The Second Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law on Selected Contemporary Competition Law Matters

Gönenç GÜRKAYNAK

The Second Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law on Selected Contemporary Competition Law Matters

Gönenç GÜRKAYNAK

ISBN:	978-605-315-352-8
Yayıncı:	Legal Yayıncılık A.Ş. (Sertifika No: 27563)
Basım ve Cilt:	Pasifik Ofset Limited Şirketi (Sertifika No:12027)
Basıldığı Yer:	Cihangir Mah. Güvercin Cad. Baha İş Merkezi A Blok No:3/1 Z.Kat Avcılar/ İstanbul Telefon: 0212 412 17 32
Yönetim Yeri:	Caferağa Mah. General Asım Gündüz Cad. Sekizler Apt.No:59/6 Kadıköy/İstanbul
Yayın Türü:	Hukuk Kitabı
Yazar Orcid Kodu:	0000-0001-8483-7809

Bu kitabın tüm yayın hakları ELİG Gürkaynak Avukatlık Bürosu'na aittir. İzin alınmadan eğitim ve tanıtım amaçlı kısmi alıntılar hariç olmak üzere hiçbir şekilde kopya edilemez, çoğaltılamaz ve yayınlanamaz.

Mart 2019

Copyright © 2019

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

Dedicated to the hopeful and industrious young lawyers of Turkey...

Gönenç Gürkaynak, Istanbul, March 2019

Türkiye'nin umutlu ve üretken genç hukukçularına adanmıştır...

Av. Gönenç Gürkaynak, İstanbul, Mart 2019

FOREWORD

This book, which consists of ten academic articles discussing contemporary competition law issues, complies with the highest standards of international academic publishing. It is a product of the collaborative efforts of lawyers specializing in competition law at ELIG Gürkaynak 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, with a majority having 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 each of the articles in this book also reflect my own extensive contributions and a rigorous editing process, this book nevertheless reveals 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 at ELIG Gürkaynak Attorneys-at-Law that were my co-authors.

Gönenç Gürkaynak, Esq.

ÖNSÖZ

Üst düzey uluslararası akademik yayın standartlarında kaleme alınmış 10 güncel rekabet hukuku akademik makalesinden oluşan bu kitabı, ELİG Gürkaynak Avukatlık Bürosu'nda özellikle rekabet hukuku alanında çalışan hukukçular arasından, bu alana yeni girmiş olanları da dahil olacak şekilde, beraberce kaleme aldık.

Bu sebeple, bu kitabın rekabet hukukunun Türkiye'deki geleceğine dönük bir çalışma olduğunu söyleyebilirim. Çoğunluğu rekabet hukuku alanındaki spesifik çaba ve çalışmaları daha 3 yılı doldurmamış bu meslektaşlarımın 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 ELİG Gürkaynak Avukatlık Bürosu'ndaki genç meslektaşlarımın potansiyelini hem de rekabet hukuku disiplininin Türkiye'deki potansiyelini göz önüne sermektedir.

Av. Gönenç Gürkaynak

İÇİNDEKİLER

Merger Control in a Global Context and Cooperation Between Competition Authorities

Gönenç Gürkaynak, Esq.[*]

Bulut Girgin[**]

Aysu Ünal[***]

1. Introduction

An international economic order began to develop at the beginning of the 20th century, with the increasing cross-border integration of national economies[1] and the emergence of foreign direct investments. The scale of worldwide technological progress and continuing commercial advancements at the end of the 20th century catalyzed this process and led national and domestic markets to incorporate into a much larger and more integrated international economy.[2] As a result, the differences between national and international markets have diminished to a significant extent in recent years, due to the globalization and integration of the modern economic order.

In this regard, participants in international markets will often seek to establish regional subsidiaries or even to locate their headquarters in a specific location regardless of national borders, and they will also seek to leverage their competitive advantage through foreign direct investments. Firms will tend to engage in such actions whenever it is more convenient or efficient to (i) source basic commercial resources

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Bulut Girgin is an associate at ELIG Gürkaynak Attorneys-at-Law.

[***] Aysu Ünal is a trainee lawyer at ELIG Gürkaynak Attorneys-at-Law.

[1] STEPHEN J. KOBRIN, *The Architecture of Globalization: State Sovereignity in a Networked Global Economy* in GOVERNMENTS, GLOBALIZATION, AND INTERNATIONAL BUSINESS, 154, (Oxford University Press, 1997).

[2] *Id.*

(such as raw materials and capital) from a foreign market, (ii) secure or improve market access, or (iii) gain access to special skills, technologies or know-how.[3] Multinational corporations play a significant role in today's globalized economy, especially with respect to the international investment process and global capital movements. Indeed, some companies have become even wealthier than entire countries.[4]

The globalization of commerce has created a vital need for establishing an international mechanism to regulate and oversee the activities of multinational undertakings. In this context, the internationalization of competition law (in parallel with the globalization of commerce) has received considerable attention from scholars and practitioners. The most fundamental and critical question that arises in this respect is: How should international commerce be governed?

All national competition policies differ from one another to some extent, due to their divergent priorities and the different issues they most urgently seek to address. However, an increasing number of cross-border mergers and acquisitions ("***M&A***") have taken place in recent years and they have had significant legal and economic effects on numerous countries, so that the actions of such large, multinational companies can now vibrate and have repercussions around the world even when they take place in a single location.[5] Moreover, it is likely that not all countries will be sufficiently well-equipped to address the potential competition law issues that may arise as a result of international M&A transactions. Whenever a competition authority is faced with evaluating an international M&A transaction, they can either address it by applying their national laws and regulations extraterritorially, or by relying on existing bilateral competition law treaties with other jurisdictions.

---

[3] JOHN H. DUNNING, *A Business Analytic Approach to Governments and Globalization* in GOVERNMENTS, GLOBALIZATION AND INTERNATIONAL BUSINESS, 117, (Oxford University Press, 1997).

[4] *See* John Cavanagh, Sarah Anderson, *Top 200: The Rise of Corporate Global Power*, 4, (Institute for Policy Studies, December 2000), http://www.ips-dc.org/top_200_the_rise_of_corporate_global_power (last visited Dec. 8, 2018). "Of to 100 largest economies in the World, 51 are corporations; only 49 are countries. (...) The Top 200 corporations' combined sale is bigger than the all countries minus the biggest 10."

[5] MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW, 80, (Cambridge University Press, 2010).

However, the extraterritorial application of a country's domestic laws in the context of an international merger may cause legal (or even political) conflicts with other countries or, at the very least, create legal uncertainties. The application of bilateral cooperation agreements for a merger or acquisition, on the other hand, may face certain difficulties or lead to considerable shortcomings in the context of international transactions. Due to the aforementioned reasons and to enhance global commercial integration, the development of an international merger control system will be not only beneficial, but also necessary.

2. Globalization and International Cooperation in Competition Law

The increasing number of international M&A transactions and the concurrent globalization of markets has created a fundamental need for a multinational governance system. As the markets become increasingly more globalized and integrated in nature, and considering that this is a trend with no end in sight, competition law problems have begun to transcend national boundaries.[6] Needless to say, national competition policies tend to prioritize national goals; therefore, they may fall regrettably short of adequately addressing international competition law issues.

Merger control at the international level is one of these issues that must be addressed through international competition law policies. In line with the ever-increasing globalization of markets and economies, competition authorities need to be able to govern and regulate the actions and policies of multinational undertakings. As stated above, national competition enforcement authorities dealing with the behavior of international undertakings may protect their interests either by (i) applying their laws extraterritorially, or (ii) entering into bilateral cooperation agreements with other competition enforcement authorities, or (iii) engaging in multilateral cooperation with other countries' competition authorities. However, each type of internationalization of the competition law system brings its own distinct advantages and disadvantages. The process of the internationalization of competition law and various methods that have been employed to address global

[6] JITENDRA JAIN, HARMONIZATION OF INTERNATIONAL COMPETITION LAWS: PROS AND CONS, 25, (Anchor Academic Publishing, Hamburg, 2013).

competition law issues will be examined briefly in the next section, before we turn to an assessment of whether it is possible to create an effective international merger control system.

3. Types of Internationalization of Competition Law

a) Unilateralism

The unilateral approach to the internationalization of competition law basically relies on the extraterritorial application of a particular country's domestic laws. In principle, a country's power and ability to apply its laws terminates at its borders; in other words, a country's legal dominion and jurisdiction only extends as far as its boundaries, according to the universal "rule of sovereignty." In general, a nation's competence to enact, apply and enforce its laws is primarily based on two types of jurisdiction, according to which legal sovereignty may be asserted.[7] The first type is "subject matter jurisdiction," which describes a country's discretion and ability to enact laws concerning issues that fall under its jurisdiction.[8] The second type is known as "enforcement jurisdiction," which refers to a country's ability to enforce its laws.[9] Subject matter jurisdiction and enforcement jurisdiction both stem from the "principle of territoriality," which is the fundamental basis of a country's sovereignty and according to which a sovereign state can prosecute criminal offences that are committed within its borders. However, considering the increasingly globalized economy and the rising number of international mergers and acquisitions, it is clear that certain exceptions will inevitably have be made to the bedrock principle of territoriality in order to prevent and deter the potential infringements and the ensuing harm that countries may suffer due to anticompetitive conducts that occur outside their geographic boundaries.[10]

Public international law sets out four main exceptions to the principle of territoriality: (i) nationality principle, (ii) protective

[7] MAHER M. DABBAH, *supra* note 5, at 419.

[8] *Id.*

[9] *Id.*

[10] *Id.*, at 420.

principle, (iii) passive personality principle, and (iv) objective territoriality principle.[11] [12] [13] [14] Apart from these four well-established exceptions, it would be highly questionable and legally problematic to apply the laws of a country extraterritorially. Nevertheless, in the context of growing international commerce in the globalized economy of the 21st century, countries may sometimes find it necessary to take unilateral actions in order to protect their national interests. Fundamentally, the coexistence and interaction of global markets and national jurisdictions necessitate the implementation of a suitable mechanism to effectively deal with cross-border competition law issues.[15] In this context, there are two separate doctrines that can be applied by national authorities to assert their jurisdiction:

- Effects doctrine: If a certain conduct has an economic effect inside the borders of a country, regardless of where the conduct takes place, the country that has been affected by the conduct may assert its jurisdiction.
- Implementation doctrine: If a company engages in anticompetitive conduct in a specific country, then that country can assert its jurisdiction over the company. If the anticompetitive conduct is implemented or carried out by one of the subsidiaries of an international holding company, then the holding company can also be held liable for its subsidiary's actions, pursuant to the "single economic entity" doctrine.[16]

---

[11] Nationality principle: Countries may assert jurisdiction over their nationals (*i.e.*, citizens) regardless of their geographical location.

[12] Protective principle: Countries may assert jurisdiction over conduct that occurs outside its borders, if that conduct puts the country's interests in danger.

[13] Passive personality principle: If an act is committed to harm a national outside of a country's borders, then that country may enforce its laws in order to protect its nationals.

[14] Objective territoriality principle: If a criminal act commences outside the boundaries of a country but is then concluded inside its boundaries, then jurisdiction can be asserted over that act by the country in question.

[15] P.J. LLOYD, MULTILATERAL RULES FOR INTERNATIONAL COMPETITION LAW, 1132, (Blackwell Publishers Ltd., 1998).

[16] CARSTEN KOENIG, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, *in* JOURNAL OF COMPETİTİON LAW &

The legal doctrine concerning the extraterritorial application of a country's laws has been developed through the years. However, the primary problem with the extraterritorial application doctrine is the expansive (and, at times, overbroad) application of national laws, more than the doctrine itself. The expansive interpretation of the extraterritorial application of domestic laws may interfere with the sovereignty of other nations and lead to all types of international disputes and disagreements. From the perspective of international merger control, the extraterritorial application of national laws may impose additional costs and lead to legal uncertainty for the undertakings with regard to the laws to be applied to their actions. The far-reaching extraterritorial application of national laws can also fall short of properly considering the maximization of global welfare (and global consumer welfare), as countries may naturally be expected to focus on their own national interests.

In addition, there is a serious limitation that arises on the enforcement level regarding the extraterritorial application of national laws. It cannot be guaranteed that a national decision would be enforced in other jurisdictions against the concerned undertaking, as other countries' national interests would take precedence over a third party's decision regarding the extraterritorial application of its laws. This limitation particularly concerns the multinational aspect of global commerce and international transactions. In light of the various deficiencies and shortcomings of the unilateral approach to international competition law, a mechanism that may allow (and even lead to) a convergence between competition law regimes seems more appropriate to adopt, especially for international merger control systems.[17]

b) Bilateralism

Bilateral cooperation is a method that is used for helping to govern the global commercial system and regulating its cross-border

ECONOMICS, Vol. 13, Issue 2 (1 June 2017), https://academic.oup.com /jcle/article-abstract/13/2/281/3885843 (last visited Dec. 17, 2018).

[17] *See* JITENDRA JAIN, *supra* note 6.. In the *Kodak/Fuji* case, experts concluded that there was a need for new multilateral practices in order to deal with private anticompetitive practices, *id.* at 52.

transactions. According to the Report on the OECD/ICN Survey on International Enforcement Co-operation (2013), *"International co-operation is a policy priority for a vast majority of competition agencies; respondents emphasized that the globalization of markets; and consequently of anti-competitive activity, requires increasing and enhanced cooperation in the enforcement."*[18] Cooperation between countries with respect to competition law enforcement is not only necessary in a globalized economy, but also highly advantageous, due to the fact that its benefits far outweigh its costs.

Bilateral cooperation between nations can be implemented either through formal agreements or by engaging in informal cooperation. A formal agreement between two jurisdictions can take the following forms: (i) a positive comity agreement, (ii) a negative comity agreement, or (iii) investigative assistance. Parties to a negative comity agreement watch out for other parties' crucial interests or notify them of their own key interests in the case at hand. In other words, negative comity agreements are principally about the mutual courtesy and consideration shown by both sides. For instance, the Antitrust Accord signed between the United States and Germany in 1976,[19] the US-Australia treaty relating to Cooperation on Antitrust Matters (1982), and the US-Canada Memorandum of Understanding (1984) are illuminating examples of negative comity agreements signed between competition authorities of different countries. In this regard, negative comity agreements are valuable tools for creating an important forum in which different jurisdictions are able to cooperate on competition law issues. In addition, the potential of negative comity agreements to promote international trade by (i) enhancing market access, and (ii) improving the enforcement of international competition law rules, is also indisputable and highly significant for the global economy.[20]

---

[18] OECD, *Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, 2013, http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf (last visited Dec. 5, 2018).

[19] *See* Federal Trade Commission, *US – Germany Antitrust Accord* (June 23, 1976), https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/agree_germany.pdf (last visited Dec. 17, 2018).

[20] MAHER M. DABBAH, *supra* note 5, at 498.

Positive comity agreements are second-generation agreements, which have emerged as a result of the inadequacy of negative comity agreements, due to the increasing complexity of the issues facing competition law enforcement authorities at the international level. To that end, positive comity agreements are based on, as the name suggests, *positive* mechanisms of action, where one party to the agreement asks the other to address the anticompetitive conduct taking place within the second party's jurisdiction. It should be noted that positive comity agreements are more common and widely used than negative comity agreements. For instance, there are positive comity agreements between the US and the EU, as well as between the US and Brazil, Canada, Israel, Japan and Mexico, in addition to such agreements signed by the EU with Japan and Canada.[21]

There can be also *de facto* cooperation agreements between countries on issues of international competition law, meaning that countries can cooperate on competition law matters (and on other issues) even in the absence of any formal agreements between them. De facto comity agreements generally take the form of positive comity

[21] *See* European Commission, *Competition – Bilateral Agreements – United States of America*, http://ec.europa.eu/competition/international/bilateral/usa.html (last visited Dec. 9, 2018); Federal Trade Commission, *United States and Brazil Sign Bilateral Antitrust Agreement*, Oct. 26, 1999, https://www.ftc.gov/news-events/press-releases/1999/10/united-states-and-brazil-sign-bilateral-antitrust-agreement (last visited Dec. 9, 2018); Federal Trade Commission, US – Canada Enhanced Positive Comity Agreement, https://www.ftc.gov/policy/cooperation-agreements/us-canada-enhanced-positive-comity-agreement-english-french-version (last visited Dec. 9, 2018); Federal Trade Commission, *United States and Israel Sign Bilateral Antitrust Agreement*, March 15, 1999, https://www.ftc.gov/news-events/press-releases/1999/03/united-states-and-israel-sign-bilateral-antitrust-agreement (last visited Dec. 9, 2018); Federal Trade Commission, *United States and Japan Sign Bilateral Antitrust Agreement*, October 7, 1999, https://www.ftc.gov/news-events/press-releases/1999/10/united-states-and-japan-sign-bilateral-antitrust-agreement (last visited Dec. 9, 2018); Federal Trade Commission, *United States and Mexico Sign Bilateral Antitrust Agreement*, July 11, 2000, https://www.ftc.gov/news-events/press-releases/2000/07/united-states-and-mexico-sign-antitrust-cooperation-agreement (last visited Dec. 9, 2018); European Commission, Countries and Regions – Japan, http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/ (last visited Dec. 9, 2018); European Commission, *Bilateral Relations on Competition Issues*, http://ec.europa.eu/competition/international/bilateral/ (last visited Dec. 9, 2018).

agreements, in which one country asks the other to address certain anticompetitive conducts occurring within its borders.

For instance, Turkey engages in bilateral cooperation with numerous countries on competition law issues. South Korea, Bulgaria, the Russian Federation, Egypt, Ukraine and the EU are some of the countries and jurisdictions with which Turkey has entered into bilateral cooperation agreements on competition law issues.[22] [23] These cooperation agreements are signed and implemented for various purposes, such as: (i) enhancing cooperation in applying competition law rules in order to increase the efficiency of product and service markets, (ii) exchanging documents and information on certain topics between authorities, and (iii) improving cooperation and fostering the exchange of information between the authorities with respect to competition law enforcement and policy.[24]

There are several potential advantages to engaging in bilateral cooperation, especially compared to unilateralism, which makes such cooperation a positive step toward the integration of national regulations.[25] First of all, bilateral cooperation offers a better alternative than straightforward extraterritoriality, as it respects the principle of national sovereignty and, as a result, it can offer a more realistic and pragmatic form of cooperation between countries compared to the extraterritorial application of national laws. Furthermore, it has the potential to enable or lead to a more coherent application and consistent development of regional laws, if the cooperation agreements are signed between neighboring countries. Moreover, in the context of cooperation agreements executed between developing countries and developed countries, bilateral cooperation may support the competition authorities in the developing countries in their work, especially by providing them with a strong legal basis and a solid regulatory framework for dealing

[22] Turkish Competition Authority, https://www.rekabet.gov.tr/tr/Sayfa/Kurumsal/ulus-lararasi-iliskiler/iki-tarafli-iliskiler/diger-rekabet-kurumlariyla-yapilan-i (last visited Nov. 17, 2018).

[23] European Commission, *Bilateral Relations on Competition Issues*, http://ec.europa.eu/competition/international/bilateral/ (last visited Dec. 8, 2018).

[24] Turkish Competition Authority, *supra* note 22.

[25] Sarah Holloway, *International Merger Control: Globalization or Global Failure*, 34 DENV. J. INT'L L. &POL'Y 353, 370 (2006).

with competition law issues. Most importantly, bilateral cooperation between countries, regardless of whether such cooperation takes the form of positive or negative comity agreements, increases the convergence between procedural and substantive issues, which may help to settle the fundamental principles of international competition rules and resolve thorny issues concerning global trade governance and regulation.

However, it is worth remembering that bilateral cooperation agreements may bring along certain disadvantages as well. For instance, they may introduce delays to the process of competition law enforcement, due to the procedural steps that need to be fulfilled whenever two governments participate in the same enforcement action. Additionally, countries may not be able to fully address or prevent anticompetitive conduct that occurs in the context of global commerce solely through bilateral cooperation agreements, due to the multinational dimension of such anticompetitive infringements.

In a nutshell, even if bilateral cooperation has some undeniable benefits and advantages for the internationalization of competition law, it may not be able to efficiently or effectively address all anticompetitive conducts that may arise in the modern globalized economy.[26]

c) Multilateralism

Multilateral cooperation offers and enables a collective approach with respect to the internationalization of competition law. Even if international competition law issues may be handled through the extraterritorial application of domestic laws or through bilateral cooperation between different jurisdictions, these methods may not be sufficient to meet the needs or requirements of the proper global management of the international commerce system. In addition to the political problems that may ensue from the extraterritorial application of national competition laws, national competition authorities may also be incapable of effectively addressing or stopping anticompetitive conduct

[26] *See* JAIN JITENDRA, *supra* note 6. For example, the *Boeing-McDonnell Douglas* merger was one of the seminal antitrust cases with a global dimension, which demonstrated the fragility of the bilateral cooperation system when dealing with international competition law cases, *id.* at 56.

that takes place outside of their national boundaries.[27] Furthermore, since multinational transactions are most likely to be scrutinized and examined by a multitude of different competition enforcement authorities, contradictory results may be reached in different jurisdictions based on the legality of the behavior under review in that particular jurisdiction.[28] Finally, engaging in multilateral cooperation may reduce the costs and the amount of work associated with the competition law enforcement process, both for the enforcement authorities and for the undertakings concerned.[29]

Multilateral cooperation can be achieved either through binding or non-binding commitment agreements. In the past, there have been several attempts to create binding multilateral competition laws. For instance, the Draft Havana Charter,[30] the ECOSOC draft convention, and attempts by the GATT Experts Group and the Munich Group's Code are all examples of historical attempts to create a binding framework for international competition law.[31] Even if the attempts were undertaken in order to eliminate the discrepancies between the inconsistent decisions being reached by different competition authorities, none of the efforts toward the development of a binding international competition law system ultimately proved to be successful. Indeed, one of the primary reasons for the failure of these attempts was the sovereignty claims that were put forth by the individual states.

Finally, there are several international organizations in operation that aim to foster international cooperation in the fields of competition law and policy. These organizations provide guidelines, offer best practices and deliver numerous reports in order to enhance cooperation and provide some consistency on competition law issues between different jurisdictions. Even though these guidelines are not legally

---

[27] YOURI DEVUYST, *Toward a Multilateral Competition Policy Regime?*, Global Governance, Vol. 6, No. 3, (July-September 2000), 319-338, at 323, https://www.jstor.org/stable/27800267 (last visited Dec. 5, 2018).

[28] *Id.*

[29] *Id.*

[30] Unıted Nations Conference On Trade And Employment, Fınal Act And Related Documents, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (last visited Dec. 17, 2018).

[31] MAHER. M. DABBAH, *supra* note 5, at 544-545.

binding, the non-binding works and recommendations provided by these organizations nevertheless encourage international cooperation on competition law issues and thereby promote economic well-being on a global scale. Below, we will briefly describe some of the international organizations that are currently striving to enhance international cooperation with respect to competition law rules and policies.

Organisation for Economic Co-operation and Development (OECD)

The OECD, which was established in 1961, promotes policies to improve the economic and social well-being of people around the world.[32] The issue of international cooperation in competition law has been under the OECD's scope since 2012.[33] In its competition-related work, the OECD studies existing models of international cooperation, investigates the limits and obstacles that hinder further convergence on these issues, and explores possible new solutions to existing problems.[34] In fact, the OECD's wide-ranging works and studies on international cooperation in competition law and policies has been instrumental in the development of the models for cooperation.[35]

Furthermore, the OECD provides a respected and valuable platform for national competition authorities to discuss the latest merger control developments amongst themselves. Finally, the OECD also provides non-binding common principles for national authorities to apply in their own merger control processes, including cooperation between competition authorities in the assessment of international mergers.[36]

Through its workshops and roundtable discussions, the OECD offers an immensely useful platform for convergence between different jurisdictions. In addition, the OECD provides a basis for cooperation and

---

32 OECD, *Our Mission*, http://www.oecd.org/about/ (last visited Dec. 6, 2018).

33 OECD, *International Co-operation in Competition*, http://www.oecd.org/competition /internationalco-operationandcompetition.htm (last visited Dec. 17, 2018).

34 *Id.*

35 *Id.*

36 OECD, *Mergers*, http://www.oecd.org/competition/mergers/ (last visited Nov. 17, 2018).

development for competition law at the international level with its competition assessment toolkits, recommendations and country reviews. Even though the OECD does not lay down binding principles for national competition authorities to follow, its work still enables and fosters convergence between different national competition authorities by setting common principles and by establishing an international competition law network.

International Competition Network (ICN)

The International Competition Network (ICN) is another multinational platform that aims to facilitate a better understanding of international competition law issues and to enhance the level of cooperation between different competition authorities. ICN describes its mission as follows: "*to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.*"[37] It is the only international organization that was established to deal solely with competition law issues.

The ICN has made substantial contributions to the international competition law community by its practical recommendations, best practices, case-handling and enforcement manuals, reports, toolkits, workshops, investigative techniques and analytical frameworks.[38] The ICN has also achieved notable accomplishments in merger review, anti-cartel enforcement, unilateral conduct regulation, and competition advocacy and competition policy through its working groups.[39] Most importantly, the ICN provides an expedient platform for governments to cooperate with each other on international competition law issues. The ICN's Merger Working Group's (MWG) objectives can be summarized

---

[37] ICN, *About*, https://www.internationalcompetitionnetwork.org/about/ (last visited Dec. 6, 2018).

[38] ICN, *Factsheet and Key Messages*, April 2009, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf (last visited Dec. 6, 2018).

[39] *Id.*

as follows: (i) to enhance the effectiveness of each jurisdiction's merger review mechanism, (ii) to facilitate procedural and substantive convergence, and (iii) to reduce the public and private cost (in terms of both time and expenditures) of multi-jurisdictional merger reviews.[40] The Merger Working Group publishes best practices in order to achieve these objectives. Moreover, the Merger Working Group not only provides guidelines and recommended practices for merger control, but also works to promote and increase the familiarity, use and implementation of its work products by different competition authorities.[41]

The ICN's work, which primarily focuses on international merger control and competition law advocacy, is based on a top-down approach and has gradually developed a set of "best practices," especially in the field of international merger control. Through its work, the ICN helps to develop an international competition network by building trust and confidence between different national competition authorities.[42] Similarly to the OECD, even if the ICN does not provide binding rules to be adopted and followed by national competition authorities, its multi-dimensional works help to build a common transnational understanding of competition law issues and convergence for competition law rules at the international level.

European Competition Network (ECN)

In March 2017, the EU Commission presented a proposal that aimed to "empower Member States' competition authorities to be more effective enforcers" (ECN+).[43] The objective of this proposal was to ensure that national competition authorities would possess the appropriate enforcement tools when applying the EU's antitrust rules, in order to create a genuine common competition enforcement system.[44]

---

[40] ICN, *Merger Working Group*, http://www.internationalcompetitionnetwork.org/ working-groups/current/merger.aspx (last visited Nov. 17, 2018).

[41] *Id.*

[42] MAHER M. DABBAH, *supra* note 5, at 155.

[43] EU Commission, *Empowering National Competition Authorities*, http://ec.europa.eu/ competition/antitrust/nca.html (last visited Dec. 8, 2018).

[44] *Id.*

Minimum guarantees and standards were settled, and these were put forth in the proposal.[45] With this proposal, the Commission aimed to contribute to the idea of a Single Market and to promote the related goals of competitive international markets.[46]

In this context, the European Competition Network provides a useful platform for the European Commission and for the national competition authorities in EU Member States to cooperate on issues related to competition law.[47] Compared to the ICN and the OECD, the ECN is more of a regional organization, with the participation of EU Member States and the EU Commission, as well as non-EU-member observer states. The ECN strives to ensure the effective and consistent application of competition rules in all Member States, by creating a pool/consortium for them to share their expertise and practices in competition law.[48] Not only does the ECN enhance cooperation between Member States, but it also provides guidance to help the Member States develop and improve their own national competition authorities so that they can become better competition law enforcers.

The ECN also includes a Merger Working Group, which aims to enhance the cooperation between national competition enforcement authorities. The aim of the Merger Working Group is described as follows: "*to foster increased consistency, convergence and cooperation among EU merger jurisdictions.*"[49] The ECN Merger Working Group publishes reports about the differences and similarities between various competition policies, merger information requirements, best practices and principles to provide guidance, and thus foster cooperation between competition authorities on these issues.[50]

The works of various international organizations described above, especially those that have been established under the ECN, can set a useful example for the creation of even more closely integrated (*i.e.* all-encompassing) international competition law organizations that could

45 *Id.*
46 *Id.*
47 European Commission, *European Competition Network Overview*, http://ec.europa.eu/competition/ecn/index_en.html (last visited Dec. 9, 2018).
48 *Id.*
49 *Id.*
50 *Id.*

facilitate and advance the economic and social well-being of people all around the world.

4. Globalization and Merger Control

Mergers are exceedingly important business transactions, which involve changes and risks not only for the relevant market, the economy, and the public at large, but also for the private parties that are participating in the transaction. As mergers have substantial and long-lasting effects on a variety of groups, the subject of merger control, in particular, has attracted an increasing amount of attention from regulatory authorities around the world.

For private parties, merger control carries great significance, as mergers comprise an entrepreneurial activity with considerable commercial and financial risks, which have enduring effects on private interests and property rights.[51] Furthermore, mergers are critical for the future of an economy and also affect the public interest, as they change the structure of the market and alter the behavior of market players accordingly. It is important to note that such merger effects do not necessarily influence the public interest negatively, in contrast to many of the other types of transactions that raise competition law concerns.[52]

In this regard, individual states regulate and set the legal framework for merger control regimes based on their own economic and financial priorities in light of their antitrust regulations, as there is no international consensus or established standard practice regarding merger analysis.[53] Although substantive merger control analysis may exhibit similarities between jurisdictions, the outcome of such analyses may nevertheless differ from one jurisdiction to the next. These differences not only influence the competition enforcement authorities, but also affect the transaction parties involved in the merger. Moreover, the existence of a multiplicity of systems to govern and regulate

[51] MAHER M. DABBAH, K.P.E. LASOK QC, *Introduction* to MERGER CONTROL WORLDWIDE, 5, (Cambridge University Press, November 2014).

[52] *Id.*

[53] Kyle Robertson, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31, International Competition Law Review, 154, (2008).

international mergers increases the risk of inconsistent decisions and raises compliance costs across jurisdictions.[54] The absence of a single uniform merger control system also makes it more difficult for competition authorities to collect evidence and implement remedies outside of their own jurisdictions.[55] In addition, this heterogeneous regulatory system extends the merger review periods and delays the consummation of merger transactions.[56]

As mentioned above, competition enforcement authorities can address international competition law concerns (including issues relating to international merger control) in three distinct ways. Generally, countries may choose to apply their domestic laws to the competition law analysis of transnational mergers. However, this might lead to certain problems. Firstly, decisions rendered by different competition authorities with respect to an international merger may conflict with one another,[57] and these conflicting decisions may give rise to tensions between different competition law authorities.[58] Secondly, multiple merger control filings in a multitude of jurisdictions will raise compliance costs for the merging parties. Thirdly, the unilateral approach to governance may be deficient in addressing the outbound (*i.e.*, international) interests and only concentrate on national priorities and concerns. [59] On the other hand, even if a bilateral approach could enlarge the scope of interests that are taken into account, and thus facilitate the collection of evidence and ease the decision-making process in the context of international merger control, it may still not suffice to address all the priorities and concerns involved in a merger, due to the fact that multinational companies' transactions generally cover and affect more than just two jurisdictions.

In Turkey, according to the Communiqué No. 2010/4, the following transactions are considered to qualify as a "merger" or

---

[54] Dimitris Liakopoulos and Armando Marsilia, *The Regulation of Transnational Mergers in International and European Law*, (BRILL, 2009), https://brill.com/abstract/title/17082 (last visited Dec. 5, 2018).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

"acquisition": (i) the merger of two or more undertakings, or (ii) the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings, or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets or through a contract or through any other means, provided that there is a permanent change in control.[60] According to Article 7 of the Communiqué, if (i) the total turnovers of the transaction parties in Turkey exceed TL 100 million, and the turnovers of at least two of the transaction parties in Turkey exceed TL 30 million, or (ii) the global turnover of one of the transaction parties exceeds TL 500 million, and at least one of the remaining transaction parties has a turnover in Turkey exceeding TL 5 million, then the merger or acquisition transaction must be notified to the Turkish Competition Board ("***Board***") and authorization must be obtained from the Board for the transaction. Even if a global economic analysis is carried out for international mergers, national thresholds and domestic laws will still be applied throughout this process, in order to assess whether a transaction will have anticompetitive effects on the Turkish market.

Considering the aforementioned limitations of the unilateral and bilateral approaches for the governance of international merger transactions, multilateral cooperation emerges as a more promising and substantive solution for the effective supervision and governance of transnational mergers. In order to articulate and discuss the benefits and drawbacks of the multinational approach more coherently, we will first examine merger control in a global context and assess ongoing multilateral cooperation efforts in the framework of international merger control.

5. Merger Control in a Global Context

The primary objective of a merger control regime is to maintain effective competition in the market.[61] Mergers may generate destructive or predatory effects on the competition in the market by laying the

---

[60] *See* Turkish Competition Authority's Communiqué No. 2010/4, https://www.wipo.int/edocs/lexdocs/laws/tr/tr/tr115tr.pdf (last visited Dec. 7, 2018).

[61] WALTER FRENZ, HANDBOOK OF EU COMPETITION LAW, 1190, (SPRINGER, 2016).

groundwork for and enabling market players to coordinate, or they may reduce the ability of rival companies to compete in the relevant market.[62] These detrimental outcomes will also adversely affect consumer welfare. Accordingly, competition authorities have generally adopted and implemented *ex ante* merger control systems, in order to be able to prevent or block any competitive harm that the market may suffer as a result of a merger transaction.[63] However, in contrast to other subjects of competition law matters, merger transactions can also generate procompetitive effects on the market by (i) creating more favorable buying conditions, (ii) leading to economies of scale and scope, and (iii) enabling technological progress and facilitating increased access to capital.[64] Giving due respect to the fact that mergers play a beneficial role in the global economy for enhancing total welfare, the implementation of effective international merger control systems and enabling the proper governance and regulation of international transactions emerge as crucial regulatory challenges.

In purely domestic merger and acquisition transactions, a notification is generally made to the national competition authority, if the concentration that will be created as a result of the transaction will exceed the preset limits (*e.g.*, with respect to turnover, market share, etc.) set forth in the national competition laws and regulations. Subsequently, the national competition authority will make an assessment based on the procompetitive and anticompetitive effects of the examined transaction, and accordingly decide whether to grant a clearance or a conditional clearance to the proposed transaction or to block it. In this "domestic M&A" scenario, the transaction parties only have one competition authority to notify, and they can therefore proceed more easily and smoothly with the necessary regulatory steps and they will be more likely to be able to stick to their preset schedule for completing the transaction.

[62] MORITZ LORENZ, AN INTRODUCTION TO EU COMPETITION LAW, 242, (Cambridge University Press, 2013).

[63] *Id.*

[64] Roger Van den Bergh, Peter Camesasca, Andrea Giannaccari, *Merger Control*, *in* COMPARATIVE COMPETITION LAW AND ECONOMICS, 454, (Roger Van den Bergh, Edward Elgar Publishing, 2017).

In the case of a transnational merger, however, each competition authority generally applies its own rules and regulations in order to determine whether to grant a clearance, a conditional clearance, or rejection decision to the proposed merger. Moreover, when evaluating the probable effects of an international M&A transaction, national authorities do not make an assessment as to the entire relevant geographic market (which will comprise multiple countries and jurisdictions), but only examine the transaction's effects on the national market. Indeed, it would be contrary to the "principle of territoriality" for them to make an assessment that exceeds the limits of their own borders/jurisdictions. Therefore, the transaction parties are required to notify the merger to multiple competition authorities, and they will be faced with a situation in which they have to act strategically in order to obtain timely clearance decisions from all of the notified competition authorities. In this context, the transaction parties will need to consider all of the following factors to successfully consummate the proposed transaction: (i) possible cost-reduction techniques, (ii) formal and informal cooperation agreements between various jurisdictions, (iii) the preset schedule (*i.e.* timeline) for the transaction that they need to abide by, (iv) varying market conditions and different laws and regulations governing the merger in every single jurisdiction. Needless to say, this makes an international merger transaction an extremely complicated process and a tremendously challenging task for the transaction parties.

Parties to a transaction will need to satisfy different conditions and complete a variety of regulatory steps in each jurisdiction, which will, at the very least, significantly increase their transaction costs. They may also be required to consider the cooperation agreements between different jurisdictions when applying to the relevant competition authorities for clearance decisions. Such cooperation agreements may reduce the length of the merger filing process by facilitating and speeding up the evidence collection phase, which will ultimately decrease the notification costs for the transaction parties. In order to be able to obtain the clearance decisions in time for the closing date of the transaction, the parties not only have to consider the possible methods that could allow them to shorten the review period in each jurisdiction, but also need to think about what they could do to facilitate a clearance decision in each jurisdiction. Since, in the current system, national competition authorities limit the definition of the relevant geographic market to their own boundaries and conduct their merger assessments accordingly, the transaction parties should also consider the varying structures of different geographic markets, and evaluate their positions in each market accordingly.

In this regard, the EU Merger System may set a valuable model for adoption as a multinational merger control system, as the European Union has succeeded in creating a system that could serve as a "one-stop-shop" for the parties involved in international merger transactions. According to the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("***EC Merger Regulation***" or "***ECMR***"),[65] if a transaction creates a concentration as defined under Article 3 of the ECMR and if this concentration has a community dimension, then the parties must notify the merger to the Commission. According to Article 3, a concentration will arise when either two independent undertakings merge or when an undertaking acquires direct or indirect control over another undertaking, wholly or in part. Furthermore, this concentration will be deemed to have a community dimension if it satisfies the thresholds set forth under Articles 1(2) and 1(3).[66] [67] However, it should be noted that, even if a

---

[65] *See* Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("***ECMR***"), https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139 (last visited Dec. 7, 2018).

[66] According to Article 1(2) of the ECMR: "A concentration has a community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

[67] According to Article 1(3) of the ECMR: "A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

concentration has a community dimension, Member States may retain jurisdiction over the proposed transaction to protect their legal interests.[68] In addition, according to Article 22 of the ECMR, the Commission's jurisdiction can be extended in certain cases if Member States request the Commission to examine the merger, even if the transaction doesn't have a community dimension, as long as it affects trade between the Member States.

The EU's merger control system not only provides "one-stop-shop" possibilities for international undertakings involved in merger transactions, but it also (i) reduces the costs of the notification process, (ii) shortens the considerably lengthy clearance period, and (iii) provides legal consistency and certainty for undertakings that are active in trade or business within the European Union. Moreover, the EU merger control system manages to balance the interests of sovereign nations and the requirements of the international economic system, by providing certain exceptions both for safeguarding the national interests of the Member States and for protecting trade at the transnational level.

Therefore, as mentioned above, the EU merger control system might set a useful example by providing a workable model for establishing an international merger control system. By constituting an international organization, initially with non-binding rules and then to regulate international transactions based on preset thresholds (and stipulating exceptions in order not to interfere with the national interests of sovereign countries), such a system will be able to not only provide the advantages of a "one-stop-shop" for multinational undertakings, but also improve economic efficiency worldwide and thus enhance total global welfare. Currently, there aren't any international organizations that are set up or equipped to govern and supervise international merger transactions. However, there are certain bilateral agreements, memorandums of understanding and multilateral agreements that already provide helpful guidance to countries on competition law issues, including on the subject of international merger control, as discussed below.

---

[68] K.P.E. Lasok QC, J. Holmes, *European Union*, *in* MERGER CONTROL WORLDWIDE, 445, *(*MaherDabbah and Paul Lasok, Cambridge University Press, 2014).

6. Cooperation Between Competition Authorities in International Merger Control

The ever-increasing globalization of the modern economic system and the growing number of transnational M&A transactions have pushed competition authorities toward cooperation at an international level, in order to be able to effectively govern and supervise the international trade system. The main principles of successful international cooperation are based on fundamental mutual respect, as in: (i) respecting each other's national sovereignty, (ii) respecting the jurisdictional rules of the countries involved, and (iii) respecting the key interests of the participating countries.[69]

Even if international cooperation is vital for the effective governance of the international commercial system, it obviously brings its own challenges as well.[70] First of all, national competition authorities should take care to recognize and respect their confidentiality obligations when sharing information with other countries. Secondly, due to the fact that international transactions generate competition concerns in more than one jurisdiction, and since there are multiple merger control processes occurring (often simultaneously) in different jurisdictions as a result, cooperating with other competition authorities might become more of a logistical challenge. Lastly, it can be difficult for competition authorities to identify, tackle and overcome the strategic behaviors of the undertakings involved.

Currently, there are numerous multilateral cooperation agreements in effect between different countries, which have generally been concluded under the aegis of an international organization. As mentioned above, there have been multiple attempts to create binding multilateral rules with respect to competition law enforcement in the past. However, mostly due to the sovereignty-related concerns of the

[69] Russell W. Damtoft, *Bilateral and Plurilateral Cooperation in Competition Cases*, UNCTAD (Sao Paolo, 2003), https://unctad.org/en/Docs/ditcclp200382b.ppt (last visited Nov. 13, 2018).

[70] *Id.*

countries involved, all of these efforts have unfortunately been unsuccessful in the end.[71]

Cooperation between different competition authorities has generally been accomplished through bilateral agreements and non-binding multilateral agreements. These multilateral agreements usually encompass a larger scope than only merger control, and they tend to include guidance rules with respect to all competition law issues. As stated in the previous section, there are multilateral guidance rules that have been promulgated under the aegis of several international organizations, including the ICN, the World Trade Organization ("***WTO***"), the United Nations Conference on Trade and Development ("***UNCTAD***"), and the OECD. Moreover, there are several instruments that have been implemented under these international organizations in order to provide useful guidance for national competition authorities, as discussed below.

The ICN has established a "Merger Working Group" that aims to promote the adoption of "best practices" in the design and operation of merger review regimes. The declared objectives of these best practices include: (i) enhancing the effectiveness of each jurisdiction's merger review mechanisms, (ii) facilitating procedural and substantive convergence between different jurisdictions, and (iii) reducing the costs (in terms of time and economic expenditures) of the multi-jurisdictional merger review system. Moreover, the "Practical Guide to International Enforcement Cooperation in Mergers" is one of the seminal documents that has been published by the Merger Working Group, which provides guidance to countries on the international merger review process. It is explicitly stated in the Practical Guide that it aims to enhance cooperation between competition authorities and provide guidance in order to create sustainable cooperation and better governance with respect to the international merger control system. In the words of the Practical Guide, it is intended to serve as: "*(i) a voluntary and flexible framework for interagency cooperation in merger investigations; (ii) practical guidance for agencies seeking to engage in such cooperation;*

[71] *See* JITENDRA JAIN, *supra* note 6 at 37.

and (iii) practical guidance for merging parties and third parties seeking to facilitate cooperation."[72]

The OECD has also published a paper entitled "*Cross-Border Merger Control: Challenges for Developing and Emerging Economies*" in 2011. This paper reached the conclusion that, since emerging economies and developing countries may be challenged by the difficulty of tackling the complexities of cross-border merger investigations, increased cooperation should be encouraged between different competition authorities in developing and developed countries.[73]

Finally, the UNCTAD has put forth a report entitled "*International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law*," which was published in July 2015. This report examined the evolution and development of international cooperation in the enforcement of competition laws with a particular focus on merger cases.[74] By providing a comprehensive study regarding the tools of effective international cooperation in competition law, the UNCTAD Report has enhanced transnational cooperation on these issues, especially by offering suggestions and models for achieving a higher level of convergence on competition law issues at the international level.

To summarize, even in the absence of any international organizations that currently govern or regulate international commerce through binding rules, there are still numerous multilateral instruments that have been put forth by international organizations in order to enhance and encourage cooperation between different competition authorities. Cooperation between competition authorities is vitally important and necessary for the proper functioning of the global

---

[72] ICN Merger Working Group, *Practical Guide To International Enforcement Cooperation In Mergers*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf (last visited Dec. 7, 2018).

[73] OECD, *Cross-Border Merger Control: Challenges For Developing And Emerging Economies* (2011), http://www.oecd.org/daf/competition/mergers/50114086.pdf (last visited Dec. 17, 2018).

[74] UNCTAD, *International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law*, NOTE BY THE UNCTAD SECRETARIAT, https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf (last visited Nov. 13, 2018).

commercial system. It is also crucial for competition authorities to respect each other's interests and share information with one other at every stage, whenever possible, to enable efficient cooperation between them. The earlier in the process that authorities can begin to cooperate with one other, the better and more effective such cooperation will be.

7. The Aims of Cooperation: Upsides and Downsides

Transnational mergers present a particularly complex challenge for competition authorities in terms of the international governance, regulation and supervision of such transactions. Setting aside the differences between competition authorities and their varying domestic priorities and interests, it should be noted that even if the exact same rules applied for a given merger throughout the world, contradictory results may still be reached in different jurisdictions. In addition, countries may create and impose negative externalities on each other due to the discrepancies in their decisions with respect to the same transnational transaction (*i.e.*, one competition authority may grant a clearance to a particular transaction, while another competition authority may block the exact same transaction).[75] Moreover, if one competition authority decides to block an international merger, it will thereby have a veto effect on it, as the transaction parties would either have to waive and abandon the merger as a whole or they would be required to waive it for the country in question.[76]

Therefore, the need for cooperation at a global level for the governance and supervision of international mergers is clearly vast and undeniable. Although international cooperation has increased over the last few decades to prevent or reduce possible negative externalities, there is still an obvious need for cooperation to grow faster at a global level.[77] There are two basic underlying reasons for this: (i) the rising number of international transactions occurring every day, and (ii) the increase in the number of competition authorities worldwide. Eventually,

[75] OECD, *Challenges Of Internatıonal Co-Operatıon In Competıtıon Law Enforcement* (2014), http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Co-op-2014.pdf (last visited Nov. 12, 2018).

[76] *Id.*

[77] *See* JITENDRA JAIN, *supra* note 6, at 60.

these factors will create more and more cases that will need to be handled and resolved by competition enforcement authorities, causing an ever-increasing number of potential conflicts between different competition authorities.[78]

However, in order to fully understand the risks and cope with the consequences of this type of cooperation, we must also ask: What are the pros and cons of multilateral cooperation for the countries involved? What kind of negative externalities could they prevent and what types of efficiencies would they be able to enhance through multilateral cooperation?

In this context, the *GE/Honeywell* case provides an illuminating example for our discussion of these vital issues. General Electric (“***GE***”) was the market leader for the production of large commercial aircraft engines, while Honeywell was a leading supplier of a particular piece of equipment (namely, jet engine starters) that is used in jet aircrafts.[79] Consequently, Honeywell was supplying GE with this equipment as a necessary component for the jet engines it produced.[80] Moreover, GE Capital’s leasing subsidiary was the world’s largest buyer of airplanes, with a policy of only purchasing airplanes that were fitted with GE engines.[81] When GE and Honeywell decided to merge and applied to competition enforcement authorities for a merger clearance decision, the US Department of Justice cleared the merger, while the EU Commission blocked it. Hence, we have tangible evidence that the results of a merger control analysis may differ between jurisdictions even when the substantive laws of the two jurisdictions are largely similar, based on their diverging interpretations and applications of the relevant laws. In this case, the European Commission’s blockage decision prevented the merger of GE and Honeywell both in the US and in the EU. As a result, due to the differences in the interpretation of analogous laws, a global merger had to be cancelled completely.

The critical question that must be asked at this juncture is whether a multilateral cooperation system could reduce the number of negative externalities created by the current international merger control system.

---

[78] *Id.*

[79] *See* KYLE ROBERTSON, *supra* note 53, at 155.

[80] *Id.*

[81] *Id.*

In the *GE/Honeywell* case, the transaction parties had to notify two different competition authorities of their proposed merger. If there was a "one-stop-shop" system for international merger control, the parties' merger notification and clearance costs would have been reduced significantly. Secondly, in a similar hypothetical case involving a competition authority from a developing country, it would have been much easier to obtain and collect evidence for all the relevant geographical markets through an international merger control mechanism. Thirdly, in a situation in which a developing country's competition authority was involved, expertise and guidance would be readily available through cooperation with competition authorities from developed economies. This would not only enhance the effective enforcement of antitrust regulations, but also reduce the duration of the merger control process. Fourthly, as national competition authorities naturally seek to preserve and advance the best interests of their own countries (and might neglect or fail to address the relevant global issues for the sake of protecting their national interests), they will be less likely to take actions that would maximize global welfare and enhance total consumer welfare as a result. Since a company's actions in one country may affect individuals living in another country, an international "one-stop-shop" for merger control purposes might be better suited to assessing the pros and cons of a proposed transaction at the global level. This will surely enable the maximization of consumer welfare and enhance total global welfare, which will eventually improve collective efficiency as well, because all the potential benefits and drawbacks of a proposed international merger would be taken into consideration and evaluated in a worldwide context. Lastly, the global harmonization of competition laws would create a level playing field for undertakings and market players around the world. This would not only help competition enforcement authorities to reduce the possible anticompetitive effects of international transactions and transnational commercial activities, but it would also facilitate the governance, regulation and supervision of global commerce.

There are significant benefits to multilateral cooperation in the context of international merger control. However, we cannot overlook the potential drawbacks of multilateral cooperation either. Even if multilateral cooperation does not necessarily eradicate the risk of inconsistent or contradictory decisions being rendered by different competition authorities, it nevertheless provides a common ground for establishing the general principles to be applied by all jurisdictions. There have been arguments made against binding multilateral instruments and opposition voiced to such mechanisms in the past,[82] but non-binding multilateral instruments are generally acknowledged to be tremendously useful, both for (i) addressing international competition law issues more effectively, and (ii) enhancing the development of competition law regimes at the international level. Considering all the benefits of multilateral cooperation, it can reasonably be concluded that establishing an international organization that would (i) deal solely with international mergers and acquisitions, and (ii) provide necessary and useful guidance to national competition authorities, would provide a better international merger control system than is currently available and enable more consistent governance and supervision for international merger transactions.

8. Conclusion

The globalization of commerce has created an international marketplace, in which some multinational corporations have emerged as the wealthiest and most powerful players in the world. In order to regulate and supervise the actions of these powerful undertakings in the flow of international commerce, different countries have adopted and implemented a diverse set of competition law policies. Accordingly, individual states have either (i) started to apply and enforce their own regulations extraterritorially, or (ii) tried to cooperate with other countries through bilateral cooperation agreements, or (iii) signed on (and become a party) to the multilateral agreements that have been implemented under the umbrella of international organizations. However, with the ever-increasing level of internationalization in global commerce, a convergence between the merger control systems of different jurisdictions has become especially necessary, if not inevitable. Accordingly, the establishment of a multilateral cooperation system between different jurisdictions appears to be the easiest and most effective option going forward.

[82] *See, e.g.*, MAHER M. DABBAH, *supra* note 5, at 544.

Mergers are one of the most important components of the global commercial system, and therefore, an area of key interest for competition law regimes. Thus, it is indisputable that setting up a system for the international governance and regulation of transnational merger transactions would be an efficiency-enhancing solution, at least to a certain degree. While there are various pitfalls to the extraterritorial application of domestic laws, such as the additional costs to be borne by the undertakings and competition enforcement authorities, as well as the potential incoherence and contradictions of such extraterritorial enforcement, bilateral cooperation agreements can also fall short of achieving their goals, due to the multinational aspects of transnational corporations that are operating simultaneously in multiple jurisdictions.

Accordingly, we conclude that (i) multilateral cooperation between different jurisdictions, and (ii) the convergence of competition law rules between various legal systems, would provide better opportunities to govern and regulate transnational transactions more effectively and also facilitate the development of a truly international competition law system.

Bibliography

Books and Periodicals

Jitendra Jain, *Harmonization Of International Competition Laws: Pros And Cons*, (Anchor Academic Publishing, Hamburg, 2013).

John H. Dunning, *A Business Analytic Approach to Governments and Globalization in* GOVERNMENTS, GLOBALIZATION AND INTERNATIONAL BUSINESS (Oxford University Press, 1997).

K.P.E. Lasok QC, J. Holmes, *European Union*, in Maher Dabbah and Paul Lasok, MERGER CONTROL WORLDWIDE, (Cambridge University Press, 2014).

Kyle Robertson, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31, International Competition Law Review, (2008).

Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge University Press, 2010).

Maher M. Dabbah, K.P.E. Lasok QC, *Introduction* at Merger Control Worldwide, (Cambridge University Press, November 2014).

Moritz Lorenz, *An Introduction to EU Competition Law*, (Cambridge University Press, 2013).

P.J. Lloyd, *Multilateral Rules for International Competition Law*, (Blackwell Publishers Ltd., 1998).

Roger Van den Bergh, Peter Camesasca, Andrea Giannaccari, *Merger Control*, in COMPARATIVE COMPETITION LAW AND ECONOMICS, (Roger Van den Bergh ed., Edward Elgar Publishing, 2017).

Sarah Holloway, *International Merger Control: Globalization or Global Failure*, 34 Denv. J. Int'l L. &Pol'y 353 (2006).

Stephen J. Kobrin, *The Architecture of Globalization: State Sovereignity in a Networked Global Economy* in GOVERNMENTS, GLOBALIZATION, AND INTERNATIONAL BUSINESS (Oxford University Press, 1997).

Walter Frenz, *Handbook of EU Competition Law*, (Springer, 2016).

Internet Sources

Carsten Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, Journal of Competition Law & Economics, Vol. 13, Issue 2, 1 June 2017, https://academic.oup.com/jcle/article-abstract/13/2/281/3885843 (last visited Dec. 17, 2018).

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (ECMR), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN (last visited Dec. 9, 2018).

Dimitris Liakopoulos and Armando Marsilia, *The Regulation of Transnational Mergers in International and European Law*, (BRILL, 2009), https://brill.com/abstract/title/17082 (last visited Dec. 5, 2018).

European Commission, *Empowering National Competition Authorities*, http://ec.europa.eu/competition/antitrust/nca.html (last visited Dec. 8, 2018).

European Commission, *European Competition Network Overview*, http://ec.europa.eu/competition/ecn/index_en.html (last visited Dec. 8, 2018).

European Commission, *Bilateral Relations on Competition Issues*, http://ec.europa.eu/competition/international/bilateral/ (last visited Dec. 9, 2018).

European Commission, *Competition – Bilateral Agreements – United States of America*, http://ec.europa.eu/competition/international/bilateral/usa.html (last visited Dec. 9, 2018).

European Commission, *Countries and Regions – Japan*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/ (last visited Dec. 9, 2018).

Federal Trade Commission, *US – Germany Antitrust Accord*, June 23, 1976, https://www.ftc.gov/sites/default/files/ attachments/international-antitrust-and-consumer-protection-cooperation-agreements/agree_germany.pdf (last visited Dec. 17, 2018).

Federal Trade Commission, *United States and Brazil Sign Bilateral Antitrust Agreement*, Oct. 26, 1999, https://www.ftc.gov/news-events/press-releases/1999/10/united-states-and-brazil-sign-bilateral-antitrust-agreement (last visited Dec. 9, 2018).

Federal Trade Commission, *US – Canada Enhanced Positive Comity Agreement*, https://www.ftc.gov/policy/cooperation-agreements/us-canada-enhanced-positive-comity-agreement-english-french-version (last visited Dec. 9, 2018).

Federal Trade Commission, *United States and Israel Sign Bilateral Antitrust Agreement*, March 15, 1999, https://www.ftc.gov/news-events/press-releases/1999/03/united-states-and-israel-sign-bilateral-antitrust-agreement (last visited Dec. 9 2018).

Federal Trade Commission, *United States and Japan Sign Bilateral Antitrust Agreement*, October 7, 1999, https://www.ftc.gov/news-events/press-releases/1999/10/united-states-and-japan-sign-bilateral-antitrust-agreement (last visited Dec. 9, 2018).

Federal Trade Commission, *United States and Mexico Sign Bilateral Antitrust Agreement*, July 11, 2000, https://www.ftc.gov/news-events/press-releases/2000/07/united-states-and-mexico-sign-antitrust-cooperation-agreement (last visited Dec. 9, 2018).

ICN, *Factsheet and Key Messages*, April 2009, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf (last visited Nov. 17, 2018).

ICN, *Merger Working Group*, http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx (last visited Nov. 17, 2018).

ICN Merger Working Group, *Practical Guide to International Enforcement Cooperation in Mergers*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf (last visited Dec. 7, 2018).

JOHN CAVANAGH, SARAH ANDERSON, *Top 200: The Rise of Corporate Global Power* (Institute for Policy Studies, December 4, 2000), http://www.ips-dc.org/top_200_the_rise_of_corporate_global_power/ (last visited Dec. 8, 2018).

OECD, *About*, http://www.oecd.org/about/ (last visited Nov. 17, 2018).

OECD, *International Co-operation in Competition*, http://www.oecd.org/competition/internationalco-operationandcompetition.htm (last visited Dec. 17, 2018).

OECD, *Mergers*, http://www.oecd.org/competition/mergers/ (last visited Nov. 17, 2018).

OECD, *Cross-Border Merger Control: Challenges for Developing and Emerging* Economies, 2011, http://www.oecd.org/daf/competition/mergers/50114086.pdf (last visited Dec. 17, 2018).

OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 2014, http://www.oecd.org/daf/ competition/ Challenges-Competition-Internat-Coop-2014.pdf (last visited Dec. 5, 2018).

Russell W. Damtoft, *Bilateral and Plurilateral Cooperation in Competition Cases*, (UNCTAD, Sao Paolo, 2003), https://unctad.org/en/Docs/ditcclp200382b.ppt (last visited Dec. 7, 2018).

Turkish Competition Authority, https://www.rekabet.gov.tr/tr/Sayfa/Kurumsal/uluslararasi-iliskiler/iki-tarafli-iliskiler/diger-rekabet-kurumlariyla-yapilan-i (last visited Dec. 5, 2018).

Turkish Competition Authority, *Communiqué No. 2010/4*, https://www.rekabet.gov.tr/Dosya/tebligler/2010-4-20180219095000940.pdf (last visited Nov. 30, 2018).

United Nations Conference on Trade and Employment, *Final Act and Related Documents*, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (last visited Dec. 9, 2018).

UNCTAD, *International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law*, Note by the UNCTAD Secretariat, https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf (last visited Nov. 13, 2018).

Youri Devuyst, *Toward a Multilateral Competition Policy Regime?*, Global Governance, Vol. 6, No. 3, (July-September 2000), at 319-338, https://www.jstor.org/stable/27800267 (last visited Dec. 5, 2018).

Recent Decisions of the Competition Authorities Regarding Behavioral Remedies: A Comparative Study of Turkey, the EU and the US

Gönenç Gürkaynak, Esq.[*]

Sinem Uğur[**]

Gizem Tahiroğulları[***]

A- Introduction

Mergers[1] may lead to certain competitive harms that are prohibited by virtually every merger control regime in the world. To avoid the outright prohibition of a transaction that is expected to both raise several competition concerns and create pro-competitive efficiencies, the transaction may be modified through various remedies in order to eliminate the expected competitive risks without also losing its other benefits and expected efficiencies arising from the transaction (such as improved product/service quality, greater choice for consumers and increased innovation, among others).

The identification of a remedy suitable to the envisaged competitive detriments of a proposed transaction is a sensitive and complicated issue, which necessitates a detailed analysis of the transaction itself and the markets affected by the transaction. For this purpose, and depending on the particular competition risks that a

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Sinem Uğur is an associate at ELIG Gürkaynak Attorneys-at-Law.

[***] Gizem Tahiroğulları is an associate at ELIG Gürkaynak Attorneys-at-Law.

[1] The term "merger" is used collectively for mergers, acquisitions and joint ventures throughout this article, unless indicated otherwise.

transaction may lead to (such as whether they are of a vertical or horizontal nature), remedies may be imposed to modify the transaction and thereby eliminate the competition concerns. In this context, remedies can mostly be divided into two groups: (i) structural remedies and (ii) behavioral remedies. Nevertheless, hybrid remedies (that have both structural and behavioral aspects) are also available and they have been effectively applied by competition enforcement authorities worldwide.[2]

This article aims to identify and analyze the approach of the competition authorities in Turkey, the European Union ("***EU***") and the United States ("***US***") with regard to behavioral remedies. We will first describe the general features, characteristics, scope and effects of behavioral remedies and clarify these issues from the perspective of the competition enforcers and judicial authorities in the abovementioned three jurisdictions. Subsequently, we will offer information and analysis on the most recent cases in the US, the EU and Turkey in order to provide some guidance for a comparative assessment of these jurisdictions. Accordingly, we will offer our evaluations of the policy implementations (stemming from the relevant legislations and regulatory/judicial decisions) in Turkey, the EU and the US as well.

B- Classification of Behavioral Remedies and Structural Remedies

Structural and behavioral remedies differ from one another primarily in that structural remedies involve the divestiture of a certain asset (mostly concerning the sale of one or more existing businesses, but sometimes involving the sale of physical assets or other rights as well) to a third party (*i.e.*, another player already active in the market or a new entrant), while behavioral remedies relate to the modification and arrangement of the transaction parties' future market behaviors.[3] In both

---

[2] An illuminating example of hybrid remedies is presented by the types of divestiture that require a relationship between the merged entity and the purchaser of the divested business after the divestment procedure. This may be necessary due to the purchaser's need for assistance (*e.g.*, technical assistance or supply requirement during the transition period) in order to operate the divested business independently.

[3] Jones, A. and B.E. Sufrin, EU Competition Law: Text, Cases and Materials (5th ed. 2014), p. 1247.

types of remedies, the main goal is to limit the anticompetitive effects of the contemplated transaction and to protect the competitive structure of the market and keep it as it was prior to the transaction.

C- Definition and Most Common Types of Behavioral Remedies

Behavioral remedies[4] involve constraints on the future conduct of a merged entity (through the parties' commitments with respect to certain contractual clauses)[5] with the objective of "*encouraging competition through conditions and prohibitions on behavior that prevent the merged firm from undermining competition.*"[6] Therefore, behavioral remedies can either facilitate competition (*e.g.*, improving information flow to customers, reducing switching costs, opening up tender processes, etc.) or aim to control specific outcomes, such as price controls, service level agreements, and supply commitments, among others.[7] Since behavioral remedies concern the merged undertaking's future conduct, they are not as simple or straightforward as asset divestitures (*i.e.*, structural remedies). Therefore, they require effective monitoring of the merged entity's implementation of the remedies to ensure its compliance with the commitments that were submitted to and accepted by the relevant competition authority for eliminating the anticipated competition concerns of the proposed transaction.

Behavioral remedies can be preferred and applied on their own as "standalone" solutions. However, they can also be used for assisting structural remedies and/or employed during the transition period for the implementation of structural remedies in order to make them more effective. These remedies are generally effective on their own for

---

[4] In competition law literature, behavioral remedies are often referred to as "non-structural" or "conduct" remedies as well.

[5] United Nations Conference on Trade and Development, *Challenges in the design of a merger control regime for young and small competition authorities*, (April 26 2017), p. 11, https://unctad.org/meetings/en/SessionalDocuments/ciclpd45_en.pdf (last visited January 4, 2019).

[6] Merger Remedies Guide 2016, International Competition Network (ICN) Merger Working Group (2016), p. 8.

[7] *Id.*, p. 17.

dealing with competition concerns raised by vertical mergers, as the competition concerns in these mergers are rather focused on the foreclosure risks in the upstream or downstream markets, where a structural remedy could be less applicable or successful. Moreover, behavioral remedies can also be used for the elimination of competitive concerns raised by horizontal mergers; however, in such cases, they are usually implemented in conjunction with structural remedies in order to complement and ensure their effectiveness.

Although behavioral remedies could be divided into various sub-segments, the most common types can be summarized as follows:

1- Non-Discrimination Obligation

Non-discrimination provisions are utilized to ensure equal access, equal efforts and equal terms, and they can be considered as useful remedies when there is a risk that the upstream entity may favor the downstream entity. By implementing a non-discrimination obligation, an upstream entity may be required to supply all downstream entities on equal sales terms (*i.e.*, with respect to price, delivery times, product quality, etc.) and be prevented from engaging in refusal to supply.

2- Mandatory Licensing

Mandatory licensing in the form of a behavioral remedy consists of granting licenses, such as licenses regarding intellectual property ("***IP***") rights, technology, patents or other assets. This is particularly useful when the competitive concern in a proposed transaction arises from the risk that other market players may not be able to compete with the merged entity and that innovation in the relevant market would be stifled if the market players could not gain access to, for instance, a specific IP. However, this remedy should be differentiated from the assignment or licensing of an IP right that is exclusive, irrevocable and non-terminable with no ongoing royalties, as this type of assignment/licensing would then constitute a structural remedy. In this regard, a divestiture or sale of a license that requires the licensee to rely on the licensor for upgrades, supplies, etc., could also be considered as a hybrid remedy[8] that has both structural (in terms of the divestiture/sale process) and non-structural (*i.e.*, licensee must rely on the licensor)

[8] *Id.*, p. 13.

elements, in which the non-structural aspects would necessitate monitoring requirements. In this context, requiring licensing arrangements instead of a license divestiture, for instance, may be beneficial for increasing customer choice and providing better access to alternative products in the relevant market. Therefore, license-related remedies may be implemented as both structural and behavioral remedies.

3- Access Remedies

Access remedies require the merged undertaking to provide access to key infrastructure, networks, critical technologies such as patents, know-how or other IP rights, and mandatory inputs.[9] In some cases, the business operations of competing market players may be dependent on gaining access to such assets of the merging entities. Therefore, these types of remedies may be particularly suitable when the merger transaction and the changing market structure lead to significant entry barriers due to certain rights that are held by the merged undertaking.[10] In this regard, they may eliminate foreclosure concerns, provide competitors with information or IP rights that their operations depend on, and also facilitate the entry of new players into the relevant market.[11]

4- Non-retaliation

Non-retaliation provisions may serve to prevent the merged entity from retaliating against customers or other parties who conduct business (or who contemplate conducting business) with the merged entity's competitors. Such provisions may come in various forms, such as prohibiting the merged entity from including provisions in its customer agreements that are aimed at restricting competing entities' activities or otherwise creating incentives to retaliate against competitors.

5- Contracting Limitations

In some situations, a merged entity may use restrictive or exclusive contracting provisions in order to block competitors' access to a vital

---

[9] Bilaçlı, C., *Behavioral Remedies in Mergers and Acquisitions Restricting Competition*, Competition Authority Dissertation, Ankara, p. 7 (2017).

[10] Paas, K., *Implications of the Smallness of an Economy for Merger Remedies*, European Competition Law Review, Vol. 27, No: XV, p. 210 (2008).

[11] Merger Remedies Guide 2016, *supra* note 6, p. 30.

input in an anticompetitive manner.[12] Therefore, imposing limits on the merged entity's ability to enter into restrictive or exclusive contracts, or to impose modifications in or even terminations of its existing contractual arrangements (especially long-term supply or distribution agreements and contracts with key customers containing automatic renewal provisions)[13] may be useful to protect the effective competition in the market and avoid, for instance, the foreclosure of a divestiture purchaser from obtaining business (in a horizontal merger) or closing off access to upstream of downstream markets.[14]

6- Firewall Provisions

Firewalls are designed to prevent the dissemination of business secrets and other confidential information within an enterprise. For example, if an upstream manufacturer proposes to merge with one of several downstream distributors who compete against each other, the competition authorities may be rightfully concerned that the manufacturer will share information with its acquired distributor in order to facilitate anticompetitive behavior. In this example, a firewall may also be useful to prevent the dissemination of information in the downstream market for the purpose of coordination between the distributors. In general, firewall provisions are stipulated for a limited period of time.

7- Transparency Provisions

Making certain information available to a regulatory authority that the undertaking would otherwise not be required to provide by law can be also submitted and considered as a behavioral remedy. By enabling the disclosure of prices, terms and conditions, or other data, such transparency provisions may reveal competition law violations in the form of discrimination among customers.[15]

---

[12] US Department of Justice, *Antitrust Division Policy Guide to Merger Remedies*, (June 2011), p. 17.

[13] Faull, J. and A. Nikpay, *The EU Law of Competition*, Third Edition, Oxford University Press, (2014), New York, p. 781; *see also* Bilaçlı, *supra* note 9, p. 8.

[14] Merger Remedies Guide 2016, *supra* note 6, p. 30.

[15] An example of a transparency provision used as a behavioral remedy is provided by the OECD's US chapter, as follows: "*[A] consent order may require a telecommunications firm to inform a regulatory agency of the prices the firm is*

8- Limited Behavioral Remedies

To ensure the effective implementation of structural remedies, it may be necessary to impose behavioral remedies in conjunction with the structural remedies (these are known as "hybrid remedies"). In this context, limited behavioral remedies, which can take the form of short-term supply agreements or technical assistance provided by the merged entity to the purchaser during the transition period, could prove useful for maintaining the viability of the divested business (especially if it's a complex production facility or in the case of a divestment that involves a technology transfer).[16]

9- Other Types of Behavioral Remedies

The remedy types discussed above do not constitute an exhaustive list of behavioral remedies and other types of behavioral remedies could be applicable depending on the merits and characteristics of a particular case. In this regard, other types of applicable behavioral remedies include: (i) notice of otherwise non-reportable mergers, (ii) supply contracts, and (iii) restrictions on reacquisition of scarce personnel assets.[17]

D- Benefits of Behavioral Remedies

Most competition enforcement authorities worldwide tend to favor structural remedies[18] over behavioral remedies, due to the "one-off" nature of structural remedies. In structural remedies, generally speaking, a part of the business of one of the transaction parties is separated and excluded from the post-transaction entity (*i.e.*, merged entity), without

---

charging customers for telecommunications equipment, even though the regulatory agency may not have the authority to regulate those prices. The additional information can aid the regulatory agency in preventing the firm from engaging in regulatory evasion by, for example, charging telecommunications equipment clients with which it competes for provision of telecommunications services higher prices than it charges its other telecommunications equipment customers." See OECD Policy Roundtables, Remedies in Merger Cases 2011, footnote 15 at page 225.

[16] Merger Remedies Guide 2016, *supra* note 6, p. 30.

[17] US Department of Justice, *Antitrust Division Policy Guide to Merger Remedies*, (June 2011), p. 17.

[18] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 19, 24.

necessitating any major monitoring requirements. Therefore, structural remedies may appear to provide effective and straightforward solutions to competitive concerns, at least at first glance. However, this is not necessarily always the case, depending on the nature of the transaction and the relevant market structure. This may be particularly true in the case of complex transactions and markets, in which conventional remedies (such as divestiture) may not always be adequate for eliminating the competition concerns and providing satisfactory solutions to the problems arising from the transaction. For instance, in the case of a vertical merger that would lead to foreclosure in the upstream or downstream market, behavioral remedies that regulate and monitor the conduct of the merged entity in the post-transaction market would be more useful, as they would either oblige the merged undertaking to act in a certain way (*i.e.*, positive behavioral obligations) or require it to avoid certain conducts (*i.e.*, negative behavioral commitments).

Moreover, after careful consideration, behavioral remedies could even be seen as more suitable and beneficial depending on the facts and merits of the case, if they address the competitive concerns without the need for a divestiture that could disrupt one or both of the transaction parties' businesses and that would generally inflict higher costs (in terms of time and expenses) and thus be more burdensome for the merging parties.

The ICN Merger Working Group initially defined three circumstances, in particular, in which behavioral remedies would take precedence over structural remedies, and these were later confirmed by the OECD in 2011[19] These three circumstances are as follows:[20]

- "*when a divestiture is not feasible or subject to unacceptable risks (e.g. absence of suitable buyers [which can be the case, for instance, if there are simply no interested purchasers or the consolidated nature of an industry or the nature of a small economy excludes third*

[19] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 20.

[20] ICN Merger Working Group, *Merger Remedies Review Project, Report for the fourth ICN annual conference* (2005), p. 12, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesReviewReport.pdf (last visited January 4, 2019).

parties from purchasing the divested assets]) and prohibition is also not feasible (e.g. due to multi-jurisdictional constraints [in case of cross-border transactions]), or

- *when the competitive detriments are expected to be limited in duration owing to fast changing technology or other factors, or*

- *when the benefits of the merger are significant (e.g. in some vertical mergers behavioral remedies are substantially more effective than divestitures in preserving these benefits in the relevant case).*"

The ICN Merger Working Group, in its 2016 Merger Remedies Guide, further elaborated its view on the circumstances in which behavioral remedies would be more suitable than structural remedies or in which structural remedies would simply not be possible. Accordingly, the ICN emphasized in its report that, in some cases, divesting assets could make the transaction unfeasible.[21] On the other hand, the ICN has also stated that, "*The characteristics of an industry may not support a viable divestiture due to: the absence of suitable purchasers; limited options to create or support a viable standalone business; risk of significant customer attrition; or, risk that a purchaser will be unable to carry on the business going forward*."[22] The ICN Merger Working Group further analyzed the advantages of behavioral remedies in the context of vertical mergers separately (along with other circumstances where a structural remedy would not be suitable) and evaluated that, in such cases, behavioral remedies could be an effective method for eliminating the anticompetitive effects that are likely to arise from the proposed transaction.

Additionally, the ICN Merger Working Group once again stated the arguments in the second and third bullet-points listed above and emphasized the importance of providing a behavioral interim relief (such as technical assistance) to complement the structural remedy until such time as the structural remedy is fully implemented.

[21] In such a case, if behavioral commitments are not able to address the competitive harms that are likely to result from the merger, the merger may be prohibited by the competition authority.

[22] Merger Remedies Guide 2016, *supra* note 6, p. 9.

Finally, the ICN Merger Working Group highlighted the remedies that prescribe certain conducts in connection with a regulatory system, so that the monitoring/policing function may be undertaken and carried out by a specialized regulatory agency. The specific definition of such a regulatory agency would depend on the jurisdiction of the competition authority accepting and implementing the remedy, and it would be relevant as long as it has a monitoring/policing function with respect to the agreed remedy.

E- Difficulties of Behavioral Remedies and How to Minimize Them

All types of remedies have their own advantages and disadvantages, and they all carry certain risks in terms of the composition[23] and implementation of the necessary remedies to prevent the anticipated competition harms. However, the most significant challenge with respect to behavioral remedies lies primarily in the implementation phase rather than the composition phase, since behavioral remedies require significantly more monitoring (which may continue for months or years) to ensure compliance than structural remedies, which are highly straightforward and usually one-off by nature. Accordingly, the monitoring requirement to ensure the merged entity's continuing compliance with the accepted remedies is often the most unfavorable and problematic feature of behavioral remedies as compared to structural remedies.

Based on the ICN Merger Working Group's[24] and the OECD's[25] explanations on the relevant factors that should be taken into account when considering behavioral remedies, it can be said that:

(i) High implementation costs associated with ongoing monitoring (necessary for the effective implementation of behavioral remedies), oversight and enforcement activities may ensue;

---

[23] "Composition" refers to the selection and design of the most appropriate remedy to address the competitive concerns.

[24] Merger Remedies Guide 2016, *supra* note 6, p. 10.

[25] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 11.

(ii) Competition authorities may be not well equipped for engaging in long-term oversight of the merged entities' conduct and compliance with the behavioral remedies;

(iii) Merging entities may tend toward non-compliance and find it easier to circumvent, evade or manipulate their commitments, as the compliance to behavioral remedies may be at odds with entities main purpose which is to increase their profits since behavioral remedies may be at odds with this purpose;

(iv) It may be difficult to gauge how long it will take for new entries, expansion, or other relevant changes to occur in the relevant market, which would need to be taken into consideration in determining the appropriate duration of a behavioral remedy;

(v) Behavioral remedies may lead to market distortion, as they may either (a) prevent the merged entity from efficiently responding to changing market conditions, or (b) restrain or prevent potentially pro-competitive conduct by the merged entity.

The disadvantages of behavioral remedies listed above relate mostly to the implementation phase. Although these are substantial factors that should not be overlooked by competition authorities, it could be said that there are applicable solutions for avoiding or minimizing each one of these drawbacks. Accordingly, provided that the behavioral remedies actually address the anticipated competition concerns from a proposed merger without requiring or necessitating any structural remedies, the following solutions can be used to ameliorate or eliminate the disadvantages listed above:

(i) In terms of costs, even if the competition enforcement agency lacks sufficient financial resources for the implementation of a behavioral remedy, such costs could be borne by the merging entities themselves, if they are financially capable of doing so and if they would prefer this solution to a potential divestiture or the outright prohibition of the transaction. In fact, implementation costs are already borne by the transaction parties in a merger; therefore, it could be said that competition authorities do not face a high financial burden in this context.

(ii) As is often the practice, independent monitoring trustees can be appointed to assist with the implementation of the remedies (for both structural and behavioral remedies). Once such trustee(s) are appointed by the competition authority, they can carry out the monitoring tasks and report to the competition authority on their activities in order to ensure the effective oversight of the competition authority over the merged entity and to avoid any incompliance problems.

(iii) If it is not possible for the competition authority to apply sanctions or penalties on the merged entity in case of non-compliance (*i.e.* if the competition authority is not empowered or authorized to do so), then a behavioral remedy cannot be imposed in the first place.[26] If the competition authority is properly equipped with such enforcement tools, then it can use them to ensure the compliance of the merged entity either by imposing penalties or through other sanctions, as long as it has effective oversight over the conduct of the merged entity that is subject to the behavioral remedies, which can also be realized through a trustee, as explained above.

(iv) By definition, behavioral remedies are concerned with and relate to the future conduct of the merged entity. Therefore, competition authorities may not be able to predict each and every new development that will affect the implementation of the remedies in the future. However, based on the specifics of the behavioral remedy, precise revision clauses allowing for the commitments to be suitably (and justifiably) modified can be included in the initial behavioral remedy package. This would minimize the risks of unpredictable and unforeseen developments that could lead to rendering the behavioral commitments inapplicable or incapable of addressing the expected competitive concerns.

[26] The challenges of remedies in cross-border mergers are excluded from the scope of this argument, since similar cross-border challenges may arise in both structural and behavioral remedies. In this regard, a structural remedy (for instance, by means of a divestiture of an asset located abroad) may face similar challenges as a behavioral remedy, such as a certain conduct in a different jurisdiction, as the oversight ability of the competition authority would be highly restricted outside of its own jurisdiction. In such cases, international cooperation between competition authorities may be useful for increasing the effectiveness of the remedy (for both structural and behavioral remedies).

(v) Including revision clauses in behavioral remedy agreements is also an applicable solution for market distortion risks that may arise from behavioral remedies. Once again, specific revision clauses may be inserted into the initial behavioral remedy agreement if market distortions would be expected to arise or occur during the course of the behavioral remedy.

In line with the foregoing considerations, it can be reasonably concluded that the negative effects of behavioral remedies can be overcome to a significant extent, as long as they succeed in addressing the likely competition concerns expected to arise from the proposed merger.

F- Behavioral Remedy Policies of Different Jurisdictions and Recent Precedents

We will first offer brief explanations regarding the behavioral remedy policies that are in effect in the EU, the US and Turkey in order to provide a factual and doctrinal basis for the ensuing comparison between the three jurisdictions, which will involve information and analysis on recent precedents in these three jurisdictions.

➢ *European Union*

The EU merger control regime is set out in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 20.1.2004 ("***EUMR***"), and the responsible authority for implementing and enforcing this merger control regime is the European Commission ("***Commission***"). As per the EUMR, the European Commission reviews large-scale concentrations that have a "Union dimension."[27] Other transactions subject to the merger control regime will be reviewed by the respective national competition authorities. The policy for accepting remedies is regulated under the Commission notice on remedies acceptable under Council

[27] A concentration will be subject to the EUMR if the aggregate worldwide turnover of all the transaction parties exceeds €5 billion and the aggregate Union-wide turnover of each of at least two parties exceeds €250 million, unless each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same Member State.

Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008 ("***Remedy Notice***"). As confirmed in the OECD's Remedies in Merger Cases:[28] "*The guiding principle – already explained in the EU Merger Regulation, endorsed by the European Courts*[29] *and set out in detail in the Remedies Notice – is that remedies have to eliminate the competition concerns raised by a concentration entirely and must be comprehensive and effective from all points of view.*"[30]

The Commission may grant conditional approval to mergers under the EUMR. The EUMR also asserts that the remedies should be: (i) proportionate to the competition problem and (ii) capable of completely eliminating the competitive concerns (see para. 30).

The Remedy Notice provides further guidance on the characteristics of acceptable remedies under the EU merger control regime. Accordingly, the Remedy Notice indicates that divestitures are considered to be the benchmark for other remedies in terms of evaluating their effectiveness and efficiency. Furthermore, the Remedy Notice lists (i) divestitures and (ii) removal of links with competitors as the preferred types of remedies; it further notes that, in cases where the links contribute to the competition concerns raised by the merger, the divestiture of minority shareholding may be necessary.[31] Therefore, behavioral remedies do not seem to be considered as sufficient to eliminate competitive concerns when they are unaccompanied by structural remedies.

---

[28] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 233.

[29] *See* judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II5575, para. 52 ("*General Electric*") and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 ("*EDP/GDP/ENI*").

[30] *See* Recital 30 of the EU Merger Regulation; para. 9 of the Remedies Notice; and judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 52 ("*General Electric*") and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 ("*EDP/GDP/ENI*").

[31] As per para. 58 of the Remedy Notice, "*The divestiture of a minority shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor [Case IV/M.942 — VEBA/Degussa of 3 December 1997.], or, similarly, the divestiture of a minority shareholding in a competitor [Case COMP/M.3653 — Siemens/VA Tech of 13 July 2005, paragraphs 491, 493 ff].*"

Nevertheless, the Remedy Notice also confirms that divestitures and removal of links are not the only possible remedies to eliminate competition concerns and does not exclude behavioral remedies completely, by indicating that the Commission may accept other types of commitments, but only in circumstances where the alternative remedy proposed is at least equivalent in its effects to a divestiture.[32]

The Remedy Notice does not include any detailed explanations on the types of behavioral remedies and how they might be implemented considering the variety and diversity of behavioral remedies,[33] but provides an analysis of behavioral remedies under three subchapters: (i) access remedies, (ii) change of long-term exclusive contracts, and (iii) other non-divestiture remedies. Access remedies are often used in practice, whereas other behavioral remedies are only accepted under exceptional circumstances.[34] In this regard, access remedies are used to lower entry barriers so that it is easier and more likely for new entrants to enter the relevant market and to eliminate foreclosure effects, assuming that the competitors will actually take advantage of such commitments. Nonetheless, the Remedy Notice also emphasizes that the Commission will only be able to accept such commitments in cases where (i) the complexity of the proposed remedies will not put their effectiveness at risk from the outset, and (ii) the proposed monitoring devices will ensure that such commitments will be effectively implemented, and (iii) the enforcement mechanism will lead to timely results,[35] and (iv) if they will have the same effect as a divestiture.[36]

Behavioral commitments other than access remedies may be acceptable only in exceptional cases under very specific circumstances, and they will generally not be acceptable for the purpose of eliminating competition concerns resulting from horizontal overlaps. However, it is confirmed that "*long term supply contracts can create links and*

---

[32] For instance, *see Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio*, No. COMP/M.3680 (28 April 2005), where a divestiture was impossible.

[33] Bilaçlı, C., *supra* note 9, p. 15.

[34] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 236.

[35] *See* judgments of the Court of First Instance in *EDP v. Commission,* No. T-87/05 [2005] ECR II-3745, at paragraphs 102 et seq., and *easyJet v. Commission,* No. T-177/04 [2006] ECR II-1931, at paragraph 188.

[36] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 237.

interaction between competitors and promote information dissemination about the cost structures of the competitor." Therefore, the termination or change of existing exclusive agreements may be considered as an appropriate remedy to eliminate such competition concerns.[37]

Other behavioral remedies, such as promises by the transaction parties to abstain from certain commercial behaviors (*e.g.*, bundling products), will generally not be deemed sufficient to eliminate the competition concerns resulting from horizontal overlaps, and they are considered to be difficult in practical terms, based on the absence of effective monitoring systems for their implementation. Hence, the Remedy Notice states that these behavioral remedies can only be accepted in rare circumstances and for specific purposes, such as eliminating conglomerate concerns.[38]

As seen from the Remedy Notice, the Commission has adopted a rather distant and skeptical stance against behavioral remedies. Nevertheless, we observe that the Commission has gradually progressed toward a more inclusive approach with respect to such remedies. As a result of this shift in the Commission's attitude, it has abandoned its approach of excluding behavioral remedies categorically, and started to focus on their efficiency and sufficiency with respect to addressing the expected competition harms that may result from a proposed merger.[39]

---

[37] *Newscorp/Telepiù,* No. COMP/M.2876 (April 2, 2003), paragraphs 225 et seq., granting unilateral termination rights to suppliers of TV content, limiting the scope of the exclusivity clauses, and limiting the duration of future exclusive agreements relating to supply of content; *ENI/EnBW/GVS,* No. COMP/M.2822 (December 17, 2002), granting early termination rights to all local gas distributors concerning long-term gas supply agreements; *New Holland,* No. IV/M.1571 (October 28, 1999); *Rohm and Haas/Morton,* No. IV/M.1467 (April 19, 1999).

[38] *See*, in relation to the conglomerate effects of a concentration, ECJ's judgment (February 15, 2005) in *Commission v. Tetra Laval,* No. C-12/03 P [2005] ECR I-987, paragraphs 85, 89.

[39] For instance, in the *Gencor v. Commission* case from 1999 (*Gencor v. Commission*, No. T-102/96 (1999) ECR II-753, para. 319), the Court of First Instance ruled that the categorization of a proposed commitment as "behavioral" or "structural" is therefore immaterial and the possibility of their use cannot automatically be ruled out, and that commitments which are *prima facie* behavioral may themselves also be capable of preventing the emergence or strengthening of a dominant position.

- *United States*

As confirmed by the OECD's Remedies in Merger Cases,[40] the merger control regime in the US conducts its competition evaluations under two key substantive merger control statutes, namely the Sherman Act[41] and the Clayton Act.[42] Furthermore, the Hart-Scott-Rodino Act[43] governs premerger notification procedures and requires transaction parties who meet certain monetary thresholds to notify the US government and observe waiting periods before consummating their mergers.

In the United States, there are two federal competition enforcement agencies, which are the Antitrust Division of the US Department of Justice ("***DOJ***") and the US Federal Trade Commission ("***FTC***") (together "***Agencies***"). These Agencies are responsible for analyzing, implementing and enforcing merger remedies, and therefore, they review and assess proposed merger transactions in order to determine whether they have anticompetitive effects. Both Agencies have issued guidelines on the merits, advantages and implementation procedures of various merger control solutions. One of these guidelines is the "Antitrust Division Policy Guide to Merger Remedies," issued by the DOJ in 2011, and the other is the "Statement of the FTC's Bureau of Competition on Negotiating Merger Remedies," issued by the FTC in 2012. The FTC has also issued a guideline containing answers to "Frequently Asked Questions About Merger Consent Order Provisions" in 2003, which provides information on settlement procedures as well. The guidelines collectively provide valuable guidance for designing merger control solutions and techniques that can eliminate the anticompetitive effects that are likely to arise from merger transactions.

The FTC's guidelines demonstrate the agency's approach to different merger solutions and reveal a clear preference for structural remedies over behavioral remedies. The guidelines focus particularly on divestitures, and from the perspective of horizontal mergers (which constitute most of the merger cases according to the guidelines), a behavioral remedy is only considered as an "*aid of a required divestiture*

---

[40] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 221.

[41] US Code Title 15, para. 1-2.

[42] *Id.*, para. 18.

[43] *Id.*, para. 18a.

to remedy those effects." Nevertheless, in the case of vertical mergers, it is acknowledged that behavioral remedies may be required to remedy the anticompetitive effects of the proposed transaction. Accordingly, it is indicated in the guidelines that such behavioral remedies "*may include a requirement to erect firewalls to protect confidential information or a requirement not to favor certain entities*"; however, no further guidance is provided with respect to the composition, design or implementation of non-structural remedies.

The DOJ's initial attitude toward behavioral remedies was very similar to the FTC's approach. In the 2004 version of the Merger Remedies Policy Guide, behavioral remedies had been categorized as remedies of last resort, and it was indicated that they could only be suitable for use in limited circumstances. Indeed, the 2004 Merger Remedies Policy Guide explicitly stated that "*[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement.*"[44]

This approach evolved in time with the issuance of the revised Policy Guide to Merger Remedies in 2011. The 2011 amendments were more favorably disposed toward the use of behavioral remedies that prohibit specific anticompetitive behaviors of the merged undertakings. In this regard, the 2011 version of the Merger Remedies Policy Guide did (i) remove the statement asserting the DOJ's preference for structural remedies, (ii) delete comments to the effect that behavioral remedies were only appropriate in a narrow set of circumstances, and also (iii) provide an expanded list of behavioral remedies. The 2011 Merger Remedies Policy Guide stated that *"[i]n certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances behavioral relief may be the best choice."* It also confirmed that "*Conduct [behavioral] remedies can be an effective method for dealing with competition concerns raised by vertical mergers and also are sometimes used to address concerns raised by horizontal mergers (usually in conjunction with a structural remedy).*" This policy revision was reflected in three recent merger decisions,

[44] US Department of Justice, *Antitrust Division Policy Guide to Merger Remedies*, para. III.A (October 2004).

where, in quick succession, the proposed transactions were all permitted to proceed subject to substantial behavioral remedies. These cases involved the mergers of *Ticketmaster-Live Nation*, *Google-ITA*, and *Comcast-NBCU*, which are analyzed in detail below.

Nonetheless, in September 2018, the DOJ announced reforms to merger review process. In this scope, the DOJ's current Assistant Attorney General for the Antitrust Division, Makan Delrahim, announced that the 2011 Remedies Guide would be withdrawn and the 2004 version of the Merger Remedies Policy Guide would be reinstated until the release of an updated policy[45]. Therefore, the rather short trend of warming up to behavioral remedies in the US retreated once again as the DOJ's current Assistant Attorney General for the Antitrust Division, Makan Delrahim, has made it also clear in the past that his regime will look at behavioral remedies with a much more critical eye.[46] Makan Delrahim has previously illustrated the newly skeptical stance of the DOJ toward behavioral remedies by announcing "*(...)a renewed emphasis on seeking structural relief when possible, as opposed to regulatory behavioral conditions, to remedy anticompetitive mergers. Doing so is consistent with the Division's broader emphasis on antitrust as law enforcement, not regulation."*

Likewise, the FTC's Acting Director, Bruce Hoffman, has also criticized behavioral remedies in his speech on "Vertical Merger Enforcement at the FTC"[47] and declared that "*we prefer structural remedies—they eliminate both the incentive and the ability to engage in harmful conduct, which eliminates the need for ongoing intervention.*"

---

45 *See* Press Release, US DOJ, *Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium*, (April 26, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust (last visited January 4, 2019).

46 *See* Press Release, US DOJ, *Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation*, (April 26, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second (last visited January 4, 2019).

47 *See* Remarks of D. Bruce Hoffman, Acting Director, Bureau of Competition, *Vertical Merger Enforcement at the FTC* (January 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (last visited January 4, 2019).

Consequently, it can be said that the approach of the enforcement authorities in the US will tend to favor structural remedies over behavioral remedies going forward, and that such structural remedies will be preferred by the Agencies in future cases where it will be necessary for the merging parties to submit commitments to the competition law authorities.

➢ *Turkey*

In Turkey, the merger control regime is regulated under the Law on the Protection of Competition No. 4054, dated December 13, 1994 ("***Law No. 4054***"), and the related communiqués published by the Turkish Competition Authority ("***TCA***"), which is the national regulatory body that is responsible and authorized for the enforcement of the Law No. 4054. In particular, Article 7 of the Law No. 4054 governs merger and acquisition ("***M&A***") transactions. The competent decision-making body of the TCA is the Turkish Competition Board ("***Competition Board***" or "***Board***" or "***TCB***"), which is responsible, *inter alia*, for reviewing, analyzing and resolving M&A notifications.

As per Article 7, the Competition Board is authorized to regulate, through its communiqués, which mergers and acquisitions must be notified to the competition authorities in order to become legally valid. Further to this provision, the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), which was published on October 7, 2010, is the primary instrument for assessing merger cases in Turkey.

Guidance on acceptable remedies is provided by the "Guidelines on the Remedies that are Acceptable by the Turkish Competition Authority in Merger and Acquisition Transactions" ("***Guidelines***"). Similar to the approach in the US and the EU, the Guidelines explicitly underline the Board's preference for divestitures (and/or removal of links with competitors), due to their beneficial features, such as (i) producing a sustainable result in the short term with respect to eliminating the expected competition problems, and (2) not creating additional costs or expenses for the TCA in terms of the supervision/monitoring of the market behavior of the merged entity following the implementation of the remedies. Nonetheless, the Guidelines indicate that access remedies and non-discrimination obligations may also be considered and utilized as effective behavioral remedies under certain circumstances, depending on a case-by-case analysis.

The Guidelines establish that behavioral remedies may only be accepted by the Board in exceptional cases and only when an equally effective structural remedy cannot be found. Once again, such behavioral remedies would only be acceptable to the Board if they were found to be capable of attaining a similar level of efficiency as the structural remedies with respect to eliminating the expected competition problems arising from the merger. In this regard, the Guidelines also emphasize the various difficulties and drawbacks associated with behavioral commitments, such as (i) the monitoring requirement, (ii) the possibility that the merged entity may subvert or defy the main purpose of the remedy, thus evading its behavioral responsibilities, without necessarily infringing its written commitments (*i.e.*, violating the spirit but not the letter of the behavioral remedy), and (iii) the risk that the behavioral remedies may prevent behaviors that may, in fact, be procompetitive. In any case, the Guidelines confirm that ensuring an efficient implementation and monitoring system for the remedy is considered as a preliminary condition for accepting a behavioral remedy.

The Guidelines further state that behavioral remedies are rarely used as standalone solutions on their own to address anticipated competition concerns, but rather implemented in conjunction with structural remedies in order to support said structural remedies. Therefore, it can be concluded that the Board's preference with respect to merger remedies would be to consider structural remedies first, and then look at hybrid remedies (if structural remedies are not available/feasible), rather than to embark on a consideration of behavioral remedies alone. In this context, the Guidelines offer the example of behavioral commitments that are undertaken during the transition period of a divestment business in a merger transaction. Nevertheless, the Board finally acknowledges that—if it is impossible to implement structural remedies in a particular case—then the application of behavioral remedies as a standalone solution could also be considered (for instance, in strictly regulated markets) after analyzing the sufficiency of such behavioral remedies based on an examination of the costs and risks involved with their implementation and monitoring requirements. In this context, the Guidelines also suggest that such remedies may be limited in time, but the duration of behavioral remedies would depend on the specific facts and merits of each case.

As for the different types of behavioral remedies, the Guidelines specifically list (i) access remedies and (ii) remedies involving change of long-term exclusive agreements, and explain in detail under which conditions (and how) such remedies could be effective in eliminating competition problems to achieve the goals of the merger control regime. Although the Guidelines fail to provide any details on other types of behavioral remedies, the Board's precedents clearly show that the Board has accepted other behavioral remedies in the past, even before the Guidelines were issued.[48] For instance, other behavioral remedies that have been accepted and implemented by the Board in previous decisions include: (i) promise not to be active in the same market as the established JV,[49] (ii) provision of equal distributorship,[50] (iii) joint participation in tenders,[51] (iv) supplying periodical information,[52] (v) fair dealing clauses,[53] and (vi) limiting production capacities.[54] Likewise, as will be seen in the precedents discussed below, the Board has continued to adopt various behavioral remedies after the issuance of the Guidelines. Moreover, the fact that the Board has accepted purely behavioral remedies in the *Bekaert/Pirelli* case can be seen as a positive indication (and an encouraging sign) that the Board may consider and allow the effective use of behavioral remedies in the future.

---

[48] Bilaçlı, C., *supra* note 9, p. 53; OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 201.

[49] *Metro/Migros*, No. 57/424-52 (TCB, March 19, 1998).

[50] *New Holland/Trakmak*, No. 67/517-84 (TCB, May 28, 1998).

[51] *Garanti Koza/Balfour*, No. 00-29/307-174 (TCB, August 03, 2000).

[52] *Borusan/Mannesmann*, No. 80/617-119 (TCB, August 20, 1998).

[53] *THY/DoCo*, No. 06-96/1225-370 (TCB, December 29, 2006), and *THY/DoCo*, No. 06-96/1224-369 (TCB, 29.12.2006).

[54] *Toros/Sümer Holding Mazıdağı Fosfat Tesisleri*, No. 08-16/189-62 (TCB, February 21, 2008).

G- Recent Decisions of the European Commission[55]

1- Airbus/Safran/JV (2014)[56]

The transaction concerned the creation of a 50/50-owned joint venture ("***JV***"), to which the Airbus Group N.V. ("***Airbus***") and Safran S.A. ("***Safran***") intended to contribute their respective activities regarding space launchers, satellite systems and subsystems, and missile propulsion programs. Safran provides the propulsion systems used in the Airbus launchers, which generate the power required to take spaceships into space. A separate company, Arianespace, retails and operates these launchers. Moreover, the transaction parties intended to take control of Arianespace at an unspecified time in the future. The Commission considered that this would constitute a separate transaction. As a result of its evaluation, the Commission concluded that the JV would have the incentive to shut out Airbus's competitors or to limit their access to a number of important components, and that the transaction would have led to exchanges of competitors' confidential information between the JV and Airbus. To address the Commission's concerns, the parties proposed three sets of remedy packages, and the final remedy package was accepted by the Commission. In that package, the transaction parties proposed the following remedies:

- Excluding Safran's activities in electric satellite propulsion from the JV (*Non-Contribution*);

- Concluding a framework supply agreement with Safran's current main customer for a number of components (*Supply Assurance Commitment*);

- Guaranteeing the supply of these components to any third-party prime contractor on transparent and non-discriminatory terms.

---

[55] One of these recent decisions is the *General Electric/Avio* decision, dated February 1, 2013 and numbered COMP/M.6844; however, this decision could not be included in this article, since the remedies were deemed to constitute commercial secrets and redacted as a result, thus precluding their evaluation.

[56] See *Airbus/Safran/JV*, No. COMP/M.7353 (EC, November 26, 2014) http://ec.europa.eu/competition/mergers/cases/decisions/m7353_20141126_20212_4175584_EN.pdf (last visited January 4, 2019).

For the non-contribution commitment, the transaction parties proposed the following monitoring mechanism: (1) appoint a Trustee, to be approved by the Commission, to supervise the implementation of the Non-Contribution Commitment, and (2) provide an annual report to the Commission about the Utilisation Agreement and the transmission of confidential information. The Commission stated that the presence of a trustee monitoring the separation between Safran's activities in electric satellite propulsion systems and the Joint Venture would also guarantee that Airbus would not exert any influence on the Excluded Business and prevent the transmission of confidential information regarding third parties.[57] For the Supply Assurance Commitments, the transaction parties proposed the following monitoring mechanism to the Commission: (1) appoint the European Space Agency ("***ESA***") to monitor the implementation of this commitment, and (2) arbitrate any dispute between the Joint Venture and a third-party prime contractor arising from the claim that the Joint Venture is failing to comply with the Supply Assurance Commitment, if the complainant and the Joint Venture fail to first reach an amicable settlement on their own. The Commission indicated that, by assigning the ESA to monitor the implementation of the remedy, "a strong role is given to ESA for the monitoring of the negotiation of the framework supply agreement with (…) and in the monitoring and arbitration of disputes regarding the supply of the Commitments Equipment to third party prime contractors."[58]

2- Chiquita Brands/Fyffes (2014)[59]

The transaction subject to the notification concerned Chiquita Brands International, which is a US-based banana producer, and its merger with the Irish banana supplier, Fyffes. In this case, the Commission decided that, despite the parties' high combined market shares in many Member States, there was no basis for competition

[57] *Id.*, para. 560.

[58] *Id.*, para. 569.

[59] See *Chiquita Brands International/Fyffes,* No. COMP/M.7220 (EC, October 3, 2014) *http://ec.europa.eu/competition/mergers/cases/decisions/m7220_20141003_20212_4073454_EN.pdf* (last visited January 4, 2019).

concerns on the market for the import and supply of bananas. The Commission emphasized, in particular, that (i) the wholesale and retail customers would still have a number of alternative suppliers to choose from, (ii) these competitors would not face significant obstacles to expand their activities, (iii) the barriers to new market entry at the various levels of the banana supply chain were low, and (iv) the supermarkets would possess strong countervailing buyer power. However, the Commission determined that the proposed transaction posed a risk of foreclosing competitors at the shipping level. The remedies submitted by the transaction parties addressed this concern, although they did not include any divestments and were limited to the elimination of any exclusivity in shipping arrangements to Northern Europe with third-party shipping providers for the next ten years after the consummation of the merger. The final remedies submitted to the Commission were as follows:

- Not to enter or seek to enter into any agreement that contains a Shipping Exclusivity Obligation, from the closing of the notified transaction and for a period of ten years;

- To refrain from incentivizing any shipping company in any other (non-contractual) manner to refuse to provide shipping services for bananas of third-party importers on relevant routes, from the closing of the notified transaction and for a period of ten years;

- To release Maersk from the Maersk Shipping Clause immediately following the closing of the notified transaction;

- To release any shipping company from any Shipping Exclusivity Obligations or otherwise not to apply any Shipping Exclusivity Obligations (if any) that either Notifying Party may have entered into between the effective date and the closing of the notified transaction immediately following the closing of the notified transaction.

The Commission further stated that the parties would be obliged to provide the Monitoring Trustee with, among others, (i) copies of their agreements with shipping companies, and (ii) final internal proposals of agreements to be concluded with shipping companies. As a result, the Monitoring Trustee would have an overview of the parties’ relationships with shipping companies, and thus be able to effectively monitor the implementation of the commitments.

In addition, the behavioral commitments accepted by the Commission declared that "*the Monitoring Trustee will propose to the parties such measures as it considers necessary to ensure their compliance with the Final Commitments. It will also act as a contact point for any request by third parties in relation to the Final Commitments; in particular it will examine and respond to any complaints regarding compliance by the parties with the Final Commitments and provide guidance to these third parties in relation to the scope and application of the Final Commitments to third party access to shipping services for imports of bananas into Northern Europe.*"[60]

The Commission concluded that the Final Commitments (*i.e.*, behavioral remedies) "*removed the serious doubts that the Merged Entity, given its accrued influence, might make it more costly for rivals to ship bananas to the ports in Finland and Ireland.*"[61] Furthermore, the Commission stated that—considering the commitments—it was "*unlikely that post-Transaction Notifying parties will be able to create entry barriers by hindering the shipping of bananas in each of the abovementioned markets for the import and supply of bananas to retailers and wholesalers.*"[62] Finally, it is stated within the decision that, with regards to Estonia, Latvia, Lithuania and Sweden, the behavioral commitments eliminated any potential serious doubts that could arise in these Member States.[63]

In this case, the Commission did not identify any competition concerns regarding the markets for banana ripening services and for the sourcing and sale of pineapples. As a result, the Commission granted a clearance decision to the transaction. However, Chiquita's shareholders ultimately rejected the merger and the transaction was not consummated.

---

[60] *Id.*, para. 405-406.

[61] *Id.*, para. 407.

[62] *Ibid.*

[63] *Ibid.*

3- Kuraray/ GLSV Business *(2014)*[64]

This transaction concerned the acquisition of sole control over the Glass Laminating Solutions/Vinyls Business ("***GLSV***") of E. I. du Pont de Nemours and Company ("***DuPont***"), through a purchase of assets by Kuraray Co., Ltd. ("***Kuraray***"). As a result of its investigation, the Commission determined that the transaction would bring together two close competitors who both had a strong focus on the segment of "PVB film for architectural applications." Moreover, the transaction would combine two competitors with particularly strong positions in the European Economic Area ("***EEA***"). Therefore, the Commission concluded that the transaction was likely to lead to non-coordinated effects in an overall market for PVB film. The Commission also asserted that the proposed transaction raised serious doubts as to its compatibility with the internal market in the following potential markets: (i) the supply of PVB film for all applications in the EEA, and (ii) the supply of PVB film for architectural applications in the EEA. Therefore, the transaction parties proposed the following remedies:[65]

- Divesting GLSV's PVB film manufacturing facility in Uentrop, Germany, as well as all associated technical, sales and customer support personnel ("***Divestment Business***") to an independent third party;

- The Divestment Business would also include a long-term lease agreement for GLSV's facility in Mechelen, Belgium, which housed a customer service group, a supply chain team and an R&D/technical service lab, together with all personnel that were necessary to ensure the continuation and development of the Divestment Business' operations;

- The Divestment Business would also involve a transfer of all other personnel currently employed in sales, customer service and technical support functions in relation to the Divestment Business;

- In order to ensure the continuous and uninterrupted operation of the Divestment Business, the purchaser would be granted the option of

---

[64] See *Kuraray/GLSV Business,* No. COMP/M.7115 (EC, October 3, 2014) http://ec.europa.eu/competition/mergers/cases/decisions/m7115_20140429_20212_3758673_EN.pdf (last visited January 4, 2019).

[65] *Id.*, para. 130-133.

entering into a supply agreement with Kuraray for the same PVB resin following the divestiture.

In particular, through these commitments, Kuraray undertook:[66]

- Not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy, or the investment policy of the Divestment Business;

- To make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;

- To take all reasonable steps, or procure and ensure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all key personnel to remain with the Divestment Business, and not to solicit or move any personnel to Kuraray's remaining business.

On the basis of the above commitments, the Commission concluded that the remedies were suitable and sufficient to eliminate the serious competitive doubts that had been raised by the proposed transaction in the potential markets for: (i) the supply of PVB film for all applications in the EEA, and (ii) the supply of PVB film for architectural applications in the EEA. Moreover, the remedies were found to be comprehensive and effective from all points of view, and they were deemed as capable of being implemented effectively within a short period of time. Furthermore, it was stated in the remedy package that, no later than two weeks after the effective date (*i.e.*, the date of adoption of the decision), Kuraray would appoint a Monitoring Trustee to carry out the functions specified in these remedies and Kuraray also committed not to close the concentration before the appointment of a Monitoring Trustee.

Moreover, the Commission declared that the remedies discussed above would "*remove almost entirely the increment that would have been added by the transaction in the potential markets for the supply of*

[66] *Id.*, Section C8(a) of the Commitments to the European Commission.

PVB film for architectural applications in the EEA and for the supply of PVB film for all applications in the EEA."[67]

Finally, the Commission stated that the remedies would also "*create an important competitor in the supply of PVB film with a particularly strong position in architectural applications in the EEA,*"[68] which would be able to react to any market changes in the future.

H- Recent Decisions in the US

1- FTC, In the Matter of Renown Health, Docket No: C-4366, 30.12.2012[69]

The transaction in question concerned the acquisition of the medical practices and assets of Sierra Nevada Cardiology Associates, Inc. ("***SNCA***") and Reno Heart Physicians, Inc. ("***RHP***"), by Renown Health, directly or by or through its wholly owned subsidiaries, Nevada Heart Institute and NHI-1, Inc. (collectively "***Renown Health***"). As a result of the transaction, Renown employed the physician members and physician employees who were previously providing cardiology services in connection with those acquired entities. The consolidation resulted in 15 of the cardiologists who had been associated with SNCA and 17 of the physicians who had been associated with RHP becoming employees of Renown Health.

According to the FTC's complaint, there were very few cardiologists practicing in the Reno area other than the physicians associated with SNCA and RHP. Accordingly, the FTC alleged that the competition for adult cardiology services was effectively eliminated as a result of the transaction.

Moreover, the contracts between Renown Health and the newly hired cardiologists included "non-compete" provisions, which effectively prevented them from joining medical practices that competed

---

[67] *Id.*, para. 157.

[68] *Id.*, para. 158.

[69] *See Renown Health*, No. C-4366 (FTC, December 30, 2012) https://www.ftc.gov/sites/default/files/documents/cases/2012/12/120806renownhealthcmpt.pdf (last visited January 4, 2019) https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf (last visited January 4, 2019).

with Renown Health. As a result of the acquisitions and non-compete clauses, the FTC asserted that Renown Health employed 88 percent of the cardiologists in the Reno area at the time.

The FTC's complaint[70] also alleged that Renown Health's acquisitions of SNCA's and RHP's medical practices had created a highly concentrated market for the provision of adult cardiology services in the Reno area. The complaint argued that the consolidation of the competing practices into a single cardiology group controlled by Renown Health had led to the elimination of competition based on price, quality and other terms. In addition, according to the complaint, the consolidation had increased the bargaining power that Renown Health had vis-à-vis insurers, and this could lead to higher prices for adult cardiology services in the Reno area.

The proposed order settling the FTC's charges was designed to remedy the anticompetitive effects of Renown Health's acquisitions of SNCA and RHP, and to restore competition for cardiology services in the Reno area. Accordingly, Renown Health agreed to an order temporarily suspending the non-compete provisions that were currently in place with its cardiologists. During this time, the former SNCA and RHP cardiologists who were working for Renown Health at the time would be able to seek other employment, including positions with other hospitals in the Reno area.

Under the proposed order, the non-compete provisions would be suspended for at least 30 days, while the FTC considered the public comments it received on the order. During that time, former SNCA and RHP cardiologists would be allowed to contact other employers about leaving Renown Health, and they were also required to notify a special monitor (appointed by the FTC) regarding any contacts they made to ensure that they were included in a group of up to 10 cardiologists that would be allowed to join competing groups and if 10 of its cardiologists left for competing practices Renown Health could ask the FTC to end the release order. If this is not the case Renown Health would be required to continue the suspension of the non-compete provisions until at least six cardiologists accepted offers with competing practices in the Reno area.

[70] See https://www.ftc.gov/sites/default/files/documents/cases/2012/12/120806renownhealthcmpt.pdf (last visited January 4, 2019).

However, there were no provisions that restricted Renown's ability to contract with health plans, to set prices, or that otherwise limited Renown's ability to create Accountable Care Organizations ("***ACOs***"), which are health care providers that seek to improve quality and reduce health care costs, or to deliver other innovative services to meet the demands of health care reform.[71]

In conclusion the parties entered into a commitment with regulatory authorities to maintain current physician cardiology rates in the area and to not renegotiate payor contracts during the time that competitor hospitals were recruiting new cardiologists to build their own heart health programs. This decision is also noteworthy in that the prescribed remedy was not a typical behavioral remedy, such as a firewall.

2- US v. Google Inc. & ITA Software, Inc., Final Judgment, Case No: 1:11-cv-00688 (D.C., 05.10.2011)[72]

In 2010, Google proposed to acquire ITA Software, Inc. ("***ITA***") for $700 million. ITA is a licensed software product that allows travel websites to provide consumers with complex and customized flight search functionality. Prior to the acquisition, ITA had licensed its "*QPX*" tool, which is an airfare search and pricing system, both to airlines and to leading online travel intermediaries ("***OTIs***"), which included online travel agents ("***OTAs***"), such as Orbitz and Expedia, and meta-search travel sites like Kayak, Bing Travel and Trivago.

The parties to the transaction did not directly compete with one another and were not even vertically linked in the supply chain. Furthermore, the risk of anticompetitive effects was strongest and most clear-cut in a market for flight search services that neither of the parties had entered prior to the transaction nor would even necessarily enter post-transaction. Google argued that it would not sell airline tickets itself, but rather develop a flight search engine that would be similar to Bing Travel, which would send customers to the airlines' sites or to

[71] FTC, "*Overview of FTC Actions in Health Care Services and Products*" (2018).

[72] See *US v. Google Inc. & ITA Software, Inc.,* No. 1:11-cv-00688 (D.C., October 5, 2011) https://www.justice.gov/atr/case-document/file/497636/download (last visited January 4, 2019).

online travel agencies to complete their purchases. Google also contended that its primary goal and intention was to develop a more advanced flight search engine. However, it was seen that Google had the ability and the intention of developing a comparative flight search services product that would incorporate QPX technology, and that, by doing so, it would place itself in direct competition with ITA's customers. In its complaint, the DOJ identified two relevant product markets: (i) a P&S system market, and (ii) a comparative flight search market. Each of the relevant product markets' geographic scope was defined as "nationwide" (*i.e.*, the entire United States).

The comparative flight search market comprised both OTAs and meta-search travel sites; however, the market definition excluded airline websites, which were deemed to constitute sufficient substitutes for OTIs. The DOJ also emphasized that QPX was a critical flight search tool for OTIs and that OTIs currently had no adequate alternatives to this product. Thus, according to the DOJ's argument, Google would be able to foreclose or disadvantage competitor OTIs' access to QPX, and therefore, the transaction posed the risk of reducing innovation among travel websites. Moreover, this would potentially lead to unfair increases in competitors' costs, and consumer choice would be harmed as a result. The DOJ also asserted that entry barriers into the airfare search and pricing system market were "*extremely high,*" and, in order to substantiate its point, provided the example of two start-up companies who had failed to gain any significant OTI market share, also drawing attention to the time required for Google itself to develop its own search and pricing system. Furthermore, the DOJ argued that the transaction would raise entry barriers in the comparative flight search market by placing QPX out of the reach of potential new entrants to the relevant market. The commitment submitted by the parties consisted entirely of behavioral remedies, which were to remain in effect for five years.

These behavioral remedies included: (i) a mandatory licensing component, (ii) a dispute resolution mechanism, (iii) a quality of terms component, (iv) maintenance and R&D commitments, (v) explicit behavioral prohibitions, (vi) affirmative behavioral obligations, (vii) monitoring requirements and compliance provisions (including arbitration), and (viii) changeable firewall protections to address the possible exchange of competitively sensitive information regarding

OTIs. The settlement obligated Google to continue licensing both ITA's existing QPX product and its future "*InstaSearch*" product, which was a new travel search technology that ITA had been developing at the time of the merger, to OTIs on fair terms, and Google was also obliged to negotiate agreements to utilize "InstaSearch" in the post-transaction market. This commitment prohibited Google from entering into agreements that would restrict the rights of airlines to share certain data with parties other than Google, and therefore, obligated Google to include certain airline data in the searching and pricing system, and significantly, also prohibited Google from tying the sale of ITA products and services to the purchase of other Google products and services. Furthermore, Google was required to create a website where OTIs could submit their complaints regarding Google's non-compliance with the submitted remedies. Lastly, upon the written request of the DOJ, its Antitrust Division attorneys would be allowed to access Google's records, interview its employees, and even require Google to conduct internal audits.

In light of the remedies discussed above and the related audit mechanism, the system set up by the undertakings and the DOJ appeared sufficient to prevent Google from using its position to harm competition in the relevant market. Furthermore, the mechanism that would enable companies to monitor whether or not Google was complying with the behavioral remedies (and to lodge their complaints if they found that it wasn't) seems to be a major step forward with respect to the audit mechanisms of behavioral remedies.

3- US v. Ticketmaster Entm't, Inc., Final Judgment & Competitive Impact Statement, Case No: 1:10-cv-00139 (D.C., 07.30.2010)[73]

In early 2009, Ticketmaster, which is an American ticket sales and distribution company, proposed to acquire Live Nation (an American events promoter and venue operator) for $2.5 billion. Both of these companies were powerful undertakings in the markets in which they

[73] See *US v. Ticketmaster Entm't, Inc.,* No. 1:10-cv-00139, (D.C., July 30, 2010). https://www.justice.gov/atr/case-document/final-judgment-180 (last visited January 4, 2019).

operated. Therefore, the transaction posed a serious risk of creating a comprehensively integrated and dominant company in the live music business. The DOJ's investigation of the proposed acquisition was also joined by regulatory authorities from 17 states and it was also coordinated with the Canadian Competition Bureau. The UK Competition Commission investigated the transaction separately as well. The proposed transaction would eliminate the only sizeable horizontal competitor (and any potential competitors) to Ticketmaster's exceedingly strong position in the relevant market, since both undertakings were active in the same market. The DOJ also noted that several significant barriers to entry existed in the relevant market and that the proposed transaction would also increase the degree of vertical control. Competitors at any stage/level of the market would not be able to avoid transacting with the merged Ticketmaster-Live Nation entity for essential services, and that necessity would create significant potential for several types of competitive harm toward both rival undertakings and consumers at the same time.

The transaction parties argued that considerable cost savings would be achieved from the vertical integration and also that revenue synergies would ensue from being able to market their services more effectively to consumers. However, the DOJ emphasized that each company was already significantly integrated, and that, absent the merger, "*venues and concert goers would have continued to enjoy the benefits of competition between two vertically integrated competitors. A vertically integrated monopoly is less likely to spur innovation and efficiency than competition between vertically integrated firms, and a vertically integrated monopoly is unlikely to pass the benefits of innovation and efficiency onto consumers."* Despite these concerns, the DOJ ultimately decided to approve the merger, subject to the conditions that were directed at both the horizontal and vertical competition concerns and which were effective for ten years.

First of all, the DOJ required the licensing of the basic ticketing platform (known as "Host") to AEG (which was the second leading concert promoter and also the operator of a number of major venues), so that AEG would have strong incentives to utilize Host both to operate its own ticketing service and to compete for new ticketing business to replace the lost horizontal competition. Furthermore, the merged entity was also required to discard Paciolan (a venue-based ticketing division) to Comcast-Spectacor, which is a small and primarily regional ticketing service. The DOJ stated that "*[its order to] divest Ticketmaster's entire Paciolan business will establish another independent and economically viable competitor in the market for primary ticketing services to major concert venues.*"

To address the vertical competition concerns, the DOJ also prohibited the merged entity from engaging in several behaviors, such as (i) retaliation against venue owners who contracted for primary ticketing services with a rival undertaking; (ii) any requirement that a venue use its primary ticketing services when that venue only wants to obtain the right to host concerts promoted by the merged firm; (iii) any requirement that venues take (*i.e.*, host) the merged company's concerts as a condition for obtaining its ticketing services; and (iv) using ticketing data in their non-ticketing businesses. However, no sufficient monitoring mechanism was identified or implemented in the decision, which made it difficult to ensure that the merged company would comply with the commitments, which could also result in harm to competitors and consumers.

I- Recent Decisions of the Turkish Competition Board[74]

1- AEH/Migros(2015)[75]

The transaction in question concerned the acquisition of sole control over Migros Ticaret A.Ş. ("***Migros***") by Anadolu Endüstri Holding A.Ş. ("***AEH***"), which controls and operates major food and beverages companies in Turkey, such as Coca Cola Turkey and Anadolu

[74] The Competition Board recently decided to grant conditional approval to the *Luxottica/Essilor* merger (01.10.2018, 18-36/585-286), in which the parties submitted both structural remedies (*i.e.*, divestiture of business) and behavioural commitments. The relevant announcement indicates that the behavioural remedies will be re-evaluated at the end of three years; however, there is no further information available on the details of these remedies since the reasoned decision has not been published yet. For the announcement on the conditional approval, *see* https://www.rekabet.gov.tr/tr/Guncel/luxottica-group-s-p-a-ile-essilor-intern-d3c7e82352c6e81180e500505694b4c6 (last visited January 4, 2019).

[75] See *AEH/Migros*, No. 15-29/420-117, (Turkish Competition Board, July 9, 2015).

Efes. In the *AEH/Migros* decision, the vertical effects of the proposed transaction were thoroughly evaluated and behavioral remedies were fully adopted as a result. In the decision, which was notable for evaluating more than one upstream market, it was concluded that AEH could strengthen its dominant position in the beer market by engaging in customer restriction. In addition, the Board stated that, if AEH were to use its control over Migros to obtain information from its competitors who were working with Migros, the market would become transparent and coordination risks would consequently rise. The Board ultimately approved the merger subject to the remedies discussed below, which would be effective for three years in order to eliminate the anticompetitive effects of the transaction:

- Migros would continue its commercial relations with AEH's competitors;

- Migros would provide objective commercial conditions to the undertakings that newly entered the beer market;

- Migros would not prevent AEH's competitors from selling their products in Migros stores, and also continue to provide shelf shares and display the products offered in the beer category in Migros stores;

- AEH would not intervene in Migros's commercial relations with AEH's competitors in any way (*i.e.*, through meetings, by giving instructions, etc.).

The Board also stated that an audit expert would be appointed in order to track and monitor the implementation of the abovementioned remedies. Furthermore, the Board imposed the remedies below in order to eliminate the potential coordination risks:

- Migros, AEH and their subsidiaries would be required to keep their organizational structures, managements and personnel separate;

- Migros, AEH and their subsidiaries would not share any commercially sensitive information regarding their competitors with each other under any circumstances, and in this context, the necessary access restrictions between these organizations would also be implemented.

The Board approved the transaction by determining that the abovementioned remedies (which could be revised by the Board after three years) would be sufficient to eliminate the competition concerns raised by the transaction. It also decided that the appointed trustee would regularly follow up with regard to the implementation of the first three remedies listed above and submit a report to the Board every six months, if necessary.

2- Bekaert/Pirelli (2015)[76]

This transaction concerned the acquisition by Bekaert (a Belgium-based company that deals in steel wire transformation and coatings) of the steel tire cord business of Pirelli, which is a tire manufacturing company based in Milan, Italy. Pirelli's steel tire cord business consisted of five plants located in five different countries: China, Italy, Brazil, Romania and Turkey ("***Çelikord A.Ş.***"). Once Bekaert acquired Pirelli's steel tire cord business, Pirelli would no longer be active in the steel tire cord market and become a pure tire manufacturer. In order to carry out the aforementioned transaction between the parties, a "Sale and Purchase Agreement" was signed on February 27, 2014. The Board determined that three markets would be affected by the proposed transaction, and characterized them as follows: (i) *steel tire cord* – serious competitive concerns and significantly high concentration levels, (ii) *bead wire* – competitive concerns, and (iii) *hose wire* – not problematic.

The Board stated in the scope of its evaluation on the market for steel tire cord, which was expected to have the highest concentration ratio in terms of the transaction, that Bekaert's market share in the relevant market after the consummation of the transaction would, in fact, give Bekaert more market power. The Board reached this conclusion because Bekaert's biggest competitor in this market, Bridgestone, had a very low market share and it was highly dependent on Bekaert in terms of supply. It was also determined that Bridgestone generally did not have the necessary motivation or incentive to increase its sales amount, considering that it produced steel tire cord for use in its own tire production process. Therefore, the Board found that Bridgestone would not be able to exert a sufficiently strong competitive pressure on Bekaert

[76] See *Bekaert/Pirelli*, No. 15-04/52-25, (Turkish Competition Board, January 22, 2015).

after the acquisition. In this sense, based on its evaluation of the existing players in the steel tire cord market, the Board found that ESC Çelik Ürünleri Sanayi ve Ticaret Limited Şirketi ("***ESC***") would be the only market player capable of putting competitive pressure on the merged entity in the post-transaction market. However, it was observed that ESC generally operated in the spot market. Considering that steel tire cord sales are conducted through long-term agreements, the Board ascertained that ESC was not qualified to inflict sufficient competitive pressure on the merged undertaking. Therefore, the Board concluded that ESC would not be able to exert competitive pressure on Bekaert after the transaction, due to its low market share[77] and the fact that it operated primarily in the floating spot market.

Within the scope of its evaluation on the market for bead wire, the Board stated that, considering that the transaction parties had strong competitors (such as Kiswire and Sumin) and in light of the parties' market shares, it could be reasonably concluded that the parties would not become dominant in the relevant market following the transaction. However, since there was supply elasticity among the mentioned products, it would be possible for Bekaert to shift its market power and high idle capacity resulting from its dominant position in other related product markets.

Finally, in terms of the hose wire market, which was the third and last relevant product market that needed to be handled, the Board noted that there had been an increase in the market shares of the parties since 2011. Moreover, Bekaert had a strong market share in the relevant market, since Kiswire had left that market in 2013. Therefore, the Board found that Bekaert had a significant market power in the market.

The Board ruled that the transaction subject to the notification would provide a significant market power to the parties, based on its analysis of the relevant structural indicators, such as market shares and concentration ratios. Moreover, given the findings of the potential competition assessment, it was concluded that there were serious indications of a significant risk of the competition being restricted by the parties as a result of their gaining dominance in the relevant market

[77] The market share of ESC was redacted in the published version of the reasoned decision.

pursuant to the transaction. Therefore, the Board demanded the parties to separate their agreements into two parts as (i) specifically for Turkey and (ii) for the rest of the world. The transaction parties were able to split up the agreements, since the manufacturer of the products and the buyers were all based in Turkey. After the agreements were separated, the Board approved the merger, subject to the remedies listed below:

- Execution of long-term supply agreements lasting a minimum of 3 years with the local customers, namely Petlas, Superlas and Karlas (*i.e.*, the scope of the protected local customers was expanded);
- Provision of the steel cord products at competitive prices;
- No purchasing obligation: customers would be free to procure all or a part of their steel cord requirements from third parties;
- Making available and supplying all volumes that the relevant customer might require to meet its own production needs (*i.e.*, guaranteed supply of sufficient volumes);
- Guarantees relating to product quality and service level;
- Supply period to be determined by the customers at their full discretion;
- Customers' option/ability to request changes to supply terms.

3- SGH/THY Opet (2014)[78]

Within the scope of the transaction, the parties requested the Board to grant an exemption to the "*Field Allocation Agreement*," which included the allocation of the right of operation of the fuel storage, sales, and supply units at the İstanbul Sabiha Gökçen Airport ("***SGH***") for five years and which was concluded between İstanbul Sabiha Gökçen Uluslararası Havalimanı Yat. Yap. ve İşl. A.Ş. ("***ISG***") and THY OPET Havacılık Yakıtları A.Ş. ("***THY OPET***"). The Board concluded that this was a concentration transaction within the meaning of Article 7 of the Law No. 4054, and that the investigation should be conducted and

[78] See *SGH/THY Opet*, No. 14-08/155-66, (Turkish Competition Board, February 26, 2014).

resolved within this scope. The relevant product market was defined as "*the market for aviation fuels*."

The Board evaluated the market power of THY OPET and stated that, when the figures (in the charts and graphs provided within the case file) relating to the market shares of THY OPET and its competitors are examined, it is evident that THY OPET's market share has been rising through the years. In addition to the high market share of THY OPET, the Board noted that another important consideration regarding the structure of the market is the high concentration ratio in the market. The Board concluded that the high market share of THY OPET, the high concentration ratio in the market, and the absence of powerful competitors were interpreted as strong indicators that the undertaking may be dominant in the relevant market. Moreover, THY OPET had an indirect partnership relation with TÜPRAŞ, which is one of the largest suppliers of jet fuel (through its crude oil refineries) in Turkey, from the supplier-side perspective, and had a direct partnership with Turkish Airlines, which is the biggest airline in Turkey, from a customer-side perspective. These relationships differentiate THY OPET from other undertakings, as it can behave independently from the suppliers and customers in the relevant market, unlike its competitors. The Board concluded that the proposed transaction would restrict the competition in the aviation fuel market; therefore, the parties were required to provide commitments to the Board in order to ensure that the competition in the relevant market would be preserved.

The Board set forth two main competition concerns regarding the proposed transaction, which were as follows: (i) after the transfer process, competitors could be prevented from accessing the fuel facilities at SGH by THY OPET, and (ii) prices increases could be implemented for access to these facilities. Accordingly, the remedy package included the following commitments by the transaction parties:

- Taking the necessary actions and steps to receive the license that would enable the merged entity to provide third parties with storage services;

- Accepting third parties' requests for access to storage services in line with security of supply protocols and capacity ratios, and apply prices as per the Energy Market Regulatory Authority's ("***EMRA***") tariffs;

- Meeting the requests related to taking products from warehouses and providing access to refuel services ("under wings" refueling);

- Committing to the prevention of discrimination among undertakings.

The Board considered the remedy package as sufficient to eliminate the competition concerns raised by the transaction. Within the scope of the remedies, the merged undertaking would not be prevented from restricting/prohibiting access to storage services by claiming that the capacity constraints required doing so. Moreover, the Board declared in the decision that the capacity to be opened for access would be sufficient in the short-term for new entries, and it also evaluated that, since the prices would be determined on the basis of the tariffs approved by the EMRA, the transaction would not restrict competition in the relevant market.

4- Mobil/THY Opet (2014)[79]

The transaction concerned the acquisition of Mobil Oil Türk A.Ş.'s ("***Mobil***") shares corresponding to 25% of the property rights over the assets that were subject to the "Agreement Regarding the Aviation Operations for Storage and Refueling for Aircrafts in Turkish Airports" by THY OPET Havacılık Yakıtları A.Ş. ("***THY OPET***"). The Board concluded that the proposed acquisition constituted a concentration transaction within the meaning of Article 7 of the Law No. 4054, and declared that the investigation should be carried out and resolved within this scope. The relevant product market was defined as "*the market for aviation fuels*."

The Board further stated that, when the market shares of THY OPET were analyzed, it was seen that the undertaking had a market share of approximately 14% when it first started its business activities in

[79] See *Mobil/THY Opet*, No. 14-24/482-213, (Turkish Competition Board, July 16, 2014).

2010. However, THY OPET's market share had reached 40% in 2011, and then, in the previous two years, THY OPET had attained a market share of 60%. The Board concluded that (i) THY OPET's high market share, (ii) its indirect partnership with TÜPRAŞ and/or its direct partnership with Turkish Airlines, (iii) the supply agreement with THY, (iv) the high concentration ratio in the market, (v) the absence of strong competitors in the market, and (vi) the elevated legal, administrative and physical obstacles to entry into the market, all strengthened the creation of the dominant position in the relevant market, and the Board found that the transaction could strengthen the dominant position as well. Furthermore, according to the report dated 19.02.2014 and numbered 2013-1-117/Öİ, it had been concluded that (i) the closing of the relevant market partially or completely to potential competitors, and (ii) the increase in the prices in the upper/lower market, were also among the competition concerns that could arise with respect to the transaction subject to the notification. Finally, it was observed that the risk of blocking access to the competitors or access to the market was particularly prominent in the case at hand.

The transaction parties proposed the remedies listed below within the scope of the preliminary investigation process:

- Complying with the provisions of the Association Agreement, which had been granted an exemption by the Board's decision dated 09.07.2008 and numbered 08-44 / 606-231;

- Providing access to the storage operations for other undertakings;

- Providing access to product sales and wing services for other undertakings, subject to the capacity ratios of the facilities and the availability of equipment;

- Not discriminating between undertakings;

- Complying with the relevant regulations regarding aviation fuels.

However, the Board did not find these proposed remedies to be sufficient to eliminate the competition concerns and the transaction was subsequently taken into a Phase II review. The remedies provided by THY OPET were not considered to be sufficient because THY OPET asserted that it would only provide access to third parties as long as security of supply considerations and capacity ratios would allow it. In scope of the Phase II review, THY OPET offered additional remedies, as follows:

- In case of demand from İzmir Adnan Menderes and Milas Bodrum Airports, 1/3 of the 25% of the capacity subject to this transaction (depending on whether or not THY OPET obtained its license) would be open to third parties or THY OPET would consent to opening such capacity to third parties or agree not to prevent it from opening to third parties who are not a party to the Joint Operation Agreement;

- In scope of the İstanbul Atatürk ve Antalya Airports, 1/3 of the 25% of the capacity subject to this transaction (depending on whether or not THY OPET obtained its license) would be open to third parties or THY OPET would consent to opening such capacity to third parties or agree not to prevent it from opening to third parties who are not a party to the Joint Operation Agreement;

- Provide access to infrastructure services of storage and refueling to third parties on a non-discriminatory and transparent basis, and determine the prices for such access within the scope of the tariffs prepared by the competent entities by taking into consideration objective criteria.

The Board stated that the second round of proposed remedies provided a clear and well-defined approach regarding the implementation of the remedies proposed by THY OPET. The Board indicated that, in the absence of the remedies, the primary competitive concern with regard to the transaction would be its effect on increasing the capacity of an undertaking that was already dominant in the relevant market, while the access problems already existed at airports such as Istanbul Atatürk Airport, which would worsen the competitive structure in the market. In that case, the competitive pressure on the dominant undertaking would be further reduced, and it would become relatively free to increase prices in the future. However, the remedies regarding the capacity were deemed to be efficient and effective. Moreover, when the structure to be formed as a result of the implementation of such remedies is compared with the existing situation in the relevant market, it was observed that the storage facilities that are currently open to the use of four partners (and which the undertaking may not be required to open to third parties under the pretext of "capacity constraints") would be opened to the use of at least four other undertakings, if requested so by third parties. Moreover, Mobil would depart from the market, but at least one undertaking would be replaced.

In the decision, the Board also emphasized that, considering the changes in the structure of the relevant market over the previous 4 years, THY OPET, which was already in a dominant position in the market, would not be able to completely exclude or avoid the possibility of losing its dominant position after a certain period of time. Therefore, in light of the variable and fluctuating structure of the relevant market, the THY OPET's request to be reviewed after 3 years following the implementation of the remedies was deemed by the Board to provide a sufficient monitoring mechanism. As a result, the transaction was granted approval by the Board within the scope of the remedies provided.

5- Lesaffre/Dosu Maya (2014)[80]

In the *Lesaffre/Dosu Maya* decision, the Board determined that the merged undertaking was not likely to become dominant in the yeast market as a result of the transaction. However, the Board also concluded that it was possible that more than one undertaking could be in a dominant position due to the particular structure of the relevant market. For this analysis, the Board considered and examined a variety of factors, such as: (i) the market shares of the undertakings in the market, (ii) entry barriers, (iii) the importance of manufacturer-distributor relations, (iv) the static structure of the market, (v) the homogeneity of the product, (vi) the insufficiency of the buyer power, and (vii) the rigidity of the demand elasticity.

The remedy package submitted to the Board included the following commitments:

[80] See *Lesaffre/Dosu Maya*, No. 14-52/903-411, (Turkish Competition Board, December 12, 2014).

- Divestiture of the distribution company ("2000 Gıda") and execution of a distribution agreement with the divestment business to ensure its viability;

- Protection of the existence, price points, independent/separate distribution networks of the Dosu Maya brands, which would be subject to the transaction for at least five years and expand their geography;

- Removal of the regional exclusivity provisions that prevent active sales from the dealership agreements and removal of the exclusivity provisions that prevent the sales of competitor brands from the distributor agreements;

- Implementing and conducting regular and effective competition compliance programs for at least three years;

- Restricting Öz Maya's and Dosu Maya's fresh yeast brands' prices by designating four different price ceilings;

- Not acquiring the Akmaya facilities.

The above remedies were deemed as sufficient by the Board for eliminating the competitive concerns arising from the transaction. By imposing these remedies, the Board aimed to prevent unreasonable increases in yeast prices after the transaction (through the price ceiling introduced within the framework of the remedies) and to increase competition in the "low price/quality" spectrum in the geographical markets in which Dosu Maya had not previously been active.

J- Conclusion

All competition authorities in the EU, the US and the Turkish jurisdictions favor behavioral remedies over structural remedies due to their straightforward and one-off nature. The guidelines set forth by these competition authorities also support this view and consider behavioral remedies to be suitable only in exceedingly exceptional circumstances. Having said that, it can also be observed that the tendency to apply behavioral remedies has slowly increased over time in each of these jurisdictions, provided that such remedies are able to address and resolve the relevant competition concerns that are likely to arise from the proposed merger and that the categorization of remedies into "structural" and "behavioral" therefore becomes irrelevant.[81] In this regard, it can be seen from the precedents discussed in this article that each jurisdiction has confronted a recent case in which the competition authorities ultimately accepted purely behavioral remedies [see *Chiquita Brands International/Fyffes* in the EU, *US v. Google Inc. & ITA Software, Inc.* in the US, and *Bekaert/Pirelli* in Turkey].

On the other hand, as for the US example, it could be argued that the reversing back to the 2004 Merger Remedies Policy Guide is a strong signal for the end of the short-term trend of behavioral remedies that came around the time of the revised 2011 Merger Remedies Policy Guide and competent authorities may block mergers to prevent anticompetitive harm when purely behavioral remedies are the only option if they strictly consider behavioral remedies as ongoing unresolved matters in merger reviews[82].

Although the prejudice against behavioral remedies is strong among competition authorities mainly due to the associated monitoring requirements, the negative factors introduced by behavioral remedies can be eliminated (or at least minimized) if a clear structure is established at the outset of the implementation of the behavioral remedy. Further options to avoid such negative effects have been explained and analyzed herein under Section E.

Whether structural or behavioral, the proposed remedies must be assessed in terms of their efficiency and effectiveness in preventing the creation or strengthening of a dominant position and in removing the

[81] G. Gürkaynak, Z. Ortaç, S. Şimşek, G. C. Burul, *An Analysis of Remedies in Concentrations Under Turkish Competition Law*, Mondaq, (December 15, 2015), http://www.mondaq.com/turkey/x/451912/Antitrust+Competition/An+Analysis+Of+Remedies+In+Concentrations+Under+Turkish+Competition+Law#_ftn3 (last visited January 4, 2019).

[82] In scope of its speech announcing the withdrawing the 2011 Remedies Guideline, the Assistant Attorney General Makan Delrahim makes a particular emphasis on the need for shortening the duration of merger reviews extending to the remedies phase. *See* Press Release, US DOJ, *Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium*, (April 26, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust (last visited January 4, 2019).

anticipated competition law problems.[83] Therefore, provided that the behavioral remedies, either as standalone solutions or in conjunction with structural remedies, are able to sufficiently address the relevant competition concerns, they should be taken into account by competition authorities and given serious consideration as appropriate remedies, since they may help to avoid disrupting one or both of the transaction parties' businesses and be less burdensome for the merging parties. Moreover, with the assistance and co-operation of independent third parties, the burdens of the monitoring requirement can be alleviated to a great extent.

In any case, although the EU, the US, and the Turkish jurisdictions appear to continue to prefer structural remedies, there are other jurisdictions that have adopted different approaches favoring behavioral remedies: for instance, according to the OECD's Remedies in Merger Cases,[84] Austrian competition authorities mainly impose behavioral remedies in merger control cases. Therefore, with a clear structure at the outset, established review periods, and assistance from third parties with respect to monitoring requirements, competition authorities may evolve and eventually become well-equipped to accept and implement behavioral remedies. Indeed, they might even begin to favor behavioral remedies over structural remedies, provided that they both sufficiently address the relevant competition concerns, depending on the merits of the case.

However, although there may be encouraging signs of a positive inclination toward behavioral remedies among competition authorities (particularly toward access remedies), they are not expected to embrace behavioral remedies to any significant degree in the near future, especially since the relevant jurisdictions have similar merger control regimes that continuously affect and influence each other. The mutual reinforcement between these competition law jurisdictions makes them slow, if not entirely reluctant, to change their tendencies in favor of using structural remedies.

---

[83] Lindsay, Alistair and Alison Berridge, The EU Merger Regulation: Substantive Issues (4th ed. 2012), p. 633.

[84] OECD Policy Roundtables, *Remedies in Merger Cases 2011*, p. 233.

Bibliography

Books

A. Jones, B. Sufrin, EU Competition Law: Text, Cases and Materials, Fifth Edition.

K. Paas, Implications of the Smallness of an Economy for Merger Remedies, European Competition Law Review, Vol. 27, No: XV, (2008).

J. Faull, A. Nikpay, The EU Law of Competition, Third Edition, Oxford University Press, New York (2014).

A. Lindsay, Alison Berridge, The EU Merger Regulation: Substantive Issues, Fourth Edition (2012).

Periodicals and Theses

C. Bilaçlı, *Behavioral Remedies in Mergers and Acquisitions Restricting Competition*, Competition Authority Dissertation, Ankara, (2017).

Cases

General Electric v. Commission, No. T-210/01 ECR II-5575 (General Court, 2005)

EDP v. Commission, No. T-87/05, ECR II-3745, (General Court, 2005)

VEBA/Degussa, No. IV/M.942 (EC, December 3, 1997)

Siemens/VA Tech, No. COMP/M.3653 of 13 July 2005

Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio, No. COMP/M.3680 (EC, April 28, 2005)

easyJet v. Commission, No. T-177/04, ECR II-1931(General Court, 2006)

Newscorp/Telepiù, No. COMP/M.2876, (EC, April 2, 2003)

ENI/EnBW/GVS, No. COMP/M.2822 (EC, December 17, 2002)

New Holland, No. IV/M.1571 (EC, October 28, 1999)

Rohm and Haas/Morton No. IV/M.1467 (EC, April 19, 1999)

Gencor vs. Commission, No. T-102/96, ECR II-753 (EC, 1999)

General Electric/Avio, No. COMP/M.6844 (EC, July 1, 2013)

Airbus/Safran/JV, No. COMP/M.7353 (EC, November 26, 2014)

Chiquita Brands International/Fyffes, No. COMP/M.7220 (EC, October 3, 2014)

Kuraray/GLSV Business No. COMP/M.7115 (EC, October 3, 2014)

Commission v. Tetra Laval, No. C-12/03 P, ECR I-987 (ECJ, February 15, 2005)

Migros/Metro, No. 57/424-52, (Turkish Competition Board, March 19, 1998).

Trakmak Traktör, No. 67/517-84, (Turkish Competition Board, May 28, 1998).

Balfour Beatty, No. 00-29/307-174, (Turkish Competition Board, August 3, 2000).

Borusan/Mannesmannröhren, No. 80/617-119, (Turkish Competition Board, August 20, 1998).

Uçak Servisleri, No. 06-96/1225-370, (Turkish Competition Board, December 29, 2006).

THY/DoCo, No. 06-96/1224-369, (Turkish Competition Board, December 29, 2006).

Toros Tarım, No. 08-16/189-62, (Turkish Competition Board, February 21, 2008).

AEH/Migros, No. 15-29/420-117, (Turkish Competition Board, July 9, 2015).

Bekaert/Pirelli, No. 15-04/52-25, (Turkish Competition Board, January 22, 2015).

SGH/THY Opet, No. 14-08/155-66, (Turkish Competition Board, February 26, 2014).

Mobil/THY Opet, No. 14-24/482-213, (Turkish Competition Board, July 16, 2014).

Lesaffre/Dosu Maya, No. 14-52/903-411, (Turkish Competition Board, December 12, 2014).

US v. Ticketmaster Entm't, Inc, Case 1:10-cv-00139, (D.C., July 30, 2010). https://www.justice.gov/atr/case-document/final-judgment-180 (last visited January 4, 2019).

US v. Google Inc. & ITA Software, Inc., No. 1:11-cv-00688 (D.C., October 5, 2011) https://www.justice.gov/atr/case-document/file/497636/download (last visited January 4, 2019).

Renown Health, No. C-4366 (FTC, December 30, 2012) https://www.ftc.gov/sites/default/files/documents/cases/2012/12/120806renownhealthcmpt.pdf (last visited January 4, 2019).

Statutes, Legislative and Administrative Materials

Law No. 4054 on the Protection of Competition (1994).

Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (2010).

Turkish Competition Authority, Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger and Acquisition Transactions (2011).

EC Council Regulation No. 139/2004 (January 20, 2004) on the Control of Concentrations Between Undertakings, European Community Merger Regulation.

EC Commission Regulation No. 802/2004, OJ C 267 (2008).

Sherman Act § 15 U.S.C. (1890).

Clayton Act § 4, 15 U.S.C. § 18 (1964).

Hart-Scott-Rodino Antitrust Improvements Act (1976).

DOJ, US Department of Justice, Antitrust Division Policy Guide to Merger Remedies (2004).

FTC, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (2003).

FTC, Frequently Asked Questions About Merger Consent Order Provisions https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq (last visited January 4, 2019)

ECN Recommendation On Commitment Procedures, http://ec.europa.eu/competition/ecn/ecn_recommendation_commitments_09122013_en.pdf (last visited January 4, 2019).

International Competition Network (ICN) Merger Working Group, Merger Remedies Guide (2016).

ICN Merger Working Group, Merger Remedies Review Project report, (2005), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesReviewReport.pdf (last visited January 4, 2019).

FTC, "*Overview of FTC Actions in Health Care Services and Products*" (2018).

OECD Policy Roundtables, Remedies in Merger Cases (2011).

Internet Sources

G. Gürkaynak, Z. Ortaç, S. Şimşek, G. C. Burul, *An Analysis Of Remedies In Concentrations Under Turkish Competition Law*, Mondaq (December 15, 2015), http://www.mondaq.com/turkey/x/451912/Antitrust+Competition/An+Analysis+Of+Remedies+In+Concentrations+Under+Turkish+Competition+Law#_ftn3 (last visited January 4, 2019).

United Nations Conference on Trade and Development, *Challenges in the design of a merger control regime for young and small competition authorities*, (April 26, 2017), https://unctad.org/meetings/en/SessionalDocuments/ciclpd45_en.pdf (last visited January 4, 2019).

Press Release, US DOJ, *Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation*, (April 26, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second (last visited January 4, 2019).

Press Release, Turkish Competition Authority, *The in-depth analysis for the merger of Luxottica Group S.p.A. and Essilor*

International S.A., (September 2, 2018), https://www.rekabet.gov.tr/tr/Guncel/luxottica-group-s-p-a-ile-essilor-intern-d3c7e82352c6e81180e500505694b4c6 (last visited January 4, 2019).

Remarks of D. Bruce Hoffman, Acting Director, Bureau of Competition, *Vertical Merger Enforcement at the FTC* (January 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (last visited January 4, 2019).

https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (last visited January 4, 2019).

Emerging Trend of "*Fix-it-first*" and "*Up-front Buyer*" Remedies in Merger Control Regimes

Gönenç Gürkaynak, Esq.*

Umut Bakanoğulları**

Simru Tayfun***

I. Introduction

Along with the prohibitions against anticompetitive agreements and abuses of market power, merger control is one of the three pillars of competition law in many jurisdictions, including the European Union and the United States. Such jurisdictions forbid concentrations that they deem to pose competitive concerns.[1] However, in order to reach a more beneficial outcome than an outright prohibition, competition authorities may sometimes prefer to approve these concentrations that give rise to competition risks by requiring and implementing appropriate remedies for them.[2]

In most of these cases, the transaction parties are the ones who actually propose the implementation of remedies in order to achieve their ultimate aim, which is completing the proposed transaction and realizing the envisaged concentration. Competition authorities can approve transactions that restrict competition in a given relevant market

---

* Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

** Umut Bakanoğulları is an associate at ELIG Gürkaynak Attorneys-at-Law.

*** Simru Tayfun is a trainee lawyer at ELIG Gürkaynak Attorneys-at-Law.

1 Nazlı Varol, *Rekabeti Kısıtlayıcı Nitelikteki Birleşmelerde Esasa İlişkin Çözümler* [Remedies Concerning the Substantial Aspects of Competition Restrictive Mergers], REKABET KURUMU: UZMANLIK TEZLERI SERISI 101 (2010) at 3 (Tr.).

2 George Metaxas, Matthew Giles, Phil Larson & Jan McDavid, *Merger Reviews in the US and the EU: A Comparative Overview*, THE ANTITRUST REVIEW OF AMERICAS (2006), at 57, https://www.hoganlovells.com/~/media/hogan-lovells/pdf/public-ation/2206globalisation_pdf.pdf (last visited Dec. 14, 2018).

if the proposed remedies are capable of completely eliminating the competition concerns that have been identified[3] in all respects (*e.g.*, the primary competition concern identified by the relevant Turkish laws, which is the creation or strengthening of a dominant position that would result in a significant lessening of competition in a market for goods or services within the whole or part of the country)[4] and if they can be implemented in a short period of time.[5]

Choosing a suitable remedy requires a careful examination of the relevant competitive concerns. This is because an inadequate merger remedy will fail to achieve its declared goals and may thereby lead to the hindering of competition in the relevant market. Besides, an inadequate or unsuitable remedy also carries the risk of generating excessive costs and irreversible losses both for the undertakings subject to the transaction (in terms of depriving them of anticipated efficiency gains) and for consumers (due to the ineffective or inadequate protection of competition).[6]

Effective merger[7] remedies are commonly categorized as either (i) structural or (ii) behavioral (conduct) remedies.[8] Structural remedies are defined as one-time remedies that result in a permanent change in the structure of the relevant market. Divestment of assets and/or entities, and

---

3 European Commission, *Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004*, (2008), 9-14.

4 LAW NO. 4054 ON THE PROTECTION OF COMPETITION [LAW NO. 4054] art. 7 (Dec. 13, 1994, No. 22140).

5 Héctor Armengod, *Merger Control Procedure*, COLLEGE OF EUROPE ADVANCED EU COMPETITION LAW (Oct. 21, 2018), https://www.lw.com/presentations/eu-merger-control-procedures-2012.

6 MENGMENG SHI, THE DIVESTITURE REMEDIES UNDER MERGER CONTROL IN THE US, THE EU AND CHINA: A COMPARATIVE LAW AND ECONOMICS PERSPECTIVE, 178 (University of Maastricht, 2017), https://cris.maastrichtuniversity.nl/portal/files/16627891/c5779.pdf (last visited Dec. 14, 2018).

7 In order to avoid repetition and ensure readability, the term "merger" will henceforth be used to also cover "acquisitions."

8 Shi, *supra* note 6, at 148; *see also* Turkish Competition Authority's ("***TCA***") Guidelines on Remedies that are Acceptable in Merger and Acquisition Transactions (Jun. 16, 2011; 11-37/792-RM (5)), 18., https://www.rekabet.gov.tr/Dosya/kilavuzlar/birlesme-devralma-islemlerinde-rekabet-kurumunca-kabul-edilebilir-cozumlere-iliskin-kilavuz1.pdf (last visited Dec. 13, 2018).

termination of exclusive distribution agreements are classic examples of such structural remedies.[9] Moreover, structural remedies can be imposed either as a pre-condition for the approval of a merger (*i.e.*, the remedy must be achieved before the merger will be permitted), or the transaction parties may be required to implement and realize the remedies within a certain period of time after the approval of the concentration.[10] Structural measures are often preferred by competition law enforcement authorities because they address the grounds of the competitive harm more directly and permanently than behavioral remedies.[11]

Conduct remedies, on the other hand, modify the future behavior of the transaction parties.[12] To put it another way, conduct remedies comprise a commitment by the transaction parties not to act in a certain manner in the post-merger market. Since conduct remedies involve ongoing long-term oversight and reporting obligations (*i.e.*, post-merger obligations), they are not usually favored by competition enforcement authorities. Examples of conduct/behavioral remedies include: (i) open licensing schemes, (ii) requirements to grant access to products on equal terms, (iii) provision of access to certain facilities or services under pre-defined conditions, (iv) firewall provisions, and (v) transparency provisions.[13] [14]

Generally, a merger remedy should be capable of and targeted at removing competition concerns and preserving competition in the

---

9 A Practice Note on EU Merger Remedies, THOMSON REUTERS, https://uk.practicallaw.thomsonreuters.com/5-422-4975?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk (last visited Feb. 4, 2019).

10 The Organization for Economic Co-operation and Development [OECD] - Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement DAF/COMP/WP3/WD(2011)58, POLICY ROUNDTABLES: REMEDIES IN MERGER CASES (Jul. 30, 2012), at 11, http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf (last visited Oct. 24, 2018); *see also* TCA, *supra* note 8, 18.

11 METAXAS ET AL., *supra* note 2, at 58.

12 Int'l Competition Network [ICN], *Merger Remedies Guide* (2016), at 8, http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf (last visited Oct. 21, 2018); *see also* TCA, *supra* note 8, 19.

13 See EU Merger Remedies, *supra* note 9, at 4.

14 Shi, *supra* note 6, at 148.

relevant market to the pre-merger extent.[15] Protecting or favoring certain individual competitors should not be an outcome that is aimed for or expected from a proposed remedy. As the Supreme Court has said, restoring competition is the "*key to the whole question of an antitrust remedy*".[16] Moreover, the proposed remedies should be able to address and eliminate competition concerns while incurring costs at the lowest possible level.[17]

Furthermore, the suitability of a merger remedy will also depend on its enforceability. In other words, a merger remedy will only fulfill its proper function when it can be implemented and carried out effectively within a short period of time.[18]

An efficient merger remedy must also preserve the efficiency gains that the parties hope to achieve from their planned concentration. And lastly, transaction parties or enforcement authorities should choose a remedy that they deem most likely to preserve competition in the relevant market (*i.e.*, that protects competition with the most certainty). This final criterion demonstrates the importance of employing remedy enforcement methods that reduce potential failure risks. In the case of merger divestitures, fix-it-first ("***FIF***") and up-front buyer ("***UFB***") options are generally considered as the two methods that increase the ability of a proposed remedy to achieve the goal of preserving competition with the utmost certainty.[19]

In 2017, the US Federal Trade Commission ("***FTC***") released a report analyzing the effectiveness of its merger remedy decisions[20] in earlier investigations. This report confirms and illustrates the FTC's preference for structural remedies, such as divestiture, over conduct remedies requiring post-merger obligations and regulatory supervision.

---

[15] *Id.*, at 138.

[16] United States v. E.I. du Pont de Nemours & Co., 366 US 316, 326 (1961).

[17] Shi, *supra* note 6, at 179.

[18] *Id.*, at 180.

[19] US DEP'T OF JUSTICE ANTITRUST DIVISION [DOJ], ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (Jun. 2011), at 2-3, https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf (last visited Dec. 13, 2018); *see also* Shi, *supra* note 6, at 179-180.

[20] FEDERAL TRADE COMMISSION [FTC], THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS, (Jan. 2017).

On that note, it could be argued that FIF and UFB remedies, which make it possible to alleviate competitive concerns prior to the consummation of the proposed transaction, or even before the competition authorities' approval decisions, constitute even more effective options for achieving the well-established purpose of merger remedies (*i.e.*, preserving competition at the pre-merger level) with certainty.

A standard structural remedy consists of commitments made by the transaction parties, which the parties will carry out in a prescribed time period following the conditional clearance decision granted by the competition authorities. Under a standard structural remedy procedure, the transaction parties will be obliged to consummate the transaction immediately after receiving approval from the competition authorities. Unlike this standard approach, FIF and UFB remedies require the transaction parties to suspend the consummation of the transaction in question until they have first entered into binding agreements with third parties to put the (approved) remedy into effect.[21] Competition authorities regard this approach (*i.e.*, using FIF and UFB remedies) as advantageous and view it as reducing the risks of potential harm to competition before the proposed remedies are carried out, whereas transaction parties regard FIF remedies favorably as reducing the potential risk of being forced to divest their business(es) in a fire sale.[22] Merger parties should have a similar perspective on UFB remedies, as they do not pose the risk of a fire sale either.

FIF and UFB remedies are usually preferred by competition enforcement authorities in cases where it would be difficult to find a suitable purchaser (or reach an agreement with one) for the acquisition of the business(es) subject to the proposed divestment. This situation is likely to occur when there are only a few buyers who can meet the criteria for suitability, such as the likeliness of the ensuing divestiture to eliminate the identified competition concerns.[23]

---

[21] Dominic Long, Catherine Wylie & David Weaver, *Rising tide of 'Fix-it-first' and 'Up-front Buyer' remedies in EU and UK Merger Cases* 3 (Competition Policy International, 2016), https://www.competitionpolicyinternational.com/wp-content/uploads/2016/10/Europe-Column-October-Full.pdf (last visited Nov. 16, 2018).

[22] *Ibid.*

[23] *See* EU Merger Remedies, *supra* note 9, at 6-7.

The Department of Justice's Antitrust Division ("***DoJ***"), the European Commission ("***Commission***") and the FTC all employ FIF and UFB solutions in their enforcement regimes, but they do not share absolutely common understandings and definitions for these remedies.[24] While their interpretations or implementation of these remedies may not be identical, one cannot doubt that the main objective of these agencies is the same, namely to ensure that the remedies they approve are effective in preserving the competition in the relevant markets.[25] [26] Accordingly, there is an emerging trend of utilizing FIF and UFB remedies in order to ensure that the precautions that are necessary to protect the competition are implemented prior to the realization of proposed transactions.

This article aims to provide valuable insights regarding this specific type of remedy enforcement, which we will endeavor to achieve by: (i) comparing the FIF and UFB remedy enforcement systems that are used by different jurisdictions and competition authorities by presenting and evaluating their regulations and precedents, and thereby (ii) analyzing the advantages and drawbacks of FIF and UFB remedies, as well as the suitable conditions for implementing such measures. This article will also briefly touch on the issues surrounding the potential implementation of FIF and UFB remedies within the Turkish jurisdiction.

II. What are "Fix-it-first" and "Up-front Buyer" remedies?

1. Merger Control in the United States

In the United States ("***US***"), there are two distinct competition authorities that conduct merger control reviews, namely the FTC and the

[24] ALISTAIR LINDSAY AND ALISON BERRIDGE, THE EU MERGER REGULATION: SUBSTANTIVE ISSUES (Sweet & Maxwell, 4th ed. 2012), at 721; *see also* EC, *supra* note 3, 50.

[25] EC, *supra* note 3, 15.

[26] Patricia Brink, Daniel Ducore, Johannes Luebling and Anne Newton McFadden, *A Visitor's Guide to Navigating US/EU Merger Remedies*, COMPETITION LAW INTERNATIONAL, 12/1, 85

DoJ.[27] Pursuant to Section 7(a) of the Clayton Act, the direct or indirect acquisition of any voting securities or assets of any other person can only be consummated after notifying the transaction to the FTC and the DoJ. In October 2004, the DoJ published the "Antitrust Division Policy Guide to Merger Remedies"[28] ("***Guide to Merger Remedies – 2004***"),[29] [30] which was intended to provide the Antitrust Division attorneys and economists with an operational framework for fashioning and implementing appropriate relief methods (short of a full-stop injunction) in merger cases.[31] Furthermore, in January 2012, the FTC published the revised "Negotiating Merger Remedies – Statement of Bureau of Competition of the Federal Trade Commission" ("***Merger Remedies Statement***"), which similarly provides guidance for those negotiating a settlement in a merger case.[32]

[27] 15 U.S.C. § 18a (2018); 15 U.S.C. § 4 (2018).

[28] US DoJ, *supra* note 19

[29] US DEP'T OF JUSTICE ANTITRUST DIVISION [DOJ], ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (Oct. 2004), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf (last visited Dec. 13, 2018).

[30] In June 2011, the DoJ published an updated version of the Antitrust Division Policy Guide to Merger Remedies ("***Guide to Merger Remedies – 2011***" or "***Guides to Merger Remedies***" when combined with the "Guide to Merger Remedies – 2004"), which was superseded on September 25, 2018. The Antitrust Division Policy Guide to Merger Remedies, published in 2004, came back into effect on the same date. Makan Delrahim, Assistant Attorney General Antitrust Division, stated that "*Withdrawing the 2011 Remedies Guide: We are also taking a close look at our remedies policy. Negotiating remedies to anticompetitive mergers often adds significant time to the merger review, and our commitment to shortening the duration of merger reviews extends to the remedies phase. While our review is underway, I want to be transparent with the bar about what the Division's practices will be. To that end, today, I announce the withdrawal of the 2011 Policy Guide to Merger Remedies. The 2004 Policy Guide to Merger Remedies will be in effect until we release an updated policy.*" *See also* Makan Delrahim, Assistant Attorney General Antitrust Division US DoJ, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium: *It Takes Two: Modernizing the Merger Review Process*, (Sep. 25, 2018), at 11-12.

[31] US DoJ, *supra* note 29, at 1.

[32] FTC, MERGER REMEDIES STATEMENT, at 1: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf (last visited Dec. 14, 2018).

When evaluated together, the Guides to Merger Remedies[33] and the Merger Remedies Statement provide insights regarding the methods and purposes of enforcing merger remedies for notified transactions that are deemed to present anticompetitive concerns. The DoJ emphasizes the effectiveness and importance of the proper implementation of merger remedies.[34] Accordingly, proper implementation can only be achieved by considering various practical aspects of a merger remedy, such as its timing and the crucial steps that must be taken to ensure that the remedy will sustain competition in the post-merger environment. Particularly for divestment remedies, the Guide to Merger Remedies – 2004 applies three different tests on the proposed purchasers[35] and requires divestment assets to include incentives for increasing the possibility of the purchaser acting as an effective and long-term competitor.[36] Although the Guide to Merger Remedies states that the DoJ must approve any proposed purchaser, it subsequently provides other requirements as well, stating that: (i) the divestiture must not cause competitive harm by itself, (ii) the DoJ must be certain that the purchaser has the necessary incentive to use the divestiture assets to compete in the relevant market, and (iii) the purchaser possesses sufficient acumen, experience and financial capability to compete effectively in the relevant market.[37] However, for the reasons explained below, in certain cases, the parties may seek to implement a pre-consummation FIF[38] remedy that may remove the DoJ's competitive concerns without requiring the DoJ to bring a lawsuit. In addition, transaction parties also propose UFB remedies before the DoJ, whereas the Guide to Merger Remedies – 2004, the current effective guidelines which have superseded the 2011 version since September 2018, does not include any insights regarding UFB remedies.

---

[33] In order to avoid repetition and ensure readability, the DoJ's "***Guide to Merger Remedies – 2004***" and its "***Guide to Merger Remedies – 2011***" will henceforth be referred to jointly as the "***Guides to Merger Remedies.***"

[34] US DoJ, *supra* note 29, at 2; *see also* US DoJ, *supra* note 19, at 21.

[35] *Id.*, at 31.

[36] *Id.*, at 9-10.

[37] *Id.*, at 31-32.

[38] *Id.*, at 26-27; *see also* US DoJ, *supra* note 19, at 22.

Also, the FTC's Merger Remedies Statement addresses potential divestment remedies. Accordingly, the FTC requires transaction parties to propose a competitively and financially viable party as the acceptable buyer. In other words, the FTC seeks a proposed buyer who will be capable of maintaining and restoring competition in the relevant market after acquiring the divested assets. Therefore, a proposed buyer will be evaluated as to whether it possesses: (i) the financial capability[39] and economic incentives to acquire and operate the divested assets, and (ii) the competitive ability to maintain or restore competition in the relevant market.[40] In addition, under certain circumstances discussed below, the FTC's Merger Remedies Statement allows notifying parties to propose a UFB[41] for a specific package of divestiture assets to the FTC's discretion.

In this respect, it is the transaction parties who are obliged to demonstrate that the buyer is satisfactory within their proposed remedies. Within the context of the FTC's review process, settlements that are reached with the notifying parties constitute an "order," if such settlements are agreed upon by the parties and approved and issued by a vote of the FTC Commissioners. On the other hand, settlements at the DoJ take the form of a proposed final judgement, which describes in detail the divestiture and/or other relief measures agreed upon by the transaction parties and the DoJ.[42]

Due to the risks and concerns discussed below, the FTC and the DoJ may prefer to implement FIF and/or UFB remedies, especially if they believe that the parties will not be able to easily find a suitable purchaser for divestiture remedies. Accordingly, the implementation of FIF and UFB remedies within the US jurisdiction is carried out as follows:

---

[39] The proposed buyer's financial condition should be thoroughly scrutinized by reviewing its financial statements, such as balance sheets and other financial data, in order to determine whether it possesses the necessary financial resources. *See* US FTC, *supra* note 32, at 10.

[40] US FTC, *supra* note 32, at 10; *see also* Brink et al., *supra* note 26, at 87.

[41] US DoJ, *supra* note 19, at 23; *see also* US FTC, *supra* note 32, at 7.

[42] Brink et al., *supra* note 26, at 87.

1.1. Fix-it-First Remedies in the US

The DoJ defines a FIF remedy as "*a structural solution implemented by the parties that the Division accepts before a merger is consummated.*"[43] [44] It also adds, for clarification purposes, that a unilateral restructuring of the proposed transaction by the concerned parties will not be deemed or accepted as a FIF remedy.[45] The merging undertakings are always free to identify an acceptable purchaser in a FIF solution prior to the review(s) of the DoJ.[46]

With respect to the timing of the enforcement of FIF remedies, one can deduce from the FIF section of the Guides to Merger Remedies that the remedy should be implemented with a binding agreement prior to the consummation of the transaction. This interpretation is based on the DoJ's declaration that "*a fix-it-first remedy is unacceptable if the remedy must be monitored.*"[47] In other words, the DoJ's clearance decision with a FIF remedy should constitute a final decision both for the remedy itself and for the approval of the transaction. In this respect, the transaction parties need the DoJ's consent decree to fulfill any ongoing, long-term oversight obligations. Therefore, a FIF remedy would be unacceptable if the merged firm would be required to provide the purchaser with a necessary input pursuant to a supply agreement as part of the "fix."[48] On a related note, the Guides to Merger Remedies also provide that the implementation of a FIF remedy is subject to the transaction parties' request.[49]

In light of the factors discussed above and the characteristics of such remedies, the FIF remedies implemented by the DoJ aim to

---

[43] US DoJ, *supra* note 29, at 26.

[44] US DoJ, *supra* note 19, at 22.

[45] *Ibid. See also* footnote 36 in US DoJ, *supra* note 29: "The parties may always unilaterally decide to restructure their transaction to eliminate any potential competitive harm. While this may obviate the need for the Division to further investigate the transaction, it is not considered a fix-it-first remedy for the purposes of this Guide since the Division did not "accept" the fix."

[46] US DoJ, *supra* note 29, at 30.

[47] *Id.*, at 28; *see also* US DoJ, *supra* note 19, at 22.

[48] US DoJ, *supra* note 29, at 28.

[49] *Id.*, at 26; *see also* US DoJ, *supra* note 19, at 22.

preserve competition in the relevant market more immediately and effectively than could be achieved through a DoJ decree, and thereby seek to ensure that the DoJ uses its resources more efficiently. However, if the competitive harm projected from a notified transaction requires remedial provisions that entail continuing, post-consummation obligations, the DoJ may reject the implementation of the proposed FIF remedy.[50] To that end, the DoJ's purpose and grounds for implementing FIF remedies in certain cases can be summarized as follows: (i) FIF remedies are required for preserving competition more effectively in terms of timing, and (ii) the case does not require post-consummation obligations for ensuring the future preservation of competition.

On the other hand, the FTC does not include any references to FIF solutions in its Merger Remedies Statement. In fact, it can be reasonably argued that FIF remedies are rarely implemented, particularly by the FTC. This is due to the FTC's structure; namely, the proposed order of the FTC staff, which is mostly finalized through the remedy proposals offered by the notifying parties and subsequent negotiations between the FTC staff and the undertakings, is not binding for the decision-making commissioners. Indeed, there was a recent case[51] in which the FTC found the up-front divestiture package (*i.e.*, divesting four different cigarette brands to a competitor) to be insufficient to eliminate potential competition concerns in the relevant market, and imposed additional post-merger remedies through a consent order. Accordingly, even if the transaction parties prefer to adjust their proposed merger and the FTC staff includes the adjustment in their proposed order, there is no guarantee that this proposed solution will be accepted or implemented by the FTC's final order.[52] For that reason, although it may seem as if undertakings can, in practice, implement FIF remedies within the FTC's merger control reviews by carrying out the agreed-upon divestments in

[50] OECD - Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement DAF/COMP/WP3/ WD(2011)58, REMEDIES IN MERGER CASES (THE UNITED STATES OF AMERICA'S SUBMISSION) 27, https://www.ftc.gov/sites/default/files/ attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf (last visited Dec. 4, 2018).

[51] *Reynolds American Inc./Lorillard Inc.*, FTC File No. 141 0168, Docket No. C-4533.

[52] Brink et al., *supra* note 26, at 93.

the proposed order, the possibility that the FTC may ultimately decide to require additional remedies prevents the remedy mechanism from being considered as a genuine "FIF remedy." However, there have been some cases in which the transaction parties have unilaterally divested certain assets in an acceptable manner, so that the FTC eventually decided that no further remedies were required. In such cases, a FIF-type remedy was implemented indirectly and the FTC did not render a formal order.

Conversely, the DoJ includes FIF solutions in its Guides to Merger Remedies and utilizes such FIF remedies in the context of merger divestitures. The DoJ favors FIF remedies for the following reasons: (i) they allow the transaction parties to remove or mitigate competitive concerns before the merger is consummated, which eliminates the need to launch a case, (ii) they enable the Division to use its resources more efficiently, and (iii) they avoid costs that would be incurred by society at large.[53] [54] [55] Moreover, the DoJ takes the view that FIF remedies grant a greater degree of flexibility to the transaction parties in fashioning and shaping their divestiture plans. [56] [57]

Pursuant to the Guides to Merger Remedies, the DoJ must be satisfied that the proposed FIF remedy will effectively preserve competition after the concentration is realized.[58] Indeed, for any proposed merger, the DoJ can only decide that it will not file a case when it is satisfied in this regard. In this context, "*an acceptable FIF remedy contains no less substantive relief than would be sought if a case were filed.*"[59] [60] For that reason, the transaction parties must submit an agreement concerning their FIF remedy, and the agreement should (i) specify the assets to be sold, (ii) declare that the DoJ will be notified when the divestiture assets are sold, and (iii) confirm that the agreement

---

[53] Jessica C. Strock, *Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies*, 53/6 WILLIAM. & MARY L. REV. 2147 (2012), http://scholarship.law.wm.edu/wmlr/vol53/iss6/7 (last visited Nov. 9, 2018).

[54] US DoJ, *supra* note 29, at 27.

[55] US DoJ, *supra* note 19, at 22.

[56] *See* Shi, *supra* note 6, at 138-139.

[57] US DoJ, *supra* note 29, at 27; *see also* US DoJ, *supra* note 19, at 22.

[58] US DoJ, *supra* note 29, at 27; *see also* US DoJ, *supra* note 19, at 22.

[59] *Id.*, at 22-23.

[60] US DoJ, *supra* note 29, at 27.

constitutes the entire understanding with the DoJ concerning the divested assets.[61]

To sum up, the FIF remedy option is defined as a merger control remedy under the DoJ's Guides to Merger Remedies, and therefore, considered to be subject to its enforcement principles and procedures. However, it remains unclear from the Merger Remedies Statement whether undertakings can implement FIF remedies for the FTC's merger control reviews (genuinely, as defined under other competition authorities' guidelines), in order to eliminate competition law concerns prior to the rendering of the FTC's final order.

1.2. Up-front Buyer Remedies in the US

As mentioned earlier (in footnote 29), the DoJ has superseded the "Guide to Merger Remedies – 2011" and it has decided that the "Guide to Merger Remedies – 2004" will be in effect until a new guide is adopted. On that note, it should be noted that the Guide to Merger Remedies – 2004 does not contain any content on or cover UFB remedies. Therefore, for the purposes of this article, the DoJ's approach to UFB remedies is provided below, as per the Guide to Merger Remedies – 2011.

The DoJ classifies UFB remedies as falling under the rubric of "post-consummation sale remedies."[62] Transaction parties may prefer to offer the divestiture of a specific package of assets to a designated purchaser prior to the DoJ's decision on the proposed transaction in order to alleviate the DoJ's concerns regarding the protection of competition in the post-merger relevant market. Accordingly, the DoJ will grant a consent decree if it decides to approve the proposed UFB remedy and accept it as a divestiture that will effectively preserve competition in the relevant market.

According to the DoJ, UFB remedies are considered to provide benefits for both the merging parties and the DoJ itself. That is to say, the transaction parties benefit from the brief divestiture process, since

[61] US DoJ, *supra* note 19, at 23.

[62] *Ibid*.

the UFB remedy offers certainty about the divestiture transaction, whereas the DoJ (i) benefits from avoiding the costs that might have been incurred in a lengthy investigation and the costs of monitoring the post-consummation sales process, and thereby (ii) ensures that the divestiture will be effective in preserving competition in the relevant market.[63] Also, pursuant to the DoJ's practice, a UFB consent decree should include an alternative relief proposal, in case the pre-approved purchaser decides to cancel the deal and back out of the agreement.[64] On that front, it can be plausibly argued that UFB remedies do not strictly provide certainty for either the transaction parties or the DoJ; there still remains the possibility that the pre-approved buyer could terminate the divestment agreement and the divestiture assets might thereby have to be sold in a fire sale. Such cases may potentially incur additional costs and necessitate an increased workload in order to appoint a divestiture trustee and monitor whether the divestment has been implemented properly.[65]

On the other hand, the FTC describes UFB remedies as a mechanism in which "*the parties must identify an acceptable buyer and then negotiate, finalize, and execute the purchase agreement and all ancillary agreements with that buyer before staff forwards the proposed order to the Commission.*"[66] The FTC usually requires a UFB remedy in cases where the parties "*seek to divest assets comprising less than an autonomous, on-going business or if the to-be-divested assets are susceptible to deterioration pending divestiture.*"[67] More concretely, if the transaction parties propose to divest a relatively limited number of assets, the staff (*i.e.*, case handlers) will be more likely to consider proposing a UFB remedy. The FTC's consent orders generally require the parties to divest the designated assets to the approved up-front buyer within a short time frame following the order.[68]

[63] *Ibid.*

[64] *Id.*, at 23-24.

[65] *Id.*, at 26.

[66] US FTC, *supra* note 32, at 7.

[67] *Ibid.*

[68] *Ibid.*

With respect to the identity of the specific purchaser, regardless of whether it is an up-front or post-order buyer, the FTC seeks to determine and ensure that the buyer "*has (i) the financial capability and incentives to acquire and operate the assets, and (ii) the competitive ability to maintain or restore competition in the market.*"[69]

An order that specifies an up-front buyer will typically require that the parties divest the designated assets to the up-front buyer swiftly and in compliance with the divestment agreement, which will be attached to the order. In the event that the transaction parties fail or neglect to divest the assets to the approved buyer in a timely fashion (or in the specified time frame), the FTC may appoint a trustee to oversee the divestiture process for the assets in question. On that note, the FTC may also choose to expand or replace the assets to be divested with "crown jewel" assets that are deemed suitable to be "more readily divested."[70] In contrast, the DoJ explicitly disfavors the implementation of crown jewel provisions,[71] which concern an undertaking's most valuable or attractive assets, as it deems just provisions to be an acknowledgement of the fact that the proposed remedy is less effective than it should be. The DoJ also considers the fact that crown jewel provisions incentivize purchasers to delay the divestment in order to potentially benefit from them.

In order to reduce the failure risk of the implementation of a UFB remedy (and to eliminate it entirely, if possible), the FTC also requires the transaction parties to obtain the necessary third-party consents before recommending the proposed UFB divestiture to the Commission, which is the decision-making body of the FTC. Examples of such third-party consents, whose lack may cause the divestment transactions to be blocked, include the following: (i) landlord/tenant consent, (ii) customer consent due to a customer agreement, and (iii) licensor consent. The FTC's practice aims to propose a ready package of divestments to the Commission, whose implementation will not face any legal barriers or impediments following the Commission's final order.[72] Nevertheless, in cases where the Commission deems it necessary, it may amend the

[69] *Id.*, at 10.

[70] *Id.*, at 7, 21.

[71] US DoJ, *supra* note 29, at 36-37.

[72] *Id.*, at 10.

proposed UFB remedy package, as it did in the *Reynolds American Inc./Lorillard Inc.* case. In that case, the parties initially proposed to divest four of Reynolds American Inc.'s cigarette brands to a UFB, namely Imperial Tobacco Group ("***Imperial***"), whereas the FTC additionally required the divestment of Lorillard Inc.'s manufacturing facilities in Greensboro, North Carolina, and thereby provided Imperial with the opportunity to hire most of the existing management, staff and sales force of Lorillard Inc. The FTC's order also required Reynolds American and Lorillard to provide Imperial with retail shelf space for a short period of time and to provide other operational support during the transition. Finally, the FTC's order also appointed a monitor to oversee the divestiture process.[73] Against this background, the decision also constitutes an important precedent, establishing that the FTC may (i) approve the proposed UFB remedies by amending them, (ii) nonetheless prefer to monitor the implementation of UFB remedies, and (iii) combine behavioral remedies with UFB remedies.

In general, the FTC primarily requires UFB remedies in two main circumstances: (i) when the risk of failing to find a suitable purchaser is high, and (ii) when there are concerns regarding the viability of the assets to be divested. For that reason, the FTC frequently seeks UFB remedies with respect to transactions concerning pharmaceutical products, as there would be a limited number of pharmaceuticals manufacturers who do not have overlapping products with the transaction parties, and who could therefore potentially purchase the divestiture. The FTC's increasing tendency toward seeking UFB remedies also applies to products in the food retailing market, since the relevant assets are prone to customer losses during the divestiture period.[74] Moreover, in order to ensure the competitiveness of the assets to be divested, the FTC may also seek to impose additional obligations to be undertaken by the transaction parties. As discussed below in the context of the *Anheuser-Busch InBev SA/NV* ("***ABI***") decision,[75] such

[73] FTC, FTC APPROVES FINAL ORDER PRESERVING COMPETITION IN US MARKET FOR CIGARETTES, https://www.ftc.gov/news-events/press-releases/2015/07/ftc-approves-final-order-preserving-competition-us-market (last visited Dec. 5, 2018).

[74] *See* OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *supra* note 50, 28.

[75] United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., D.D.C. Civil Action No. 13-127 (2013)

additional remedies can be implemented through a variety of methods. The FTC's Merger Remedies Statement provides examples of such additional orders, including: (i) transitional assistance, (ii) assurance of supply of a product until the buyer can manufacture or obtain that product itself, (iii) technical assistance with regard to divested patents, technology and know-how, and (iv) persuasion of customers to switch their purchases to the buyer of the divestment.[76]

In summary, UFB remedies are required more frequently than FIF remedies by the FTC and the DoJ in merger control reviews, and they are particularly essential in cases where (i) the transaction parties propose a divestiture of assets that do not constitute a stand-alone business, (ii) the FTC or the DoJ is uncertain that the divested business will remain competitive, (iii) there is a possibility/risk of competitive harm during the search for a divestiture buyer, or (iv) there is a possibility/risk that the proposed divestiture may not be attractive to or draw the attention of potential suitable purchasers.[77]

1.2.1. Cases Involving Up-front Buyer Remedies in the US

Examining the decisional practices of the FTC and the DoJ, we observe that they have required identified up-front buyers in numerous cases. The *Anheuser-Busch InBev* decision[78] is a prime example of a case in which the DoJ compelled a UFB remedy. In that case, Anheuser-Busch InBev ("***ABI"***)[79] sought to acquire the remaining shares of Grupo Modelo S.A.B de C.V. ("***Modelo***") that it did not already own. Prior to the envisaged concentration, there were two leading competitors in the

[76] US FTC, *supra* note 32, at 15-16.

[77] Brink et al., *supra* note 26, at 88.

[78] D.D.C, *supra* note 75.

[79] ABI is a corporation organized and existing under the laws of Belgium, with its headquarters in Leuven, Belgium. ABI brews and markets more beer sold in the US than any other firm, with a 39 percent market share nationally. Furthermore, ABI owns and operates 125 breweries worldwide, including 12 in the US. It owns more than 200 different beer brands, including Bud Light—the best-selling brand in the US—and other popular brands, such as Budweiser, Busch, Michelob, Natural Light, Stella Artois, Goose Island and Beck's. According to the case, ABI was the largest beer producer in the US market at the time.

US beer market (*i.e.*, ABI and Modelo), and ABI owned a substantial stake in Modelo. In that case, Bill Bear, the Assistant Attorney General in charge of the DoJ's Antitrust Division at the time, stated that "*the companies' proposed merger would have reduced those two competitors to one, ABI. The proposed settlement will create an independent, fully integrated and economically viable competitor to ABI.*"[80] Within the scope of the contemplated transaction, as originally proposed, competition would be substantially reduced in the US beer market. On that note, the DoJ alleged that the proposed transaction would result in consumers paying more for beer and that it would limit innovation in the beer market. Accordingly, in its final judgement, the DoJ required the transaction parties to divest certain assets to an identified purchaser, Constellation Brands, Inc. ("***Constellation***"), or to an alternative purchaser if, for some reason, the transaction with Constellation could not be completed. Therefore, the DoJ stated in its final judgement that the parties would be required "*upon the later of (i) the completion of the Transaction or (ii) ninety (90) calendar days after the filing of this proposed Final Judgement, to divest the Divestiture Assets in a manner consistent with this proposed Final Judgement to an Acquirer acceptable to the United States in its sole discretion.*"[81] Accordingly, Constellation acquired Modelo's entire US business, including (i) its perpetual and exclusive licenses of the Modelo brand beers for distribution and sale in the US, (ii) its newest, most technologically advanced brewery (*i.e.*, the Piedras Negras Brewery in northern Mexico), and (iii) its interest in Crown Imports LLC[82] and other assets, rights and interests necessary to ensure that Constellation would be able to compete in the US beer market using the Modelo-brand beers. In order to ensure that Constellation could become a fully independent competitor to ABI, the DoJ also required (i) Constellation to make a number of improvements to the divested brewery (*i.e.*, Piedras Negras), and (ii) ABI to provide interim supply and transition services to

---

[80] US DEP'T OF JUSTICE, JUSTICE DEPARTMENT REACHES SETTLEMENT WITH ANHEUSER-BUSCH INBEV AND GRUPO MODELO IN BEER CASE (Apr. 19, 2013), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case (last visited Nov. 16, 2018).

[81] *See* D.C.C., *supra* note 75, Section IV, paragraph B of the Final Judgement.

[82] Crown is the joint venture that was established by Modelo and Constellation to import, market and sell certain Modelo beers in the US market.

Constellation (or to another alternative buyer) during the expansion of the brewery. These DoJ requirements were aimed at enhancing Constellation's ability to compete with the combined firm in the post-merger market environment.[83]

In its *Johnson&Johnson/Synthes* decision, [84] the FTC required Johnson & Johnson ("***J&J***") to sell its system for the surgical treatment of serious wrist fractures before approving the proposed merger. The FTC compelled this sale in order to alleviate the potential competitive concerns that would arise from J&J's proposed acquisition of Synthes, Inc. ("***Synthes***"),[85] which would allegedly reduce competition in the market for the relevant treatment systems, since J&J and Synthes together would possess more than 70% of the US market share for wrist fracture treatment systems. The FTC required J&J to divest its distal radius plate business, along with the rest of its product line for treating traumatic injuries, to a suitable buyer within 10 days after the consummation of the transaction, and J&J selected Biomet, Inc. ("***Biomet***") as the suitable buyer of its assets. According to the FTC's complaint, J&J's proposed acquisition of Synthes would harm competition in the US market for volar distal radius plating systems, which are internal devices surgically implanted on the underside of the wrist to achieve proper alignment of the radius bone following a wrist fracture. The FTC's complaint also alleged that the US market for volar distal radius plating systems was highly concentrated.[86] Biomet had only a negligible presence in the markets for volar distal radius plating or trauma products, and was therefore well positioned to replace the competition that would have been eliminated as a result of the proposed acquisition.

---

[83] Brink et al., *supra* note 26, at 89.

[84] *Johnson & Johnson/Synthes, Inc.*, FTC File No. 111 0160, Docket No. C-4363.

[85] According to the case, Synthes, a medical device company headquartered in Solothurn, Switzerland and West Chester, Pennsylvania, is the leading producer of skeletal treatment devices in North America. Moreover, a unit of Synthes sells a rival volar distal radius plating system.

[86] FTC, FTC APPROVES FINAL ORDER SETTLING CHARGES THAT JOHNSON & JOHNSON'S PROPOSED ACQUISITION OF SYNTHES, INC. WAS ANTICOMPETITIVE IN MARKET FOR TREATING TRAUMATIC WRIST INJURES (Aug. 7, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-order-settling-charges-johnson-johnsons (last visited Nov. 13, 2018).

The *J&J/Synthes* decision serves as a landmark precedent in the FTC's decisional practice. This decision suggests that the FTC is more likely to require UFB remedies specifically for merger control reviews that concern sectors, such as medical devices and pharmaceuticals, in which the parties must also seek the approval of other governmental authorities, such as the necessary approval of the US Food and Drug Administration in the *J&J/Synthes* case. Absent a UFB remedy in such transactions, a post-consummation divestment may fail due to a potential block or prohibition that may be imposed by another relevant administrative or regulatory authority. Therefore, in line with the acknowledged purpose of UFB remedies (*i.e.*, preventing possible divestment problems, such as the potential difficulty of finding a suitable purchaser), the FTC prefers implementing UFB remedies within such challenging sectors in order to avoid the potential cancellation of the proposed divestment due to a lack of administrative or regulatory approval.[87]

Another FTC case requiring a UFB remedy was *Solera Holdings, Inc*. ("***Solera***"),[88] which took place in 2013. Following a public comment period, the FTC approved a final order which charged that Solera's 2012 acquisition of its rival, Actual Systems of America, Inc. ("***Actual Systems***"),[89] would be likely to harm competition considerably in the market for yard management systems ("***YMS***") used by automotive recycling yards, which, according to the case, was already highly concentrated. The FTC alleged that combining the two firms would reduce direct and effective competition between Solera and Actual Systems, and that it would likely lead to increased prices for YMS products and diminished innovation in the relevant market. Solera, through its wholly owned subsidiary Hollander, Inc. ("***Hollander***"), and Actual Systems comprised two of the three leading providers of YMS products and services in the North American market at the time of the acquisition. To address the FTC's competition law concerns, Solera had to sell its US and Canadian YMS business to ASA Holdings, LLC. ("***ASA Holdings***"), which was established by former Actual Systems managers for the acquisition of the divested business. The FTC's order

[87] Brink et al., *supra* note 26, at 90.

[88] *Solera, Inc./Actual Systems, Inc.*, FTC File No. 121 0165, Docket No. C-4415.

[89] Actual Systems is a subsidiary of Solera.

included certain provisions to ensure that the divestiture to ASA Holdings would be successful, including the obligation to provide ASA Holdings with a license to Solera's Hollander Interchange,[90] which is an auto-parts database that Hollander maintains and licenses to third parties, for 10 years.[91] Although the acquisition had already occurred, the FTC required an up-front divestiture to be in place before it accepted and approved the settlement, in order to ensure that an effective remedy would be achieved.[92]

In a very recent case, the FTC launched an investigation[93] into the proposed acquisition of Pinnacle Entertainment, Inc. ("***Pinnacle***")[94] by Penn National Gaming, Inc. ("***Penn National***").[95] In a press release published on October 1, 2018,[96] the FTC raised concerns that the proposed acquisition would pose substantial risks to competition in the market for casino services.[97] The FTC identified three relevant

[90] Pursuant to the case, "Hollander Interchange" refers to the numeric indexing system maintained and sold/licensed by Solera, which is used to identify automotive parts and assemblies and determine their ability to be interchanged.

[91] FTC, FTC APPROVES FINAL ORDER SETTLING CHARGES THAT SOLERA HOLDINGS' 2012 ACQUISITION OF ACTUAL SYSTEMS WAS ANTICOMPETITIVE IN THE MARKET FOR YARD MANAGEMENT SYSTEMS (Oct. 24, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/ftc-approves-final-order-settling-charges-solera-holdings-2012 (last visited Nov. 9, 2018).

[92] Brink et al., *supra* note 26, at 90.

[93] FTC File No. 181 0011 (Oct. 1, 2018).

[94] Pinnacle, which is based in Las Vegas, Nevada, is a publicly traded casino entertainment operator and developer. Pinnacle owns and operates 16 properties across 10 states and manages a property near San Antonio, Texas.

[95] Headquartered in Wyomissing, Pennsylvania, Penn operates 29 properties in 17 states, most under the "Hollywood" brand. Penn is a publicly traded owner and manager of gaming and racing facilities, as well as video gaming terminal operations, with a focus on slot-machine entertainment.

[96] Analysis of Agreement Containing Consent Orders to Aid Public Comment; FTC, FTC REQUIRES CASINO OPERATORS PENN NATIONAL GAMING, INC. AND PINNACLE ENTERTAINMENT, INC. TO DIVEST ASSETS IN THREE MIDWESTERN CITIES AS A CONDITION OF MERGER (Oct. 1, 2018), https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle (last visited Nov. 14, 2018).

[97] According to the complaint, casino services include gaming services, such as slots and table games, as well as related lodging, entertainment, and food-and-beverage services. Typically, casino operators generate the vast majority of their revenues

geographic markets (*i.e.*, markets where Penn National and Pinnacle were close competitors) in which to analyze the merger's potential effects, namely: (i) the St. Louis, Missouri, metropolitan area; (ii) the Kansas City, Missouri, metropolitan area; and (iii) the Cincinnati, Ohio, metropolitan area. In particular, the proposed acquisition raised competitive concerns that the number of competitors in the St. Louis market would be reduced from 4 to 3. Therefore, the FTC argued that the proposed transaction carried the risk of leading to a highly concentrated market in which only two properties would be competing with Penn National, and, what is more, only one of which would have a casino that would provide substantial competition to Penn. In a similar manner, in both Kansas City and Cincinnati, it was determined that the proposed transaction would reduce the number of competitors from 5 to 4 and that it would materially escalate the level of concentration in the relevant markets. The acquisition, if consummated, would presumably hinder direct competition between Penn National and Pinnacle in and around St. Louis, Kansas City, and Cincinnati. Thus, it was determined that the transaction would cause Penn National to exercise unilateral market power and would lead to increased prices and reduced quality for consumers of casino services. The parties and the FTC therefore settled on a remedy that involved the divestment of Pinnacle's casino facilities in these three geographic markets, including relevant trade names, customer data, hotels and related services. These casino facilities would be sold to Boyd Gaming Corporation within 10 days after the consummation of the transaction. The FTC's order also included a stipulation with respect to the provision of transitional assistance services to Boyd Gaming Corporation, if requested. In this respect, the merging parties were obliged to maintain the viability, marketability, and competitiveness of the divested assets during the interim period.[98]

from gaming activities. Casinos are highly regulated, with a limited number of licenses granted in any given state, as well as age restrictions on who can engage in gambling and gaming activities.

[98] *Penn National Gaming, Inc./Pinnacle Entertainment*, FTC File No. File No. 181 0011. https://www.ftc.gov/system/files/documents/cases/181_0011_penn_pinnacle_decision_and_order.pdf (last visited Dec. 7, 2018).

2. Merger Control in the European Union

The European Commission is the authorized body for merger control reviews in the European Union.[99] In this respect, Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, (2008), ("***EC Remedies Notice***") presents the guidelines on the Commission's merger review procedures.

Furthermore, in the EU jurisdiction, when a proposed concentration poses the risk of raising competition law concerns by significantly impeding effective competition in the relevant market, particularly as a result of creating or strengthening a dominant position, the transaction parties may seek to modify the concentration in order to address and resolve the competition law issues, and thereby gain clearance for their transaction.

On evaluating whether the proposed remedies are likely to eliminate the competition problems, the Commission takes into account all the relevant dynamics, including, *inter alia*, (i) the type, scale and scope of the proposed remedies, and (ii) the characteristics of the market in which the competition concerns arise, including the position of the transaction parties and other participants in the relevant market.[100] In order to ensure that all the applicable existing factors are considered, the Commission conducts various market tests, usually by interviewing and consulting with interested third parties. These market tests involve information requests from relevant customers or competitors on whether the proposed remedies will succeed in preserving the competition in the relevant market.[101]

Merger remedies must first be proposed by the transaction parties to the Commission and the Commission only becomes entitled and authorized to evaluate the proposed remedies after they are submitted by the transaction parties. In other words, the Commission is not allowed to

---

[99] The Commission was granted the authority to regulate and control concentrations at the EU level by the enactment of the 1989 Merger Regulation.

[100] EUROPEAN COMPETITION LAW – A CASE COMMENTARY 537 (Weijer VerLoren van Themaat & Berend Reuder, eds., 2014).

[101] Brink et al., *supra* note 26, at 87.

offer or put forth a potential remedy for a proposed concentration; it only has the power to approve or deny such remedies when proposed by the transaction parties.[102] Under the EU merger control system, there are three different types of remedies, which are categorized as follows: (i) divestiture of a business by sale to a suitable purchaser, (ii) removal of links with competitors, and (iii) other remedies. The first type of remedy includes carve-outs, divestiture of assets (in particular, divestiture of brands and licenses) and re-branding actions, as well as "crown jewels" and their transfer to a suitable purchaser.[103] The Commission only utilizes the FIF and UFB methods as remedies within the context of a business divestiture to an adequate and suitable purchaser.

2.1. Transfer to a Suitable Purchaser

Since its legal system is based on civil law, the guidelines on the EU's merger control and remedy evaluation regimes are more extensively elaborated than the comparable regulations and guidelines in the US, where the legal system operates on a case-law basis. For that reason, transaction parties in the EU should strictly follow the rules and guidance provided in the applicable regulations in order to ensure that they can receive clearance for their transactions from the Commission.

The Commission asserts, in the EC Remedies Notice, that the anticipated results from a merger remedy involving the transfer of a business to a suitable purchaser can only be achieved if and when the business is actually transferred to a suitable purchaser, when the divested business will be able to develop into and operate as an active competitor in the relevant market. In this respect, the Commission takes into consideration the potential and capabilities of the divested business when assessing a proposed merger remedy. As stated above, the main criterion for the suitability of a purchaser is its ability to remove the competition concerns that have been identified.[104] For the sake of eliminating competition concerns, the EC Remedies Notice seeks suitable purchasers that satisfy the following conditions: (i) they are independent of and unconnected to the transaction parties, (ii) they have

[102] Themaat & Reuder, *supra* note 100, at 537.

[103] EC, *supra* note 3, 22-70.

[104] *Id.*, 47.

sufficient financial resources and relevant expertise, and possess the incentive and capability to continue and develop the divested business as a viable and active competitive force in the post-merger relevant market, and (iii) they do not create new competition problems and do not cause the application of the proposed remedies to be delayed. Nevertheless, it should be noted that, in practice, the application of these conditions is not an automatic process and the Commission evaluates the requirements of a suitable purchaser on a case-by-case basis.[105] [106]

The identification of a suitable purchaser plays a crucial role in guaranteeing that the divested business will preserve competition in the relevant market in the post-merger environment. There are three principal methods of ensuring that the business is transferred to a suitable buyer, namely: (i) divestment within a fixed time limit, (ii) divestment to a UFB, and (iii) applying a FIF remedy. The particular method that is selected by the Commission will depend on the risks involved in each case, including (i) the nature and scope of the business to be divested, (ii) the possibilities and likelihood of degradation to the business in the interim period, and (iii) uncertainties involved in the transfer of the business and the implementation of the divestment, namely the difficulty of finding a suitable buyer.[107]

The Commission's most common practice is requiring "divestment within a fixed time limit." In cases where this method is employed, the business to be divested must be transferred within a fixed time limit after the Commission renders its decision, based on the requirements above. Under this system, the parties are permitted to proceed with the sale of the divested business (i) based on the purchaser requirements, and (ii) within a fixed time limit, and they are also allowed to complete their main merger transaction prior to the required divestment. Nevertheless, in most cases, the Commission will order the parties to complete the divestment within a short period of time. If the transaction parties fail to divest the business within the specified time, the clearance decision will be revoked and the transaction may need to be unwound. As mentioned

[105] *Id.*, 48-49.

[106] *See* EU Merger Remedies, *supra* note 9, at 7.

[107] *Ibid*.

above, this procedure is applied in the vast majority of cases that are decided by the Commission.[108] [109]

With respect to divestment to an up-front buyer, the parties to the transaction should include a clause within their proposed merger remedy agreement stipulating and acknowledging that they cannot complete the envisaged concentration before entering into a binding agreement with a suitable purchaser who has been approved by the Commission.[110] [111] That is to say, the buyer in an acquisition guarantees in its commitments to the Commission that it will not consummate the transaction until it has entered into a legally binding share purchase agreement to sell the divestment business and until the Commission has approved the proposed buyer of the divested business. In other words, under the UFB scenario, even though the parties may have already obtained the Commission's clearance decision, they can only close their transaction after they have submitted a suitable buyer to the Commission and received its approval for the proposed suitable buyer.[112] [113]

According to the EC Remedies Notice, there are two situations in which a UFB remedy may be required: (i) if the Commission has doubts and uncertainties over the implementation of the divestment, such as the risk that a suitable purchaser cannot be found, or (ii) if the Commission raises noticeable concerns that the divested business will not be effectively preserved.[114]

With respect to the FIF method, the transaction parties should identify a suitable buyer for the business to be divested and enter into a legally binding agreement with that buyer during the Commission's merger review. Under the FIF scenario, the Commission takes such an agreement into account in its clearance decision. In fact, it can be

---

[108] EC, *supra* note 3, 50.

[109] *See* EU Merger Remedies, *supra* note 9, at 7.

[110] Lindsay & Berridge, *supra* note 24, at 720.

[111] EC, Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation ("***Best Practice Guidelines***"), Dec.5, 2013, 16.

[112] EC, *supra* note 3, 50.

[113] *See* EU Merger Remedies, *supra* note 9, at 7.

[114] Lindsay & Berridge, *supra* note 24, at 720-721.

reasonably argued that the proposed divestment agreement constitutes the actual *basis* of the Commission's decision. After the Commission's clearance decision on the proposed remedy is granted, the transaction parties do not need any additional approvals before finalizing their main transaction and concluding their merger. In this context, the transfer of the divested business may be implemented after the Commission renders its decision.

It is worth noting that FIF solutions are not commonly used or implemented. They are mainly applicable in situations in which the effectiveness of a merger remedy, and therefore its acceptability to the Commission, depends strictly on the identity of the proposed purchaser. This is expected when the feasibility of the divestment hinges on the particular assets of the purchaser or when the purchaser must possess specific characteristics in order to allow the proposed remedy to eliminate the competitive issues arising from the transaction.[115] [116]

The Commission's rendering of a clearance decision in combination with a FIF remedy is suitable in cases where there is sufficient likelihood that the entrant to the market (*i.e.*, proposed purchaser) would resolve the competition concerns identified and that the proposed remedy would be effective and implementable.[117]

For the sake of clarity, it is worth reiterating that the key difference between UFB and FIF remedies is that, in the case of UFB remedies, the Commission does not know the identity of the purchaser of the divestiture prior to rendering its clearance decision.[118]

Due to absence of any official statement, it is still difficult to forecast the emerging trends of FIF and UFB remedies within the EU or to anticipate (with any certainty) possible adjustments to the Commission's decisional practice in the context of merger control systems. However, it is worth underlining that, in 2017, approximately one-third of all merger remedy decisions by the Commission included

[115] EC, *supra* note 3, 50.

[116] *See* EU Merger Remedies, *supra* note 9, at 8.

[117] Themaat & Reuder, *supra* note 100, at 537.

[118] EC, *supra* note 3, 50.

either a UFB or FIF remedy,[119] and the number of merger control cases with attached UFB or FIF remedies has risen significantly in recent years, from just 1 in 2010 to 7 in 2016.[120] This means that the Commission has been more proactive in recent years in its quest to preserve post-merger competition by enforcing preventive remedies (*i.e.*, by requiring UFB and FIF solutions) prior to granting clearance to notified transactions. Furthermore, since it is generally argued that the FIF and UFB remedies are more common in the US relative to the EU,[121] it could be estimated that the number of cases involving either a FIF or a UFB remedy constitute more than one-third of the total merger control examinations by the FTC and the DoJ.

2.1.1. Cases Involving Up-front Buyer Remedies in the European Union

On July 13, 2000, the Commission received notification of a proposed concentration, under which Robert Bosch GmbH ("***Bosch***") intended to acquire control of Mannesmann Rexroth AG ("***Rexroth***"). On January 12, 2001, the Commission authorized the acquisition of Rexroth[122] by Bosch[123] and this authorization was conditional upon the sale of Bosch's radial piston pumps ("***RPP***") business to prevent a dominant position in the market for hydraulic piston pumps. The Commission arrived at this decision after examining the proposed concentration and concluding that the notified operation raised serious

[119] Jérémie Jourdan and Veronica Pinotti, *Merger Remedies: The Rise of Conditions*, WHITE&CASE (May 18, 2018), https://www.lexology.com/library/detail.aspx?g=d815f1db-d52d-4eda-86a4-adc22f836b18 (last visited Nov. 11, 2018).

[120] *See* Long et al., *supra* note 21, at 2.

[121] *Id.*, at 9.

[122] According to the facts of the case, Rexroth, a subsidiary of Mannesmann Atecs AG ("***Atecs***") (a Mannesmann Atecs Holding Company), is a company that operates by itself and through subsidiaries in the fields of hydraulics (hydraulic drive and open- and closed-loop control components, power units and systems, pumps, motors and gear technology), and automation (electrical control and drive components, and movement and control technology).

[123] According to the case, Bosch is a company that operates internationally in the fields of motor vehicle technology, communications technology, consumer durables (electrical tools, electrical household appliances, etc.) and producer goods (automation technology, packaging machines).

competition law concerns. These concerns were related to the risks that: (i) the business to be divested would lose value in the meantime, and (ii) a strong buyer could not be found. For these reasons, Bosch agreed to find an "up-front buyer," and proposed Moog, Inc., which was a US company, as the suitable buyer. This was the first time that the Commission required a UFB remedy for divestments.[124] In the summary of the remedies proposed within the case, the Commission identified and incorporated the very first UFB remedy, by declaring that "*Bosch accepts that the concentration cannot be put into effect until a binding agreement for the sale of the radial piston pump business has been concluded.*"

In the *Bosch/Rexroth* case, the transaction parties offered commitments in order to remove the Commission's doubts regarding the contemplated concentration. As stated above, Bosch proposed selling its RPP business as a remedy, including the development and production divisions, the transfer of customer relations and the relevant supply contracts to the buyer, the sale of other assets needed for the continuation of the business, and the transfer of its staff. To ensure that the RPP business could be successfully continued as an ongoing concern by a future buyer, Bosch committed to selling the relevant business to an independent buyer (*i.e.*, an undertaking independent of Bosch). The suitable buyer would have to be: (i) a viable business, (ii) already in existence and operating in the European industrial hydraulics markets, (iii) in possession of the financial resources and experience necessary to be able to survive as an active competitive force, and (iv) an undertaking with the specific capacity to compete on the European market for industrial hydraulics piston pumps. Bosch also committed to the following: (i) not to compete in the RPP business for a certain period of time, which would ensure that Bosch's existing customer portfolio would not immediately be enticed away from the suitable buyer, (ii) not to poach staff, and (iii) to compensate any loss of profits suffered by the buyer, if one or more of the 10 biggest customers replaced the Bosch RPPs in existing mass-produced machines with Rexroth axial pistons in

[124] European Commission Press Release IP/00/1457, Commission Authorizes Acquisition of Control of Rexroth by Robert Bosch Gmbh Subject to Conditions (Dec. 13, 2000). http://europa.eu/rapid/press-release_IP-00-1457_en.htm (last visited, Nov. 20, 2018).

the first 3 years after the sale. Taking these promises into consideration, the Commission determined that a future buyer would have a "run-in" period in which to establish itself successfully on the market.[125] Therefore, the very first UFB decision in the Commission's decisional practice combined behavioral remedies with a structural UFB remedy, as the FTC had also done in the *Reynolds American Inc./Lorillard Inc.* case. The remedy package also included the appointment of an independent and experienced trustee by Bosch who would ensure the preservation of the economic value and competitiveness of the RPP business until the sale was accomplished.[126] This trustee provision suggests that the Commission may not deem a UFB remedy as sufficient for eliminating concerns regarding the loss of value in divestiture assets, and may therefore choose to monitor the divestment process.

Since it was the first instance of a UFB remedy in its jurisdiction, the Commission explained the underlying rationale of its new practice in detail, and this explanation serves as a landmark precedent for future notifying undertakings to follow. In its decision, the Commission stated the following: "*That the ban on putting the concentration into effect should continue to apply in this case is a measure proportionate to the aim of avoiding a real danger, namely that if the concentration were to be completed before this business was disposed of the added market shares would in time automatically accrue to the parties. In the particular situation, this could not be ruled out with sufficient probability, because if no competitive buyer is found for the radial piston pumps business, and as a result customers can find no attractive long-term alternative, customers may begin to turn Bosch, and to buy Rexroth's axial piston pumps, thus reducing the market share of radial piston pumps. In a situation of the kind described such a development is not improbable, since on the market in piston pumps relations with customers have traditionally been intensive. The continuation of the ban on putting the concentration into effect which has been promised by the parties, together with the other commitments entered into, ensures that*

[125] Case COMP/M.2060, *Bosch/Rexroth*, Dec. 4, 2000.

[126] *Ibid.*

the present market situation will continue until it is clear that the radial piston pumps business is to be taken over by a competitive buyer."[127]

In 2013, in the *UPS/TNT* decision,[128] the Commission rejected the proposed remedy and blocked the merger from proceeding, due to the absence of a UFB remedy. In that case, the Commission was concerned that the transaction was basically a "three-into-two" merger in the market for overnight parcel deliveries, with DHL being the only remaining competitor in the post-merger relevant market. However, the Commission also considered that, in some EU Member States where FedEx (a US-based parcel-delivery company with a limited presence in Europe) was active, the efficiency gains arising from the merger (particularly with respect to savings in air network costs) would outweigh the competitive damage. Nonetheless, the Commission ultimately determined that this was not the case in the majority of EU Member States. For that reason, it ruled that UPS would be required to sign a binding agreement with a suitable purchaser before the merger could be carried out. However, UPS did not propose a UFB remedy and failed to implement a FIF solution. Consequently, the Commission blocked the proposed merger, because the submitted remedies were not capable of eliminating the competitive concerns that had been raised.[129] This decision validates the view that realizing a pre-consummation remedy or entering into a binding divestment agreement prior to the closing of the transaction may constitute the most vital aspect of a proposed transaction with respect to securing a clearance from competition authorities. In fact, it could further be argued that the emergence of UFB and FIF remedies were actually triggered by the need for relieving the problems arising from the prohibition of transactions that could have been approved if the timing of the implementation of the proposed remedy were different. As such, FIF and UFB remedies have enabled an increased number of merger transactions to be cleared and they have increased the undertakings' commercial liberty against the limitations of competition law enforcement.

[127] *See Bosch/Rexroth*, *supra* note 125, 93-94.

[128] Case COMP/M.6570, *UPS/TNT*, Jan. 30, 2013.

[129] *See* EU Merger Remedies, *supra* note 9, at 8.

As a more recent example, on March 27, 2017, the Commission approved the proposed merger of two US-based chemical companies, namely Dow[130] and DuPont.[131] [132] The Commission had three substantial competition concerns in that case, which related to the risk of significantly reducing (i) competition on price in various markets for existing pesticides, (ii) innovation competition in the market for pesticides, and (iii) competition on petrochemical products. The Commission cleared the merger subject to the condition that major assets of DuPont's global pesticide business, including its global research and development organization, would be divested to an up-front buyer. Furthermore, in order to preserve post-merger competition with respect to the petrochemical products market, the parties proposed to divest relevant assets from Dow's petrochemical business, which comprised (i) two manufacturing facilities producing acid co-polymers in Spain and in the US, and (ii) a contract with a third-party manufacturer from which Dow sourced ionomers that it sold to its customers.[133]

In parallel, the Commission also approved the *Bayer/Monsanto*[134] transaction subject to the divestments that were proposed during its Phase II examination. The decision includes a remedy to address the alleged loss of competition in innovation, similar to the *Dow/DuPont* decision, and thereby requires an up-front buyer for the relevant assets of Bayer related to research and development.[135] The *Bayer/Monsanto* decision focused, *inter alia*, on the alleged reduction in incentives to innovate and required a divestment of significant R&D activities. To that

[130] The Dow Chemical Company is a diversified chemicals company with its headquarters in the US. It is active in plastics and chemicals, agricultural sciences, and hydrocarbon and energy products and services.

[131] E.I. du Pont de Nemours and Company is also a diversified company with its headquarters in the US. It produces a variety of chemical products, polymers, agro-chemicals, seeds, food ingredients, and other materials.

[132] Case COMP/M.7932, *Dow/DuPont*, Mar. 27, 2017.

[133] European Commission Press Release IP/17/772, Mergers: Commission Clears Merger Between Dow and Dupont, Subject To Conditions (Mar. 27, 2017), http://europa.eu/rapid/press-release_IP-17-772_en.htm (last visited Nov. 16, 2018).

[134] Case COMP/M.8084, *Bayer/Monsanto*, Apr. 11, 2018.

[135] Cormac O'Daly, Virginia Del Pozo, and John Ratliff, *Major Events and Policy Issues in EU Competition Law, 2017-2018: Mergers*, WILMERHALE (Nov. 2018), at 2.

end, the Commission's interpretation of this issue resembled its relevant assessments in the *Dow/DuPont* decision.

2.1.2. Cases Involving Fix-it-first Remedies in the EU

On July 4, 2006, following an in-depth investigation, the Commission conditionally approved the acquisition of Falconbridge Limited ("***Falconbridge***") by Inco Limited ("***Inco***"), which are both Canadian mining companies that are globally active in the mining, processing, refining, and sale of non-ferrous metals.[136]

The Commission raised concerns with respect to the proposed acquisition's risk of significantly impeding competition, particularly as a result of the creation of a dominant position in the relevant market, as the transaction parties would have the ability and incentive to raise prices on the market for the supply of nickel to the plating and electroforming industry in the European Economic Area. In their proposed remedy package, the parties committed to divesting Falconbridge's Nikkelverk refinery in Norway, together with the related feed procurement entity and existing third-party feed supply agreements, related marketing organizations and existing customer contracts, as well as divesting Falconbridge's proprietary refining technologies and trademarks. These assets would be sold to a suitable purchaser, who would have access to sufficient feed resources to sustain the economic viability of Nikkelverk. In addition, the parties undertook to offer the identified purchaser an option to enter into a 10-year flexible feed supply agreement, covering a substantial part of Nikkelverk's feed requirements.

The aim of this remedy package was to ensure the presence of a viable competitor in the relevant markets in the post-merger world. These relevant markets consisted of the markets for (i) the supply of nickel to the plating and electroforming industry, (ii) the production of high-purity nickel for super alloys, and (iii) the supply of high-purity cobalt for the production of super alloys used in safety critical parts. The Commission's market research during its examination indicated that there were high barriers to entry in the abovementioned relevant

[136] Case COMP/M.4000, *Inco/Falconbridge*, Jul. 4, 2006.

markets. The market investigation also revealed that the nickel industry was vertically integrated and that there was virtually no stand-alone refinery or trading in nickel intermediate products. Thus, the divestiture of a nickel processing business could only take place if it was sold to a competitor that was vertically integrated in nickel supply,[137] who would have the ability and incentives to compete in the long term. Therefore, the identity of the proposed purchaser played a crucial role in the Commission's assessment of the proposed merger remedy. Given the fact that the number of suitable purchasers was rather limited, the Commission required the parties to commit to consummating the transaction only after the closing of the divestiture sale, in order to eliminate the risk that no suitable buyer could be found or identified.[138] Accordingly, the Commission required the parties to enter into a binding agreement with an identified purchaser prior to the consummation of the proposed transaction. To that end, Falconbridge agreed with LionOre Mining International Ltd. ("***LionOre***") to divest the relevant assets, and the Commission determined that LionOre qualified as a suitable purchaser.[139] Therefore, the proposed transaction was approved by the Commission, subject to the parties' compliance with the proposed FIF remedies.

Also, in the *Metso/Aker Kvaerner* case,[140] the Commission considered only one buyer, namely GL&V Canada Inc., to qualify as a suitable purchaser, because only that particular undertaking possessed the essential know-how and the requisite presence in the neighboring markets.[141] Subsequent to the conclusion of a binding agreement with the identified buyer for the divestiture, the Commission determined that this remedy "*provided the required certainty that the commitments will be implemented by transferring the businesses to a suitable purchaser*."[142]

---

[137] *See* EU Merger Remedies, *supra* note 9, at 9.

[138] *Inco/Falconbridge*, *supra* note 136, 576.

[139] *Id.*, 684.

[140] Case COMP/M.4187, *Metso/Aker Kvaerner*, Dec. 12, 2006.

[141] *See* EU Merger Remedies, *supra* note 9, at 9.

[142] *See Metso/Aker Kvaerner*, *supra* note 140, 146 and 170.

In its decision, the Commission also emphasized the necessity of providing a clear description of the divestiture assets within the commitment documents. In fact, with respect to its decision to reject the initial FIF proposal (which had been made during the Phase I examination), the Commission asserted that its decision had been based on a lack of elaboration or detailed description in the commitments submitted by the transaction parties: "*Phase I Commitments only summarised the tangible and intangible assets to be transferred, without providing detailed information on the specific assets and rights to be transferred, and without providing solutions and mechanisms for problems related to the transfer of key personnel, the separation of shared assets or the separation of rights and information relating to "mixed" contracts (contracts relating not only to the divested businesses but also to other businesses such as wood handling etc.). In a situation where an extensive carve-out is required to separate the divested business, the Commission considers a detailed description of the assets to be transferred, including shared assets and contracts, and the procedures for the transfer of the key personnel, etc., as indispensable for securing the viability of the business. The proposed Phase I package could therefore not discard the potential "carve-out" problems with the necessary degree of certainty.*"[143]

To present a more recent example, in 2016, the Commission accepted a FIF remedy with respect to a proposed transaction in the mobile telecommunications sector. In the *Hutchison/VimpelCom JV* case,[144] VimpelCom Limited ("***VimpelCom***") and CK Hutchison Holdings Limited ("***Hutchison***") notified the Commission of a proposed joint venture ("***JV***") between their Italian mobile telecommunications subsidiaries, WIND Telecomunicazioni S.p.A. ("***WIND***") and H3G S.p.A. ("***3 Italia***"), respectively.[145] The consummation of the JV transaction would reduce the number of mobile network operators ("***MNO***") active in the Italian market from four to three. The transaction parties agreed to divest sufficient assets to allow a new entrant to join the Italian market as a fourth MNO. The parties submitted the French

[143] *Id.*, 137.

[144] Case COMP/M.7758, *Hutchison/VimpelCom JV*, Sep. 1, 2016.

[145] H3G S.p.A. is the parent company of 3 Italia.

telecommunications undertaking, Iliad S.A. ("***Iliad***"), as a suitable purchaser (whereby Iliad also agreed to acquire the assets that were necessary to operate as an MNO in Italy from WIND and 3 Italia), noting that Iliad had been the fourth successful entrant into the French relevant product market 4 years earlier. As a result of its evaluation, the Commission determined that Iliad possessed the requisite know-how and expertise to operate, invest, and innovate in the Italian mobile telecommunications market. Therefore, the Commission approved Iliad as the purchaser of the assets to be disposed of by Hutchison and VimpelCom, and decided to grant a clearance with a FIF remedy.[146] [147] [148] It should also be emphasized that the transaction parties did not even formally submit a commitment package of proposed remedies to the Commission; rather, they obtained clearance for their transaction subject to the FIF divestiture that had already been implemented through the new MNO entrant, namely Iliad.[149]

On June 15, 2016, the Commission received notification of a proposed acquisition by Sanofi S.A. ("***Sanofi***")[150] of Boeringer Ingelheim Consumer Healthcare business[151] ("***Boeringer***

[146] *See* EU Merger Remedies, *supra* note 9, at 8-9.

[147] Long et al., *supra* note 21, at 6.

[148] European Commission Press Release IP/16/2932, *Mergers: Commission approves Hutchison/VimpelCom joint venture in Italy, subject to conditions* (Sep. 1, 2016), http://europa.eu/rapid/press-release_IP-16-2932_en.htm (last visited Dec. 13, 2018).

[149] Christopher Cook, Vladimir Novak, and Sven Frisch, *Recent Developments in EU Merger Remedies*, 8/5 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 341, 342 (2017), http://awa2018.concurrences.com/IMG/pdf/33._c._cook_v._novak_ and_s._frisch_- _survey_recent_developments_in_eu_merger_remedies.pdf (last visited Dec. 7, 2018).

[150] Sanofi is a global pharmaceuticals company active in the research, development, manufacturing and sale of healthcare products. It is organized around three principal fields of activity: (i) pharmaceuticals, (ii) human vaccines, and (iii) animal health. Within pharmaceuticals, Sanofi specializes in diabetes, rare diseases and multiple sclerosis, oncology and other pharmaceutical products, including both prescription and over-the-counter products.

[151] Boeringer Ingelheim Consumer Healthcare ("***BI CHC***") is part of Boehringer Ingelheim International GmbH ("***BI***"), which is an independent, family-owned company, headquartered in Germany. BI CHC is active worldwide in the research, development, manufacturing, and marketing of human medicines, and is focused mostly on gastro-intestinal treatments, cough and cold products, vitamins and well-being products, as well as pain and mobility medicines, sold over-the-counter.

Ingelheim").[152] The proposed concentration raised various competition law concerns regarding several animal vaccine and pharmaceutical markets. The primary challenge posed by this transaction was finding an appropriate remedy to resolve the competitive concerns in relation to animal vaccines, given the fact that the problematic vaccines were produced at a facility in which many other vaccines were also manufactured.[153] After the Commission's rejection of the first package of proposed remedies, Sanofi proposed divesting both its and Boeringer Ingelheim's various businesses operating in different geographical markets in each of the relevant product markets in order to eliminate such competitive concerns. However, only the identification of a suitable buyer could ensure that the proposed remedies would pan out, and accordingly, the Commission approved Ceva Santé Animale as the suitable purchaser. The Commission's decision in this case required the buyer to be an established "over-the-counter" pharmaceutical products supplier and to have an existing "footprint" in the relevant geographic markets.[154] Pursuant to the successful implementation of the FIF remedy, the Commission approved the merger in its Phase I evaluation.

III. "Crown Jewel" Provisions

As we have already used the term "crown jewel" several times in our discussion above, we believe it would be useful to briefly explain "crown jewel provisions," which are implemented by the Commission, the FTC and the DoJ ("***Three Agencies***") in various merger control circumstances.

A "crown jewel provision" is a stipulation included in a consent agreement, which provides competition enforcement authorities with the power to divest additional assets if the parties are unable to sell the originally planned divestiture assets to a viable buyer within a certain period of time.[155] In other words, if there is uncertainty with respect to

---

[152] Case COMP/M.7919, *Sanofi/Boeringer Ingelheim*, Aug. 4, 2016.

[153] Marion Bailly and Justin Gibbs, *Boehringer Ingelheim/Sanofi Animal Health - The Timely Injection of a Fix-it-first Remedy*, 1/2017 THE EC'S COMPETITION MERGER BRIEF 12 (2017).

[154] *Sanofi/Boeringer Ingelheim*, *supra* note 152, 313.

[155] Shi, *supra* note 6, at 80.

whether any suitable buyers will be attracted to a proposed divestiture package, the Three Agencies may envisage adding/augmenting certain specified (and generally more valuable) assets into the remedy order, if the initially agreed-upon divestiture does not occur within the arranged time limit. [156] These additional assets are aimed at making the divested business more attractive to potential buyers. Also, such provisions would enable the divestiture to be completed more quickly and effectively.[157]

The DoJ strongly disfavored such measures in its Guide to Merger Remedies – 2004.[158] However, in the 2011 version, the DoJ reversed its position and changed its skeptical attitude toward crown jewel provisions and clearly confirmed the adoption of crown jewel provisions in its merger control doctrine.[159]

In terms of crown jewel provisions, the Commission and the FTC have displayed broad-minded perspectives.[160] Indeed, pursuant to the EC Remedies Notice, crown jewel provisions may be required in the event that the implementation of the parties' chosen divestiture plan (to a viable business eliminating the competition concerns in the post-merger relevant market) might be uncertain. Such doubts regarding the divestiture may arise, for example, from third parties' pre-emption rights or uncertainty as to the transferability of key contracts or intellectual property rights, or from the uncertainty of finding a suitable buyer to preserve the competitive nature of the relevant market. Nevertheless, the parties may believe that they would be able to sell the proposed divestment business to a suitable purchaser within a very short period of time.[161] If the Commission harbors such doubts and uncertainty as to the divestment's potential to succeed, it may require the parties to propose an alternative divestment, which would better correspond to and address the Commission's competition concerns, compared to the initial divestiture package.[162]

---

[156] ICN, *supra* note 12, at 11-12.

[157] Metaxas et al., *supra* note 2, at 58-59.

[158] US DoJ, *supra* note 29, at 36.

[159] US DoJ, *supra* note 19, at 24-25.

[160] Metaxas et al., *supra* note 2, at 58-59.

[161] EC, *supra* note 3, 44.

[162] Metaxas et al., *supra* note 2, at 58-59.

IV. FIF and UFB Remedies Under the Turkish Merger Control Regime

Article 14 of the Turkish Competition Authority's Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board[163] ("***Communiqué No. 2010/4***") provides the legal basis for merger remedies in Turkey.

In parallel with the EC Remedies Notice, Article 14 of Communiqué No. 2010/4 states that remedies must be capable of eliminating all the competition law concerns that have been identified in a particular case.[164] Pursuant to the second paragraph of Article 14, the Board may conditionally approve a transaction or impose certain obligations on the transaction parties within its clearance decisions. On that note, although the competition law and merger control enforcement regimes of the Turkish Competition Authority ("***TCA***") are broadly akin to the Commission's practices, the TCA does not contribute to or partake in the emerging trend of FIF and UFB remedies. In 2011, the Turkish Competition Board ("***Board***") published the Guidelines on Remedies that are Acceptable in Merger and Acquisition Transactions[165] ("***Guidelines on Acceptable Remedies***"), which aims to provide guidance with respect to the remedies to be proposed by the transaction parties to the Authority in order to eliminate the competition concerns that a concentration could raise.[166] In parallel with the Commission's limited approach, the TCA is not in a position to unilaterally impose specific remedies and the decision to propose merger remedies lies solely within the discretion of the transaction parties.[167] However, it is worth underlining that neither the Communiqué No. 2010/4 nor any other competition law legislation nor any guidelines of the Authority contain any explicit references to UFB remedies. Furthermore, although

[163] TURKISH COMPETITION AUTHORITY COMMUNIQUÉ NO. 2010/4 ON MERGERS AND ACQUISITIONS REQUIRING THE APPROVAL OF THE COMPETITION BOARD [COMMUNIQUÉ NO. 2010/4], (Oct. 7, 2010, No. 27722) https://www.rekabet.gov.tr /Dosya/ tebligler/2010-4-20180219095000940.pdf (last visited Dec. 13, 2018).

[164] Turkish Competition Authority, *supra* note 163, art. 14.

[165] Turkish Competition Authority, *supra* note 8.

[166] *Id.*, 4.

[167] *Id.*, 8.

the Guidelines on Acceptable Remedies explicitly considers FIF as a divestment method recognized by the Turkish Competition Board, there is not a single decision of the Board in which it approved a proposed transaction by implementing a FIF remedy.

According to the relevant section of the Guidelines on Acceptable Remedies, the Board accepts two methods for identifying a suitable buyer: (i) the transaction parties may propose a suitable buyer who possesses the required qualifications to acquire the divestment business within a limited time frame following the Board's approval decision, or (ii) the transaction parties may enter into an acquisition contract with a suitable buyer before the Board's decision on the case.[168] The required characteristics of the suitable buyer and the necessary features/facilities of the divestment business are akin to the comparable requirements in the merger remedy regimes of both the US and the EU.[169]

If a sufficient number of suitable purchasers are foreseen to be available in the relevant market and the divestiture appears to be feasible, then the transaction parties may choose to sell the divestment business following the authorization decision. In that case, the Board attaches a condition to the approval decision that is rendered prior to the transaction parties reaching a binding agreement with the purchaser of divestiture assets. This is the exact equivalent of the Commission's "sale of the divested business within a fixed time-limit after the decision"[170] method.

For the second method (*i.e.*, FIF), the transaction parties should identify a suitable buyer during the Board's examination and conclude a sales agreement with that buyer. In this respect, the Board will evaluate the transfer of the divestment business to the purchaser that is specified in the sales contract together with the concentration transaction that is subject to the examination (*i.e.* assess the divestiture and the merger transaction collectively), and thereby decide whether or not the proposed remedy removes the competition law concerns that would arise due to the proposed concentration. If the Board grants its approval to the concentration transaction, the sales agreement regarding the divestiture

---

[168] *Id.*, 40.

[169] *Id.*, 22-39.

[170] EC, *supra* note 3, 52.

could be put into effect together with the concentration transaction, without the need for an additional Board decision.[171] This method is especially appropriate when the number of suitable purchasers is limited due to the characteristics of the case, or if the effectiveness of the remedy is strictly dependent on the identity of the purchaser. For example, if the sustainability of a business that is not viable on its own can only be assured through specific resources or assets owned by the purchaser, or if the purchaser is required to have certain characteristics on this front, then a FIF remedy serves the purpose of "cherry-picking" the purchaser of the divestiture, since only a few (or perhaps even just one) potential purchaser will satisfy these conditions.[172]

In this regard, the Board's *Syngenta* decision[173] may be seen as an exceptional case, in which the Board took the identity of the divestiture purchaser into account for its decision. The proposed transaction concerned Syngenta Crop Protection AG's ("***Syngenta***") acquisition of Advanta B.V. ("***Advanta***") from Astrazaneca Holding B.V. and Koninklijke Vanderhave Groep B.V. Syngenta's and Advanta's practices in Turkey were overlapping within markets for seeds of sugar beet, sunflower and corn. With that respect, the Board argued that the proposed transaction may strengthen Syngenta's dominant position in the relevant Turkey markets. For that reason, the Board took the commitment that Syngenta has proposed before the Commission into account. Accordingly, Syngenta committed to divest Advanta's all Europe business (which includes Turkey) to Fox Paine & Company LLC within the merger control review of the Commission; and the Board concluded that pursuant to divestment committed, the competition in the relevant product market will not be affected. In other words, the Board seemed to approve the proposed transaction subject to the condition established by the divestment committed. To that end, the Board's ruling in that case can be interpreted as an indirect enforcement of a FIF remedy.

Consequently, however, the Board conditionally approved the proposed transaction under the committed divestment by Syngenta,

[171] *Id.*, 43.
[172] *Id.*, 44.
[173] Turkish Competition Board 04-49/673-171, *Syngenta*, Jul. 29, 2004.

which the Board knew the identity of the divestment purchaser prior to making its decision. Within this framework, the Board examined the transaction parties' share purchase agreement and concluded that the realization of the proposed divestment before the Commission would prevent occurrence of competition law concerns within the relevant product market.

Furthermore, the Board has another exceptional case among its precedents, which could be interpreted as the Board's indirect implementation of a FIF remedy. In the *Bayer/Monsanto* case,[174] the Board established concrete links with the merger control review regimes of other competition authorities, and primarily with the merger control regime of the Commission. Indeed, for conducting its assessment of whether or not the notified transaction would eliminate or impede competition, the Board explicitly took the already consummated divestments into account, which had been realized in accordance with the FIF remedies committed before the Commission. The Board's assessments on this issue were as follows: "*In consideration of the facts that (i) the EC accepted the remedies regarding the divestment of Bayer assets related to vegetable seeds to BASF, and (ii) the Board approved the relevant divestment transaction, which was notified on April 19, 2018, with number 3202, with its decision of May 8, 2018, numbered 18-14/262-127, the execution of the relevant remedy will eliminate any overlap that would occur within the vegetable seeds market due to the proposed transaction. On that front, there are no concerns for approving the transaction in relation with the vegetable seeds market, within the framework of the remedies committed before the Commission, since the transaction will not result in the creation or strengthening of a dominant position.*" As is plainly stated in the decision, the Board based its approval decision for the vegetable seeds market on the committed and realized divestment commitment, which it also approved in a separate merger control decision. Therefore, although the merger remedy was not committed before the TCA, since a pre-consummation divestment was also implemented with the approval of the Board,[175] one could arguably interpret the remedy as a FIF remedy.

[174] Turkish Competition Board 18-14/261-126, *Bayer/Monsanto*, May 8, 2018.

[175] Turkish Competition Board 18-14/262-127, *BASF*, May 8, 2018.

However, it should be mentioned that both the *Syngenta* and the *Bayer/Monsanto* decisions constitute unique and exceptional cases in the Board's decision practice. On that note, it could be reasonably argued that the trend of major competition authorities (such as the Commission, the FTC or the DoJ) being notified by the transaction parties in advance of other competition authorities (such as the TCA), and the filings of former jurisdictions being submitted to the latter, may reduce the chances that the TCA will encounter FIF or UFB remedies that are initially committed before it. To put it differently, although the TCA handles merger control cases that may satisfy the conditions for necessitating FIF or UFB remedies, in most cases, the transaction parties will have already committed such remedies before other (*i.e.* major) competition authorities; thus, the Board can only consider and evaluate such existing remedies and does not find itself in a position to decide on or implement such remedies itself. For that reason, it could be predicted that the TCA will be able to conduct its first merger control case with a genuine FIF remedy only if (and when) it becomes the initial competition authority to which the transaction parties file their notification.

V. Advantages and Disadvantages of FIF and UFB Remedies

As discussed above, FIF and UFB remedies highly resemble each other with respect to their descriptions and their enforcement systems. In fact, the scope of a UFB remedy implemented in the US is equivalent to a FIF remedy implemented in the EU. Moreover, for the purposes of finding a suitable purchaser in advance, UFB remedies have the same effect as FIF remedies.[176] Although FIF and UFB remedies differ from each other in procedural terms, they comprise suitable measures in the same circumstances. It is worth noting that the terminology for these terms is not wholly consistent, and "fix-it-first" is often used as an overall term to cover both types of remedies.[177] To that end, we will consider UFB and FIF remedies to constitute a single combined type of remedy for the rest of our analysis in this section.

[176] Shi, *supra* note 6, at 139.

[177] Lindsay & Berridge, *supra* note 24, at 721.

Naturally, UFB and FIF solutions have various advantages as well as drawbacks and their beneficial implementation still depends heavily on the facts and circumstances of each particular case. Firstly, they shift the risk of failing to identify or reach an agreement with a suitable buyer for the divestment assets onto the transaction parties. In other words, if the parties cannot find a suitable purchaser for divestiture, they cannot complete their main concentration transaction. Bearing this in mind, the transaction parties would have a greater incentive to find an acceptable buyer as soon as possible.

The Merger Remedies Study[178] presents the advantages of these types of remedies acting as an accelerant of the divestiture mechanism, and thus states that they reduce the risks of maintaining the viability of the divested business and shorten the transitional period during which competition is not yet fully restored. Therefore, these remedies provide a strong assurance that the identified competition law concerns would be eliminated, and reduce the risk of degradation of the divested business during the interim period.[179]

Another benefit of UFB and FIF remedies is that they minimize the risk that the value of the firms' assets will fall and that competition in the relevant market will be diminished pending divestiture. Past examples have shown that certain assets (*e.g.*, supermarkets) are inclined to depreciate during the interim period of such transactions, which can lead to competitive harm and prevent the buyer from competing effectively in the relevant market.[180] It is worth reiterating that this was the rationale and grounds for the enforcement of the Commission's very first UFB remedy.[181] This is also one of the grounds that the FTC considers for implementing UFB remedies.[182] However, if there is a risk that the business to be divested will deteriorate during the interim period (in which the transaction parties are supposed to search for, identify, and

---

178 EUROPEAN COMMISSION DG COMP, MERGER REMEDIES STUDY (PUBLIC VERSION), (2005), http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf (last visited Dec. 13, 2018).

179 Lindsay & Berridge, *supra* note 24, at 721-722; DG COMP, *supra* note 178, at 107-108.

180 The buyer will have a hard time maintaining and restoring competition in the relevant market. *See* US FTC, *supra* note 32, at 7.

181 *See Bosch/Rexroth*, *supra* note 125.

182 *See* US FTC, *supra* note 32, at 7.

reach an agreement with a suitable buyer), then the competition authorities should especially prefer to implement the US-style UFB remedies or the EU-style FIF remedies in order to eliminate the interim period altogether. On that note, it should also be remembered that the EU-style UFB remedies will only decrease the length of the interim period and thus offer an insufficient solution to dealing with these risks.[183]

By employing FIF and UFB remedies, competition authorities ensure that they can determine, with a requisite degree of certainty, that the proposed remedies will be implemented through a sale to a suitable purchaser, and that competition will thereby be preserved. These solutions can thus remove the competitive concerns of competition enforcement authorities, particularly in cases where there is only a limited number of suitable purchasers in the relevant market.

From a more liberal approach, it could be asserted that UFB and FIF remedies contribute to undertakings' commercial liberty in general, by way of enabling the competition authorities to apply fewer restrictions on strategic commercial decisions. In other words, UFB and FIF remedies represent compromise solutions with respect to transactions that threaten to impede competition, rather than complete prohibitions.

Unfortunately, FIF and UFB remedies may also bring about significant drawbacks. Firstly, they suspend or delay the consummation of a proposed transaction. This delay or suspension may be more likely to occur in UFB remedies, where an interim period still exists, yet is shorter. Although the successful completion of UFB remedies will lead to pro-competitive outcomes, this delay will also incur certain costs in the market. Secondly, requiring the implementation of either a UFB or a FIF remedy can lead to strategic behavior by potential buyers, who will thereby possess greater leverage in merger negotiations. This may distort the bidding process in a way that is inconsistent with the competition authorities' fundamental goal of preserving competition in the relevant market.[184] Also, a UFB remedy could occasionally generate undesired

---

[183] *See* Shi, *supra* note 6, at 138.

[184] *See* Majoras, Deborah Platt, Deputy Assistant Attorney General, Antitrust Division, US DoJ, Address before the Houston Bar Association Antitrust and Trade

negative side effects on the overall effectiveness of the remedy. Since the consummation of the contemplated concentration depends upon the transaction parties finding a suitable buyer, in rushing to propose a buyer, the seller could fail to take all the necessary precautions and follow all the steps for a proper sales procedure, which is likely to affect the future viability and competitiveness of the divested business.[185]

VI. Conclusion

Merger control review is one of the three pillars of competition law. Therefore, as thousands of transactions are notified each year before various competition authorities (including the Three Agencies), merger remedies have become an effective tool for offsetting the competitive harms that may arise from the notified transactions by enforcing pro-competitive solutions. In light of the reasons presented above, such as the risk of deterioration of the divestiture assets or a lack of suitable purchasers, standard remedies that are implemented after the competition authorities' approval decisions may not achieve their purpose of preserving competitive conditions in the given relevant markets. For that reason, various competition enforcement authorities, including the FTC, the DoJ and the Commission, have adopted FIF and UFB remedies for certain situations (although they may each have their own styles and interpretations), and such remedies have now become an emerging trend among competition law enforcement authorities. As per the recent decisions and statistical studies discussed in this article, it can be observed that this trend is occurring both in the US and the EU. Furthermore, considering the significant benefits of FIF and UFB remedies (which outweigh their potential drawbacks), it seems likely that we will see even more of them implemented in the future, particularly in major competition law jurisdictions such as the US and the EU. Finally, as a different jurisdiction than the US and the EU, the Turkish Competition Authority has also indicated that it favors FIF remedies by including it in its Guidelines on Acceptable Remedies.

Regulation Section: *Houston, We Have a Competitive Problem: How Can We Remedy it?*, (Apr. 17, 2002), https://www.justice.gov/atr/speech/houston-we-have-competitive-problem-how-can-we-remedy-it (last visited Dec. 14, 2018).

[185] *Ibid.*

Ultimately, our in-depth analysis of FIF and UFB remedies lead us to conclude that they provide certainty, add acceleration and increase the effectiveness of merger remedies implemented for relieving the competition law concerns raised by merger and acquisition transactions.

Bibliography

Statutes

Clayton Act, 15 U.S.C. § 18a (2018).

LAW NO. 4054 ON THE PROTECTION OF COMPETITION [LAW NO. 4054] (Dec. 13, 1994, No. 22140).

Sherman Act, 15 U.S.C. § 4 (2018).

Administrative and Executive Materials

European Commission, Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation.

European Commission, *Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004*, (2008).

FEDERAL TRADE COMMISSION [FTC], NEGOTIATING MERGER REMEDIES STATEMENT OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION, (Jan. 2012).

FEDERAL TRADE COMMISSION [FTC], THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS, (Jan. 2017).

Turkish Competition Authority Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board [Communiqué No. 2010/4], (Oct. 7, 2010, No. 27722) https://www.rekabet.gov.tr/Dosya/tebligler/2010-4-20180219095000940.pdf (last visited December 13, 2018).

Turkish Competition Authority's Guidelines on Remedies that are Acceptable in Merger and Acquisition Transactions (June 16, 2011; 11-37/792-RM (5)).

US DEP'T OF JUSTICE ANTITRUST DIVISION [DOJ], ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (October 2004).

US DEP'T OF JUSTICE ANTITRUST DIVISION [DOJ], ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (June 2011).

Cases

Case COMP/M.8084, *Bayer/Monsanto*, Apr. 11, 2018.

Case COMP/M.2060, *Bosch/Rexroth*, Dec. 4, 2000.

Case COMP/M.7932, *Dow/DuPont*, Mar. 27, 2017.

Case COMP/M.4000, *Inco/Falconbridge*, July 4, 2006.

Case COMP/M.4187, *Metso/Aker Kvaerner*, Dec. 12, 2006.

Case COMP/M.7758, *Hutchison/VimpelCom JV*, September 1, 2016.

Case COMP/M.6570, *UPS/TNT*, Jan. 30, 2013.

Case COMP/M.7919, *Sanofi/Boeringer Ingelheim*, Aug. 4, 2016.

Johnson & Johnson/Synthes, Inc., FTC File No. 111 0160, Docket No. C-4363.

Penn National Gaming, Inc./Pinnacle Entertainment, FTC File No. File No. 181 0011.

Reynolds American Inc./Lorillard Inc., FTC File No. 141 0168, Docket No. C-4533.

Turkish Competition Board 04-49/673-171, *Syngenta*, July 29, 2004.

Turkish Competition Board 18-14/261-126, *Bayer/Monsanto*, May 8, 2018.

Turkish Competition Board 18-14/262-127, *BASF*, May 8, 2018.

United States v. E.I. du Pont de Nemours & Co., 366 US 316, 326 (1961).

United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., D.D.C. Civil Action No. 13-127 (2013).

Books, Reports and Other Nonperiodic Materials

ALISTAIR LINDSAY AND ALISON BERRIDGE, THE EU MERGER REGULATION: SUBSTANTIVE ISSUES (Sweet & Maxwell, 4th ed. 2012).

EUROPEAN COMMISSION DG COMP, MERGER REMEDIES STUDY (PUBLIC VERSION), (2005), http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf (last visited Dec. 13, 2018).

EUROPEAN COMPETITION LAW – A CASE COMMENTARY (Weijer VerLoren van Themaat & Berend Reuder, eds., 2014).

MENGMENG SHI, THE DIVESTITURE REMEDIES UNDER MERGER CONTROL IN THE US, THE EU AND CHINA: A COMPARATIVE LAW AND ECONOMICS PERSPECTIVE (University of Maastricht, 2017).

Periodicals

Christopher Cook, Vladimir Novak, and Sven Frisch, *Recent Developments in EU Merger Remedies*, 8/5 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 341, 342 (2017), http://awa2018.concurrences.com/IMG/pdf/33._c._cook_v._novak_and_s._frisch_-_survey_recent_developments_in_eu_merger_remedies.pdf (last visited Dec. 7, 2018).

Cormac O'Daly, Virginia Del Pozo, and John Ratliff, *Major Events and Policy Issues in EU Competition Law, 2017-2018: Mergers*, WILMERHALE (Nov. 2018).

George Metaxas, Matthew Giles, Phil Larson & Jan McDavid, *Merger Reviews in the US and the EU: A Comparative Overview*, THE ANTITRUST REVIEW OF AMERICAS (2006).

Jessica C. Strock, *Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies*, 53/6 WILLIAM. & MARY L. REV. 2147 (2012), http://scholarship.law.wm.edu/wmlr/vol53/iss6/7 (last visited Nov. 9, 2018).

Marion Bailly and Justin Gibbs, *Boehringer Ingelheim/Sanofi Animal Health - The Timely Injection of a Fix-it-first Remedy*, 1/2017 THE EC'S COMPETITION MERGER BRIEF (2017).

Nazlı Varol, *Rekabeti Kısıtlayıcı Nitelikteki Birleşmelerde Esasa İlişkin Çözümler* [Remedies Concerning the Substantial Aspects of Competition Restrictive Mergers], REKABET KURUMU: UZMANLIK TEZLERI SERISI 101 (2010) (Tr.).

Patricia Brink, Daniel Ducore, Johannes Luebling and Anne Newton McFadden, *A Visitor's Guide to Navigating US/EU Merger Remedies,* COMPETITION LAW INTERNATIONAL, 12/1.

Press Releases

European Commission Press Release IP/00/1457, Commission Authorizes Acquisition of Control of Rexroth by Robert Bosch Gmbh Subject to Conditions (Dec. 13, 2000). http://europa.eu/rapid/press-release_IP-00-1457_en.htm (last visited, Nov. 20, 2018).

European Commission Press Release IP/17/772, Mergers: Commission Clears Merger Between Dow and Dupont, Subject To Conditions (Mar. 27, 2017), http://europa.eu/rapid/press-release_IP-17-772_en.htm (last visited Nov. 16, 2018).

European Commission Press Release IP/16/2932, *Mergers: Commission approves Hutchison/VimpelCom joint venture in Italy, subject to conditions* (Sep. 1, 2016), http://europa.eu/rapid/press-release_IP-16-2932_en.htm (last visited Dec. 13, 2018).

FTC, FTC APPROVES FINAL ORDER PRESERVING COMPETITION IN US MARKET FOR CIGARETTES, https://www.ftc.gov/news-events/press-releases/2015/07/ftc-approves-final-order-preserving-competition-us-market (last visited Dec. 5, 2018).

FTC, FTC APPROVES FINAL ORDER SETTLING CHARGES THAT JOHNSON & JOHNSON'S PROPOSED ACQUISITION OF SYNTHES, INC. WAS ANTICOMPETITIVE IN MARKET FOR TREATING TRAUMATIC WRIST INJURES (Aug. 7, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-order-settling-charges-johnson-johnsons (last visited Nov. 13, 2018).

FTC, FTC APPROVES FINAL ORDER SETTLING CHARGES THAT SOLERA HOLDINGS' 2012 ACQUISITION OF ACTUAL SYSTEMS WAS ANTICOMPETITIVE IN THE MARKET FOR YARD MANAGEMENT SYSTEMS (October 24, 2013), available at https://www.ftc.gov/news-events/press-releases/2013/10/ftc-approves-final-order-settling-charges-solera-holdings-2012 (last visited November 9, 2018).

FTC, FTC REQUIRES CASINO OPERATORS PENN NATIONAL GAMING, INC. AND PINNACLE ENTERTAINMENT, INC. TO DIVEST ASSETS

IN THREE MIDWESTERN CITIES AS A CONDITION OF MERGER (October 1, 2018), available at https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle (last visited Nov. 14, 2018).

US DEP'T OF JUSTICE, JUSTICE DEPARTMENT REACHES SETTLEMENT WITH ANHEUSER-BUSCH INBEV AND GRUPO MODELO IN BEER CASE (Apr. 19, 2013), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case (last visited Nov. 16, 2018).

Speeches

Majoras, Deborah Platt, Deputy Assistant Attorney General, Antitrust Division, US DoJ, Address before the Houston Bar Association Antitrust and Trade Regulation Section: *Houston, We Have a Competitive Problem: How Can We Remedy it?,* (Apr. 17, 2002), https://www.justice.gov/atr/speech/houston-we-have-competitive-problem-how-can-we-remedy-it (last visited Dec. 14, 2018).

Makan Delrahim, Assistant Attorney General Antitrust Division US DoJ, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium: *It Takes Two: Modernizing the Merger Review Process*, (September 25, 2018).

Internet Sources

A Practice Note on EU Merger Remedies, Thomson Reuters, https://uk.practicallaw.thomsonreuters.com/5-422-4975?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk (last visited Feb. 4, 2019).

Héctor Armengod, *Merger Control Procedure*, COLLEGE OF EUROPE ADVANCED EU COMPETITION LAW (Oct. 21, 2018), https://www.lw.com/presentations/eu-merger-control-procedures-2012.

Jérémie Jourdan and Veronica Pinotti, *Merger Remedies: The Rise of Conditions*, WHITE&CASE (May 18, 2018), https://www.lexology.com/library/detail.aspx?g=d815f1db-d52d-4eda-86a4-adc22f836b18 (last visited Nov. 11, 2018).

International Materials

Dominic Long, Catherine Wylie & David Weaver, *Rising tide of 'Fix-it-first' and 'Up-front Buyer' remedies in EU and UK Merger Cases* 3 (Competition Policy International, 2016), https://www.competitionpolicyinternational.com/wp-content/uploads/2016/10/Europe-Column-October-Full.pdf (last visited Nov. 16, 2018).

Int'l Competition Network [ICN], *Merger Remedies Guide* (2016), at 8, http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf (last visited Oct. 21, 2018).

The Organization for Economic Co-operation and Development [OECD] - Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement DAF/COMP/WP3/WD(2011)58, POLICY ROUNDTABLES: REMEDIES IN MERGER CASES (Jul. 30, 2012), http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf (last visited Oct. 24, 2018).

The Organization for Economic Co-operation and Development [OECD] - Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement DAF/COMP/WP3/WD(2011)58, REMEDIES IN MERGER CASES (THE UNITED STATES OF AMERICA'S SUBMISSION), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf (last visited Dec. 4, 2018).

Gun-Jumping through Pre-Closing Information Exchanges in M&A Transactions and Alternative Safeguard Mechanisms

Gönenç Gürkaynak, Esq.[*]

Esen Ergül[**]

Salih Buğrahan Köroğlu[***]

1. Introduction

Mergers and acquisitions ("***M&A***"), as critical and complex corporate transactions, require relatively lengthy negotiation and/or due diligence processes in order to enable the parties to accurately appraise the financial advantages that might be achieved through the concentration as well as its potential drawbacks. While these evaluation processes are crucial for the parties in terms of their business strategies, they can also raise serious competition law concerns under some circumstances.

The primary concern is, undoubtedly, whether the transaction would cause competition law problems by creating or strengthening a dominant position, and thus eliminating competition in the relevant market, which is prohibited in almost every jurisdiction. In order to avoid and prevent anti-competitive concentrations (or to eliminate the anti-competitive effects of these concentrations), many competition law regimes require that competition authorities are notified of these transactions in order to facilitate their assessment and oversight.[1] Several

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Esen Ergül is an associate at ELIG Gürkaynak Attorneys-at-Law.

[***] Salih Buğrahan Köroğlu is an associate at ELIG Gürkaynak Attorneys-at-Law.

[1] U.N. Conference on Trade and Development, *Challenges in the Design of a Merger Control Regime for Young and Small Competition Authorities* (Apr. 26, 2017), at 6,

different notification systems have been devised for this purpose. While a limited number of jurisdictions, including Australia, Chile, New Zealand and the United Kingdom,[2] have implemented voluntary notification systems, many others have adopted mandatory systems, including the United States ("***US***"), the European Union ("***EU***"), Canada, and Japan.[3] Most of these jurisdictions have opted for an *ex-ante* notification system (*i.e.*, requiring notification prior to the consummation of the transaction), while a few countries (*e.g.*, Albania, Pakistan and Romania) employ *ex-post* mandatory notification systems.[4] There are also a number of hybrid regimes, which allow either *ex-ante* or *ex-post* mandatory notification and voluntary notification.[5]

The second concern arising from concentrations in terms of competition law rules relates to the "Do's and Don'ts" that the parties must observe prior to the approval of the transaction by the relevant competition authority, specifically in jurisdictions requiring *ex-ante* mandatory notifications. Transactions often necessitate a considerable amount of time to allow the parties to obtain all the necessary approvals and clearances from the relevant competition authorities in order to close

---

https://unctad.org/meetings/en/SessionalDocuments/ciclpd45_en.pdf (last visited Feb. 5, 2019).

2 Organization for Economic Cooperation and Development ("***OECD***") - Directorate for Financial and Enterprise Affairs Competition Committee, *Local Nexus and Jurisdictional Thresholds in Merger Control*, (Mar. 10, 2016), at 9 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En (last visited Feb. 5, 2019).

3 *See* OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *Investigations of Consummated and Non-Notifiable Mergers* (Jan. 20, 2015), at 5, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)1&doclanguage=en (last visited Feb. 5, 2019). The following OECD jurisdictions have opted for a mandatory notification system as well: Argentina, Barbados, Belgium, Bosnia, Brazil, Bulgaria, Colombia, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Jersey, Jordan, Korea, Latvia, Lithuania, Macedonia, Malta, Mexico, the Netherlands, Norway, Poland, Portugal, Russia, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, and Zambia.

4 *Id.* at 4.

5 *Id.* at 5. Countries using hybrid notification systems include: Albania, Barbados, Bosnia, Canada, Colombia, Croatia, the Czech Republic, Greece, Jordan, Ireland, Korea, Lithuania, Macedonia, Mexico, Norway, Pakistan, Russia, South Africa, Spain, Sweden, Turkey, and Zambia.

the deal. Prior to the consummation of such M&A transactions, the undertakings involved will have a legitimate need to gather detailed information—which may involve competitively sensitive but essential information including, but not limited to, financial information (*e.g.*, turnover figures, debits and credits, etc.), legal matters (*e.g.*, current agreements, ongoing lawsuits, etc.) and operational assets—about the counterparty in order to evaluate the risks of the business that might have an effect on the valuation of the transaction. However, under certain circumstances, exchanging such information during the pre-closing period could lead to the violation of the *standstill obligation* (*i.e.*, which prohibits closing or taking certain steps to implement a notifiable transaction before obtaining the approval of the competition authority). This is because the procurement of the relevant information could prevent the parties to the transaction from fulfilling the requirement to remain as separate and independent entities prior to the consummation of the transaction. However, in practice, it might often be difficult for the undertakings to draw a bright line between information exchange as a preliminary step that is necessary for the risk assessment of the investment and as a prohibited step that could lead to charges of "jumping the gun." In fact, as a preliminary step, such information exchanges are aimed at accelerating the integration process of the undertakings concerned, and thereby maximizing the synergies expected from combining the value/performance of the undertakings involved in the transaction. Having said that, it is worth emphasizing that the transaction parties should take the utmost care to cooperate carefully and to behave meticulously when sharing information during the pre-closing period in order to steer clear of any activities that could lead to accusations of gun-jumping.

Another risk arising from information exchanges prior to the consummation of an M&A transaction occurs when the parties to the transaction are competitors. As a general rule, coordination between competitors is prohibited under the competition law rules. To that end, information exchanges in the pre-closing period can also lead to the violation of this general rule, which might trigger lengthy investigations and result in substantial monetary fines.

In recent years, competition authorities in the US and the EU have imposed hefty monetary fines on companies engaged in mergers and acquisitions due to various forms of gun-jumping. Therefore, owing to the increasing number of precedents, the scope and boundaries of gun-jumping through the exchange of information (in the eyes of competition authorities) is gradually becoming clearer. However, it can still be quite complicated and challenging for companies to comprehend which information exchanges may lead to gun-jumping claims and thus raise competition law concerns. Additionally, considering the vital necessity of sharing such information prior to the closing of the transaction in order to conduct proper risk assessments regarding the investment, these companies are left on the horns of a dilemma. To successfully resolve this dilemma, several different mechanisms can be employed, including the formation of a “clean team,” comprising members who are entitled and empowered to access and evaluate the sensitive information with the aim of helping to implement the integration plan of the transaction, without engaging in any activities that could be characterized as gun-jumping.

To provide a better understanding of these issues, this article will first focus on the concept of gun-jumping, including its definition and its types (*i.e.*, procedural and substantive). Subsequently, we will examine gun-jumping rules (with a particular focus on gun-jumping through information exchange) in a number of different jurisdictions—specifically, the US, the EU and Turkey—together with an assessment of several groundbreaking cases in those jurisdictions. In this section, the relevant applicable legislation in each country will be comprehensively described and analyzed. Thereupon, we will discuss and ascertain what kind of information is deemed competitively sensitive and then evaluate certain alternative safeguard mechanisms to reduce the risk of gun-jumping violations through pre-closing information exchanges.

2. The Concept of Gun-Jumping

In athletic competitions, beginning a race before the starting pistol goes off is one of the most serious violations that an athlete can commit on the field. As an expression that originated with the use of starting pistols in competitive field races, ‘gun-jumping’ or ‘jumping the gun’ in an M&A context refers to the implementation of a merger or acquisition before receiving the approval of the relevant competition authority, when an *ex-ante* notification system is in effect in that jurisdiction. In other words, just like runners in a track and field race, business people who are involved in a merger or acquisition (whether as an acquirer or target) are not permitted to "jump the gun" to implement the transaction wholly or partially before giving notification or receiving the necessary clearances from the relevant competition authorities.[6]

As explained above, merger control rules in most jurisdictions oblige the transaction parties to notify the proposed transaction to the relevant authorities if the transaction meets any of the notification requirement criteria, such as exceeding the thresholds for turnover and/or market share. It is unmistakably clear from existing precedents that notifiable transactions that are implemented without providing notification to the competent authorities are considered unlawful.[7] The other main requirement in merger control regimes is the *standstill obligation*, which refers to a period of time (whose length may vary depending on the jurisdiction) during which the undertakings are obliged not to implement the concerned operation or transaction until given clearance to do so by the relevant authority.

One of the primary objectives of the obligations and requirements set by merger control regimes is to give the competition authorities ample time and opportunity to examine the proposed transactions, which may impede competition by leading to higher prices or lower production outputs, by obstructing competitors' entry to (or expansion in) the relevant market, and by reducing alternatives in the relevant market, among other competition concerns. Any actions contrary to the goals of competition law would undermine the effectiveness of merger control systems, which ultimately exist to protect and promote the consumer welfare. To that end, regulators aim to take preventive actions in order to avoid having to "unscramble the eggs," which expresses the difficulty (if not the impossibility) of subsequently repairing or fixing the undesirable outcomes that may result from the unlawful implementation or consummation of an M&A transaction.[8]

---

6 PATRICK HUBER ET AL., DAY-TO-DAY COMPETITION LAW: A PRACTICAL GUIDE FOR BUSINESSES 246 (2nd ed. 2014).

7 James R. Modrall & Stefano Ciullo, *Gun-Jumping and EU Merger Control*, 9 EUROPEAN COMPETITION L. REV. 424 (2003).

8 Matthew S. Bailey, *The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests*, 67 OHIO STATE L.J. at 433, 444 (2006).

2.1. Categories of Gun-Jumping

In light of the abovementioned *standstill obligation* and notification requirements, gun-jumping practices mainly arise in two distinct situations. The first one involves the premature closing or implementation of a notifiable transaction, which is known as "procedural gun-jumping." The other one occurs when the parties to a transaction are competitors and coordinate their competitive conduct by exchanging or sharing competitively important and sensitive information.

2.1.1. Procedural Gun-Jumping

Many jurisdictions have their own general competition rules and more than 100 countries apply their own merger control regimes, including certain notification requirements that may differ among jurisdictions with regard to their timing and threshold rules.[9] Regardless of the jurisdiction, one of the most important functions of these merger control rules is to prevent anti-competitive concentrations. Therefore, merger control regimes in numerous jurisdictions (including the EU, the US and Turkey) provide objective criteria with respect to the waiting periods and notification thresholds. If precise merger control rules are in effect in a given jurisdiction, transaction parties are able to determine whether or not a notification is required, and thus know when to notify and implement the transaction.[10] Procedural gun-jumping refers to the implementation of a notifiable transaction without making the required notification or complying with the waiting periods or clearance requirements. It can also involve taking steps that could lead to one party exercising control over the counterparty, such as establishing joint marketing or working teams, initiating the integration process between the undertakings, taking administrative actions or making recommendations with respect to employees and managers, and exchanging commercially sensitive information, without satisfying the

---

9 JEAN-FRANÇOIS BELLIS ET AL. ED., MERGER CONTROL: JURISDICTIONAL COMPARISONS (1st ed. 2011).

10 JULIE CLARKE, INT'L MERGER POLICY APPLYING DOMESTIC LAW TO INT'L MARKETS 105 (Edward Elgar, 2014).

notification, standstill and clearance requirements. Therefore, procedural gun-jumping is considered to be the basic and most common form of gun-jumping that is witnessed in M&A transactions.

First of all, implementing a transaction that is subject to the notification requirement prior to the fulfillment of this obligation is fundamentally considered to be a gun-jumping practice. Depending on the jurisdiction, notification thresholds for a particular transaction can be determined on the basis of the parties' market shares or their turnover figures.[11] For example, under Section 7A of the Clayton Antitrust Act of 1914 ("***Clayton Act***") in the US,[12] the parties' turnovers for the relevant fiscal year are taken into consideration in order to determine whether or not the transaction exceeds the notification thresholds, which are revised annually by the Federal Trade Commission ("***FTC***") on the basis of the change in the gross national product. Similar to the EU merger control regime, a transaction falls within the scope of the Turkish merger control regime if the turnovers of the parties to the proposed transaction exceed the predetermined jurisdictional thresholds, which are set by the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***").[13] On the other hand, certain countries (including Jordan, Uruguay, and the United Arab Emirates) implement merger control rules for proposed transactions purely on the basis of the parties' respective market shares.[14]

Gun-jumping practices also arise in situations where the parties implement a notifiable transaction immediately after making the required notification to the relevant authority, but without observing the standstill period or receiving official final clearance regarding the proposed transaction. The fundamental aim of standstill obligations is to prevent a premature change of control between undertakings. Therefore, failing to observe timing limitations is considered to be a serious

---

[11] DAVID J. LAING ET AL., GLOBAL MERGER CONTROL MANUAL 511 (Cameron May Ltd., 7th ed. 2007).

[12] Section 7A of the Clayton Act, 15 U.S.C. § 18a.

[13] Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board (published on Oct. 7, 2010).

[14] J. MARK GIDLEY & GEORGE L. PAUL, WORLDWIDE MERGER NOTIFICATION REQUIREMENTS (Kluwer Law Int'l, 2009).

infringement of competition rules by its very nature.[15] To put it another way, standstill obligations are aimed at deterring the parties from implementing the concentration before it is declared to be compatible with the applicable competition law rules. The underlying idea behind this prohibition is that the parties are considered to be competitors and/or separate entities until clearance is received from the relevant authorities and the deal is closed. Therefore, the fact that a transaction is later approved would not legitimate or legalize prohibited pre-merger activities that constitute a gun-jumping violation.[16]

2.1.2. Substantive Gun-Jumping

Substantive gun-jumping occurs when the transacting parties are competitors and when they participate in activities that may cause or lead to the prevention, restriction or distortion of competition. In contrast to procedural gun-jumping cases, there is no notification requirement in such circumstances. Accordingly, no standstill obligation exists either, since the concerned undertakings merely possess the intention to merge in the (near) future, and therefore, engage in certain conducts aimed at coordinating their business activities with each other to create synergies or integration before the implementation of the transaction. However, undertakings might still breach general competition law rules through such behaviors by exchanging competitively sensitive information, which is treated as a violation in major competition law regimes, including those in the US and the EU.[17]

Coordinated behaviors between competitors are regulated under Article 101 of the Treaty on the Functioning of the European Union ("***TFEU***"),[18] which, *inter alia*, forbids pre-merger cooperation or exchange of commercially sensitive information among the concerned undertakings, even if the transaction is later notified to and approved by

---

[15] Elektrabel v. Compagnie Nationale Du Rhone, Case No COMP/M.4994, Comm'n of the European Communities, at 34 (Jun. 10, 2009).

[16] James R. Modrall & Stefano Ciullo, *supra* note 7, at 425.

[17] Eleanor M. Fox, *US and EU Competition Law: A Comparison*, GLOBAL COMPETITION POLICY, INSTITUTE FOR INT'L ECONOMICS, (Edward M. Graham & J. David Richardson eds., 1997), at 339-341.

[18] *See* the Consolidated Version of the TFEU (2016, C202/88).

the Commission.[19] Likewise, in the Turkish competition law regime, the primary legislation that applies to information exchanges is Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"),[20] which is akin to (and closely modeled after) Article 101 of the TFEU. Similarly, under US law, the exchange of competitively sensitive information among competing parties is considered to be illegal under Section 1 of the Sherman Antitrust Act of 1890 ("***Sherman Act***"),[21] which condemns concerted conduct that is considered to necessarily eliminate or impede competition, without regard to its actual effects.[22]

3. Assessment of Gun-Jumping Rules in Different Jurisdictions: A Comparative Look at the US, the EU and Turkey

Recently, many jurisdictions have shown a growing interest in penalizing the parties to a concentration who share information or coordinate with each other prior to the approval of the transaction by the relevant competition authorities (*i.e.*, during the pre-closing period). The fines imposed on such parties can be significantly high in the current competition law environment, as various governments have been adopting much more aggressive enforcement procedures for dealing with gun-jumping practices. For example, in 2018, the European Commission fined Altice—a multinational telecommunications company based in the Netherlands—EUR 125 million for putting into effect its acquisition of a Portuguese telecommunications operator prior to receiving the necessary clearance from the European Commission.[23] In a similar vein, the US authorities held in 2003 that the pre-merger engagements between Gemstar-TV Guide International, Inc. ("***Gemstar***") and TV Guide, Inc. ("***TV Guide***") had been illegal since the merger review process had not yet been completed, and the parties were required to pay USD 5.67 million in civil penalties, which was the largest amount ever paid in a

[19] PANAGIOTIS FOTIS & NIKOLAOS ZEVGOLIS, THE COMPETITIVE EFFECTS OF MINORITY SHAREHOLDINGS: LEGAL AND ECONOMIC ISSUES 90 (Hart Publishing, 2016).

[20] LAW NO. 4054 ON THE PROTECTION OF COMPETITION [LAW NO. 4054] (DEC. 13, 1994, NO. 22140).

21 SHERMAN ANTITRUST ACT OF 1890, 15 U.S.C. §§ 1–7.

[22] Gregory J. Werden, *Competition, Consumer Welfare & Sherman Act*, 9 SEDONA CONFERENCE J. 87-88 (2008).

[23] *Altice v. PT Portugal*, Case M.7993, European Comm'n (Apr. 24, 2018).

gun-jumping case in the US at that time.[24] Just like in the US and the EU, premature implementations of notifiable concentrations are prohibited in Turkey as well.

In the sections below, we analyze the landmark gun-jumping decisions in the case law of the US, the EU and Turkey, following the explanations of the applicable rules and the current status of the law in the relevant jurisdictions.

3.1. The United States

3.1.1. Legislation

In the US, gun-jumping violations are subject to Section 1 of the Sherman Act and Section 7A of the Clayton Act, or the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("***HSR Act***"), depending on the particular type(s) of practice in question. Even though these legislations all prohibit various pre-merger misconducts by the parties to a transaction, they are applicable to cases of different natures and distinct characteristics. For instance, the Sherman Act deals with anti-competitive agreements between independent companies, whereas the HSR Act is designed to investigate cases involving the acquisition of a beneficial ownership before the waiting period is concluded.

Section 1 of the Sherman Act provides the main competition law rules regarding *"every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,"*[25] which are deemed to be illegal. In other words, Section 1 aims to deter agreements that prevent or restrain competition. Such anti-competitive agreements can either be considered *per se* unlawful, which means that the existence of such agreements is a legal violation in itself, or they can be analyzed based on

---

[24] *United States v. Gemstar TV Guide Int'l, Inc. and TV Guide, Inc.*, 1:03CV00198, Final Judgment (2003).

[25] SHERMAN ANTITRUST ACT OF 1890, 15 U.S.C. § 1.

the "rule of reason," which examines whether or not the agreement in question actually harms competition.[26]

Within the context of Section 1 of the Sherman Act, pre-closing activities of undertakings that are engaged in an M&A transaction are examined based on the "rule of reason" approach, unless the parties are engaged in price-fixing activities with a clear intent to fix prices or allocate markets and customers.[27] The rule of reason approach requires an assessment to determine whether the restrictive practices under examination impose a restraint on competition and whether the agreement in question has pro-competitive effects.[28] Therefore, the courts apply a "balance test" in order to compare the competitive harm and the competitive benefit arising from the anti-competitive agreement.[29] In such cases, pro-competitive benefits are deemed to provide a justification for the investigated activities. However, pro-competitive effects do not always legitimate or legalize the examined practices of the parties if there were other possible ways and potential actions that the parties may have taken and which may have caused noticeably less harm to competition.[30]

The pre-closing exchange of confidential information between the parties to a merger or acquisition is considered to constitute "premature coordination," and is assessed under the rule of reason approach, as stated above. In practice, this means that cooperation among undertakings through the exchange of information is not *per se* illegal. If the concerned undertakings in an efficiency-enhancing integration coordinate their activities in order to achieve pro-competitive benefits, then the coordination among competitors is examined under the rule of

[26] Peter J. Kadzik, *Compliance Guide to the Antitrust Laws of the United States*, 2(2) INT'L COMPANY AND COMMERCIAL L.R. 47 (1991).

[27] Richard Liebeskind, *Gun-jumping: Antitrust Issues Before Closing the Merger*, 2 ABA SECTION OF BUSINESS LAW (2008).

[28] *The Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008).

[29] *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829 (3d Cir. 2010).

[30] Debre J. Pearlstein et al. eds., *Antitrust Law Developments,* AMERICAN BAR ASSOCIATION 73 -78 (2002).

reason approach.[31] In other words, legitimate information exchanges that are needed for the preparation of due diligence reports or other necessary procedures for the transaction do not constitute gun-jumping practices.[32]

Unlike Section 1 of the Sherman Act, the HSR Act does not apply to a broad range of transactions, as it only affects transactions that are subject to notification and only until the end of the HSR waiting period.[33] In other words, if a transaction requires notification within the context of the HSR Act, *"no person shall acquire, directly or indirectly, any voting securities or assets of any other person"*[34] until the HSR waiting period has expired. The waiting period, putting aside the exceptions provided in the law, is generally thirty (30) days after the consummation of the filing.[35] Therefore, both the acquirer (who will acquire voting securities or assets after the acquisition) and the acquired party are prohibited from exercising or implementing the proposed transaction until the waiting period is concluded.

As stated above, the HSR Act prohibits the acquisition of beneficial ownership without observing the notification and standstill requirements.[36] However, in looking at the precise wording of the HSR Act, we note that an explicit definition or explanation of "beneficial ownership" is not provided. According to a report by the FTC's Bureau of Competition, signing the contract may create a transfer of beneficial ownership, which is entirely lawful if the transfer does not confer additional indicia of ownership, such as *"control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence*

---

[31] The FTC and the US Department of Justice ("***DoJ***"), *Antitrust Guidelines for Collaborations Among Competitors* 8 (2000).

[32] M. Howard Morse, *Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing*, 57(4) THE BUSINESS LAWYER J. 1463, 1481 (2002).

[33] HSR Act, 15 U.S.C. § 18a.

[34] *Id.*

[35] HSR Act, 15 U.S.C. § 18a(b)(1).

[36] William Blumenthal, General Counsel, Federal Trade Comm'n, *The Rhetoric of Gun-Jumping*, Remarks Before the Association of the Corporate Counsel Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel, at 2 (Nov. 10, 2005).

inquiries,"[37] which do not comply with the purposes of the statute. This rule means that assessments of beneficial ownership within the scope of the HSR Act should be fact-based in each case.

As per Section 18a(g)(1) of the HSR Act, violations related to gun-jumping activities might be subject to civil penalties of not more than USD 40,000 for each day during which a party is in violation.[38]

3.1.2. Enforcement and Implications

As mentioned above, US enforcement authorities are known to investigate gun-jumping practices under both the Sherman Act and the HSR Act. Since there are no specific, set-in-stone written rules in terms of what kind of behaviors or actions would lead to jumping the gun, analyzing the available precedents will be of crucial importance for undertakings which intend to implement a merger or acquisition in order to avoid crossing over the fine line between permissible activities and gun-jumping violations due to pre-closing information exchange.

In 2000, the DoJ opened an investigation against Gemstar and TV Guide, which were two competing undertakings providing interactive program guides and packaged subscription television services to consumers. The investigation was initiated on the grounds that the undertakings had infringed Section 1 of the Sherman Act, Section 7A of the Clayton Act and the HSR Act, all of which collectively prohibit agreements in restraint of trade and the acquisition of assets by the potentially merging parties before the expiration of the waiting periods.[39] In late 1999, the relevant companies entered into a merger agreement that included various business restrictions, giving the merging parties a

---

[37] William J. Baer, *Rep. from the Bureau of Competition*, The ABA Spring Meeting (Apr. 15, 1999).

[38] HSR ACT, 15 U.S.C. § 18A(G)(1). The relevant section of the HSR Act sets forth a civil penalty of not more than USD 10,000. However, this amount was increased to USD 40,000 by the FTC as of August 1, 2016. *See* FTC, 16 CFR Part 1: Adjustments to Comm'n Civil Penalty Amounts to Reflect Inflation as Required by the Federal Civil Penalties Inflation Adjustment Act; Interim Final Rule, Federal Register Notice, Vol. 81, No. 126 (Jun. 30, 2016).

[39] *United States v. Gemstar TV Guide Int'l, Inc. and TV Guide, Inc.*, 1:03CV00198, Complaints (2003), 1.

certain level of control over each other's assets during the pre-closing period.[40] However, before the consummation of the merger agreement, the undertakings also shared confidential information about prices, market operations and capacity. Accordingly, the undertakings intermingled their assets even when they were both required to remain as separate companies.[41] The Court held in its judgment that the parties were restrained from *"disclosing or seeking the disclosure of information about current or future prices"*[42] during the negotiation process and the interim period of the merger agreement. Finally, the companies were ordered jointly and severally to pay a civil penalty in the amount of USD 5,676,000.[43]

In another noteworthy case, the exchange of competitively sensitive information during the pre-consummation period was deemed as gun-jumping by the United States District Court for the District of Columbia. That case concerned the merger agreement between Computer Associates International, Inc., ("***CA***") and Platinum Technology International, Inc. ("***Platinum***").[44] The merger agreement stated that Platinum would only be allowed to offer its customers discounts above 20% off list prices after receiving CA's written approval.[45] This requirement enabled CA to review competitively sensitive information about Platinum's customers and business strategies, and thereby facilitated CA in exercising control over Platinum, which was prohibited under the HSR Act as a gun-jumping practice.[46] In its final judgment, the Court ordered the parties to pay a civil penalty in the amount of USD 638,000.[47]

---

[40] *Id*. 32.

[41] *Id*. 60.

[42] *United States v. Gemstar TV Guide Int'l, Inc. and TV Guide, Inc.*, *supra* note 24.

[43] *United States v. Gemstar TV Guide Int'l, Inc. and TV Guide, Inc.*, *supra* note 39.

[44] *United States v. Computer Associates Int'l, Inc. and Platinum Technology Int'l, Inc.*, 1-02062 Competitive Impact Statement (2002).

[45] *Id*.

[46] *United States v. Computer Associates Int'l, Inc. and Platinum Technology Int'l, Inc.*, 1:01CV02062, Complaint for Equitable Relief and Civil Penalties (2001).

[47] *United States v. Computer Associates Int'l, Inc. and Platinum Technology Int'l, Inc.*, 1-02062 Final Judgment (2002), at 8.

In a recent example of a gun-jumping case due to the exchange of competitively sensitive information, US authorities filed complaints against Flakeboard America Ltd. ("***Flakeboard***") and SierraPine for engaging in unlawful conduct while the proposed acquisition of two particle mills by Flakeboard from SierraPine was still undergoing antitrust review.[48] In 2014, Flakeboard announced its intention to acquire some of the entities owned by SierraPine through the proposed transaction, which exceeded the threshold amount under the HSR Act. The gun-jumping practices occurred after the parties agreed to close some of the entities owned by SierraPine, and accordingly shifted the beneficial ownership to the acquirer before the regulatory review had been completed.[49] Through this transfer, SierraPine also provided Flakeboard with competitively sensitive information—such as the name and contact information of customers, as well as the types and volumes of the products purchased by the customers, among others—about the concerned entities.[50] The US District Court for the Northern District of California (San Francisco Division) held that Flakeboard and SierraPine had to pay USD 1.9 million each (USD 3.8 million in total) to the United States government for violating Section 1 of the Sherman Act.[51]

3.2. The European Union

3.2.1. Legislation

Under EU Law, gun-jumping practices are investigated under Article 7(1) of the Council Regulation ("***EC***") No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("***EC Merger Regulation***") and Article 101 of the TFEU, which are examined in further detail below. In a nutshell, the EC Merger Regulation sets forth the rules regarding concentrations and notification

---

[48] *United States v. Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., Inversiones Angelini y Compania Limitada, and Sierrapine*, 3:14-cv-4949, Competitive Impact Statement (2014), at 2.

[49] *Id*. at 3.

[50] *Id*. at 6.

[51] *United States v. Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., Inversiones Angelini y Compania Limitada, and SierraPine*, 3:14-cv-4949, Final Judgment (2015), at 4-5.

requirements (similar to the HSR Act), whereas Article 101(1) of the TFEU prohibits anti-competitive agreements, decisions by associations of undertakings and concerted practices.

Any kind of pre-closing coordination among the undertakings to a transaction might be caught within the scope of Article 101 of the TFEU, which prohibits *"all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition."*[52] The broad scope of Article 101 carries the risk of leading to over-enforcement during M&A procedures. Therefore, the European Commission generally refers to the Guidelines on the Applicability of Article 101 of the TFEU to Horizontal Cooperation Agreements ("***Horizontal Cooperation Guidelines***")[53] when dealing with potential gun-jumping cases due to pre-closing information exchange, especially when the parties to the transaction are competitors.[54]

According to the decisions of the European Commission and the European courts, the exchange of confidential information does not *per se* invoke the scrutiny of Article 101, if such information is exchanged in connection with pre-closing procedures only, without any effect of restricting competition.[55] On the other hand, the Horizontal Cooperation Guidelines state that information related to "*prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programs and their results*"[56] are of strategic importance, and therefore, sharing such data is likely to fall under the scope of Article 101 of the TFEU. Accordingly, parties preparing for a merger or acquisition should not

[52] *See* Article 101(1) of the TFEU.

[53] *See* Horizontal Cooperation Guidelines (2011, C 11/1).

[54] *Koninklijke Philips Electronics v. Saeco Int'l Group*, Case C‑98/17 P, European Comm'n (Sep. 26, 2018), 73-74.

[55] James R. Modrall, Stefano Ciullo, *supra* note 7, at 426.

[56] Horizontal Cooperation Guidelines, *supra* note 53, 86.

share such "strategic information" even during the due diligence or integration processes.[57]

The EC Merger Regulation establishes a clear-cut set of rules providing the European Commission with the exclusive competence and authority to control and regulate proposed concentrations. A transaction may come under the Commission's scrutiny if it satisfies the "community dimension" and exceeds the thresholds set by the EC Merger Regulation.[58] This rule indicates that any transaction that exceeds the prescribed thresholds are subject to the EU merger control regime and should be notified to and approved by the European Commission.[59]

In this regard, undertakings are not allowed to implement a concentration prior to notification and until the European Commission has cleared the transaction.[60] The European Commission may impose fines not exceeding 10% of the aggregate turnover of the concerned undertakings if the parties fail to satisfy the notification requirement or the standstill obligation, without considering whether or not the violation was intentional.[61]

Similar to the US, pre-closing information exchanges among the transaction parties may result in a gun-jumping violation under the EU merger control regime. The European Commission is empowered and authorized to inspect the parties in order to ensure that no competitively sensitive information has been shared among them before the closing or during the negotiation process that could lead to a change of control prior to the clearance of the transaction.[62] Such information sharing is

---

[57] Cani Fernández, *Information Exchanges and the Due Diligence Process*, 13 COMPETITION LAW INT'L at 67-72 (2017).

[58] *See* EC Merger Regulation, Art. 1.

[59] Ulrich von Koppenfels, *A Fresh Look at the EU Merger Regulation? The European Comm'n's White Paper "Towards More Effective EU Merger Control"*, LIVERPOOL L. R. 36, at 7-9 (2015).

[60] *See* EC Merger Regulation, Art. 7(1).

[61] *See* EC Merger Regulation, Art. 14(2)(b).

[62] *See* EC Merger Regulation, Art. 13.

only allowed when the undertakings have a legitimate business justification arising from the proposed transaction.[63]

3.2.2. Enforcement and Implications

Compared to the US enforcement authorities, the European Commission did not pay all that much attention to the issue of gun-jumping practices until *Altice/PT Portugal*,[64] which will be reviewed in detail below. On a side note, the EU decisions on gun-jumping cases are mainly related to procedural violations of Article 7(1) of the EC Merger Regulation.[65] Considering the limited number of gun-jumping cases in the EU, it would also be appropriate to conclude that the Commission is not as aggressive as the US competition authorities regarding this issue when it comes to imposing fines on the concerned undertakings.

In 1999, the Commission dealt with a joint venture agreement between three media enterprises, namely Bertelsmann, Kirch, and Premiere.[66] In that case, the questions regarding the gun-jumping violations arose from the pre-notification actions of the companies, such as the use and marketing of each other's products. Therefore, during the meeting of November 5, 1997, which was held between the representatives of the relevant companies and an official from the European Commission regarding the merger plan, the commissioner reminded the undertakings (referring to the parties' early implementation of the merger agreement) that if a merger is put into force before formal clearance is granted, the concerned companies could be fined up to 10% of their aggregate turnovers.[67] Subsequently, the European Commission warned the undertakings once again, due to their ongoing anti-

[63] Atmaja Tripathy, *Gun Jumping: The Unaddressed Issues in Pre-merger Negotiations in India*, 38 (10) EUROPEAN COMPETITION L. R. 441, 447 (2017).

[64] *Altice/PT Portugal*, Case M.7993, European Comm'n (Apr. 24, 2018).

[65] OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *Suspensory Effects of Merger Notifications and Gun Jumping*, DAS/COMP (2018) 11 (Oct. 4, 2018), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2018)11&docLanguage=En (last visited Feb. 5, 2019).

[66] *Bertelsmann/Kirch/Premiere*, Case No IV/M.993, Comm'n of the European Communities (May 27, 1998).

[67] *See* the European Comm'n's announcement of Nov. 5, 1997, no. IP/97/953.

competitive behaviors (even after the abovementioned meeting), and invited them to take the necessary measures to remove the actual effects on competition.[68] Shortly after the warning, the Commission announced that the undertakings had agreed to suspend their existing marketing operations and comply with the terms of the applicable EU merger control rules as soon as possible.[69] The final decision can be regarded as a milestone in EU merger control enforcement, since the European Commission issued several announcements about the premature implementation of a notifiable operation and finally cleared the transaction without imposing any fines on the undertakings.[70]

In 2018, the Commission has been noticeably more aggressive with respect to imposing fines for gun-jumping violations. Indeed, on April 24, 2018, the Commission imposed a record-breaking fine of EUR 124.5 million on Altice for breaching the standstill obligation with regard to the transaction concerning the acquisition of the Portuguese telecommunications operator, PT Portugal.[71] Through its *Altice/PT Portugal* decision, the European Commission has shed some valuable light on what is considered to constitute gun-jumping from its perspective. In terms of information exchanges prior to receiving clearance, the European Commission found that PT Portugal had systematically and extensively provided commercially sensitive information prior to the date of the notification and the date of the clearance decision, which was accomplished "*either during meetings between the management of the two companies, or on an ad-hoc basis, as a follow-up to these meetings or on specific topics.*"[72] The exchanged information was considered strategic and commercially sensitive, as they related to PT Portugal's commercial targets and behavior in the relevant market, tariffs, margins, costs, average revenue per user, as well as information about the details of PT Portugal's network, none of which was publicly available.[73] Additionally, the relevant information was

[68] *See* the European Comm'n's announcement of Dec. 1, 1997, no. IP/97/1062.

[69] *See* the European Comm'n's announcement of Dec. 15, 1997, no. IP/97/1119.

[70] James R. Modrall, Stefano Ciullo, *supra* note 7, at 426.

[71] *Altice/PT Portugal*, *supra* note 64.

[72] *Id*. 378.

[73] *Id*. 411.

found to be granular and up-to-date.[74] In this regard, the European Commission concluded that Altice had exercised decisive influence over PT Portugal, since the exchange of such information went beyond what was necessary for the purposes of completing the transaction, considering that such information was exchanged outside any "clean team" agreements (which will be discussed below) and after the due diligence phase. Moreover, the Commission found that Altice had acted as if it already had control over PT Portugal and was entitled to ask for and receive such information.[75]

In light of the Commission's decision in *Altice/PT Portugal*, it would be reasonable to infer that Commissioner Margrethe Vestager was signaling the European Commission's new and stricter approach toward gun-jumping violations when she declared that, "*The fine imposed by the Commission on Altice today reflects the seriousness of the infringement and should deter other firms from breaking EU merger control rules."*[76]

Following the *Altice/PT Portugal* case, the Court of Justice of the EU ("***ECJ***") provided further guidance on the interpretation of the standstill obligation under the EU merger control regime in *Ernst & Young.*[77] In 2013, KPMG Denmark and Ernst & Young ("***E&Y***"), two well-known auditing companies, agreed to merge their operations in Denmark and notified the *Konkurrencerådet* (Competition Council of Denmark, or "***Danish Competition Authority***") of the impending transaction. Relying on the merger agreement, KPMG Denmark terminated its cooperation agreement with KPMG International immediately after having signed the agreement with E&Y.[78] The Danish Competition Authority found that the termination of the cooperation agreement had infringed the standstill obligation and would be considered as a gun-jumping practice, since it was deemed to be a pre-closing implementation that had been carried out without the competition authority's approval.[79] E&Y appealed the Danish

[74] *Id*. 414.

[75] *Id*. 423.

[76] *See* the European Comm'n's announcement of Apr. 24, 2018, no. IP/18/3522.

[77] *Ernst & Young P/S v. Konkurrencerådet*, Case C-633/16, ECJ (May 31, 2018).

[78] *Id*. 16.

[79] *Id*. 2.

Competition Authority's decision before the ECJ, which ultimately concluded that *"the termination of the cooperation agreement may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects."*[80] In reaching this conclusion, the ECJ found that the termination of the cooperation agreement was likely to be of an ancillary and preparatory nature, and ruled that it would not contribute to the change of control over the target, regardless of its potential effects on the market.[81] In this context, the ECJ has clarified that the partial implementation of a concentration by taking certain measures does not in itself breach the standstill obligation, so long as such measures do not contribute to a lasting change of control over another undertaking.

3.3. Turkey

3.3.1. Legislation

Similar to the merger control regimes in the US and the EU, implementing a merger or an acquisition without notifying the Turkish Competition Board ("***Competition Board***") about the transaction is prohibited under Turkish law. Article 7 of the Law No. 4054 prohibits concentrations that would create a dominant position or strengthen a dominant position and impede effective competition in the relevant market.

The types of concentrations that require prior notification and approval by the Competition Board are regulated under Communiqué No. 2010/4. In this regard, a merger control filing is mandatory in Turkey for transactions that result in a change of control on a lasting basis and that trigger one of the alternative turnover thresholds provided under Article 7 of Communiqué No. 2010/4. Therefore, Turkey is one of the jurisdictions that stipulate and enforce an *ex-ante* notification system. The Competition Board has the authority to launch an *ex officio* investigation in case a notifiable transaction is closed before clearance is granted, and possesses the power to order structural as well as behavioral

[80] *Id*. 64.

[81] *Id*. 60.

remedies in order to restore the situation to the status quo that existed prior to the closing.[82]

Additionally, if the parties to a notifiable transaction violate the suspension requirement (*i.e.*, if they close a notifiable transaction without the approval of the Competition Board or fail to notify the transaction at all), a turnover-based monetary fine (based on the domestic turnover generated in the financial year preceding the date of the monetary fine decision) will be imposed on the acquirer in straightforward acquisitions or on both parties in the case of mergers.[83] It is also notable that a monetary fine imposed as a result of a violation of the suspension requirement will, in any event, not be less than TL 21,036 (approximately EUR 3,468 or USD 3,929 based on the exchange rate of the Central Bank of Turkey at the time of writing).[84] To that end, it should be mentioned that the monetary fines arising from gun-jumping violations in Turkey are considerably lower than comparable fines in other jurisdictions. Furthermore, considering the depreciation of the Turkish Lira in recent years, it could be argued that this may reduce the deterrent effect of monetary fines and lead to an increase in the number of concentrations that are unlawfully implemented, and therefore, impede the proper and effective functioning of the *ex-ante* merger control system.[85]

Moreover, the Turkish merger control regime decrees that a notifiable concentration is invalid (and subject to all the legal consequences of its invalidity), unless and until it is approved by the Competition Board.[86] In other words, the implementation of a notifiable transaction must be suspended until clearance is granted by the Competition Board. Therefore, a notifiable concentration will not be

---

[82] *See* Article 11(b) of the Law No. 4054.

[83] *Id*. Article 16.

[84] *See* Article 1 of the Communiqué No. 2018/1 on the Communiqué Concerning the Increase of the Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of the Law No. 4054 (published on Dec. 2, 2017). The minimum amount of this fine was set at TL 21,036 for 2018.

[85] Ayhan Kortunay, *Rekabet Hukuku Açısından Birleşme ve Devralmalarda Erken Başlama (Gun Jumping) Sorunu*, 3 BANKA VE TICARET HUKUKU DERGISI, 19, 35 (2010).

[86] *See* Article 7(2) of the Law No. 4054 and Article 10(4) of Communiqué No. 2010/4.

legally valid until the approval of the Competition Board, and such notifiable transactions cannot be closed in Turkey before clearance is obtained from the Board. Accordingly, the undertakings to a notified transaction are obliged to remain as separate entities until they receive the Board's approval.

In light of the foregoing and contrary to the EU merger control regime, which imposes the same type of fines on the undertakings regardless of whether the prematurely implemented transaction is itself compatible with the general competition rules, the Turkish merger control regime sets different penalties for two possible gun-jumping scenarios under Article 11 of the Law No. 4054.[87] The first one arises when the undertakings implement a transaction—which would not create a dominant position or strengthen the actual dominant position of an undertaking or significantly impede competition—without filing the mandatory notification. In this scenario, the Competition Board approves the transaction, but also imposes a fine on the concerned undertakings due to their failure to notify. The second situation arises when the transaction in question creates or strengthens a dominant position or significantly impedes competition. In that case, the undertakings are obliged to pay the fine imposed, terminate the transaction and remove its illegal *de facto* effects (*i.e.*, return to the pre-merger conditions) as soon as possible. It is worth noting that the Competition Board does not adopt a "rule of reason" approach when applying Article 11, and therefore, the intent and motives of the undertakings with respect to the violation are not taken into consideration.[88]

Substantive gun-jumping practices are also subject to scrutiny under Article 4 of the Law No. 4054, which prohibits anti-competitive agreements. Therefore, the exchange of competitively sensitive information prior to the Competition Board's approval could also fall within the scope of Article 4. In fact, the Competition Board has concluded in several of its precedents that the exchange of information,

---

[87] Ayhan Kortunay, *supra* note 85, at 34.

[88] İ. YILMAZ ASLAN, REKABET HUKUKU DERSLERI 224 (Oct. 2016).

detailed surveys and statistical studies carry the potential to impede the competition by facilitating collusion among competing undertakings.[89]

3.3.2. Enforcement and Implications

As a trending competition law issue that has risen in importance all around the world, gun-jumping practices have attracted the Competition Board's attention as well, especially because the Turkish competition law and merger control regimes have developed in light of the EU competition law rules. However, it could be argued that, unlike the recent developments in the EU, the Competition Board's precedents are not yet sufficiently developed to provide clear guidelines on the issue of gun-jumping practices in Turkey, particularly with respect to gun-jumping violations through pre-closing information exchanges. Nevertheless, the Competition Board's general stance reflects a willingness/tendency to follow the European Union's rules and practices in matters where there is still some lingering uncertainty.

The Board has exhibited a consistent reaction to *procedural* gun-jumping incidents, about which it appears to be less flexible. An illustrative example of its strict approach to cases involving gun-jumping through information exchange was provided by the acquisition of Ultima Bilgisayar ("***Ultima***") and Dendrite Turkey Inc. ("***Dendrite***") by Cegedim Bilişim ("***Cegedim***"). Even though the Board ultimately approved the acquisition transaction in August 2010, it also chose to impose administrative monetary fines on the parties for gun-jumping, since among other practices leading to gun-jumping (including the appointment of Cegedim's vice-chairman as a representative to Ultima's board of directors), the parties had exchanged information regarding their employment agreements, operational systems, cash flow

[89] *See e.g.*, Competition Board Decision of November 28, 2017, Case 17-39/636-276 – *Syndication Loans*; Competition Board Decision of March 8, 2013, Case 13-13/198-100 – *12 Banks*; Competition Board Decision of April 18, 2011, Case 11-24/464-139 – *Automotive Sector*; Competition Board Decision of May 20, 2009, Case 09-23/494-120 – *Private Schools*; Competition Board Decision of February 8, 2002, Case 02-07/57-26 – *Fertilizer*; Competition Board Decision of September 11, 2003, Case 03-60/733-343 – *Coal Cartel*; Competition Board Decision of February 24, 2004, Case 04-16/123-26 – *Ceramic*; Competition Board Decision of February 1, 2002, Case 02-06/51-24 – *Cement*.

statements, and technical capacities and efficiency ratings of their employees.[90]

Similarly, the Competition Board imposed a monetary fine on the acquirer in the transaction concerning the acquisition of PR Net Halkla İlişkiler ("***PR***") by Ajans Press Medya ("***Ajans Press***"). In that case, the Competition Board determined that *de facto* control of the target had already been transferred to Ajans Press prior to its approval of the transaction.[91] The Competition Board's findings on gun-jumping in this transaction were mainly related to (and derived from) the following facts: (i) PR had moved to the same building in which Ajans Press was located, (ii) Ajans Press intervened in the day-to-day operations of PR, (iii) the employees of PR had conducted a meeting pursuant to the directive of the owner of Ajans Press, and (iv) the parties had exchanged competitively sensitive information, such as customer-share lists, production resources and prepared joint projects.

4. Proposed Solutions to Reduce the Risk of Gun-Jumping Through Pre-closing Information Exchange

As analyzed in detail in the previous sections, the exchange of competitively sensitive information prior to the notification of the transaction and the approval of the relevant competition authority has been recognized as a premature implementation of a proposed transaction in the US, the EU and Turkey, where *ex-ante* mandatory notification systems have been adopted. The treatment of such information exchanges as gun-jumping violations stems from the possibility that they may result in the exercise of decisive influence of one party to the transaction over the other, which may raise coordination concerns. Nevertheless, a certain level of information exchange is often required to conduct the essential risk assessments with respect to the transaction, in addition to the necessity of engaging in such information exchange as an ancillary and preparatory step for carrying out the transaction. Therefore, it can be challenging for the parties to the transaction to determine the permissible and lawful boundaries of the

[90] Competition Board Decision of August 26, 2010, Case 10-56/1089-411 – *Cegedim*.

[91] Competition Board Decision of October 21, 2010, Case 10-66/1402-523 – *Ajans Press*.

pre-closing information exchange. Nevertheless, it is also of the utmost importance to determine these boundaries, since the undertakings face the risk of paying substantial fines due to their alleged gun-jumping practices, which might significantly impair and reduce the economic efficiencies that could be gained from the transaction. In fact, recent decisions by competition authorities around the world indicate that gun-jumping practices could result not only in monetary fines being imposed on the undertakings, but could also delay the closing and successful implementation of M&A transactions.

Considering the legitimate and genuine business need for some level of coordination between the parties before the implementation of an M&A transaction, we will now examine what kind of information is deemed competitively sensitive by the competition authorities, and then assess alternative mechanisms that could be established in order to enable the parties to a transaction to exchange such information prior to a clearance decision without getting caught in the hazardous nets of a gun-jumping violation.

4.1. Identification of Competitively Sensitive Information

In the current competition law environment, exchanging competitively sensitive information between undertakings is prohibited in many jurisdictions. Parties to a transaction do not enjoy the protections of a "safe harbor" that would allow them to share any commercial information, even prior to the signing of the agreement or during the due diligence or integration processes.[92] The scope of "competitively sensitive information" may differ from one jurisdiction to another, but it can be generally stated that the overall model and boundaries of impermissible conduct are similar in all jurisdictions, considering the precedents and guidelines that have been put forth by the major competition authorities.

[92] Jeffrey M. Weiner, *Business Due Diligence Strategies: Leading Lawyers on Meeting Client Expectations, Navigating Cross-Border M&A Transactions and Understanding the Importance of Due Diligence in Today's Economy*, Thomson Reuters/Aspatore 14 (2010).

As previously mentioned, information exchanges are evaluated under the "rule of reason" standard in the United States.[93] For example, in 2013, Bosley, Inc., (the nation's largest manager of medical/surgical hair restoration procedures) was forced to settle FTC charges that it had illegally exchanged competitively sensitive, nonpublic information about its business practices with one of its competitors, HC (USA), Inc., commonly known as the Hair Club.[94] According to the FTC, the information in question included certain details about future product offerings, price floors and discounts for surgical hair transplantations, plans for business expansions and contractions, and details about current business operations and performance data.

There are few guidelines for determining which types of information are considered to be competitively sensitive. According to the Antitrust Guidelines for Collaborations Among Competitors ("***Guidelines for Collaborations***"), which is published by the FTC and the DoJ, information relating to price, output, costs, strategic plans, operating procedures, etc., are considered to be "competitively sensitive variables," which may lead to anti-competitive effects when shared among actual or potential competitors.[95] The information mentioned in the Guidelines for Collaborations should be interpreted broadly and considered as an illustrative (rather than a comprehensive) list. For instance, the exchange of information relating to customer proposals, price discounts, licensing strategies, and personnel decisions throughout the waiting period is deemed to be a gun-jumping violation.[96] On the other hand, if there is no anti-competitive result or effect arising from the shared information, there are certain criteria that will be used to assess the lawfulness of an information exchange.[97] According to said criteria, the risk of gun-jumping is low if the information exchanged prior to the

---

[93] US Supreme Court, *United States v. United States Gypsum Co.*, 438 US 422 (1978).

[94] FTC, *Bosley, Inc., Aderans America Holdings, Inc., and Aderans Co., Ltd.* (2013).

[95] *See* Guidelines for Collaborations, at 12.

[96] *United States v. Qualcomm Incorporated and Flarion Technologies, Inc.*, 1:06CV00672, Complaints (2006), 5-7.

[97] OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *4 Roundtable on Information Exchanges Between Competitors Under Competition Law*, DAF/COMP/WD, 117 (Oct. 21, 2010), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1010informationexchanges.pdf (last visited Feb. 5, 2019).

closing is (i) publicly available, (ii) shared without anti-competitive intent, and (iii) not based on recent data. For example, it is assumed that information on current and future businesses or operations are more likely to be considered "competitively sensitive" than an undertaking's historical information or data.[98]

As for the EU merger control regime, "strategic data" are considered risky to share with competitors. This is because the exchange of strategic data among competitors is thought to reduce the undertakings' decision-making independence by decreasing their willingness to compete.[99] The European Commission provides an illustrative list for what may be considered "strategic information" (*i.e.*, strategic data), which can include information that is related to *"prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and Research & Development ("**R&D**") programs and their results."* Moreover, according to the Guidelines on Horizontal Cooperation, the accuracy of the information and the nature of the market in which the concerned undertakings operate, as well as the frequency of information exchange among the undertakings, should be taken into consideration when assessing the legality of the information sharing in each case.

According to the Competition Board, the exchange of information among parties to a transaction in Turkey is conducted primarily in three ways: (i) directly among parties to a transaction, (ii) through third parties (such as distributors, customers, etc.), and (iii) through publicly available sources.[100] In most cases, information gained through publicly available sources would not raise competition law concerns, unless the information in question is itself illegal as it is disclosed to the public for a prohibited purpose. In this regard, the Guidelines on Horizontal Cooperation Agreements[101] ("***Turkish Guidelines on Horizontal Cooperation***") provides the parameters for an analysis of the nature and

---

[98] *See* Guidelines for Collaborations, at 15.

[99] *See* Guidelines on Horizontal Cooperation, 86.

[100] *See* Competition Board Decision of September 22, 2011, Case 11-48/1215-428 – *Petder*.

[101] Turkish Guidelines on Horizontal Cooperation No. 13-24/326-RM (6) (Apr. 30, 2013).

scope of the exchange of information. In this regard, it should be noted that the list of strategic information contained in the Turkish Guidelines of Horizontal Cooperation does not differ from the one provided under the EU competition law regime.

The Turkish Guidelines on Horizontal Cooperation fail to provide a clean-cut assessment or definition of "competitively sensitive information." Hence, the Competition Board has determined the fundamental principles on the exchange of information between competitors through its various decisions.[102] Similar to the EU approach regarding information exchanges, the Competition Board has indicated that (i) the structure of the market, and (ii) the nature of the information exchanged are the key variables in assessing the competitive effects of an exchange of information.[103] It is worth underlining that, along with the market structure, the nature of the information must also be taken into account. In this respect, the exchange of information that is (i) competitively sensitive (strategic), (ii) comprehensive (*i.e.*, comprising the whole market), (iii) company-specific (individualized), (iv) about current and future data, (v) frequent, and (vi) non-public, may lead to questions and concerns being raised by the Competition Board with respect to the relevant information exchange.[104]

4.2. Alternative Safeguard Mechanisms

The undesirable outcomes that may result from the exchange of information during a merger or acquisition transaction are not always predictable for the undertakings involved. The companies may find it

---

[102] *See e.g.*, Competition Board Decision of February 1, 2002, Case 02-06/51-24 – *Cement*; Competition Board Decision of February 8, 2002, Case 02-07/57-26 – *Fertilizer*; Competition Board Decision of September 6, 2002, Case 02-53/685-278 – *Chip and Fiber Board Producers*; Competition Board Decision of February 25, 2003, Case 03-12/135-63 – *Chip and Fiber Board Producers*; Competition Board Decision of April 15, 2004, Case 02-53/685-278 – *ODD*; Competition Board Decision of December 28, 2006, Case 06-95/1202-365 – *Aviation Joint Venture*; Competition Board Decision of September 20, 2007, Case 07-76/907-345 – *Petder*; Competition Board Decision of March 10, 2008, Case 08-23/237-75 – *Doğan Gazetecilik*.

[103] *See* Turkish Guidelines on Horizontal Cooperation, *supra* note 101,60-65.

[104] *Id.* 67-74.

reasonable and prudent to share certain commercial information with each other in order to properly assess the risks and benefits of the intended transaction and to price it accordingly. Moreover, the transaction parties generally tend to believe that every piece of information regarding the undertakings should be available to both parties for the sake of facilitating their integration. However, such exchanges may amount to violations of the competition law or merger control rules in the relevant jurisdiction, and such violations end up, in most cases, leading to lengthier and more detailed/invasive review periods, along with potential monetary fines. Therefore, the information should be exchanged in an appropriate manner that would not facilitate or enable the use of the competitively sensitive information by the transaction parties. Below, we will evaluate alternative safeguard mechanisms that could minimize the risk of gun-jumping specifically with respect to pre-closing information exchanges.

Retaining the services of an outside competition law counsel is one alternative means of minimizing the risk of problematic pre-closing information exchanges, as was also acknowledged by the FTC in a recent blog post addressing the issue of how to avoid antitrust pitfalls during pre-merger negotiations and the due diligence process.[105] By employing an outside competition law counsel, the transacting parties could ensure that they would be warned by antitrust counsel about the competitively sensitive information that should not be exchanged prior to the negotiation and due diligence processes, and such outside counsel would also be able to review the agreements and any other documents that could include competitively sensitive information prior to the due diligence process and redact the relevant information, if necessary.[106] Additionally, the outside competition law counsel could design suitable

[105] Holly Vedova et al., *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, Bureau of Competition (2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger (last visited Feb. 5, 2019).

[106] *See also* ABA, *Managing and Mitigating Antitrust Risk in Transactions*, Feb. 26, 2015,https://www.americanbar.org/content/dam/aba/administrative/business_law/antitrust_risks.pdf (last visited Feb. 5, 2019).

protocols to prevent anti-competitive information exchanges and take on the task of policing the implementation of these protocols.[107]

In Brazil, the Administrative Council for Economic Defense's ("***CADE***") Guidelines for the Analysis of Previous Consummation of Merger Transactions ("***CADE Gun-jumping Guidelines***") set forth procedures that are designed to assist companies in reducing the risk of gun-jumping.[108] The first method listed under Section 2 of the CADE Gun-jumping Guidelines is an "Antitrust Protocol," which is suggested to be executed between the parties while the transaction is being negotiated or undergoing an antitrust review, and which may include guidance on the general competition procedures to be followed (including those concerning the exchange of sensitive information) until the approval of the relevant competition authority is obtained.[109] Within the scope of such documents, the parties might include relevant descriptions regarding the exchange of sensitive information or incorporate a "clean team" clause, which requires companies to form a group of independent individuals (*i.e.*, employees from the transaction companies or outside consultants, etc.) to collect all information from the undertakings and then prepare non-confidential reports to be sent to each party, and deal with the risk of gun-jumping, accordingly.[110]

Another safeguard mechanism involving the participation of an antitrust counsel in the pre-closing stages of the transaction could be implemented by setting up and running compliance programs. In order to gain awareness of gun-jumping violations and learn more about possible regulatory pitfalls, undertakings could establish competition compliance programs regarding the potential competition law concerns that could arise during the pre-closing period, and such compliance programs could be implemented either before the negotiations between the parties take place or after the parties declare their intention to carry out an M&A transaction. Especially in light of the US District Court's

---

[107] Holly Vedova et al., *supra* note 105.

[108] CADE Guidelines for the Analysis of Previous Consummation of Merger Transactions.

[109] *Id.* at 10.

[110] Bruno de Luca Drago, Fabianna Vieira Barbosa Morselli, *Clarifying Gun Jumping Through Guidelines: The Brazilian Experience*, 7 (2) JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 130, 133 (2015).

final judgment on Flakeboard and SierraPine and its requirement on the parties to maintain an antitrust compliance program,[111] the importance of establishing competition compliance programs at the beginning or in the course of a proposed transaction cannot be ignored.

Setting up a clean team is the foremost type of neutrality mechanism that could help undertakings to avoid the adverse consequences of gun-jumping through the exchange of competitively sensitive information. This mechanism has also been acknowledged and recognized as an effective safeguard by various national competition authorities. For instance, the FTC has published a blog post on the topic of avoiding the competition law concerns arising from information exchanges during the pre-transaction negotiation and due diligence periods.[112] In this guidance, the FTC listed "clean teams" as a safeguard against gun-jumping through the exchange of competitively sensitive information, and consequently, as a precaution against the violation of competition law rules that limit the dissemination and use of such information by the parties for business purposes. Additionally, the FTC noted that the personnel responsible for competitive planning, pricing or strategy should not be assigned to or employed within clean teams.

Similarly, the European Commission, in its recent *Altice/PT Portugal* decision, listed "clean team arrangements," along with confidentiality and non-disclosure agreements, as safeguards against gun-jumping through information exchange,[113] and defined a "clean team" as *"a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information."*[114] Furthermore, the European Commission determined that the exchanges in the relevant case had involved the entire management of Altice, including its operational employees, and

[111] *United States v. Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., Inversiones Angelini y Compania Limitada, and Sierrapine, supra* note 51, 5-7.

[112] *Id*.

[113] *Altice/PT Portugal*, *supra* note 64, 53.

[114] *Id*. footnote 221.

had taken place outside the scope of the mechanisms ensuring the confidentiality of the information exchanged.[115]

One of the most important functions of a clean team is to ensure the privacy of the commercially sensitive information of the parties that is exchanged throughout an M&A transaction. The members of the clean team are expected to collect all relevant information from the parties and to transfer all such information to the parties' executive committees. In this regard, clean teams may include third parties, such as independent lawyers (*e.g.*, "of counsel" attorneys), consulting firms, investment banks,[116] and/or employees of the transaction parties who are not involved in the strategic decision-making processes of the undertakings. Hiring third parties as members of a clean team could arguably be unfeasible for practical purposes, since the parties may incur substantial expenses as a result,[117] whereas assigning existing employees as clean team members could be rather advantageous, as experienced individuals would then be able to review and assess the exchanged information in terms of the relevant business.[118] Additionally, it should be remembered that clean teams should not comprise any individuals who are still active or engaged in making strategic decisions for one of the merging parties, because there is a risk that such members might use the information shared with the clean team to their own advantage while carrying out their ongoing duties.[119] Moreover, it could be plausibly suggested that (i) retired or former employees, or (ii) recently or soon-to-be retired employees would be good candidates for inclusion on clean teams, as the former do not have any ongoing business responsibilities toward the parties and the latter have no ongoing responsibilities toward the business under review.[120] Another strategy might be to restrict clean

[115] *Id*. 422.

[116] Cani Fernandez et al., *Information Exchanges and the Due Diligence Process*, 13 No. 1 COMPETITION L. INT'L 67, 76 (2017).

[117] Kathryn M. Fenton et al., *FTC Warns Parties on Information Exchanges During M&A Due Diligence*, MONDAQ (Apr. 26, 2018).

[118] Debra J. Pearlstein & Adam C. Hemlock, *Sharing Before the Deal Is Done*, V. 11, N. 1 ABA BUSINESS LAW SECTION, (Oct. 2011).

[119] William R. Vidgor, *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange*, 199 (ABA, 2006).

[120] *Altice/PT Portugal*, *supra* note 64, footnote 221 and 422.

team members from being assigned to positions in which they can use the sensitive information, at least for a certain time period. However, this strategy might be detrimental both for the company and for the relevant employees, as the former may lose long-serving, valuable employees with substantial know-how as a result, and the latter cannot continue to work in their previous positions and may potentially suffer from status deprivation. Finally, a clean team that is made up of a large number of members would increase the risk of information leakage; thus, it would be prudent to limit the number of members included on a clean team.

In employment law, non-disclosure agreements ("***NDAs***") are executed between the parties (typically between an employee and an employer) in order for the employer to ensure that the employee, who is in a position to access the confidential information of the firm, does not disseminate or use such information to benefit another company.[121] In M&A transactions, clean team members could be viewed/treated as employees of the transaction parties. Therefore, the execution of NDAs could be considered as a tool to boost the effective functioning of a clean team and to help protect the information transferred to the clean team members from being shared with third parties.[122]

Setting up a clean team whose members are bound by NDAs may be sufficient in certain circumstances to ensure that no competitively sensitive information would be transferred to the transaction parties until the relevant competition authority's decision was finalized. In other words, a well-designed clean team may be instrumental for ensuring the parties that the entire set of applicable procedural rules for the transaction are handled smoothly and properly, from signing day to closing day. However, like all good things, setting up a clean team also entails certain drawbacks, one of which relates to the future of the clean team members if the transaction is not implemented, and another of which concerns the clean team members' participation in other areas of the business for the duration of their clean team duties. The execution of non-disclosure agreements may prevent the members of the clean team

[121] ABRAHAM Y. SKOFF, LEADING LAWYERS ON DEFINING KEY TERMS, NEGOTIATING AND DRAFTING EMPLOYMENT AGREEMENTS: REVIEWING COMPENSATION PROVISIONS AND CONSTRUCTING TERMINATION CLAUSES 3 (Thomson Reuters, Sep. 2011).

[122] Cani Fernandez et al., *supra* note 116.

from using the competitively sensitive information that they may have obtained in these circumstances; however, the neutrality and objectivity of such members could nevertheless be mistrusted or questioned. In other words, this arrangement could raise doubts as to whether such members could be involved in the decision-making process without being influenced by the information they have obtained in the course of their clean team duties, especially since it is presumed, in the case of unilateral information exchanges (*i.e.*, a company receiving competitively sensitive information from a competitor), that the recipient has accepted the acquisition of such information and adapted its market conduct accordingly.[123]

5. Conclusion

The undertakings involved in an M&A transaction may desire to exchange as much information as possible in order to properly conduct due diligence, facilitate the integration planning process, and correctly assess the value of the transaction. However, the exchange of competitively sensitive information prior to notification and before an approval is granted by the relevant competition authorities might lead to gun-jumping violations in jurisdictions where *ex-ante* mandatory notification systems have been adopted. This may raise competition law concerns under the provisions prohibiting anti-competitive agreements and concerted practices, which are explicitly set forth under almost every competition law regime.

The general principle is that the merging parties in a transaction are considered as separate entities (and required to remain so) until the clearance or approval of the relevant competition authority. Therefore, various activities related to the proposed transaction, including the exchange of competitively sensitive information prior to notification or during the standstill period may run afoul of competition law principles. Considering the increasing number of hefty monetary fines imposed on companies engaged in M&A transactions due to gun-jumping violations, companies should take the utmost care to ensure that their actions are

[123] *See* Horizontal Cooperation Guidelines, *supra* note 53, 62; *see also* Turkish Guidelines on Horizontal Cooperation, *supra* note 101, 46.

compatible with the competition law rules in the relevant jurisdiction(s) prior to the implementation of the transaction.

As each jurisdiction has a different approach toward the definition of "competitively sensitive information," gun-jumping analyses should be conducted on a case-by-case basis. In any event, future commercial plans or strategies (including pricing policies, numerical data related to supply and demand, etc.) are, *inter alia*, among the types of information that the companies should refrain from exchanging during the pre-closing stages of the transaction. Nonetheless, companies might require certain competitively sensitive information in order to conduct the risk assessment of the investment and to decide whether to continue with the transaction.

There are alternative safeguard mechanisms available for minimizing the risk of gun-jumping through pre-closing information exchange, which also allow the parties to exchange information to a certain, *quantum satis*, extent. These alternative safeguard mechanisms include retaining an outside antitrust counsel who could "police" the exchange of competitively sensitive information between the parties, executing an antitrust protocol between the parties as suggested by CADE, establishing competition compliance programs specifically for M&A transactions, and setting up a clean team.

We believe that setting up a clean team is the foremost and most effective type of neutrality mechanism on this front. More specifically, the execution of NDAs by the members of the clean team would enhance the effective functioning of a clean team and help to protect the information transferred to the clean team members from being shared with third parties.

Indeed, the competition authorities in the EU and the US, through their respective decisions, have been outlining the possible framework of effective clean team arrangements. For example, the precedents discussed above indicate that: (i) personnel responsible for competitive planning, pricing or strategy, and individuals involved in the day-to-day commercial operations of the businesses, should not be utilized on clean teams, (ii) the clean team can involve third parties, such as "of counsel" attorneys and/or employees of the transaction parties who are not involved in the strategic decision-making process, (iii) retired or former employees, as well as recently or soon-to-be retired employees, are suitable candidates for clean teams, and (iv) it would be prudent to limit the number of clean team members. Having said that, the future prospects of the members of a clean team in case the transaction is not be implemented, and the participation of clean team members in other areas of the business while carrying out their clean team duties, remain as unresolved questions.

Bibliography

Books and Reports

ASLAN, İ. YILMAZ, REKABET HUKUKU DERSLERI (Oct. 2016).

BELLIS, JEAN-FRANÇOIS ET AL. ED., MERGER CONTROL: JURISDICTIONAL COMPARISONS (1st ed. 2011).

CLARKE, JULIE, INT'L MERGER POLICY APPLYING DOMESTIC LAW TO INT'L MARKETS (Edward Elgar, 2014).

FOTIS, PANAGIOTIS & ZEVGOLIS, NIKOLAOS, THE COMPETITIVE EFFECTS OF MINORITY SHAREHOLDINGS: LEGAL AND ECONOMIC ISSUES (Hart Publishing, 2016).

GIDLEY, J. MARK & PAUL, GEORGE L., WORLDWIDE MERGER NOTIFICATION REQUIREMENTS (Kluwer Law Int'l, 2009).

HUBER, PATRICK ET AL., DAY-TO-DAY COMPETITION LAW: A PRACTICAL GUIDE FOR BUSINESSES (2nd ed. 2014).

LAING, DAVID J. ET AL., GLOBAL MERGER CONTROL MANUAL (Cameron May Ltd., 7th ed. 2007).

Periodicals

Baer, William J. *Rep. from the Bureau of Competition*, The ABA Spring Meeting (Apr. 15, 1999).

Bailey, Matthew S. *The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests*, 67 OHIO STATE L.J. 433 (2006).

Blumenthal, William (General Counsel, Federal Trade Comm'n). *The Rhetoric of Gun-Jumping*, Remarks Before the Association of the Corporate Counsel Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel (Nov. 10, 2005).

Drago, Bruno de Luca, Morselli, Fabianna Vieira Barbosa *Clarifying Gun Jumping Through Guidelines: The Brazilian Experience*, 7 (2) JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 130 (2015).

Fenton, Kathryn M. et al., *FTC Warns Parties on Information Exchanges During M&A Due Diligence*, MONDAQ (Apr. 26, 2018).

Fernandez, Cani et al., *Information Exchanges and the Due Diligence Process*, 13 No. 1 COMPETITION L. INT'L 67 (2017).

Fox, Eleanor M., *US and EU Competition Law: A Comparison*, GLOBAL COMPETITION POLICY, INSTITUTE FOR INT’L ECONOMICS, (Edward M. Graham & J. David Richardson eds., 1997)

Kadzik, Peter J. *Compliance Guide to the Antitrust Laws of the United States*, 2(2) INT’L COMPANY AND COMMERCIAL L.R. 47 (1991).

Kortunay, Ayhan *Rekabet Hukuku Açısından Birleşme ve Devralmalarda Erken Başlama (Gun Jumping) Sorunu*, 3 BANKA VE TICARET HUKUKU DERGISI (2010).

Liebeskind, Richard *Gun-jumping: Antitrust Issues Before Closing the Merger*, 2 ABA SECTION OF BUSINESS LAW (2008).

Modrall, James R. & Ciullo, Stefano *Gun-Jumping and EU Merger Control*, 9 EUROPEAN COMPETITION L. REV. (2003).

Morse, M. Howard *Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing*, 57(4) THE BUSINESS LAWYER J. (2002).

Pearlstein, Debra J. & Hemlock, Adam C. *Sharing Before the Deal Is Done*, V. 11, N. 1 ABA BUSINESS LAW SECTION, (Oct. 2011).

Pearlstein, Debre J. et al. eds., *Antitrust Law Developments,* AMERICAN BAR ASSOCIATION (2002).

SKOFF, ABRAHAM Y. LEADING LAWYERS ON DEFINING KEY TERMS, NEGOTIATING AND DRAFTING EMPLOYMENT AGREEMENTS: REVIEWING COMPENSATION PROVISIONS AND CONSTRUCTING TERMINATION CLAUSES (Thomson Reuters, Sep. 2011).

Tripathy, Atmaja *Gun Jumping: The Unaddressed Issues in Pre-merger Negotiations in India*, 38 (10) EUROPEAN COMPETITION L. R. (2017).

Vidgor, William R. *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange* (ABA, 2006).

Von Koppenfels, Ulrich *A Fresh Look at the EU Merger Regulation? The European Comm'n's White Paper "Towards More Effective EU Merger Control"*, LIVERPOOL L. R. 36 (2015).

Weiner, Jeffrey M. *Business Due Diligence Strategies: Leading Lawyers on Meeting Client Expectations, Navigating Cross-Border M&A Transactions and Understanding the Importance of Due Diligence in Today's Economy*, Thomson Reuters/Aspatore (2010).

Werden, Gregory J. *Competition, Consumer Welfare & Sherman Act*, 9 SEDONA CONFERENCE J. (2008).

Statutes, Legislative and Administrative Materials

CADE Guidelines for the Analysis of Previous Consummation of Merger Transactions.

CLAYTON ANTITRUST ACT OF 1914, 15 U.S.C.

Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board (published on Oct. 7, 2010).

Communiqué No. 2018/1 on the Communiqué Concerning the Increase of the Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of the Law No. 4054 (published on Dec. 2, 2017).

Consolidated Version of the Treaty on the Functioning of the European Union (2016, C202/88).

European Comm'n's Announcement of Nov. 5, 1997, no. IP/97/953.

European Comm'n's Announcement of Dec. 1, 1997, no. IP/97/1062.

European Comm'n's Announcement of Dec. 15, 1997, no. IP/97/1119.

European Comm'n's Announcement of Apr. 24, 2018, no. IP/18/3522.

European Comm'n's Horizontal Cooperation Guidelines (2011, C 11/1).

European Union Council Regulation No. 139/2004 of Jan. 20, 2004, on the Control of Concentrations between Undertakings.

Federal Trade Comm'n, 16 CFR Part 1: Adjustments to Comm'n Civil Penalty Amounts to Reflect Inflation as Required by the Federal Civil Penalties Inflation Adjustment Act; Interim Final Rule, Federal Register Notice, Vol. 81, No. 126 (Jun. 30, 2016).

Federal Trade Comm'n and the US Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000).

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976.

LAW NO. 4054 ON THE PROTECTION OF COMPETITION [LAW NO. 4054] (DEC. 13, 1994, NO. 22140).

SHERMAN ANTITRUST ACT OF 1890, 15 U.S.C.

CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, MAY 9, 2008.

Turkish Guidelines on Horizontal Cooperation No. 13-24/326-RM (6) (Apr. 30, 2013).

Cases

Altice v. PT Portugal, Case M.7993, European Comm'n (Apr. 24, 2018).

Bertelsmann/Kirch/Premiere, Case No. IV/M.993, Comm'n of the European Communities (May 27, 1998).

Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 (3d Cir. 2010).

Elektrabel v. Compagnie Nationale Du Rhone, Case No. COMP/M.4994, Comm'n of the European Communities (Jun. 10, 2009).

Ernst & Young P/S v. Konkurrencerådet, Case C-633/16, ECJ (May 31, 2018).

FTC, *Bosley, Inc., Aderans America Holdings, Inc., and Aderans Co., Ltd.* (2013).

Koninklijke Philips Electronics v. Saeco Int'l Group, Case C‑98/17 P, European Comm'n (Sep. 26, 2018).

The Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008).

Turkish Competition Board’s *Cement* decision (Feb. 1, 2002, 02-06/51-24).

Turkish Competition Board’s *Fertilizer* decision (Feb. 8, 2002, 02-07/57-26).

Turkish Competition Board’s *Chip and Fiber Board Producers* decision (Sep. 6, 2002, 02-53/685-278).

Turkish Competition Board’s *Chip and Fiber Board Producers* decision (Feb. 25, 2003, 03-12/135-63).

Turkish Competition Board’s *Coal Cartel* decision (Sep. 11, 2003, 03-60/733-343).

Turkish Competition Board’s *Ceramic* decision (Feb. 24, 2004, 04-16/123-26).

Turkish Competition Board’s *ODD* decision (Apr. 15, 2004, 02-53/685-278).

Turkish Competition Board’s *Aviation Joint Venture* decision (Dec. 28, 2006, 06-95/1202-365).

Turkish Competition Board’s *Petder* decision (Sep. 20, 2007, 07-76/907-345).

Turkish Competition Board’s *Doğan Gazetecilik* decision (Mar. 10, 2008, 08-23/237-75).

Turkish Competition Board’s *Private Schools* decision (May 20, 2009, 09-23/494-120).

Turkish Competition Board’s *Cegedim* decision (Aug. 26, 2010, 10-56/1089-411).

Turkish Competition Board’s *Ajans Press* decision (Oct. 21, 2010, 10-66/1402-523).

Turkish Competition Board’s *Automotive Sector* decision (Apr. 18, 2011, 11-24/464-139).

Turkish Competition Board’s *Petder* decision (Sep. 22, 2011, 11-48/1215-428).

Turkish Competition Board’s *12 Banks* decision (Mar. 8, 2013, 13-13/198-100).

Turkish Competition Board's *Syndication Loans* decision (Nov. 28, 2017, 17-39/636-276).

United States v. Gemstar TV Guide Int'l, Inc. and TV Guide, Inc., 1:03CV00198.

United States v. Computer Associates Int'l, Inc. and Platinum Technology Int'l, Inc., 1-02062.

United States v. Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., Inversiones Angelini y Compania Limitada, and Sierrapine, 3:14-cv-4949.

United States v. Qualcomm Incorporated and Flarion Technologies, Inc., 1:06CV00672, Complaints (2006).

US Supreme Court, *United States v. United States Gypsum Co.*, 438 US 422 (1978).

Internet Sources

ABA, *Managing and Mitigating Antitrust Risk in Transactions*, Feb. 26, 2015, https://www.americanbar.org/content/dam/aba/administrative/business_law/antitrust_risks.pdf (last visited Feb. 5, 2019).

OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *Investigations of Consummated and Non-Notifiable Mergers* (Jan. 20, 2015), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)1&doclanguage=en (last visited Feb. 5, 2019).

OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Local Nexus and Jurisdictional Thresholds in Merger Control*, DAF/COMP/WP3 (2016), (Mar. 10, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En (last visited Feb. 5, 2019).

OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Information Exchanges Between Competitors Under Competition Law*, DAF/COMP/WD (Oct. 21, 2010), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1010informationexchanges.pdf (last visited Feb. 5, 2019).

OECD - Directorate for Financial and Enterprise Affairs Competition Committee, *Suspensory Effects of Merger Notifications and Gun Jumping*, DAS/COMP (2018) (Oct. 4, 2018), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2018)11&docLanguage=En (last visited Feb. 5, 2019).

U.N. Conference on Trade and Development, *Challenges in the Design of a Merger Control Regime for Young and Small Competition Authorities* (Apr. 26, 2017), https://unctad.org/meetings/en/SessionalDocuments/ciclpd45_en.pdf (last visited Feb. 5, 2019).

Vedova, Holly et al. *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, Bureau of Competition (2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger (last visited Feb. 5, 2019).

Competition Law Assessments in Big-Data Merger Reviews

Gönenç Gürkaynak, Esq.[*]

Naz Altınsoy[**]

Umay Rona[***]

Introduction

It is hardly news to note that companies around the world have recently engaged in an escalating arms race with respect to data collection and that they have been using data collection and processing as a major growth strategy. The quickest and most efficient way for undertakings to access significant amounts of useful data is to conduct merger and acquisition ("***M&A***") transactions with other companies that do have such data in their possession. For instance, available data from the Organization for Economic Co-operation and Development ("***OECD***") and other sources clearly indicate that the number of notified transactions to the European Commission have increased rapidly from 55 deals in 2008[1] to approximately 380 deals in 2017.[2]

In this respect, the increasing digitalization of markets worldwide has led to the introduction of "Big Data" driven business models, which allow consumers to use (i) online search engines, such as Google Search, Microsoft Bing or Yandex, (ii) online audio-visual streaming services, such as Spotify and YouTube, and (iii) social media platforms, such as

---

* Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

** Naz Altınsoy is an associate at ELIG Gürkaynak Attorneys-at-Law.

*** Umay Rona is an associate at ELIG Gürkaynak Attorneys-at-Law.

1 OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*, OECD Publishing, Paris (2015), http://dx.doi.org/10.1787/9789264229358-en (last visited Dec. 5, 2018).

2 Global Legal Insights, *Merger Control 2018/European Union*, https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/european-union (last visited Dec. 14, 2018).

Facebook, Instagram and WhatsApp (all of which are owned by Facebook), without having to pay any service or subscription fees. In return, these business models enable the collection, processing and utilization of large amounts of personal data for commercial purposes, in order to allow the companies to gain a better understanding of consumer behavior, and thus, a better grasp of the markets in question. As set forth by Stucke and Grunes, big data can be defined through the "*4 Vs*" of data: *volume*, *velocity*, *variety,* and *value*.[3] In other words, "big data" is a term that summarizes the willingness (indeed, eagerness) of companies to collect large amounts of diversified information about consumers and to process them as quickly and efficiently as possible, in order to generate intrinsic value and enhance or grow their businesses.

Needless to say, the accumulation of such an important competitive asset through merger transactions has sparked the interest and concern of the competition law community, and it has caught the attention of competition enforcement authorities as well. Unsurprisingly, one aspect of this multifaceted debate revolves around the question of whether current merger control rules are sufficient to assess and resolve the competition law risks stemming from big-data mergers. A second, highly debated issue relates to the ongoing discussions on whether privacy-related concerns should be addressed through the merger control regime as well. This article will seek to provide an overview of these debates, and offer some observations and proposals regarding these two noteworthy issues.

Section I aims to present an overview of both the positive and the negative effects of big-data mergers, by counterweighing their possible competition law risks against their efficiency gains. Section II will begin by analyzing the merger control review of data-driven transactions based on the precedents of the European Commission ("***Commission***") and the Federal Trade Commission ("***FTC***"), and then assess whether the current competition law tools are sufficient and suitable for catching potential infringements in data-driven mergers and for regulating "Big Data" M&A transactions. Finally, Section III will examine to what extent privacy concerns should be included in the assessment of merger and acquisition transactions under competition law rules, in light of the

[3] Stucke, M.E. and A.P. Grunes, Big Data and Competition Policy, Oxford University Press, United Kingdom, (2016).

relevant Commission and FTC decisions, and more generally evaluate whether data protection should be considered to fall within the scope of the competence and abilities of competition enforcement authorities in the first place.

I. Overview of the Potential Anti-Competitive and Pro-Competitive Effects of Big-Data Mergers

As stated above, for many undertakings operating in data-driven markets, the collection, processing and use of data has become a crucial competitive asset. While these data-related activities have allowed and enabled companies to tailor their products and services to their consumers' preferences, they have also given such companies the opportunity to monetize online advertisement spaces based on the consumers' characteristics and online activities.

Although the majority of academicians and practitioners who have delved into this issue have recognized the virtues of big data,[4] there is still a significant faction that also foresees various potential vices and drawbacks in this brave new world. These commentators have rightfully drawn our attention to the anti-competitive effects of big data on the relevant markets. In this respect, while highlighting the virtues and benefits of big data, we will also argue in this Section that competition enforcement authorities should carefully scrutinize M&A transactions in data-intensive markets and keep a watchful eye on the post-transaction effects of the merged entity's actions on the relevant product markets.

1. Potential Anti-Competitive Concerns of Big-Data Mergers

Competition law analysis regarding big-data mergers and acquisitions can be structured to focus on exclusionary behaviors that occur in one of two ways: (i) in horizontal mergers, by significantly increasing an undertaking's market power or by way of combination of data, and (ii) in non-horizontal mergers, by means of input foreclosure

---

[4] *See, e.g.*, Duch-Brown, Nestor, *The Competitive Landscape of Online Platforms*, No. 2017-04, Joint Research Centre (Seville site), 2017, https://econpapers.repec.org/paper/iptdecwpa/2017-04.htm (last visited Dec. 7, 2018); Daniel Sokol and Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1148 (2016), https://scholarship.law.ufl.edu/facultypub/803/ (last visited Dec. 7, 2018).

after the closing of the merger transaction.

a. Competition law concerns in horizontal mergers

The majority of discussions regarding the potential implications of big data revolve around the issues raised by the merger of two competitors both of whom are operating in online platforms. In fact, although mergers between an established undertaking and a maverick firm would likely have little impact on the existing market structure (due to the maverick firm's low market share), such a transaction could nevertheless lead to differentiated data access among firms in the post-transaction market, if the newcomer holds or has access to a significant quantity of datasets.[5] This would mean that the firms in the post-transaction market would have access to varying levels of data. Indeed, one of the concerns in this scenario would be the substantial increase in the volume of data in the possession of the newly merged entity, which could then be used by the company to increase its market share and to set barriers to entry, and thereby engage in exclusionary practices against its competitors and new entrants to the relevant market.[6] The major competition law concern here is the potential strengthening of the "feedback loops" in the post-transaction market. Such feedback loops can either boost the market share of a company by strengthening its position in the market solely through its own efforts or they can be achieved through a merger transaction between two companies operating in data-intensive online platforms.[7]

Feedback loops are primarily a competition law concern in multi-sided markets, where there are two different demand groups: the online advertisers on one side of the market and the users of the service on the

---

5 Competition Authorities of France and Germany, *Competition Law and Data* (2016), http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf (last visited Dec. 5, 2018).

6 *Ibid*.

7 Andres V. Lerner, *The Role of 'Big Data' in Online Platform Competition*, SSRN (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780 (last visited Dec. 5, 2018).

other.[8] Furthermore, there are two distinct kinds of feedback loops: the first is a “user feedback loop,” which represents the idea that when the number of users in an online platform increases, the volume of data also increases, which allows the company (*i.e.*, an undertaking of the platform) to improve the quality of its products and services by tailoring them to the preferences of its users.[9] This enables the company to attract more users and thus process more data, creating a beneficial feedback loop for the company. The second kind of feedback loop is called a “monetization feedback loop.” This feedback loop refers to the ability of a company to increase its revenues by engaging more extensively with advertisers to deliver more ads on the platform and to acquire greater financial resources, which can subsequently be used to increase the quality of the targeted advertisement service for the users on one side of the platform and for the advertisers on the other.[10] This allows the company to provide a higher quality platform with more appealing products/services, which attracts both more users and more advertisers to the company. In this respect, it can clearly be seen that user and monetization feedback loops intensify and reinforce each other, and help the company to provide exponentially better products and services in comparison to its competitors.

As for the feedback loops achieved through a merger transaction between companies operating in online markets, it can be argued that such mergers cause certain competition law concerns from the perspective of the users, as well as the competitors. Indeed, from the standpoint of the merged entity’s competitors, since the undertaking will be in possession of a combination of datasets and users, it will be able to enhance the quality of its products and services both for its users and its advertisers, and will thus be in a position to raise its market share. Therefore, it can be reasonably asserted that it would be rather difficult for the rival firms to compete effectively with the merged entity in the post-transaction relevant market.

---

8 Ben Holles de Peyer, *EU Merger Control and Big Data*, Journal of Competition Law and Economics (2018), https://academic.oup.com/jcle/article-abstract/13/4/767/480 2444 (last visited Dec. 5, 2018).

9 OECD, *Big Data: Bringing Competition Policy to the Digital Era*, DAF/COMP(2016)14, https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf (last visited Dec. 5, 2018).

10 *Ibid*.

However, rivals might attempt to catch up with the merged entity by adopting a "user-to-data" and/or a "data-to-user" strategy. While the user-to-data strategy aims to attract users by providing differentiated and innovative products or services in order to collect their data, the data-to-user strategy seeks to acquire data by either investing in data collection, acquiring data from third-party sources, or increasing the amount of data used for the purpose of better understanding users' preferences, and thus attracting more of them to the platform by providing higher quality products and services. Although competitors may try to implement these "user-to-data" and/or "data-to-user" strategies, some commentators argue that the "feedback loops" of the merged entity would set barriers to expansion for existing competitors and barriers to entry for new entrants to the relevant market.[11] On the other hand, although the switching costs in online platforms are often said to be minimal, the collection of data might actually lead to higher switching costs for users, as data-holding and data-processing undertakings will be in a more advantageous position than their rivals to offer individualized products and services to each user.[12] Accordingly, the merged entity's platform might potentially be better suited to addressing the consumers' needs and satisfying their preferences. In that case, users would be reluctant to switch to a rival undertaking's platform, unless the rival in question offered a truly differentiated product or service, including multi-homing scenarios.[13]

As mentioned above, it has been argued that the anti-competitive effects of this scenario, where the merged entity achieves a considerable amount of market power in the post-transaction environment, might constitute a barrier to entry for competitors who would find it difficult to

[11] Charlotte Breuvart, Étienne Chassaing and Anne-Sophie Perraut, *Big Data and Competition Law in the Digital Sector: Lessons from the European Commission's Merger Control Practice and Recent National Initiatives*, Concurrences (2016), https://www.concurrences.com/en/review/issues/no-3-2016/articles/big-data-and-competition-law-in-the-digital-sector-lessons-from-the-european-80763 (last visited Dec. 5, 2018).

[12] Competition Authorities of France and Germany, *supra* note 5.

[13] Multi-homing refers to the practice of "connecting a host or a computer network to more than one network. This can be done in order to increase reliability or performance." *See* OECD, *supra* note 9. *See also*, Ben Holles de Peyer, *supra* note 8.

compete on both sides of the market.[14] This is due to the risk posed by the post-transaction entity with respect to (i) reducing the quality of its products and services, as well as its innovation rate, within the scope of the non-monetized side of the market, and (ii) raising the prices of its advertising services on the monetized side of the market.

b. Anti-competitive scenarios concerning non-horizontal mergers in data-driven markets

As for merger transactions involving two companies that are operating at different levels of the market, some commentators have argued that the new merged entity in this scenario would be in a position to create "input foreclosure,"[15] and thus be able to raise the costs of its downstream rivals by restricting their access to an important input.

Two main scenarios come to mind with respect to vertical merger transactions in data-driven markets. First, there is the possibility for the accumulation and combination of the different datasets held by the merging undertakings to hinder the ability of rivals to compete in the relevant market, since the rivals will not be in a position to access or replicate the information extracted from the accumulation of said data.[16] Another possibility involves the merger of two companies that are operating in the upstream or downstream markets, in which each of them holds a significant amount of market power. In that case, the merged entity might be able to foreclose the market to new entrants, especially with regard to online service providers.[17] As a result, competitors may have to suffer higher prices to access such data or they may not be able to obtain such data at all, and this data deprivation would be then reflected in the price and quality of the services they provide to their users.

c. Is Big Data a real barrier to effective competition?

In light of the above, although data-driven mergers may seem, at

---

[14] Ben Holles de Peyer, *supra* note 8.

[15] Oskar Törngren, *Mergers in big data-driven markets - Is the dimension of privacy and protection of personal data something to consider in the merger review?* (2017), https://su.diva-portal.org/smash/get/diva2:1186978/FULLTEXT01.pdf (last visited Dec. 11, 2018).

[16] Competition Authorities of France and Germany, *supra* note 5.

[17] *Ibid.*

first glance, to enhance the collection of data at all times for both sides of a multi-sided market, and thus to set barriers to entry and lead to market foreclosure, we will argue below that competition enforcement authorities should proceed cautiously and closely scrutinize all the factors involved in a case when assessing big-data mergers.

This call for caution on the part of competition enforcement authorities stems from a number of related considerations. First of all, the claim that a dataset is unique can be questioned and put into doubt by reflecting on the very nature of "data." As a matter of fact, it can easily be observed that data is "non-rivalrous," meaning that: (i) its consumption by one company does not decrease its availability to that company's competitors, (ii) data has almost no marginal cost of production or distribution (*i.e.*, such costs are negligibly low), and (iii) there are countless new internet users (*i.e.*, new entrants to the market) every day, who voluntarily furnish their personal data to online platforms, and thus create a marketplace full of uncollected, unprocessed, and unused big data.[18]

Moreover, it should be emphasized that only the strategy of "data-to-user" may set barriers to entry for competitors or for potential new entrants to the market. Having said that, it is also possible for new entrants to collect consumer data by implementing an effective user data collection system. Indeed, although it has been argued that consumers might be reluctant to switch service providers following a merger (since the post-merger entity that owns the dataset will be able to offer tailored services to its customers), this claim does nothing to change the fact that switching costs are still considerably low in such markets. In other words, consumers can easily choose and switch to a rival online service provider if it offers a more innovative and user-friendly product or service than the merged entity. The risk of losing customers is also the most effective response to the potential danger that the merged entity might reduce the quality of its products/services or decrease its innovation rate once it attains a high market share in the post-merger world. In other words, the fear of losing customers (and market share)

[18] Anja Lambrecht and Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?*, CPI ANTITRUST CHRONICLE, January 2017, at 11, 12. https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht-Tucker.pdf (last visited Dec. 7, 2018).

acts as the most effective deterrent for the merged entity with respect to any thoughts of diminishing the quality of its products/services or reducing its innovation rate. Accordingly, in a scenario in which the merged company continues to innovate and provide differentiated products to its customers (which is very plausible since the ultimate aim of such companies should be to create dynamic efficiencies), such undertakings may very well choose to employ the "user-to-data" strategy.[19]

Additionally, Bourreau, de Streel and Graef's "CERRE Project Report on Big Data" draws our attention to the fact that any competition law assessment related to big data needs to be conducted on the basis of a thorough case-by-case analysis.[20] We will point out and reflect on the two main arguments advanced by the authors. Firstly, with respect to user feedback loops, the authors indicate that, in reality, service quality hardly depends on the accessibility of user data, according to a number of scholars.[21] The authors further explain that the feedback loop actually depends on the relationship *between* data and service quality, which, in turn, hinges on the type and characteristics of the product/service itself. They also add that the effect of a feedback loop, if any, would be infinitesimal, proceeding under the reasonable assumption that the cost of data collection is also very small. As for the monetized feedback loops, the authors note that their very existence and intensity should be evaluated on a case-by-case basis, and assert that there are three factors to consider when assessing monetized feedback loops: (i) whether the quantity of data impacts ad-targeting algorithms, (ii) whether the quality of ad-targeting affects the appeal to advertisers (*i.e.*, how attracted advertisers are to the platform), and (iii) how the platform invests its revenues from advertisement sales and how it finances the improvement and development of its products and services. In that regard, the authors

---

[19] Sokol & Comerford, *supra* note 4.

[20] Marc Bourreau, Alexandre de Streel, and Inge Graef, *Big Data and Competition Policy: Market power, Personalised Pricing and Advertising* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920301 (last visited Dec. 7, 2018).

[21] *See* Sokol & Comerford, *supra* note 4, at 1129; Lambrecht & Tucker, *supra* note 18; Lerner, *supra* note 7; David A. Balto and Matthew Lane, *Monopolizing Water in a Tsunami: Finding Sensible Antitrust Rules for Big Data* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753249 (last visited Dec. 6, 2018).

also refer to Lerner and Sokol's work on this subject, and report that the hypothesis that a higher number of users necessarily leads to better monetization of data is not actually supported by the available empirical evidence.[22]

2. Big-Data Merger Efficiencies

Since data has become the new essential input in digitalised markets, companies are expected to aim at acquiring as much data as possible in order to provide better products and services to their customers. However, they are also expected to seek to monetize their platforms by appealing to advertisers and engaging in ad sales, which provides them with significant financial resources that can be used to fund their future investments and R&D plans. Indeed, although a big-data merger has, at its root, the objective of making a commercial gain (as in any other business deal), these transactions also significantly improve both (i) the online services of companies, and (ii) the targeted online advertisements shown to consumers, and thereby contribute to the total public welfare.

The continuous improvement of online services over the years is an undeniable phenomenon of modern life, which has brought incalculable benefits to consumers. Indeed, consumers are now able to access any product or service—easily and instantly—through the internet. Although the feedback loop could be considered to potentially introduce certain anti-competitive aspects to the market, it has also unquestionably improved the quality of online services.[23] By using datasets, companies can innovate and enhance their products and services (and thus increase their quality), while simultaneously allowing users to reach their intended goals or destinations as quickly as possible by reducing the response time to their queries, which will ultimately benefit the consumer welfare. For instance, search engines (such as Google) collect and process user data in order to provide the most relevant results to their customers in the most effective and efficient way possible.

[22] *See* Lerner, *supra* note 7; Sokol & Comerford, *supra* note 4.

[23] Sokol & Comerford, *supra* note 4.

Hence, whereas the increase in consumer welfare in online services through the use of big data is indeed a remarkable fact of the 21st century global economy, the challenge for antitrust enforcers lies in the difficulty of actually quantifying this increase. In fact, competition law rules require a case-by-case assessment of each transaction that depends on a fundamentally economics-based approach. Accordingly, just as big-data mergers might cause qualitative harm to the competitive landscape, which is a non-quantified factor that can easily be overlooked, it is also a significant challenge to use an economics-based analysis in order to accurately assess whether the efficiency gains of such a big-data merger are sufficiently large to alleviate or overcome competition law concerns. In other words, the collection and analysis of empirical evidence that would allow a thorough competition law assessment of online platforms is still very much a work in progress.[24]

On the other side of the market, data-driven merger transactions have significantly improved targeted online advertisements through the use of monetization feedback loops.[25] The advances made with respect to the monetization feedback loops have enhanced several aspects of online advertisements at once. First of all, monetization feedback loops have enabled advertisers to better target a particular user group, among all users, which their product is primarily aimed at and searched by. In this regard, Facebook offers a useful example of a platform that has allowed companies to target users on the bases of their hobbies, purchase patterns, interests, and social backgrounds, and of a company that provides differentiated advertisements to each user in accordance with their personal preferences and characteristics. Similarly, after the completion of a merger transaction, either between firms in the same market or in different product markets, the new merged entity would be able to provide better targeted and higher quality advertisements to its users. This is not only beneficial for the platform companies in terms of enabling them to increase their revenues through ad sales, but also useful for allowing them to respond to their users' desires and address their needs more rapidly, by reducing the response time to their requests and queries on the platform. Indeed, by amassing additional financial resources through targeted online advertisement sales, companies may

[24] *See e.g.*, Duch-Brown, Nestor, *supra* note 4.

[25] *See* Sokol & Comerford, *supra* note 4.

be able to use such resources to innovate and thus increase the effectiveness of their platforms on both sides of the market. They can achieve this goal by providing more relevant advertisements that fulfil the needs of their users more effectively, which are deemed to be pro-competitive effects under various merger control regimes, as discussed below.

II. Big-Data Merger Review Under the Decisions of the EU Commission

Although there are no more than a handful of precedents in the European Commission's decisional practice concerning data-driven merger transactions, these few precedents offer ample insights regarding the fact that EU competition law enforcers are well aware of the current debates surrounding big-data mergers. Moreover, these decisions indicate that the Commission is well-equipped with the necessary investigative and analytical tools to assess big-data mergers. In this respect, we will now examine how the Commission has addressed the "theories of harm" put forth in Section I in its decisional practice, and evaluate how it has responded to claims regarding anti-competitive behavior in data-intensive merger cases.

To provide a structured review of the Commission's decisional practice, this sub-section will follow the headings provided under Section I.

a. The Commission's Assessment of Horizontal Mergers

There are several important decisions in which the Commission has reviewed horizontal big-data merger transactions, which focus primarily on online advertisement markets, such as the *Google/DoubleClick*, *Telefónica UK/Vodafone UK/Everything Everywhere/JV*, and *Facebook/WhatsApp* decisions.[26] As the abovementioned companies are all operating in multi-sided markets,

[26] *See* the European Commission's *Microsoft/Yahoo! Search Business* decision, Case COMP/M.5727 and dated February 18, 2010; *Google/DoubleClick* decision, Case COMP/M.4731 and dated March 11, 2008; *Facebook/WhatsApp* decision, Case COMP/M.7217 and dated October 3, 2014; *Telefónica UK/Vodafone UK/Everything Everywhere/JV* decision, Case COMP/M.6314 and dated September 4, 2012.

which are characterized by two different demand structures (composed of online advertisers on one side and end users on the other), it can be seen that the Commission has specifically assessed these transactions in terms of the theory of "feedback loops," including both "user feedback loops" and "monetization feedback loops."

As a matter of fact, in a seminal decision in which the Commission assessed the potential competition law concerns arising from Microsoft's purchase of Yahoo's search technology, with respect to the proposed acquisition's potential effects on the users of online search services, the Commission implicitly referred to the "feedback loops" by stating that, "*Advertisers aim to reach a large audience and monetize their investment in advertising. Users value the relevance of the internet search which includes the organic (or algorithmic) and advertising (or sponsored) results.*"[27] In this respect, the Commission observed that, following the consummation of the transaction, the combination of the parties' respective datasets could have an impact on the users of online search platforms. Indeed, the Commission clearly stated that this transaction, driven by big-data considerations, would be in a position to enable the parties to increase the relevance of their algorithms by combining, processing and using their databases in order to provide customers with better search results in line with their interests and preferences.[28] The underlying logic of this analysis runs in parallel to the "user feedback loop" theory, which sets forth the idea that when the number of users of an online platform increases, the volume of data also increases, which allows the platform company to improve the quality of its products and services by tailoring them to the preferences of its users. This, in turn, ultimately enables the company to attract more users and thus process more data, thereby creating a feedback loop and strengthening its position in the relevant market. Having said that, the Commission ultimately decided to approve the transaction, and stated that "*the transaction will be pro-competitive allowing the parties to more effectively compete with Google.*"[29] In this respect, although the Commission considered the potential consequences that may arise from the user feedback loop, such as a potential increase in the market power

[27] *Microsoft/Yahoo! Search Business* decision, *supra* note 26, para. 100.

[28] *Id.*, para. 225.

[29] *Id.*, para 256.

of the post-merger undertaking, or barriers to entry and expansion, it nevertheless concluded that the transaction in question would generate market efficiencies by creating a viable competitor to Google in the online advertising market.

Moreover, in its *Google/DoubleClick, Facebook/WhatsApp, and Telefónica UK/Vodafone UK/Everything Everywhere/JV* decisions, the Commission also analyzed the potential effects of the "monetization feedback loop" by referring to the ability of a company to: (i) raise its revenues by aggregating more data to generate additional financial resources, which can then be used to increase the quality of the targeted advertisement services for the end users, and (ii) attract more advertisers on the other side of the market pursuant to the closing of the transaction.

Indeed, in its *Google/DoubleClick* decision, the Commission analyzed whether the combination of the parties' data would lead to market foreclosure in the relevant product market by allowing the post-merger entity to reach a position in the market that its competitors would not be in a position to attain or challenge.[30] Indeed, the Commission stated that:

"(…) *such a combination, using information about users' IP addresses, cookie IDs and connection times to correctly match records from both databases, could result in individual users' search histories being linked to the same users' past surfing behaviour on the internet. For instance, after such a match, the merged entity may know that the same user has searched for terms A, B and C and visited web pages X, Y and Z in the past week. Such information could potentially be used to better target ads to users.*"[31]

This evaluation by the Commission is rather similar to the "monetization feedback loop" analysis, which we've discussed earlier in Section I. Indeed, the Commission analysed whether combining such databases through a merger would lead to a foreclosure effect, and thus to the exclusion of potential competitors from the relevant market, which would result in a price increase for consumers. Further to its analysis on this subject, the Commission noted that such behaviors would not be

[30] *Google/DoubleClick* decision, *supra* note 26, para. 359.

[31] *Ibid*.

maintainable for the merged entity; this is due to the fact that the remaining players in the market would have the ability to gain access to equivalent datasets through collecting, using and processing similar personal data, and since DoubleClick lacked market power in third-party ad-serving markets, the transaction would not lead to the foreclosure of a sufficiently large fraction of market output or result in the elimination of a sufficient number of competitors. Consequently, the Commission granted its approval to the transaction by also underlining that "*even if Google's and DoubleClick's data collections were available as input for DoubleClick, it would therefore be unlikely that its competitiveness would be enhanced in a way that would confer on the merged entity a competitive advantage that could not be matched by its competitors.*"[32]

Furthermore, in its *Facebook/WhatsApp* decision, the Commission took a similar approach to its *Google/DoubleClick* analysis, and assessed whether Facebook was in a position to improve its targeted advertisement services by processing WhatsApp's user information database and whether it sought to increase its financial resources to provide higher quality services to end users in order to attract more advertisers to the platform following the consummation of the transaction.[33] Once again, the Commission examined the effects of the monetization feedback loop on users, but declared that platforms such as Facebook, Google+, LinkedIn, Twitter and MySpace were perceived as similar providers of social networking services in the eyes of the consumers, and thus evaluated that these platforms all "*facilitate a rich social experience characteristic of a typical social network by enabling users to create their digital identity and to interact in a variety of forms in reflection of their preferences and interests.*"[34] Consequently, the Commission determined that there were competitors who are able to access, process, and use large amounts of consumer data, and stated that "*large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control*" would continue to exist even if the merger took place. Therefore, the Commission granted its approval to the relevant merger transaction.[35]

[32] *Id.*, para. 361-364.

[33] *Facebook/WhatsApp* decision, *supra* note 26, para. 180.

[34] *Id.*, para. 148.

[35] *Id.*, para. 189.

As can be observed in the abovementioned cases, the Commission has exhibited a tendency to approve data-driven merger transactions that allow the competitors in the relevant market to gain access to similar databases as the merged entity. In fact, this decisional pattern can also be detected in other cases, such as *Telefónica UK/Vodafone UK/Everything Everywhere/JV*, in which the Commission adopted a similar approach when granting its approval to the merger and noted that the "*information available to the JV Co is however also available to a large extent to both existing and new market players such as Google, Apple, Facebook, card issuers, reference agencies, or retailers.*"[36]

Hence, although the Commission does take the theory of harm related to the feedback loops into account in its merger evaluations, we observe that it has consistently decided to grant its approval to the merger transactions discussed above upon a thorough assessment of the facts of each case. This decisional practice should be appraised in the light of other applicable factors as well, such as the absence of any empirical evidence that would suggest that feedback loops create competition law problems in general. Besides, one should note that the Commission has shown a tendency to approve such transactions and deem them to be pro-competitive, provided that the merged entity's datasets are not unique and as long as competitors have access to sufficient alternative sources of data.[37]

b. The Commission's Assessment of Non-Horizontal Mergers

As for the Commission's assessment of vertical and conglomerate cases related to big-data transactions, it can be clearly seen that the Commission considers in its evaluations whether or not such transactions would ultimately lead to foreclosure in the relevant product markets.

For instance, in the *Microsoft/LinkedIn* case, the Commission examined the allegation that Microsoft's products would be improved by the addition and integration of LinkedIn's features in such a way that they could not be matched by competing providers in the relevant

[36] *Telefónica UK/Vodafone UK/Everything Everywhere/JV* decision, *supra* note 26, para. 543.

[37] Ben Holles de Peyer, *supra* note 8.

market, since those competitors did not have access to LinkedIn's data.[38] In this respect, the Commission analyzed whether the merged entity would be in a position to implement an "input foreclosure" strategy to exclude its competitors operating in the "customer relationship management software" market from the personal data of LinkedIn users. Moreover, further to certain comments that were made in the course of the Commission's market investigation, which articulated the view that the personal data of LinkedIn users would become the ultimate input that would enable innovation in the relevant market, the Commission examined LinkedIn's market position and assessed whether this database was unique for the other competitors in the relevant market. Pursuant to its examination, the Commission concluded that, even if LinkedIn's database were to be inaccessible to other competitors, it would be doubtful that the relevant transaction would "*negatively affect the overall availability of data*," as LinkedIn's market shares were considerably low and it did not have a strong presence in any of the upstream markets.[39] Thus, while examining the transaction, the Commission took into consideration whether the transaction would generate an input foreclosure effect in the relevant product market. Once again, it appears that the empirical data failed to support or uphold potential foreclosure scenarios regarding post-transaction markets in the case of a big-data merger.

As for conglomerate mergers, in its *IMS Health/Cegedim Business* decision, the Commission once again examined whether the transaction would ultimately lead to a possible foreclosure by tying or linking customer relationship management software and/or healthcare professional databases to sales tracking data.[40] Additionally, the Commission reviewed the parties' market power in the relevant product markets, and although it noted that the merged entity would have a strong market presence in the market for sales tracking data after the completion of the transaction, the Commission concluded that there would still be rivals operating in the relevant market that also tie or link their products and offer them to customers as bundles, comparable with

---

[38] *Microsoft/LinkedIn* decision, Case M.8124 and dated December 6, 2016, para. 394.

[39] *Id.*, para. 253-254.

[40] *IMS Health/Cegedim Business* decision, Case COMP/M.7337 and dated December 19, 2014, para. 265.

the potential strategies of the merged entity. The Commission further added that both the customers and the competitors could counterweigh the parties' foreclosure attempts through the commitments provided by the parties. Therefore, the Commission declared that the transaction would not have anti-competitive effects on the relevant market, and thus granted a clearance decision to the transaction.[41]

In light of the preceding analysis of the Commission's decisional practice regarding big-data mergers, it can be plainly seen that the Commission primarily examines two main aspects of a transaction in both horizontal and non-horizontal mergers, namely: (i) whether the merged entity's competitors will able to access similar and sufficient alternative sources of databases, compared to the merging parties' databases, and (ii) whether the merged entity will be in a position to create market foreclosure in the post-transaction market by increasing its market presence.

Although data-intensive transactions are rather new and the Commission's experiments are fairly few in number, it can easily be contended that, so far in its decisional practice, the Commission has only used the 'conventional' tools that have been employed in all other merger control assessments. In this respect, when the Commission assesses the potential market power of the merged entity after the completion of a data-intensive merger transaction, it conducts the same evaluations as it does during any other merger control examination. Indeed, the Commission takes into consideration the parties' market shares in the relevant product and geographical markets, the structure of the market (*i.e.*, whether it is oligopolistic or monopolistic), and assesses whether there are barriers to entry or exit in the relevant market. As a matter of fact, for non-horizontal merger transactions, when the Commission examines the alleged anti-competitive effects, it evaluates whether the transaction party is in a dominant position, and if so, whether it abuses its dominant position through (i) the imposition of unfair trading conditions, (ii) refusal to deal, or (iii) input foreclosure. In this respect, it can be clearly observed that the existing, well-established merger control regulations are sufficient to properly assess data-driven merger transactions as well, and that the current competition law tools

[41] *Id.*, para. 265-275.

are more than adequate to catch violations in a digitalized economy. This conclusion derives from the fact that competition assessments in the digitalised economy do not materially or substantially differ from the 'conventional' merger control review procedures of the Commission, which are already quite robust and effective.

III. Privacy-related Concerns in Big-Data Merger Reviews

It is hardly an original observation to note that competition law attracts countless claims that are partly or wholly unrelated to competition law issues, especially considering the wide scope of matters that are examined by competition enforcement authorities. Recently, many such claimants have sought to advance their demands within the scope of the "consumer welfare doctrine." Whereas the subject of data protection was previously debated within this framework, privacy issues can now be listed at the top of such "consumer welfare" concerns, in light of the recent trends in data-related M&A transactions. Unfortunately, this approach presents an intrinsic danger both for antitrust enforcement regimes and for the legal system in general. The prudence and practical wisdom displayed by both the European Court of Justice ("***ECJ***") and the Commission in refusing to throw open the doors of antitrust enforcement to claims that are not related to competition law matters up to this point is more than welcome and should be lauded by commentators and practitioners alike.

1. Interaction Between Privacy, Data Protection and Competition Law in Light of the EU's Case Law

While the question of whether competition enforcement authorities should examine data protection concerns in assessing transactions under competition law rules was once a highly debated issue, a quasi-consensus has now emerged on the understanding that there is a strict separation between data protection rules and competition law, and that this demarcation is well worth maintaining.[42] In fact, both data

[42] Alfonso Lamadrid & Sam Villiers, *Big Data, Privacy and Competition Law: Do Competition Authorities Know How to Do It?*, CPI ANTITRUST CHRONICLE, January 2017, at 7, 7–8, https://antitrustlair.files.wordpress.com/2017/01/cpi-lamadrid-villiers.pdf (last visited Dec. 5, 2018); Maximilian N. Volmar & Katharina

protection rules and the competition law enforcement regime share a common fundamental goal, which is enhancing consumer welfare. However, the framework of competition law is already well-established and claims that are not related to economic efficiency (*i.e.*, those concerning environmental protection, public health and data protection) only fall within the scope of competition law to the extent that they would result in the impediment of effective competition in the relevant market.[43] This is also in line with the approach taken in the decisional practice of EU jurisdictions, as explained below.

In the *Asnef-Equifax* case, following the opinion of Advocate General Geelhoed, the ECJ refused to examine "*problems concerning the sensitivity of personal data*" through competition law rules, and simply declared that such issues must be dealt with under the relevant data protection legislation.[44]

The Commission also adhered to this approach and demonstrated a similar attitude toward data protection issues in several cases. In the previously discussed *Google/DoubleClick* decision, where the parties had submitted a merger filing involving data accumulation, the Commission emphasized that its decision referred exclusively to a competition law assessment and that it was without prejudice to the obligations "*in relation to the protection of individuals and the*

O. Helmdach, *Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation*, https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1538033?af=R (last visited Dec. 5, 2018).

[43] *See*, *e.g.*, Graef, Inge, *Blurring Boundaries of Consumer Welfare: How to Create Synergies between Competition, Consumer and Data Protection Law in Digital Markets* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881969 (last visited Dec. 24, 2018).

[44] The European Commission's decision in Case C-238/05, *Asnef-Equifax*, 2006 ECLI:EU:C:2006:734, para. 63, http://curia.europa.eu/juris/document/ document.jsf;jsessionid=507BDB3459C70465B720BE06236DF78D?text=&docid=65421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1267402 (last visited Dec. 10, 2018). *See also* Opinion of Advocate General Geelhoed, *Asnef-Equifax*, delivered on 29 June 2006, para. 56,http://curia.europa.eu/juris/document/document.jsf;jsessionid=507BDB3459C70465B720BE06236DF78D?text=&docid=55923&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1267402 (last visited Dec. 10, 2018).

protection of privacy with regard to the processing of personal data."[45] The Commission further stated that the parties were still subject to the EU data protection rules, but also underlined that data protection concerns fell outside the scope of its jurisdiction.

The next Commission case in which these issues came up concerned the acquisition of WhatsApp, a provider of mobile communication *(i.e.* cross-platform messaging and Voice over IP) services, by Facebook, a social networking service and online advertising space provider.[46] In that decision, the Commission clearly stated that it examined "*potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof.*"[47] The Commission also added that "*[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.*"[48]

This decision was followed by the *Sanofi/Google/DMI JV* case, where the transaction parties sought to offer services for the management and treatment of diabetes, including data collection, processing and analysis, through the proposed joint venture.[49] Since the transaction involved data accumulation, it attracted certain claims on the ability of DMI JV to "lock-in" patients. The Commission noted, however, that the draft GDPR law[50] would allow users to ask for data portability with respect to their personal data, which would indeed restrict DMI JV's ability to "lock-in" patients through the accumulation

---

[45] *Google/DoubleClick* decision, *supra* note 26, para. 368.

[46] *Facebook/WhatsApp* decision, *supra* note 26.

[47] *Id.*, para. 164.

[48] *Ibid*.

[49] The European Commission's *Google/Sanofi/DMI JV* decision, Case COMP/M.7813 and dated February 3, 2016, http://ec.europa.eu/competition/mergers/cases/decisions/m7813_479_2.pdf (last visited Dec. 11, 2018).

[50] "GDPR" refers to the General Data Protection Regulation 2016/679, which is a regulation in EU law on data protection and privacy for all individuals within the European Union and the European Economic Area. It also addresses the export of personal data outside the EU and EEA areas. *See generally* https://eugdpr.org/ (last visited Dec. 10, 2018).

of their personal data.[51] The Commission highlighted, once again, that "*any privacy-related concerns flowing from the use of data within the control of the Parties do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules*."[52]

Finally, in its most recent *Microsoft/LinkedIn* case, the Commission did take privacy issues into consideration as a parameter of its competition law assessment.[53] However, it is worth emphasizing that this approach did not actually deviate from the EU jurisdictions' established case law, as the Commission rightfully held that the protection of user data falls under the scope of national legislation and the EU data protection rules, observing that "*the newly adopted General Data Protection Regulation, which will apply from 25 May 2018, may further limit Microsoft's ability to undertake any treatment of LinkedIn full data by strengthening the existing rights and empowering individuals with more control over their personal data (i.e. easier access to personal data; right to data portability; etc.).*"[54] The Commission did, therefore, stress the strict separation between data protection rules and competition law enforcement regimes. Nevertheless, it is still noteworthy that the Commission considered privacy as a parameter of competition in this case, stating that:

"(...) these foreclosure effects would lead to the marginalization of an existing competitor which offers a greater degree of privacy protection to users than LinkedIn (or make the entry of any such competitor more difficult), the Transaction would also restrict consumer choice in relation to this important parameter of competition when choosing a PSN [professional social network]."[55]

The Commission did, therefore, consider and assess privacy as a component of potential consumer harm due to a restriction in the consumers' choices.

[51] *Google/Sanofi/DMI JV*, *supra* note 49, para. 69.

[52] *Id.*, para. 70.

[53] *Microsoft/LinkedIn*, *supra* note 38, para. 350.

[54] *Id.*, para. 255.

[55] *Id.*, para. 350.

2. Privacy: A New Parameter for Merger Assessments?

One might be tempted to say that both competition law rules and data protection laws aim to protect consumers with respect to their choices in the marketplace.[56] However, it should be remembered that competition law actually seeks to protect the *competitive process* itself and not to protect *consumers* from any data-related privacy violations.[57] Therefore, the question facing competition law enforcers has recently evolved, as they seek to understand in which circumstances privacy needs to be considered as a parameter of competition law in the context of merger assessments.

For instance, the US Federal Trade Commission announced in its "Statement Concerning *Google/DoubleClick*" that:

"*Not only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry. That said, we investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as consumer privacy. We have concluded that the evidence does not support a conclusion that it would do so.*"[58]

Unfortunately, we do not have access to further details concerning the FTC's assessment on consumer privacy as a *non-price attribute of competition*. The EU Commission's analysis in the *Microsoft/LinkedIn* case (as discussed above) is relatively more clear-cut than the FTC's opaque statement. In fact, the Commission found in that case that the

[56] Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy* (2014), https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf (last visited Dec. 5, 2018).

[57] Giuseppe Colangelo and Mariateresa Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition?*, (2017) 8 JECLP 363, 367-68, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2945085 (last visited Dec. 5, 2018).

[58] Federal Trade Commission, *Statement of the Federal Trade Commission concerning Google/DoubleClick*, *FTC*, File No. 071-0170, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf (last visited Dec. 24, 2018).

merger could lead to a foreclosure effect, in light of the fact that the market for PSN services could potentially "tip" in favor of LinkedIn and it might therefore become more difficult for rival PSN service providers "*to regain their ability to compete and for potential competitors to enter the market.*"[59] The Commission further referred to privacy as an important *parameter of competition*, and asserted that the effects of a foreclosure that would lead to the marginalization of competitors who offer a greater degree of privacy protection to users than the merged entity would restrict consumer choice on that front.[60]

A well-designed framework to assess privacy-related concerns within the context of a competition law analysis has been offered by Ben Holles de Peyer, who is a private practitioner focusing on EU competition law and regulation in network industries.[61] The author argues that the following three criteria should be fulfilled in order for competition enforcement authorities to consider and evaluate privacy issues within a merger assessment: (i) privacy needs to be an important non-price parameter of competition, based on quantitative and/or qualitative evidence, (ii) the foreseen degradation in the level of privacy protection must result from the change in the competitive process or shifting structural conditions arising from the merger, and (iii) this degradation or harm should concern privacy as a parameter of competition.[62] In his article on the issue, the author first laid out these three conditions and then proceeded to apply this test to the Commission's *Microsoft/LinkedIn* decision, concluding that the Commission had indeed fulfilled these three cumulative criteria for the consideration of privacy issues within a merger assessment.

Needless to say, any finding that would hint at the existence of a degradation in the level of privacy protection that is caused by the change in the competitive structure of the relevant market following a merger transaction should rely on strong and convincing evidence. This evidentiary standard is supported by the first criterion in Holles de

[59] *Microsoft/LinkedIn*, *supra* note 38, para. 347.

[60] *Id.*, para. 350.

[61] *See* Ben Holles de Peyer, Attorney Profile, https://www.clearygottlieb.com/professionals/ben-holles-de-peyer (last visited Dec. 24, 2018).

[62] Ben Holles de Peyer, *supra* note 8.

Peyer's test, which requires the existence of quantitative and/or qualitative evidence to ascertain the importance of privacy as a non-price parameter of competition. For instance, in the *Microsoft/LinkedIn* case, the Commission referred to the results of a market investigation conducted within the scope of the assessment, thereby satisfying the first condition of this test.[63]

The problem at this stage is distinguishing between "consumer choice" and "consumer welfare." In fact, the assessment of the notion of "consumer welfare" within the realm of competition law needs to be guided by economic principles, as competition law rules seek to protect only the competitive process itself. However, the consumer choice standard is said to "*reject an economic analysis of consumer preference as the fundamental guiding principle of antitrust analysis*" and that "*choice standard rejects even the view that the role of antitrust is to protect the competitive process as one that produces desirable outputs (i.e., consumer welfare) in favor of an antitrust regime that analyzes non-price competition as a standalone and inviolable virtue.*"[64] Needless to say, this applies to the Commission's approach in the *Microsoft/LinkedIn* case, where it called attention to the potential post-transaction "tipping" risk, which would deprive consumers of available choices in terms of different levels of privacy protection. In that regard, although different consumers assign different values to their personal privacy, most agree that a reduction in product quality is generally undesirable.[65] As consumer choice with respect to privacy protection levels cannot be assessed in economic terms, relying on such a nebulous factor (instead of using a well-established economic standard, such as consumer welfare) would greatly harm economics-based competition law analyses for enforcement purposes. Some commentators have hinted that this approach might be the sign of an impending break from the consumer welfare approach used in the United States, and they have suggested that it represents "*a going backward toward the ordoliberal*

[63] *Microsoft/LinkedIn, supra* note 38, footnote 330.

[64] Wright, Joshua D., and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice,* Fordham L. Rev. 81 (2012): 2405.

[65] Sivinski, Greg, Alex Okuliar, and Lars Kjolbye, *Is big data a big deal? A competition law approach to big data*, European Competition Journal 13.2-3 (2017), p. 199-227, https://www.tandfonline.com/doi/abs/10.1080/17441056.2017.1362866 (last visited Dec. 7, 2018).

paradigm,"[66] which represents an alternative method to the *laissez-faire* system or the state-planned economy.[67] In the absence of an effect-based analysis and by using an analytic approach that disregards whether the proposed transaction would really harm the competitive structure of the market (and thus reduce consumer welfare), competition enforcers risk impeding the dynamic and innovative nature of the market, particularly in the technology-driven sectors of the global modern economy.

Conclusion

The tendency of competition enforcement authorities and commentators to meet digital developments (such as artificial intelligence or big data) with skepticism is nothing new. However, the efficiencies generated by big data and through big-data mergers in online platforms are undisputable, and big data can even be considered as an essential part of the ever-growing digitalized economy. Although the parameters and framework of the discussion concerning feedback loops is already well-established in competition law circles, empirical evidence and recent Commission decisions indicate that such feedback loops are, in fact, very rare occurrences in practice, and big-data mergers do not threaten to obstruct or hinder the competitive process through data accumulation.

---

[66] Gerber, David J., *Law and Competition in 20th Century Europe: Protecting Prometheus* (1998), cited in: Coniglio, Joseph, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3066458 (last visited Dec. 5, 2018).

[67] Ordoliberalism is a German school of economics that emphasizes the need for the state to ensure that the free market produces results close to its theoretical potential, *see* https://en.wikipedia.org/wiki/Ordoliberalism (last visited Dec. 11, 2018). Ordoliberalism seeks to establish competition through the prevention of both unrestrained private power and discretionary government intervention in the economy. For an interesting and comprehensive approach to ordoliberalism, *see* Behrens, Peter, *The Consumer Choice Paradigm in German Ordoliberalism and its Impact upon EU Competition Law*, Discussion Paper No. 1/14 Europa-Kolleg Hamburg, p. 24-26 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568304 (last visited Dec. 24, 2018).

Additionally, the Commission's decisions on big-data mergers reveal an inclination toward conducting comprehensive analyses on a case-by-case basis when dealing with these issues, clearly establishing that competition enforcement authorities are already well-equipped with the necessary and sufficient tools to fully assess M&A transactions from a competition law perspective.

Finally, the analysis provided in Section III leads us to the conclusion that the debate on the incorporation of data protection rules within the framework of a competition law assessment is futile and regrettably out-of-date. On the other hand, privacy as a competition law parameter has the potential to provide a more suitable and fruitful point of discussion. This, however, raises the final question of whether privacy is indeed a suitable factor that can be assessed under the consumer welfare notion of competition law doctrine. For the reasons explained above, we are inclined to answer that it is not.

Bibliography

Cases

The European Commission’s *Microsoft/Yahoo! Search Business* decision, Case COMP/M.5727 and dated February 18, 2010 <http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf> (last visited Dec. 15, 2018).

The European Commission’s *Google/DoubleClick* decision, Case COMP/M.4731 and dated March 11, 2008 <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf> (last visited Dec. 15, 2018).

The European Commission’s *Facebook/WhatsApp* decision, Case COMP/M.7217 and dated October 3, 2014 <http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf> (last visited Dec. 15, 2018).

The European Commission’s *Telefónica UK/Vodafone UK/Everything Everywhere/JV* decision, Case COMP/M.6314 and dated September 4, 2012 <http://ec.europa.eu/competition/mergers/cases/decisions/m6314_20120904_20682_2898627_EN.pdf> (last visited Dec. 15, 2018).

The European Commission’s *Microsoft/LinkedIn* decision, Case COMP/M.8124 and dated December 6, 2016 <http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf> (last visited Dec. 15, 2018).

The European Commission’s *IMS Health/Cegedim Business* decision, Case COMP/M.7337 and dated December 19, 2014 <http://ec.europa.eu/competition/mergers/cases/decisions/m7337_20141219_20212_4101276_EN.pdf> (last visited Dec. 15, 2018).

The European Commission’s decision in Case C-238/05, *Asnef-Equifax*, 2006 ECLI:EU:C:2006:734, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=507BDB3459C70465B720BE06236DF78D?text=&docid=65421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1267402> (last visited Dec. 10, 2018).

The European Commission’s *Google/Sanofi/DMI JV* decision, Case No COMP/M.7813 and dated February 3, 2016 <http://ec.europa.eu/competition/mergers/cases/decisions/m7813_479_2.pdf> (last visited Dec. 11, 2018).

Federal Trade Commission, *Statement of the Federal Trade Commission concerning Google/DoubleClick*, *FTC*, File No. 071-0170, <https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf> (last visited Dec. 5, 2018).

Books and Reports

Competition Authorities of France and Germany, Competition Law and Data (May 10, 2016), <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> (last visited Dec. 15, 2018).

OECD, Big Data: Bringing Competition Policy to the Digital Era, DAF/COMP (2016)14, <https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf> (last visited Dec. 5, 2018).

OECD, Data-Driven Innovation: Big Data for Growth and Well-Being, OECD Publishing (2015), <http://dx.doi.org/10.1787/9789264229358-en> (last visited Dec. 5, 2018).

Stucke, M.E. and A.P. Grunes, Big Data and Competition Policy, Oxford University Press, United Kingdom (2016).

Periodicals and Theses

Alfonso Lamadrid and Sam Villiers, *Big Data, Privacy and Competition Law: Do Competition Authorities Know How to Do It?*, CPI ANTITRUST CHRONICLE (January 2017), at 7, 7–8, <https://antitrustlair.files.wordpress.com/2017/01/cpi-lamadrid-villiers.pdf> (last visited Dec. 5, 2018).

Andres V. Lerner, *The Role of 'Big Data' in Online Platform Competition*, SSRN (2014), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780> (last visited Dec. 15, 2018).

Anja Lambrecht and Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?*, CPI ANTITRUST CHRONICLE (2017), at 11, 12. <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht-Tucker.pdf > (last visited Dec. 7, 2018).

Behrens, Peter, *The Consumer Choice Paradigm in German Ordoliberalism and its Impact upon EU Competition Law*, Discussion Paper No. 1/14 Europa-Kolleg Hamburg (2014), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568304> (last visited Dec. 24, 2018).

Ben,Holles de Peyer, *EU Merger Control and Big Data*, Journal of Competition Law and Economics (2018), <https://academic.oup.com/jcle/article-abstract/13/4/767/4802444> (last visited Dec. 5, 2018).

Charlotte Breuvart, Étienne Chassaing and Anne-Sophie Perraut, *Big Data and Competition Law in the Digital Sector: Lessons from the European Commission's Merger Control Practice and Recent National Initiatives*, Concurrences (2016), <https://www.concurrences.com/en/review/issues/no-3-2016/articles/big-data-and-competition-law-in-the-digital-sector-lessons-from-the-european-80763> (last visited Dec. 5, 2018).

Daniel Sokol and Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1148 (2016), < https://scholarship.law.ufl.edu/facultypub/803/> (last visited Dec. 7, 2018).

David A. Balto and Matthew Lane, *Monopolizing Water in a Tsunami: Finding Sensible Antitrust Rules for Big Data* (2016), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753249> (last visited Dec. 6, 2018).

David J. Gerber, *Law and Competition in 20th Century Europe: Protecting Prometheus* (1998), cited in: Coniglio, Joseph, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism* (2017), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3066458> (last visited Dec. 5, 2018).

Francisco Costa-Cabral and Orla Lynskey, *Family ties: the intersection between data protection and competition in EU Law*, Common Market Law Review (2017).

Global Legal Insights, *Merger Control 2018/European Union*, <https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/european-union> (last visited Dec. 14, 2018).

Giuseppe Colangelo and Mariateresa Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition?*, (2017) 8 JECLP 363, 367-68, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2945085> (last visited Dec. 5, 2018).

Greg Sivinski, Alex Okuliar, and Lars Kjolbye, *Is big data a big deal? A competition law approach to big data*, European Competition Journal 13.2-3 (2017), p. 199-227, <https://www.tandfonline.com/doi/abs/10.1080/17441056.2017.1362866> (last visited Dec. 7, 2018).

Gönenç Gürkaynak, Esra Uçtu and Anıl Acar, *Applying the Dynamic Competition Approach to Zero-Priced Markets*, Douglas H. Ginsburg | An Antitrust Professor on the Bench - *Liber Amicorum* (2017).

Inge Graef, *Blurring Boundaries of Consumer Welfare: How to Create Synergies between Competition, Consumer and Data Protection Law in Digital Markets* (2016), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881969> (last visited Dec. 5, 2018).

Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice,* Fordham L. Rev. 81: 2405 (2012).

Marc Bourreau, Alexandre de Streel, and Inge Graef, *Big Data and Competition Policy: Market power, Personalised Pricing and Advertising* (2017), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920301> (last visited Dec. 7, 2018).

Maximilian N. Volmar and Katharina O. Helmdach, *Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation*, <https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1538033?af=R> (last visited Dec. 5, 2018).

Nestor Duch-Brown, , *The Competitive Landscape of Online Platforms*, No. 2017-04, Joint Research Centre (Seville site) (2017), <https://econpapers.repec.org/paper/iptdecwpa/2017-04.htm> (last visited Dec. 7, 2018).

Oskar Törngren, *Mergers in big data-driven Markets - Is the dimension of privacy and protection of personal data something to consider in the merger review?* (2017), <https://su.diva-portal.org/smash/get/diva2:1186978/FULLTEXT01.pdf > (last visited

Dec. 11, 2018).

Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy* (2014), <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf> (last visited Dec. 5, 2018).

Opinion of Advocate General Geelhoed, *Asnef-Equifax*, delivered on 29 June 2006, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=507BDB3459C70465B720BE06236DF78D?text=&docid=55923&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1267402> (last visited Dec. 10, 2018).

Internet Sources

European Union, *General Data Protection Regulation*, https://eugdpr.org/ (last visited Dec. 10, 2018).

Wikipedia, *Ordoliberalism*, https://en.wikipedia.org/wiki/Ordoliberalism (last visited Dec. 11, 2018).

Challenges of the Digital Age: The Relevant Product Market Definition in Online and Offline Sales

Gönenç Gürkaynak, Esq.*
Büşra Aktüre**
Sıla Coşkunoğlu***

I. Introduction

Major developments in technology have led to a transition from traditional trade to online commerce, and this transition has substantially transformed the means of doing business in the modern global economy. Indeed, e-commerce has been on a continuous rise over the last few decades, allowing firms to overcome their geographical limitations and expand their businesses through modernized distribution strategies. While such increases in online sales open up new vistas for retailers and introduce new possibilities for consumers in general, the increasingly blurred lines between online and offline channels also pose certain regulatory challenges for public authorities. In particular, antitrust agencies frequently face the difficulty of properly defining the relevant product market, in terms of assessing the competitive interaction between online and offline sales.

In this article, we will first introduce and discuss the basic principles of market definition in several jurisdictions, with a specific focus on the various approaches to drawing the borders for a given

* Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

** Büşra Aktüre is an associate at ELIG Gürkaynak Attorneys-at-Law.

*** Sıla Coşkunoğlu is an associate at ELIG Gürkaynak Attorneys-at-Law.

relevant product market. We will then explain the changing dynamics of markets in the 21st century, caused by the rise of online retailing, and subsequently take a closer look at case law to better understand how competition agencies have dealt with the complexity of online and offline competition in defining the relevant product market. More specifically, we will conduct a comparative jurisdictional study, mainly between the approaches adopted in Europe and Turkey from a practical point of view and examine the degree of substitution between online and offline sales. In an attempt to provide more concrete answers to these vexing questions, we will focus on the example of book sales, in light of the recent case law that illustrates the intertwined nature of online and offline channels in book retailing.

II. Basics of the Relevant Product Market Definition

Market definition is of crucial importance in almost all antitrust cases. It plays a significant role in determining the actual arena of competition in the context of antitrust and regulatory policy, and therefore, has a decisive influence on the assessments of competition law enforcers. Indeed, the primary aim of lawmakers in adopting and implementing this factor as a consideration in competition law enforcement is (i) to enable the assessment of actual competitors that apply competitive pressures on each other with regard to a specific good, and (ii) to comprehend the degree of real competition in a particular market in the most accurate way possible. Although market definition is not, in itself, the end goal of competition assessments, it is unquestionably a valuable tool for the analysis of any anticompetitive effects and outcomes.[1]

Indeed, a market definition that fails to cover all competitive constraints caused by the relevant players can lead to misleading or erroneous results, which can be detrimental to the protection of competition itself. In an effort to illustrate the impact of market definition, one would—not surprisingly—think of a firm that is considered to be dominant in a given market (based on its calculated

---

1 Øystein Daljord, Lars Sørgard, Øyvind Thomassen, *The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz and Shapiro*, *JOURNAL OF COMPETITION LAW & ECONOMICS*, at 263-270 (2008).

market share). In this context, the extension or reach of the market borders with regard to a variety of products would be a key parameter for measuring such a firm's market power. This is primarily because the market share of firms in a defined relevant market is an important indicator of market power in the analyses of competition enforcement agencies.[2]

Technically, market definition requires identifying a group of buyers and a corresponding group of sellers whose purchase and output decisions collectively determine the equilibrium price.[3] In this analysis, this group of parties should comprise both a geographic space and a product space.[4] In other words, the determination of the relevant market is a two-tier analysis, composed of two fundamental elements: (i) the relevant product market, and (ii) the relevant geographical market. Although these two elements are intrinsically dependent on each other, this article will focus solely on the issues surrounding the relevant product market (as each concept brings its own complexities and entails a comprehensive analysis) and how the growth in e-commerce impacts the assessment of competing products that are traded or sold either online or offline.

The conceptualization of a "product market" within the context of competition law analysis differs significantly from what is commercially accepted or recognized in several different industries.[5] This fundamental element of competition law is widely acknowledged and incorporated by various jurisdictions, with the United States playing a leading role as the originator country and the "founding father" of antitrust law doctrine. Indeed, the Horizontal Merger Guidelines published by the US antitrust agencies (*i.e.*, the Federal Trade Commission ("***FTC***") and the

---

[2] Organisation for Economic Co-operation and Development ("***OECD***"), Directorate for Financial and Enterprise Affairs, Competition Committee, *Roundtable on Market Definition – Note by the Delegation of the United States* (June 7, 2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf (last visited Dec. 3, 2018).

[3] *ROGER D. BLAIR AND DAVID L. KASERMAN, ANTITRUST AND ECONOMICS, 2ND ED.* (2009).

[4] *Ibid.*

[5] Thomas E. Kauper, *The Problem of Market Definition Under EC Competition Law*, 20 *FORDHAM INT'L L.J.* 1682 (1996), https://ir.lawnet.fordham.edu/cgi/ viewcontent. cgi?article=1804&context=ilj (last visited Dec. 3, 2018).

Department of Justice ("***DoJ***")) explain the fundamentals of product market definition and describe certain assessment mechanisms (such as the hypothetical monopolist test or SSNIP test) that are used to discover substitutable products in competition. On the other side of the world, the European Commission, influenced by the doctrine and decisional practice of its American counterparts, has also put significant emphasis on the issue of market definition ever since the concept was adopted as part of the EU competition policy. Accordingly, the Commission has enacted a Notice on the Definition of the Relevant Market ("***Notice***"), whose content is similar to that of the US guidelines, and which also sets out a generally accepted definition of "relevant product market," as follows: "*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.*"[6]

Substitutability is clearly considered the guiding principle and most crucial factor in the definition of relevant product markets, due to the greater degree of certainty it provides as to whether 'product A' and 'product B' belong to the same market. Moreover, the substitutability of goods and services are categorized by the Notice into two kinds: (i) demand-side substitutability, and (i) supply-side substitutability. With that said, the Notice acknowledges that demand substitution provides the most immediate and powerful disciplinary effect on firms, particularly on their pricing strategies.[7] In other words, the Commission gives more weight to the interchangeability of products in the eyes of consumers (*i.e.*, demand), whereas it considers the capabilities of the providers of goods and services (*i.e.*, supply) only when it requires an analysis of additional factors to define the relevant market.

As a developing economy with 20 years of competition law enforcement experience, the decisional practice of enforcement authorities in Turkey is also worth analyzing, since the Turkish Competition Authority ("***TCA***") is a close follower of the EU

---

[6] Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372 /03 (1997), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A1997%3A372%3ATOC (last visited Dec. 3, 2018).

[7] *Id.*, at para. 13.

competition enforcement regime. Indeed, the TCA's Guidelines on Market Definition are akin to and closely modeled after the Commission's Notice, except that the TCA requires products to be "identical" in order to be considered as falling in the same product market.[8] However, given the principles set out in the Guidelines and their similarity to the principles laid out in the Commission's Notice, one could reasonably assume that the TCA has sought to amplify the meaning of "substitution" when referring to identical products. This has been confirmed by the analogous elements of substitution, which the TCA also lists as: (i) product characteristics, (ii) price, and (iii) intended use. While assessing the interchangeability of products in light of these key factors, not only the Commission, but the TCA distinguishes demand-side substitutability and attributes more significance to the consumers' perspective as well.

To that end, in order to evaluate the interchangeability of products and assess the competitive constraints on firms, both from the demand side and from the supply side, one should delve deeper into these issues and attempt to gain a greater understanding of these types of substitution.

(i) Demand substitution

An analysis of demand substitution consists of establishing a range of products that the consumers perceive to be substitutable to one another.[9] Antitrust agencies around the world factor in prices and buyers' choices in the event of "small and permanent" changes in the relative price to determine whether the products in question are substitutes for each other. Indeed, the determination of a market definition essentially focuses on demand substitution arising from small and permanent price increases.[10] This practice, in fact, is incorporated into a test known as SSNIP ("*Small but Significant Non-transitory Increase in Price*"), which was first introduced by the DoJ in the

[8] The Turkish Competition Authority's Guidelines on the Definition of the Relevant Market, at para. 3 (2008).

[9] Commission Notice, *supra* note 6, at para. 14; TCA Guidelines, *supra* note 8.

[10] Commission Notice, *supra* note 6, at para. 15.

analysis of horizontal mergers,[11] and was later adopted by a substantial number of agencies worldwide, including the Commission and the TCA.

In brief, the SSNIP test seeks to identify the narrowest market in which a hypothetical monopolist could impose a "*Small but Significant Non-transitory Increase in Price.*" The key question to be asked is, "What other products would the customers switch to in the event of a price increase?" For instance, when the price of a cup of filter coffee increases at Starbucks—an American coffee company and global coffeehouse chain—would fans of Starbucks coffee prefer to purchase another type of coffee instead of filter coffee? If the answer is yes, then these two types of coffee (*i.e.*, the filter coffee and the coffee that the customers switch to) would fall into the same product market according to the SSNIP test. In short, the SSNIP test essentially aims to assess the consumers' reactions to a small but significant price increase concerning a particular product. Although such test is generally helpful to effectively extend or narrow down the variety of goods and services in a given market, there are certain aspects of the test that remain unclear in terms of the test's implementation, such as the appropriate ratio of the price increase or the duration of the increase. In this regard, the Commission provides a range of "5% to 10%" with respect to the hypothetical "small" increase,[12] whereas the Turkish Guidelines, by contrast, do not specify a precise ratio to be used for the price increase in the SSNIP test.

In their analysis of demand substitution, both the Commission and the TCA consider 'product characteristics,' 'prices,' and 'intended use' as the key factors that are employed to initially narrow down the scope of potential substitutes in their investigations.[13] These factors, however, may not be sufficient on their own to determine whether two products are, in fact, demand substitutes, as the reactions of different customers to relative price changes are likely to diverge from one another. Therefore, various other factors are also taken into account in the demand substitution analysis, such as: (i) evidence of substitution in the recent

---

[11] Horizontal Merger Guidelines (1992), *as cited in* RICHARD WHISH AND DAVID BAILEY, *COMPETITION LAW*, 9th Ed., Oxford University Press (2018), at 31; Current Horizontal Merger Guidelines (2010).

[12] Commission Notice, *supra* note 6, at para. 17.

[13] *Id.*, at para. 7; TCA Guidelines, *supra* note 8, at para. 3.

past, (ii) a number of quantitative tests that have been specifically designed for the purposes of delineating markets, (iii) the views of customers and competitors, (iv) consumer preferences, (v) barriers and costs associated with switching demand to potential substitutes, and (vi) the existence of different categories of customers and price discrimination.[14]

It is evident that the SSNIP test provides a useful conceptual framework for identifying the substitute products from the customers' perspective. Additionally, this price-based test is also applied to assess the reaction of suppliers to price increases in certain cases, in order to identify and cover all goods and services that are in competition with each other.

(ii) Supply substitution

Even though demand substitutability is considerably more effective in terms of defining the relevant product market, supply substitutability is also occasionally taken into consideration and examined by competition enforcement authorities.

The underlying rationale of assessing supply substitutability is that, even if consumers cannot react immediately to a price increase by switching to other products, producers may be able to do so.[15] Indeed, such producers may possess certain assets or technologies that they can utilize in order to easily adjust their production facilities and produce substitute goods.[16] The ability of firms to switch their production facilities reveals the immediate and actual effects of supply substitution, in cases where demand substitution analysis may not offer satisfying results. Therefore, supply-side substitutability becomes crucially important under such circumstances, and this fact has already been accepted and acknowledged by several judgments of the Court of Justice of the European Union ("***CJEU***") and the Commission.[17]

---

[14] Commission Notice, *supra* note 6; TCA Guidelines, *supra* note 8.

[15] Dr. Atilano Jorge Padilla, *The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control*, A Report for DG Enterprise A/4, European Commission, 2001.

[16] *Ibid*.

[17] Continental Can v Commission of the European Communities, Case 6/72 (1973) ECR 215, (1973) CMLR 199; *see, e.g.*, Euro x-Bauco v Hilti OJ (1988) L 65/19,

Both the Commission and the TCA define supply substitution as a situation in which (i) the suppliers are able to switch production to the relevant products and offer them to their customers in the short term in response to a small and permanent price change and (ii) they are able to do so without incurring significant additional costs or risks.[18] Supply-side substitution will constitute an effective competitive constraint only if consumers consider the output of supply-side substitution to be a valid demand substitute.[19] In this way, the extra output will put competitive constraints on others, and therefore, the products will be involved in (and part of) the same given product market.

The Notice includes an illustrative example concerning paper production, which is worth examining in detail to reach a better understanding of the circumstances in which supply substitution analysis becomes useful. According to the Notice, paper is produced and offered to customers in various qualities (ranging from standard to high) and consumers will typically prefer to buy a specific type of paper, which would not be considered interchangeable with another type of paper from their perspective. In that case, an analysis of demand substitution would be highly likely to result in misleading or erroneous outcomes in terms of the definition of the relevant product market, due to the exclusion of certain competitive constraints from this analysis. In reality, paper manufacturers are typically well-equipped to produce paper of varying qualities, and therefore, they are able to immediately and easily (*i.e.*, with manageable costs) switch to the production of different types and qualities of paper when necessary. In light of the foregoing, various qualities of paper and their respective fields of use should comprise the relevant product market in a competition law investigation. In such cases, supply-side considerations should naturally (and rightfully) lead competition enforcement agencies to define a single, broader relevant product market.

Last but not least, the Commission also lists "potential competition" in the Notice as a final factor to consider in the definition

(1989) 4 CMLR 677, at para. 55, upheld on appeal to the General Court in Hilti AG v Commission, Case T-30/89 (1991) ECR II-1439, (1992) 4 CMLR 16, and on appeal to the CJEU in Case C-53/92 P (1994) ECR I-667, (1994) 4 CMLR 614.

[18] Commission Notice, *supra* note 6, at para. 20; TCA Guidelines, *supra* note 8.

[19] *See* Padilla, *supra* note 15.

of the relevant product market. By doing so, the Commission aims to refer to certain competitive restraints that are assumed to originate from potential competition. However, it is worth noting that this option is not often applied in practice, and therefore, it is only taken into account in the event that the firms' positions are already determined and such positions give rise to certain concerns from the point of view of competition. The TCA's Guidelines, on the other hand, clearly state that potential competition is not considered in general, since it does not have any equivalent or corresponding effects as either demand-side or supply-side substitution.

All in all, the significance of properly defining the relevant product market has been recognized by many scholars and practitioners worldwide. The methodology of this process follows similar—if not identical—steps in most jurisdictions. Although the approaches and rules employed by the antitrust agencies are clear in theory, they are less likely to be so in practice. This is mainly due to the fact that, while the SSNIP test provides a precise and clear-cut theoretical standard to guide and steer a market definition exercise, its actual/exact implementation can arguably be rather difficult.[20] Indeed, the technicalities involved in the definition of relevant product markets, which have become even more complex with the advent of technology and the rise of digital platforms, create certain challenges with respect to making a proper product market definition. It is evident that businesses have already altered (and continuously adjust) their distribution strategies to stay competitive with the rise of e-commerce, and this phenomenon has led many scholars and enforcement authorities to become well-acquainted with thorny questions concerning the substitutability of products that are offered in brick-and-mortar stores with the ones that are traded over the internet.

[20] Padilla, *supra* note 15.

III. Conventional Tools of Competition Policy and the Rise of E-Commerce

a. An Overview of the Online and Offline Paradigms

E-commerce has boomed over the last few decades, transforming the business models of firms and the range of choices available to consumers. The more common and widespread e-commerce has become, the more people have started to shop online. Indeed, the number of consumers who use e-commerce platforms has increased substantially across the world in the past few decades. Not only do we see this fact around us every day, but it is substantiated by the official statistical data as well, which shows the tremendous growth in the ratio of online buyers in the European Union that has increased from 30% of the population (aged 16 to 74) in 2007 to 55% in 2016.[21] Furthermore, a robust body of empirical studies has found that seven out of ten (i.e. 70%) internet users purchased goods and services online in the EU in 2017.[22] While e-commerce usage has continued to increase significantly across the entire European Union and online sales have continued to rise in popularity, the ratio of e-shoppers exhibits a wide range among the Member States, from 20% of internet users in Romania to 83% of internet users in the United Kingdom in 2018, revealing cross-country disparities in the adoption of online commerce.[23]

Considering the example of Turkey, we observe that the upsurge in internet usage and online shopping has been prevalent there as well, according to the information provided by the Turkish Statistical Institute. The data suggest that goods or services purchased online for private purposes represented 34% of the overall market in 2016.[24] Studies also

[21] See 2016 Eurostat Community Survey on ICT usage in households and by individuals (2017), http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_ statistics_for_individuals (last visited Dec. 25, 2018).

[22] *Ibid.*

[23] *Id.*, at Table 1 (listing the proportion of individuals who had purchased goods or services online within the last 12 months).

[24] Turkish Statistical Institute, *Information and Communication Technology (ICT) Usage Survey on Households and Individuals, 2016,* Press Release (August 18, 2016), http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=21779 (last visited Dec. 26, 2018).

indicate that e-commerce has grown substantially between 2016 and 2017 (*i.e.*, by 37%) and that Turkish citizens are increasingly purchasing various products online, ranging from electronics to food and groceries.[25]

From the consumers' perspective, the considerable rise in online shopping is quite understandable, given the unquestionable convenience of being able to shop at anytime and anywhere. In fact, e-commerce provides access to a broader range of products, price comparisons, and shared opinions (*i.e.*, reviews, feedback, etc.) on goods and services from other consumers.[26] Indeed, online commerce has slowly begun to replace brick-and-mortar sales due to the multiple advantages it offers over traditional sales channels. From the retailers' perspective, however, the situation is rather more complicated, since businesses have had to change their distribution strategies in order to reach more customers and to be able to compete with rivals who adjust and fine-tune their business plans in line with the latest technological developments. Accordingly, companies have partly shifted their businesses to e-commerce platforms and they have created "omni-channels," combining online/offline sales and offering both options to potential customers. The concept of retailing has gradually evolved into its contemporary form and it still continues to evolve further, significantly altering the static and long-established parameters of markets in the process. In other words, digital distribution transforms the static environment of any given market into a dynamic one, where market fundamentals (*i.e.*, firms' marginal costs, demand elasticity, number of competitors, initial constellation of prices, etc.) are all subject to rapid and continuous change. Friederiszick and Głowicka (2015) have argued that these changes in market dynamics stem from several underlying reasons, such as changes in consumer behavior and the size of geographic markets, as well as differences in

---

[25] TÜBİSAD Informatics Industry Association, *E-commerce in Turkey 2017 Market Size*, (May 2018), http://www.tubisad.org.tr/en/images/pdf/tubisad_2018_e-commerce_in_turkey_en.pdf (last visited Dec. 26, 2018).

[26] Gönenç Gürkaynak, *Competition and antitrust in the digital age*, *INTERNATIONAL LAW OFFICE* (April 27, 2017), http://www.gurkaynak.av.tr/docs/c10ed-competition-and-antitrust-in-the-digital-age.pdf (last visited Dec. 26, 2018).

cost structures and pricing models between offline and online retail markets.[27]

Despite the numerous advantages introduced by online sales that encourage us to look on the bright side of e-commerce, these changes also pose serious concerns for competition enforcement agencies. This is because the dynamism of online commerce (and the rapidly changing nature of digital markets) test the traditional tools of competition law, which were designed for static market conditions. More explicitly, changes and distortions in market fundamentals due to online competition are expected to have a significant impact on customers' behavior (*i.e.*, demand) and on companies' distribution strategies (*i.e.*, supply), and thus influence a given product market definition.[28] As such, increasingly blurred lines between online and offline sales cause confusion and lead to complications for competition enforcers in the analysis of relevant product markets, and raise the increasingly relevant and common question of whether online and offline sales are substitutable and/or complementary.

Before jumping to any conclusions on this vital question, one should attempt to gain a better understanding of online competition and its interaction with the offline world by carefully analyzing the empirical facts. Within this context, the aspects in which online platforms differ from their offline counterparts may provide valuable insights for our assessment of the interactions between online and offline commerce. Indeed, there are certain considerations that clearly illustrate the different parameters of online and offline platforms, such as asymmetric information, lower search, comparison and distribution costs, among others.

First and foremost, a substantial body of evidence in the available literature highlights the asymmetry of information that arises between buyers and sellers in the context of online shopping. This informational asymmetry only exists (and becomes an issue) in online shopping, since

[27] Hans W. Friederiszick and Ela Głowicka, *Competition Policy in Modern Retail Markets*, *JOURNAL OF ANTITRUST ENFORCEMENT*, Volume 4, Issue 1, 1 April 2016, at 42–83, https://doi.org/10.1093/jaenfo/jnv030 (last visited Dec. 25, 2018).

[28] European Commission - *Final Report on the E-Commerce Sector Inquiry*, COM(2017) 229 final (May 10, 2017) (report from the Commission to the Council and the European Parliament), http://ec.europa.eu/competition/antitrust/ sector_ inquiry_final_report_en.pdf (last visited Dec. 25, 2018).

ordered products are physically delivered and consumed at a later stage following the actual purchase, unlike in brick-and-mortar sales.[29] This interval between purchasing and receiving a product has traditionally been considered as a "waiting cost," which could reduce the prospective utility and value derived from an online purchase, although the extent and impact of this cost is somewhat vague and controversial among some academics.[30]

Reduced search costs are perhaps one of the most obvious outcomes and benefits of online commerce. This is because consumers can easily and effortlessly compare prices through various price-comparison sites, and they can also benefit from the information provided on discussion forums and review sites with regard to their desired product or service. This consumer gain presumably impacts various market outcomes, such as prices, market shares, and the profitability of undertakings.

The lower distribution costs associated with online sales, along with the wider distribution networks (that reach more customers) are also noteworthy advantages of the online retail channel. In other words, e-commerce paves the way for companies to distribute their products across larger geographic areas than is possible for the typical physical store, mainly due to the lowered distribution costs.[31] Indeed, Brynjolfsson and Smith (2000) provide the example of book sales and find that online book retailers offer 23 times more variety (*i.e.*, a selection of books that is 23 times larger) than typical brick-and-mortar bookstores.[32] Moreover, they also estimate that this greater product variety leads to significantly more gains in consumer welfare (specifically 7 to 10 times more) than the gains from increased competition.[33]

---

[29] Ethan Lieber and Chad Syverson, *Online vs. Offline Competition*, *OXFORD HANDBOOK OF THE DIGITAL ECONOMY* (Martin Peitz and Joel Waldfogel eds.), August 2012.

[30] George Loewenstein, *Anticipation and the Valuation of Delayed Consumption*, *ECONOMIC JOURNAL* (1987), at 666-684.

[31] Lieber and Syverson, *supra* note 28.

[32] Erik Brynjolfsson and Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, *MANAGEMENT SCIENCE* (2000), at 563-585.

[33] *Ibid.*

In light of the foregoing considerations, it is not difficult to see how online sales channels differ from traditional markets. There are relatively significant differences between the characteristics of online and offline platforms and their impact on the market environment, which, in turn, can lead to shifts in consumer behavior and distribution strategies (*i.e.*, affecting both demand- and supply-side fundamentals). Therefore, the next question that must be addressed is whether online and offline sales of identical products should be considered as substitutes and/or complimentary for each other. Strictly speaking, there is no simple or generalized answer to this question, as each product or service comprises different features. As a matter of fact, theoretical discussions may be deficient in providing useful answers in this regard, since the definition of a relevant product market requires a practical implementation of the rules on a case-by-case basis, and this analysis must be carried out by taking into account the various distinguishing features of each sector. Practical aspects of product market definition may indeed provide more valuable insights, which could help us to reach more realistic conclusions in terms of identifying the actual competitors (whether online and/or offline) for a particular good or service. To that end, in order to gain a better understanding of how to evaluate online retail settings (and comprehend "brick-and-click" sales) with regards to the exercise of the product market definition, one should first examine how various competition enforcement agencies have been handling this particular problem in commercial environments where online and offline markets overlap.

b. Leading Case Law on "Bricks and Clicks"

In recent years, the forms of commerce and the means of competition have been evolving together in a more complex way than a simple bifurcation between (i) retailing in "brick-and-mortar stores" and (ii) selling products on a website. Indeed, many retailers have established multi-channels, which has led to a combined distribution model in which the characteristics of online and offline channels meet and blend together. However, such an amalgamation of online and offline markets raises the enduring and long-debated issue of how to define the relevant product market in such cases, which has become a truly vexing problem for antitrust agencies worldwide. In its recent meeting on the implications of e-commerce for competition policy, the OECD Competition Committee discussed the growing interaction and interplay between online and offline marketplaces, and also touched upon the difficulties faced by competition enforcement authorities in defining a relevant product market in cases where online competition is involved.[34] Promisingly, the OECD's report concluded that this issue should be resolved based on a case-by-case analysis by analyzing and factoring in the relevant circumstances in each case, and including all the competitive constraints imposed by online sales channels. Given the inconsistent judgments that have been rendered in this regard so far, we agree that this may be the most reasonable and feasible approach that we have come across to date.

The Commission's precedents provide a useful starting point for our analysis, particularly since many national competition authorities are greatly influenced by the Commission's enforcement actions and its decisional practice. In that sense, the Commission's *DSGI/Fotovista* decision[35] presents an illuminating example, as it contains the parties' thought-provoking arguments regarding online and offline channels, which emphasize that consumer goods actually exert very powerful competitive constraints on each other.

To provide a brief summary on the case, this transaction concerned the acquisition of Fotovista, an online retailer of audio and photographic equipment, by DSGI, who was active in the consumer electronics market. Both DSGI and Fotovista forcefully argued that online and offline sales of electrical goods belonged to the same product market, because price movements in one channel were swiftly reflected and replicated in the other channel. More explicitly, these arguments in favor of a broad relevant product market definition (encompassing both online and offline sales of electronic goods) were grounded on the following considerations: "*(i) the physical goods sold are exactly the same as the online sales; (ii) e-commerce is particularly suited for the sale of electrical goods because consumers trust the brand of the product and*

---

[34] 129th OECD Competition Committee Meeting - *Implications of E-commerce for Competition Policy - Note by the United States* (June 6, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/e-commerce_united_states.pdf (last visited Dec. 3, 2018).

[35] DSGI/FOTOVISTA, Case No. COMP/M.4226 (Jun. 29, 2006).

give less importance to the distribution channel; (iii) there is evidence of increasing number of customers 'shopping around' between on-line and off-line before actually purchasing the good; (iv) the boundaries between the two are blurred as many retailers use a mixed strategy whereby it makes no difference where the actual purchase is made."[36] Consequently, even though the Commission ultimately left the question of the relevant product market definition open, it nevertheless exhibited a slight tendency toward defining an overall market that encompassed both online and offline sales. The Commission evinced this inclination by acknowledging that the online retail of electrical goods increases the ability of customers to source and find alternatives.

A similar approach was also taken by the Commission in the *UTC/Honeywell/MyAircraft.com* case, which concerned the acquisition of joint control over MyAircraft.com by UTC and Honeywell.[37] In that case, UTC and Honeywell both argued that the relevant product market for this transaction should be defined broadly as the market for "aerospace parts and services," and that e-commerce should be considered as merely one segment among the many modalities by which companies in this sector engage in business transactions.[38] The underlying rationale of this argument was that customers (such as airlines and service providers) were free to decide how they wished to conduct business with UTC, Honeywell or other suppliers (*e.g.*, by using MyAircraft.com, through e-mail, fax, telephone, etc.). The Commission, however, decided to leave the market definition open in this particular case as well. Therefore, *UTC/Honeywell/MyAircraft.com* constitutes a valuable example of a decision that was based on the transaction parties' evaluation of the online channel's role in overall sales.

[36] *Ibid.*

[37] UTC is a US-based diversified industrial equipment company. Honeywell is a US-based diversified technology and manufacturing company, selling aerospace products and services worldwide. The proposed transaction involved the creation of a joint venture, MyAircraft.com, whose purpose was to create and operate an electronic market, a so-called B2B ("business-to-business") marketplace. The goal was that MyAircraft.com would be a "one-stop" shopping destination for aerospace parts and services.

[38] UTC/HONEYWELL/i2/MY AIRCRAFT.COM, Case No. COMP/M.1969 (Aug. 4, 2000), at para 11.

Both of these rulings could certainly be perceived and interpreted as supporting the view that online sales are by nature complementary to the offline sales channel. However, it is worth noting that when the Commission delved into the music industry, it adopted a slightly different approach in terms of its evaluation of whether physical and digital distribution of recorded music fell within the same relevant product market, although it did not go so far as to declare them substitutable. For instance, despite the arguments put forth by the parties in *Sony/BMG*, the Commission noted in its market investigation report that these online and offline channels were not largely substitutable from a user's perspective, as the increase in digital sales in recent years has led to a change in the demand structure for this product.[39] Therefore, the Commission did not consider online and offline sales to fall within the same relevant product market, due to the lack of demand- and supply-side substitutability, explaining that: "*...from a demand-side perspective, sales concern mainly single tracks in digital format whereas in physical format purchases are predominantly for albums; and prices for digital singles are usually lower than in physical format. From a supply-side point of view, the structure of digital music services differs significantly from physical retail in terms of organization, technical and commercial conditions, marketing and cost structure.*"[40] Along these lines, *Sony/BMG* was certainly not the only decision in which the Commission drew a distinction between online and offline sales. Indeed, in its *Otto/Grattan* ruling, the Commission considered "*catalogue mail-ordering services*" to be a separate relevant product market for non-food products, based on the differences between the two shopping experiences, rather than on the characteristics of the product itself.[41] In this regard, it is fairly evident that the justifications given for the distinction between online and offline sales are actually based on the underlying shifts in the demand and supply substitution of goods, which in turn change and determine how market fundamentals play out in the online and offline retail settings.

[39] SONY/SONYBMG, Case No. COMP/M.5272 (Sep. 15, 2008).

[40] SONY/BMG, Case No. COMP/M.3333 (Oct. 3, 2007), as cited in SONY/SONYBMG, *supra* note 38.

[41] OTTO/GRATTAN, Case No. IV/M.070 (Mar. 21, 1991).

In addition to the Commission's case law, the French Competition Authority ("***FCA***") has also drawn a tremendous amount of attention recently with its landmark decision in the *Fnac/Darty* case, regarding online and offline sales. This ruling is considered to be the first evaluation of the FCA in which it defined a product market for consumer electronics that comprised both in-store and online retail channels. In its press release, the FCA explained its decision by asserting that the "*competitive pressure exerted by online sales has become significant enough to be integrated in the concerned market, whether it comes from pure players (such as Amazon or Cdiscount) or from stores' own websites which complete in-store physical sales.*"[42] Furthermore, the FCA justified its novel approach by referring to its assessment of several factors, such as (i) the rapid increase in online sales in the last five years and the fact that the online channel's share in the overall sales of consumer electronics ranges from 15% to 30%, (ii) the convergence in time between the relative customer experiences in these two channels (*i.e.*, decrease in delays and delivery times for sales through online channels, more effective customer service for online sales, etc.), (iii) the transformation of pure offline players into hybrid firms that have established multi-channel distribution plans in order to be able to compete with online platforms, (iv) the price convergence between online and offline channels due to increasingly blurred and combined (*i.e.*, joint) distribution strategies, (v) the increased price competition as a result of price transparency, which is generated by online channels and caused by the reduced costs of price comparison, (vi) the examination of the customers' perspectives with respect to their preferences regarding online and offline channels in the event of price increases, according to information obtained from customer questionnaires.[43] In this respect, the *Fnac/Darty* decision is a huge step forward toward the regulatory acknowledgment of competitive pressures exerted on products and

[42] Editorial Board, *Fnac-Darty: A Landmark Merger Decision in France*, ORRICK ANTITRUST WATCH (Aug. 5, 2016), https://blogs.orrick.com/antitrust/2016/08/05/fnac-darty-a-landmark-merger-decision-in-france/ (last visited Dec. 6, 2018).

[43] Fnac/Darty, République Française Authorité de la Concurrence Décision n° 16-DCC-111 (Jul. 27, 2016); Press Release: Fnac's acquisition of Darty, Jul. 18, 2016 (Jul. 27, 2018), http://www.autoritedelaconcurrence.fr/user/ standard.php? id_rub= 684&id_article=3241&lang=en (last visited Dec. 25, 2018).

services that result from the steady and continuous increase in the amount of online sales pertaining to electronic products.

Examples from outside the realm of EU competition enforcement, such as recent cases from the Turkish jurisdiction, also provide valuable insights and deserve closer scrutiny. Similar to the Commission and the FCA, the rise of e-commerce has posed a significant challenge to the TCA as well, in terms of the exercise of the relevant product market definition. Although the Turkish Competition Board ("***TCB***"), which is the decisional body of the TCA, has not generally delved into the details of the characteristics of each market when analyzing online and offline sales, it has nevertheless recognized that rapid changes are occurring in traditional retailing and has taken note of the increased volume of sales in e-commerce. Moreover, the TCB has explained these changes by referring to recent technological and societal developments, such as the increase in internet use among Turkish consumers, the expansion of consumer rights through new consumer protection laws, and the increased reliability and security of credit cards following certain amendments to the relevant banking laws.[44]

In this context, one should first point out that, when evaluating the relevant market, the TCB has generally shown a tendency to differentiate between online and offline sales channels. Indeed, until very recently, the TCB typically elected to define a separate relevant market for e-commerce services. For example, in the *Biletix* case, which involved one of the largest companies for ticket sales and distribution for various cultural/musical/sports events in Turkey, the TCB separated the electronic and physical sales of event tickets by defining the relevant product market as "*intermediary services for the electronic sale of event tickets over a platform.*"[45] Furthermore, in *Çiçek Sepeti*, which concerned an online platform for flower sales, the TCB analyzed the market for "*flower sales services*" in both online and offline channels and found that the online services in this sector were considered to be different from offline services in the eyes of consumers, according to the "purpose and use" criteria. The TCB reached this conclusion and drew a distinction between online and offline flower sales services based on the

[44] D-Market decision, TCB, 15-40/662-231, (Nov. 10, 2015).

[45] Biletix decision, TCB, 13-61/851-359, (Nov. 11, 2013).

following considerations: (i) customers are limited to the opening and closing hours of the stores in the offline channel, whereas they are not so limited in the online channel, (ii) transaction costs differ between the two channels due to the wider accessibility and reach of the online channel, (iii) increased opportunity for product comparisons and the availability of more options in the online channel, (iv) tracking services and options provided for out-of-town deliveries in the online channel, and (iv) existence of alternative payment options for online sales.[46] To that end, the TCB determined that there was a distinction between brick-and-mortar flower retailers and online florists, and accordingly concluded that the relevant product market in this case should cover merely the online sales of flowers.[47] It constitutes a landmark decision in Turkish competition law doctrine, due to the TCB's comparatively detailed analysis on the substitutability between online and offline sales channels, particularly considering that this decision was rendered back in 2013.

As for the TCB's more recent decisions, such as *Yemeksepeti* (concerning the largest online food delivery company in Turkey) and *Booking.com* (a global travel e-commerce company and metasearch engine for lodging reservations), the TCB has held that online sales channels offer (i) more comprehensive visuals, (ii) free-cancellation opportunities, (iii) the ability to easily inform and notify customers of all discounts and promotions, (iv) multi-functioning capabilities in a single place, and (v) straightforward price comparisons, which are not similarly available or accessible in the offline sales channels.[48] Therefore, based on the differences between two platforms and their potential impact on consumers and suppliers, the TCB ultimately chose to distinguish and separate the online and offline sales channels in both of its abovementioned judgments.

In light of the foregoing, we can reasonably conclude that there is no overarching consensus among the various antitrust agencies on this issue, and it is clear that the approaches taken with respect to the

[46] Çiçek Sepeti, TCB, 10-78/1623-623, (Dec. 16, 2010).

[47] *Ibid*.

[48] Booking.com, TCB, 17-01/12-4, (Jan. 5, 2017); Yemeksepeti, TCB, 16-20/347-156, (Jun. 9, 2016).

definition of the relevant product market depends on the particular product category in question, which exhibit different characteristics and whose retailers employ various distribution methods. In this context, since the definition of the relevant product market hinges on the particular characteristics of the investigated product, it may be more useful to focus our analysis on a particular product category that is popularly sold and purchased through both online and offline channels. Taking all relevant factors into account, we believe that 'books' would provide a suitable candidate for such scrutiny, especially given the recent case law of various competition enforcement authorities and the abundance of earlier precedents relating to this product market, which may allow us to reach a more clear-cut and unambiguous conclusion as to whether online and offline sales of books fall within the same relevant product market.

c. Evaluating the Online Competition for Books: A Closer Look

Books offer perhaps the best available product category for evaluating the issues surrounding relevant product market definitions in the context of online and offline sales. This is primarily due to the increasingly well-established habits of individuals with respect to ordering books online, which appear to develop in parallel with the growth of internet usage in a given society. Indeed, the long-standing (and ongoing) rise in the online sales of physical books, especially compared to the online sales of many other consumer goods, is clearly demonstrated by the available sales figures. For instance, an empirical study of the Turkish market reveals that traditional retail stores still remain an important sales channel (according to consumers' preferences) in numerous sectors, including consumer electronics, food, clothing, etc. However, the online sales channels for books, music, movies and video games have gained a significant share (reaching 59% of overall sales) in these markets, unlike in any other sectors in Turkey.[49] Furthermore, another related study indicates that 50% of consumers prefer to purchase

[49] PWC, PWC Küresel Toplam Perakende Araştırması ("PWC Global Total Retail Study") (2016), https://www.pwc.com.tr/tr/publications/industrial/retail-consumer/pdf/toplam-perakende-2016-pwc-web.pdf (last visited Dec. 25, 2018).

books online.[50] These statistics may be an important indicator of the convergence between online and traditional retailing channels in this market segment, which has turned the "*book sales*" sector into a rather unique case in terms of the relevant product market definition. Indeed, this state of affairs explains why the interaction between online and offline sales of books has been the subject of a fairly large number of merger control assessments by competition enforcement authorities.

Very recently, the TCB rendered a landmark decision on this issue, in which it considered online and offline book sales to fall within the same product market for the first time in its decisional practice. Indeed, *Turkuvaz/Doğan* will certainly be considered a cornerstone judgment in Turkish jurisprudence by future scholars, due to its detailed analysis of demand and supply substitution in the context of online and offline (*i.e.*, traditional) book sales.[51]

In further detail, the TCB began its evaluation in this case by first comparing the figures for the sales value and volume obtained through each sales channel (*i.e.*, online and offline) between 2013 and 2017. Interestingly, it was found that the number of books sold online in 2017 had exceeded the sales made through the offline channel for the first time (for the years between 2013-2017). However, the total sales value (*i.e.*, revenue) generated from book sales by traditional brick-and-mortar retailers in 2017 was still found to be higher than the total sales value generated by their online counterparts. The TCB must have reached the conclusion that this discrepancy could be explained by the lower average book prices in the online retailing channels, since it highlighted the price gap between the online and offline channels, that could sometimes reach up to 35%. In this regard, given its assessment that the key factor underlying the consumers' preference in favor of the online channel was *lower prices*, and due to the substantial popularity of the online sales channel for books and music, the TCB eventually concluded that the online channel could indeed exert competitive pressure on the offline channel in this case.

[50] KPMG, *The Truth About Online Consumers*, 2017 Global Online Consumer Report (2017), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/the-truth-about-online-consumers.pdf (last visited Dec. 25, 2018).

[51] *Turkuvaz/Doğan*, TCB, 18-16/293-146, (May 29, 2018).

What is perhaps even more interesting is that the *Turkuvaz/Doğan* case included arguments on competitive constraints being disproportionally applied by the online and offline sales channels, which is encapsulated by the concept of "*asymmetric competition.*" In accordance with the TCB's definition, asymmetric competition means that, if the online channels exert competitive pressure on the traditional channels, even if the traditional channels would not be deemed as competitors for the online channels, the market would still be defined as a whole to encompass both channels and would not be separated into the sub-segments of online and offline sales channels. In case of asymmetric competition, there will be a focal market and its relationship with other markets will assist and contribute to the product market definition in situations where the substitutability of the channels is contentious or debatable. Accordingly, in order to determine whether sales that are made through different channels fall within the same or separate product markets (*i.e.*, whether the relevant market should be construed broadly or narrowly), enforcement authorities will seek to assess whether the focal market faces competitive constraints from others, although the reverse situation (*i.e.*, other markets facing competitive constraints from the focal market) is not entirely or necessarily required. In other words, competitive pressure on the traditional sales channel for books applied by the online sales channel will be sufficient to determine that both channels fall within the same product market, regardless of the competitive pressure (if any) that the traditional sales channel puts on the online sales channel. From the TCB's reasoning in *Turkuvaz/Doğan*, assuming that brick-and-mortar sales constitute the focal market, the assessment on the competitive pressure applied by the other market (*i.e.*, the online sales channel) would lead to a product market definition covering both channels in the case at hand. In light of the foregoing, both channels were determined to be substitutable from the demand side, although this was not found to be the case for supply-side substitution, due to various differences the TCB named in the decision such as the required investment amounts and the number of staff, among other factors.

In fact, the TCB's approach on asymmetric competition in *Turkuvaz/Doğan* relied on several decisions of the UK's competition authority. One of the referenced decisions was *HMV/Ottokar*, in which the Office of Fair Trading ("***OFT***"), the successor to the Competition and Market Authority ("***CMA***"), acknowledged the existence of various types of book retailers and recognized that there was price competition between all types of suppliers in a market that included specialist and generalist brick-and-mortar retailers, distance sellers (including internet retailers), and book clubs.[52] In its assessment, the OFT successfully applied the SSNIP test, and accordingly found that the book retailers in question raised their discounts in response to increasing discounts from other retailers, including online sellers.[53]

Relatedly, the UK's *Amazon/Bookdep*[54] case is also worth examining at this juncture. *Amazon/Bookdep* involved the globally largest online retailer, Amazon, and the OFT assessed the competition law concerns relating to Amazon's proposed acquisition of an online book retailer. This case presented important arguments put forth by the parties, who suggested that the various sales channels for books (*i.e.*, brick-and-mortar stores, online sales channels, and mail-order book clubs) overlapped with one another on the demand side, and that they thus constituted part of an overall "*book retailing*" product market. The decision explained the underlying rationale of such market aggregation (leading to a broadly defined relevant product market) as follows: "*the purchasing behavior of individual customers did not show any particular fixed pattern or preferences in buying books from any one of these channels.*"[55] Furthermore, the decision also mentioned the blurry lines between traditional brick-and-mortar stores and online retailers due to the growing access of the UK's population to the internet. Nevertheless, the OFT found that the online retailers were not competitively constrained by the offline retailers, and noted that the parties to the case did not involve any offline players, since Bookdep

[52] Competition Commission, *HMV Group plc and Ottakar's plc* (May 12, 2006), https://webarchive.nationalarchives.gov.uk/20140402195103/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/hmv-group-plc-waterstones-plc-ottakars-plc/final-report-and-appendices-glossary (last visited Dec. 3, 2018).

[53] *Ibid*.

[54] Office of Fair Trading, *Anticipated acquisition by HMV Group plc, through Waterstone's Limited, of Ottakar's plc* (Dec. 6, 2005), https://assets.publishing.service.gov.uk/media/555de420e5274a74ca0000f1/hmv.pdf (last visited Dec. 3, 2018).

[55] *Ibid*.

was an online retailer as well. More importantly, the case was supportive to the "theory of asymmetric competition," as the TCB calls it, since offline markets (*i.e.*, the focal market) did not necessarily put any competitive pressure on the online channels (*i.e.*, other markets) as long as online sales constrained brick-and-mortar stores. After all, in its retail merger commentary published in 2017, the UK's CMA considered that price gaps between brick-and-mortar stores and online sales channels may not indicate a non-competitive interaction; instead, the magnitude of such price gaps may simply reveal and prove the strength of customers' preferences for shopping in a traditional retail setting. The CMA also added that the competitive dynamics are fluid and still evolving in the industry.[56]

These may be the particular decisions that the TCB consulted and utilized in terms of its theory of asymmetric competition, but they are certainly not the only ones relating to book retailing. The Commission has also rendered multiple decisions in recent years regarding online and offline book sales. Indeed, in the well-known *Egmont/Bonnier* case, the Commission scrutinized the online retailing of books and ultimately cleared the acquisition of a Danish book publishing company (Bonnier) by a media group (Egmont), evaluating the traditional and online sales of books as falling within the same relevant product market.[57] The *Egmont/Bonnier* ruling appears to represent a U-turn in the Commission's decisional practice, given that it contradicts the views that the Commission had put forth in its earlier decisions in which it had assessed the distance-selling of books.

For instance, in 2004, the Commission had taken the opposite approach in *Lagardere/Natexis/VUP* case to the position it adopted in *Egmont/Bonier*. In *Lagardere/Natexis/VUP*, the Commission had determined that sales through book clubs (including internet sales) were not a part of the market for "*retail sales in shops*" due to the differences in the marketing of book clubs.[58] Moreover, older decisions, such as

---

[56] Competition & Markets Authority, *Retail Mergers Commentary* (Apr. 10, 2017), at 27, https://assets.publishing.service.gov.uk/government/uploads/ system/uploads/ attachment_data/file/607524/retail-mergers-commentary.pdf (last visited Dec. 3, 2018).

[57] Egmont/Bonnier (Books), Case No. COMP/M.4611, (Oct. 15, 2007).

[58] Lagardere/Natexis/Vup, Case No. COMP/M.2978,(Jan. 7, 2004).

Advent International/EMI/W.H. Smith[59] and *Bertelsmann/Mondadori*,[60] also provide instances that illustrate the Commission's approach on distinguishing separate product markets for books retailed in stores and for books retailed through distance-selling, including internet sales. In *Bertelsmann/Mondadori*, the Commission further clarified its view and explained its reasoning for defining a potential separate product market for the sales of consumer books at a distance, as follows: (i) consumers could choose from a catalogue (or similar list) at home (*i.e.*, not in the presence of the seller), (ii) they could have the goods delivered to their homes and send them back with reimbursement, and (iii) internet purchases were not an option for the population that lives in remote areas.[61]

Consequently, it is evident that various antitrust agencies have generally exhibited a consistent approach to the case of books in their recent case law and appear to consider online and offline sales channels as part of a single broader market, in line with the increase in internet usage and the growing popularity of e-commerce. Older precedents, however, reflecting a time when distance-selling was not yet a common or widespread phenomenon, typically reveal a tendency to distinguish brick-and-mortar stores from e-commerce sites and to define separate markets for online and offline sales channels. These novel approaches favoring broader relevant product market definitions that encompass both online and offline channels, as seen in the most recent landmark decisions of *Turkuvaz/Doğan* and *Fnac/Darty*, seem likely to prevail in the technology-driven digital era of the future. However, the relevant product market definition in any given case will continue to hinge on the technological developments and the particular characteristics of each sector.

[59] The Commission left the question open, but did not eliminate the possibility, that the distance-selling market (including internet sales) is a distinct relevant product market for books. See Advent International/EMI/W.H. Smith, Case No IV/M.1112, (Mar. 24, 1998).

[60] Bertelsmann/Mondadori, Case No. IV/M.1407, (Apr. 22, 1999).

[61] *Ibid*.

IV. Conclusion

Internet use and e-commerce will undoubtedly continue to grow for the foreseeable future. Indeed, whether or not online channels will entirely overtake brick-and-mortar stores and erase them from the market in the following decades may be an open question and it shouldn't be surprising that this possibility raises reasonable concerns among brick-and-mortar retailers. Moreover, while traditional retailers attempt to survive in business by establishing omni-channels to meet customer demand, they are not the only ones who watch the emergence of new markets with apprehension; competition law enforcers also tackle their own unique challenges and attempt to take the necessary steps to protect competition in newly established or recently transformed markets. Indeed, the rapidly changing dynamics of markets can startle and perplex enforcement agencies even at the first step of their competitive assessments, which involves the definition of the relevant product market, especially when online and offline competition intersect.

In this article, we initially explored the legal frameworks of well-established antitrust enforcement authorities, revealing the shared parameters that have been adopted and used worldwide in the definition of relevant product markets. We then examined the relationship between online and offline sales channels and delved into the relevant case law across the European and Turkish jurisdictions in an effort to assess the impact of hybrid distribution systems on the definition of the relevant product market.

Our analysis mostly indicates that no clear-cut or universally applied rule exists for the determination of the relevant product market in cases involving both online and offline retailers, and the results of the enforcement agencies' market definition exercises appear to vary on a case-by-case basis. These non-uniform approaches adopted by competition authorities have led us to focus on a single product for our detailed analysis, for which we found 'books' to be the most suitable candidate for several aforementioned reasons, and accordingly, we examined the regulatory precedents in this regard. Recent case law relating to the evaluation of online competition for book sales clearly revealed the gradual evolution of the approaches taken by antitrust agencies to the online channel in parallel with the growth of e-commerce. Indeed, the TCB's recent decision in *Turkuvaz/Doğan* provides a valuable example in this regard, due to its in-depth analysis of the relevant product market definition, which factored in the competitive relationship between the online and offline retail channels in its assessment.

In conclusion, when customers regard offline products as interchangeable with their online counterparts, we contend that this substitutability pattern cannot and should not simply be ignored by competition enforcement authorities. Rather, competition agencies should incorporate substitutability assessments into their product market definitions, depending on the relevant sector's characteristics. Future developments and case law will shed further light on market structures and how the internet-driven economy will influence the reactions of consumers, retailers and competition enforcers to the constantly changing market dynamics in the modern global economy.

Bibliography

Cases

Advent International/EMI/W.H. Smith, Commission, Case No. IV/M.1112, (Mar. 24, 1998).

Bertelsmann/Mondadori, Commission, Case No. IV/M.1407, (Apr. 22, 1999).

DSGI/FOTOVISTA, Commission, Case No. COMP/M.4226, (Jun. 29, 2006).

Egmont/Bonnier (Books), Commission, Case No. COMP/M.4611, (Oct. 15, 2007).

Euro x-Bauco v Hilti OJ, Comission, Case No. IV/30.787 and 31.488, (Dec 22, 1987)

Lagardere/Natexis/Vup, Commission, Case No. COMP/M.2978, (Jan. 7, 2004).

OTTO/Grattan, Commission, Case No. IV/M.070, (Mar. 21, 1991).

SONY/BMG, Commission, Case No. COMP/M.3333, (Oct. 3, 2007).

SONY/SONYBMG, Commission, Case No. COMP/M.5272, (Sep. 15, 2008).

UTC/Honeywell/i2/MY Aircraft.com, Commission, Case No. COMP/M.1969, (Aug. 4, 2000).

Hilti AG, Commission, Case No. T-30/89 (1991) ECR II-1439, (1992) 4 CMLR 16, and on appeal to the Court of Justice in Case C-53/92 P (1994) ECR I-667, (1994) 4 CMLR 614.

Continental Can v Commission of the European Communities, Case 6/72 (1973) ECR 215, (1973) CMLR 199.

Biletix, TCB, 13-61/851-359, (Nov. 11, 2013).

Booking.com, TCB, 17-01/12-4, (Jan. 5, 2017).

Çiçek Sepeti, TCB, 10-78/1623-623, (Dec. 16, 2010).

D-Market, TCB, 15-40/662-231, (Nov. 10, 2015).

Turkuvaz/Doğan, TCB, 18-16/293-146, (May 29, 2018).

Yemeksepeti, TCB, 16-20/347-156, (Jun. 9, 2016).

Fnac/Darty, République Française Authorité de la Concurrence Décision n° 16-DCC-111, (Jul. 27, 2016).

Legislative Materials

US DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (2010).

EUROPEAN COMMISSION, NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW, 97/C 372 /03 (1997).

TURKISH COMPETITION AUTHORITY, GUIDELINES ON THE DEFINITION OF THE RELEVANT MARKET, 08-04/56-M, 2008.

Books and Reports

ETHAN LIEBER AND CHAD SYVERSON, ONLINE VS. OFFLINE COMPETITION, OXFORD HANDBOOK OF THE DIGITAL ECONOMY (MARTIN PEITZ AND JOEL WALDFOGEL EDS.), 2012.

ROGER D. BLAIR AND DAVID L. KASERMAN, ANTITRUST AND ECONOMICS, 2nd Ed., 2009

RICHARD WHISH AND DAVID BAILEY, COMPETITIM LAW, OXFORD UNIVERSITY PRESS, 9th, Ed. 2018.

PWC, *PWC Küresel Toplam Perakende Araştırması* ("PWC Global Total Retail Study"), 2016.

Periodicals

Dr. Atilano Jorge Padilla, *The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control*, A Report for DG Enterprise A/4, European Commission, 2001.

Erik Brynjolfsson and Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, MANAGEMENT SCIENCE, 2000, at 563-585.

George Loewenstein, *Anticipation and the Valuation of Delayed Consumption*, ECONOMIC JOURNAL, 1987, at 666-684.

Hans W. Friederiszick and Ela Głowicka, *Competition Policy in Modern Retail Markets*, JOURNAL OF ANTITRUST ENFORCEMENT, 2016.

Øystein Daljord, Lars Sørgard, Øyvind Thomassen, *The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz and Shapiro*, JOURNAL OF COMPETITION LAW & ECONOMICS, 2008.

Thomas E. Kauper, *The Problem of Market Definition Under EC Competition Law*, 20 FORDHAM INT'L L.J. 1682, 1996.

Internet Sources

Office of Fair Trading, *Anticipated acquisition by HMV Group plc, through Waterstone's Limited, of Ottakar's plc*, Dec. 6, 2005, https://assets.publishing.service.gov.uk/media/555de420e5274a74ca0000f1/hmv.pdf (last visited Dec. 3, 2018).

Competition & Markets Authority, *Retail Mergers Commentary*, Apr. 10, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607524/retail-mergers-commentary.pdf (last visited Dec. 3, 2018).

OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Roundtable on Market Definition – Note by the Delegation of the United States*, Jun. 7, 2012, https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf (last visited Dec. 3, 2018).

Editorial Board, *Fnac-Darty: A Landmark Merger Decision in France*, ORRICK ANTITRUST WATCH, Aug. 5, 2016, https://blogs.orrick.com/antitrust/2016/08/05/fnac-darty-a-landmark-merger-decision-in-france/ (last visited Dec. 6, 2018).

European Commission - *Final Report on the E-Commerce Sector Inquiry*, COM(2017) 229 final, May 10, 2017 (report from the Commission to the Council and the European Parliament), http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (last visited Dec. 6, 2018).

Turkish Statistical Institute, Press Release, *Information and Communication Technology (ICT) Usage Survey on Households and Individuals, 2016*, Aug. 18, 2016, http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=21779&utm_source=ELIG%2c%20Attorneys

-at-Law&utm_content=ILO%20newsletter%2035241& utm _medium= pdf&utm_campaign=ILO%20Newsletters (last visited Dec. 18, 2018).

Competition Commission, *HMV Group plc and Ottakar's plc*, May 12, 2006, https://webarchive.nationalarchives.gov.uk/20140402195 103/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/hmv-group-plc-waterstones-plc-ottakars-plc/final-report-and-appendices-glossary (last visited Dec. 3, 2018).

République Française Authorité de la Concurrence, *Press Release: Fnac's acquisition of Darty, Jul. 18, 2016* (Jul. 27, 2018) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3241&lang=en (last visited Dec. 3, 2018).

OECD, 129th OECD Competition Committee Meeting - *Implications of E-commerce for Competition Policy - Note by the United States*, Jun. 6, 2018, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/e-commerce_united_states.pdf (last visited Dec. 3, 2018).

2016 Eurostat Community Survey on ICT usage in households and by individuals, 2017, http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals (last visited Dec. 25, 2018).

Gönenç Gürkaynak, *Competition and antitrust in the digital age*, INTERNATIONAL LAW OFFICE, (April 27, 2017), http://www.gurkaynak.av.tr/docs/c10ed-competition-and-antitrust-in-the-digital-age.pdf (last visited Dec. 26, 2018).

A New Approach Toward the Understanding of Dominance in the Digital Era: Assessing Dominant Position in Dynamic Markets

Gönenç Gürkaynak, Esq. [*]

Hazar Başar [**]

Özlem Cansu Tekşen [***]

"*Only the paranoid survive*."

– Andy Grove, Founder and former CEO of Intel

I. Introduction

Since the 20th century, the world has been undergoing an immense transformation, which is still expanding all over the world and affecting every aspect of our lives, including the economic structures and commercial arrangements of nation states. As in the case of the Industrial Revolution, this transformation wave has shaped (and continues to shape) societies, countries, institutions and systems. Increasing use and widespread adoption of various information and communication technologies, which are now indispensable parts of our daily lives, have led to an information revolution and they have rendered traditional approaches to economic matters obsolete, if not entirely discredited. This information revolution eventually led to the digitalisation of markets and brought about the emergence of .a new economic system since the beginning of the 1990s.

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Hazar Başar is an associate registered at Istanbul Bar Association.

[***] Özlem Cansu Tekşen is an associate registered at Istanbul Bar Association.

Unlike the manufacturing and commodity based traditional economy, the new economy uses technology aggressively to offer new products and services at a much higher speed that the traditional economy could not adopt. Ahlborn exemplifies the new economy industries as computer software and hardware, the internet, mobile telephony, biotechnology and others that are based primarily on the creation of intellectual property and that are undergoing rapid technological change.[1] In this regard, the new economic system applies primarily to digital markets that are driven by technologic improvements.

As information and communication technologies have been improving and growing with dazzling speed in recent years, companies that have failed to give due importance to innovation and research and development ("***R&D***") activities have been left behind in the competitive race and they have often vanished entirely from the market. Accordingly, the ability of undertakings to maintain a sustainable competitive advantage depends on their capacity to develop new products and their ability to innovate genuinely ground-breaking and original products. Therefore, the dynamics of the new digital economy, which allow quick and frequent entries/exits into markets through aggressive innovation, have required competition enforcement authorities to alter their traditional, static approach (which focuses on price competition) for evaluating the market position(s) of companies that are active in the 'new economy' (*i.e.*, dynamic) markets.

In this article, we will first assess whether market share can still be considered as an adequate or suitable indicator for ascertaining dominance in dynamic markets, given that the market forces and competitive parameters that prevail in dynamic markets differ significantly from the traditional markets to which the static 'price competition' approach applies. Subsequently, we will examine the potential new approaches and parameters that should be taken into account for assessing whether an undertaking active in dynamic markets is actually in a dominant position in those markets. In this regard, we will begin our analysis by first explaining the establishment of

---

[1] Christian Ahlborn, David S. Evans, and A. Jorge Padilla, *Competition Policy in the New Economy: Is European Competition Law up to the Challenge?*, 22 EUROPEAN COMPETITION LAW REVIEW 156 (2001), at 159.

"dominant position" in the European and Turkish competition law regimes with regard to sectors and industries with traditional market characteristics. We will then scrutinize and evaluate the structural differences between traditional and dynamic markets by emphasizing the heightened role and increased impact of innovation on the latter. As the traditional methods utilized by competition enforcement authorities are based on the traditional understanding of markets, which depends on certain assumptions regarding static market characteristics, we will seek to demonstrate that adopting or implementing the conventional approach with regard to the market positions of undertakings that are active in dynamic markets could mislead the competition authorities and cause them to reach flawed results that do not reflect the realities of the new marketplaces in the modern global economy.

II. Traditional Approach to the Assessment of Dominant Position

In the Turkish competition law regime, Article 6 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") is the primary legislation that applies specifically to the conduct of dominant undertakings. Article 6 of the Law No. 4054 is based on (and closely akin to) Article 102 of the Treaty on the Functioning of the European Union ("***TFEU***")[2] and it provides that "*any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited.*"

In terms of the European competition law regime, the European Court of Justice ("***ECJ***") has defined the concept of 'dominant position' in its *United Brands* and *Hoffmann-La Roche* decisions, as follows: "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant product market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its*

[2] For the sake of comparison, Article 102 of the TFEU reads as follows: "*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*."

consumers."[3] In a similar manner, Article 3 of the Law No. 4054 defines "dominant position" as "*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, amount of production and distribution, by acting independently of their competitors and customers.*" In this context, we observe that the ECJ's approach to the definition of 'dominant position' has been adopted by the Turkish Competition Board ("***Board***") as well.[4]

The ECJ has underlined in its decisional practice that a dominant undertaking has a "*special responsibility not to allow its conduct to impair genuine undistorted competition.*"[5] The Board has also adopted this approach, and its decisions emphasize that dominant undertakings have an obligation to recognize and acknowledge the possible effects of their conducts in the relevant product markets.[6] Although being in a dominant position is not *per se* illegal under competition law rules, dominant undertakings bear special responsibilities with respect to refraining from abusive behavior to the detriment of competition in the relevant market. In fact, the primary examples of abusive behavior, such as predatory pricing, tying and bundling and exclusionary conduct, constitute well-established business strategies that many undertakings often employ in order to compete and survive in the market (or to expand their market shares). While there is nothing in competition law rules that prevents non-dominant undertakings from engaging in these practices, competition law prohibits dominant undertakings from participating in these practices because they may prevent, impede or restrict competition in the relevant market.

---

3 ECJ, Case 85/76, *Hoffmann-La Roche & Co AG v. The Commission* (13 February 1979), para. 38; ECJ, Case 2/76, *United Brands v. The Commission* (14 February 1978), para. 65.

4 The Turkish Competition Board's *Karbogaz* decision (23.08.2012; 02-49/634-257).

5 The Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("***EU Guidelines***") refers to the special responsibility of a dominant firm not to allow its conduct to impair genuine undistorted competition on the common market. (*See* Communication from the Commission— *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 24 February 2009, No: 2009/C 45/02).

6 The Board's *FritoLay* decision (04.05.2004; 04-32/377-95), para. 2760.

In accordance with the Board's precedents, an undertaking is not deemed to be 'dominant' unless it holds the power to set prices or other terms above the competitive levels, unconstrained by actual or potential competitors or by the reaction of customers.[7] In other words, undertakings with dominant market power must be capable of profitably increasing prices above the competitive level for a significant period of time.[8] To that end, the determination of dominance requires the undertaking in question to behave in a way that is unconstrained by actual or potential competitors or by the reaction of its customers. However, competition enforcement trends indicate that the Board has been increasingly more inclined in recent years to broaden the scope of the application of the Article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition of 'dominant position,' and to infer dominance even in cases where the concerned undertaking is clearly dependent (or interdependent) on either its competitors or its customers.[9]

Importance of Market Share in Establishing Dominance in the EU and Turkish Competition Law Regimes

In the Turkish competition law regime, the main factors for the assessment of dominant position are established and put forth under the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("***Guidelines***"). According to the Guidelines, the Board should consider the following factors when making a dominant position determination: (i) market positions of the undertaking concerned and its competitors (market positions are primarily indicated by the market shares of the undertakings in terms of most relevant product markets), (ii) barriers to entry and expansion, and (iii) bargaining power of buyers.[10] In a similar vein, in order to determine

[7] *See* the Board's *Pegasus* decision (14.06.2012; 12-33/940-295) and the Board's *Türk Telekom A.Ş.* decision (08.03.2012; 12-10/328-98).

[8] *See* the Turkish Competition Authority's ("***TCA***") Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position (29.01.2014; 14-05/97-RM (1)), para. 8.

[9] The Board's *Anadolu Cam* decision (01.12.2004; 04-76/1086-271); the Board's *Warner Bros* decision (24.03.2005; 05-18/224-66).

[10] TCA, *supra* note 8, para. 10.

dominance in a particular market, the Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("***EU Guidelines***") also seek to assess additional factors, such as the market position of the relevant undertaking, entry barriers, and countervailing buyer power. In this regard, the EU Guidelines stipulate that "*the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position [...]*" and underlines that high market shares merely constitute a "*useful indication*" for the European Commission ("***Commission***") and that the Commission should interpret and evaluate market shares in light of the particular dynamics of the relevant product market.

Accordingly, in terms of the assessment of market position, the Board should consider several additional factors beyond the market share of the undertaking concerned, such as (i) the stability of its market share, (ii) the number of rivals in the relevant market, and (iii) their corresponding market shares.[11] To that end, the fact that an undertaking maintains a significantly high market share for a long period of time (and that its rivals have very low market shares) would increase the probability that the undertaking in question enjoys a dominant position in the relevant market. Although the Guidelines do not establish any specific market share thresholds that would evince or prove a dominant position, they nevertheless provide that undertakings that possess market shares below 40% are less likely to be dominant in the relevant product market, unless the facts and circumstances of a particular case indicate or require otherwise.[12]

Furthermore it is also worth noting that the Guidelines establish a distinction between static and dynamic markets and underline that, in terms of fast-growing 'new economy' markets, market shares are not steady or stable, and therefore, they do not constitute a reliable indicator for the assessment of dominant position. Nevertheless, both the

---

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

[12] *Id.*, para. 12. This has also been acknowledged by the following decisions of the Turkish Competition Board: *Mediamarkt* decision (12.05.2010; 10-36/575-205); *Pepsi Cola* decision (05.08.2010; 10-52/956-335), and *Egetek* decision (30.09.2010; 10-62/1286-487).

European and Turkish competition law regimes indicate that market share is still the "*starting point*" for assessing or establishing dominant position.[13]

In terms of the European competition law regime, although the ECJ emphasized in its *Hoffmann-La Roche* decision that the significance of market shares to a dominant position assessment may vary from one market to the next, it has also underlined that an elevated market share constitutes a significant piece of evidence for the existence of a dominant position, unless exceptional circumstances require otherwise.[14] Furthermore, in its *AKZO* decision, the ECJ established that high market shares (*e.g.*, market shares exceeding 50%) provide a clear indicator for determining a dominant position, by referencing its *Hoffmann-La Roche* decision.[15]

Similarly, in several of its decisions, the Board has emphasized that the market share of an undertaking, along with its competitors' market shares, is the most important factor in establishing/determining its market power.[16] However, while considering high market shares as a starting point in the assessment of market power, the Board also considers various other factors, such as: (i) the existence of barriers to entry, (ii) the market structure, (iii) the competitors' market positions, (iv) other market dynamics (as necessary), and (v) whether the undertaking concerned indeed behaves independently from its competitors, customers and consumers. For instance, in the *Sanofi Aventis* case, even though the undertaking had a market share of 100% in several pharmaceutical markets, the Board also took the sales conditions of the relevant products into consideration to reach the conclusion that

[13] Piet Jan Slot & Angus Johnston, *An Introduction to Competition Law*, Hart Publishing, at 112 (2006), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=884309 (last visited January 8, 2019).

[14] ECJ, Case 85/76, *Hoffmann-La Roche & Co AG v. The Commission* (13 February 1979), para. 41. In this decision, looking beyond Roche's market share, the ECJ also considered other pertinent factors, such as potential competition in the relevant market, the market shares of Roche's competitors and Roche's sales network (*see* para. 42).

[15] ECJ, Case C-62/86, *Akzo Chemie BV v. The Commission* (3 July 1991), para. 60. In this decision, the Commission also emphasized that AKZO had maintained its 50% market share for 3 years.

[16] *See* the Board's *Mey İçki* decision (25.10.2017; 17-34/537-228) and *Yonga Levha* decision (13.10.2016; 16-33/571-248).

Sanofi Aventis indeed held a dominant position.[17] In any event, the Board has not yet adopted a different or separate approach with respect to assessing or establishing dominance that would account for the characteristics of dynamic markets.

III. Characteristics of Dynamic Markets and How They Differ from Traditional Markets

Under the influence of the new, fast-paced economic system of the 21st century, practically every business in the modern global economy is, to a greater or lesser extent, operated in the digital world or at least carried out in a digitalized manner. In this context, Evelin Hlina defines 'digital markets' as industries that are characterized by the supply of digital goods or services: "*[D]igital markets comprise operating systems for PCs or laptops (eg Windows), search engines (eg Google), apps for smart mobile devices (eg Whatsapp), websites or software for the distribution of digital content (eg YouTube or Spotify), or social networks (eg Facebook). Furthermore, also industries where physical goods are distributed through a digital platform come under this definition, provided that the core business in question concerns the development and management of the platform (eg Amazon).*"[18]

These digital markets comprise the aforementioned dynamic markets, which have been defined and described in various different ways, including "new economy markets," "high technology markets," and "innovative markets."[19] In this regard, Evans and Schmalensee define these digital markets (which have more or less the same characteristics) as "*[C]ompanies whose fortunes are tied to success in the creation of intellectual property and are highly vulnerable to successful innovation by others*."[20]

---

[17] *See* the Board's *Sanofi Aventis* decision (20.04.2009; 09-16/374-88), para. 1000.

[18] Evelin Hlina, *Dominant Undertakings in the Digital Era: A Call for Evolution of the Competition Policy Towards Article 102 TFEU?*, ICC Global Antitrust Review, Issue 9, at 121 (2016), available at http://www.icc.qmul.ac.uk/ media/icc/gar/ gar2016/4.Evelin-Hlina-Essay-GAR-2016.pdf (last accessed on January 7, 2019).

[19] Hilal Yılmaz, *Yenilik (İnovasyon), Yeni Ekonomi ve Rekabet*, REKABET KURUMU UZMANLIK TEZLERI, at 22 (2003).

[20] *Id.*, at 20.

Although dynamic markets are yet to be defined by lawmakers under statutory provisions, it is clear that dynamic markets differ significantly from traditional markets, due to the fact that they are driven by rapid technological improvements and characterized by constant innovation, which lead to frequent market entries and exits. In this regard, the Board has acknowledged the following characteristics of 'new economies' in its *Demotion* decision: (i) decreasing average costs due to economies of scale, (ii) high rate of innovation, which leads to frequent market entries and exits, and (iii) network effects.[21]

Accordingly, dynamic markets differ from traditional markets in several important ways (as discussed below), and each of these distinguishing characteristics leads such dynamic markets to deviate from the traditional markets to which static price competition applies:

1. Constant Innovation

In traditional markets, where technological improvements generally occur at a slow and gradual pace, undertakings compete primarily on the basis of price. On the other hand, dynamic markets are characterized by and subject to ceaseless dynamic competition, where undertakings compete chiefly on the basis of 'innovation' rather than price. In this regard, 'innovation' provides the main source of sustainable competition in dynamic markets.

Competition in dynamic markets does not seek to deliver high-quality products and services to consumers at low prices, but rather aims to enable the competing undertakings to eliminate the existing products from the relevant market by replacing them with newly developed and more technologically advanced products. In other words, in traditional markets where the static competitive approach applies, undertakings seek to maintain their market positions and/or market shares by utilizing data technologies in the short term; whereas, in the 'new economy' markets where the dynamic competitive approach applies, companies aim to utilize new technologies in the long term by focusing on current and potential competitors and by replacing their products with more advanced versions. While static competition in traditional economies

[21] *See* the Board's *Demotion* decision (16.11.2016; 16-39/638-284).

depends on price competition based on cost advantages, dynamic competition in the 'new economy' is characterized as "*competition in innovation.*"

In order to maintain their presence in the market, undertakings in dynamic markets are bound to innovate continuously and thus required to invest heavily in R&D activities, which often result in rapid and disruptive technological changes.[22] The swiftly transforming nature of these dynamic markets often results in the sudden elimination of incumbent players from the market due to new and innovative products being launched by market entrants, as well as the rapid formation and expansion of new incumbents. In this context, Spotify (a music-streaming service) and Airbnb (an online marketplace for hospitality services) provide illuminating examples of successful start-up companies that have quickly achieved worldwide success and recognition and upended their respective industries.[23] Accordingly, the threat of new market entrants or rapid innovation by current competitors leads companies operating in dynamic markets not to focus on taking price-oriented decisions, but rather concentrate on innovating original features and functionalities for previously developed products and services, in order to attract new users and retain existing customers.[24]

2. High Fixed Costs, Low Marginal Costs

The cost structure of dynamic markets is characterized by high fixed costs (*i.e.*, sunk costs) and low (to virtually non-existent) marginal production costs.[25] As the undertakings in dynamic industries usually

---

[22] David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, Innovation Policy and the Economy, Volume 2 (Adam B. Jaffe, Josh Lerner and Scott Stern, eds.), at 3 (2002), available at http://www.nber.org/chapters/c10784.pdf (last accessed on January 7, 2019).

[23] Hlina, *supra* note 18, at 122.

[24] Howard A. Shelanski, *Information, Innovation and Competition Policy for the Internet*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, VOL. 161, 1663 (2013), at 1685, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi? referer= https://www.google.com/&httpsredir=1&article=1025&context=penn_law_review (last accessed on January 7, 2019).

[25] Ahlborn et al., *supra* note 1, at 159; Hlina, *supra* note 18, at 123.

need to invest heavily in their products until they gain brand recognition in their market, and since their workforce is often well-educated and equipped with the essential know-how underlying their products, they need to invest in significant fixed costs (such as substantial expenditures on R&D and physical/virtual networks) in order to deliver and further innovate their products.[26] However, once a company undertakes these high fixed costs and establishes itself in the relevant market, the ensuing marginal production costs are usually low; even more importantly, these marginal costs decrease in time, since such undertakings are not required to sustain high costs to produce additional units of successful digital goods or services, such as the Microsoft Office Package, or to attract other users to flourishing digital platforms, such as Amazon.com or Hepsiburada.com.[27]

3. Risky Investments Promising High Profits

New market entrants bear substantial financial risks by undertaking the high fixed costs that are necessary to enter a dynamic market, especially considering that most of the incumbents in today's 'new economy' markets were founded as start-ups (*e.g.*, Facebook, which was created in a dorm room at Harvard University in 2004).[28] Thus arises the crucial question: "*If it is that risky to enter a dynamic market, why are undertakings and even ordinary individuals so eager to take these risks and try to enter new economy markets?*" The answer is that, once such undertakings establish themselves and settle into a dynamic market, they are compensated for these risks by the potential financial rewards of earning immense profits in these markets, which they can accomplish as long as they manage to secure and maintain their

---

[26] Gönenç Gürkaynak, Merve Bakırcı, Sevgi Mutafoğlu, *Excessive Pricing Enforcement in Dynamic Sectors: Should You Stop Reading Now?*, THE ACADEMIC GIFT BOOK OF ELIG-ATTORNEYS-AT-LAW IN HONOUR OF THE 20TH ANNIVERSARY OF COMPETITION LAW PRACTICE IN TURKEY (2018), at 143, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3174409 (last accessed on January 7, 2019); *see also* Evans & Schmalensee, *supra* note 22, at 9.

[27] Ahlborn et al., *supra* note 1, at 4.

[28] *See* Business Insider, *At Last – The Full Story of How Facebook Was Founded* (2010), available at https://www.businessinsider.com/how-facebook-was-founded-2010-3 (last accessed on January 7, 2019).

presence in the market through constant innovation. These vast financial "prizes" serve the same incentivizing purpose as the massive earnings of prominent football clubs, celebrated movie stars, or most recently, social media celebrities.[29] Thus, these fiscal risks are countervailed by the substantial financial rewards. Since the path to successful innovation is fraught with various difficulties and setbacks, encouraging a large number of entrepreneurs to devote themselves and their resources to technological innovation ultimately serves the public interest and enhances total welfare.[30]

4. Network Effects

Network effects arise in markets where the value of a network for a particular user depends heavily (whether directly or indirectly) on the number of other users on the network. The link between an increase in the value of a network and an increase in the number of users on the network is characteristic of products/services in which customers can communicate and interact with other customers that are using the same product.[31] If the value of a network increases along with the rise in the number of users on the network, then demand-side network effects exist; if production costs decline along with the increase in the number of users on the network, then supply-side network effects exist.[32]

A variety of digital industries exhibit network effects in varying degrees, including social media, computer software, e-commerce, and telecommunications. These industries may comprise an actual physical network, as well as a virtual network. For instance, fax machines, phones and credit-card systems (including point-of-sale machines) are the most common examples of physical networks. Most of these systems

---

[29] Ahlborn et al., *supra* note 1, at 5.

[30] Kwangkug Kim, *Competition Law in the New Economy Industries: Is the Current Competition Analysis Adequate to Protect Consumers in the New Economy Industries* (Master's Thesis) (2012), at 19, available at https://www.escholar.manchester. ac.uk/api/datastream?publicationPid=uk-ac-man-scw:182635&datastreamId=FULL-TEXT.PDF (last accessed on January 8, 2019).

[31] Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, THE ANTITRUST BULLETIN Vol: XLIII, No: 3-4/Fall-Winter, at 656 (1998).

[32] Yılmaz, *supra* note 19, at 21.

connect users via physical networks, which become more useful and gain more value as the number of users on the network increases. For instance, as new users are added to the telephone network, the telephone becomes exponentially more valuable as a communications tool for the users who have already purchased it.

Network effects are observed in virtual networks as well. Virtual network users benefit indirectly from the number of users on the network. In this regard, virtual networks, which may consist of complementary components such as operating systems and mobile applications, can also be described as the combination of products that are compatible with each other, sharing a common technical platform.[33]

In virtual networks, indirect network effects occur as a result of not only the needs and expectations of consumers, but also the willingness and desire of complementary product manufacturers to be part of a network. For instance, the will of software application developers to code their applications for the most dominant (*i.e.*, popular) platforms in order to reach and attract more users, as well as those users' will and desire to subscribe to the applications with the highest number of users (such as Instagram, YouTube and Facebook) lead inexorably to indirect network effects. In this regard, network effects are of particular importance mostly in high-technology markets that are based on computing applications and the internet. Such network effects are most prominent and prevalent in messaging services and chat rooms, where the value of the network directly increases with the number of people on the same network. Such network effects are also observed in market-making services, such as eBay and Amazon, where the buyers benefit from the presence of more sellers on the network, and sellers benefit from the existence of more buyers in the marketplace.

Network effects are the primary driving force behind innovation and technological change. In markets that are dependent on (and characterized by) network effects, undertakings that are not in a leading position are less likely to become market leaders, unless they can achieve a major ('leapfrog') innovation or make a technological breakthrough, which can overcome the natural advantages provided by

[33] *Id.*, at 26.

network effects to the dominant undertaking(s) in the relevant market.[34] Market leaders, on the other hand, should strive to keep their products and services as up-to-date as possible through constant innovation and revitalize themselves before other market players can create a leapfrog innovation that will render their products/services obsolete, in order to maintain their leading positions (or even guarantee their continued presence) in the market.[35]

In traditional 'old-economy' markets, on the other hand, network effects do not have much of an influence on the value of products or on the customers, since each individual customer experiences or consumes such goods and services by themselves; in other words, "no one eats a hamburger because others do too."[36]

5. Winner-takes-all

The 'winner-takes-all' effect is one of the most prominent and noteworthy features of digital markets. In digital markets that are established through and fuelled by radical innovation, the company that releases a disruptive new product will not only create a new market, but it will often enjoy a durable leadership position—or even a monopolistic position—as well, at least until other companies are able to adapt their products/services through innovation and enter the newly established market. Importantly, since the first mover will have the opportunity to serve the entire market demand, at least for some time, it may benefit from certain economies of scale that the new entrants will not be able to replicate, at least in the short term. This incumbency advantage enjoyed by the first mover may be further magnified if the invention in question is protected by laws relating to intellectual property rights or if the relevant market is subject to network effects, among other factors.[37]

---

[34] Evans & Schmalensee, *supra* note 22, at 9.

[35] *Id.*, at 9 and 10.

[36] Ahlborn et al., *supra* note1, at 4.

[37] Miguel Rato & Nicolas Petit, *Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?*, 9 EUROPEAN COMPETITION JOURNAL, 3-6, at 4 (2013).

Unfortunately, according to the traditional competition law approach, all successful firms operating in markets that are prone to the ‘winner-takes-all’ effect may be regarded as dominant undertakings or even categorized as monopolists after the initial burst of dynamic competition.[38] Although one cannot doubt that network effects strengthen leadership positions and benefit incumbent undertakings, it can be reasonably argued that, in many high-technology sectors, undertakings are extremely eager to reach the summit of the market, and therefore, they engage in fierce competition with their rivals. Thus, ‘leapfrog’ or breakthrough innovations occur repeatedly in such markets, and the switching costs and the ‘lock-in’ effect are far from guaranteed to be successful in securing the dominant undertakings’ position in such markets for any significant length of time. In other words, market leaders can easily be displaced by other undertakings offering new or upgraded products/services to the consumers in a dynamic market. In this regard, as also explained in further detail in Section IV below, the dominant or monopoly position of the apparent “winner” in such markets is fragile by nature, as such dominant undertakings face an omnipresent threat of disruptive ‘leapfrog’ innovations from current or potential market players.

IV. Dynamic Competition in New Economy Markets and Assessments of Dominance

As indicated above, due to the effects of dynamic competition, new economy markets are mainly characterized by rapid changes in the market positions of undertakings that are active in such markets. The fast-paced and fluctuating nature of dynamic markets depends on the intensive and widespread use of new technologies and innovations, which are continuously being developed by such undertakings.[39] Therefore, evaluating the market positions of undertakings in dynamic markets by applying conventional dominance tests, which rely on the characteristics of traditional (*i.e.*, static) markets, would not provide accurate or useful results, since such tests would merely succeed in

[38] Ahlborn et al., *supra* note 1, at 8.

[39] Ali İ. Çağlayan, *Rekabet Hukukunda Pazar Gücünün Önemi ve Ölçülmesi,* REKABET KURUMU UZMANLIK TEZLERI 48 (2003).

taking a 'snapshot' of the relevant market at the moment of assessment, reflecting only the current status and conditions of the market. However, it is plainly evident that the realities of new economy markets cannot be captured by such 'static snapshots,' as such markets are mainly characterized by: (i) high-level and rapid innovations, (ii) significant price and product differentiation, (iii) network effects,[40] (iv) substantially high fixed costs and low marginal costs,[41] (iv) requiring only a modest amount of capital, and (v) swift and frequent market entries and exits.

As a result of these fundamental characteristics, competition in dynamic markets is essentially based on (i) innovation,[42] (ii) technological development, (iii) quality,[43] and (iv) performance,[44] rather than price competition, which is commonly observed in traditional markets. Furthermore, the absence of capacity limits and the presence of continuous growth in dynamic markets combine to make it more attractive for newcomers to enter these markets, since an undertaking that launches an innovative product that addresses the needs and desires of consumers could immediately dominate the market in question and quickly reach high market shares. Moreover, in this scenario, such an undertaking might reach a position to maintain its market leadership for a relatively long period of time, as other actual or potential competitors would have to adapt their products or services to the new level of innovation in the relevant market in order to challenge or eliminate the market leader's market power.

That being said, the main parameter exerting competitive pressure on an undertaking with a significant amount of market power in a dynamic market is not the existence of powerful competitors or even the relatively low prices charged by those competitors for their products or services. Instead, it is the threat of innovation by rivals and the

---

[40] Rato & Petit, *supra* note 37, at 3-6.

[41] Ahlborn et al., *supra* note 1, at 159.

[42] Yılmaz, *supra* note 19; Çağlayan, *supra* note 39.

[43] Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, UNIVERSITY OF CAMBRIDGE – ANTITRUST LAW JOURNAL 9 (2018).

[44] Jerry Ellig, *Dynamic Competition, Online Platforms, and Regulatory Policy*, statement submitted to the House of Lords Select Committee on the European Union (EU Internal Market Sub-Committee) (2015), at 4.

possibility of new market entrants that actually increase the motivation and incentives of the market-leading company to continue innovating, in order to maintain its competitive advantage in the relevant market. In this respect, considering that undertakings in dynamic markets compete on innovation (instead of traditional competition parameters, such as price, supply, production and distribution amounts), actual competitors who aim to topple a market-leading undertaking, or potential competitors who contemplate entering such a market, could apply competitive pressure on the companies currently operating in that market by innovating and developing new products that could fundamentally alter the dynamics of the relevant market.[45] In this respect, since rapid technological developments that lead to the growth of dynamic markets have the potential to radically and swiftly change the structure of such markets,[46] the market shares of undertakings operating in dynamic markets are, in most cases, (i) open to change (*i.e.*, unstable), (ii) fragile, and (iii) temporary.[47]

Accordingly, in light of the fact that the fragility and temporary nature of the market shares of undertakings operating in dynamic markets essentially stem from the abovementioned structural features of dynamic markets, maintaining a leadership position in a dynamic market for an extended period of time would be insufficient on its own to determine a dominant position. This is because, unlike in traditional markets, the competitive process in dynamic markets is based on the principle of "*competition for the market*" rather than "*competition in the market*."[48] To put it differently, in a market whose competitive landscape is characterized by *competition for the market*, even an undertaking that has gained significant market power by utilizing more advanced technologies, releasing new products that better address the needs and desires of consumers, or developing a unique business model, could nevertheless lose its market position quickly and easily.[49] One of the best-known examples of such rapid loss of market power is the collapse

---

[45] Hlina, *supra* note 18, at 143-144.

[46] COSMO GRAHAM AND FIONA SMITH, COMPETITION, REGULATION AND THE NEW ECONOMY, 4 (2004).

[47] *Ibid. See also* Ahlborn et al., *supra* note 1, at 162; Hlina, *supra* note 17, at 142-143.

[48] Coyle, *supra* note 43.

[49] *Id.*, at 4.

of MySpace, which achieved its highest market power and peak value in 2008 as the global leader among social-media platforms, and was subsequently defeated and supplanted by Facebook by 2011. Another illuminating example in this regard is provided by the entry of Spotify into the "music streaming platforms" market in 2008. Spotify's innovative business model (offering both paid and free music streaming services to its customers) negatively affected various powerful music services, such as iTunes (which charged its customers to download songs in a digital format) and also triggered the development and release of numerous new applications, including Apple Music, Pandora, Fizy, Deezer, Tidal, Amazon Music Prime, Google Play Music and Soundcloud, which are still competing vigorously with Spotify in the music streaming market, as of 2018. Furthermore, just like ICQ was effectively eliminated from the "online messaging platform" market by MSN Messenger in the early 2000s, the development of new mobile communications applications, such as WhatsApp and Facebook Messenger, within the last decade has erased other messaging applications from the market, including MSN Messenger. As plainly evident from these examples, the current market players could only respond to and counteract the innovative efforts of actual and potential competitors by continuing to develop their own products, services and technologies.[50] In a nutshell, even an undertaking with a significantly high market share (*i.e.*, over 40-45%) in a dynamic market can only retain its market power if it continues to innovate ceaselessly, as its market share (and the market shares of all undertakings operating in dynamic markets) are under permanent threat of innovation from actual or potential competitors.

Having said that, certain markets (including the market for operating systems, in which there are only a few market players, such as Microsoft, Apple and Linux) are subject to (i) significant entry barriers, (ii) '*lock-in*' effects, which refer to network externalities, high switching costs or other structural characteristics of a market that cannot be attributed to any anticompetitive behaviour of an undertaking that has a competitive advantage in the market, and (iii) first-mover advantages (*i.e.*, 'winner-takes-all' principle), which can enable and facilitate the maintenance of market power by market-leading undertakings. However,

[50] Ahlborn et al., *supra* note 1.

the fact that an undertaking appears capable of maintaining its market position for a relatively long period of time in such markets is inadequate by itself to demonstrate that such an undertaking is in a dominant position. This is because simply operating in a market with "dynamic" characteristics does not necessarily mean that the market power of the undertakings in that market is always ephemeral.[51] In this respect, sustaining a powerful market position for a relatively long period of time does not suffice to deduce or conclude that the market shares of the undertakings in the investigated market are not open to change, fragile, or temporary. This was amply illustrated by the case of Internet Explorer, which lost a significant amount of market share in the "web browser" market after the entry of Mozilla Firefox and Google Chrome to the market, even though it had maintained a highly strong position in the relevant market for more than 10 years. As explicitly stated by the US Court of Appeals for the District of Columbia Circuit in the *Microsoft* case, "rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product enhancements."[52] To that end, it should be noted that the fragility and temporary nature of market shares in dynamic markets do not, in fact, refer to the *durability* or *steadiness* of the market shares achieved by the undertakings operating in such markets. Rather, market shares are considered to be 'fragile' and 'temporary' in conceptual terms, as a result of the particular structural characteristics of dynamic markets, given that even the market share of an undertaking enjoying a monopolistic position that has been maintained for a long time could still be quickly and easily eradicated by the development of an innovative or ground-breaking product.

Furthermore, according to the Comments of the American Bar Association's Sections of Antitrust Law and International Law on the European Commission's Public Inception Impact Assessment on

---

[51] JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW OF THE ISRAEL ANTITRUST CONSULTATION ON COMPETITION ISSUES IN THE DIGITAL ECONOMY (October 31, 2018), available at https://www.americanbar.org/content/dam/aba/administrative /antitrust_law/ comments-2018/salsil_comments%20_israel-consultation-on-digital-markets-final-10312018.pdf (last accessed on January 7, 2019).

[52] US V. MICROSOFT, 253 F.3d 35, 49 (D.C. Cir. 2001).

Fairness in Platform-to-Business Relations, published on January 9, 2018, since competition among digital platforms is essentially based on offering the best experience addressing the needs/desires of end-consumers by differentiating the core strengths of the platform and developing complementary product or service specifications that may overlap with the core services of other platforms, the absence of "closely symmetric competitors" does not necessarily indicate the lack of competitive pressure or the development of new services.[53] Therefore, the unilateral actions taken by undertakings with high market shares (such as charging higher prices for their products or utilizing the competitive advantages provided by their market positions) in digital markets should not automatically be considered as anticompetitive behaviours (*i.e.*, monopoly leveraging).[54]

Digital platforms that are financially supported by international companies can afford to invest continuously in technological research and to develop more advanced products, and they can attain a powerful position in their markets in this way. However, it would still be inaccurate and misleading to interpret this result as assurance of long-term dominance or natural monopoly. Considering the heterogeneity of end-users in dynamic markets and taking into account the low barriers to entry (except for the existence of network effects which constitute a barrier to entry), an undertaking operating a digital platform needs to remain vigilant at all times to assure the fair returns (*i.e.*, financial rewards) expected from the provision of its products/services, even in the presence of competing imitations or copies of the products or services it provides.[55]

Although the focus of our discussion in this article does not concern the difficulties associated with defining a relevant product market within the scope of dynamic markets, it is necessary to point out

[53] COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION'S PUBLIC INCEPTION IMPACT ASSESSMENT ON FAIRNESS IN PLATFORM-TO-BUSINESS RELATIONS, at 6 (2018), available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20180109.authcheckdam.pdf (last accessed on January 7, 2019).

[54] *Ibid*.

[55] *Ibid*.

that market shares also provide a poor criterion for assessing the market power of undertakings active in dynamic markets, since establishing precise market boundaries is more difficult and problematic in such markets, and therefore, it would be very challenging to determine under which relevant product market definition the market shares of such undertakings could be accurately calculated. In this respect, narrow market definitions, which are formulated by ignoring the potential future development and evolution of the concerned market and by solely taking into account the functional substitutes for the product in question *at the precise moment of assessment*, might lead to erroneous results regarding the market power of the undertakings, as consumers act fluidly in such markets and they can quickly shift their attention and interest to potential competitors featuring innovative products.[56] However, this does not necessarily mean that broad market definitions always provide better or more appropriate results either, given that the level of actual or potential product differentiation is significantly high in dynamic markets, and thus, consumers' attention and interest might be consciously directed to different products provided within the same relevant product market.[57] Therefore, in the absence of a common and reliable method for agreeing upon a relevant product market definition, relying on the market shares of undertakings for the assessment of dominant position in a dynamic market would not provide a safe harbour for an accurate analysis either.

Joseph Schumpeter has described dynamic competition as a "perennial gale of creative destruction," which "strikes not at the margins of the profits of the existing firms but at their foundations and their very lives."[58] In this context, it is merely the structural characteristics of dynamic markets that are sufficient to encourage undertakings to invest in technological R&D activities in order to maintain their market presence and guard against the threat of potential new market entrants and the release of new (and possibly 'leapfrog')

---

[56] David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, University of Chicago, Coase-Sandor Institute for Law and Economics Research Paper No. 753 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746095 (last accessed on January 8, 2019).

[57] *Ibid*.

[58] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (1984).

products. In this respect, even if an undertaking possesses a high market share that could indicate a dominant position, such a market position would not enable or allow that undertaking to act independently from its actual or potential competitors and its consumers, given that (i) the fundamental competition in dynamic markets does not occur in terms of traditional market parameters (such as price), and (ii) the market itself forces existing undertakings (including the dominant ones) to continuously innovate and improve their products and services, due to the disruptive effects of innovation.[59]

At this point, the assessment on whether an undertaking enjoys a position of dominance in a dynamic market boils down to the question of whether the relevant product market is *contestable*, as new economy markets often are.[60] To that end, a dominance test that depends primarily on the market share of the undertakings conducting commercial activities in a dynamic market could lead to inaccurate results regarding the actual market positions of the undertakings in question. Although competition enforcement authorities generally acknowledge the necessity for a case-by-case analysis in terms of the dynamic structure of the relevant market and the short-lived nature and fleeting durability of market shares in such markets, there is still considerable sensitivity and vigilance on the part of regulatory authorities toward high market shares, even in the context of investigations concerning abuse of dominance allegations in dynamic markets. However, as explained in detail above, if an undertaking releases a revolutionary product into a dynamic market, it could easily and swiftly gain a position of monopolistic power in that market, since the introduction of such an innovative product would, in fact, create a new market by drastically changing the structure of the market, if the market in question possesses dynamic characteristics.

V. A New Approach to the Determination of Dominance in Dynamic Markets

Having established that an examination of market shares does not provide a reliable indicator of dominant position in dynamic markets and

[59] Hlina, *supra* note 18, at 140.

[60] Ahlborn et al., *supra* note 1.

that the undertakings active in such markets actually compete through innovation, technological development and quality, the prudent and proper approach to dominance assessments would take the following factors into account: (i) the growth potential of the relevant market, (ii) whether there are high barriers to entry, including negative network effects, and, most importantly, (iii) potential competition in the relevant market[61] (*i.e.*, market contestability).

In recent years, competition enforcement authorities have started to question the reliability of market shares as an assessment tool, as they have faced various difficulties related to the definition of relevant product markets and the assessment of dominant position, in light of the fact that the traditional methods are not useful or suitable for revealing the competitive landscape of dynamic markets or reflecting the commercial structure of these markets. For instance, in its *Facebook/WhatsApp* decision (concerning Facebook's acquisition of sole control over WhatsApp, Inc.), the Commission explicitly stated that, although market shares and concentration levels provide useful indications of the market structure and of the competitive significance of both the transaction parties and their competitors, "high market shares are not necessarily indicative of market power and lasting damage to competition in the consumer communications sector," since "the consumer communications sector is a recent and fast-growing sector which is characterized by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral."[62] To that end, even though the Commission evaluated the market share data pertaining to the transaction parties, due to the reliability concerns relating to the use of market shares for making dominance assessments in such dynamic contexts, the core elements of the Commission's assessment regarding whether the transaction could lead to the creation or strengthening of a dominant position essentially focused on the following parameters: (i) closeness of competition, (ii) the ability of consumers to switch providers, (iii) general barriers to entry and expansion, and (iv) network effects. Furthermore, in its *Microsoft/Skype*

[61] Daniel Mandrescu, *Applying EU Competition Law to Online Platforms: The Road Ahead – Part 2*, 38 EUROPEAN COMPETITION LAW REVIEW 413 (2017).

[62] Case No COMP/M.7217 – FACEBOOK/WHATSAPP, paras. 95-99.

decision,[63] the Commission asserted that, market shares are not the best proxy for evaluating the market power of service/product providers in dynamic markets, as the market shares of these undertakings can change quickly, and thus, market shares only provide a preliminary indication of the competitive landscape of these dynamic markets.

Furthermore, the German Competition Authority's (**"*Bundeskartellamt*"** or "Federal Cartel Office") Paper on Platform Market Power explicitly indicates that, under the influence of strong innovation dynamics, digital markets are prone to high levels of concentration and that the market shares of undertakings active in digital markets should not absolutely (or always) be treated as the most relevant factor when assessing market power and dominance in such markets.[64] In this respect, the Bundeskartellamt also recognized the requirement and necessity of a case-by-case analysis, which also takes into account various factors that are specific to dynamic markets, such as: (i) direct and/or indirect network effects, (ii) economies of scale, (iii) prevailing type of use (*e.g.*, single-homing or multi-homing connections) and the degree of differentiation in the relevant market, (iv) access to data,[65] and (v) innovation potential of digital markets. Furthermore, the Bundeskartellamt also suggested that the criteria according to which market power is determined should be clarified by law.

Having said that, it can be reasonably argued that the current competition law tools are indeed adequate and suitable for evaluating dynamic markets. Instead of expecting or awaiting legislators to clarify the criteria to be used for the assessment of dominant position in the context of dynamic markets, it would be more effective to develop a new approach toward the indicators of market power within dynamic markets, which would allow competition law enforcers to provide a comprehensive analysis reflecting the realities of the dynamic

[63] Case No COMP/M.6281 – MICROSOFT/SKYPE, paras. 78 and 121.

[64] BUNDESKARTELLAMT'S PAPER ON PLATFORM MARKET POWER – RESULTS AND RECOMMENDATIONS 2-3 (2018), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung_Englisch.pdf (last accessed on January 7, 2019).

[65] According to the Paper on Platform Market Power, control over data is not *per se* an indication of market power. However, it may have a significant role in the overall assessment of all circumstances.

competitive process in the relevant market, rather than taking a 'snapshot' of the instantaneous and transitory appearance of the market positions of the undertakings *at the precise moment of assessment*. In other words, competition enforcement authorities should adopt a fresh and innovative approach to dominance assessments, which would take into account not only how the market looks at the precise moment of investigation, but also how it will develop and transform in the future.[66]

In this respect, competition authorities should consider the fact that the rapid pace of technological change and development could alter dynamic markets quite radically and swiftly, and thus, realize that market shares are always fragile and temporary in dynamic markets. Therefore, unnecessary vigilance, excessive sensitivity and inappropriate interventions on the part of competition authorities in such markets would cause severe harm to effective *competition through innovation*, and result in the restriction of efficiency gains. This is because the specific characteristics of dynamic markets *per se* create deviations from 'perfect competition' (as the term is understood in the context of traditional/static markets) and such dynamic markets are expected to self-correct in the most appropriate and efficient manner.[67] To that end, even in cases where an undertaking possesses a significantly high market share (*i.e.*, over 40-45%) in a relevant product market with dynamic characteristics, competition authorities should take a skeptical approach toward presuming that the traditional outcome of high market shares (*i.e.*, dominance) will transpire in that market as well, by taking into account the potential competition and growth potential of such dynamic markets, along with the anticipated entry barriers.

To that end, from a neo-structuralist perspective,[68] there are three main market characteristics which suggest the likelihood of dominance

[66] Graham and Smith, *supra* note 46.

[67] *Id.*, at 4.

[68] Neo-structuralism is a modern version of the structuralist current of thought which is articulated around the following themes: power relations between center and periphery, the criticism to comparative advantage and the prominence of the external constraint, the dual character of economic development at different levels, a vision of development as structural change, the need for an adequate regional and international insertion, the necessity of a development guided by the government especially in infrastructure and productive development. (Esteban Pérez Caldentey, Miguel Torres and Romain Zivy – *Interview on neo-structuralism*, 2015)

in dynamic markets, especially those arising with the use of the internet: (i) significant economies of scale, (ii) 'lock-in' situations, and (iii) network effects creating entry barriers.[69] In terms of many products supplied through dynamic markets(such as computer software products), even if it is critically expensive to devise, develop and produce such products, it would only require a low-cost investment to reproduce them, as the marginal costs of production are extremely low (almost at zero level), which would lead to a situation in which a dominant undertaking would be able to capture most of the relevant market. If such a situation occurs, it will be supported by (i) *network effects*, which are subject to the conditions that (a) sufficient consumer demand exists for the products or services obtained via the dominant undertaking's network and (b) demand for the products/services offered by other networks are not compatible or overlapping with the ones offered by the dominant undertaking's network, and (ii) *consumer lock-in*, which occurs when the cost of switching to a new product is higher for the end-users than the marginal benefits to be gained by the use of the new product.[70]

On the other hand, neo-Schumpeterians[71] basically argue that the competitive advantages gained by undertakings active in dynamic markets are temporary and that these markets are contestable.[72] As a result, even the creation of successful networks and consumers' lock-ins are always temporary, due to the dynamism of such markets, and thus,

---

[69] Giorgio Monti, *Article 82 EC and New Economy Markets*, 18-19 (2004).

[70] *Ibid*.

[71] Joseph Schumpeter is known for his theory of economic development which is described as "creative destruction." Schumpeter's theory of dynamic economic growth assigns paramount role to the entrepreneur and innovations that the entrepreneur brings during the process of development. According to Schumpeter, the process of production is marked by a combination of material and immaterial productive forces. (http://www.economicsdiscussion.net/economic-development /schumpeters-theory-economic-development/schumpeters-theory-of-economic-development-economics/30174, last access date: January 14, 2019). Neo-Schumpeterian economics however, is concerning "*dynamic processes causing qualitative transformation of economies basically driven by the introduction of novelties in their various and multifaceted forms"* (Horst Hanusch & Andreas Pyka, "*Principles of Neo-Schumpeterian Economics*," Discussion Paper Series 278, Universitaet Augsburg, Institute for Economics (2005)).

[72] Michael A. Cusumano & David B. Yoffie, *Competing on Internet Time: Lessons from Netscape and Its Battle with Microsoft*, FREE PRESS (1998).

these dynamic characteristics of new economy markets can cancel out and negate the ephemeral dominance of any given undertaking.[73] In brief, according to the neo-Schumpeterians, "periodic dominance by one firm or a few firms may be symptomatic of healthy, innovation-based competition and may be subject to displacement, even when goods with network externalities are at issue."[74] To that end, it can be concluded that the neo-Schumpeterian approach is based on the belief that, in the assessment of dominance, competition enforcement authorities should rely on the self-corrective nature of dominance in new economy markets.[75]

So far, although competition enforcement authorities seem to strike a balance between the abovementioned economic approaches, the neo-structuralist approach appears to be the most suitable option for addressing the traditional competition law concerns regarding dynamic markets, since neo-structuralism leaves sufficient room to argue for the existence of a dominant position under certain conditions and also allows interventions by competition authorities. Having said that, although neo-structuralism analyzes and investigates the negative effects of market failures in dynamic markets, it does not sufficiently evaluate the positive impact of the dynamism of such markets. In other words, neo-structuralism appears to ignore the fact that, in certain cases, the existence of potential competition could compensate for and ameliorate the negative impact of network externalities, whereas, the undertaking in a dominant position in dynamic markets is, in any case, under permanent threat of potential competition. In this respect, we believe that competition enforcement authorities should attribute more importance to the existence of potential competition and to the growth potential of dynamic markets in their assessments of dominance.

---

[73] Monti G., *supra* note 68.

[74] Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 THE UNIVERSITY OF CHICAGO LAW REVIEW 12 (2001), available at https://chicagounbound.uchicago.edu/uclrev/vol68/iss1/1/ (last accessed on January 8, 2019).

[75] David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, THE ANTITRUST BULLETIN 801 (1998).

VI. Conclusion

Technological developments in the digital era reshape market structures, along with economic theories, and accordingly transform competition law understanding as well. In this respect, given that dynamic (or new economy) markets possess considerably different characteristics than traditional markets, the competitive process is affected by these market characteristics and occurs according to different parameters as well.

Until the rise of new economy markets, undertakings that were active in static markets were competing through traditional competition parameters, such as price. However, in dynamic markets, these undertakings compete primarily through innovation, the quality of their products/services, and performance within the dynamic framework of the market. In this respect, the market powers of such undertakings are always open to change, fragile and temporary, as dynamic markets change rapidly and continuously. Accordingly, while assessing the market powers of undertakings that are active in dynamic markets, market shares that are calculated by employing traditional tests do not provide reliable or accurate outcomes for the determination of dominant position. To that end, when assessing dominance in the context of dynamic markets, competition authorities should scrutinize whether there are: (i) significant *economies of scale*, (ii) *lock-in* situations, and (iii) *network effects* creating entry barriers in the relevant market, along with (iv) potential competition in the market, and finally (v) its growth potential.

Bibliography

Literature

Christian Ahlborn, David S. Evans, and A. Jorge Padilla, *Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?*, 22 EUROPEAN COMPETITION LAW REVIEW 159 (2001).

BUNDESKARTELLAMT, PAPER ON PLATFORM MARKET POWER – RESULTS AND RECOMMENDATIONS 2-3 (2018) https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung_Englisch.pdf

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION'S PUBLIC INCEPTION IMPACT ASSESSMENT ON FAIRNESS IN PLATFORM-TO-BUSINESS RELATIONS 6 (2018) https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20180109.authcheckdam.pdf

Ali İ. Çağlayan, *Rekabet Hukukunda Pazar Gücünün Önemi ve Ölçülmesi*, REKABET KURUMU UZMANLIK TEZLERİ 48 (2003).

Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, UNIVERSITY OF CAMBRIDGE - ANTITRUST LAW JOURNAL 9 (2018).

Michael A. Cusumano & David B. Yoffie, *Competing on Internet Time: Lessons from Netscape and Its Battle with Microsoft*, FREE PRESS (1998).

Jerry Ellig, *Dynamic Competition, Online Platforms, and Regulatory Policy*, STATEMENT SUBMITTED TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION, EU INTERNAL MARKET SUB-COMMITTEE 4 (2015).

David S Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, University of Chicago, Coase-Sandor Institute for Law and Economics Research Paper No. 753 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746095

Gönenç Gürkaynak, Merve Bakırcı, Sevgi Mutafoğlu, *Excessive Pricing Enforcement in Dynamic Sectors: Should You Stop Reading Now?*, THE ACADEMIC GIFT BOOK OF ELIG-ATTORNEYS-AT-LAW IN HONOUR OF THE 20TH ANNIVERSARY OF COMPETITION LAW PRACTICE IN TURKEY, at 143 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3174409

Evelin Hlina, *Dominant Undertakings in the Digital Era: A Call for Evolution of the Competition Policy Towards Article 102 TFEU?*, ICC Global Antitrust Review, Issue 9, at 121 (2016)

http://www.icc.qmul.ac.uk/media/icc/gar/gar2016/4.Evelin-Hlina-Essay-GAR-2016.pdf

Kwangkug Kim, *Competition Law in the New Economy Industries: Is the Current Competition Analysis Adequate to Protect Consumers in the New Economy Industries* (Master's Thesis), at 19 (2012) https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:182635&datastreamId=FULL-TEXT.PDF

Daniel Mandrescu, *Applying EU Competition Law to Online Platforms: The Road Ahead – Part 2*, 38 EUROPEAN COMPETITION LAW REVIEW 413 (2017).

Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, THE ANTITRUST BULLETIN VOL: XLIII, NO: 3-4/FALL-WINTER, at 656 (1998).

Giorgio Monti, *Article 82 EC and New Economy Markets*, 18–19.

Miguel Rato & Nicolas Petit, *Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?*, 9 EUROPEAN COMPETITION JOURNAL 3–6, at 4 (2013).

Howard A. Shelanski, *Information, Innovation and Competition Policy for the Internet*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 161, 1663, at 1685 (2013) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1025&context=penn_law_review

Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 THE UNIVERSITY OF CHICAGO LAW REVIEW 12 (2001) https://chicagounbound.uchicago.edu/uclrev/vol68/iss1/1/

Piet Jan Slot & Angus Johnston, *An Introduction to Competition Law*, Hart Publishing, at 112 (2006)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=884309

JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (1984).

David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, THE ANTITRUST BULLETIN 801 (1998).

Horst Hanusch & Andreas Pyka, *Principles of Neo-Schumpeterian Economics*, DISCUSSION PAPER SERIES 278, Universitaet Augsburg, Institute for Economics (2005)

Esteban Pérez Caldentey, Miguel Torres and Romain Zivy – *Interview on neo-structuralism*, WORLD ECONOMICS ASSOCIATION NEWSLETTER 5(2), p12, (2015) http://www.worldeconomicsassociation.org/files/Issue5-2.pdf

Hilal Yılmaz, *Yenilik (İnovasyon), Yeni Ekonomi ve Rekabet*, REKABET KURUMU UZMANLIK TEZLERİ 22 (2003).

Cases

The European Commission's Case No COMP/M.7217 – *FACEBOOK/WHATSAPP* (3 October 2014).

The European Commission's Case No COMP/M.6281 – *MICROSOFT/SKYPE* (7 October 2011).

Case C-62/86, *Akzo Chemie BV v. The Commission* (3 July 1991).

Case 85/76, *Hoffmann-La Roche & Co AG v. The Commission* (13 February 1979).

Case 2/76, *United Brands v. The Commission* (14 February 1978).

Turkish Competition Board's *Karbogaz* decision (23.08.2012; 02-49/634-257).

Turkish Competition Board's *FritoLay* decision (04.05.2004; 04-32/377-95).

Turkish Competition Board's *Pegasus* decision (14.06.2012; 12-33/940-295).

Turkish Competition Board's *Türk Telekom A.Ş.* decision (08.03.2012; 12-10/328-98).

Turkish Competition Board's *Anadolu Cam* decision (01.12.2004; 04-76/1086-271).

Turkish Competition Board's *Warner Bros* decision (24.03.2005; 05-18/224-66).

Turkish Competition Board's *Mediamarkt* decision (12.05.2010; 10-36/575-205).

Turkish Competition Board's *Pepsi Cola* decision (05.08.2010; 10-52/956-335).

Turkish Competition Board's *Egetek* decision (30.09.2010; 10-62/1286-487).

Turkish Competition Board's *Mey İçki* decision (25.10.2017; 17-34/537-228).

Turkish Competition Board's *Yonga Levha* decision (13.10.2016; 16-33/571-248).

Turkish Competition Board's *Sanofi Aventis* decision (20.04.2009; 09-16/374-88).

Turkish Competition Board's *Demotion* decision (16.11.2016; 16-39/638-284).

Legislation

Law No. 4054 on the Protection of Competition [Published in the Official Gazette No. 22140, dated 13 December 1994].

Consolidated Version of the Treaty on the Functioning of the European Union (2012), OJ C 326.

Turkish Competition Authority — Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings.

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009), C 45/02.

An Analysis on the Television Broadcasting Sector – The Impact of OTT Services: Are They Complementary or Substitutable?

Gönenç Gürkaynak, Esq.[*]

Berfu Akgün[**]

Zeynep Ayata Aydoğan[***]

I. Introduction

Many industries have undergone or are currently undergoing an inevitable digital transformation process due to various technological developments in the past few decades and the ensuing convergence of different services. The TV broadcasting sector is among the markets that are most susceptible to change in the face of revolutionary technological developments. Every day, TV consumers are gaining access to a variety of new services, which, in turn, continuously alters their consumption habits and the demand structure in the broadcast market. For instance, just a few years ago, consumers were only able to access TV content on a specific channel, at a certain time; whereas today, almost all content can be accessed through any device with an internet connection at any desired time, which clearly demonstrates that the consumers' usage habits concerning media and communication services are changing rapidly due to convergence.[1]

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Berfu Akgün is an associate at ELIG Gürkaynak Attorneys-at-Law.

[***] Zeynep Ayata Aydoğan is a trainee lawyer at ELIG Gürkaynak Attorneys-at-Law.

[1] Convergence is defined as "*the process by which communications networks and services, which were previously considered separate, are being transformed such that: (i) different network platforms carry a similar range of voice, audiovisual and data transmission services, (ii) different consumer appliances receive a similar range of services; and (iii) new services are being created.*" See OECD, *The Implications of Convergence for Regulation of Electronic Communications*, 5 DSTI/ICCP/TISP, (2004). https://www.oecd-ilibrary.org/docserver/2326323771

The emergence of new technologies inescapably alters the competitive environment in the TV broadcasting industry, since such development enables the entrance of new players to the market and brings forth innovative broadcasting methods, business models and content development techniques, which, in turn, provide significant competitive advantages to the respective undertakings. Since this transformation is happening very rapidly, defining the exact borders of the relevant product markets in the broadcasting industry has become a significant challenge for national competition authorities, as the market definition analysis conducted at a certain time for the purposes of a specific assessment could become outdated and incompatible with the market reality within a short period of time. Therefore, in order to properly define the relevant market, competition authorities must have a clear and up-to-date understanding of demand and supply-side substitutions along the entire value chain, all the way from content production to distribution to the end users; also taking into account different factors that are specifically applicable to the markets for audiovisual products and services.[2]

Defining the borders of the "pay-TV market" in a broad sense, and determining the services and players that should be included within this market definition has been one of the focal points of concern for national competition authorities in terms of the competition law analyses conducted in the TV broadcasting sector. The emergence of new technologies, such as over-the-top ("***OTT***") services,[3] has raised the question of whether these new technologies could be deemed "substitutable" with other means of traditional broadcasting, and therefore, whether they should be included in the same relevant product market definition with other methods utilized for the transmission of content to consumers. Therefore, national competition authorities have

63.pdf?expires=1549373722&id=id&accname=guest&checksum=27D89366D9B4E17120BC03A2791E2E37.

[2] OECD, *Competition Issues in Television and Broadcasting,* 6 OECD Policy Roundtables (2013), http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf.

[3] This essentially refers to the delivery of video bit-streams over broadband transmission networks rather than via traditional cable, satellite and other conventional broadcast means, in addition to other services typically provided via the internet. *See* OECD, *supra* note 2, at 5-6.

begun to question the impact of OTT services in the pay-TV sector, which is viewed by some sources as the digital turning point for the TV broadcasting industry,[4] "*likely to lead to the reinvention of the way in which we experience television.*"[5]

In light of the distinct approaches taken and perspectives displayed by different competition authorities, as well as the dynamics of the TV broadcasting sector and the consumers' changing TV consumption habits, this article aims to explore the relationship between OTT services and the pay-TV sector, and seeks to demonstrate that they have indeed become substitutable with other traditional TV broadcasting methods.

II. A General Outlook on the TV Broadcasting Sector

During the last quarter of the 20th century, the TV broadcasting sector experienced rapid growth and significant developments, which constituted the starting point of the technological evolution that has completely altered the concept of traditional broadcasting. This is essentially due to the shift away from the use of analogue technology to the digital model, which has allowed for the transmission of unlimited amounts of information to a mass audience through Internet Protocol ("***IP***") technologies, rather than through television signals that are transmitted via analogue antennas. The digitalization of audio and voice has enabled the transmission of such content via various technological mediums (*e.g.*, cable, satellite and terrestrial broadcasting), the combination of TV and computer services (*i.e.*, multimedia services), as well as through certain information and communications means (*e.g.*, IPTV, internet TV, mobile TV, among others).[6] Therefore, the shift to digital broadcasting constitutes a pioneering breakthrough and a significant milestone as a harbinger of media convergence.

Today, content can be transmitted to TV audiences through assorted diverse methods, as explained below:

---

[4] PWC Entertainment & Media Outlook for the Netherlands, *Outlook Special - Over-the-top Television*, 3 (2015), https://www.pwc.nl/nl/assets/documents/pwc-outlook-special-over-the-top-television.pdf.

[5] *See* OECD, *supra* note 2, at 6.

[6] Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence*, para 4 (2017).

(i) Analogue terrestrial broadcasting: Analogue terrestrial broadcasting is the method by which image and sound that originates from a traditional terrestrial source is conveyed to the receptors of the viewers through electromagnetic waves.[7]

(ii) Digital terrestrial broadcasting: This method involves the transmission of TV content in a digital format from terrestrial TV stations to viewers through the use of radio signals. The transmitters are capable of receiving multiple channels on a single frequency. Thus, digital terrestrial broadcasting differs significantly from analogue terrestrial broadcasting, since it enables the viewers to access a variety of channels. It also provides enhanced picture and sound quality compared to the analogue transmission method.[8] Digital terrestrial broadcasting can be accessed via set-top boxes.[9]

(iii) Satellite broadcasting: Satellite broadcasting is based on the transmission of television broadcasts to the viewers' receivers through satellites orbiting the earth, which has the potential and capability of providing a wide range of channels and services to consumers. The transmitted signals are then received by the consumers' satellite dishes and set-top boxes.[10]

(iv) Cable television: This method conveys TV content to consumers through a closed and typically fiber-optic cable system. The cable system is usually managed by the service provider.[11]

(v) Broadband internet infrastructure: The transmission of content via broadband internet infrastructure may be further categorized into (i) Internet Protocol TV ("***IPTV***"), and (ii) Over-the-Top TV/Video ("***OTT TV/Video***") services, as discussed below:

i) Internet Protocol TV: Internet Protocol TV can be defined as the transmission of visual/audio/text/graphics/data over IP-based

---

7 Turkish Competition Authority, *supra* note 6, at para 7.

8 Plum Consulting, *A Report for the GSMA Benefits of Digital Broadcasting*, 1 (2014), https://www.gsma.com/spectrum/wp-content/uploads/2014/02/Benefits-of-Digital-Broadcasting.-Plum-Consulting.-Jan-2014.pdf.

9 OECD, *supra* note 2, at 14. Also, "[a] set-top box is a hardware device that allows a digital signal to be received, decoded and displayed on a television." *See* Set-Top Box (STB), https://www.techopedia.com/definition/2284/set-top-box-stb (last visited Dec. 3, 2018).

10 OECD, *supra* note 2, at 14-15.

11 *Ibid.*

networks, which provides a guaranteed service quality. The delivery of the content is carried out in a closed network and managed by an IPTV operator, which maintains a TV-level quality of service for its customers.[12] Therefore, in simple terms, IPTV involves the transmission of content via internet technologies by using the broadband infrastructure with a service quality guarantee.[13]

IPTV infrastructure enables and delivers numerous services, such as linear TV,[14] video-on-demand (**"*VoD*"**), TV broadcasting services based on subscription payments (**"*pay-TV*"**), personal video recorders (**"*PVR*"**), pause-live TV (**"*PLTV*"**), catch-up TV, pay-per-view (**"*PPV*"**), electronic program guides (**"*EPG*"**), as well as various interactive services and applications.[15]

ii) Over-the-Top TV: OTT services are defined in the Report by BEREC (which stands for "The Body of European Regulators for Electronic Communications") as "*content, a service or an application that is provided to the end user over the public Internet*." This means that the internet service provider does not have any involvement or control over the distribution of the content, which is provided solely by the OTT service provider.[16]

Table 1: Differences Between IPTV and OTT Services[17]

IPTV	OTT
(i) Network scalability, (ii) end-user applications, and (iii)	Does not require multiple system operators for controlling and

[12] DIFFERENCE BETWEEN IPTV AND OTT, https://iptvmiddleware.com/iptv-ott/difference-between-iptv-and-ott/ (last visited Dec. 5, 2018).

[13] Turkish Competition Authority, *supra* note 6, at para 9.

[14] Live/linear TV is the type of TV broadcast that provides content to audiences that can only be viewed at the time of the broadcast (as in "traditional TV" services). In contrast, non-linear TV offers on-demand services, which enable the viewers to watch content at their convenience and time of choosing. *See* Kantar Media, *Linear vs non-linear viewing: A qualitative investigation exploring viewers' behaviour and attitudes towards using different TV platforms and services providers*, 5 (2016), https://www.ofcom.org.uk/__data/assets/pdf_file/0029/68816/km_report.pdf.

[15] Turkish Competition Authority, *supra* note 6, at para 9.

[16] The Body of European Regulators for Electronic Communications (BEREC), *Report on OTT Services*, 14 (2016), https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services.

[17] GET THIS STRAIGHT: OTT vs IPTV, https://www.muvi.com/blogs/get-this-straight-ott-vs-iptv.html (last visited Dec. 24, 2018).

infrastructure are the three most important areas of concentration.	distributing content.
Requires [three] major components, namely (i) private [and] IP-based connected TV, (ii) a content headend (a master facility for receiving, processing and distributing IPTV signals), and (iii) a set-top box.	Content is delivered to any connected device using an unmanaged, public internet network. No external equipment (like a set-top box) is required.
Content is delivered via an internet service provider's own infrastructure, which may resemble existing digital cable-TV setups; however, they are different from digital cable TV in the sense that IPTV signals are transmitted using a different protocol (*i.e.*, format) and a different network.	It uses no dedicated networks; infrastructure is made available [and] provided by an operator.
IPTV service providers usually work with TV channels and primarily aim to distribute channel content with options for catch-up TV (*i.e.*, record/replay), [and] time-shifted TV. IPTV service providers may or may not offer video-on-demand content.	OTT service providers usually work with distributors/production houses and primarily aim to acquire and deliver on-demand content, whilst [also] providing options [for] live streaming of TV channels.
IPTV requires the device to be connected via a broadband, cable-based connection.	OTT can be viewed on any device [that has a] data or Wi-Fi [connection] and does not [require] broadband-based connectivity.
IPTV services typically provide Electronic Program Guide ("***EPG***") [services], which is an on-screen guide of scheduled broadcast television programs.	OTT service providers typically provide a catalogue of viewable [and available] content for viewers to pick and choose from.

III. The Concept of Convergence and the Era of New Media

The transmission methods listed above have diversified and proliferated over the years through the digitalization process, due to the increasingly intertwined nature of TV broadcasting and internet infrastructure. This observation brings us to the concept of convergence. According to the OECD, "*Convergence refers to the process by which communications networks and services, which were previously considered separate, are being transformed such that: (i) different network platforms carry a similar range of voice, audiovisual and data transmission services, (ii) different consumer appliances receive a similar range of services; and (iii) new services are being created.*"[18]

Convergence arises at different levels of the technological ecosystem with respect to the media broadcast processes (*i.e.*, covering a wide spectrum from the tools for the acquisition or production of content to the distribution, storage or display of the acquired content). As explained above, the radical transformation of distribution technologies began with the emergence of digital distribution broadcasting services back in the 1990s. Subsequently, the appearance of other digital wireless and wireline technologies (*e.g.*, Wi-Fi and optical fiber, respectively) have led to a dramatic evolution of distribution systems for audio and video communications and content.[19]

In terms of the TV broadcasting sector, the concept of convergence essentially refers to the advanced union of traditional broadcasting methods with the internet infrastructure, which, in turn, offers the consumers diverse means of accessing and viewing TV content. These methods include set-top boxes with additional internet connections, services provided "over-the-top," and other audiovisual services provided via various devices (*i.e.*, computers, smartphones and other mobile devices). For instance, through the convergence of several different services, consumers may be able to utilize various technologies in order to obtain more information about the content they are watching,

---

[18] OECD, *supra note*, at 5.

[19] Pavlik, John V., *Understanding Convergence and Digital Broadcasting Technologies for the Twenty-First Century*, 139 NHK Broadcasting Studies No: 4 (2005), https://www.nhk.or.jp/bunken/english/reports/pdf/05_no4_08.pdf.

which is what happens when they use their smartphones or similar devices while watching TV in order to be somehow more involved with the show or to interact with others who are also viewing the same content at the same time.[20]

As mentioned above, the merger of traditional broadcasting services and the internet has diversified the range of distribution technologies that are employed to transmit content to the consumers, which has significantly altered the demand structure in the TV broadcasting sector. Upon the widespread availability and adoption of broadband access, consumers have become increasingly more inclined and grown used to being able to watch the content they choose "anywhere," "at any time," and "through any available device,"[21] rather than being dependent on and tied to the broadcast schedules of the content providers. The convergence process outlined above marks the beginning of an innovative era in broadcasting, known as "*the new media*." The main features of this era include: (i) reciprocal interactions between consumers and content providers, (ii) synchronization, (iii) individualization, and (iv) enabling viewers to take control of the broadcast stream, rather than entrusting this power solely to the service providers.[22]

The specific characteristics of this sector, as explained above, require national competition authorities to constantly review and reevaluate the relevant market definitions that have been adopted in the TV broadcasting sector in recent years, since the fast-paced convergence phenomenon inevitably leads commentators to the conclusion that almost every network already can (or will soon be able to) carry any broadcast service.[23] In the past, different types of media (*i.e.*, TV, radio,

---

[20] *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, COM/2013/0231 (2013).

[21] Turkish Competition Authority, *supra* note 6, at para 25.

[22] Kırık, Ali Murat, *International Conference of New Media and Interactivity*, 476-479 Marmara University Faculty of Communications (2010), https://www.researchgate.net/profile/Ali_Murat_Kirik2/publication/328738745_Televizyon_Yayinciliginda_IP_Devrimi_IPTV/links/5be01a1f4585150b2b9f7329/Televizyon-Yayinciliginda-IP-Devrimi-IPTV.pdf

[23] *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, *supra* note 20.

internet) used to be evaluated under separate relevant markets; however, due to the convergence of different services and the sector players' opinions on the need to adopt broader market definitions, the lines between the relevant broadcast methods have increasingly blurred, entailing new regulatory approaches and leading national competition authorities to adopt more inclusive market definitions (*e.g.*, in the *CME/Balkan News Corporation and TV Europe* case in Bulgaria).[24]

IV. Defining the Relevant Markets in the TV Broadcasting Sector

As stated above, delineating the borders of the relevant product markets in the TV broadcasting sector has been described as a "*serious challenge*" for national competition authorities, due to the recent technological evolutions in the industry and the resulting dawn of the "convergence" phenomenon.[25] The TV broadcasting market is characterized by constant and unceasing technological developments, which inevitably presents the risk of quickly rendering all previous market definitions obsolete. The evaluation on the market definition necessitates an understanding of the products that are currently interchangeable with one another (at the exact moment in time when the evaluation is being made), initially from a demand-side and (where required) from a supply-side perspective. The SSNIP test,[26] which usually constitutes the starting point for market definition assessments, remains conceptually useful but not realistically applicable when it comes to defining the relevant product markets in the TV broadcasting sector.[27] This is because an accurate analysis necessitates the utilization of empirical tools that focus on the effects reflected on the consumer behavior, the prevailing prices by the supply of new and innovative

---

[24] *See* CME's acquisition of Balkan News Corporation and TV Europe, No. 385/08.04.2010, cited in OECD, *supra* note 2, at 6.

[25] OECD, *supra* note 2, at 6.

[26] The SSNIP test helps define the relevant product market by evaluating whether a "small but significant non-transitory increase in prices" would be profitable for a monopolist in the market in question. *See Guidelines on the Definition of the Relevant Market* (10.1.2008, 08-04/56-M), (2008).

[27] *Guidelines on the Definition of the Relevant Market*, *supra* note 6, at para 87.

services and the relative price variations,[28] as well as an assessment of the characteristics of the respective products or services.

Under most circumstances, the market definitions set forth on the basis of retroactive information and data will likely become invalid after a certain period of time in the markets for audiovisual services, which are subject to a fluctuating demand structure that is significantly sensitive towards new products and services. Therefore, it is prudent for national competition authorities to attribute particular importance and give more weight to forward-looking information and data that could provide valuable insights on future developments in this sector.[29]

Taking these factors into consideration, we observe that the conventional methods of market definition that are based on retrospective data do not seem to lead to accurate results when it comes to defining the relevant product markets in the TV broadcasting sector. This also includes the question of whether OTT services should be considered substitutable with other TV broadcasting methods and whether they should therefore be included in the same relevant product market. Having noted that the national competition authorities would be well-advised to adopt a forward-looking approach in terms of defining the relevant product market, the sections below explore the various approaches that have been adopted toward the pay-TV markets in the Turkish and EU jurisdictions.

V. Where Turkey Stands – The Competition Authority's Approach Toward the Impact of OTT TV/Video Services on the Relevant Product Market Definition

1. The Sector Inquiry Report for Television Broadcasting in the Context of Digitalization and Convergence

The Turkish Competition Authority conducts inquiries into sectors in which there are structural changes in the configuration of the market or ongoing bottlenecks or impediments arising from competition law concerns. The legal basis for these inquires is Article 20 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), which

[28] *Id.*, at para 89.

[29] *Id.*, at para 91.

provides that the Competition Authority has a duty "*to ensure the formation and development of markets for goods and services in a free and healthy competitive environment, and to observe the implementation of this Law,*" and Article 27(a) of the Law No. 4054, which states that the Turkish Competition Board has the power and duty to "*to carry out, upon application or on its own initiative, examinations, inquiries and investigations about the activities and legal transactions prohibited in this Act; to take the necessary measures for terminating infringements upon establishing that the provisions provided in this Act have been infringed, and to impose administrative fines on those responsible for such infringements.*"

In this context, on May 11, 2017, the Turkish Competition Authority published its report on the "Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence" ("***Sector Report***" or "***Report***").[30]

In order to assess the competitive structure of the TV broadcasting sector, the Turkish Competition Board has initiated the sector inquiry on October 10, 2013 ("***Sector Inquiry***"). During the course of the Sector Inquiry, the Competition Authority utilized the information obtained from market players and undertakings active in other neighboring industries, as well as relying on its own experience and expertise from previous cases related to the TV broadcasting industry. The 174-page Report includes the results of nearly four years of research and provides a thorough assessment of the market structure and the conduct of the players in this sector.

The competitive pressure exerted on traditional TV services (and especially pay-TV platforms) by OTT services constituted one of the focal points of the Sector Report. In this regard, the Competition Authority evaluated whether OTT services could be included in the same relevant product market as other traditional pay-TV platform services (*e.g.*, pay-TV platforms, IPTV service providers, cable or satellite broadcasters, etc.), and therefore, assessed whether traditional pay-TV platforms and OTT services could be deemed as substitutable with one another.

[30] Turkish Competition Authority, *supra* note 6.

1.1. The Effects of OTT TV/Video Services on Pay-TV Platform Services

The Sector Report states that, as a result of the increase in the utilization of fiber networks (which provide more broadband bandwidth) and the prevalence and widespread availability of online content and applications, traditional TV services (namely pay-TV, IPTV, cable and satellite subscriptions) are increasingly being exposed to the competitive pressure exerted by OTT TV/Video Services. The Sector Report also includes a comprehensive market study that clearly demonstrates the steady rise in the consumption rates of OTT services: the average consumption rate of OTT services was measured at only 2 hours per week in 2014 and is projected to rise up to 22 hours per week in 2022. The same study also reveals that the consumption of live/linear television, which was measured at 29 hours per week in 2014, is expected to experience a steady decrease in the future and projected to fall to 6.5 hours per week in 2022. The market study also forecasts that the consumption levels of OTT TV/Video Services and live/linear TV services will be equalized by 2019, before OTT TV/Video Services surpass live/linear TV in popularity and usage.[31]

Based on the abovementioned trends in consumer habits, the Sector Report then evaluates whether OTT TV/Video Services could be deemed substitutable with traditional TV services, and examines the factors that could potentially lead consumers toward "*cord-cutting behavior.*"[32] Thereby, the Sector Report takes the following factors into consideration:

1.1.1. The Supply of OTT TV/Video Services by Traditional Broadcast Service Providers

The Report initially focuses on a trend that is prevalent both on a global scale and in Turkey, which relates to the traditional TV

[31] Telkoder, *Internet Tabanlı Hizmetler (ITH/OTT) Elektronik Haberleşme Sektörüne Etkisi ve Düzenleme Önerileri*, 5 (2015), http://telkoder.org.tr/wp-content/uploads/2017/06/RAP2015-4.pdf .

[32] "Cord-cutting" is the term used to explain the process of unsubscribing from traditional cable, IPTV or satellite TV platforms and switching to OTT TV/Video Services. *See* Turkish Competition Authority, *supra* note 6, at para 287.

broadcasters' growing tendency and increasing efforts toward supplying their own OTT TV/Video Services (*i.e.*, "TV everywhere" strategy) alongside their traditional TV services, in order to contend with the competitive pressure exerted by OTT TV/Video Services. Examples of these services, as listed by the Report, are: TTNET through Tivibu GO, Superonline through Turkcell TV+, D-Smart through Blu TV, Digiturk through Digiturk Play and "*Digiturk Dilediğin Yerde*" ("Digiturk Wherever You Want It"), and Teledünya through Teledünya Web. The Report indicates that, by implementing this method, the pay-TV platform operators are increasing the value of their pay-TV platform services, while simultaneously coping with the competitive pressure exercised by independent/third-party OTT TV/Video Services. The Report also states that various channel operators have also begun to provide OTT TV/Video Services in Turkey, including Doğuş Yayın Group through Puhu TV and Doğan Group through Net D, and also mentions that Netflix, which is one of the most prominent global OTT TV/Video Service providers, has recently entered the Turkish market in 2016.

1.1.2. The Prevalence of Triple-Play Bundles

The Report asserts that one of the primary factors that is instrumental in terms of determining the level of substitutability between OTT TV/Video Services and traditional pay-TV platforms is the prevalence of "triple-play bundles." Triple-play bundles are packages that enable and facilitate telecommunications companies to enter content-delivery markets by offering voice, data and TV services, all packaged into a single bundle and provided as a combined service. The Report indicates that such bundles have evolved into a significant market-entry strategy and that they have created competitive advantages for incumbent market players on a global scale. The Report declares that certain studies have also shown that triple-play bundles may prevent or reduce "cord-cutting" behavior, and thereby increase the barriers to market entry in terms of OTT TV/Video Service providers.[33] This is due

[33] Baccarne, B., Evens, T. and Schuurman, D., *The Television Struggle: An Assessment of Over-the-Top Television Evolutions in a Cable Dominant Market*, Digiworld Economic Journal, 2013, cited in Turkish Competition Authority, *supra* note 6, at para 288.

to the fact that the customers who obtain and consume various telecommunications services in a single package would be less likely to switch to independent OTT TV/Video Service providers.

In light of the above factors, the Report concludes that the pay-TV platform operators in the Turkish market have formulated various strategies against the potential competitive pressure exerted by third-party/independent providers of OTT TV/Video Services, by way of (i) reinforcing their pay-TV platform services with OTT services and (ii) bolstering the attractiveness of their platforms to consumers by offering triple-play bundles.

1.1.3. Network Neutrality Discussions

The Report states that, unlike other jurisdictions (such as the US and the EU), Turkey has not yet set forth regulations that would ensure network neutrality, which refers to the principle that internet service providers should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites. The Report initially makes reference to the current situation in the United States, where the Federal Communications Commission ("**FCC**") has laid down explicit regulations that called for and provided equal access to the internet in 2015. According to the relevant regulations, broadband internet service is deemed to be a "public utility," which must mainly serve/pursue the common good, while internet service providers are deemed as "common carriers," who are tasked with ensuring that this goal is accomplished. In this scope, the regulations ensure that internet service providers (i) do not obstruct access to lawful content, applications, services, and non-hazardous devices, (ii) do not intentionally slow down the data flow sourced or originating from certain applications and services, and (iii) do not demand additional fees from content providers in order to provide faster traffic or to deliver prioritized network speed and quality.

The Report then makes reference to the network neutrality regulations in effect in the European Union, where the issue is not as prevalent or hotly debated as in the US, and where the discussions are not as long-standing either. In 2009, certain regulations were introduced in the EU in order to set forth minimum quality standards and to ensure that the end users were incentivized to access internet services. Later on, as concerns related to network neutrality increasingly came to the forefront and service providers and end users became subject to inconsistent rules and regulations in different Member States, EU regulators found it necessary to set forth unified regulations that would address the concerns in question. Therefore, in 2013, the European Council asked the EU Commission to prepare a set of regulations in order to unify and standardize the regulation of the telecommunications sector in Europe, which was then submitted to and approved by the European Parliament in 2014. The Commission's governance package also included regulations that would safeguard network neutrality, by ensuring that internet service providers would treat all internet traffic in a non-discriminatory manner, guaranteeing that they would not unlawfully obstruct or block internet service. The Report provides that the package was still being deliberated and had not yet been put into legal effect through a decision of the European Council.

In terms of the regulatory framework, the Report notes that there are no *ex-ante* regulations on network neutrality in Turkey. However, certain secondary, indirect regulations address this issue, as set forth by the Information and Communication Technologies Authority ("**ICTA**") within the Electronic Communications Law[34] and the Consumer Rights Regulation on the Electronic Communications Sector,[35] as well as the Regulation on Access and Interconnection, the Regulation on Service Quality and the Regulation on Tariffs, among others. The Report also indicates that, due to the fact that there have not been many concerns or disputes related to network neutrality in Turkey, the ICTA has seen it fit to implement a "*wait-and-see*" policy for the time being, rather than putting comprehensive *ex-ante* network neutrality regulations into effect.

Moreover, the Report declares that, due to the competitive concerns that might arise from issues related to network neutrality (such as the decrease in the value attributed by consumers to the network, decline in the supply of innovative products or the imposition of new transaction costs, rendering the internet service providers' own services

[34] *See* the Electronic Communications Law No. 5809 (2018).

[35] *See* the Consumer Rights Regulation on the Electronic Communications Sector 30224 (2017).

more valuable than their competitors', among others), the legislative underpinnings of network neutrality should be explicitly regulated by the relevant Turkish authorities as well. The Report notes that this legislative groundwork should be prepared by taking into account the regulations that are widely used or that will be applicable in the US and the EU, and by determining a set of objective criteria in order to identify deviations from the relevant principles.

1.1.4. The Level of Development in Broadband Internet Services

The Report indicates that one of the relevant factors with respect to the growth of OTT TV/Video Services and their degree of substitutability with pay-TV platform services relates to the level of development in broadband internet services. In the case of Turkey, the Report dwells upon the difficulties related to the infrastructure, capacity (*i.e.*, speed and quality), penetration ratios and level of competition within the broadband internet market; in this context, the Report also refers to certain comparative studies regarding internet connection speeds in Turkey, which are discussed below.

In this respect, the Report reveals that the global average broadband connection speed has been measured as 6.3 megabits per second ("***Mbps***"), while Turkey's average broadband connection speed, ranking 64th globally, was determined to be 7.2 Mbps. In terms of mobile connection speeds, the global average was calculated as 4.7 Mbps, while Turkey's average speed was measured as 6.5 Mbps.[36] The Report also notes that the minimum connection speed necessary for receiving OTT TV/Video Services was determined by several resources to be 2 Mbps, while a satisfactory OTT TV/Video experience that could compete with traditional TV services would require a download speed between 6-10 Mbps.[37]

[36] Akamai, *The State of the Internet Report* (2016), cited in Turkish Competition Authority, *supra* note 6, at para 309.

[37] Ganuza, J. J. and Viecens, M. F., *Over the Top Content: Implications and Best Response Strategies of Traditional Telecom Operators: Evidence from Latin America*, Proceedings of the CRP LATAM Conference (2014), cited in Turkish Competition Authority, *supra* note 6, at para 309.

The Report concludes that, even though the average speed of fixed and mobile internet connections in Turkey meet the minimum requirements for providing OTT TV/Video Services, broadband internet penetration ratios and average broadband connection speeds in Turkey still lag behind the comparable figures for developed countries.

The Report then emphasizes the positive effects of the prevalence and widespread use of unlimited internet access packages and the abolishment of usage quotas on the future development of OTT TV/Video Services in Turkey. The Report also contends that the tendency of Turkish consumers toward utilizing unlimited broadband internet packages is a positive factor in terms of the development of OTT TV/Video Services; however, the existence of "fair-use quota" regulations still raises certain questions in this regard. The Report indicates that, even though it has been announced that the internet connection speeds of consumers who exceed their fair-use quotas would be gradually increased from 3 Mbps up to 64 Mbps (beginning in March 2017),[38] there is still substantial room for improvement on this matter. In this respect, the Report states that, without prejudice to the negative effects and impediments arising from the low level of broadband internet penetration in Turkey, the development of OTT TV/Video Services will nevertheless benefit from the abolishment of fair-use quotas altogether by internet service providers, which is expected to occur starting on January 1, 2019.

1.1.5. The Socio-Economic Factors

The Report declares that one of the most significant factors affecting the development of the OTT TV/Video Services in Turkey is the socio-economic dynamics of the country. The Report compares the trends regarding the use of OTT TV/Video Services in the US and in Turkey, and concludes that while the younger generation (whose average income level is relatively lower) is more inclined to consume OTT TV/Video Services in the US, the same correlation cannot be detected in Turkey, bearing in mind that there is a linear relationship between income levels and broadband internet penetration rates. The Report

[38] Upon the decision ICTA, No: 2016/DK-THD/518, Dec 27, 2016, (2016)

concludes that low-income populations continue to have rather limited access to broadband internet services in Turkey.

1.1.6. The Effects of Free-to-Air Broadcasting

The Report also touches and reflects upon the effects of free-to-air broadcasting, which has an overall consumer portfolio in Turkey that comprises approximately 62% of the country's population. The Report indicates that only 26% of Turkish consumers utilize pay-TV platform services, which means that the penetration rates of pay-TV platforms remain quite low, due to factors that are intrinsically and fundamentally related to income levels. The Report reveals that consumers with lower incomes exhibit correspondingly low levels of demand for pay-TV platform services and predicts that their demand levels will remain low for paid OTT TV/Video Services as well. With respect to the free-of-charge OTT TV/Video Services, without prejudice to the abovementioned issues relating to broadband internet utilization ratios, the Report concludes that they will remain complementary (rather than becoming competitors) to free-to-air TV broadcasting services.

1.1.7. Issues Related to the Ubiquity of Content Piracy

The Report also evaluates that the lack of an efficient mechanism that could prevent or reduce the illegal screening and/or downloading of TV shows, movies and other premium content from "pirate broadcasting websites" in Turkey plays a role in limiting the demand for pay-TV platform services, as well as hampering the demand for OTT TV/Video Services.

1.1.8. The Development of OTT TV/Video Services in Turkey and the Assessment of Cord-Cutting Behavior

In light of the factors and explanations above, the Report concludes that the Turkish market is not yet attractive enough for subscription-based and paid OTT TV/Video Service providers, as evinced by the fact that the majority of the leading OTT TV/Video Service providers in the world still have not entered the Turkish market and do not engage in any business activities in Turkey. The Report also indicates that the popularity and reach of independent OTT TV/Video Service providers operating in Turkey (such as Netflix, Mubi, Teknosa Filmbox Live, Tiglon and Superplay)[39] also remain rather limited, especially when compared to their counterparts in the EU and the US.

The Report concludes that, even though the adoption of OTT TV/Video Services has increased in recent years, a critical mass of "cord-cutting" behavior is not expected to materialize in the short- or medium-term in Turkey. The key findings and evaluations in the Report are further explained below:

(I) *With respect to both paid and free-of-charge OTT TV/Video Services*: The low levels of development and penetration with respect to broadband internet services play a role in limiting demand for both paid and free OTT TV/Video Services. This, in turn, indicates that OTT TV/Video Services may only serve as a complementary source of content for most consumers.

(II) *With respect to free-of-charge OTT TV/Video Services*: Besides the low broadband penetration levels discussed above, another inhibiting factor with respect to the widespread use of free-of-charge OTT TV/Video Services is that the majority of these services usually do not incorporate or offer premium content on their platforms. Therefore, they are likely to serve only as complementary sources of content alongside free-to-air and pay-TV services.

(III) *With respect to paid OTT TV/Video Services*: Besides the low broadband penetration levels mentioned above, due to the fact that pay-TV platforms usually offer their own OTT TV/Video Services to their subscribers (either free-of-charge or for a small fee) and because they are able to combine their OTT TV/Video Services with multi-play bundles, the competitive pressure exerted on pay-TV platforms by OTT TV/Video Services remains quite limited. In addition, various other factors continue to constrain the development and growth of paid OTT TV/Video Services in Turkey, including (i) the prevalence and popularity of free-to-air broadcasting, (ii) the socio-economic dynamics of Turkey, and (iii) the problems associated with piracy/illegal content, as discussed above.

[39] Turkish Competition Authority, *supra* note 6, at para 315.

In this regard, the Report concludes that OTT TV/Video Services are not considered substitutable with traditional broadcasting and, within the scope of this study, with pay-TV platform services in the short- or medium-term in Turkey. The Report also indicates that OTT TV/Video Services will only emerge and serve as complementary sources of content (alongside traditional broadcasting services) in Turkey, and that even this function will be fulfilled by free-of-charge OTT TV/Video Services rather than paid OTT TV/Video Services.

2. The Turkish Competition Board's Decisional Practice on the Pay-TV Market

The table below sets forth the decisions in which the Turkish Competition Board previously evaluated the TV broadcasting sector generally, and the pay-TV services market in Turkey more specifically, and provides brief summaries of the Board's analyses in these decisions:

Table 2: The Turkish Competition Board's Decisional Practice Concerning the TV Broadcasting Sector

	Date and number	**Markets Defined/Evaluated**	**Evaluations on the Market Definition**
1	Turkish Football Federation I (30.04.2012, 12-23/659-181) and Turkish Football Federation II (04.11.2014, 14-43/804-361)	i) pay-TV broadcasting market, ii) digital platform broadcasting/services market, iii) the market for the TV broadcasting rights for Turkish Super League contests, iv) the market for the broadcasting rights for Turkish Super League contests via alternative technologies	The Board stated that, as the pay-TV platform operator Digiturk's activities may be evaluated under both the "pay-TV broadcasting market" and the "digital platform broadcasting/services market" and since football contests are critically valuable in terms of both markets, the relevant product market related to broadcasting activities

			could be defined as "pay-TV broadcasting market or digital platform broadcasting/services market."
2	TTNET (19.12.2013, 13-71/959-406)	i) broadband internet access market (regarding the internet access services), ii) pay-TV broadcasting services market (regarding the TV broadcasting services)	With regards to the broadcasting market, the Board noted that, while distinct sub-segments may be defined based on (i) whether the services offered are paid or free-of-charge, (ii) the type of platform that is utilized for transmitting the content (*i.e.*, satellite, cable, digital terrestrial), or (iii) the content provided (*e.g.*, significant sports channels, movie channels with high revenues, etc.), such an analysis is not necessary since it would not affect the outcome of the Board's evaluation.
3	Turkish Football Federation III (20.03.2014, 14-11/206-90)	i) pay-TV broadcasting market, ii) digital platform services operation market	The Board observed that the agreement under review may be restricting competition in the pay-TV broadcasting market and in the digital platform broadcasting/services

			market.
4	Güçlü Radyo ve Televizyon (20.03.2014, 14-11/205-89)	i) TV broadcasting services market, ii) digital TV broadcasting platform services market, iii) satellite and cable broadcast platform services market, iv) satellite platform services market, and v) pay-TV broadcasting services market	The Board stated that the allegations could be evaluated under all of these markets, since the relevant product market definition did not have a material impact on the conclusions reached by the Board's analysis in this case.
5	Bugün TV (16.07.2014, 14-24/491-220)	i) TV broadcasting services market, ii) digital TV broadcasting platform services market, iii) satellite and cable broadcast platform services market, iv) satellite platform services market, and v) pay-TV broadcasting services market	The Board noted that the pay-TV platform operators in Turkey at the time of the decision consisted of: Digiturk (satellite platform operator), D-Smart (satellite platform operator), Kablo TV (analogue) and Kablo TV-Teledünya (digital), and Tivibu (IPTV). The Board stated that the allegations could be evaluated under all of these markets, since the relevant product market definition did not have a material impact on the conclusions of this examination.

6	Krea/Bugün (16.07.2014, 14-24/491-220)	i) TV broadcasting services market, ii) digital TV broadcasting platform services market, iii) satellite and cable broadcast platform services market, iv) satellite platform services market and, v) pay-TV broadcasting services market	The Board found that Digiturk (satellite platform operator), D-Smart (satellite platform operator), Kablo TV (analogue) and Kablo TV-Teledünya (digital), and Tivibu (IPTV) were the undertakings that were active in the pay-TV broadcasting services market, and therefore determined that these undertakings would be deemed and treated as competitors to one another.
7	Tivibu (05.02.2015, 15-06/74-31)	i) wholesale broadband internet access market, ii) retail broadband internet access market, iii) pay-TV broadcasting services market	The Board indicated that the undertakings active in the pay-TV sector in Turkey comprised D-Smart, Digiturk, Filbox, Turksat Kablo (analogue Kablo TV and digital Teledünya), Tivibu, and Turkcell TV+. These undertakings utilized different transmission methods to offer their broadcasts to consumers. In particular, D-Smart, Digiturk and Filbox used satellite technology; Turksat Kablo utilized terrestrial broadcast technologies; whereas Tivibu and Turkcell TV+

			broadcast via the internet. The Board noted that, even though the foregoing undertakings employ different transmission methods, they all fundamentally aim to increase their number of subscribers through various content diversification methods. Therefore, the Board found that these undertakings were all competing with each other from a demand-side perspective.
8	Pozitron/Krea (09.09.2015, 15-36/540-172)	i) market for TV broadcasting services	The Board defined the relevant product market broadly as “the market for TV broadcasting services,” since the market definition would not have any effect on the subsequent competition law evaluation. The Board observed that the players active in this market were the pay-TV platform service providers, such as Digiturk and D-Smart, and free-to-air broadcasting service providers (that are not based on a subscription

			model), such as Kanal D, Star TV and ATV.
9	BEIN/DPA (03.11.2015, 15-39/639-221)	i) TV broadcasting services market, ii) digital TV broadcasting platform services market, iii) satellite and cable broadcast platform services market, iv) satellite platform services market, and v) pay-TV broadcasting services market	The Board did not make a conclusive relevant market definition, since there were no overlaps between the parties' activities in Turkey. However, the Board made reference to its previous decisions in which the alternative market definitions had been adopted with regard to the services provided by Digiturk, the pay-TV platform operator.
10	TTNET (19.01.2017, 17-03/25-11)	i) wholesale broadband internet access market, ii) retail broadband internet access market, ii) pay-TV broadcasting services market	The Board evaluated the allegations that TTNET was using the revenues generated by its retail fixed-broadband internet services (where it holds a dominant position) in order to cover the financial harm (and make up for the losses) generated by the below-cost pricing model of its Tivibu service, thereby restricting the competition in the pay-TV broadcasting services market. The Board noted that TTNET had been active in the pay-TV broadcasting services

			sector through (i) Tivibu Go (OTT services) since 2010, (ii) Tivibu Ev (IPTV) since 2011, and (iii) Tivibu Uydu (satellite services) since 2015.

11) *Sinema TV* (18.05.2016, 16-17/299-134)

The Competition Board's *Sinema TV* decision is of the utmost importance, since it is the sole decision in which the Board specifically recognized the effects of the emergence of OTTs in the pay-TV sector.

In the decision, the Board defined pay-TV broadcasting as a TV broadcasting method that provides a subscription-based service, regardless of the technology utilized. Thus, the Board stated that demand for pay-TV broadcasting services could only begin to materialize when content that is not available via other channels is offered to consumers through pay-TV platforms. This is because the basic TV broadcast channels are offered to consumers free-of-charge, and thus they will always be preferred by consumers over pay-TV services if the same content is available on traditional TV channels. In this context, the Board explained that the pay-TV sector has developed at the same time as providing sufficient content to consumers was becoming a serious bottleneck in the industry, since the supply of "premium content"[40] is extremely limited. In this respect, the Board indicated that pay-TV broadcasting has evolved as a service that delivers a "broadcasting bouquet" to its audience, which consists of the basic free-to-air channels along with certain special content (*i.e.*, the pay-TV channel's own unique programs), such as documentaries, cartoons and other premium content.

The Board observed that, at the time of the decision, the undertakings active in the pay-TV sector in Turkey were: D-Smart, Digiturk, Filbox, Turksat Kablo TV (Teledünya), Tivibu, Turkcell TV+,

[40] "Premium content" includes the initial exhibition rights of certain sporting contests, Hollywood movies and certain foreign TV shows.

Vodafone TV, and Doping Box. The Board noted that the transmission method and the target audience of the premium content were critically important in terms of the definition of the market in which Digiturk and D-Smart operate, since the relevant factors play a decisive role in terms of understanding the level of competition that Digiturk and D-Smart must confront and cope with in the course of their business activities.

In this regard, the Board observed that premium content providers could reach their subscribers via certain transmission methods, such as establishing their own encryption and subscription systems or by being included in the TV platforms that are active in the pay-TV broadcasting market. In addition to the foregoing, the Board also mentioned other transmission methods that have emerged as alternatives to pay-TV broadcasting services in recent years, namely: (i) IPTV, (ii) OTT services, and (iii) CAM devices (*i.e.*, Conditional Access Modules, which are encryption system modules that operate the smart cards of their respective platforms). The Board indicated that, while there were certain economic and technical barriers to entry with respect to the pay-TV sector, undertakings who wished to do so only had to endure and deal with such barriers until they attained a certain number of subscribers, and that it was possible to compete in the relevant sector by using effective marketing techniques and offering more premium content to subscribers. The Board also observed that the alternative transmission methods (*i.e.*, IPTV, OTT services, and CAM devices) were becoming increasingly popular and widespread in Turkey and that it was possible to foresee a time in the near future when they would become viable alternatives to traditional pay-TV broadcasting services. In turn, the Board further emphasized that this indicated that the premium content providers would be able to compete in the sector through alternative transmission methods, while recognizing that being included in the pay-TV platforms could provide them with certain competitive advantages.

In this regard, the Board clearly acknowledged that, in terms of the supply of premium content and satellite platform services, Digiturk and D-Smart were competing with (i) Filbox, which is a satellite platform operator, (ii) Teledünya, which provides digital platform services through cable TV, (iii) Tivibu and Turkcell TV+, which offer IPTV services, (iv) Doping Box, which delivers webTV services, and (v) Vodafone TV, which is an OTT service provider.

Therefore, when defining the relevant product market as the "pay-TV broadcasting services market," the Board specifically took into account the competitive pressure exerted by alternative and non-traditional transmission methods (such as IPTV and OTT services), by ascertaining that the investments made in the telecommunication services sector (especially with regard to fixed and mobile services) are steadily increasing, and noting that this leads to constant changes in consumer habits due to the emergence of new technologies and products.

In light of the Competition Board's decisional practice with respect to the TV broadcasting sector, it can be seen that the Board usually refrains from making clear-cut or precise market definitions regarding pay-TV broadcasting services. There are some instances in which the Competition Board assessed the relevant product market more narrowly as "satellite platform services" or "pay-TV broadcasting services," where only a few players (such as Digitürk, D-Smart and Filbox) are active, while, in other instances, the Board interpreted the relevant product market as broadly as the "TV broadcasting market," in which satellite/terrestrial free-to-air broadcasters and other services were included as well.

In terms of the pay-TV broadcasting market, the Board has not yet explicitly evaluated whether there is sufficient competitive pressure exerted by the OTT service providers in order to deem them as competitors to traditional broadcasting service providers, such as D-Smart, Digitürk, Filbox, Turksat Kablo (analogue Kablo TV and digital Teledünya), Tivibu, and Turkcell TV+. Having said that, in certain cases, the Board has recognized that OTT services have been gaining wider currency among consumers and emerging as viable alternatives to traditional pay-TV broadcasting services (*Sinema TV*, 18.05.2016; 16-17/299-134), and it has set forth certain evaluations indicating that each pay-TV broadcasting platform fundamentally aims to increase its number of subscribers through content diversification schemes, and therefore, from a demand-side perspective, the relevant undertakings will be deemed as competing with one another, regardless of the transmission method (*i.e.*, whether they use terrestrial broadcasting methods, satellite broadcasting methods, or transmit their content via the internet) (*Tivibu*, 05.02.2015; 15-06/74-31).

Therefore, while the Competition Board has recognized that there is a degree of competition between OTT services and other (*i.e.*, traditional) pay-TV broadcasting methods, it has neither explicitly acknowledged that the relevant services should be included in the same product market, nor categorically rejected the view that the relevant services are competing with one another.

VI. An Analysis on the Approach of Other Competition Authorities to Evaluating the Substitutability of Different Transmission Technologies in the TV Broadcasting Industry

In contrast to the Turkish Competition Authority's stance with respect to the argument that there is adequate competition between OTT TV/Video Services and other pay-TV platform services, there have been instances in which the European Commission has recognized that the competitive constraints exerted by OTT TV/Video Services on traditional pay-TV services is sufficient to evaluate that these transmission methods are in competition with each other.

The Commission has delved deeper into the sector characteristics of TV broadcasting services and thoroughly examined the particular features of this industry. Even though the Commission ultimately left the market definition open in most of its cases, it has previously "*considered whether the retail market for TV services should be sub-divided according to: (i) the type of technology used; (ii) the nature of TV services provided in terms of Pay-TV and Free-To-Air ("FTA") TV services; and, (iii) the nature of TV services provided in terms of linear and non-linear services*."[41]

Having said that, in many instances, the Commission has determined that the provision of retail pay-TV services through different distribution technologies all belong to the same product market, as discussed below.

[41] EU Commission Decision, *Case No COMP/M.7978 - Vodafone/Liberty Global/Dutch JV*, at para 42 (2016).

1) *Ziggo/Liberty Global*[42]

In 2014, the Commission assessed the proposed acquisition of sole control over Ziggo by Liberty Global,[43] where it found that it was not necessary to delineate separate retail TV markets depending on the type of distribution technology (*i.e.*, via DTT, DTH, satellite, cable, IPTV, OTT and/or other mobile technologies)[44] that is employed to deliver the retail TV broadcasting service.[45] Upon its market evaluation, the Commission found that "*Some respondents explain that from the end customer's perspective, the different transmission technologies are regarded as substitutable. As pointed out by one respondent, consumers can switch between the different infrastructures as long as the necessary TV services are available on them*."[46] In this respect, the Commission has come to the conclusion that there is demand-side substitutability between retail pay-TV services that are provided through different distribution technologies, which, in turn, indicates that they should be considered to be included in the same product market.[47]

In its decision, the Commission further explained that:

"The Parties and TV broadcasters negotiate the carriage of the broadcasters' Pay-TV channels and associated content via the Parties' Pay-TV platforms. This negotiation takes place on the Dutch market for the acquisition of Pay-TV channels. At the same time, TV broadcasters are increasingly offering their content via Internet-based OTT services. To the extent that this content is offered to third-party operators of OTT services, those operators compete with the Parties as buyers of that content. Those operators also potentially compete, on the downstream retail market for Pay-TV services, with the Pay-TV platforms of the Parties. To the extent that broadcasters themselves offer their content

[42] EU Commission Decision, *Case No. COMP/M.7000 - Liberty Global/Ziggo* (2014).

[43] Ziggo and Liberty Global were separate cable TV operators, providing mainly fixed telecommunications services, with non-overlapping activities in the Netherlands.

[44] DTT refers to "digital terrestrial television" and DTH refers to "direct-to-home" broadcasting services.

[45] *Liberty Global/Ziggo*, *supra* note 42, at para 136.

[46] *Id.*,at para 111.

[47] *Id.*, at para 113.

online, they too potentially compete with the Parties' Pay-TV platforms on the downstream retail market for Pay-TV services."[48]

The Commission conditionally approved the transaction in March 2014, but the decision was subsequently annulled by the General Court in 2017 for procedural reasons; in particular, the General Court annulled the Commission's approval decision "*on the ground that the Commission did not fully state the reasons of its conclusion that the merger would not lead to vertical anti-competitive effects on the potential market for premium pay-TV sports channels."*[49]

In its 2018 decision, while re-confirming that the various distribution technologies are all part of the same product market, the Commission further assessed the level of substitutability between linear and non-linear TV broadcasting services. In scope of the supplement (Form CO) submitted by the parties to the transaction, the undertakings contended that linear and non-linear broadcasting should be included in the same product market definition. The underlying rationale of this claim, according to the parties' argument, was that the content consumption habits of consumers have changed significantly since 2014 and that this evolution in consumer behavior constitutes a key development in the broadcasting and television markets, since audiences have begun to spend more time watching non-linear broadcasts via the internet, rather than watching linear television through traditional broadcasting services. The Commission remarked that "*More specifically, they [the undertakings] submit that the growth of the offer of nonlinear services, which was identified in 2014, has been very significant, with the penetration of Netflix in the Netherlands (with 2.6 million subscribers in 2017) being a key example."*[50] The parties have underlined that, from a demand-side perspective, they are facing a significant amount of competition from the non-linear broadcasting services of OTTs, and that there is a significant level of substitutability in terms of linear and non-linear broadcasting rights from a supply-side

[48] *Id.*, at para 289.

[49] European Commission, *Mergers: Commission confirms approval of acquisition of Dutch cable TV operator Ziggo by Liberty Global, subject to condition,* (2018)

[50] EU Commission Decision, *Case No. COMP/M.7000 - Liberty Global/Ziggo* (2018).

perspective, since they are usually subject to joint negotiations and implemented through a single agreement.

The Commission further noted that, while it does not consider the content rights for linear and non-linear broadcasting to be substitutable on the demand side, non-linear broadcasting is, at the same time, increasingly constraining linear broadcasting, with consumers replacing linear broadcasting services with a selection of their preferred non-linear content through "cord-cutting"[51] behavior. The Commission also confirmed that there is elasticity between the two distribution modes from a supply-side perspective, in the sense that linear and non-linear content rights are usually licensed together.[52] Consequently, the Commission decided to leave the market definition open in this particular case, since the consummation of the transaction did not give rise to any competition law concerns, irrespective of the conclusion with respect to the relevant market definition.

2) *Liberty Global/ Virgin Media*[53]

In its decision concerning the acquisition of sole control over Virgin Media, Inc., by Liberty Global, Inc., the Commission determined that different technologies (*i.e.*, DTT, satellite, cable, IPTV, OTT, and mobile) utilized for TV broadcasting services were substitutable with one another, and therefore ruled that all technical means of television distribution compete with each other and should be considered to fall within the same product market. The Commission ultimately left the exact market definition open, since the transaction in this case did not raise any competition law concerns regardless of the market definition.

---

[51] "Cord-cutting" is the term used to explain the process of unsubscribing from traditional cable, IPTV or satellite TV platforms and switching to OTT TV/Video Services. *See* Turkish Competition Authority, *supra* note 6, para 287.

[52] *Liberty Global/Ziggo, supra* note 50, para 61.

[53] EU Commission Decision, *Case No. COMP/M.6880 - Liberty Global/Virgin Media* (2013).

3) *News Corp/Premiere*[54]

In 2008, the Commission analysed the proposed acquisition of Premiere AG by News Corporation. In its analysis, the Commission first declared that, as a rule of thumb, competition authorities do not choose to define separate product markets based on the technical delivery methods for TV content, such as distribution through cable, satellite, or DSL technologies. The Commission further asserted that, "*The reason for that is that producers of pay-TV programmes usually want their channels to be distributed as widely as possible in order to maximise revenues and, at the very least, to have a presence on all the broadcasting platforms through exclusive rights for more than one platform*."[55] Having emphasized this approach, the Commission declined to reach a definite conclusion concerning the definition of the relevant market, as the transaction did not present any competition law concerns regardless of the relevant market definition.

4) *News Corp/ BSkyB*[56]

In its decision concerning the acquisition of sole control by News Corporation over British Sky Broadcasting Group ("***BskyB***") by way of a public bid, the Commission analysed whether the distribution channels used for the retail distribution of audio-visual content to end users were substitutable with one another.

The Commission cited the notifying party's statements that the providers of TV services to consumers in the UK and Ireland utilize various technical means to distribute their content in order to reach the widest audience possible. By making reference to one of its previous decisions,[57] the Commission noted that consumers' choices ultimately depend on the quality of the TV content rather than the specific mode of distribution. The results of the market investigation appeared to point toward the same conclusion as well, since they indicated that content

---

[54] EU Commission Decision, *Case No. COMP/M.5121 - News Corp/Premiere* (2008).

[55] *Id.*, para 22.

[56] EU Commission Decision, *Case No. COMP/M.5932 - News Corp/BSkyB* (2010).

[57] EU Commission Decision, *Case No. COMP/M.4504 - SFR/Télé 2 France* (2007).

distributors consider different modes of transmission to be substitutable from the consumers' point of view.

As a result, the Commission concluded that, based on its findings in previous decisions and the facts of this case, different distribution modes were deemed to belong to the same product market.

VII. An Analysis on the Television Broadcasting Sector and the Impact of OTT Services: Are They Complementary or Substitutable?

The definition of the relevant product market is undoubtedly one of the most important analytical tools in the arsenal of competition authorities for the examination and evaluation of competition problems. This is due to the fact that competition law analyses simply cannot be carried out independently from relevant market definitions.[58]

As explained in detail above, defining the relevant product market in the TV broadcasting sector poses certain difficulties from the perspective of national competition authorities, since the convergence of various media products and services and the rapid technological developments in these markets keep altering the viewing habits of consumers. The transformation of consumer habits, in turn, blurs the exact boundaries of different product market definitions. Reviewing the prior analyses and decisions of competition authorities can certainly be helpful in terms of comprehending the level of substitutability between different transmission technologies and broadcasting platforms. However, competition authorities are nevertheless obliged to adopt forward-looking approaches and conduct their analyses on a case-by-case basis in terms of the definition of the relevant product markets in order to be able to take into account the dynamic competition that emerges between novel television broadcasting products and services.[59] This is especially true in the case of OTT players, since they have become highly prominent in the TV broadcasting sector over a rather

---

[58] OECD, *supra* note 2. *See also* OECD, *Market Definition*, 84 OECD Policy Roundtables DAF/COMP(2012)19, http://www.oecd.org/daf/competition/Market definition2012.pdf (last visited Dec. 12, 2018).

[59] OECD, *supra* note 2, at 6.

short period of time, thus changing the viewing habits of consumers and beginning to exert a significant amount of competitive pressure on other means of traditional TV broadcasting.

Upon reviewing the Competition Authority's approach toward defining the boundaries of the pay-TV broadcasting market, it can be observed that the Competition Authority has so far been disinclined to accept that OTT TV/Video Services exert sufficient competitive pressure on other traditional TV broadcasting services to be deemed or treated as competitors to one another. In order to reach this assessment, the Competition Authority first evaluated certain aspects of the relevant sector, and concluded that OTT TV/Video Services will serve only as complementary sources of content alongside traditional broadcasting services in the Turkish market (rather than competing directly with them), and that this role will be filled by free-of-charge OTT TV/Video Services, rather than being provided by paid OTT TV/Video Services.

Having said that, the Turkish Competition Authority's stance on these issues and its approach to the evaluation of OTT TV/Video Services appears to be outdated (as explained below), since it fails to take into account the rapid development of OTT TV/Video Services and the evolution of certain aspects in this sector that render the relevant services substitutable with traditional means of TV broadcasting from the customers' perspective.

1. Broadband Penetration Ratios and Internet Connection Speeds

According to the Turkish Competition Authority, one of the most prominent and glaring obstacles that prevent the development of OTT services in Turkey (for both subscription-based and free-of-charge services) is the insufficiently low internet penetration ratios in the country, precluding widespread access to such services. In its Sector Report, while acknowledging that the average fixed- and mobile-internet speeds in Turkey meet the minimum requirements for providing OTT TV/Video Services, the Competition Authority nevertheless concluded that the broadband internet penetration ratios and connection speed levels in Turkey lag behind the comparable figures in developed economies. However, when the most recent data relating to broadband penetration ratios and average connection speeds are examined, it is seen that the Competition Authority's evaluations in the Sector Report may no longer be applicable or valid for the current state of affairs (regarding internet access levels) in Turkey. In particular, according to the most recent Household Information Technologies Utilization Survey, published by the Turkish Statistical Institute ("**TURKSTAT**") in August 2018:[60]

(I) The internet utilization ratio in 2018 was found to be 72.9% of the population in Turkey (compared to 66.8% in 2017[61] and 61.2% in 2016).[62]

(II) It was determined that more than 8 out of 10 households (83.8%) had internet access in 2018 (compared to 80.7% in 2017[63] and 76.3% in 2016).[64]

(III) The ratio of households that had access to the internet through broadband services in 2018 was found to be 82.5% (compared to 78.3% in 2017[65] and 73.1% in 2016).[66]

In addition to the figures listed above regarding internet penetration ratios, according to the Information and Communication Technologies Authority's ("**ICTA**") Market Data Report for the second quarter of 2018,[67] approximately 69% of the fixed broadband subscribers in Turkey preferred to use internet packages that offered connection speeds of 10-30 Mbps, while 16.8% chose packages that offered connection speeds of 4-8 Mbps, and only 1.1% of subscribers had connection speeds under 1 Mbps.[68] The Sector Report itself indicates that the minimum connection speed required for the provision of OTT

[60] TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2018, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=27819.

[61] TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2017, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=24862.

[62] TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2016, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=21779.

[63] TUIK, *supra* note 61.

[64] TUIK, *supra* note 62.

[65] TUIK, *supra* note 61.

[66] TUIK, *supra* note 62.

[67] Information and Communication Technologies Authority, Market Data Report, 14 (2018).

[68] *Id.*, at 54.

services is 2 Mbps, while the connection speed necessary for a satisfactory OTT viewing experience (*i.e.*, which would be comparable to and compete with traditional TV broadcasting services) was estimated to be 6-10 Mbps.

In light of the above, even though Turkey may still lag behind developed countries in terms of internet usage rates and fixed broadband penetration ratios, the figures set forth by TURKSTAT reveal that there has been a steady and rapid increase in internet access and speed rates for Turkish consumers over as little as 2 years (*i.e.*, 2016 to 2018). Moreover, the available data indicate that the majority of Turkish households currently possess the underlying technology that is required to utilize OTT TV/Video Services. As also acknowledged by the Sector Report itself, it is evident that there are no technological obstacles in Turkey for an individual to gain internet access (*i.e.*, connect to the internet infrastructure) and that the coverage area of Turkey's DSL infrastructure network exceeds the DSL infrastructure network of many European countries in terms of the population served.[69] This encouraging statistic has also been corroborated by the OECD's broadband statistics update, which declared that, as of December 2017, "*Turkey, Australia, Colombia and Italy showed the highest year-on-year growth in fixed broadband penetration, with respective growth rates of 13.6%, 7.4%, 6.9% and 6.6%.*"[70]

In addition, the data referenced above clearly demonstrates that almost all subscribers in Turkey are currently utilizing internet services with connection speeds that are deemed to be adequate for a satisfactory OTT experience which could compete with other methods of traditional TV broadcasting. Therefore, the argument that the average broadband internet penetration rates and connection speeds pose an obstacle in terms of the development of OTT services in Turkey no longer seems to be valid or even convincing, particularly when the official figures listed above are taken into consideration.

---

[69] T.C. KALKINMA BAKANLIĞI, BILGI TOPLUMU STRATEJISININ YENILENMESI: GENIŞBANT ALTYAPISI VE SEKTÖREL REKABET EKSENI MEVCUT DURUM RAPORU (2013), cited in Turkish Competition Authority, *supra* note 6, at para 112.

[70] OECD, *Broadband Statistics Update* (2018), http://www.oecd.org/sti/broadband/broadband-statistics-update.htm (last visited Dec. 10, 2018).

This fact is further reinforced and reiterated by the ICTA's decision to abolish fair-use quotas, since the Sector Report itself indicates that the tendency and preference of Turkish consumers toward unlimited broadband internet packages facilitates the development of OTT TV/Video Services. However, the continued existence of fair-use quota regulations raises certain questions for broadcast service providers as well as for consumers. Therefore, we expect that the development of OTT TV/Video Services will be positively affected to the extent that internet service providers eliminate their fair-use quota practices. In this respect, it should be noted that the ICTA has decided to abolish fair-use quotas, which are used to decelerate consumers' internet connection speeds when they reach a certain monthly usage limit, starting on January 1, 2019.[71] As mentioned above, the removal of such fair-use quotas is expected to significantly boost the development of OTT TV/Video Services.

In light of the above, we conclude that the insufficient broadband penetration ratios and internet connection speeds in Turkey, which were deemed as two of the most prominent threats/impediments standing in the way of the growth of OTT TV/Video Services by the Competition Authority, no longer seem to constitute unsurpassable obstacles that would prevent the expansion or widespread adoption of OTT TV/Video Services in Turkey.

On a separate but related note, the Sector Report indicates that IPTV services, which also utilize broadband internet connections to transmit content to viewers, and which have been included in the relevant product market defined as "pay-TV broadcasting services" in previous Board decisions, require an internet connection speed of at least 8 Mbps for the transmission of content with regular (SD) resolution quality, and at least 12 Mbps for high-definition (HD) resolution quality,[72] both of which exceed the internet connection speeds necessary for transmitting content via OTT services. In this regard, even if it was considered that the available broadband infrastructure and internet connection speeds in Turkey pose significant threats and obstacles in

[71] Information and Communication Technologies Authority, *Regulation of the Fair-Use Quota*, Public Release (2016), https://www.btk.gov.tr/uploads/news/akn-du-zenleme-basin-ac-iklamasi-son-v2.pdf .

[72] Turkish Competition Authority, *supra* note 6, at para 119.

terms of the development of OTT services, the same consideration would have been more evident and applicable in terms of the development of IPTV services, which could reduce the level of substitutability of IPTV transmission methods with other traditional TV broadcasting technologies that do not require an internet connection. Therefore, it does not seem logically coherent to differentiate between OTT services and IPTV services in this regard, since IPTV services have consistently been included in the relevant product market defined as "pay-TV broadcasting services."

2. The Competitive Strategies Formulated in Response to OTT players vs. the Competitive Advantages Specific to OTT players

One of the factors taken into account by the Competition Authority in its Sector Report—especially in terms of the OTT services that require subscription fees—is based on the argument that the pay-TV platform operators in Turkey have already formulated certain strategies to deploy against the potential competitive pressure exerted by third-party/independent providers of OTT TV/Video Services. The strategies in question relate to (i) the additional OTT services that are offered free-of-charge or for a nominal fee by the traditional broadcast service providers and (ii) triple-play bundles.

The Report indicates that the triple-play bundles offered by network and cable TV operators (which combine voice, data and TV services) have facilitated the relevant undertakings' entry into the content distribution industry. According to the Report, this may, in turn, create entry barriers for independent/third-party providers of OTT TV/Video Services, and thereby hamper or slow down the tendency of consumers to engage in "cord-cutting" behavior.

Initially, the Sector Report failed to take into account that independent/third-party providers of OTT TV/Video Services may counteract such strategies by entering into innovative partnerships with other players, such as broadband and cable operators. For instance, in an illuminating case, Netflix partnered up with Virgin Media, the largest cable provider in the United Kingdom, whereby a 6-month Netflix subscription was advertised and provided for free by Virgin Media in conjunction with a broadband internet services offer.[73] Another illustrative example was provided by the Swedish cable operator, Com Hem, which advertised the inclusion of Netflix within its TiVo-box interface.[74] Therefore, it is apparent that independent/third-party OTT providers could implement counteracting strategies against triple-play bundles by taking measures to promote and enhance their subscriber bases through various partnerships models. It should also be emphasized that, according to a study conducted by Ovum,[75] members of younger generations are less inclined to purchase triple- or quadruple-play bundles offering a full array of telecommunications and broadcasting services, and that they rather lean toward buying "standalone" broadband internet and OTT TV/Video Services that best suit their tastes and interests, and which are considered to be more affordable in most cases when compared to bundled packages.

On a related note, even though the Sector Report contends that the prevalence and widespread adoption of triple-play bundles has impeded the development of the TV broadcasting sector, it also appears to acknowledge that there are serious obstacles in terms of the provision of triple-play bundles. This is because the Sector Report mentions that, besides the vertically integrated economic unity of Turk Telekom and TTNET, the only undertaking that has provided bundles consisting of multiple services (including IPTV services) has been Turkcell Superonline, and there have been no undertakings that have partnered up with others to offer or provide similar services to consumers.[76] This could either indicate that the particular market structure of this sector is

[73] OECD, *Triple and Quadruple Play Bundles of Communication Services*, 33 OECD Publishing (2015), https://www.oecd-ilibrary.org/science-and-technology/triple-and-quadruple-play-bundles-of-communication-services_5js04dp2q1jc-en (last visited Dec. 24, 2018).

[74] *Ibid*.

[75] McCormick, Nicole, *The Telco Services Bundle Unraveled – The Rise of New Bundles*, 3 OVUM TMT Intelligence, https://ovum.informa.com/resources/product-content/the-telco-services-bundle-unraveled-the-rise-of-new-bundles-te0009-001650 (last visited Dec. 24, 2018). Ovum is "a market-leading data, research and consulting business focused on helping digital service providers and their technology partners." *See* INTRODUCING OVUM, https://ovum.informa.com/about/about-us (last visited Dec. 24, 2018).

[76] Turkish Competition Authority, *supra* note 6, at para 274.

not amenable to providing such services bundled up in a single package, or that this practice is not favored by the sector players due to insufficient consumer demand. Indeed, various examples of triple-play bundles around the world reveal that this practice is not always preferred by the customers in the TV broadcasting sector. In fact, Time Warner Cable Inc, which is one of the most prominent cable service providers in the United States, has previously announced that it would no longer focus on triple-play bundles that combined internet, video and voice services. During an interview in 2013, Time Warner's Chief Operating Officer at the time, Rob Marcus, explained the altered marketing strategy. He described the previous situation as *"We were almost exclusively about the 'triple play' previously*. However, as Baker restate Marcus' comments, "*Getting customers hooked on all three services will no longer be a priority when potential customers call to ask about subscribing."*[77] The article in which this interview appeared also noted that the cable industry faced a challenge from customers who consume an increasing amount of internet video and subscribe to lower cost alternatives such as Netflix. This trend was exemplified by the fact that Time Warner Cable had issued an earnings report in April 2013 that showed that it had lost a worse-than-expected 119,000 video customers in the first quarter. Therefore, Time Warner decided to instruct its representatives to "*probe customers to find out what services they actually use and then "upsell" premium offerings such as faster Internet or premium television channels based on customer's interests.*"[78] This example clearly demonstrates that prominent players in the industry, who are well-equipped to offer triple-play bundles, had begun to willingly shift away (and may keep shifting away) from this marketing strategy, due to the changing viewing habits of customers in light of the increasing availability and ubiquity of internet access and the related emergence of new broadcasting technologies.

The Sector Report further evaluated that the pay-TV service providers' strategy of offering their own OTT TV/Video Services has enabled them to reduce the competitive pressure exerted by independent OTT TV/Video Service providers, as well as increasing the value of

---

[77] Baker, Liana B., *Time Warner Cable shifts away from "triple play,"* (2013), https://www.reuters.com/article/us-timewarner-results-idUSBRE93O0D120130425.

[78] *Ibid.*

their pay-TV broadcasting services. However, rather than decreasing the competitive pressure exerted by the OTTs in the pay-TV sector, it may be reasonably argued that the relevant strategies are almost requisite for the pay-TV platform service providers in order to sustain their business activities and be able to maintain their presence in the market. This is due to the fact that, as with many other industries (*i.e.*, print, music, travel, retail, etc.), the TV broadcasting sector is going through an undeniable and immense digital transformation process. Due to the widespread accessibility and adoption of internet services and the convergence of various new technologies, OTT TV/Video Services can arguably be said to represent the digital turning point for the TV broadcasting industry, enabling the emergence of novel business models and fundamentally altering the success factors through every step of the value chain, from content creation to product distribution. In this regard, building new business models and offering innovative services in consideration of the ever-changing technological developments seems to be the only way in which the incumbent players might be able to handle and carry out this transformation successfully.[79] Nevertheless, it should also be emphasized that, despite the possible counterstrategies implemented by the incumbent pay-TV platforms, the independent OTT TV/Video Service provider Netflix, which only entered the Turkish market in 2016, posted the highest subscriber growth rate among several satellite/IPTV and OTT Service providers, including Digitürk, Tivibu, Turkcell TV+, Kablo TV, Puhu TV, Blu TV, and D-Smart, according to the figures discussed below.[80]

The willingness and propensity of consumers to utilize OTT services in Turkey was clearly demonstrated by a consumer survey conducted in 2018 by Twentify,[81] which is an "on-demand workforce company that provides field operations and data collection to companies with the help of crowdsourcing."[82] This study focused on the utilization and customer satisfaction rates in media services, and its results revealed

---

[79] PWC Entertainment & Media Outlook for the Netherlands, *supra* note 4, at 9.

[80] Twentify, *Digital Eye of Turkey*, 5-13 (2018), https://www.twentify.com/tr/raporlar/medya-dagitim-servislerinde-kullanim-ve-memnuniyet-arastirmasi-raporu (last visited Dec. 10, 2018).

[81] *Ibid*.

[82] ABOUT US, https://www.twentify.com/about (last visited Dec. 24, 2018).

that OTT services have gained substantial ground over the years in the TV broadcasting sector.

As mentioned above, amongst Digitürk, Tivibu, Turkcell TV+, Kablo TV, Netflix, Puhu TV, Blu TV, and D-Smart, Netflix displayed the highest subscriber growth rate (24.20%), followed by Blu TV (13.43%), D-Smart (6.58%), and Digiturk (5.42%). In terms of the consumer experience, users gave an average customer satisfaction score of 4 out of 5 to OTT services, while other satellite and IPTV service providers, such as Tivibu, Kablo TV, Digitürk, and D-Smart, all scored below 4 on a scale of 1 to 5. Netflix had the highest customer satisfaction rate (4.59) in the study, followed by other OTT service providers, such as Puhu TV (4.50), Turkcell TV+ (4.36), and Blu TV (4.24). According to the study, these findings demonstrate that Turkish consumers have grown accustomed to OTT TV/Video Services and that the market is about to enter a consolidation period through consumer migration.

The Report also indicates that distribution technologies which are based on the satellite infrastructure and offered through physical devices (such as set-top boxes or IPTV technologies) are currently facing a significant threat from new-generation, internet-based distribution technologies. Provided below are a few examples supporting this forecast:

- As of 2017, Turkcell TV+ had attained a customer base of 506.000 subscribers,[83] with an average daily consumption rate of more than 63 minutes, which corresponds to more than 7 hours per week.[84]

- In February 2018, Puhu TV was the third most-visited website on personal computers, the fifth most-visited website on smartphones, and the second most-visited site on tablets in Turkey.[85]

---

[83] Turkcell Grup, *2018 Investor and Analyst Day Presentation* (*2018 Yatırımcı ve Analist Günü Sunumu)*, 79 (2018), https://s3.turkcell.com.tr/SiteAssets/Hakkimizda/yatirimci-iliskileri/documents/pdf/CMD-Final-TR.pdf (last visited Dec. 5, 2018).

[84] *Id.*, at 50.

[85] IAB Türkiye, *Turkish Internet Computation Study* (*Türkiye Internet Ölçümleme Araştırması*), (2018), https://www.iabturkiye.org/UploadFiles/TopTwentyFiles/Internet_audience_toplist_02_2018_Overnight_.pdf (last visited Dec. 5, 2018).

- According to the information published by Puhu TV and Blu TV in April 2017, the TV show “Fi,” which was one of Puhu TV’s exclusive premium contents, had surpassed 10 million total views and reached 6 million individual viewers up to that date. In addition, Blu TV’s mobile application had been downloaded more than one million times as of the relevant date.[86]

- According to the relevant data published in December 2017, the 15 episodes of the TV show “Fi” and its sequel “Çi” had garnered approximately 100 million views from 17 million unique viewers, and each episode had been watched by 6.6 million individuals on average.[87]

- Netflix is estimated to have reached 117.500 paid subscribers at the end of 2017, and is projected to reach 234.400 subscribers in 2018, and 297.400 subscribers as of 2019.[88]

In addition to the above, the Sector Report indicates that, due to the fact that free-of-charge OTT TV/Video Services usually do not incorporate premium content into their products, they may serve only as complementary sources of content alongside free-to-air and pay-TV broadcasting services, rather than competing with them. However, the findings discussed above with respect to Puhu TV indicate that the Competition Authority’s evaluations in the Sector Report regarding free-of-charge OTT TV/Video Services may already be obsolete under the current circumstances and inapplicable for the realities of today’s broadcasting industry.

Puhu TV, which does not use a paid-subscription model and is therefore offered free-of-charge to viewers, currently offers three different exclusive premium contents, namely the TV shows Şahsiyet, Fi (and its sequel Çi), and Dip. According to Twentify’s survey, these three TV shows have been considerably popular with consumers, and therefore, it can be surmised that the viewers prefer this particular OTT

[86] Webrazzi, *New-generation online TV platforms in Turkey* (*Türkiye’nin yeni nesil online TV platformları*), (2017), https://webrazzi.com/2017/04/12/turkiyenin-yeni-nesil-online-tv-platformlari/ (last visited Dec. 24, 2018).

[87] MedyaTava, *What would the ratings of Fi be if it were broadcast on TV?*, (2017), http://www.medyatava.com/haber/fi-dizisi-televizyonda-yayinlansa-reytingi-ne-kadar-olurdu_151793 (last visited Dec. 24, 2018).

[88] Statista, *Estimated number of active streaming subscribers for Netflix in Turkey from 2017 to 2020 (in 1,000)*, (2018), https://www.statista.com/statistics/607812/ netflix-subscribers-in-turkey/ (last visited Dec. 24, 2018).

player primarily due to (i) the fact that the content is provided free-of-charge, and (ii) the richness and abundance of the local (*i.e.*, Turkish) content offered to audiences.[89] Indeed, in addition to the success of the TV shows "Fi" and its sequel "Çi," as explained above, the TV show "Şahsiyet" has also been ranked as high as 39th amongst the top 250 most popular TV shows globally, as determined by user votes for IMDB's list of the most popular TV shows in the world.[90] In addition to its original content, Puhu TV also offers hundreds of foreign and domestic TV shows and box-office movies, which has apparently helped it to attract a considerable number of viewers. Therefore, the Puhu TV example illustrates that different business models (*i.e.*, whether subscription-based or offered free-of-charge) can be adopted and implemented to fund OTT TV/Video Services by any given player in the sector, and that the particular business model chosen by an OTT service provider does not necessarily limit or put a constraint on the quality of the services or content offered to consumers.

The extensive content libraries and the superior quality of the product provided to customers by OTT TV/Video Services is indeed one of the most important reasons why viewers choose to use these services. The popularity of OTT TV/Video Services stems from the fact that different OTT services can offer access to numerous exclusive TV shows and movies, which their customers can only access and watch through that particular OTT player. For instance, Netflix, which has only very recently entered the Turkish market (in 2016), offers hundreds of exclusive TV shows, documentaries, movies, original productions, and various other content that the viewers can solely access by subscribing to Netflix. Indeed, according to the Twentify report, the primary reasons why customers prefer Netflix over other content providers are the richness of the Netflix content library (*i.e.*, its extensive and high-quality collection), comprising thousands upon thousands of movies and TV shows, followed by the original Netflix programming in which the

---

[89] *See* Twentify, *Twentify Survey*, *supra* note 80, at 5-13.

[90] Yeni Şafak, *Şahsiyet'in ünü sınırları aştı: Dünyanın en iyi 40 dizisinden biri* (November 20, 2018), https://www.yenisafak.com/hayat/sahsiyetin-unu-sinirlari-asti-dunyanin-en-iyi-40-dizisinden-biri-3409975 (last visited Dec. 24, 2018). IMDB is an online database (owned by Amazon) containing information about films, TV programs, video games, etc. *See* IMDB, https://www.imdb.com/ (last visited Dec. 24, 2018).

company invests billions of dollars each year.[91] Indeed, according to a report in Forbes magazine, "*It was originally reported that the company [Netflix] was spending $8 billion on content this year, but now that we've passed the halfway point of 2018, that number has been updated. The Economist, citing data from a Goldman Sachs assessment, estimates that Netflix will spend between $12 and $13 billion on content on a cash basis this year. Of this, 85% of new spending is earmarked for original series and movies, a wise move considering that more than 90% of Netflix's customers regularly watch original programming.*"[92]

Even though it is a US-based company, Netflix's business strategy is not solely based on producing and acquiring content in English. To the contrary, Netflix invests a significant amount of energy and capital to address the specific needs and desires of subscribers in a number of different countries. Indeed, following its original productions in many other countries, such as Spain, Germany, Italy, France, Poland and the Netherlands, Netflix has recently produced and released its first Turkish TV series, called "The Protector."[93]

Likewise, Blu TV provides access to hundreds of movies, TV shows and numerous original productions, as well as approximately 30 linear TV channels (*i.e.*, traditional broadcast TV), which are available for live viewing.[94]

This brings forth the question of whether there are any competitive advantages specific to OTT players that could allow them to extend their reach among viewers and lead to their widespread adoption by consumers, when compared to other traditional TV broadcasting

---

[91] Twentify. *supra* note 80, at 5-13.

[92] Feldman, Dana. *Netflix's Content Budget Is Updated to $13B for 2018* (July 9, 2018), https://www.forbes.com/sites/danafeldman/2018/07/09/netflixs-content-budget-is-updated-to-13b-in-2018/#2322db932b8c (last visited Dec. 5, 2018).

[93] Netflix Media Center, *Netflix Announces Cast and Start of Production for its First Turkish Original Series* (March 7, 2018), https://media.netflix.com/en/press-releases/netflix-announces-cast-and-start-of-production-for-its-first-turkish-original-series (last visited Dec. 5, 2018).

[94] Ekonomist Online, *Online Competition on Series and Films* (*Dizi ve filmlerde online rekabeti*) (2017), www.ekonomist.com.tr/teknoloji/dizi-filmlerde-online-rekabeti.html (last visited Dec. 5, 2018).

methods. Indeed, besides the strategies adopted by traditional pay-TV service providers, the provision of OTT TV/Video Services also generates certain competitive advantages that are rather unique in terms of the services provided. According to a White Paper published in connection with the Pay-TV Innovation Forum, "*As the availability of IP-connected consumer devices and alternative OTT services continues to grow, consumer expectations about video services are shifting, with users becoming accustomed to advanced functionalities and features, such as multiscreen, on-demand viewing, greater pricing and packaging flexibility, and personalisation. Many of these trends are associated with the emergence of younger generations of consumers, but few pay-TV executives are willing to ignore them."* In the paper, the statements made by pay-TV executives in the MTM research study and analysis, as well as extensive engagement with pay-TV industry executives, lead the authors to conclude that *"If you look at the younger demographics, the trends are very discouraging. They do not want to subscribe to pay-TV services as we know them today. They will require a different approach."*[95]

Besides the high-quality and exclusive content offered to consumers, the most significant competitive advantage of OTT players relates to the ability of viewers to watch the content on their own terms; in other words, OTT TV/Video service providers enable viewers to consume content *whenever* and *wherever* they want. Consumers are not required to wait until the programming airs on TV or forced to schedule their lives around the broadcast time of a particular TV show or movie. In addition, viewers may choose to stream the content via multiple accounts and devices, since all they would require to access such content is a suitable device with online access and an adequate internet connection. Therefore, as mentioned above, OTT services provide the viewers with the flexibility of watching the content "anytime, anywhere" without being bound to a device such as a set-top box or tied to a specific time frame.

[95] Pay-TV Innovation Forum, *The Global Pay-Tv Innovation Landscape: Industry Perspectives on a Year of Change*, 10 White Paper (2017), https://asiavia.org/wp-content/uploads/2018/08/PUB-Pay-TV-Innovation-Forum-Global-Landscape-2017-NAGRA.pdf.

OTT TV/Video Services also enable viewers to undergo a personalized viewing experience, since the data analytics collected from viewers are used to guide them toward user-specific content that is tailored to their individual tastes and calculated to be to their liking. At the same time, such data analytics deliver valuable insights to the OTT TV/Video service providers with respect to their customers' viewing habits and guide them in their creative and financial decisions regarding which content to create/acquire and subsequently add to the relevant OTT service's content library. As noted in a study prepared for the Internal Market and Consumer Protection ("***IMCO***") Committee of the European Parliament, "*Personalization is becoming key to navigation and selection, making big data and data analytics a key ingredient in the way content and services are being presented. Historic, aggregated data from millions of user interactions is employed to provide highly personalized experiences*."[96] For instance, like many other OTT players, Netflix uses the data collected from its subscribers relating to their viewing habits in order to decide what type of content it should create or acquire to offer on its platform.[97]

The importance of personalization was one of the primary topics of analysis in the *United States v. AT & T Inc.* case, which was decided on June 12, 2018.[98] In that case, the Court recognized and acknowledged that the transmission of the OTT players' content via the internet enables them to access and learn about their customers' viewing habits, which, in turn, allows them to develop content delivery strategies that best suit the needs and desires of specific viewers (based on their previous viewing choices), offering them similar/related programs and developing or acquiring the types of content that are most likely to appeal to their audience. Indeed, the Court referenced certain statements by witnesses from Time Warner, stating that over-the-top companies are "*bleeding away our viewers, because they're offering competitive video that has*

[96] European Parliament, Directorate-General for Internal Policies, Policy Department A, Economic and Scientific Policy, *Over-the-Top players (OTTs) – Study for the IMCO Committee*, 48 (2015), http://www.europarl.europa.eu/ RegData/etudes/ STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf..

[97] *Ibid*.

[98] *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc*., __ F. Supp. __ (D.D.C. 2018).

these advantages, because they know what to put in front of you individually, and we don't."[99] These factors, in turn, provide significant competitive advantages to OTT players in their negotiations with content owners and also help them to schedule the right time to launch a specific TV show or movie on their platforms.[100]

In light of the information, data and related analyses provided above, we find that we cannot agree with the Turkish Competition Authority's stated position that OTT TV/Video Services offer merely a complementary means of accessing content alongside traditional broadcasting services. To the contrary, our comprehensive survey of the relevant sector and assessment of the technological developments therein lead us to conclude that there exists an adequate level of substitutability and competition between the different transmission modes from the consumers' perspective for such transmission modes to be included in the same relevant product market, which was defined as the "pay-TV broadcasting services market" in previous Competition Board decisions.

VIII. Conclusion

As a commonly held principle, "*competition law is essentially articulated around two concepts, namely (i) anticompetitive agreements, i.e., the agreements which restrict competition on a given market and (ii) creation, reinforcement or abuse of a dominant position, whether by legal means (e.g. mergers and acquisitions) or illegal ones (abuses to eliminate or weaken competitors).*"[101] It is clear that the definition of the exact boundaries of the relevant market constitutes the foundation on which both of the foregoing analyses are conducted. Therefore, any competition law evaluation that is based on an outdated or inaccurate market definition would lead to misleading results and render the entire assessment fallacious. Needless to say, competition law authorities should avoid such erroneous market definitions at any cost.

[99] *Id.*, at 23.

[100] PWC Entertainment & Media Outlook for the Netherlands, *supra* note 4, at 5.

[101] EU Commission, *Market Definition in the Media Sector - Comparative Legal Analysis,* 7 (2002).

As provided in the Turkish Competition Authority's "*Guidelines on the Definition of the Relevant Market,*" the determination of demand-side substitutability between products or services is the starting point for deciding whether the relevant products/services belong in the same product market.[102] Especially in sectors that are characterised and shaped by rapid technological evolution, such as the TV broadcasting sector, competition enforcement authorities may be confronted with significant challenges in terms of understanding what is substitutable and what remains complementary in a particular market. In terms of the TV broadcasting sector, this stems from the fact that consumers' viewing habits are subject to continuous change, due to the convergence of new services and the resulting emergence of novel content creation and distribution methods, which have fundamentally altered the experience of TV/movie watching and the perception of traditional broadcasting services.

In this respect, the emergence of OTT TV/Video Services may indeed be regarded as a digital turning point for the TV broadcasting sector, since these services have essentially freed consumers from being bound to the content providers' schedules. Thus, viewers have been given the freedom to consume content "anywhere, anytime" and to do so through any technological means that are available to them. Therefore, failing to acknowledge the undeniable pervasiveness and increasingly widespread use of OTT players, and concluding that the relevant technology still remains merely complementary alongside other traditional broadcasting methods, would amount to an outdated analysis based on retroactive and obsolescent information, which is at odds with the realities of the current TV broadcasting market.

In line with the Commission's decisional practice, we conclude that the different transmission technologies (which have inevitably emerged due to the convergence in the TV broadcasting sector) should be considered substitutable to the extent that they are available and offered to consumers. In light of the information and analyses presented above, it can be reasonably said that, even though there may still be room for improvement, the obstacles that were deemed to prevent the

[102] Turkish Competition Authority, *Guidelines on the Definition of the Relevant Market* (10.1.2008, 08-04/56-M), para 10 (2008).

development of OTT services in Turkey are now mostly obsolete and inapplicable in light of current market realities (especially with respect to rising broadband internet penetration rates and average connection speeds). Indeed, there has been a rapid and consistent increase in the tendency of Turkish consumers to utilize OTT services, and this trend is still continuing apace. Therefore, we conclude that there exists a sufficient level of substitutability and competition between all of the different technologies used for transmitting content to the end users, including OTT TV/Video Services, for all such technologies to be included as part of the same relevant product market definition.

Bibliography

Books and Reports

Akamai, *The State of the Internet Report* (2016), cited in Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence* (2017).

Plum Consulting, *A Report for the GSMA Benefits of Digital Broadcasting*, (2014).

Kantar Media, *Linear vs non-linear viewing: A qualitative investigation exploring viewers' behaviour and attitudes towards using different TV platforms and services providers*, (2016), https://www.ofcom.org.uk/__data/assets/pdf_file/0029/68816/km_report.pdf.

PWC Entertainment & Media Outlook for the Netherlands, *Outlook Special - Over-the-top Television*, (2015), https://www.pwc.nl/nl/assets/documents/pwc-outlook-special-over-the-top-television.pdf.

T.C. KALKINMA BAKANLIĞI, BILGI TOPLUMU STRATEJISININ YENILENMESI: GENIŞBANT ALTYAPISI VE SEKTÖREL REKABET EKSENI MEVCUT DURUM RAPORU (2013), cited in Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence*, (2017).

Periodicals

Baccarne, B., Evens, T. and Schuurman, D., *The Television Struggle: An Assessment of Over-the-Top Television Evolutions in a Cable Dominant Market*, Digiworld Economic Journal, 2013, cited in Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence*, (2017).

Statutes, Legislative and Administrative Materials

Consumer Rights Regulation on the Electronic Communications Sector 30224 (2017).

Electronic Communications Law No. 5809 (2018).

European Commission, *Mergers: Commission confirms approval of acquisition of Dutch cable TV operator Ziggo by Liberty Global, subject to condition*, (2018)

European Parliament, Directorate-General for Internal Policies, Policy Department A, Economic and Scientific Policy, *Over-the-Top players (OTTs) – Study for the IMCO Committee*, (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf..

EU Commission, *Market Definition in the Media Sector - Comparative Legal Analysis*, (2002).

Turkish Competition Authority, *Guidelines on the Definition of the Relevant Market* (10.1.2008, 08-04/56-M), (2008).

Information and Communication Technologies Authority, *Regulation of the Fair-Use Quota*, Public Release (2016), https://www.btk.gov.tr/uploads/news/akn-du-zenleme-basin-ac-iklamasi-son-v2.pdf.

Cases

CME's acquisition of Balkan News Corporation and TV Europe, No. 385/08.04.2010,.cited in OECD, *The Implications of Convergence for Regulation of Electronic Communications*, Report presented to the Working Party on Telecommunications and Information Services Policies, DSTI/ICCP/TISP(2004), https://read.oecd-ilibrary.org/science-and-technology/the-implications-of-convergence-for-regulation-of-electronic-communications_232632377163#page1 (last visited Dec. 5, 2018).

ICTA, No: 2016/DK-THD/518, Dec 27, 2016, (2016)

EU Commission Decision, *Case No. COMP/M.7000 - Liberty Global/Ziggo* (2014).

EU Commission Decision, *Case No. COMP/M.7000 - Liberty Global/Ziggo* (2018).

EU Commission Decision, *Case No. COMP/M.6880 - Liberty Global/Virgin Media* (2013).

EU Commission Decision, *Case No. COMP/M.5121 - News Corp/Premiere* (2008).

EU Commission Decision, *Case No. COMP/M.5932 - News Corp/BSkyB* (2010).

EU Commission Decision, *Case No. COMP/M.4504 - SFR/Télé 2 France* (2007).

EU Commission Decision, *Case No COMP/M.7978 - Vodafone/Liberty Global/Dutch JV*, at (2016).

Turkish Competition Board's *Turkish Football Federation I* Decision, dated 30.04.2012 and numbered 12-23/659-181.

Turkish Competition Board's *Turkish Football Federation II* Decision, dated 04.11.2014 and numbered 14-43/804-361.

Turkish Competition Board's *TTNET* Decision, dated 19.12.2013 and numbered 13-71/959-406.

Turkish Competition Board's *Turkish Football Federation III* Decision, dated 20.03.2014 and numbered 14-11/206-90.

Turkish Competition Board's *Güçlü Radyo ve Televizyon* Decision, dated 20.03.2014 and numbered 14-11/205-89.

Turkish Competition Board's *Bugün TV* Decision, dated 16.07.2014 and numbered 14-24/491-220.

Turkish Competition Board's *Krea/Bugün* Decision, dated 16.07.2014 and numbered 12-23/659-181.

Turkish Competition Board's *Tivibu* Decision, dated 05.02.2015 and numbered 15-06/74-31.

Turkish Competition Board's *Pozitron/Krea* Decision, dated 09.09.2015 and numbered 15-36/540-172.

Turkish Competition Board's *BEIN/DPA* Decision, dated 03.11.2015 and numbered 15-39/639-221.

Turkish Competition Board's *TTNET* Decision, dated 19.01.2017 and numbered 17-03/25-11.

United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc., __ F. Supp. __ (D.D.C. 2018).

Internet Sources

Baker, Liana B., *Time Warner Cable shifts away from “triple play,”* (2013), https://www.reuters.com/article/us-timewarner-results-idUSBRE93O0D120130425.

Ekonomist Online, *Online Competition on Series and Films* (*Dizi ve filmlerde online rekabeti*) (2017), www.ekonomist.com.tr/teknoloji/dizi-filmlerde-online-rekabeti.html (last visited Dec. 5, 2018).

Feldman, Dana. *Netflix's Content Budget Is Updated to $13B for 2018* (July 9, 2018), https://www.forbes.com/sites/danafeldman/2018/07/09/netflixs-content-budget-is-updated-to-13b-in-2018/#2322db932b8c (last visited Dec. 5, 2018).

Ganuza, J. J. and Viecens, M. F., *Over the Top Content: Implications and Best Response Strategies of Traditional Telecom Operators: Evidence from Latin America*, Proceedings of the CRP LATAM Conference (2014), cited in Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence*, (2017).

IAB Türkiye, *Turkish Internet Computation Study* (*Türkiye Internet Ölçümleme Araştırması*), (2018), https://www.iabturkiye.org/UploadFiles/TopTwentyFiles/Internet_audience_toplist_02_2018_Overnight_.pdf (last visited Dec. 5, 2018).

Information and Communication Technologies Authority, *Market Data Report* (2018).

OECD, *Triple and Quadruple Play Bundles of Communication Services*, OECD Publishing (2015), https://www.oecd-ilibrary.org/science-and-technology/triple-and-quadruple-play-bundles-of-communication-services_5js04dp2q1jc-en (last visited Dec. 24, 2018).

OECD, *supra* note 2. *See also* OECD, *Market Definition*, OECD Policy Roundtables DAF/COMP(2012)19, http://www.oecd.org/daf/competition/Marketdefinition2012.pdf (last visited Dec. 12, 2018).

OECD, *The Implications of Convergence for Regulation of Electronic Communications*, DSTI/ICCP/TISP, (2004). https://www.oecd-ilibrary.org/docserver/232632377163.pdf?

expires=1549373722&id=id&accname=guest&checksum=27D89366D9B4E17120BC03A2791E2E37.

Pavlik, John V., *Understanding Convergence and Digital Broadcasting Technologies for the Twenty-First Century*, NHK Broadcasting Studies No: 4 (2005), https://www.nhk.or.jp/bunken/english/reports/pdf/05_no4_08.pdf.

Pay-TV Innovation Forum, *The Global Pay-Tv Innovation Landscape: Industry Perspectives on a Year of Change*, White Paper (2017), https://asiavia.org/wp-content/uploads/2018/08/PUB-Pay-TV-Innovation-Forum-Global-Landscape-2017-NAGRA.pdf.

Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM/2013/0231 (2013).

Turkish Competition Authority, *Report on the Sector Inquiry for Television Broadcasting in the Context of Digitalization and Convergence*, para 4 (2017).

The Body of European Regulators for Electronic Communications (BEREC), *Report on OTT Services*, (2016), https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services.

IMDB, https://www.imdb.com/ (last visited Dec. 24, 2018).

Kırık, Ali Murat, *International Conference of New Media and Interactivity*, 476-479 Marmara University Faculty of Communications (2010), https://www.researchgate.net/profile/Ali_Murat_Kirik2/publication/328738745_Televizyon_Yayinciliginda_IP_Devrimi_IPTV/links/5be01a1f4585150b2b9f7329/Televizyon-Yayinciliginda-IP-Devrimi-IPTV.pdf

McCormick, Nicole, *The Telco Services Bundle Unraveled – The Rise of New Bundles*, 3 OVUM TMT Intelligence, https://ovum.informa.com/resources/product-content/the-telco-services-bundle-unraveled-the-rise-of-new-bundles-te0009-001650 (last visited Dec. 24, 2018). Ovum is "a market-leading data, research and consulting business focused on helping digital service providers and their technology partners." *See* INTRODUCING OVUM, https://ovum.informa.com/ about/about-us (last visited Dec. 24, 2018).

GET THIS STRAIGHT: OTT vs IPTV, https://www.muvi.com/blogs/get-this-straight-ott-vs-iptv.html (last visited Dec. 24, 2018).

MedyaTava, *What would the ratings of Fi be if it were broadcast on TV?*, (2017), http://www.medyatava.com/haber/fi-dizisi-televiz-yonda-yayinlansa-reytingi-ne-kadar-olurdu_151793 (last visited Dec. 24, 2018).

Netflix Media Center, *Netflix Announces Cast and Start of Production for its First Turkish Original Series* (March 7, 2018), https://media.netflix.com/en/press-releases/netflix-announces-cast-and-start-of-production-for-its-first-turkish-original-series (last visited Dec. 5, 2018).

OECD, *Broadband Statistics Update* (2018), http://www.oecd.org/sti/broadband/broadband-statistics-update.htm (last visited Dec. 10, 2018).

ABOUT US, https://www.twentify.com/about (last visited Dec. 24, 2018).

Set-Top Box (STB), https://www.techopedia.com/definition/2284/set-top-box-stb (last visited Dec. 3, 2018).

DIFFERENCE BETWEEN IPTV AND OTT, https://iptvmiddleware.com/iptv-ott/difference-between-iptv-and-ott/ (last visited Dec. 5, 2018).

Statista, *Estimated number of active streaming subscribers for Netflix in Turkey from 2017 to 2020 (in 1,000)*, (2018), https://www.statista.com/statistics/607812/netflix-subscribers-in-turkey/ (last visited Dec. 24, 2018).

TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2018, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=27819.

TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2017, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=24862.

TUIK, Hanehalkı Bilişim Teknolojileri (BT) Kullanım Araştırması, 2016, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=21779.

Turkcell Grup, *2018 Investor and Analyst Day Presentation* (*2018 Yatırımcı ve Analist Günü Sunumu)*, (2018), https://s3.turkcell.com.tr/SiteAssets/Hakkimizda/yatirimci-iliskileri/documents/pdf/CMD-Final-TR.pdf (last visited Dec. 5, 2018).

Telkoder, *Internet Tabanlı Hizmetler (ITH/OTT) Elektronik Haberleşme Sektörüne Etkisi ve Düzenleme Önerileri*, (2015), http://telkoder.org.tr/wp-content/uploads/2017/06/RAP2015-4.pdf .

Twentify, *Digital Eye of Turkey,* (2018), https://www.twentify.com/tr/raporlar/medya-dagitim-servislerinde-kullanim-ve-memnuniyet-arastirmasi-raporu (last visited Dec. 10, 2018).

Twentify, https://www.twentify.com/ (last visited Dec. 10, 2018).

Webrazzi, *New-generation online TV platforms in Turkey* (*Türkiye'nin yeni nesil online TV platformları*), (2017), https://webrazzi.com/2017/04/12/turkiyenin-yeni-nesil-online-tv-platformlari/ (last visited Dec. 24, 2018).

Yeni Şafak, *Şahsiyet'in ünü sınırları aştı: Dünyanın en iyi 40 dizisinden biri* (November 20, 2018), https://www.yenisafak.com/hayat/sahsiyetin-unu-sinirlari-asti-dunyanin-en-iyi-40-dizisinden-biri-3409975 (last visited Dec. 24, 2018). IMDB is an online database (owned by Amazon) containing information about films, TV programs, video games, etc. *See* IMDB, https://www.imdb.com/ (last visited Dec. 24, 2018).

Overseeing Natural Monopolies: A Comparative Assessment of the Approach on Competition in the Electricity Sector

Gönenç Gürkaynak, Esq.*

Merve Öner**

Aybüke Akdağ***

1. Introduction

The conception of "economies of scale" in the conventional production era led to the proliferation of natural monopolies, as if demand for certain needs and products could only be sufficiently met by colossal entities.[1] The most efficient method for achieving higher production capacities, lower prices, and thus, enhancing public welfare appeared to be eliminating competition in these markets by designating a single economic unit—whether state-owned, private, or a public-private partnership—as the sole supplier.

Clearly, deregulation appears to be a consistent trend in the last few decades in electricity sector, as technology presents (and to some extent, imposes) viable alternatives to the supply structures that were adopted by natural monopolies. Although it is completely unsettled, electricity sector have recently been subjected to the scrutiny of several

---

* Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

** Merve Öner is an associate at ELIG Gürkaynak Attorneys-at-Law.

*** Aybüke Akdağ is a trainee lawyer at ELIG Gürkaynak Attorneys-at-Law.

1 The cause-and-effect relationship is established, since the "economies of scale" that can be achieved in natural monopolies are so substantial that a single undertaking is able to supply the whole market. *See* R. GLENN HUBBARD & ANTHONY PATRICK O'BRIEN, ECONOMICS, 556 (5th ed. 2010).

national and international competition enforcement authorities as well as various legislators, due to its particular nature, which is presumed to include a protective cloak that makes it *de facto* exempt from market- or consumer-driven sanctions.

In parallel, with the effective deregulation process in electricity sector since 1984 with the Law No. 3096 that legally allowed and enabled electricity production, transmission, distribution and commerce by non-state institutions. The most significant deregulation in the electricity sector concerns the vertical divestiture of the sector and thus especially the electricity retail sales segment of the divestiture is found to display a competitive commercial structure. In this respect, Turkish Competition Board ("***the Board***" or "***TCB***") actively applies competition law and enables liberation especially in the electricity retail market through its decisions and contributes to the enhancement of competition through its studies on sectorial reports, which will all be considered below.

In this respect, this article attempts to examine and illuminate the competition law regime's handling of natural monopolies in general, particularly electricity sector. In this regard, this article will (i) examine the legal and economic context of natural monopolies in general and (ii) compare the liberation policies of the electricity sector within the European Union ("***EU***") and the United States ("***USA***") with the Turkish Competition Authority's ("***Authority***") approach to the sector's liberation process. As a result, the article will analyse the on-going competitive issues within the electricity sector in Turkey and provide resolutions on how the liberation and competition within the sector can be enhanced.

2. Legal and Economic Context of Natural Monopolies

Natural monopolies are more frequently observed in network industries, including electricity sector, where the fixed costs of providing the product or service are significantly higher than the variable supply costs. In this respect, a natural monopoly can supply a sufficient amount of products/services to fulfil the entire demand (say, at the presumed point A on the supply/demand chart), and any undertaking that attempts to enter the market will initially face the challenge of high fixed costs, and it will only be able to supply the market at a presumed point B, which will be insufficient to meet the demand in the market. As a result, the lower costs, lower prices and higher quantities of the monopoly will naturally exclude any competitors from the relevant market, and the monopolistic undertaking will be left without any competitors in the market

2.1. Regulatory Approach

The term "regulation" encompasses a significantly broad concept,[2] which refers to the restrictions (other than those in perfectly competitive markets) that are imposed by the public authorities on the market players in a particular sector. Regulation is often "a *continuous and focused control,*"[3] arising from a pressing economic need related to the ineffective functioning of the free market economy. Although there is only a single undertaking in natural monopolies, mostly for economic and efficiency reasons, the lessons of behavioural economics indicate that such markets are prone to culminate in various economic inefficiencies as a result of market failures.[4] Therefore, regulating natural monopolies is often deemed as the best and most useful way of minimizing these effects, and such regulation is aimed at arriving at an economic model where the undertaking (*i.e.*, natural monopoly) behaves as if it is in a competitive market.

There are several widely accepted methodologies for handling the regulation of natural monopolies. The most frequently used regulatory technique is known as "price regulation," while several other approaches, including (i) quantity, (ii) entry and exit structure, and (iii) quality-based regulations, are also employed in different scenarios.[5] The dominant methodology for the regulation of natural monopolies is

---

2 MELTEM BAĞIŞ AKKAYA, COMPETITION LAW ENFORCEMENT IN REGULATED MARKETS: WHEN COMPETITION ENFORCEMENT CLASHES WITH A REGULATORY AGENCY'S ENFORCEMENT, 2 (2014).

3 KARABUDAK, HALIL BAHA, COMPETITION POLICY AND REGULATED MARKETS, 7 (2018).

4 BCcampus Open Education, *Principles of Economics: Regulating Natural Monopolies – Principles of Economics.*

5 MESUT EROL, DOĞAL TEKELLERIN DÜZENLENMESI VE TELEKOMÜNIKASYON SEKTÖRÜNDE DÜZENLEYICI KURUM, 37 (2003).

accepted as price regulation which has three primary methods within itself, namely: (i) *rate of return* which relies on the determination of the exact rate of return of the undertakings[6] (ii) *price cap*, which operates by setting the estimated prices proposed by the undertakings as the highest permitted price, so that it motivates the undertakings to reduce their costs and keep them at a minimum level[7]; and (iii) *yardstick method* which relies on the renewal of price lists based on the efficiency increases achieved during the previous time interval[8]. All three of the relevant methods have been criticized by the commentators, mainly due to efficiency grounds.

2.2. Competition Law Perspective

Competition law mainly tackles natural monopolies with respect to their unilateral conducts, and enforcement authorities mostly confront them if they abuse the market power (*i.e.*, dominant position) that they hold.[9] Their bilateral relationships, such as vertical relationships, might be problematic from the perspective of competition law as well, since such relationships might affect the downstream or upstream markets of the market in which they operate. However, exploring the question of "*how law impacts behaviour*" and trying to come up with a feasible answer is the ultimate goal for all regulators and enforcement agencies.[10] Even though natural monopolies are usually based on solid legal foundations and their existence is not illegal on its own, they also face regulatory scrutiny and intervention most of the time, [11] because of the dangers they pose to market and to the public welfare.

In Turkey, the energy sector, and thus, the electricity sector have been in a swift transformation process formed by the liberation and privatization acts throughout the recent years in an attempt to open the sector to competition. That being said, the sector has been a natural

---

6 *Id.*, at 39.

7 *Id.*, at 42.

8 *Id.*, at 43.

9 HUBBARD & O'BRIEN, *supra* note 1, at 556.

10 Magdalena Małecka, *Posner versus Kelsen: The Challenges for Scientific Analysis of Law*, 43 European Journal of Law and Economics, 495 (1968).

11 HUBBARD & O'BRIEN *supra* note 1, at 556.

monopoly for many years and the state control was at a high level, and the fact that the liberation process has been rendered so suddenly caused the investors to be exposed to many risks. To that end, in order to render this transformation process in the energy sector as smooth as possible, to achieve the results intended by liberalization and privatization, markets need to be formed competitively from the very beginning. The ultimate goal here should be to ensure the freedom of contract in the sector which has been significantly and negatively affected by dominance and abusive practices. In other words, competition law is both the target and the tool to maintain an efficient and optimal liberalization of the electricity sector.[12] The implementation of competition law during the liberalization and privatization process should be well-balanced, the network effects that foreclose the market to new entries should be minimised and an optimal separation method should be determined to distinguish the electricity sector from other fields of the general energy sector which has been managed single-handedly by the government in the past. Accordingly, this article will articulate the details that should be taken into consideration in order to achieve these objectives; explain the necessity of determining a competitive policy accordingly; and provide details on the possible future targets by way of exemplifying global and national cases that would shed light on the matter.

3. The European Union's Competition Policy for Liberating the Electricity Sector

The energy policies of the EU have three primary targets: (i) to establish a competitive energy sector, (ii) to maintain the security of supply and (iii) to protect the environment within the scope of sustainable development. In this regard, the EU has aimed to establish a balance between the relevant three targets while determining its policies on the electricity sector as well. To that end, the EU legislation includes regulations to ensure the establishment of highly competitive, secure and sustainable electricity sector, provide the consumers with more choices with lower prices and in this regard, to liberate the sector in its entirety.

[12] Rekabet Kurumu Uzmanlık Tezleri Serisi (Competition Authority Expertise Theses Series) No:131, 2012

In order to fulfil the target for an integrated internal energy sector in the EU, the most important element is an efficient competition law system that would ensure the protection of competition in the energy market. In this regard, the tools for the creation and regulation of this system are as follows[13]:

- Anti-trust implementation - TFEU Articles 101, 102 and 106: Article 101, regulating TFEU's decisions on agreements, concerted practices and decisions of the associations of undertakings, Article 102, regulating abuse of dominant position and Article 106 regulating that the undertakings that are considered as natural monopolies are also subject to competition law rules; are the main articles that regulate the anti-trust implementation

- Merger Control – EU Merger Regulation: The Merger Regulation, published by the Commission in 2004, regulates the control of mergers and acquisitions.

- State Aid Control – the new Guidance on State Aid for Environmental Protection and Energy Sector: The Guidance on State Aid for Environmental Protection and Energy Sector regulates state aid.

(i) The Process of Liberating the Sector and Opening it to Competition

The first steps to reach the aforementioned goals were rather cautious. The EU firstly focused on increasing the transparency and enabling interconnection between electricity and natural gas networks of the member states. Thereupon, following these cautious first steps, the EU moved towards complete liberalization of the electricity market since mid-1990s. Within this framework, two liberalization directives were adopted (i.e. the First Energy Package). The package consisted of (i) the electricity directive adopted in 1996 which has entered into force amongst the member states in 1998 and (ii) the natural gas directive adopted in 1998 which has entered into force amongst the member states in 2000. To that end, the first official liberalization step that the EU has taken within the energy sector was to non-monopolize and ensure a

[13] Monica Cunningham, "*Enforcing EU Competition Law in the Energy Sector*" 2014, available at: http://www.consiliulconcurentei.ro/uploads/docs/items/id10136/20141124_rcc_roundtable.pdf (Last visited: 29.01.2019)

competitive market for the electricity sector.[14] Accordingly, the second energy package also included the Electricity and Natural Gas Directives which came into force in 2003 and in 2007, the European Commission ("***Commission***") approved the third liberalization package.

The package approved by the Commission in 2007 consisted of the latest most significant component of the EU's energy policy: the struggle against climate change for a sustainable energy market[15]. For this purpose, with the Energy and Climate Change Package that the Commission prepared and approved in March 2007, three important targets to be realized by 2020 have been put forward: (i) Reduction of greenhouse gas emissions by 20% by 2020 compared to 1990; (ii) increasing the share of renewable energy in energy supply to 20%, especially for electricity by 2020 and the rate of utilization of biofuels in transportation to at least 10%; (iii) ensuring 20% savings in primary energy consumption by 2020. The first tool to reach the relevant targets was indicated as "establishing a single, liberal, competitive internal energy market within the EU." Under that approach, the Commission has announced its legislative proposals called the "Third Package" in 2007. The Third Package covered matters such as the legal and functional separation of the production and supply/sales activities from the network (transmission and distribution) operations which used to be carried out as a natural monopoly; increasing the independence of the national energy regulators and ensuring transparency for the market activities, in an attempt to open the electricity and gas markets to ***full competition***.

In line with the EU Energy Policy discussed above, a new internal electricity market was established. The relevant legislation, while establishing a single internal electricity market within the EU, also determined the minimum conditions for competition to develop in the market in a fair and transparent manner. In this regard, within the framework of the legislation, the manufacturers were allowed to establish a new power plant and generate electricity anywhere in the member states of the EU. On the other side of the supply chain, the large

---

[14] Frédéric Gouardères, *Internal Energy Market,* European Parliament Factsheets, 2018 available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.9.pdf (Last visited: 29.01.2019)

[15] TR Ministry of European Union Affairs, "*Avrupa Birliği Sürecinde Enerji Faslı",* 2014.

and medium-scale electricity consumers became able to have the opportunity to choose where to purchase electricity and the access of those who do not have an electricity network was also secured. Furthermore, the rules governing the licensing for generating electricity also became transparent and effective. While all of these were being accomplished, the most fundamental element for the internal electricity market was: the right of **choice** for both suppliers and consumers[16]. Given that the right of choice cannot be practiced in a market which is not fully competitive and where there is not multiple players that actively compete in the market, the precedents of the Commission play an important role for the establishment of the policy. From 2000 (close to the timing of the the publication of the first energy sector liberalization directive), there has been a noticeable increase in EU competition policy implementation for the energy sector.

For instance, in *Spain State Aid* [17] the Commission set forth that the companies that obtain electricity with integrated regulated tariffs could not make any profit from these tariffs and that certain companies would have to pay the interest resulted within their electricity due to the relevant measure taken by Spain. In this context, the Commission found that the decision of applying integrated regulated tariffs did not qualify as State Aid in the sense of Article 107 of TFEU since it would not be beneficial to market players in any way. The decision is significant given that it demonstrates the fact that EU, within its power, intends to prevent the member states' from interfering with the players in the energy sector. It also demonstrates the fact that it is the EU's priority to keep the energy sector as far away from the natural monopoly as possible and to enable free competition between the players of the sector.[18]

[16] *Id.*

[17] The Commission's *Spain State Aid Decision* numbered 2014/456/EU, Celex No. 314D0456

[18] The European Commission, "*The economic impact of enforcement of competition policies on the functioning of EU energy markets", 2016,* available at: http://ec.europa.eu/competition/publications/reports/kd0216007enn.pdf (Last visited: 30.01.2019)

Moreover, the investigation subject to *Bulgaria Energy Holding ("**BEH**")*[19] decision, evaluated the allegations that the regional restrictions in the long-term electricity sales contracts between BEH and its customers in the non-regulated Bulgarian electricity wholesale market violated competition and restricted the customers' freedom to resell the electricity that they have previously purchased. BEH has proposed certain commitments before the Commission in order to refrain from being imposed with a monetary fine. Considering the commitments made by BEH and adopted by the Commission, it can be observed that the commitments do not include any changes in the long-term electricity sale contracts, but instead target to improve the activities in the day-to-day electricity market. Under the relevant commitments: BEH committed to establish a new energy exchange in Bulgaria, to obtain information and technical support from an independent third party during the installation process and to leave the control of the energy exchange to be established to the Bulgarian Ministry of Finance. In order to ensure the liquidity of this new energy exchange, BEH has also undertaken to sell a predetermined amount of electricity to the stock exchange for a period of five years. Moreover, under the relevant commitments, the amount of electricity to be provided to the stock market to be sold during the day-to-day electricity market could vary on an hourly basis and its price would not exceed the marginal cost of electricity generated by BEH. According to the Commission, BEH's commitments would prevent sellers from imposing regional restrictions, as it would make it difficult to keep track of who sells the electricity and in the long term, the commitments would increase the integration of the Bulgarian electricity market with neighbouring countries and ultimately help to ensure the European Energy Union target. To that end, the Commission has found that the commitments proposed by BEH were sufficient.

(ii) Legal and Functional Separation: Is it Accomplished?

Although there is considerable consensus on the importance of separation for the creation of a competitively functioning electricity sector, due to the significantly different views on the relative benefits and costs of different separation methods the optimal separation method

[19] The European Commission's *Bulgaria Energy Holding* decision dated 10.12.2015 and numbered Case AT.39767

to be applied and the issue of how it will be implemented is still highly controversial in the EU.

In the EU energy directives for the electricity and natural gas markets, three alternative solutions have been proposed for the functional separation power transmission networks, which are: property separation, independent system operator (ISO) and independent transmission operator (ITO) which will briefly be explained below:

- Property Separation: According to this separation method, the same persons or entities cannot both be a transmission system or a transmission system operator; directly or indirectly control an undertaking engaged in production or procurement activity.

- Independent System Operator: Under this alternative, the ownership of the transmission network remains vertically integrated; however, the operation of the system is left to an independent operator with a different ownership structure than the network owner.

- Independent Transmission Operator: The ownership of the transmission system, yet again, remains vertically integrated; however, the operation of the system is left to a different person who is under the same ownership with the transmission system.

On the other hand, in terms of legal separation, the directives set forth that, the organization and the decision-making mechanisms shall be independent from the other market activities as well as mandating that a separate legal entity shall be formed for the distribution activities. Furthermore, the ISO's and ITO's are also legally separated by the directives and in terms of the separation of the distribution networks, the directives set forth that a compliance programme which would include the necessary precautions to be taken in order to ensure the independency and separation of the network activities from the other market activities. The annual report to be prepared within the framework of the compliance program should be submitted to the regulatory authority by the compliance officer following the compliance program and should be published. To audit whether the network owners comply with the foregoing obligations, the regulatory authorities, as well as the competition authorities have been assigned and authorized to monitor the network owners[20].

In this regard, while the legal separation system has been established, the functional separation within the electricity sector is still a subject to be discussed and developed for the EU and its member states. In order to shed light on the current circumstances within the EU in terms of the implementation of the explained policies, establishment of a competitive electricity market and separation and vertical divestiture, below are some example precedents of the national authorities and the Commission.

In *Gaz de France/Suez*[21] the Commission found that the merger between the energy companies Gaz de France ("***GDF***") and Suez would result in significant market foreclosure and would restrict the competition in the electricity and natural gas markets of France and Belgium. In France, Distrigas, a subsidiary of Suez, is one of the biggest competitors of GDF, the operator of most of the natural gas networks. The Commission's assessment on that front indicates that: as a result of the transaction, GDF's dominant position in the French market would be strengthened and the competition in the market for the supply of natural gas to electricity producers would be severely restricted. Furthermore, in Belgium, GDF held joint control over SPE, the most significant competitor of Suez, which held dominant position in the market for the wholesale of electricity. To that end, the Commission has set forth that: the transaction would result in the elimination of Suez's most effective competitor in the Belgian market for the wholesale of electricity. To that end, in order to remedy the relevant risks, the parties have committed to divest all of GDF's shares in Distrigas and SPE.

In *E.ON* [22] the Commission, alleging that E.ON has manipulated the prices within the German electricity wholesale market through hindering the utilization of its capacity by other undertakings; sat down at the negotiating table with E.ON. As a result of the negotiations, E.ON has submitted a commitment to divest 20% of its production capacity.

---

[20] *Id.*

[21] The Commission's *Gaz de France/Suez* decision dated December 14, 2006 and numbered Case COMP/M.4180.

[22] The Commission's *E.ON* decision dated November 26, 2008 and numbered Case COMP/39.388.

Furthermore *Netherlands – Essent NV*[23] decision of the European Court of Justicedemonstrates the Dutch approach to the separation of the electricity (and natural gas) suppliers and distributors. Until the decision, electricity and natural gas have been provided to the consumers through the mutual natural gas and electricity transmission stations. Therefore, the owners of these distribution networks had a natural monopoly. Within the scope of the second liberalization package of electricity and natural gas, the functional and legal separation of distribution systems and production/ supply operators has been introduced. However, the EU law did not make the separation compulsory; it was rather a *suggestion*. That being said, the Netherlands has gone beyond from assessing whether the package was an "obligation" and has imposed a "*ban on privatization of the distribution networks*" which prevented the distribution networks from being owned by private companies. In this regard, the European Court of Justice has interpreted this practice as the prevention of free movement of goods *on behalf of the public* and has not considered the practice - which would in fact preserve the competition in the market by separating the distribution networks from private suppliers - as wrongful.

(iii) Energy Integration Target: 2020 Strategies

In line with the explanations above and according to the Energy Union objective report, published by the European Commission competition law expert Monica Cunningham[24], there are five elements that should be observed and accomplished to complete the EU's strategy. The relevant elements are as follows:

- Ensuring the reliability of resources,

- To create a single energy market that is fully integrated within the EU, which is the main objective of the energy union,

- Establishing an environmentally sensitive energy sector by reducing carbon use

- Ensuring the proportionality of energy demand,

- Establishing a fully open sector for research and innovation.

---

[23] The European Court of Justice's *Netherlands – Essent NV* decision numbered C-105/12

[24] *See* Cunningham *Supra* Note 13.

In line with the foregoing, the EU, determining that the existing strategies would not be sufficient to reach the 2020 targets, has published the Energy 2020 Strategy on 10 November 2010. In the strategy, the priorities of the EU in the energy field for the next 10 years are as follows[25]: (i) to create a Europe that uses energy efficiently; (ii) to create a fully integrated energy market, (iii) to empower consumers and provide the consumers the right to choose their suppliers amongst multiple players within the market, (iv) becoming a leader in the world in energy technology and innovation and (v) strengthening the external dimension of the EU energy market[26].

That being said, in order to fulfil all of the objectives mentioned above, it is a *sine qua non* to establish a competition law system which ensures that the competition in the energy market is operational, maintained and protected.

4. The United States' Competition Policy for Liberating the Electricity Sector

Initially at the, one can call, the beginning of competition law, the Sherman Law (1890) itself, was enacted to demolish monopolies, such as the Standard Oil Company, an integrated oil research and production company, both vertically and horizontally, with its populist and progressive structure of origin. After more than 100 years, the US Department of Justice has challenged the proposal for the concentration of Halliburton and Baker Hughes, two oil-bed service companies[27].

Energy is of great importance for the US economy. EU anti-trust institutions and organizations are therefore closely monitored by the US Department of Justice and the Federal Trade Commission. The historical background of deregulation with respect to natural monopolies inevitably leads us back to the alleged "*regulatory failures*" of the 1970s in the United States, where regulation was depicted and considered as the scapegoat for the deep economic crises of that decade. One of the

[25] *See* TR Ministry for European Union Affairs *Supra* Note 15.

[26] European Commission Publications: '*The European Union explained' (Europe 2020 — The EU growth strategy)*, 2012

[27] Thomas D, Fina, *The Intersection of Energy and Competition Law in the USA*, Issue: (2016)9(6): p. 411-423, December 27, 2016

most extreme examples of this deregulatory movement was observed in the transportation sector, which involved the efforts to deregulate the airline industry. This push for deregulation in air transportation was initiated by none other than the regulatory body overseeing the airline industry (*i.e.*, the Civil Aeronautics Board) itself.[28] Nevertheless, in the absence of revolutionary technological changes, pro-regulation views still appeared to triumph over the trend toward deregulation at that time.

(i) Energy Policy Act and Energy Charter Treaty

The 1994 Energy Charter Treaty gave the first initiation for the liberalization of the energy sector and thus, caused the competition law to play an important role in the United States which is the centre and the lifeblood of the free market economy. This Treaty was also signed by the European Union and EurAtom. In this regard, the first foundation of a liberal energy sector is sector is the Energy Charter Treaty.

The Energy Policy Act, which came into force in 2005, regulates the energy production and distribution policies within the United States. The policies that it regulates are as follows: (i) renewable energy; (iii) petroleum and natural gas; (iv) coal; (v) regional energy; (vi) nuclear energy and safety (vii) vehicles and engine fuels (including ethanol) (viii) hydrogen, (ix) electricity; (x) energy tax incentives; (xi) hydro power and geothermal energy; and (xii) climate change technologies. With the relevant act, which has entered into force to deal with the increasing energy problems, it is aimed to change the energy policy of the United States through various tax incentives and financial guarantees. The law has assigned new duties to the Federal Energy Regulatory Commission and within this framework, it has enabled the liberation of the market protection of competition within the market.[29]

According to the American Anti-trust Institute, the determination of the competition policy to be followed plays an important role in the energy policy objectives to be achieved. It is essential that competition law is in place in order for a market with less carbon utilization and more innovation. The major restructuring in both the electricity and oil industries requires detailed assessments for the merger acquisition

[28] See Müftüoğlu & Karabudak, *supra* note 3, at 9.

[29] Federal Energy Regulatory Council, "Financial Report to Congress" available at: https://www.ferc.gov/about/strat-docs.asp (Last visited: January 29, 2019)

transactions from the perspective of changing balance within the market, which would enable the proper establishment of the market as a result of the precedents to be ruled. The American anti-trust institute states that[30] the traditional energy market and the new markets that are more open to expansion could tremendously benefit from the competition policies. In the energy sector, competition and regulations should not conflict with each other, but should play a complementary role.

(ii) Regulatory Approach: Federal Energy Law and the Federal Energy Regulatory Commission

The exact responsibilities of competition institutions and sector-specific regulatory bodies are not only controversial in Europe, but also in the United States. However, the Federal Energy Act allows the application of the American Antitrust Law by energy and telecommunications enterprises. It is a direct, binding and explicitly regulated regulation by only one political authority and thus, it can replace antitrust law. In cases where the US Interference Doctrine is not implemented, objection to a decision of a regulatory body is not considered as a justification for a competition restrictive behaviour.

The Federal Energy Regulatory Commission ("***FERC***") is the board that regulates interstate electricity, oil and gas transmission within the USA. As previously explained, it gained additional responsibilities under the Energy Policy Act, which came into force in 2005. The most significant responsibilities that it has gained in terms of competition law are as follows:

- Investigating certain merger acquisition transactions between electricity companies

- Licensing and auditing hydroelectric projects by private companies, municipalities and the state

- Examining and supervising energy markets

(iii) The United States' Policy Today

The disintegration and separation practice in the US electricity market is shaped by the regulations of the FERC. In the USA, most of

[30] Theocharis N. Grigoriadis, *State Responsibility And Antitrust In The Energy Charter Treaty*; 2008

the electricity networks are legally separated. Furthermore, the ISO model is also widely applied. In some states, vertically integrated undertakings have voluntarily applied for property separation for their transmission and distribution activities. There is an opinion on that front however, that the adoption of different separation and decomposition methods in different states makes it difficult to analyse and assess the effects of the USA practice in general and to exemplify it to other countries[31].

In the country, most of the natural gas and electricity networks are legally separated; The BSO model is also widely applied. In some states, vertically integrated undertakings have voluntarily applied property segregation in their transmission and distribution activities. It is stated that the adoption of different decomposition methods in different states makes it difficult to analyse the effects of US practice and to take samples from other countries.

In terms of transparency and providing information to the consumers, in the United States, various commissions operating in the states where consumers have the right to select their providers announce the price information of their alternative supply companies on their website. To that end, it is safe to indicate that the liberated electricity market in the United States is also completely transparent[32].

Having a completely liberated electricity market, recently, the United States has started to focus on the environmental issues and electricity sector. In this regard, due to global warming, the alternative, "green" electricity energy technology movement has been initiated. In order to reach an environmentally sensitive target in the energy sector, research and innovation and thus, a highly competitive market are essential. In the US, the wind and solar energy have peaked in the last period. Moreover, 2016 was recorded as the highest energy production year throughout US history[33]. For the sake of completeness, and to provide guidance on Turkey's environmentally friendly electricity target

[31] Rekabet Kurumu Uzmanlık Tezleri Serisi (Competition Authority Expertise Theses Series) No:131, 2012

[32] Competition Authority Research on Electricity Wholesale and Retail Sale Sector, 2015.

[33] Robert Rapier, *President Obama's Energy Report Card*, Forbes, 2016

in the future, the renewable energy types could be listed as follows: (i) hydraulic, (ii) biomass, (iii) wind, (iv) solar and (v) geothermal energy.[34]

In order to shed light on the current circumstances within the United States in terms of the practices within the electricity market, below are some example precedents:

In *PEPCO – Exelon*[35] (FC-1119-2016-E-1554), the Washington DC Public Service Commission has decided on the transaction concerning the merger between Pepco and Exelon. The relevant product market has been decided as the market for the wholesale and distribution of central electricity. The transaction and the decision was highly criticized given that the combined unit of Pepco - Exelon (i) would have a decisive influence on prices, (ii) would cause a vertical market foreclosure on the market, and (iii) would be able to prevent competitors from entering the market. That being said, the D.C. Public Service Commission has approved the transaction. As a result of the decision, according to the market interpretations of that period, the largest publicly traded company was formed at that time. To that end, the approval decision, which has been rejected by the Washington DC authorities twice and seen as impossible to be approved, was highly criticized by the authorities.

Oklahoma Gas & Elec. Co/FERC[36] decision concerned the annulment by the Columbia Regional Court of Appeal, of a decision adopted by FERC and was in contradiction with the reform that encouraged competition in the electricity wholesale transmission market. Through the Regulation No.100, the Energy Commission made a series of reforms in order to ensure that those who have not been authorized by the state would also have the opportunity to play a role in the development process. In this context, the Energy Commission has abolished the pre-emptive rights of state-owned electricity transmission developers and suppliers for the tariffs and agreements issued by the Commission. The Energy Commission said that such rights make it difficult for competing electricity transmission suppliers to make some

[34] American Bar Association, *Energy Antitrust Handbook*, 2009

[35] The Washington DC Public Service Commission’s *PEPCO-Exelon* decision dated 2016 and numbered FC-1119-2016-E-1554

[36] The Columbia Regional Court of Appeal’s *Oklahoma Gas & Elec. Co/FERC* decision of 01.07.2016, No. 14-1281, 2016 WL 3568086

necessary structural changes, reduce competition in the industry and potentially raise prices.

5. Turkey's Policy for Electricity Sector

The electricity sector is first and foremost an example of deregulation by vertical divestiture, which refers to the disposal of some or all the subsidiaries that make up a company's vertical combination through voluntary sale or legal compulsion.[37] To put it differently, in the electricity sector, the markets for production, transmission and distribution are split. In general, the electricity sector could be considered as (i) a regulated natural monopoly within the "electricity transmission" and "electricity distribution" markets in the vertical chain, but also (ii) a deregulated industry open to competition within the "electricity production" and "retail and/or wholesale supply" markets in the vertical divestiture.[38] The first phase of the deregulation of the electricity sector in Turkey started in 1984 with the Law No. 3096,[39] which legally allowed and enabled electricity production, transmission, distribution and commerce by non-state institutions. Following that, in 1993, the Turkish Electricity Institution ("***TEK***") was split into two undertakings, namely Turkish Electricity Production ("***TEAŞ***") and Turkish Electricity Distribution ("***TEDAŞ***"). Between 1994 and 1997, the "build-operate-transfer" and "build-operate" systems were introduced into Turkish law, including for electricity production plants.[40] In 2001, TEAŞ was further divided into three separate parts: (i) Turkish Electricity Production ("***EÜAŞ***"), (ii) Turkish Electricity Transmission

---

[37] *See* https://www.wordreference.com/definition/vertical%20divestiture (last visited December 20, 2018).

[38] Hakan Erek, *Elektrik ile Doğalgaz Piyasalarının Yakınsaması ve Rekabet Hukuku* (2018) Rekabet Dergisi, 48, 52.

[39] *See* the Law No. 3096 on the Commissioning of Institutions Other than the Turkish Electricity Institution Regarding the Production, Transmission, Distribution and Commerce of Electricity (1984).

[40] *See* the Law No. 4180 on the Build-Operate-Transfer Model for Particular Investments and Services (1996) and the Law No. 4283 on the Establishment of Electrical Energy Production Facilities with the Build-Operate Model and Law on the Organization of Energy Sales (1997).

(“***TEİAŞ***”), and (iii) Turkish Electricity Trading and Contracting (“***TETAŞ***”).[41]

In 2001, the Energy Market Regulatory Authority (“***EPDK***”) was established,[42] and since 2001, the electricity sector has exhibited an increasing trend toward deregulation.[43] The lowering of the consumption limits for eligible consumers[44] also constitutes an important step toward the completion of the electricity deregulation process, together with the ongoing privatization process in the electricity distribution sector. This is mainly because the number of eligible consumers exercising their right to choose their electricity retailer provides some information about the level of competition in the related market, even though the mere lowering of consumption limits for eligible consumers already gives us an idea about the level of deregulation in the market.[45] In this sense, the lower the eligible consumption limits, the more the competition promoted in the market.

With the Electricity Market Law in 2001, the target was to liberate the electricity sector. The aim was to bring competition to the market through liberalization and privatization of the sector, which is previously vertically integrated. In the new market structure, production and retail sales would develop in a competitive manner, while transmission and distribution are organized to provide non-discriminatory access to all market participants. The new Electricity Market Law No. 6446, which

---

[41] In 2018, TETAŞ, which was a state-owned wholesale company, merged into EÜAŞ. TETAŞ has ceased to exist and EÜAŞ (as the surviving entity) has taken over the former responsibilities of TETAŞ. As a result, the necessary legislative changes are underway. *See Zeynel Tunç and Aslı Kehale Altunyuva, Electricity regulation in Turkey: overview* (2018), https://uk.practicallaw.thomsonreuters.com/0-523-5654? (last visited December 19, 2018).

[42] *See* the Law No. 4628 on the Establishment of the Energy Market Regulatory Authority (2001).

[43] Cengiz Soysal et al., *Elektrik Toptan Satış ve Perakende Satış Piyasası Sektör Araştırması* (2012).

[44] “Eligible consumers” are the electricity consumers who are eligible/allowed to choose their retailers. However, due to the unresolved complexities in the market, there is a consumption limit in order for a consumer to qualify as “eligible.” These limits are determined by the EPDK each year.

[45] *See* Erek, *supra* note 38, at 56.

entered into force in 2013, has also adopted this objective in its Article 1 by indicating that:

"*The purpose of this Law is; to establish a financially sound, stable and transparent electricity energy market in order to ensure that consumers can operate in accordance with the provisions of private law* ***in a competitive environment*** *in order to ensure that electricity is adequate, high quality, continuous, low cost and environmentally compatible.*"

The most significant deregulation in the electricity sector concerns the vertical divestiture of the sector. In this regard, the TCB's opinion dated October 16, 1998, relating to the privatization of TEDAŞ,[46] has played a key role in shaping the structure of the vertical divestiture regime under Turkish competition law. This opinion underlines the natural monopoly characteristics of the electricity distribution market and compares them to the electricity retail sales market, which was found to display a more competitive commercial structure. The competitive concerns pointed in the opinion are especially: (i) exclusivity provisions that lead to absolute monopolies in the relevant regions; (ii) constant price regulation; and finally (iii) lack of provisions concerning the prevention of discrimination. Considering the specific features of the electricity market (especially pointing to the problems in instantaneous requirement to meet the demand in contrast with the lack of ability to store electricity), the Board grants approval to the acquisition with additional requirements addressing the competitive concerns stated above.

(i) Collaboration between TCA and Energy Market Regulatory Authority

The TCA and EPDK have signed a Collaboration Protocol in 2015. The Protocol was signed and entered into force on January 28, 2015. The aim of the Protocol was the (i) establishment, (ii) development and (iii) protection of a free and healthy competition environment through cooperation between TCA and EPDK. Accordingly, the scope of the Protocol was the bilateral exchange of information, provision of opinion and cooperation between TCA and EPDK on all kinds of legal procedures and actions related to

[46] TCB Opinion dated 16.10.1998 and numbered 87/693-138.

determination, measures, regulation and auditing for the (i) establishment, (ii) development and (iii) protection of competition in energy markets.

Within the scope of this Protocol; information exchange, cooperation and coordination matters are regulated between the TCA and EPDK. In this framework, with regard to the issues related to the establishment, development and protection of competition in the energy markets; mutual information, document and opinion exchange, providing information and coordination on the planned or on-going activities and projects and initiation of the coordination between the authorities and ensuring the exchange of information and collaboration through the Coordination Committee to be established with the participation of both authorities' personnel have been foreseen.

***(ii)* Technology's Effect on the Competition – Balancing Regulation on Natural Monopolies**

The recently deregulated sectors, including electricity, all share and confront a common global challenge, namely the rapid and far-reaching changes that have been introduced into these sectors by new technologies. Despite the encouraging developments discussed above with respect to the deregulatory approach, electricity sector continue to operate even now under intense regulatory pressure and scrutiny.

However, as previously mentioned, the economic rationale for the regulation of natural monopolies is closely linked to the explanations given regarding the particular characteristics of natural monopolies. Therefore, examining and evaluating the transformation of each deregulated sector separately (*i.e.*, under distinct headings) would be useful for illustrating the possible changes in the natural monopoly characteristics of these sectors pursuant to technological developments,[47] and demonstrating the resultant necessity of speeding up the deregulation process. In this section, however, we will first outline how new technologies can also create such alternatives in natural monopoly sectors that they can potentially transform the relevant product market definitions in these sectors in the future. This type of radical transformation could lead to a natural monopoly being economically and

[47] HUBBARD & O'BRIEN, *supra* note 1, at 558.

legally excluded from the designated regulation, so that the competition rules begin to apply freely to the relevant market.

The research on the possible movements toward this end in natural monopolies was first conducted in the energy industry (specifically, in the electricity and natural gas sectors), due to the emergence of new renewable energy resources in the electricity production segment of the vertically diversified electricity sector. A recent decision of the Turkish Competition Board TCB[48] refers to the Turkish Petroleum ("***TPAO***") Report on the Crude Oil and Natural Gas Sector, in which the primary energy sources of electricity production were listed, along with their consumption shares in Turkey. According to the Report, natural gas took first place with a consumption share of 31%, whereas petrol had a 30% share, coal was at 27%, and renewable energy resources comprised 12% of the market. Furthermore, 4.5% of the renewable energy was obtained from hydro resources. Wind is another significant source of renewable energy, according to the Report, along with solar, geothermal and biogas sources of renewable energy.

The decisions of the TCB do not make a distinction between electricity that is produced from renewable energy resources and other types of electricity production in any dimensions of its substantive competition law assessments. Instead, one recent decision of the TCB mentions that electricity can be produced from coal, natural gas, water, sun, wind, etc., and also notes that each of these production methods requires a different type of power plant. However, the decision goes on to declare that these differences in the energy sources do not alter or affect the homogenous final product of "electricity," and for this reason, the TCB concludes that there will not be a separate market definition depending on the source of electricity production.[49]

However, with respect to issues concerning energy sources, these different renewable energy resources are considered to comprise their own sectors. In other words, just like the natural gas sector is separate and distinct from the electricity sector, wind energy is also separate and distinct from the natural gas energy even though they are both primary energy resources to produce electricity. For example, in a recent decision

---

[48] TCB Decision dated 08.05.2018 and numbered 18-14/254-120, p. 2.

[49] TCB Decision dated 18.01.2018 and numbered 18-03/22-11, p. 4.

of the TCB, even though the decision did not directly concern this point, the phrase "photovoltaic cell production market" was used to describe one of the affected markets in the case.[50] Therefore, it is indisputable that renewable energy sources provide an alternative to conventional energy resources (such as natural gas and coal) in order to produce secondary energy resources (*e.g.*, heat and electricity). Thus, TCB is also expected to approach the competition law issues including relevant market production in this context in the future.

Nevertheless, at this point in time, these alternative sources are far from being able to deliver competitive markets in the energy sector, since these renewable energy sources also suffer from certain market failures and involve sunk costs, which necessitate regulation. For this reason, the Energy Market Regulatory Authority ("***EPDK***") has been established as well to regulate this sub-sector, and it does so by employing various methods and techniques, including the Renewable Energy Support Mechanism ("***YEK-YEKDEM***"), as part of the nation's energy policy. Through this mechanism, the renewable energy sector is incentivized by governmental purchase guarantees. This practice was criticized in a recent TCB decision[51] in terms of its detrimental effect on the deregulation process. The TCB decision makes the argument that these incentives are actually costs ("YEK costs" in the TCB's words) that are passed on to eligible consumers, and therefore constitute additional expenses for consumers whose level of cost-awareness and knowledge on these issues is already deemed to be low. As a result, the TCB decision highlights the self-contradiction in these energy policies, the latter of which has negative effects on the deregulation process.[52]

Secondly, the emergence of new technologies in the telecommunications sector and their effects on the relevant markets should also be considered to understand the relationship between deregulation and the competitive process. In this respect, the role of over-the-top ("***OTT***") services[53] in the telecommunications sector is

[50] TCB Decision dated 21.12.2017 and numbered 17-42/658-290, p. 4.

[51] TCB Decision dated 20.02.2018 and numbered 18-06/101-52.

[52] *Id.*

[53] "Over-the-top" refers to "content providers that distribute streaming media as a standalone product directly to viewers over the Internet, bypassing telecommunications, multichannel television, and broadcast television platforms that

especially important, since the TCB has indicated that it approves of and supports the acceleration in the technological improvements in the telecommunications sector, specifically in the case of mobile communications services.[54] In this regard, an important recent TCB decision involved the paid-TV broadcasting services market, where the TCB chose not to define a separate product market for OTT services and stated that these services are in the process of becoming viable alternatives to conventional paid broadcasting services.[55] Following this 2017 decision, the TCB ruled that TTNET's OTT service, Tivibu Go, was considered to be a paid broadcasting service.[56] However, the European Commission's decisions[57] lean toward making a sharp distinction between the online and offline advertisement sectors, in light of the differences between their (i) targeting, (ii) following, and (iii) pricing mechanisms, which are more complex and to the point (*i.e.* relevant) in the realm of online advertisements.

However, even though the changes in the telecommunications market are especially quickened by technological developments, specifically with respect to OTT services, as with the energy sector, it is not possible at this stage to conclude that new technologies will succeed in transforming the recently deregulated natural monopoly sector into a competitive one or that they will deliver perfectly competitive markets at all. This is mainly because the input of online access for OTT services is still highly dependent on the underlying internet network infrastructure, which is generally the main underlying reason for the existence of large economies of scale and natural monopolies in this sector. However, it is still possible to envisage that new technological advancements will alter and perhaps eliminate these restrictions and eventually lead to

traditionally act as a controller or distributor of such content." *See* https://en.wikipedia.org/ wiki/Over-the-top_media_services (last visited December 19, 2018).

[54] TCB Decision dated 31.05.2018 and numbered 18-17/315-155.

[55] TCB Decision dated 18.05.2016 and numbered 16-17/299-134.

[56] TCB Decision dated 19.01.2017 and numbered 17-03/25-11.

[57] The Commission's *Google/DoubleClick* decision – Case No Comp/M.4731 (11.03.2008), p. 17; *Microsoft/Yahoo! Search Business* decision – Case No Comp/M.5727 (18.02.2010), p. 5; and *Viacom/Channel 5 Broadcasting* decision – Case No Comp/M.7288 (09.09.2014), p. 2.

competitive markets that will abolish the regulations that are in effect in other pre-existing product markets.

(iii) Other Factors That Affect the Establishment of a Competitive Electricity Market and the Steps to be Taken

In the energy market where there are market distortions, most significant of them being natural monopolies, due to the effects of deregulation movement, the states are no longer a direct actor in the electricity market; they have rather adopted a regulatory role. In this context, together with the liberal policies on the agenda in the 1980s in Turkey, especially with the EU membership negotiations and the momentum gained through the pressure of IMF and World Bank, there have been reforms and structural changes in the electricity sector as well as in many other areas. As previously mentioned in this context, in addition to the enactment of various laws in 2001, Energy Market Regulatory Authority was established and the authorities were given the power to perform sectorial regulations, audit and sanction in electricity sector.

That being said, according to Turkish Industry and Business Association ("***TUSIAD***") there are important issues that highly affect the production, distribution and retail activities of the on-going liberalization process in the electricity market as follows: (i) the share of the public and ceiling market share levels; (ii) energy exchange, (iii) liberal consumer limitations, (iv) the approach of purchase guaranteed production investment model; (v) electricity sector's parallel liberalization process with the natural gas sector; (vi) prices, (vii) other factors that could be considered as market foreclosure effects within the electric market. The relevant factors are briefly explained below:

a) The Share of the Public and Ceiling Market Share Levels: According to TUSIAD, while 20% market share limits are meaningful in order to increase supplier diversity in the market and prevent dominant situation, limits apply only to private companies. It would be appropriate to introduce certain market share limits to public companies for an equal, more balanced and competitive market among the parties.

b) Energy Exchange: In order to establish freedom and liberalization in the market, with the Law No. 6446, a stock exchange mechanism operated by EPIAS was established, which includes balancing power markets with day ahead and intraday markets. This is a very important development in terms of competition in the electricity markets. The continued functioning of this mechanism with transparent, reliable and healthy rules will increase the impact of competitive parameters in the formation of wholesale electricity prices.

c) Eligible Consumer Limit: In order to effectively implement cost-based pricing mechanisms in the market, and to offer competitive gains to the consumer on a wider scale, it is necessary to reset the limits in the eligible consumer application, which would allow the subscribers who purchase more than a certain amount of electricity to obtain the electricity they need from the supplier they desire, and it is also necessary that a regulated tariff should not be applied other than the supply tariff of the latest resource. According to TUSIAD, as of 2017, the eligible consumer limit has been drawn to 2,400 kW/s, which would correspond to a consumption equivalent to an electricity bill of approximately TL 82-83. This is a satisfactory step towards resetting limits. As the limit decreases, it becomes possible for consumers to choose their own suppliers and purchase electricity from them through bilateral agreements. Accordingly, the number of subscribers on the regulated tariff decreases and independent supply companies become more competitive with the supply companies involved.

d) The Purchase Guaranteed Production Investment Model Approach: Although the model is acceptable for renewable energy sources, incentives in all production activities within the framework of purchase guaranteed models are contrary to the market structure and have a disruptive effect. Therefore, investment-oriented incentive models need to be implemented, which will improve economic feasibility rather than purchase / price guaranteed models. However the relevant models should not conflict with the nature of the competitive market.

e) Electricity Sector's Parallel Liberalization Process with the Natural Gas Sector: The fact that the regulations aimed at selecting the suppliers of the final consumers and the arrangements for the separation of distribution and retail sales activities in the natural gas market have not been in parallel or at the same time with the electricity market applications could create a competition restrictive effect for the players within the electricity market. The elimination of this sales advantage of natural gas distribution companies is considered to be one of the most important elements in establishing a competitive market structure.

f) Prices: Due to the non-real electricity prices resulting from the subsidization of natural gas prices over electricity prices, it is difficult for domestic sources such as coal, hydraulic energy, wind energy and solar energy to enter the electricity market. The lower prices, which do not reflect the actual cost in the market, prevent the liberalization of the electricity market and the increase in the share of other resources (renewable energy sources) in electricity generation.

g) Other Factors that Could Be Considered as Market Foreclosure Effects

- *Pre-licence:* Since the obligation to obtain pre-license increases the transaction costs for undertakings and is more burdensome, it may be considered that it poses a risk of introducing an entry barrier to new players. Indeed, the factors such as the arrangements being more detailed, the necessary criteria for the pre-license being required to be provided in a limited period of time and the undertaking companies executing contracts under more stringent conditions, would increase the transaction costs. Although, in terms of competition law doctrine pre-license application is considered as a market foreclosure effect, the contributions of the pre-license application in terms of the applications in the electricity market in Turkey should also not be ignored.

- *Regime for Entry into the Market:* Pursuant to the new model determined by EPDK, the system connection process should be initiated by TEIAS and the production plant investments could only be made to the plants determined/considered as in need by TEIAS only. It is thought that the new regulation would create a serious barrier for entrances to the market.

- *Price Equalizing Mechanism*[58]*:* Business and investment costs between regions are not the same as the reasons of loss and leakage, geographical and climatic reasons. In order to maintain the free market model, the Cost-Based Regional Tariffs model should be adopted. It is of great importance to supervise the price differences by an institution

[58] TUSIAD Competition Law and the Competition Strength Sectorial Discussions: Energy sector, September 2014A

that considers the well-being of the consumers, to maintain the competitive environment in the market and to protect the consumer welfare.

6. Conclusion

All in all, as can be seen from the examples of the EU and the United States, in order to have a completely liberal and competitive electricity market in Turkey, most important factors are (i) enabling the complete separation between the components of manufacture, distribution and transmission; (ii) enabling transparency in the market, (iii) informing the customers to the necessary extent and (iii) encouraging innovations and therefore, competition.

In this regard, it can be indicated that the legislative and regulatory framework within Turkey is close to the approach in the EU and is sufficient. Especially the collaboration between the TCA and EPDK is significantly beneficial for the creation of a competitive and liberal electricity sector. That being said, as there are still problems within the implementation of the relevant rules and the market is still not a fully competitive market in Turkey, while taking the necessary precautions on the matters listed above, a feasible solution would be to establish a liberalization and energy sector network with the participation of the EU Member States and institutions, so that it would be possible to further develop and implement resolutions in Turkey and enable a fully competitive, transparent, innovative and separated electricity market.

Bibliography

Books and Reports

Hubbard RG and O'Brien AP, *Economics*, PEARSON LEARNING SOLUTIONS, (2010).

Gürkaynak Gönenç, *Türk Rekabet Hukuku Uygulaması İçin Hukuk ve İktisat Perspektifinden Amaç Tartışması*, Rekabet Kurumu, (2003).

Gürzumar OB, *Sözleşme Yapma Yükümlülüğü*, Seçkin Yayıncılık, (2006).

American Bar Association, ENERGY ANTITRUST HANDBOOK, (2009)

Cengiz Soysal et al., *Competition Authority Research on Electricity Wholesale and Retail Sale Sector*, ELEKTRIK TOPTAN SATIŞ VE PERAKENDE SATIŞ PIYASASI SEKTÖR ARAŞTIRMASI, Rekabet Kurumu, (2015).

European Commission Publications: '*The European Union explained*', EUROPE 2020 — THE EU GROWTH STRATEGY, (2012)

Frédéric Gouardères, *Internal Energy Market*, EUROPEAN PARLIAMENT FACTSHEETS, (2018) available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.9.pdf (Last access date: 29.01.2019)

The European Commission, *The economic impact of enforcement of competition policies on the functioning of EU energy markets*, (2016), available at: http://ec.europa.eu/competition/publications/reports/kd0216007enn.pdf (Last access date: 30.01.2019)

TR Ministry of European Union Affairs, *Avrupa Birliği Sürecinde Enerji Faslı*, (2014).

Tunç Z and Altunyuva AK, *Electricity regulation in Turkey: overview* (2018), https://uk.practicallaw.thomsonreuters.com/0-523-5654?

TUSIAD, *Competition Law and the Competition Strength Sectorial Discussions: Energy sector*, (September 2014)

Presentations

M. Bağış Akkaya, *Competition Law Enforcement in Regulated Markets: When Competition Enforcement Clashes with a Regulatory Agency's Enforcement*, (2014).

HB Karabudak, *Competition Policy and Regulated Markets,* (2018).

Periodicals and Theses

Competition Authority Expertise Theses Series *(Rekabet Kurumu Uzmanlık Tezleri Serisi)* No:131, (2012).

Erek H, *Elektrik ile Doğal Gaz Piyasalarının Yakınsaması ve Rekabet Hukuku, 18* REKABET DERGISI 48 (2018).

Erol M, *Doğal Tekellerin Düzenlenmesi ve Telekomünikasyon Sektöründe Düzenleyici Kurum*, DEVLET PLANLAMA TEŞKILATI UZMANLIK TEZLERI (2003).

Federal Energy Regulatory Council, *Financial Report to Congress*, available at: https://www.ferc.gov/about/strat-docs.asp (Last access date: January 29, 2019)

Robert Rapier, *President Obama's Energy Report Card*, FORBES, (2016)

Małecka M, Posner versus Kelsen, *The Challenges for Scientific Analysis of Law*, 43 EUROPEAN JOURNAL OF LAW AND ECONOMICS, 495-516 (2016).

Müftüoğlu T and Karabudak HB, *İktisadi Politikalar Bağlamında Hukuki Düzenleme (Regülasyon) Üzerine Düşünceler*, REKABET DERGISI, 3, (2002).

Monica C, *Enforcing EU Competition Law in the Energy Sector*, (2014), Available at: http://www.consiliulconcurentei.ro/uploads/docs/items/id10136/20141124_rcc_roundtable.pdf (Last access date: 29.01.2019).

Theocharis N. Grigoriadis, *State Responsibility And Antitrust In The Energy Charter Treaty*; (2008).

Thomas D, Fina, *The Intersection of Energy and Competition Law in the USA*, Issue: (2016)9(6): p. 411-423, (December 27, 2016).

Yücel CÖ, *Elektrik Üretiminde Hakim Durumun Tespiti* (Thesis), REKABET KURUMU UZMANLIK TEZLERI, (2012).

Case Law

Turkish Competition Board

TCB Decision dated 10.11.2003 and numbered 03-72/874-373 https://www.rekabet.gov.tr/Karar?kararId=5aa8d3ce-07ef-4c8f-acd3-b10333a2ae2f

TCB Decision dated 18.01.2018 and numbered 18-03/22-11 https://www.rekabet.gov.tr/Karar?kararId=a8bee89d-6fba-47be-9824-eb0e319f98fe

TCB Decision dated 18.05.2016 and numbered 16-17/299-134 https://www.rekabet.gov.tr/Karar?kararId=c0fbb83d-108c-4aac-a193-2d4b01fe207e

TCB Decision dated 18.12.2003 numbered 03-81/973-400 https://www.rekabet.gov.tr/Karar?kararId=5afd888d-b16f-4e39-9f18-3f1e2d386a74

TCB Decision dated 19.01.2017 and numbered 17-03/25-11 https://www.rekabet.gov.tr/Karar?kararId=238009e3-9c40-4a9e-b7c4-53a08f014de6

TCB Decision dated 20.02.2018 and numbered 18-06/101-52 https://www.rekabet.gov.tr/Karar?kararId=537b366a-8bd7-4821-8760-43592452b711

TCB Decision dated 21.12.2017 and numbered 17-42/658-290 https://www.rekabet.gov.tr/Karar?kararId=10576c37-c605-4d8b-87d6-fd4981154613

TCB Decision dated 31.05.2018 and numbered 18-17/315-155 https://www.rekabet.gov.tr/Karar?kararId=bcd23c8f-7bc7-42d1-a6f4-e24e912e3b62

TCB Decision dated 08.01.2004 numbered 04-01/4-2 https://www.rekabet.gov.tr/Karar?kararId=29b0036b-af50-4975-b109-69654d6126d1

TCB Decision dated 08.05.2018 and numbered 18-14/254-120 http://www.rekabet.gov.tr/Karar?kararId=996e4ca1-dcd8-43a2-b7f2-2c7b96ba03d3

TCB Decision dated 24.06.2004 numbered 04-43/538-133 https://www.rekabet.gov.tr/Karar?kararId=b5594632-09c7-4808-8b27-6827c3598f52

TCB Decision dated 26.8.2010 and numbered 09-39/945-232 https://www.rekabet.gov.tr/Karar?kararId=71d58380-e709-4d6a-bd39-f49deca0e2fe

TCB Decision dated 22.10.2014 and numbered 14-42/762-338 https://www.rekabet.gov.tr/Karar?kararId=48d2079a-9781-42c0-adac-ba2771703774

TCB Opinion dated 16.10.1998 and numbered 87/693-138.

https://www.rekabet.gov.tr/(X(1)S(5rqfsfeiwy5cc4hvpsqad45f))/tr/DavaDetay?davaId=d04f674d-f1b8-48f4-9fa9-c039f01628c0

The European Commission

COMP/39.388 *E.ON* (26.11.2008)

M.3440 - *ENI/EDP/GDP* (9 December 2004) http://ec.europa.eu/competition/mergers/cases/decisions/m3440_20041209_610_en.pdf.

M.5224 - *EdF/British Energy* (22 December 2008) http://ec.europa.eu/competition/mergers/cases/decisions/m5224_20081222_20212_en.pdf

M.4517 - *Iberdola/Scottish Power* (26 March 2007) http://ec.europa.eu/competition/mergers/cases/decisions/m4517_20070326_20310_en.pdf

M.5467 - *RWE/Essent* (23 June 2009) http://ec.europa.eu/competition/mergers/cases/decisions/m5467_20090623_20212_en.pdf

M.4731 - *Google/DoubleClick* (11.03.2008) http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

M.5727 - *Microsoft/Yahoo! Search Business* (18.02.2010) http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

M.7288 - *Viacom/Channel 5 Broadcasting* (09.09.2014) http://ec.europa.eu/competition/mergers/cases/decisions/m7288_20140909_20310_3881848_EN.pdf (Last access date November 13, 2018).

M.4180.*Gaz de France/Suez* decision dated (14.12.2006)

2014/456/EU *Spain State Aid* numbered (Celex No. 314D0456)AT.39767 *Bulgaria Energy Holding* (10.12.2015)

Others

Netherlands – Essent NV decision numbered C‑105/12

The Washington DC Public Service Commission's *PEPCO-Exelon* decision (2016, FC-1119-2016-E-1554

The Columbia Regional Court of Appeal's *Oklahoma Gas & Elec. Co/FERC* decision of 01.07.2016, No. 14-1281, 2016 WL 3568086

Internet Sources

BCcampus Open Education (ed), *Regulating Natural Monopolies*, PRINCIPLES OF ECONOMICS, https://opentextbc.ca/principlesofeconomics/chapter/11-3-regulating-natural-monopolies.

Wordreference- Online Language Dictionaries. https://www.wordreference.com/definition/vertical%20divestiture

Statutes, Legislative and Administrative Materials

Law No. 3096 on the Commissioning of Institutions Other than the Turkish Electricity Institution

Law No. 4180 on the Build-Operate-Transfer Model for Particular Investments and Services.

Law No. 4628 on the Establishment of the Energy Market Regulatory Authority.

Law No. 4054 on the Protection of Competition

Consolidated Version of the Treaty on the Functioning of the European Union, (2012), OJ C 326.

Energy Charter Treaty 1994

Settlement as a Streamlined Process: Should Turkey Adopt a Settlement Procedure?

Gönenç Gürkaynak, Esq.[*]

Kansu Aydoğan[**]

Sertaç Kocahal[***]

I. Introduction

Over the years, competition enforcement authorities have introduced and utilized various instruments for combatting cartels, which have been called "*cancers on the open market economy.*"[1] The European Commission ("***Commission***") had first launched its leniency program in 1996 and subsequently announced an improved plan through its Leniency Notice in 2006.[2] In the Leniency Notice, the Commission presented its motivation as cooperating with undertakings or individuals who had formed or taken part in cartels.[3] The Commission entertained the aim of detecting cartels more effectively and increasing deterrence

---

[*] Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, and member of faculty at Bilkent University, Faculty of Law and Bilgi University, Faculty of Law.

[**] Kansu Aydoğan is an associate at ELIG Gürkaynak Attorneys-at-Law.

[***] Sertaç Kocahal is a trainee lawyer at ELIG Gürkaynak Attorneys-at-Law.

[1] European Commission Press Release SPEECH/00/295, Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour? – Speech by Mario Monti, 3rd Nordic Competition Policy Conference (Stockholm, September 11-12, 2000).

[2] European Commission Press Release IP/06/1705, Competition: Commission adopts revised Leniency Notice to reward companies that report cartels (December 7, 2006).

[3] Commission Notice 2006/C 298/11, *Immunity from fines and reduction of fines in cartel cases*, 2006 O.J. (C 298) 17.

on undertakings,[4] by way of granting immunity or fine reductions to undertakings in exchange for providing information on the cartels and their cooperation with the Commission's investigations.[5] The leniency program has been quite successful in terms of uncovering cartels more effectively and increasing deterrence. However, the length of cartel proceedings has not been reduced as envisaged by the Commission.[6]

On that note, the Commission introduced a settlement procedure in 2008 that would act as an efficiency catalyst[7] in order to shorten the duration of cartel investigation procedures, reduce the number of judicial appeals, allow for more efficient use of its Cartel Department staff, and thereby free resources to pursue and investigate more cases. Likewise, undertakings involved in a cartel infringement would benefit from the advantages of a shorter and faster process and also enjoy reduced fines as a result of this settlement procedure. In light of the foregoing, there is reason to believe that the objective of the settlement procedure is different from that of the leniency program, which is an investigative tool designed to uncover cartels and gather evidence against them. In other words, leniency is a tool for collecting evidence against a cartel, while settlement is an efficiency-enhancing instrument that is designed to increase effectiveness and which incentivizes and rewards tangible contributions by undertakings to procedural efficiency.

Taking the foregoing into consideration, this article seeks to assess the settlement procedure and revitalize it as an effective procedural tool to be adopted by competition enforcement regimes. In this context, we will also discuss whether it should be incorporated into the Turkish competition law regime. In order to demonstrate the highly rewarding

---

[4] Jerónimo Maillo, *EU Cartel Settlement procedure: an assessment of its results 10 years lat*er, 7, (October 30, 2017), http://www.idee.ceu.es/Portals/0/Publicaciones/EU%20Cartel%20Settlement%20procedure_WPCPC_Final.pdf (last visited November 29, 2018).

[5] Molly Kelley, *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*, 9, WASH. U. GLOBAL STUD. L. REV., 699, 701 (2010).

[6] Aurora Ascione & Massimo Motta, *Settlements in cartel cases*, European University Institute, 1, (2008), https://mpra.ub.uni-muenchen.de/24416/1/MPRA_paper_24416.pdf (last visited November 29, 2018).

[7] European Commission, Cartel case settlement, http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html (last visited November 17, 2018).

nature of the settlement procedure, this article will also focus on its incentives (as well as the envisaged benefits and drawbacks) without disregarding other aspects of the process that may pose certain risks for the fight against cartels.

II. A Historical Overview and Preliminary Evaluation of the Settlement Procedure

In recent times, the Commission has undertaken considerable efforts to improve and streamline the procedure for tackling cartels. On that note, one of the most important measures in this effort was introduced by the Commission through a press release on October 26, 2007, which presented the "*settlement package*" procedure, along with a request for public consultation. The settlement package consisted of a draft Settlement Notice that outlined the procedure as the Commission envisioned it, as well as a proposal for a "Regulation to amend Commission Regulation No 773/2004" to enable the implementation of this procedure.

Commenting on the proposed cartel settlement procedure, Neelie Kroes (who was the Competition Commissioner in 2008) declared that *"Companies would benefit by drawing a line under their past illegal behaviour, the Commission would benefit by freeing up resources to pursue more cartels, and the European economy would benefit because more cartels would be punished more quickly,*"[8] thus underlining that the Commission was acting with the twin goals of facilitating effective decision-making and safeguarding due process in mind.

On July 1, 2008, the Commission published the Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases, 2008 O.J. (C 167) 1-6

---

8 European Commission Press Release IP/07/1608, Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels (October 26, 2007).

(“***Notice***”), and Commission Regulation (EC) No 622/2008 of 30 June 2008 Cartel Cases, 2008 O.J. (L 171) 3-5.[9]

The main underlying motivation and rationale for the settlement procedure was to increase procedural efficiencies by way of simplifying administrative proceedings and reducing litigation in cartel cases.[10] In his article on the subject,[11] Andreas Stephan concluded that the leniency program had been successful in detecting more cartels, but had not helped to reduce the length of cartel proceedings. Andreas Stephan has calculated that cartel cases last three and a half years on average, from when an investigation is first opened to when the Commission delivers its final decision.

In the European Union, the settlement procedure proceeds in parallel with the standard process for cartel cases until the drafting of the statement of objections. This is the point at which the settlement procedure diverges from the standard procedure.[12] When the settlement procedure was first proposed, it was expected that the length of the proceedings would be reduced and that this reduction would happen specifically in the stage between the drafting of the statement of objections and the final decision. To that end, Andreas Stephan has calculated that this period (*i.e.*, between the statement of objections and the final decision) lasts 12-13 months on average, based on the cartel cases that have been completed since 2001, and he envisaged a potential reduction in the procedural length by up to one-third pursuant to the

9 Maarten Pieter Schinkel, *Bargaining in the shadow of the European settlement procedure for cartels*, 1 n.1, (ACLE working paper; No. 2010-17). Amsterdam: Universiteit van Amsterdam, Amsterdam Center for Law & Economics (2010), https://pure.uva.nl/ws/files/1481242/97032_SSRN_id1729640_1_.pdf (last visited November 29, 2018).

10 David Vascott, *Cartel settlements: Are they working?*, 2, (April 8, 2013), https://www.lw.com/mediaCoverage/are-eu-cartel-settlements-working (last visited November 29, 2018).

11 Andreas Stephan, *The Direct Settlement of EC Cartel Cases*, 5, (December 2007), http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/astephan.pdf (last visited November 29, 2018).

12 Draft Commission Notice 2007/C 255/20, on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, art. 9, 2007 O.J. (C 255) 20.

introduction of the settlement procedure.[13] In this regard, the settlement procedure has been described as an "*early exit route,*" on the basis that it replaces and provides a substitute for (i) a detailed statement of objections, (ii) an oral hearing, and (iii) a comprehensive decision.[14]

One of the primary reasons for the introduction of the settlement procedure was that shorter procedures would also allow competition authorities to save substantial financial resources. Neelie Kroes, the Competition Commissioner between 2004 and 2010, pointed out at the time that "*First, a high number of enforcement decisions inevitably brings a corresponding increase in the number of legal challenges. One cartel decision triggers an average of 3 to 4 court cases. Defending our decisions is an ongoing and implicit part of the process and needs to be planned for in terms of resources.*"[15]

Similarly, a quantitative analysis[16] conducted in 2007 demonstrated that the Commission expends valuable resources for the legal defence of its cartel prosecutions. For example, 59 actions were brought against 11 cartel decisions in 2005 and 2006, and 53 out of 72 firms who had been fined over €1 million appealed their decisions. To that effect, the settlement procedure was welcomed on the basis that the Commission would be able to use its limited resources to tackle and resolve more cartel cases and thereby enhance the deterrence effect of its investigations, since more cartels would be investigated and uncovered as a result.[17]

It was also anticipated that, along with the Commission, the participating undertakings would also receive their share of benefits from the settlement procedure. The expected cost savings would be the most prominent and obvious benefit for the companies; undertakings would receive a ten percent (10%) discount on their fines, especially if

[13] Stephan, *supra* note 11, at 42.

[14] Vascott, *supra* note 10, at 6.

[15] European Commission Press Release SPEECH/05/205, The First Hundred Days – Speech by Neelie Kroes, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, (Brussels, April 7, 2005).

[16] Stephan, *supra* note 11, at 7.

[17] Flavio Laina & Elina Laurinen, *The EU Cartel Settlement Procedure: Current Status and Challenges,* 4, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, 302, 302.

the undertaking in question was not eligible for full immunity.[18] Savings on legal costs was another anticipated benefit. Since the settlement procedure would shorten the litigation process and also reduce the incentive to appeal, the undertakings involved would gain more from the process than a mere reduction in fines.[19] Furthermore, the settlement procedure was expected to allow undertakings to devote more of their efforts and resources to running their businesses and enable them to focus on developing or advancing their business activities. Obviously, the attention of their managers would also be directed toward more useful and productive pursuits than spending considerable amounts of time and money on administrative and legal procedures.[20] It was also envisioned that the undertakings involved in cartel infringements would benefit from the settlement procedure due to the fact that settled decisions would not contain a full assessment of the facts of the case, and thus, less information would be publicly available about their infringing activities, which would limit their use by potential claimants for damages.[21]

Alongside the expected benefits, there were also several possible drawbacks that were discussed at the time of the introduction of the settlement procedure. The first potential drawback was related to the amount of the fine reduction. Aurora Ascione and Massimo Motta conducted a valuable analysis in 2007 in order to determine the average fine reduction obtained by undertakings who had appealed the Commission's decision in their cases between 1970 and 2007. They determined that the average fine reduction received by undertakings as a result of appealing the Commission's decision was 26%. The analysis outlined and explained that undertakings would be expected to compare the fine they would receive as a result of the settlement procedure to the fine that they would anticipate receiving if they appealed the Commission's decision, and the authors concluded that the 10%

[18] Kelley, *supra* note 5, at 711.

[19] Ascione & Motta, *supra* note 6, at 5.

[20] Maillo, *supra* note 4, at 11.

[21] Vascott, *supra* note 10, at 7.

reduction in the settlement procedure would not be considered (from the undertakings' perspective) as providing a strong incentive to settle.[22]

The settlement procedure was also criticised for not being sufficiently transparent; it was alleged that the procedure would provide a wide amount of discretion to the Commission, which would make it difficult for the investigated undertakings to predict the results of their decision on whether to settle. On this front, the Notice crucially stipulates that the Commission would retain the right to adopt a decision that would deviate from the settlement submission.[23] Critics have alleged that this would cause the settlement procedure to be misleading and uncertain for undertakings, based on the argument that they would not want to spend their time and resources pursuing a settlement when the Commission would retain its right not to settle (and to adopt an entirely different decision) until the conclusion of the settlement procedure.[24]

Another potential drawback was related to the fact that the proposed procedure enabled the separate treatment of undertakings involved in a cartel infringement. In other words, the settlement procedure would allow a settlement to be reached with only some of the parties in a case and permit the prosecution of the non-settling parties under the standard procedure for cartel activities.[25] According to the critics of this feature, the settlement procedure would be able to achieve the expected efficiencies only when all cartel members in a particular case uniformly and unanimously agreed to settle with the Commission. Otherwise, the Commission would still be required to expend its resources to conduct a regular prosecution against the non-settling parties. Moreover, it was argued that it would be unlikely for all cartelists to choose to settle with the Commission in practice. Therefore,

---

[22] Ascione & Motta, *supra* note 6, at 7.

[23] Commission Notice 2008/C 167/0, on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, art. 29, 2008 O.J. C (167) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008XC0702(01)&from=EN (last visited December 13, 2018).

[24] Kelley, *supra* note 5, at 714-715.

[25] Commission Regulation 622/2008, amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, art. 4, O.J. L (171) 3.

it was concluded by some commentators that the expected efficiencies of the settlement procedure could rarely be achieved.[26]

While these discussions had been ongoing in Europe as early as 2007, the issue of the settlement procedure was only introduced before the Turkish legislature for the first time in early 2014. As will be discussed further in Section IV, a settlement procedure had been demanded by various interested parties in Turkey for a long time, since the Turkish competition enforcement regime lacked a procedural tool that would allow undertakings to reach an agreement with competition authorities, which was expected to result in cost/resource savings both for the companies and for the competition authorities. The absence of a settlement mechanism within the primary and secondary legislation of Turkish competition law was an established and much criticized fact at the time that the introduction of the settlement procedure was attempted (through the draft law), and efforts to legislate this vital issue were undertaken for the first time by the Turkish National Assembly. To that end, the Prime Ministry sent the Draft Law on the Protection of Competition, which was designed to launch the settlement procedure, to the Presidency of the Turkish National Assembly on January 23, 2014.

III. The Settlement Procedure and Practice in the EU and Certain National Jurisdictions

a) Preconditions

In cartel cases, the settlement procedure proceeds in parallel with the standard procedure until the drafting of the statement of objections.[27] The traditional investigation tools, such as leniency offers, inspections and information requests, are utilized in all cartel cases as well.[28] In other words, the Commission can only initiate a settlement procedure when the case has been fully investigated and has proceeded to the stage where it can draft the statement of objections. To that end, the established practice dictates that the Commission should always carry

[26] Kelley, *supra* note 5, at 715-716.

[27] Vascott, *supra* note 10, at 3.

[28] Laina & Laurinen, *supra* note 17, at 303.

out a detailed screening/assessment prior to determining whether the settlement procedure can be started.[29]

The Notice clearly states that the Commission enjoys broad discretionary powers with respect to seeking a settlement. Furthermore, the Notice provides a non-exhaustive list of criteria that are taken into account to determine which cases may be suitable for a settlement.[30] These criteria comprise the following factors:

- Parties' spontaneous interest in settling,
- Number of parties,
- Number of successful leniency applicants,
- Expected degree of contestation,
- Parties' foreseeable conflicting positions on liability,
- Impact of aggravating circumstances,
- Procedural efficiencies (including lack of appeals),
- EU/EEA cases or cases already decided or pending in other jurisdictions,
- Novel legal issues in the case.[31]

The Commission's broad margin of discretion with respect to initiating a settlement procedure has also been accepted and acknowledged by the General Court. For instance, in one illuminating case, the Commission decided to impose fines on several companies in the *Air Freight Forwarding* cartel.[32] Panalpina, one of the fined cartelists, appealed the ruling by challenging the Commission's decision not to apply the settlement procedure in that case. Panalpina argued that the Commission was required to contact and communicate with the investigated parties before reaching a decision on whether the case was

---

[29] Agapi Patsa, James Robinson & Mara Ghiorghies, *Cartel Settlements: An Overview of EU and National Case Law*, 11 n. 22, (September 21, 2016), https://www.bakermckenzie.com/-/media/files/insight/publications/2016/09/cartel-settlements/ar_antitrust_cartelsettlements_20160929.pdf (last visited November 29, 2018).

[30] Commission Notice 2008/C 167/0, *supra* note 23, art. 5.

[31] Eric Van Ginderachter, *European Commission's settlement procedure – a success story*, 6, (November 8, 2014), http://www.idee.ceu.es/Portals/0/Investigacion/Cartls/European%20Commission's%20settlement%20procedure%20%E2%80%93%20a%20success%20story.pdf (last visited November 29, 2018).

[32] Case T-270/12, Panalpina World Transport (Holding) Ltd and Others v. Comm'n, 2016 E.C.R. 109.

suitable for a settlement procedure. Moreover, Panalpina claimed that the Commission had not considered whether the parties were willing to take part in the settlement discussions.[33] In its decision of February 29, 2016, the General Court rejected Panalpina's first argument on the grounds that it was clear from the Notice that the Commission is not obligated to have contact with the parties in relation to the possibility of a settlement.[34]

In the alternative, Panalpina also argued that the Commission had made an error of assessment in determining that the case was not suitable for settlement. The General Court rejected this argument as well and stated in its decision that the Commission must take account of the probability of reaching a common understanding with the parties involved within a reasonable time frame. In this regard, the General Court asserted that the Commission may consider various factors when considering the possibility of seeking a settlement, such as (i) the number of parties involved, (ii) foreseeable conflicting positions on the attribution of liability, and (iii) the extent to which the facts may be disputed.[35] For the case at hand, the General Court noted that the investigation had included a large number of parties (47 undertakings in total) and that a significant proportion of these undertakings were not willing to cooperate with the Commission. Therefore, the General Court concluded that the Commission had been justified in deciding not to seek a settlement with the undertakings.[36]

Aside from the Commission, the undertakings involved may also express in writing their interest toward a settlement before the adoption of the statement of objections.[37] However, settlement is still an option that resides exclusively with the Commission; the undertakings do not have a unilateral right to settle. Even if all the parties to a cartel request to participate in a settlement procedure, it remains solely in the

---

[33] *Id.*, at 205.
[34] *Id.*, at 209.
[35] *Id.*, at 215.
[36] *Id.*, at 232.
[37] Commission Notice 2008/C 167/0, *supra* note 23, art. 9.

Commission's discretion to decide whether the case is suitable for settlement.[38]

b) The Process

1. Initiation of Proceedings

The settlement procedure only begins after the cartel investigation is completed. In this regard, the Notice prescribes that the Commission should initiate proceedings no later than the date on which it issues a statement of objections against the undertakings concerned. Article 2(1) of Regulation (EC) No. 773/2004 further specifies that, should the Commission consider it suitable to explore the parties' interest in engaging in settlement discussions, it must initiate proceedings "*no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier*."[39] This is the stage at which the Commission tries to discern whether the undertakings are interested in settling their cases. Accordingly, the Commission invites the parties to demonstrate their interest in seeking a settlement.[40]

The Commission will set a deadline of no less than two weeks for the undertakings to declare in writing whether they envisage engaging in settlement discussions, in view of possibly introducing settlement submissions at a later stage. The written confirmation of an interest in engaging in settlement discussions by the undertakings does not imply an admission of guilt (with respect to having participated in an infringement) or of being liable for it.[41]

2. Settlement Discussions

The bilateral discussions occur after the written confirmation of interest in settlement discussions by the undertakings. The Commission

---

[38] *Id.*, art. 6.

[39] *Id.*, art. 9.

[40] Robbert Snelders, *The EU Cartel Settlement Procedure: The First Years - Experience and Challenges*, 3, (March 10, 2016), https://www.studienvereinigung-kartellrecht.de/sites/default/files/14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (last visited November 29, 2018).

[41] Commission Notice 2008/C 167/0, *supra* note 23, art. 11.

aims to reach a "common understanding" with each party to the discussions regarding the scope of the potential objections and the estimation of the range of fines likely to be imposed by the Commission. The Notice states that these bilateral discussions will allow the parties to be informed of (i) the facts alleged in the case, (ii) the classification of those facts, (iii) the gravity and duration of the alleged cartel, (iv) the attribution of liability, (v) the evidence supporting the case (*i.e.*, the evidence used to establish the potential objections), and (vi) an estimation of the range of likely fines.[42]

The bilateral discussions consist of three meetings between the Commission and the undertakings. The first settlement meeting is where the Commission presents its assessments regarding the case. In that meeting, the Commission puts forth the facts of the case and presents selected pieces of evidence that have enabled the Commission to build its case against the undertakings and that support its objections. The Commission also elucidates the different steps of the settlement process and provides an anticipated timetable with the undertakings.[43]

Following the first settlement meeting, the Commission grants access to the undertakings with respect to selected pieces of evidence within the case file. Compared with the standard procedure, the extent of the access permitted to the case file for the undertakings in the settlement procedure is rather limited. To that end, the process generally moves much more quickly in the settlement procedure, where access is only given to selected evidence, which consists of the essential documents on which the Commission built its case against the undertakings. This evidence set is usually far more limited than the total amount of evidence in the case file.[44] Parties can request further access to additional pieces of evidence, and such access will be granted as long as it is a reasonable and justified request. In that case, the Commission will provide the parties with non-confidential versions of accessible documents in the case file in order to enable them to ascertain their

[42] *Id.*, art. 16.

[43] Laina & Laurinen, *supra* note 17, at 304.

[44] Flavio Laina & Aleko Bogdanov, *The EU Cartel Settlement Procedure: Latest Developments*, 5, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, Vol. 8, Issue 5, 717, 720 (2017).

positions regarding a particular time period, or any other aspect of the cartel.[45]

The second settlement meeting aims to verify that the Commission and the undertakings have reached a common understanding regarding the scope of the potential objections and the range of likely fines to be imposed by the Commission. For this purpose, the Commission presents its overview of the case and the value of sales that would be taken into account in determining the amount of the fine for each undertaking. As mentioned above, the Commission seeks to reach a common understanding with the undertakings on these key issues. However, the Commission does not provide a specific fine range to the cartel parties in this meeting.[46]

The third settlement meeting is where the Commission presents the parties with a range of likely fines to be imposed. The Commission also provides some information regarding the basis of the calculation of such fines, such as indicating whether any mitigating or aggravating circumstances have been taken into account. Subsequently, the Commission delivers a draft settlement submission for the parties' comments.[47]

It should be noted that "technical meetings" may also occur between the three official settlement meetings, where the undertakings can submit technical "non-papers," which refer to informal papers without any indication of authorship or distribution, and informal consultations without any records,[48] which provide the parties with an opportunity to clarify or explain the key issues in the case. These meetings have been considered helpful for illuminating the relevant issues and shedding light on the Commission's observations, particularly if they concern sundry technical details. However, it should be

[45] Commission Notice 2008/C 167/0, *supra* note 23, art. 16.

[46] Patsa, Robinson & Ghiorghies, *supra* note 29, at 3.

[47] *Ibid*.

[48] FRIEDER ROESSLER, ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY, 121, (Richard L. Revesz et al. eds., 2000).

emphasized that these submitted non-papers are not regarded as evidence in the case files.[49]

The content of the discussions between the undertakings and the Commission are considered and treated as confidential. On that note, both the Regulation and the Notice set forth certain provisions concerning the settlement process and the evidence and documents to which the undertakings will have access. To that end, the undertakings may not disclose to any third party in any jurisdiction the content of the discussions or the documents to which they have had access in view of the settlement procedure, unless given explicit approval by the Commission. Any breach in this regard may lead the Commission to terminate the settlement proceedings. Furthermore, such a breach may also constitute an aggravating circumstance in the case and affect the amount of the likely fines to be imposed.[50] [51]

3. Settlement Submission, Statement of Objections and Decision

After three rounds of bilateral discussions, the Commission will grant a time limit of at least 15 working days for an undertaking to introduce a final settlement submission, if the Commission considers that (i) a common understanding has been reached in the case regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission, and (ii) the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the overall progress made in the case. The provided time limit is subject to a possible extension following a reasoned request.[52] The settlement submission is a highly structured document and must contain specific elements that are provided in the Notice, which consist of the following:

(a) An acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their

[49] Laina & Bogdanov, *supra* note 44, at 721.

[50] Commission Regulation 622/2008, art. 10a/2.

[51] Commission Notice 2008/C 167/0, *supra* note 23, art. 7.

[52] *Id.*, art. 17.

participation in the infringement in accordance with the results of the settlement discussions,

(b) An indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure,

(c) The parties' confirmation that they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission,

(d) The parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision,

(e) The parties' agreement to receive the statement of objections and the final decision in an agreed official language of the European Community, pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003.[53]

As seen above, the settlement submission constitutes the expression of the parties' commitment to cooperate with the Commission. On that note, settlement requests cannot be revoked unilaterally by the parties that have provided them, and hence, the settlement submission constitutes a "*point of no return*" for the undertakings, unless the Commission fails to meet/fulfil the settlement requests by reflecting the settlement submissions in a statement of objections, and ultimately, in a final decision.[54] The statement of objections will be deemed to have endorsed the settlement submissions if it reflects their content on the abovementioned issues regarding the parties' acknowledgement of liability for the infringement. Additionally, for a final decision to be deemed to reflect the settlement submissions, it should also impose a fine that does not exceed the maximum amount indicated in the settlement submissions. However, as mentioned before, the Commission retains the right and sole discretion to adopt a statement

[53] *Id.*, art. 20.

[54] Snelders, *supra* note 40, at 4.

of objections and ultimately a final decision which do not reflect the settlement submissions.[55]

Following the settlement submissions, the Commission will issue a written statement of objections that reflects the undertakings' settlement submissions. The statement of objections is a mandatory step both in the settlement procedure and the standard procedure; in both cases, it delineates and presents the maximum scope of the Commission's decision. The decision cannot contain or introduce any new issues that have not been put forth in the statement of objections, unless the parties have been given an opportunity to contest and refute them. However, the statement of objections in the settlement procedure differs considerably from the statement of objections in the standard procedure in several ways, including the following: (i) the parties have already been notified and learned about the Commission's objections, (ii) there is an estimated range of fines, and (iii) the parties have already discussed the facts of the case with the Commission and reached a common understanding in the settlement procedure. On top of that, the parties have already had a chance to introduce their settlement submissions regarding the admission of liability for the infringement (as discussed above) and received an indication of the maximum amount of the likely fines to be imposed by the Commission. Therefore, the statement of objections in the settlement procedure is a much more streamlined process (and therefore considerably shorter) than the statement of objections in the standard procedure.[56]

The Commission grants a time limit of at least two weeks for the parties to provide a written confirmation (in unequivocal terms) that the statement of objections reflects the parties' settlement submissions and that they therefore remain committed to follow and adhere to the settlement procedure.[57]

However, it is worth reiterating that the Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submissions. In such a case, the acknowledgements provided by the parties in the settlement submission would be deemed as

---

[55] Commission Notice 2008/C 167/0, *supra* note 23, art. 22 and art. 27.

[56] Maillo, *supra* note 4, at 4-5.

[57] Commission Notice 2008/C 167/0, *supra* note 23, art. 26

withdrawn, and the Commission would not be allowed to use them as evidence against any of the parties to the proceedings. Accordingly, if the Commission adopts a statement of objections that does not reflect the parties' settlement submissions, it reverts to the standard procedure, where the parties concerned would no longer be bound by their settlement submissions and would have the right to present their defence anew, including the possibility of accessing the file and requesting an oral hearing.[58]

Following the parties' reply to the statement of objections, the Commission may render its final decision. On that note, the parties are not allowed to request an oral hearing or access to the case file at this stage (*i.e.*, once their settlement submissions have been reflected by the statement of objections), in contrast to the standard procedure.[59] Before adopting the final decision, the Commission submits the draft decision to the Advisory Committee and to the College of Commissioners for their opinions. The Advisory Committee or the College of Commissioners may decide not to adopt the settlement decision; however, this hardly ever happens in practice. In that scenario, the Commission would once again abandon the settlement procedure and revert to the standard procedure for cartels.[60]

Settlement decisions have the same legal effect as regular decisions adopted in a standard procedure. Similar to standard decisions, they establish and confirm the existence of an infringement, impose a fine on the responsible parties, and require them to bring the infringement to an end. Therefore, settlement decisions can be challenged and appealed through the judicial system.[61]

---

[58] *Id.*, art. 27

[59] *Id.*, art. 28.

[60] Maillo, *supra* note 4, at 5-6.

[61] Laina & Laurinen, *supra* note 17, at 306.

c) Practical Challenges in the Real World: Hybrid Settlements and Failed Settlements

1) Hybrid Settlements

As discussed above, the settlement procedure primarily aims to increase procedural efficiencies. Indeed, settlement has been said to lose its "*raison d'être if it cannot bring procedural efficiencies.*"[62] Accordingly, it can be surmised that the maximum amount of efficiencies would be generated in a scenario where all the parties taking part in a cartel agree to settle with the Commission. However, this does not necessarily mean that the parties should not be allowed to opt out of the settlement procedure.

"Hybrid settlement" occurs when one or more of the settling parties refuse to engage in settlement discussions or opt out of the settlement procedure.[63] In that scenario, the Commission may settle with the remaining parties and follow the standard procedure for the non-settling parties.[64] The settling parties benefit from shorter and quicker proceedings, a shorter statement of objections, as well as a shorter decision. On the other hand, the non-settling parties will be able to benefit from a fully detailed statement of objections, full access to the case file, the right to an oral hearing, and a fully motivated decision-making process.[65]

The *Animal Feed Phosphates* case,[66] which was the Commission's second settlement decision, was also the first hybrid settlement case in the Commission's decisional practice. In that case, the Commission fined several producers for participating in price-fixing and market-

---

[62] *Ibid*.

[63] Jean-François Bellis, *General Overview of the EU Cartel Settlement Procedure*, 5, (2014), https://www.competitionpolicyinternational.com/assets/General-Overview-of-the-European-Settlement-Procedure.pdf (last visited December 5, 2018)

[64] European Commission, Cartel case settlement, *supra* note 7.

[65] Kris Dekeyser, *Alternative Procedures in the European Antitrust Legal Framework - Cartel Settlements and Commitment Decisions*, 16, http://www.euchinacomp.org/attachments/article/161/PPT1-Settlements%20and%20commitments-Kris-EN%20%20(small%20size).pdf (last visited November 29, 2018).

[66] Case COMP/38866, Yara Phosphates Oy and Others v. Comm'n, 2010.

sharing cartels, which had covered and operated in most of the European Union. All except one company decided to settle the case with the Commission and each settling party received a 10% reduction on their fines. However, Timab Industries chose to withdraw from the settlement procedure after the Commission informed the parties of the ranges for the likely fines, and thus became the only party subject to the standard procedure.[67] Consequently, Timab Industries received a 108-page decision, while the settling parties were addressed and their cases were resolved in a much shorter, 55-page "settled" decision.[68]

Hybrid settlements carry two distinct risks for the settling parties.[69] One of them is related to the information that is included in the standard decision rendered against the non-settling parties. A settlement decision is much briefer than a standard decision and divulges fewer details about the settling parties. However, a standard decision can still contain comprehensive information about the settling parties, which poses a particular risk in hybrid settlement cases. For example, in the *Animal Feed Phosphates* case, we noted that Timab received a 108-page decision while the settling parties received only a 55-page decision.[70] Therefore, we can infer that the standard decision on Timab contained detailed information on the settling parties as well. It can be argued that this additional information about the settling parties was not relevant to Timab's prosecution, and therefore provided a disincentive for the parties to settle, if they thought that the case was likely to result in a hybrid settlement. It has been suggested that the Commission should be more careful to not disclose any more information about the settling parties than is necessary in the public versions of standard decisions, in order to keep alive the incentives of the investigated parties to settle in hybrid cases.[71]

---

[67] European Commission Press Release IP/10/985, Antitrust: European Commission fines animal feed phosphates producers €175 647 000 for price-fixing and market-sharing in first "hybrid" cartel settlement case (July 20, 2010).

[68] Vascott, *supra* note 10, at 13.

[69] Chris Bryant & Marieke Datema, *Has the Dust Settled for Cartel Settlements?*, 2, (June 14, 2016), https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/Marieke-Bryant.pdf (last visited November 29, 2018).

[70] Dekeyser, *supra* note 65, at 16.

[71] Bryant & Datema, *supra* note 69, at 2.

The second critical risk of hybrid settlements is related to the appeals that may be lodged by the non-settling parties. The settlement procedure for the settling parties will be completed prior to the standard procedure carried out against the non-settling parties. Therefore, the settlement decisions will be announced before the standard decisions against the non-settling parties, and the settling parties will face the risk of encountering damage claims earlier than the non-settling parties due to the concept of joint and several liability. On a further note, the EU Damages Directive also provides a safeguard for the settling parties who are also immunity recipients at the same time. In this regard, having received immunity, the settling parties will only be liable to their own direct and indirect purchasers (unless the claimant can prove that it cannot obtain damages from other infringers).[72]

2) *Failed Settlements*

As mentioned above, the Commission retains the right to discontinue and terminate the settlement procedure at any point. In this respect, it is worth noting that the Commission chose to discontinue the settlement proceedings for all the parties concerned in only a single case, *i.e.*, *Smart Card Chips*,[73] because of the clear lack of progress in the settlement discussions.

In that case, certain chip suppliers were accused of having reached an agreement and/or coordinating their market behaviours in order to keep prices up in the relevant market. The Commission tried to settle the case with some of the parties to the cartel infringement, yet it ultimately decided to discontinue the settlement procedure and reverted to the standard procedure to pursue the suspected infringement against the undertakings. As a result of the investigation, the Commission imposed fines totalling €138,048,000. Under the Commission's 2006 Leniency Notice, Renesas (and its joint-venture parent companies, Hitachi and Mitsubishi) received full immunity, avoiding a fine of more than €51 million for their participation in the infringement, and Samsung received a reduction of 30% on its fine and was penalised with a fine of €35,116,000. Philips and Infineon, the other undertakings subject to the

[72] *Id*., at 3.

[73] Case AT.39574, Infineon and Others v. Comm'n, 2014.

infringement, were subject to fines of €20,148,000 and €82,784,000, respectively.[74] The underlying reason for the discontinuation of the settlement proceedings stemmed from the clear lack of progress in the settlement discussions. As Joaquín Almunia, who was the Commission Vice President in charge of competition policy at the time, declared: "*It is not because settlement talks fail that companies get off the hook. The essence of settlement is to benefit from a quicker, more efficient procedure, and to reach a common understanding on the existence and characteristics of a cartel. If that is not possible, the Commission will not hesitate to revert to the normal procedure and to pursue the suspected infringement.*"[75]

d. How Does the Settlement Procedure Work in Germany, France and the United Kingdom?

1. Germany

Unlike the Commission, Germany implements the settlement procedure without relying on any specific regulatory basis or providing any kind of official notice.[76] However, there is an informational leaflet ("***Leaflet***"), known as the "*Settlement procedure used by the Bundeskartellamt in fine proceedings,*" which provides valuable information and guidance on the settlement procedure in Germany.[77]

The Leaflet defines the settlement procedure as a tool that expedites and shortens complex and resource-intensive cartel fine proceedings and that reduces the amount of the fines imposed on the concerned parties. In Germany, it is possible to adopt the settlement

---

[74] European Commission Press Release IP/14/960, Antitrust: Commission fines smart card chips producers €138 million for cartel (September 3, 2014).

[75] European Commission Press Release, IP/13/346, Antitrust: Commission sends statement of objections to suspected participants in smart card chips cartel (April 22, 2013).

[76] Global Legal Insights, *Cartels 2018/Germany*, https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/germany (last visited November 30, 2018).

[77] Bundeskartellamt, *Settlement procedure used by the Bundeskartellamt in fine proceedings* (February 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet_Settlement_procedure.pdf?__blob=publicationFile&v=3 (Ger.) (last visited November 29, 2018).

procedure in all cartel proceedings; even hybrid settlement proceedings can be applied to cartel cases. Moreover, the Leaflet states that not all the investigated parties in a particular case are required to agree to terminate/resolve the cartel proceedings by settlement, and also provides that no formal requirements must be satisfied in order to agree on a settlement. Accordingly, there is no fixed timetable in Germany to initiate a settlement procedure and settlement discussions can be offered by any party, at any time.

In a settlement procedure, the *Bundeskartellamt* (Germany's Federal Cartel Office) informs the parties orally or in written form of the facts of the case. Partial access to the case file is also provided during settlement proceedings in Germany.[78] The parties are then presented with the maximum fine amount that they could face if a settlement is reached. Furthermore, the parties can submit their settlement declarations orally or in written form. In this regard, the settlement agreement requires the parties to submit a "statement of confession" that contains not only a description of the offence, but also information on the circumstances that are relevant for determining the amount of the fine; further, this statement acknowledges the facts of the infringement and the range of the likely fine. The Leaflet clearly states that the settling parties are not required to waive their right to appeal. If the settlement procedure succeeds, the *Bundeskartellamt* issues a brief decision. The maximum fine reduction allowed as a result of a settlement declaration is 10 percent.[79]

2. France

The current settlement procedure was added to the French Commercial Code under Article L. 464-2 III by the "Law for Growth, Activity and Equality of Economic Opportunities," known as the "Macron Law," on August 6, 2015. This law replaced the settlement procedure that had been introduced by the French Commercial Code in 2001. The Macron Law provides that the Head Rapporteur[80] of the

---

[78] *Id*. at §3.

[79] *Ibid*.

[80] A rapporteur is a person who is appointed by an organization to report on the proceedings of its meetings.

French Competition Authority ("***FCA***") will submit to the concerned undertaking(s) a proposal on a minimum and maximum fine that would be imposed as a result of the settlement procedure (*i.e.*, provide a range for the fine amount) in exchange for the undertaking(s) agreeing not to contest or dispute the allegations of the FCA.[81]

French law provides that the settlement procedure of the FCA will be applicable to all competition cases. The FCA has confirmed the universal applicability of settlement proceedings in competition cases in its press release on a public consultation on the new procedural notice regarding the settlement procedure. The FCA has also stated that the current settlement procedure has been used nine times so far, in cases relating to the abuse of dominant position and anti-competitive agreements.[82]

Furthermore, the FCA has recently published Draft Guidelines which explain the current settlement procedure that was introduced by the Macron Law.[83] Pursuant to the Draft Guidelines, the undertakings involved in a cartel investigation have no right to demand a settlement. As in the Commission's settlement procedure, the Head Rapporteur has broad discretion as to whether or not the FCA will seek a settlement in competition cases. The Draft Guidelines also provide that the settlement procedure can commence after the issuance of the statement of objections. In this regard, the undertakings are granted a time limit of two months to reply to the statement of objections.[84]

---

[81] Autorité de la Concurrence, *Settlement Procedure,* http://www.autoritedela concurrence. fr/user/standard.php?lang=en&id_rub=532&id_article=2193 (last visited December 13, 2018).

[82] Autorité de la Concurrence, *The Autorité de la concurrence opens a public consultation on the new procedural notice regarding the settlement procedure,* http://www. autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3137 (last visited December 13, 2018).

[83] Nathalie Jalabert Doury, Jean-Maxime Blutel & Estelle Leclerc, *The Amended Settlement Procedure of the French Competition Authority*, (April 30, 2018), https://www.mayerbrown. com/files/Publication/9d119dc0-f753-4f7e-8ee4-fe2b54d93441/ Presentation/Publication Attachment/4ec193c0-4114-463f-af9b-0052f4facdcf/Competition-Alert-English.pdf (last visited December 13, 2018).

[84] *Id.*, at 4.

The settlement procedure in France requires undertakings to waive their right to challenge the objections of the FCA. Accordingly, the undertakings can only comment or make remarks on issues related to the calculation of the fine amount. However, the settlement procedure of the FCA differs from the Commission's procedure in that it does not require an admission of liability from the concerned undertakings. The absence of an admission of liability requirement emphasizes the fact that the main underlying motivation and purpose of the FCA's settlement procedure is the cost savings regarding the potential procedural expenses of pursuing a cartel infringement.[85] Moreover, the Draft Guidelines allow undertakings to propose certain commitments within the framework of a settlement procedure, such as: (i) structural commitments (accountant division, subsidiarisation, etc.), (ii) behavioural commitments (modification of contract clauses, of terms and conditions of sale, of pricing schedules, etc.), and (iii) compliance commitments.[86] If the settlement procedure is successful, the settlement decision is adopted by the FCA's College of Members within the limits of the fine range that was determined and offered to the undertakings by the Investigation Services, which is the department that carries out the investigation process in cartel cases. Both departments are incorporated within the FCA.[87]

3. United Kingdom

In the United Kingdom, the Competition Act 1998 is the legal regulation that prohibits unlawful agreements and abuses of dominant position. In this regard, the "Guidance on the CMA's investigation procedures in Competition Act 1998 cases" ("***Guidance***") provides that the Competition and Markets Authority ("***CMA***") may consider a settlement in any case that falls under the scope of the Competition Act 1998.[88] The CMA retains a broad margin of discretion to decide whether

---

[85] *Ibid.*

[86] Autorité de la Concurrence, *supra* note 81.

[87] *Id.*, at 5.

[88] Competition and Markets Authority, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, (2014), art. 14.4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachm

or not to seek settlements, similar to the Commission's settlement procedure. The investigated undertakings have neither the right nor the obligation to settle their cases. The Guidance describes the settlement procedure as a voluntary decision of the undertakings.[89]

In the UK, the settling undertakings in a cartel case must admit liability in clear and unequivocal terms and accept a streamlined investigation process as a result.[90] Contrary to the Commission's settlement procedure, settlement discussions in the United Kingdom can take place either before or after the statement of objections has been issued.[91] Settlement discussions are carried out orally, whereas the settlement submission must be confirmed in writing.[92]

It is worth noting that the settlement procedure in the United Kingdom does not require the undertakings to waive their right to appeal. In this regard, the settlement decision will be final and binding on a settling party (unless the settling party itself successfully appeals the settlement decision), even if other parties subject to the settlement decision appeal the decision.[93] However, the discount on fines set out in the settlement decision will be withdrawn if the settling party appeals the settlement decision to the Competition Appeal Tribunal, in which case the Competition Appeal Tribunal will have full jurisdiction to review the appropriate level of penalty.[94]

The CMA applies varying discount rates for fines under different circumstances. The maximum discount amount will be 20% for settlement procedures that commence before the statement of objections is issued. However, a maximum discount of 10% will be applicable for settlement proceedings that start after the statement of objections has been issued. The actual discount awarded will "*take account of the resource savings achieved in settling that particular case at that*

ent_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf (last visited November 29, 2018).

[89] *Id.*, at 14.5.

[90] *Id.*, at 14.8.

[91] *Id.*, at 14.10.

[92] *Id.*, at 14.18.

[93] *Id.*, at 14.8.

[94] *Id.*, at 14.26.

particular stage in the investigation," and settlement discounts will be capped at 20% in all cases.[95]

IV. Impact of the Settlement Procedure

As articulated in Section II, the main motivation and rationale for the introduction of the settlement procedure in cartel cases was targeting procedural efficiencies.[96] As Joaquín Almunia, the former European Competition Commissioner, affirmed in a press release, this streamlined procedure was expected to speed up cartel investigations significantly, and thereby free up enforcement resources.[97]

In this regard, for settlement proceedings to be considered a success, it is clear that the primary impact should be observed in achieving the anticipated procedural efficiencies. The settlement proceedings follow the same procedural path as the standard proceedings until the statement of objections is drafted. Thereafter, the standard procedure and the settlement procedure diverge in how cartel cases are handled, and this is the stage at which the targeted/expected procedural efficiencies could emerge. As presented above, when the settlement procedure replaces the standard procedure, this results in: (i) limited access to the case file, (ii) a briefer statement of objections, (iii) no oral hearings for the undertakings, and (iv) a less detailed, briefer decision. A shorter statement of objections and a final decision containing fewer details about the parties and the facts of the case are serious adjustments to cartel proceedings; they cannot be overlooked as merely small or simple changes. The statement of objections and the final decision in a settlement procedure fluctuate between 20 to 40 pages rather than reaching several hundred pages (as in the standard procedure), as noted by Flavio Laina, who is currently the Head of the Cartel Settlement Unit at the Commission.[98] Moreover, the settlement decision and the statement of objections are only prepared in an agreed official language of the European Community, which leads to another abridgment with

---

[95] *Id.*, at 14.27.

[96] Vascott, *supra* note 10, at 2.

[97] European Commission Press Release, SPEECH/10/247, First cartel decision under settlement procedure – Introductory remarks by Joaquín Almuni*a* (May 19, 2010).

[98] Laina & Laurinen, *supra* note 17, at 305.

respect to the drafting process.[99] In contrast, when carrying out the standard procedure, the Commission has to address the concerned undertakings in the language of the country in which they are based, in addition to an agreed official language of the European Community.[100]

The elimination, reduction and curtailment of all these procedural steps in the settlement process indicate that the primary and most significant impact of settlement procedures occurs with respect to the duration of the proceedings. In this regard, Flavio Laina stated in 2013 that the last four settlement cases had been concluded in around 3 years, whereas standard cartel cases usually last significantly longer.[101] Furthermore, Kai Hüschelrath and Ulrich Laitenberger conducted an analysis regarding the impact of the settlement procedure on the duration of cartel cases between 2000 and 2014, which was published in 2015. In their article, the authors concluded that the settlement procedure had reduced the length of the period from the introduction of the statement of objections to the adoption of the final decision by more than 12 months on average.[102]

Another substantial impact of the settlement procedure in cartel cases concerns the appeal process. A settlement decision is a regular prohibition decision, which contains a finding of an infringement by the parties.[103] In this regard, the Commission's settlement decisions can be appealed to the European courts.[104] However, settlement decisions seem less likely to be appealed to judicial authorities, since the settlement procedure requires the parties to unequivocally acknowledge and admit their involvement in the investigated cartel.[105] Furthermore, the Commission and the parties must reach a "common understanding" in

---

[99] Commission Notice 2008/C 167/0, *supra* note 23, art. 20.

[100] Council Regulation No 1, determining the languages to be used by the European Economic Community, art. 3, 1958 O.J. (385) 58.

[101] Vascott, *supra* note 10, at 2.

[102] Kai Hüschelrath & Ulrich Laitenberger, *The Settlement Procedure in EC Cartel Cases: An Empirical Assessment*, 28, (August 2015), http://ftp.zew.de/pub/zew-docs/dp/dp15064.pdf (last visited on November 29, 2018).

[103] Commission Notice 2011/C 308/06, on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, art. 117, 2011 O.J. (308) 6.

[104] Laina & Bogdanov, *supra* note 44, at 721.

[105] Commission Notice 2008/C 167/0, *supra* note 23, art. 20/a.

the settlement meetings with respect to the value of the sales that will be taken into account in the determination of the settlement fine(s).[106]

With regard to the effect of the settlement procedure on appeals, Michael Hellwig, Kai Hüschelrath and Ulrich Laitenberger have recently analysed the relationship between the settlement procedure and the appeals process. In their study, the authors included an assessment on the number and rate of appeals against the Commission's decisions reached in cartel cases between 2000 and 2015. They also conducted research into the change in the relevant figures before and after 2010, which was the year in which the first settlement decision was adopted. As a result of these calculations, they have concluded that the average number of appeals per year before 2010 in cartel cases was 25, while the corresponding number after 2010 was 8, which points to a 68% reduction in the number of appeals/year. The authors have also analysed the percentage of firm groups that filed an appeal in the year of the respective cartel decision for each year in the study. They determined that the average appeal rate in cartel cases before 2010 was 63%. However, this rate dropped to 20% after 2010, which shows that there was a significant drop in the appeal rate against cartel decisions after the adoption of the settlement procedure.[107] All of these data reveal that the settlement procedure has had a measurable impact in reducing the number of appeals brought against the Commission's cartel decisions.

Moreover, the increase in the number of cartel cases that have been settled since the introduction of the settlement procedure points to another major impact that has resulted from its implementation. 52 cartel decisions have been adopted since the first cartel case was resolved through the settlement procedure in 2010 (in a case that involved dynamic random-access memory ["DRAM"] producers).[108] In 2011, 3 of the 4 cartel decisions were settlement decisions. In 2012, 1 settlement decision was adopted out of a total of 5 cartel decisions. Subsequently, 3 settlement decisions and 1 standard decision were adopted in 2013, and

[106] Patsa, Robinson & Ghiorghies, *supra* note 29, at 3.

[107] Michael Hellwig, Kai Hüschelrath &Ulrich Laitenberger, *Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment*, 9, (January 2016), http://ftp.zew.de/pub/zew-docs/dp/dp16010.pdf (last visited on November 29, 2018).

[108] Case COMP/38511, Micron and Others v. Comm'n, 2010.

there were 6 settlement decisions out of 9 cartel decisions in 2014. Most recently, 3 settlement decisions were reached out of 5 cartel decisions in 2015, which were followed by 6 settlement decisions and 1 standard decision in 2016, and 4 settlement decisions out of 7 cartel decisions in 2017.[109] As of this writing, 3 settlement decisions have been reached in 2018. Overall, we observe that 28 of the 52 cartel decisions that have been made since the adoption of the settlement procedure for cartel cases have been settlement decisions, which includes both full settlements and hybrid settlements.[110] Joaquín Almunia made a noteworthy prediction on this topic in 2013, in which he declared that he expected settlement decisions to constitute approximately half of the Commission's cartel decisions in the future.[111] Only time will tell if Mr Almunia will be proved prescient in his prediction, but the numbers above already indicate that the settlement procedure has been even more successful than the Commission anticipated.

V. Is it Time for Turkey to Adopt the Settlement Procedure?

The Turkish competition law regime does not feature an explicit provision regarding the settlement procedure. However, there are ongoing discussions in regulatory and legislative circles with respect to introducing and adopting the settlement procedure in Turkey. The topic of the settlement procedure was first brought up for discussion in a scholarly article by one of our authors[112] regarding the necessity of introducing the settlement procedure into the Turkish competition law regime.

In this regard, the Draft Act to amend the Law No. 4054 on the Protection of Competition, which was submitted before the Presidency

[109] The EU competition rules on cartels, 25-26, (January 2018), https://www.slaughterandmay.com/media/64584/eu-competition-rules-on-cartels.pdf (last visited on November 29, 2018).

[110] European Commission, Cartel Cases, http://ec.europa.eu/competition/cartels/cases/cases.html (last visited on November 29, 2018).

[111] European Commission Press Release, SPEECH/13/210, Remedies, commitments and settlements in antitrust - Speech by Joaquín Almunia (March 8, 2013).

[112] Gönenç Gürkaynak, *AB Rekabet Hukuku Uygulamasında Komisyon ve Teşebbüsler Arasında Uzlaşma ve Sulh* [Settlement between the Commission and Undertakings in the EU Competition Law Regime], 17, COMPETITION JOURNAL, 35, (2004).

of the Turkish Grand National Assembly on January 23, 2014, included a provision regarding the settlement procedure.[113] However, the Draft Act became obsolete when it failed to pass into law before the general parliamentary elections of June 7, 2015. Nonetheless, the settlement procedure remained on the legislative agenda after the introduction of the Draft Act, and these discussions finally found a receptive venue at the Symposium on Current Developments in Competition Law, which was organized by the Turkish Competition Authority and held in Ankara on April 4, 2018. The settlement procedure, whose adoption into the Turkish competition law regime was contemplated within the amendment to the Law No. 4054, was comprehensively discussed at this symposium. During the symposium, Prof. Dr. Ömer Torlak, chairman of the Turkish Competition Board, voiced that there is this planning of bringing the settlement procedure, as in the European Union, into the Turkish competition law regime and practice. [114]

On the other hand, it is worth remembering that several other settlement-like procedures already exist in Turkish law. Therefore, these procedures should be thoroughly analysed before discussing whether the settlement procedure should be introduced in Turkey and considering what its potential contributions to the Turkish competition enforcement regime would be. In this regard, there are several regulatory instruments that allow the Turkish Competition Authority to provide discounts on the administrative monetary fines imposed on undertakings in exchange for their admissions of liability and their cooperation in the Authority's investigations.[115]

---

113 *Rekabetin Korunması Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun Tasarısı* [Draft Act to Amend the Law on the Protection of Competition] (January 24, 2014), https://www2.tbmm.gov.tr/d24/1/1-0882.pdf (last visited on November 29, 2018).

114 Turkish Competition Authority, *Rekabet Hukukunda Güncel Gelişmeler Sempozyumu* [Symposium on Current Developments in Competition Law] (April 4, 2018), https://www.rekabet.gov.tr/tr/Haber/rekabet-hukukunda-guncel-gelismeler-semp-90f9 ce789e39e81180e90050568d4f05 (last visited on November 29, 2018).

115 M. Haluk Arı, Esin Aygün & H. Gökşin Kekevi, *Rekabet Hukukunda Taahhüt Ve Uzlaşma* [Commitment and Settlement in Competition Law], 281, (April 2009), https://www.rekabet.gov.tr/Dosya/etkinlik-yayinlari/24-pdf, (last visited on November 29).

The Regulation on Active Cooperation for Detecting Cartels ("***Leniency Regulation***") is the first instrument which includes provisions that could be said to resemble the settlement procedure. As per Article 5 of the Leniency Regulation, undertakings that are not granted or covered by full immunity agreements will be allowed to benefit from a reduction of fines if they submit sufficient information and evidence to the investigation and if they also meet the conditions for a monetary fine discount independently from their competitors.

The undertakings should provide such information between the decision of the Board to initiate a preliminary inquiry and the notification of the investigation report. The undertakings will be offered different discount rates for their fines depending on the timing of their application for leniency (*i.e.*, whether they are the first, second or a subsequent undertaking to apply for leniency).[116] The Leniency Regulation differs from the Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases ("***Notice on Immunity***") in that the Notice on Immunity looks for significantly added value for an undertaking to benefit from the reduction on fines.[117] On the other hand, the Leniency Regulation does not seek or require significantly added value to provide a reduction on fines to the concerned undertakings. The undertakings are rewarded with a reduction on fines if and when they admit their liability in the case and consequently provide certain information to the enforcement authorities.[118]

However, the Leniency Regulation cannot be said to contain provisions that resemble the Commission's settlement procedure. As explained above, the key aim of the settlement procedure is to generate procedural efficiencies. The Leniency Regulation, on the other hand, is aimed at detecting cartels more easily, but not at achieving procedural efficiencies. In this regard, the Leniency Regulation provides a reduction on fines to undertakings in order to reward them for admitting their

[116] Regulation on Active Cooperation for Detecting Cartels, art. 5, (February 15, 2009).

[117] Commission Notice 2006/C 298/11, art. 24.

[118] M. Haluk Arı, Esin Aygün & H. Gökşin Kekevi, *supra* note 115, at 281.

liability and for providing certain information to the enforcement authorities.[119]

There are also some provisions in the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("***Regulation on Fines***"), which include similar rules for competition law violations outside the realm of cartel infringements. For example, Article 7/3 of the Regulation on Fines provides that undertakings (or associations of undertakings) that have engaged in other violations and who admit their liability and actively cooperate with the Turkish Competition Authority will receive a reduction on fines by one-sixth to one-fourth (*i.e.*, 16.6%-25%).[120] At first glance, the relevant provision appears to resemble the settlement procedure, since it rewards undertakings by offering a reduction on fines in exchange for an admission of liability and active cooperation. However, similar to the Leniency Regulation, the Regulation on Fines does not aim at or serve the purpose of generating procedural efficiencies.[121]

In this regard, recent discussions regarding the introduction of the settlement procedure in Turkey are highly significant, especially when one considers the lack of a procedure that aims to achieve procedural efficiencies in Turkish competition law. Adopting clear policies regarding settlement procedures in Turkish law would bring about various benefits for both the undertakings and the enforcement authorities. First and foremost, achieving procedural efficiencies would be the most significant and crucial benefit that the settlement procedure could provide. In this regard, the Authority would attain a more streamlined organizational procedure for its investigations. Furthermore, the duration of the proceedings would be reduced, as the settlement procedure has already shown itself capable of providing this benefit to the Commission. Consequently, fewer valuable resources would be

[119] Esin Aygün, *Cartel Settlements: General Features, Recent Developments in the European Commission's Practices and Implications for Turkey*, 54, COMPETITION JOURNAL, 3, 36, (2013).

[120] Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, art. 7/3, (February 15, 2009).

[121] M. Haluk Arı, Esin Aygün & H. Gökşin Kekevi, *supra* note 115, at 286.

expended in each investigation and the Authority would be able to investigate more cases, which would lead directly to an increase in the deterrence effect of such investigations. Moreover, a regulation on the settlement procedure would increase the undertakings' awareness of these issues, since they would recognize that admitting their liability in an infringement would bring various benefits to them, including a reduction on likely monetary fines.

VI. Conclusion

Competition authorities around the world have been making considerable efforts to build a streamlined process for combatting cartels. On that note, the settlement procedure has been implemented in various jurisdictions as an efficiency-enhancing instrument, which makes tangible contributions to the procedural efficiency of enforcement actions. Settlement procedures accomplish this goal by offering a fast-track option for resolving cartel cases speedily and bypassing the compulsory procedural steps of the investigation whilst simultaneously guaranteeing the defendant undertaking(s) an offer of immunity or a reduction on monetary fines.

Commentators and practitioners in Turkey have been discussing these issues for years; however, Turkish legislators still have not introduced a settlement procedure into the Turkish competition law enforcement regime. For the time being, Turkey merely contends itself with employing settlement-like procedures, which have not produced significant procedural efficiencies, as expected. Along the same lines, we emphasize that disregarding the improvement potential offered by the settlement procedure and failing to implement it into Turkish competition law practice would be a crucial step backwards for the entire competition enforcement mechanism in terms of efficiency considerations. On that note, we conclude that incorporating the settlement procedure will contribute substantially to the effective functioning of the Turkish competition law system and add a valuable tool to the well-established, settlement-like procedures that are already in the arsenal of the Turkish competition enforcement authorities.

Bibliography

Legislative, Administrative and Executive Materials

Commission Notice 2006/C 298/11, Immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17.

Draft Commission Notice 2007/C 255/20, on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, art. 9, 2007 O.J. (C 255) 20.

Commission Notice 2008/C 167/0, on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, art. 29, 2008 O.J. C (167) 1.

Commission Regulation 622/2008, amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, art. 4, O.J. L (171) 3.

Council Regulation No 1, determining the languages to be used by the European Economic Community, art. 3, 1958 O.J. (385) 58.

Commission Notice 2011/C 308/06, on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, art. 117, 2011 O.J. (308) 6.

Regulation on Active Cooperation for Detecting Cartels, art. 5, (February 15, 2009).

Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, art. 7/3, (February 15, 2009).

Periodicals

Molly Kelley, *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*, 9, WASH. U. GLOBAL STUD. L. REV., 699, 701 (2010).

Flavio Laina & Elina Laurinen, *The EU Cartel Settlement Procedure: Current Status and Challenges*, 4, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE.

Flavio Laina & Aleko Bogdanov, *The EU Cartel Settlement Procedure: Latest Developments*, 5, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, Vol. 8, Issue 5 (2017).

Gönenç Gürkaynak, *AB Rekabet Hukuku Uygulamasında Komisyon ve Teşebbüsler Arasında Uzlaşma ve Sulh* [Settlement between the Commission and Undertakings in the EU Competition Law Regime], 17, COMPETITION JOURNAL, (2004).

Esin Aygün, *Cartel Settlements: General Features, Recent Developments in the European Commission's Practices and Implications for Turkey*, 54, COMPETITION JOURNAL, (2013).

Internet Sources

Maarten Pieter Schinkel, *Bargaining in the shadow of the European settlement procedure for cartels*, (ACLE working paper; No. 2010-17). Amsterdam: Universiteit van Amsterdam, Amsterdam Center for Law & Economics (2010), https://pure.uva.nl/ws/files/1481242/97032_SSRN_id1729640_1_.pdf (last visited November 29, 2018).

Jerónimo Maillo, *EU Cartel Settlement procedure: an assessment of its results 10 years lat*er, (October 30, 2017), http://www.idee.ceu.es/Portals/0/Publicaciones/EU%20Cartel%20Settlement%20procedure_WPCPC_Final.pdf (last visited December 13, 2018).

Aurora Ascione & Massimo Motta, *Settlements in cartel cases*, European University Institute, (2008), https://mpra.ub.uni-muenchen.de/24416/1/MPRA_paper_24416.pdf (last visited November 29, 2018).

David Vascott, *Cartel settlements: Are they working?*, (April 8, 2013), https://www.lw.com/mediaCoverage/are-eu-cartel-settlements-working (last visited November 29, 2018).

Andreas Stephan, *The Direct Settlement of EC Cartel Cases*, (December 2007), http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/astephan.pdf (last visited November 29, 2018).

Agapi Patsa, James Robinson & Mara Ghiorghies, *Cartel Settlements: An Overview of EU and National Case Law*, (September 21, 2016), https://www.bakermckenzie.com/-/media/files/insight/publications/2016/09/cartel-settlements/ar_ antitrust_ cartelsettlements _20160929.pdf (last visited November 29, 2018).

Eric Van Ginderachter, *European Commission's Settlement Procedure – A Success Story*, (November 8, 2014), http://www.idee.ceu.es/Portals/0/Investigacion/Cartls/European%20Commission's%20settlement%20procedure%20%E2%80%93%20a%20success%20story.pdf (last visited November 29, 2018).

Robbert Snelders, *The EU Cartel Settlement Procedure: The First Years - Experience and Challenges* (March 10, 2016), https://www.studienvereinigung-kartellrecht.de/sites/default/files/14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (last visited November 29, 2018).

Jean-François Bellis, *General Overview of the EU Cartel Settlement Procedure*, (2014), https://www.competitionpolicyinternational.com/assets/General-Overview-of-the-European-Settlement-Procedure.pdf (last visited December 5, 2018).

Kris Dekeyser, *Alternative Procedures in the European Antitrust Legal Framework - Cartel Settlements and Commitment Decisions*, http://www.euchinacomp.org/attachments/article/161/PPT1-Settlements%20and%20commitments-Kris-EN%20%20(small%20size).pdf (last visited November 29, 2018).

Chris Bryant & Marieke Datema, *Has the Dust Settled for Cartel Settlements?*, (June 14, 2016), https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/Marieke-Bryant.pdf (last visited November 29, 2018).

Global Legal Insights, *Cartels 2018/Germany*, https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/germany (last visited November 30, 2018).

Autorité de la Concurrence, *Settlement Procedure*, http://www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=532&id_article=2193 (last visited December 13, 2018).

Autorité de la Concurrence, *The Autorité de la concurrence opens a public consultation on the new procedural notice regarding the settlement procedure*, http://www.autoritedelaconcurrence.fr/user/

standard.php?lang=en&id_rub=684&id_article=3137 (last visited December 13, 2018).

Nathalie Jalabert Doury, Jean-Maxime Blutel & Estelle Leclerc, *The Amended Settlement Procedure of the French Competition Authority*, (April 30, 2018), https://www.mayerbrown.com/files/Publication/9d119dc0-f753-4f7e-8ee4-fe2b54d93441/Presentation/PublicationAttachment/4ec193c0-4114-463f-af9b-0052f4facdcf/Competition-Alert-English.pdf (last visited December 13, 2018).

Kai Hüschelrath & Ulrich Laitenberger, *The Settlement Procedure in EC Cartel Cases: An Empirical Assessment*, (August 2015), http://ftp.zew.de/pub/zew-docs/dp/dp15064.pdf (last visited on November 29, 2018).

Michael Hellwig, Kai Hüschelrath &Ulrich Laitenberger, *Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment*, (January 2016), http://ftp.zew.de/pub/zew-docs/dp/dp16010.pdf (last visited on November 29, 2018).

The EU competition rules on cartels, (January 2018), https://www.slaughterandmay.com/media/64584/eu-competition-rules-on-cartels.pdf (last visited on December 13, 2018).

European Commission, Cartel case settlement, http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html (last visited November 17, 2018).

European Commission, Cartel Cases, http://ec.europa.eu/competition/cartels/cases/cases.html (last visited on November 29, 2018).

M. Haluk Arı, Esin Aygün & H. Gökşin Kekevi, *Rekabet Hukukunda Taahhüt Ve Uzlaşma* [Commitment and Settlement in Competition Law], (April 2009), https://www.rekabet.gov.tr/Dosya/etkinlik-yayinlari/24-pdf (last visited on November 29).

Turkish Competition Authority, *Rekabet Hukukunda Güncel Gelişmeler Sempozyumu* [Symposium on Current Developments in Competition Law] (April 4, 2018), https://www.rekabet.gov.tr/tr/Haber/rekabet-hukukunda-guncel-gelismeler-semp-90f9ce789e39e81180e90050568d4f05 (last visited on November 29, 2018).

Bundeskartellamt, *Settlement procedure used by the Bundeskartellamt in fine proceedings* (February 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet_Settlement_procedure.pdf?__blob=publicationFile&v=3 (Ger.) (last visited November 29, 2018).

Competition and Markets Authority, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, (2014), art. 14.4,https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf (last visited November 29, 2018).

Rekabetin Korunması Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun Tasarısı [Draft Act to Amend the Law on the Protection of Competition] (January 24, 2014), https://www2.tbmm.gov.tr/d24/1/1-0882.pdf (last visited on November 29, 2018).

Press Releases

European Commission Press Release SPEECH/00/295, Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour? – Speech by Mario Monti, 3rd Nordic Competition Policy Conference (Stockholm, September 11-12, 2000),.

European Commission Press Release IP/06/1705, Competition: Commission adopts revised Leniency Notice to reward companies that report cartels (December 7, 2006).

European Commission Press Release IP/07/1608, Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels (October 26, 2007).

European Commission Press Release IP/10/985, Antitrust: European Commission fines animal feed phosphates producers €175 647 000 for price-fixing and market-sharing in first "hybrid" cartel settlement case (July 20, 2010).

European Commission Press Release IP/14/960, Antitrust: Commission fines smart card chips producers € 138 million for cartel (September 3, 2014).

European Commission Press Release, IP/13/346, Antitrust: Commission sends statement of objections to suspected participants in smart card chips cartel (April 22, 2013).

European Commission Press Release, SPEECH/10/247, First cartel decision under settlement procedure – Introductory remarks by Joaquín Almunia (May 19, 2010).

European Commission Press Release, SPEECH/13/210, Remedies, commitments and settlements in antitrust – Speech by Joaquín Almunia (March 8, 2013).

European Commission Press Release SPEECH/05/205, The First Hundred Days – Speech by Neelie Kroes, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, (Brussels, April 7, 2005).

Books

Frieder Roessler, Environmental Law, the Economy and Sustainable Development: The United States, the European Union and the International Community, 121, (Richard L. Revesz et al. eds., 2000).

Cases

Case T‑270/12, Panalpina World Transport (Holding) Ltd and Others v. Comm’n, 2016 E.C.R. 109.

Case COMP/38866, Yara Phosphates Oy and Others v. Comm’n, 2010.

Case AT.39574, Infineon and Others v. Comm’n, 2014.

Case COMP/38511, Micron and Others v. Comm’n, 2010.