An Overview of the Turkish Competition Law Regime Applying to Pricing Policies in Light of the Turkish Competition Board's Recent Decisional Practice

Authors: Gönenç Gürkaynak, Esq. and Esra Uçtu, ELIG, Attorneys-at-Law

Ronald Coase, nobelist in Economics in 1991, said he had gotten tired of antitrust because "*when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion*"[1].

In their reviews, competition law authorities might be led to directly examine the undertakings' pricing strategies, which can be perceived as a direct intervention in their freedom to set their own prices, as opposed to the principles of the free market economy. The scope of competence of the competition law authorities with respect to pricing strategies has therefore been a matter of debate among practitioners.

In parallel with the global trend, a significant number of the Turkish Competition Board's ("***Board***") cases concern pricing issues examined under the provisions of Article 4 (anticompetitive agreements) or Article 6 (abuse of dominant position) of Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), which are akin to Article 101 and Article 102 of the Treaty on the Functioning of the European Union ("***TFEU***") respectively. In this regard, this article initially aims to provide a general insight on the Board's approach with respect to pricing policies of undertakings in light of its recent decisional practice. To that end, the methods that the Board uses in its assessment on pricing issues will be discussed below for each type of pricing strategy prohibited under competition law–namely with respect to excessive pricing as a form of exploitative conduct and through exclusionary conducts involving margin squeeze, predatory pricing and rebate systems–by also referring to the EU competition law regime.

1. <u>Excessive Pricing</u>

Excessive pricing is among the most controversial theories of harm in competition law. In light of the international best practices, it may be claimed that excessive pricing has remained

[1] William Landes, "*The Fire of Truth: A Remembrance of Law and Econ at Chicago*", 1981, p.193.

underdeveloped conceptually and competition law authorities' approaches to excessive pricing differ considerably. In this sense, there is an ambiguity as to what constitutes excessive or unfair pricing[2].

In competition law, excessive pricing is prohibited under the general prohibition of abusive practices of dominant firms under Article 102(a) of TFEU[3] which explicitly refers to unfair prices or trading conditions. On the other hand, while there is no explicit provision covering excessive pricing under Turkish competition law, Article 6 of Law No. 4054 provides a non-exhaustive list of different types of abuse of dominant position and the Board does not hesitate to assess excessive pricing under the provisions of Article 6.

In general, excessive pricing is defined as the price determined significantly and consistently above the competitive level as a result of market power[4]. To that end, competition authorities condemn excessive prices which may lead to direct loss in consumer welfare. However, the analysis of excessive pricing under competition law rules is not crystal clear; namely issues such as what constitutes excessive pricing and the adequacy of competition law in dealing with excessive prices. Moreover, there are many objections to competition law authorities' intrusion in the undertakings' pricing policy; e.g. a regulatory intervention on high prices could potentially have a chilling effect on investments and innovation, and thus on consumer welfare. This explains to a large extent the competition law authorities' reluctance to engage in excessive pricing cases[5].

The Board's decisional practice tends to establish a standard on what may constitute excessive pricing and draws the limits of competition authorities' intervention with respect to market players' pricing policy. The Board's recent decisions as described below are also in line with this tendency.

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[2] Pınar Akman&Luke Garrod, "*When are Excessive Prices Unfair*?", ESRC Centre for Competition Policy, February 2010, p.1.
[3] Pursuant to Article 102(a) of TFEU, "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*" may constitute a form of abuse of dominant position.
[4] OECD, Glossary of Statistical Terms.
[5] OECD, "*Excessive Prices*", Policy Roundtables, 2011, p.10.

In *Congresium*[6], the Board, upon the decision of the administrative court[7], re-assessed the allegations on whether Congresium violated Article 6 of Law No.4054 through refusing the application of a company to organise a furniture expo and implementing excessive prices for expo centre services.

In this decision, the Board provided detailed explanations on the assessment of excessive pricing in terms of competition law. The Board also referred to EU and US competition law regimes. To that end, the Board held that there is no intervention in excessive pricing in the scope of competition law in the US and that abuse of dominance by way of excessive pricing is seldom evaluated in EU.

The Board also referred to its precedents[8] and accordingly concluded that it intervenes in excessive pricing only under limited circumstances, given that such an intervention may have a negative effect on the nature of the market as there is a risk of error in terms of competition law authorities' determination of excessive pricing and intervention methods.

The Board stated that three criteria should be taken into consideration while determining the existence of dominance; namely (i) market shares and concentration level in the relevant market, (ii) barriers to entry or to market expansion and (iii) buyer power.

In order to determine whether excessive pricing constitutes an abusive behaviour, the Board referred to the two-staged “economic value test” which consists of (i) a price/cost comparison and (ii) comparison between the undertakings’ prices as well as comparison with the prices of competitors offering equivalent products or services.

In the case at hand, the Board applied the economic value test to determine whether Congresium’s prices constitute abuse of dominant position by way of excessive pricing within the meaning of Article 6 of Law No. 4054. To that end, when conducting the price/cost comparison, which is the first stage of the economic value test, the Board considered that given the difficulties in determining the costs specific to expo centre operation activities, the second stage of the relevant test would be more appropriate in the case at hand. In this regard,

[6] The Board's decision numbered 16-35/604-269 and dated 27.10.2016.
[7] In Turkey, decisions of the Board may be appealed before administrative courts.
[8] The Board's decision numbered 01-17/150-39 and dated 06.04.2001 and the decision numbered 08-01/5-4 and dated 03.01.2008.

the Board compared Congresium's prices with (i) its own prices of its other products and (ii) its competitors' prices; and observed that although Congresium's prices were higher than some other expo centres, its pricing policy was not continuous and Congresium set lower prices compared to substitutive expo centres during certain time periods.

Based on these considerations, the Board rejected the allegations regarding excessive pricing behaviour of Congresium. That said, in this decision, Congresium has been imposed an administrative monetary fine on the basis of abuse of dominant position through refusal to deal with the complainant.

The Board adopted a similar approach in its *Soda* decision[9] which also concerned excessive pricing allegations against Soda in the basic chromium market. In this decision, the Board applied the same two-staged economic value test. In this regard, the Board held that Soda's products cost more than competing products and Soda has generally a high-profit margin in its domestic and export sales. Furthermore, the Board held that Soda's domestic prices and profits were higher than its export prices and profits. The Board also noted that although Soda has a steady market power in the relevant market for a certain period, there is no considerable barrier to entry in the relevant market. To that end, the Board stated that the stable market power of Soda may be explained by the fact that Soda's products are more qualified than competing products and there is no substitutive product to Soda's products in the relevant market. As a result, the Board rejected the allegations against Soda and decided not to initiate a full-fledged investigation.

2. Margin squeeze

Margin squeeze is considered to exist where a dominant undertaking in an upstream market supplies a key input to undertakings that compete with it in a downstream market in a way where an equally efficient competitor is not allowed to compete profitably with the relevant dominant undertaking in the downstream market[10].

The Guidance on the European Commission's Enforcement Priorities in Applying Article 82 (now Article 102) to abusive exclusionary conduct by dominant undertakings (the "***EU***

[9] The Board's decision numbered 16-14/205-89 and dated 20.04.2016.
[10] Richard Whish&David Bailey, "*Competition Law*", 8th Edition, Oxford University Press, 2015, p.796.

Guidance Paper”) also provides the same definition with respect to margin squeeze (para. 80). Similar to the EU regime[11], the Board’s Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (“***Guidelines***”) refer to margin squeeze as a form of exclusionary abuse and provide a definition of margin squeeze that is similar to the one adopted in the EU[12].

As for the decisional practice of the Board, in *Turk Telekom/TTNET*[13], upon the judgment of the administrative court, the Board re-evaluated the allegations as to whether Turk Telekom violated Article 6 of Law No. 4054 through its pricing policy regarding Ev Avantaj campaign which concerns tariffs offered in the fixed line market.

In the relevant decision, the Board first set forth the fundamental principles for determining margin squeeze by also referring to its Guidelines (para. 62), namely (i) the dominant undertaking must be active in upstream and downstream markets that are connected to each other in a production chain, (ii) the upstream product must be indispensable in order to operate in the downstream market, (iii) the undertaking must have dominant position in the upstream market and (iv) the margin between the upstream and downstream markets must be so close as to ensure that a competitor, that is as efficient as the dominant undertaking in the upstream market, would be unable to profit and operate in the downstream market on a lasting basis.

To that end, when dealing with margin squeeze cases, the Board evaluates whether the scrutinized conduct is likely to generate anticompetitive foreclosure effects.

In the case at hand, the Board assessed as to whether the abovementioned four conditions are satisfied. In this regard, the Board concluded that three of Turk Telekom campaigns which are offered to individual end-users have failed to cover their costs during the investigated period.

[11] Case C-280/08 P Deutsche Telekom v. Commission [2010].
[12] Paragraph 61 of the Guidelines defines margin squeeze as follows: “*an undertaking active in vertically related markets that is dominant in the upstream market sets the margin between the prices of the upstream and downstream products at a level which does not allow even an equally efficient competitor in the downstream market to trade profitably on a lasting basis*”.
[13] The Board's decision numbered 16-15/254-109 and dated 03.05.2016.

Afterwards, the Board assessed whether Turk Telekom's relevant campaigns lead to any anticompetitive foreclosure effects on competitors operating in the downstream market. To that end, the Board referred to the concept of "*fixed-mobile substitution*" provided in the reports of ICTA[14] and BEREC[15] and held that in order to make a decent analysis on the competitive landscape in the retail fixed-line market, the effects of fixed-mobile substitution should also be examined. Based on the findings of these reports, the Board concluded that there is an asymmetrical substitution between fixed and mobile services, as mobile services may be regarded as a substitute to fixed line services, while the opposite is not valid. Moreover, it is held that there is a decrease in demand for fixed line services due to the competitive pressure stemmed from mobile services on fixed line services. In this regard, the Board stated that fixed line market shows the characteristics of a shrinking market.

The Board then evaluated the effects of Turk Telekom campaigns which have failed to cover their costs. In this scope, the Board held that the number of individual subscribers of Turk Telekom has been consistently decreasing during the period of such campaigns while other fixed line operators increased their number of subscribers. Based on the foregoing, the Board concluded that Turk Telekom's alleged campaigns did not lead to any anti-competitive foreclosure effect in the fixed line market and thus rejected the allegations regarding margin squeeze.

3. **Predatory Pricing**

Contrary to excessive pricing which is a form of exploitative abuse, predatory pricing is an exclusionary practice which aims at driving out or weakening competitors in a given market. Predatory pricing involves the predator's setting prices sufficiently low to reduce competitors' ability or incentives to compete effectively or to exclude them from the market[16].

Pursuant to the EU Guidance Paper, the European Commission will "generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to as 'sacrifice'),

[14] Information and Communications Technologies Authority.
[15] Body of European Regulators for Electronic Communications.
[16] International Competition Network, "*Unilateral Conduct Workbook Chapter 4: Predatory Pricing Analysis*", 2012, p.2.

so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm"[17].

Predatory pricing is substantially different from margin squeeze as in predatory pricing the dominant undertaking undergoes suffering losses in the short term in an effort to foreclose the market and charge higher prices at a later stage when the intended effect of market foreclosure has been achieved (the so-called "harvest strategy"). On the contrary, as stated above, margin squeeze does not require such a sacrifice given that in this case, the dominant undertaking may fix high retail prices in the short and long terms[18].

The Board's definition of predatory pricing provided in its Guidelines (para. 50) does not fall far from the definition adopted by the European Commission[19]. As for the criteria used to determine the existence of predatory pricing, similar to the European practice, in its decisional practice, the Board generally applies the criterion of "average avoidable cost" ("***AAC***")[20] in order to determine whether a dominant undertaking incurred avoidable losses as a result of its conduct under scrutiny. In this regard, the Board applies the AAC test in order to check whether the dominant undertaking undergoes incurring losses in the short-term and an equally efficient competitor would not be in a position to operate in the relevant market without incurring losses[21]. Moreover, in certain circumstances and depending on the market characteristics, the Board may use another cost benchmark in its assessment on predatory pricing, namely "long-run incremental cost" ("***LRAIC***")[22]. In this regard, LRAIC is typically higher than AAC given that AAC only involves fixed costs incurred in the period under scrutiny, while LRAIC covers costs associated with the development of a new product or

[17] EU Guidance Paper, para.63.
[18] European Commission, "*Margin Squeeze*", Working Party No. 2 on Competition and Regulation, 2009, p.4.
[19] Para. 50 of the Guidelines defines predatory pricing as follows: "*an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behaviour*".
[20] Pursuant to the Guidelines, AAC may be defined as the costs that an undertaking would avoid or save if it had not produced a certain amount of output. When calculating AAC, the sum of all variable and fixed costs directly related to production can be taken into account in order to calculate all costs incurred by the business for the production under examination.
[21] Guidelines, para. 54.
[22] LRAIC is defined in the Guidelines (para. 54) as "the average of all (fixed and variable) costs a firm incurs to manufacture a product.

service and other product specific fixed costs incurred before the period where the allegedly conduct took place[23].

The use of the aforementioned criteria allows the Board to examine whether the conduct under scrutiny involving predatory pricing is likely to lead to anticompetitive foreclosure effect for an equally efficient competitor.

To illustrate, in *Hatay RO RO*[24], the Board evaluated the allegations that Hatay RO RO violated Article 6 of Law No.4054 by way of predatory pricing and discrimination among its customers. In this decision, after having provided general explanations with respect to the theoretical background of the predatory pricing concept, the Board evaluated whether Hatay RO RO's pricing policy had the purpose of excluding its sole competitor–Varan–in the market for ro ro transportation services in the route between Turkey and Middle East countries, as Varan ceased its activities in the relevant market in 2014, i.e. the year when Hatay RO RO entered the market.

To that end, the Board first compared Hatay RO RO's prices to Varan's prices for a given period. The Board concluded that Hatay RO RO has entered into the market at the same price level as Varan and did not change its prices for ro ro transportation services for five months starting from Varan's ceasing to operate in the market. Hatay RO RO's price increase after Varan's exit from the market was deemed as based on a rational reason (i.e. the necessity for Hatay RO RO to change the route it used for a given destination).

The Board also referred to the AAC criterion, by evaluating Hatay RO RO's AAC costs and prices per vehicle and per voyage. Based on the information regarding AAC and prices, the Board held that AAC differed in each voyage depending on the capacity usage rates of the ro ro ships. Within this framework, the Board noted that despite the volatile structure of AAC with regard to each voyage, even the highest AAC incurred was below the price set by Hatay RO RO. Accordingly, the Board concluded that the comparison between Hatay RO RO's prices and AACs for each voyage shows that Hatay RO RO did not accept incurring losses.

[23] Guidelines, para. 54.
[24] The Board's decision numbered 16-01/12-5 and dated 06.01.2016.

Therefore, the Board rejected the allegations of predatory pricing under Article 6 of Law No. 4054.

4. Rebate Systems

Discounts and rebates make part of the general business practice and are often used as instruments of healthy and legitimate price competition[25]. Rebate schemes, including discounts applied by suppliers on price lists and rebates that are retrospectively granted to purchasers as a reward,[26] may, however, be considered as an anticompetitive practice by competition authorities when granted by dominant firms.

In the EU competition law regime, the wording of Article 102 of TFEU does not explicitly list rebate systems as an abusive conduct. However, the decisional practice of the European Commission and the case law of European courts have covered various types of rebate systems. As pointed out in the General Court's *Intel* judgment[27], the EU courts tend to classify rebate schemes within three categories: (i) quantity rebates, (ii) exclusivity rebates and (iii) third category rebates[28].

Quantity rebates depend solely on the volume of purchases made by a dominant undertaking and as stated in *Post Denmark II*[29], they are considered as being the least harmful conduct within the rebate practice, as they might be the reflection of economic efficiencies made by undertakings in dominant position[30]. In order not to fall within the scope of Article 102 TFEU, such rebates schemes should apply (i) to all purchasers, (ii) depending on the quantity of their purchases, and (iii) on the basis of an objective criteria[31].

Exclusivity rebates, which include loyalty and fidelity rebates, are rebates that are conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. EU courts consider exclusivity rebates as a "by object" infringement,

[25] European Commission, "*Roundtables on Bundles and Loyalty Discounts and Rebates*", Working Party No. 3 on Co-operation and Enforcement, 2008, p. 21.
[26] Alison Jones, &Brenda Sufrin. *EU competition law: text, cases, and materials*. Oxford university Press, 2016, p. 435.
[27] Case T-286/09, Intel Corp. v. Commission, [2014], para.74.
[28] *Ibid*, see also Richard Whish&David Bailey , "*Competition Law*", 8th Edition, Oxford University Press, 2015.
[29] Case C-23/14, Post Danmark A/S v Konkurrencerådet, [2015] para.27.
[30] Case T-286/09, Intel Corp. v. Commission, [2014], para.75.
[31] *Whish&Bailey citing* Case C-95/04 P, British Airways plc v Commission, [2007].

without taking into consideration the potential efficiencies that may arise in the relevant markets. This highly criticized approach has lately been approved by the General Court's *Intel* judgment[32].

Third category rebates form a residual category, where the "loyalty-inducing" practice of the dominant undertaking is neither linked to a mere quantity requirement, nor to a direct exclusivity condition, such as target rebates[33].

In Turkish competition law regime, rebate systems may be analysed under Article 4 (prohibiting restrictive agreements) or Article 6 (prohibiting abuse of dominance) of Law No. 4054. To that end, although there is no explicit provision regarding rebate systems under Article 4, in practice rebate systems occur in the instances where there is a vertical agreement between the buyer and the supplier. On the other hand, the Guidelines also list rebate systems as a form of abuse of dominant position. To that end, the Guidelines provide that *"Rebate systems, which see common use in commercial life, can have effects that can increase efficiency and consumer welfare, such as ensuring price drops, increasing level of output and product variety, reducing transaction costs stemming from the separate sale of products, and preventing free-riding by ensuring that resellers focus on the products of the supplier. On the other hand, when offered by dominant undertakings, the rebates in question may also lead to anti-competitive foreclosure"*[34]. When determining whether a rebate system is likely to lead to any anticompetitive foreclosure effect in the market, the Board evaluates various factors such as the structure of the relevant rebate system, its duration, etc. Moreover, the Guidelines also state that the Board may use the equally efficient competitor test in the assessment of a rebate system. To that end, the Board's decisional practice shows that the Board mainly adopts an effect-based analysis on rebate systems rather than a formalistic approach which may lead to the prohibition of certain practices which are intrinsically competitive. Accordingly, the Board considers all aspects of the rebates systems and proceeds with an effect-based assessment of the rebate systems in the market.

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32 Case T-286/09, Intel Corp. v. Commission, [2014], para.77.
33 Case C-23/14, Post Danmark A/S v Konkurrencerådet, [2015]. See a*lso, Jones&Suffrin*, p. 445.
34 Guidelines, para.72.

In *Tüpraş*[35], the Board evaluated the allegations that Tüpraş abused its dominant position through its turnover premium system granted to fuel distribution companies. In this regard, the complainant alleged that the turnover premium system would lead to discrimination among distributors, resulting in small size distributors being excluded from the market.

The Board first stated that the anticompetitive effects of a rebate system implemented by a dominant undertaking may arise in two forms; namely (i) foreclosure effects and (ii) discriminatory effects. To that end, the Board held that although rebate systems are a common strategy in business life and they may have efficiency-enhancing effects with regard to undertakings, when granted by a dominant undertaking, the rebates under scrutiny may lead to anticompetitive foreclosure.

The Board then analysed the alleged anticompetitive effects of the turnover premium system in order to evaluate whether the relevant system lead to any exclusionary and/or discriminatory effect in the market.

In this regard, as to the alleged foreclosure effects of Tüpraş's turnover premium system, the Board concluded that since almost half of the fuel demand in Turkey is met through imports and Tüpraş is the only undertaking in the local production, Tüpraş's turnover premium system could not produce an exclusionary effect in the relevant market.

In relation to the discriminatory allegations, the Board evaluated the features of Tüpraş's turnover premium system under the general prescription of rebate systems in Turkish competition law. To that end, the Board stated that the turnover premium system includes a standardised–rather than individualised–volume threshold which is transparent and is provided to all customers on equal terms and objective criteria. Therefore, considering the foregoing factors, the Board decided not to initiate a full-fledged investigation against Tüpraş.

Conclusion

In line with the general trend in Europe and the principle of the free market economy, the Turkish Competition Board is reluctant to intervene in the pricing policies of undertakings to the extent they are complying with the competition law principles. In an effort to limit its

[35] The Board's decision numbered 16-10/159-70 and dated 16.03.2016.

intervention solely to behaviours which may be detrimental to competition and thus constitute a competition law violation, the Board's recent case law demonstrates its intention to draw the lines of its intervention in pricing policies by setting the competition law standards applying to such behaviours. To that end, the relevant standards defined by the Board are aligned, to a large extent, with the standards that apply in the European competition law regime.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

(First published in Mondaq on March 27, 2017)