would significantly decrease competition in the market although Cisco's market share would become 70,5% and CR4 would become 89,7% in the router market. The TCA took into account the factors that average growth rate was 30-40% in the network sector, the forecasts showed that the growth would continue increasingly, new entry was encouraged by the speedy growth, innovation in the sector was done mostly by small players of flexible structure concentrated on certain fields, the behaviours of customers encouraged new entry to the market, the buyers bought the products from different sellers, new undertakings were attracted into the

1 *Karbogaz,* 23.8.2002; 02-49/634-257.

2 *Turkcell*, 20.7.2001, 01-35/347-95. The TCA refers to decisions of European Court of Justice, namely Hoffmann-La Roche v. Commission, Michelin v Commission and AKZO Chemie BV v Commission.

3 *Cisco*, 02.05.2000, 00-16/160-82.

sector and the new comers could find place in the market and new progress in recent years in information technology led suppliers of telephone equipments to realize great investment for computer network technology via both research and development and acquisitions.

6. Similarly, in its *Turkcell*[4] decision, although Turkcell's market share was much larger than its one and the only competitor at that time, the TCA in addition to market shares, considered other factors such as;

- structure of the demand,
- legal barriers to market entry,
- other barriers to entry (sunk costs; infrastructure investment costs; marketing, sales and distribution expenditures; product dependency and network externalities; vertical integration, and group advantages) and decided that Turkcell could preserve its market position for a long time due to not only its high market share but also entry barriers granting it a freedom of action to a certain extent, vertical integration advantages, advantages of being large and widespread and its freedom in its market conduct for 6 years that could not be realized in competitive market conditions and as a result it had the power to determine, independently of its competitors and customers, according to its own strategies to a large extent the variables playing a decisive role on demand such as amounts of subsidies, quantity of the offer of lines independently of its competitors and customers and therefore it held a dominant position.

7. To cite another case handled within the TCA may be important to see a collection of criteria that have been taken into account to establish dominance, especially in collective dominance cases.

8. In a collective dominance case[5] where two undertakings (BBD and YAYSAT), operating in the market for the distribution of newspapers and journals, created a joint venture (JV or namely BIRYAY) to jointly distribute newspapers and journals, following evidence was considered to establish joint dominance.

9. Market shares of the undertakings in question during the last five years

- Combined market share of the two undertakings (and their JV) in question operating in the market for the distribution of newspapers and journals was almost 100%.

10. Market characteristics

- Substantial changes in the market shares of the relevant parties and the competitors might be important while deciding the existence of a dominant position.

11. Market history

- Whether the market has been highly concentrated well before the case at hand.

12. Joint conduct

---

4 20.7.2001, 01-35/347-95. The TCA refers to decisions of European Court of Justice, namely Hoffmann-La Roche v. Commission, Michelin v Commission and AKZO Chemie BV v Commission.

5 *BİRYAY*, 17.07.2000; 00-26/292-162

- Whether the relevant parties acted jointly in a large number of issues after they set up JV.

13. Degree of Concentration

- As the combined market share covering the entire market indicated, the concentration degree was very high.

14. Low potential of new competitors

- As it would be inferred from the examination of market history including the fact that, after the concentration operation, only one company distributing only its own publications has managed to enter the market, the probability of a new competitor entering the market was very low.

15. Low price elasticity of demand

- Publishers had no alternative in response to price changes and their reactions were weak due to the existence of few undertakings operating in the market for distribution of newspapers and journals and sharing of the market.

16. Low bargaining power of customers

- JV was assigned by the parent undertakings to distribute the publications exclusively and the publishers had no alternatives for the distribution of their publications.

17. Economic Barriers to Market Entry

- Large size of the need for physical capacity and manpower necessary to establish a distribution firm; requirements for a good organization, technical equipment, experience to distribute most of the newspapers and journals, cost of initial investment and other process; allowed only owners of big capital to enter this market. The requirement for each distribution company willing to enter the market to develop final sale points numbering in tens of thousands, while the substitution of existing sale points was difficult and economically irrational, constituted a serious barrier to market entry.

18. The TCA, after taking into account these criteria, decided that BBD, YAYSAT and BİRYAY were collectively dominant in the market for the distribution of newspapers and journals with the following considerations;

- relevant market showed the characteristics of an oligopoly or even a duopoly as the combined market share of BBD, YAYSAT and BİRYAY reached 100% in the last five years,

- it was difficult to find a single firm holding a dominant position in such markets because it was the existence of undertakings with the same or similar size and strength that made the market an oligopoly,

- the most important characteristics of oligopolistic markets was that the undertakings were aware of the high degree of concentration in the market and determined their course of conduct depending on the conduct of other undertakings in the market and as a result it was possible for undertakings in such markets to be able to act jointly independently of their customers,

- in markets such as the market for distribution of newspapers and journals which did not offer much perspective for development and expansion, the potential of new entry was low and therefore it was assumed that the existing undertakings would retain their market shares,

- the fact that market shares at the time the charter for JV was signed and afterwards did not change much was an indication that balance of power was somehow maintained,

- competition in the market for distribution of newspapers and journals was limited to a great extent because the market was already very concentrated before the foundation of the JV, there was only two undertakings distributing the client publications, these two undertakings, that were competitors, established a JV and made it compulsory to distribute the client publications via it

- BBD, YAYSAT and BİRYAY acted jointly in a large number of issues such as fixing price and commission rates with the consensus of BBD and YAYSAT, existence of common dealers, joint decisions to exclude products coming from other distribution channels.

19. In another collective dominance case[6], following non-exhaustive list of factors was taken into account to determine that two undertakings owning separate GSM infrastructures were collectively dominant;

- Small number of market players
  - Only two undertakings in GSM infrastructures market at that time
- Mature market structure
- Stagnant and moderate growth in demand
- Low elasticity of demand
  - Demand elasticity for GSM infrastructure service was low due to its essential facility characteristic
- Homogenous products
  - GSM infrastructure services are homogenous products from the view point of those demanding them
- Similar cost structures
- Similar market shares
  - As there were only two undertakings each with 90% coverage area, their market shares were equal to each other in GSM infrastructures services market

6 *National Roaming,* 9.6.2003; 03-40/432-186.

- Transparent market conditions

  – Process experienced regarding national roaming gained great popularity and attracted great interest from the press. Morever, commercial negotiations, arbitration and the intervention by Telecommunications Authority brought transparency facilitating the market players to understand the strategies of the competitors. The transparency in this market enabled undertakings to monitor each other's conduct and determine the deceptions.

- Low technological innovation

- Non-existence of excess capacity

- High barriers to market entry

  – Frequency band as a limited source, requirement to obtain a licence to enter the market were legal barriers whereas high licence fees, large amount of investment cost required for building GSM networks were economic barriers to market entry

- Absence of buyers' power

  – Quantity of GSM infrastructure services demanded by the new entrant and impossibility to build the alternative to this service prevented the emergence of buyers' power.

- Absence of potential competition

  – Permission required to enter the market for GSM infrastructures services and high economic entry barriers prevent potential competitors to enter.

- Existence of various informal and other links between the relevant undertakings

  – Undertakings in the relevant market met in connection with the Network Interconnection and Cooperation Agreement between the parties in the market and their representatives attended nearly all meetings in the telecommunications sector.

- Existence of retaliation mechanisms

  – Process of provision of national roaming services looked like a recurring game model rather than a one-move game model. Undertakings in question knew they would encounter each other many times. Therefore, they would be making their decisions according to past behaviours of their competitors and they were aware that their current decisions would have impact on prospective conduct of their competitors. This showed the possibility of retaliation.

- Absence or lowness of price competition

  – There was no competition between the two undertakings in question to provide national roaming services.

20. In addition to the above mentioned criteria in various decisions on TCA, technological superiority has also been taken into account as a criterion in dominance cases.[7] The undertaking in question caught international standards in technical facilities it provided which enabled it to acquire an important image for customers. Technical superiority caused the undertaking in question to increase the large gap with its closest competitor. Moreover, economic dependence is also cited as a very important criterion in this case while establishing dominance. In some cases, economic dependence alone can also be regarded as sufficient to establish dominance. An undertaking which the clients are dependent on economically becomes in a sense an essential business partner. Due to peculiar conditions of the market of liquid carbon dioxide market, the customers, who did not feel the need for an alternative to the undertaking in question or need for doing business with a new entrant, became dependent on the undertaking in question in *Karbogaz*.

21. Finally, undertakings owning essential facilities such as electricity transport infrastructures[8], GSM infrastructures[9] become automatically dominant.

22. In conclusion, as it is seen from the case law of the TCA, several elements such as market shares, entry barriers, market characteristics are taken into account on a case by case basis before establishing dominance in order to avoid hasty and erroneous conclusions.

7 *Karbogaz*, 23.8.2002; 02-49/634-257.

8 *ÇEAŞ,* 10.11.2003; 03–72/874-373.

9 *National Roaming,* 9.6.2003; 03-40/432-186.