THE REPUBLIC OF TURKEY
BAHÇEŞEHİR UNIVERSITY

COMPETITION LAW ABUSES IN MEDIA SECTOR COMPARING TURKEY AND EUROPEAN UNION: BASED ON TWO EXAMPLE CASES

Master's Thesis

SİNEM ÇELİK

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THE REPUBLIC OF TURKEY
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Supervisor: ASST. PROF. DR. SELİN ÖZOĞUZ

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Bana yeniden şarkılar söyleten kadına,
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ÖZET

MEDYA PİYASALARINDA AVRUPA BİRLİĞİ VE TÜRKİYE KARŞILAŞTIRMALI REKABET HUKUKU İHLALLERİ: İKİ ÖRNEK VAK'A İNCELEMESİ

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Avrupa Birliği İlişkileri
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Bu çalışma kapsamında, medya piyasalarının karşılaştığı kartel ve hâkim durumun kötüye kullanılması problemleri ile ilgili olarak Roma Anlaşması'nın 81. ve 82. maddeleri çerçevesinde genel bilgiler verilmiştir. Ancak tezin özellikli konusunu oluşturan; Roma Anlaşması'nın ve Rekabetin Korunması Hakkında Kanun'un karteli düzenleyen 81. ve 4. maddeleridir. Bu bağlamda çalışma, Türkiye ve Avrupa Birliği ilgili pazarlar olarak ele alınarak hazırlanmıştır. Tez içerisinde öncelikle rekabete ve rekabet hukukuna olan ihtiyaç tanımlanmış ve rekabetin piyasalar ve tüketiciler için avantajları ele alınarak arzu edilen rekabet yapısı ortaya konmuştur. Çalışmada müteakip olarak rekabet politikalarının düzgün bir şekilde işlemesi için yasal düzenlemelere ihtiyaç duyulduğuna değinilmiştir. Medya piyasaları; rekabet ihlalleri söz konusu olduğu zaman teknoloji, fiyat ve piyasada etkinliğin kötü yönde etkilenmesinin yanında ifade özgürlüğü, çoğulculuk ve bilgi alma hakkı gibi bazı temel haklar zarar görebileceği için değinilmesi gereken geniş bir alandır. Bu sebeple tez içerisinde medyanın işlevlerine, ilgili pazar olarak rekabet müessesesindeki yerine ve rekabet hukuku açısından temel haklara etkisi ele alınmış bulunmaktadır. Bir piyasada rekabetin varlığının sorgulanması halinde; yapılması gereken öncelikle coğrafi pazarın belirlenmesidir. İlgili pazarların belirlenmesini müteakiben Avrupa Birliği ve Türkiye rekabet hukuku mevzuatı tez konusuyla sınırlı olmak üzere örnek vakalardan yola çıkılarak tanımlanmıştır.

Çalışmanın Avrupa Birliği ve Türkiye ayırımında; medya piyasalarında rekabet hukukunun gelişimi ele alınmıştır. Roma Antlaşması'nın ve Rekabetin Korunması Hakkındaki Kanun'un uyumlu eylem ve hakim durumun kötüye kullanılmasını konu alan yasal düzenlemeleri medya piyasaları çerçevesinde tanımlanmıştır. Son olarak daha önce sağlanan hukuki dayanaklar ve bilgiler doğrultusunda 81. madde kapsamında her iki pazar için örnek davalar incelenmiş ve bu davalar Komisyon'un ve Rekabet Kurulu'nun denetimi ve kararları bakımından bir karşılaştırmaya tabi tutulmuştur. Avrupa Birliği örnek davası olarak; Roma Antlaşmasının 81. Maddesi kapsamında UEFA Davası seçilmiştir. Türkiye için ise Roma Anlaşması'nın 81. Maddesi ile uyumlu 4054 sayılı Kanun'un 4. Maddesi kapsamında DOĞAN davası incelenmiştir. Tezin sonuç bölümünde Avrupa Birliği ve Türkiye bazında yapılan karşılaştırma kapsamında gerek rekabet otoritelerinin yetkisel yapıları gerekse bu otoritelerin kararlarının hukuki altyapıları arasındaki benzerlikler ve farklılıklar ortaya konmuştur.

Anahtar Kelimeler: Rekabet hukuku, Roma Antlaşması, medya piyasaları, Avrupa Birliği, uyumlu eylem, hâkim durumun kötüye kullanılması.

ABSTRACT

COMPETITION LAW ABUSES IN MEDIA SECTOR
COMPARING TURKEY AND EUROPEAN UNION:
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Çelik, Sinem

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Supervisor: Assistant Professor Doctor Selin Ozoguz

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In this study; general information has been given in accordance with article 81 and 82 of Rome Treaty in relation to the abuse of dominant position and cartel problems that media markets encounter. Yet, the main subject of this thesis is the article 81 of Rome Treaty and article 4 of Turkish Competition Code regulating cartels. In this context; the study has been prepared by considering Turkey and European Union regarding as relevant markets.

First of all; the requirement for the competition and competition law is determined, then the advantages of competition for the consumers and the markets are defined and desired competition structure has been stated. Further it has been stated that legislation is needed for the functioning of competition properly in the study. Media market is a wide area that makes it essential to touch with the reason of some fundamental rights can be damaged as freedom of speech, plurality and right to information besides the negative effect on technology, price and the efficiency in the market in case of a competition infringement. Therefore the functions of media, its place within the competition institution and its effect to the fundamental rights are mentioned within the thesis. Assessment of relevant geographic market is the first thing to do prior to questioning of competition. Following to the determination of the relevant markets; Turkey and EU law have been defined within the limits of the subject of the thesis by giving case law examples.

The development of competition law in media markets have been dealt with in the division of Turkey and EU in the study. The legislation regarding concerted practice and abuse of dominant position under Rome Treaty and Competition Law No.4054 of Turkey has been determined in accordance with media markets. Finally case law examples have been analyzed for each market within the context of article 81 based on the previously provided legislation and information. These cases have been compared in terms of analysis and decisions of Competition Board of Turkey and Commission. As a case law example; UEFA case has been selected under article 81 of Rome Treaty and DOĞAN case has been selected under article 4 of Competition Law No.4054 which is harmonized in parallel with article 81. In the conclusion of the thesis; the differences and the similarities of the legislative basis and competence structures of competition authorities have been expressed within the context of Turkey and EU comparison.

Key words: Competition law, Treaty of Rome, Media markets, European Union, Concerted practice, Abuse of dominant position.

TABLE OF CONTENTS

ABBREVIATIONS

Competition Directorate General	:	DG COMP
Court of First Instance	:	CFI
European Broadcasting Union	:	EBU
European Court of Justice	:	ECJ
European Union	:	EU
European Community	:	EC
Television	:	TV
Union of European Football Associations	:	UEFA
Act no. 4054 Regarding the Protection of Competition	:	Competition Code

1. INTRODUCTION

It is beyond doubt that competition has a very material role in regulating economic and social life. Competition guides the undertakings to present products or services which are cheaper and of good quality. Competition which constitutes the material basis of market economy; provides the distribution and usage of the limited sources of society in the most effective way and it provides the products and the services to be submitted to the consumers in the cheapest price and highest quality as ensuring the gathering of demand and supply freely in the market conditions. What is more; effective competition enables the undertakings to have the opportunity to gain more profit, to expand their production, to enlarge their market share. While competing actors in the market will work more and will use their best efforts to be successful in the market; markets are developing and social welfare continues through competition at the same time. However; in free markets in case of the governments do not intervene to competition policy; the market can encounter with cartels and monopoly. Therefore; public authorities should establish and systematize competition policies by regulatory and prohibitory regulations for the maintenance of this beneficial system. It is important to note that the competition regulations neither can nor should safeguard economic success for one specific product or technology. Instead competition law has a primarily structural function which is to guarantee free competition as a necessary precondition for success on the market. Whereas various exemptions may aim at directly promoting production and distribution, protection of third parties and the internal market ultimately serve to safeguard competitive market structures.

Media has an indispensible role for the society as it stands for the source of information, provides social connection, cultural diversity and choice. Media first started with print media comprised of books and newspapers. Then radio and TV is invented and finally internet has become an integral part of our life which came through convergence. Since media is a sector which permanently produces information; its proper functioning has always been a matter of question. Cartels between the undertakings or monopolist structures within media sector are undesirable situations in democratic societies.

Because in case of foreclosures in media sector will eliminate the choice, right to get information, freedom of speech, social connection and other fundamental democratic values.

Therefore; it is very essential to procure the operation of media under democratic rules and free market structure which provides right to information and connection of society by numerous instruments. "The use of competition rules to preserve competitive markets may achieve economic efficiency but may also uphold the foundations of liberal democracy." (Jones and Surfin, EC Competition Law, Second Edition, 2004, p.16)

In the second section of the thesis; the need for competition and the obstacles of the sector are stated. In the third section of the thesis; functions and product structure of the media is described. Subsequently in the fourth and fifth sections, competition law in media sector within EU and Turkey are analyzed. In these sections; a comparison has been made within the context of the development of competition in media sector, the relevant legislation and competition authorities of EU and Turkey.

Competition law has been of critical essence in Community policy in European Union. Fundamental competition rules are contained in The Treaty Establishing European Community. (Treaty of Rome) Competition law is mainly regulating anti-competitive agreements between the undertakings, abuses of dominant position and mergers. Competition rules relating to cartels take part in Article 81 and dominant position take part in the Article 82 of Rome Treaty. Turkey and European Economic Community (EEC) have signed Ankara Agreement on 1963. EEC Accession Council decided to establish a Customs Union between Turkey and EEC with decision number 1/95 in 1995. One of the chapters of the Customs Union Decision was regarding the adoption of competition rules in consistent with EU. Therefore; the competition code of Turkey is Act no. 4054 Regarding the Protection of Competition (Turkish Competition Code) has been adopted from Rome Treaty. Article 4 and 5 of Turkish Competition Code is regulating cartels and article 6 of the Turkish Competition Code is regulating dominant

position. Two parallel articles regulating dominant position are Article 82 of the Treaty and article 6 of the Turkish Competition Code. These articles are generally described and EU and Turkish legislation is explained in general within the thesis. However, the main subject of this thesis is to introduce the abuse of competition law rules in media sector regarding article 81 of Treaty and article 4 and 5 of Turkish Competition Code regulating cartels. What is more; as described in section four more detailed; Article 82 of Rome Treaty seems to have a limited role comparing to article 81 EC in media sector regarding the decisions taken by Commission. Therefore; a comparison will be made between the case law of European Union and Turkey markets in regards of cartels within media sector, varieties and similarities of these markets will be handled.

The selected case of European Union is UEFA case[1] which is about the sale of bundling tv rights jointly and for a long term period. In its application to Commission for an individual exemption; UEFA argues that, as long as the term of the licenses are not too long, joint selling of these commercial rights should be exempted from Article 81 of EC Treaty. The selected case law of Turkey is Doğan case[2] in which tying agreements are in question. The claim in Doğan case is Doğan Dağıtım Satış ve Pazarlama A.Ş. ("Doğan") delivers products not related to media to the main vendors and Doğan refuses to supply newspaper and magazines in case that the vendors do not want to sell the said products.

As we will state in detail in conclusion section of the thesis; both the structure of competition authorities and their analyses are very similar in EU and Turkey. The main reason for that is, the fundamental articles of Turkish Competition Law No. 4054 has been adopted from Rome Treaty which is regulating cartels and abuse of dominant position. It wouldn't be incorrect to say that Turkey is closely following EU in competition policy. Besides the Rome Treaty being reference code for Turkish Commercial Code; Turkey consistently adopts parallel regulations with Commission. The close relationship may also be seen where Competition Board of Turkey is making references to the previous cases analyzed by ECJ or Commission in its decisions.

[1] Case No IV/37.398-UEFA, (1999/c 99/09).
[2] Case No 08-69/1122-438, 2008-2-225.

2. NEED FOR COMPETITION

2.1. ADVANTAGES OF COMPETITION

Competition can simply be defined as the relation between firms which sell similar kind of goods and services. The benefits of competition are numerous in a market economy. Competition, which constitutes the basis of liberal market economy, procures efficiency, low prices, wider choice for consumers, technology and innovation. The main advantages of competition are basically efficiency, low prices, technology and innovation. The efficiencies caught as a result of an advantage of competition is mainly divided into two: productive efficiency and allocative efficiency. Liberal market economies are pushing firms to reduce their costs by using brand production technologies, better organizations and cheaper production inputs. Minimizing the wastage of resources means productive efficiency. A firm tries to obtain the maximum profit if it furnishes a level where product prices are equal to their marginal costs. This allocation realized on a point where the price is equal to the marginal cost is an optimal allocation. A producer, desiring to maximize its profits, will expand its production for as long as it is privately profitable to do so. A reduction in a producer's own output cannot affect the market price and therefore there is no reason to limit it; the producer will accordingly increase output to the point at which marginal cost and marginal revenue (the net addition to revenue of selling the last unit) coincide. This means that allocative efficiency is achieved and consumers can purchase goods or services they require at the price they are prepared to pay: resources are allocated according to their wishes. What is more; the best way of competing for a firm with other firms, in other words, the best way to attract customer’s attention and to gain the customer is to keep down the costs in the market. Having low prices in the pocket; producers are keen to produce new and original products and develop new technologies to abolish customer’s dilemma out of the other choices.

Besides the economic and technical goals mentioned above; also social welfare is caught through competition. In Addition to the economic efficiency procured by the

competition rules, also liberal democracy may only be possible with efficient competition in a market. Competition cannot be isolated from other policies, quite the contrary competition may also serve for other policies such as employment, environment or industry. For example; by controlling mergers and preventing the use of dominant position in bad way; unemployment problem can be solved. Maher M. Dabbah (EC and UK Competition Law, 2004, p. 7) points out the social goal of competition as protecting consumer from the oppressive exercises of the big firms and protecting the interests and opportunities of small firms for the entrance of the market at the same time.

> *Put differently, the concern is to ensure some degree of market fairness and equity. It is clear that this is an expression of wholly non-economic "democratic" principles of justice and equality of bargaining power.*

In a liberal market economy; all these results mentioned above are spontaneously detected by the market and directly felt by the customer in a positive way, while firms are having their battles.

2.2. NEED FOR REGULATIONS

2.2.1. Invisible Hand (Manus Dei) and Visible Hand

Since our main purpose is to set out the comparison between Europe and Turkey in respect of competition abuses, our starting point must be designating the jurisdictional basis of competition law. Adam Smith, the inventor of market economy; alleged the theory of invisible hand in his book called "Wealth of Nations". In his theory he points out that it is not right that governments set neither prices nor granting privileges to the undertakings. He also states that economic efficiency can only be satisfied by developing liberal and competitive markets and the markets shall be regulated by an invisible hand without interference of public bodies. Because invisible hand (free price mechanism) facilitates the dissolve of the surplus of demand and supply, and market returns to the equilibrium point.

However, it is not difficult to say that the invisible hand is insufficient solely. Although the master goal is to protect competition itself by the help of Manus Dei; it has been affirmed that when the economies run by invisible hand of undefined rules, they turn into a monopolistic structure departing from competitive medium. In market economy, unrestraint is a sine qua non clause but not limitless. In economies where industrial and commercial structuring is left to market players, night watchman states come into existence. And night watchman states lack roles except basic public services. This deficiency brings us to the requirement of composing competition policies and regulations for providing, protecting and developing competition.

For this reason; regulations which are the visible hands of the competition are needed while the liberal market economy runs with invisible hand. Competition law realizes its goals by uses following techniques to realize its goals by preventing anti-competitive agreements between firms, preventing abuse of dominant position and mergers which lead to concentration in market power and by having control on oligopolistic and monopolistic markets.

2.2.2. Obstacles Entering the Sector

As Maher M. Dabbah explains; an undertaking can integrate in a market in many ways. It has the choice to work with a subsidiary company which sells the goods and services to customers at the end. Or the undertaking has the choice to sell its products through retail outlets and internet. However this undertaking may encounter some difficulties when trying to integrate vertically in the market. For instance integration costs might be high for the undertaking or it may not have satisfactory information and experience to enter the relevant sector. For these reasons; undertakings chose to enter into vertical agreements. (EC and UK Competition Law, 2004, p. 133)

The enlargement of companies with their own resources or mergers/ acquisitions of companies that are in the similar scope of activity in order to increase the market share and to work more effective carries out horizontal integration. Horizontal integration

may cause reduction in the number of the players in the sector which give rises to the concentration of control in the hands of few companies. Acquisition of companies may result in decrease in costs and the content investments. This causes standardization and decline in the number of information sources. In parallel; several undertakings which operate in an industry search the way to gain the profit from the economic effect of monopoly. Undertakings who aim the same may choose the way to merge or make agreements to increase their profitability. These cartels may bring the economic gain for those specific undertakings while at the same time decreasing the level of social and economic welfare resulting with high prices, less choice and barriers for smaller firms entering the sector. In accordance with the above mentioned ways of concentration; big players can block the market to the entrance or take the weak players out of the market in which a monopolist -where there is only one seller but many buyers- or oligopolistic -where there are only few producers- structure rises.

It is important to touch upon a question here whether the negative effects of monopolist or oligopolistic structure in media market is more dangerous than the other markets. Because; in addition to the economic damages resulting from the competition law abuses in media sector, there are also social costs such as damages on freedom of speech and plurality. As a conclusion; concentration in media sector may give to those who control the media companies the right to effect and direct public.

3. THE MEDIA SECTOR

3.1. MEDIA AND ITS FUNCTIONS

It is vital to define what media is, who are the players in media and in what ways these players may affect competition. Media is an indispensible instrument that functions as a bridge among all kinds of products, services and consumers. As Matthew Kieran (Media Ethics, Introduction) explains;

> *The media clearly have a strong and complex influence upon how we understand and shape our world. From news reporting and investigative journalism to the broadcasting of soaps, dramas and films, they provide us with information, entertainment and seek to enhance our understanding of the world.*

Postal, billboards and advertisement panels generally have commercial nature and not included within media. Cinema is not respected as television which is a proper instrument for media with cable, satellite and cassette. In general use; media term encloses newspapers, magazines, radio and television. So we have succeeded in determining the limits of our relevant market. The need for media is comprised in the functions media itself. The main functions of media are including but not limited to providing free flow of information, surveillance and reporting, entertainment, advertisement, holding society together and acting as a bridge between the government and the governed. Media is defined as the ability to access all kinds of information and to understand and critically evaluate different aspects of various contents. Media also includes the ability to communicate in a variety of contexts. It may also contribute to safeguarding the pluralism and freedom of speech. It permits the expression of diverse opinions from different social groups and promotes the development of the values of tolerance and dialogue. Media also plays an important role in increasing knowledge of and interest in cultural works.[3] The functions of media should be determined in order to evaluate whether media administers its job or not. These functions are calculated in 6

[3] http://europa.eu/legislation_summaries/information_society/am0004_en.htm.

categories which are monitoring the environment, providing social connection, providing a vision regarding world, transmitting the culture, entertaining, selling by advertising.

It is for sure that, media can serve better if it has bigger financial sources. However, there is the risk that public interest can be damaged. In case that media turns out to be holdings; the sector can encounter the risk of monopolistic structure comprised of people whose main principle is not informing society. Those people, in other words major financial institutions, may have the power to rule what is happening in the world by deciding which event shall be announced and which shall not.

In media sector, vertical integration is composed of production, packaging and distribution. Production does not exist without distribution and distribution does not exist without production. Under competition law, restraints featuring vertical agreements are considered to be less harmful than those contained within horizontal agreements. However; vertical agreements play an important role as much as horizontal agreements in media sector. With the aim to have more control over distribution or procurement stages and to avoid access difficulties, media companies enter into vertical agreements by using their own resources or by acquisitions. Consequently; companies have all distribution stages from music or film production, duplication and distribution of all by physical distribution chains or by internet, cable TV or satellite. Companies have the power to use their products or services on every stage of value chain which is as dangerous as horizontal agreements in the manner of competition.

3.2. CONVERGENCE AND PRODUCT STRUCTURE OF MEDIA SECTOR

Convergence is, in its generally accepted meaning; different network platforms (telecommunication, broadcasting, information technologies) providing same services, combining a variety of consumer instruments as television, personal computer and telephone.[4]

[4] EC Green Paper, 1997, 1

The most fundamental effect of convergence on consumers is the possibility of the usage of consumer electronics as TV, pc or telephones in a convertible environment. Convergence is materialized in three levels: technology and network platforms, industrial agreements and mergers, services and markets.[5] Convergence is amending the structure of markets. To reach effective competition; competing undertakings are entering into other markets through the medium of new investments or mergers in a converged market. This causes new investment and merger waves. Convergence provides new products and services such as digital pay television or digital platforms. These new instruments coming up with convergence movement making it hard to define "media market". Hence this situation brings out new arguments in relation to regulations and competition policy.

A media product can be subject to goods or/and service market. Goods market is nothing but the information that accesses people and which encloses a movie, magazine, newspaper, and radio broadcast and so on. Service market is advertisement market and it is directly in relation with the product market. A media product is differently used by two bodies. First one is the audiences/the readers and the other one is the advertisers. Profitability in one sector affects the profitability in the other sector. The reason for that is the product or the service is used in different manner and the audiences'/readers' demand is directly reflected to advertisement incomes. According to some media researchers, media companies are actually selling places for advertisement to the advertisers. Mostly, media companies that are working under their costs in the first market (audience, reader); gain their real income from the second market (advertisement). That is because the newspapers are endeavoring for raising their circulation and television channels to be watched.

According to Herbert Ungerer (Application of Competition Law to Media, 2004, p.3);

> *The market scenario that we are faced with a diversification of platforms and product:*

[5] EC Green Paper, 1997, 2.

a. Free TV, where we have seen the emergence of the dual system in all Member States during the nineties, heavily dependent on advertising on the one hand, and license fees on the other;

b. Pay TV/ pay per view, a relative newcomer, another quarter of revenues today;

c. Interactive TV;

d. Broadband internet, with %5 penetration now but rising.

As we will mention competition violation analyses in this thesis; we will consider the first and the second market in the scope of Article EC 81 and 82 and there will be case law examples given article 81 for relevant market.[6]

3.3. MEDIA AS A RELEVANT MARKET

When somebody desires to handle the abuses in competition law; the relevant market should be defined. Defining the relevant market in its product and geographic dimension is fundamental for a consistent application of the competition rules. As competition is determined as the relationship of undertakings who sell the goods or services of same kind; market power of an undertaking should be assessed. This leads us to the necessity to define relevant market. Surely; undertakings producing and distributing goods or services which are not close substitutes for one another; cannot compete and we do not talk about competition law or competition policy there. European Court of Justice enounced relevant market definition within the framework of goods. Court defines the relevant market in two manners: substitutability and interchangeability:

"…the definition of relevant market is of essential significance; for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extend interchangeable with other products." [7]

[6] Commissions work for year 2010: http://europa.eu/legislation_summaries/information_society/c11328_en.htm
[7] Case 6/72 Europemballage Corp and Continental Can Co Inc v. Commission (1973) ECR 215,(1973) CMLR, 199, para.32.

Interchangeability may be an issue if there are different products in the same geographic market or same products within different geographical market. That is why relevant market may be discussed in two dimensions: the good-service perspective and the geographical perspective. It is also important to understand the "relevant market" description of Commission who plays a significant role in the enforcement of EC competition rules. Commission was criticized for failing to make a market definition in the manner of economic principles until 1997. In October 1997; Commission published a Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law. The Commission states that the market definition is a tool to identify and define the boundaries of competition between firms and it serves to establish the framework of which the Commission shall apply competition policy. Commission adopted the definition of "relevant market" in its Notice from Court of Justice in the following case:

"…. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of products' characteristics, their prices and their intended use." [8]

The problem rises where it is hard to determine which products are held as substitutes for consumers. The relevant geographic market is defined as geographical area in which the firms under examination are involved in the supply and demand matrix of the relevant product and services (determined following a definition of the relevant product market). The conditions of competition in this area must be sufficiently homogeneous and it will be regarded as distinct from neighboring geographical areas because the conditions of competition prevalent in those areas are appreciably different. Commission also provides clarification for the definition of geographical market in its Notice 1997:

[8] [1997] OJ C372/5, [1998] 4 CMLR 177

"……The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas."

As to Holoubek, Damjanovic and Traimer (Regulating Content-European Regulatory Framework for the Media and Relating Creative Sectors, p.64):

Given the fact that technological environment is continuously evolving, defining markets for media content is particularly complex. A great number of providers are involved in producing and distributing a variety of products and services. Hence media market definitions will always relate to individual cases and will be valid only for a limited period of time. In practice, the situation can be roughly sketched as follows: as to the relevant product market, a basic product related distinction is made between production and acquisition of content (upstream) on the one hand, and distribution to the end customer (downstream) on the other hand, these two levels mutually influencing each other in many ways. With vertically integrated undertakings, for example their dominant position on the production market will often impact the distribution market as certain premium content products constitute an integral part of the selling offer.

4. COMPETITION LAW PRACTICE REGARDING MEDIA SECTOR IN EU

4.1. DEVELOPMENT OF COMPETITION REGARDING MEDIA SECTOR IN EU

Media first came into being with the print media, afterwards it moved ahead with radio and television and nowadays it is shifting to a new area as internet and digital technologies. Especially after 1980s, information technologies and convergence emerged. [9]

Printed media has been liberated in democratic regimes and protected with constitutional securities. For this reason; there had been no restrains on publishing magazines or newspapers. If we handle the media branches that families own in Europe; we can say that this sector is susceptible to oligopolistic development. Concentration in media sector in West Europe has been increased after World War II. In West Europe, television and radio publishing have been exercised by the government until 1983. After 1980s; the monopolistic position of public left its place to a complex structure in which private sector is also included. (Humphreys, 1996)

Besides technological development, abolition of some restrictions in entering publishing sector lead the investors to trend this area. As a result, many of the commercial television channels started to take place leaning to add revenue and subscription system. In Europe; television publishing sector's first actors were newspapers owners. Their primary aim was to diversify their activities in media sector, and thus to benefit synergy by usage of common input. (Communication source,reporters, experts etc.) The most classic examples of newspaper owners entering into television publishing sector are: Springer in Germany (SAT 1), Hersant in France (La Cinq – Channel 5) and Rupert Murdoch in England (Sky TV) (Doyle 2002a)

[9] Different network platforms (telecommunication, publishing, information technologies) furnishing the same services. (EC 1997,I).

In Europe; media players became monopolist actors in the sector by mergers and acquisitions, horizontal or vertical agreements, and finally they became media holdings. They acted in every engaged stage of the market such as internet, cable television, newspaper, movie productions and so on.

Convergence process, telecommunication sector opening to competition all over the world, and internet becoming widespread, caused a formation of brand market structures in media sector. The most significant shifts are arising out of merger and acquisitions of broadcasting, telecommunication, and information technologies sectors. These mergers provided the companies operating in telecommunication and broadcasting markets to enter into each other's market. To give an example; telecommunication companies are desiring to recover the required funding by returning profit in content and interactive services market while content servers are entering into infrastructure markets to control the distribution and to directly reach the customers.

Media companies compete for "content" at the preliminary stage. It is very important to reach the content to survive in the market. Secondly; media companies compete for distributing the content in the most effective manner. Finally, media companies compete for the customers. The customer and the company are likely to have a sales relation for a long term as to have product and service development and increase in the average profit.

The foreclosure of the aforementioned competition areas is the main problem for European Union competition policy resulting from vertical agreements and merger and acquisitions. Limiting the entrance to input, and distribution markets composed of copyrights or broadcasting rights, may have dangerous effects on competition policy. Foreclosure of competition lines may be in both direct and indirect ways. Some of the indirect ways are to increase competitors' costs or entering barriers or tying/bundling practices. Especially tying agreements between media and telecommunication companies are mostly seen practices as a result of convergence of new technologies. Examples of bundling are: service of pay TV and internet access together or fixed

telephone lines as an addition.

The mission of European Union and the national competition authorities must be to open the entrance of current and developing market to competition. European Union takes into consideration the following issues in relation to reach right determinations subject to the developments in the media sector:

i. Efficiency arguments taken into account in merger and acquisitions
ii. Development of new markets rather than companies' financial situations, opening those markets to competition
iii. Providing content and distribution channels considered as bottleneck to the companies recently entered the sector.

Holoubek, Damjanovic and Traimer (Regulating Content-European Regulatory Framework for the Media and Relating Creative Sectors, p.61) states that;

> *The European Single Market is based on the principles of an open market economy entailing free competition (Articles 4 and 98 EC). Article 3(2)(g) EC provides for a system ensuring that competition in the internal market is not distorted and thus institutionalizes a competitive economy. In addition to protecting and safeguarding economic freedom and equal treatment of the individual, rules on competition ensure functioning market structures as an inherent characteristic of the internal market.*

The ownership in media sector and accordingly the concentration of limited number of peoples' control caused some problems in the manner of competition and pluralism. Media sector is regulated with some special laws beside general competition law. The reason is; general law is incompetent to cope with horizontal integration, vertical integration, concentration and convergence which have so many unrecoverable negative effects on competition law.

According to Jowell and Hewitt (2001), when it is considered that competition rules are based on economical causes, these rules are not satisfactory in accordance with the achievement of social benefit and media sector should be regulated with sui generis regulations. Governments are following three general policies with regards to provide pluralism and competitive market structure in media markets:

i. Policies affecting or limiting media companies' administration methods directly.
ii. Policies affecting or limiting media companies' administration methods indirectly.
iii. Policies which directly or indirectly affect the structure of the market.

First two methods are in relation to regulating companies' attitudes. General policies such as Press-Information policies, anti-trust practices are directly applied to all companies in market economy. Policies like allocating broadcasting licenses, cable licenses, constructing technical and mechanical standards for the hardware used in production of audio visual products, controlling horizontal and vertical mergers are followed market structure oriented.

According to Harcourt and Verhulst (1999); Governments take the advantage of following policies when regulating the media markets:

i. Fundamental constitutional rights in relation to freedom of speech,
ii. Regulations aiming transparency,
iii. To identify the information of company owners and their shareholders,
iv. Transparency of companies' accounts,
v. Transparency of companies' revenues,
vi. Reporting relevant share transfers to the regulating authority,
vii. Regulations relating media owners,
viii. General ownership rules, licenses,

ix. Cross ownership rules,[10]
x. Foreign ownership and partnership rules,
xi. Competition Law,
xii. Control on merger and acquisitions,
xiii. Examination of cartels and dominant position,
xiv. State Aids and subvention of media companies,
xv. Rules regulating responsibility of media companies,
xvi. Limitations regarding content.

As it can be seen above; there is transparency, responsibility, independency, content limitations, ownership, cross ownership and competition rules under the title of media policy instruments. Within these subtitles; our aim shall be dealing with competition law within the aforementioned policy instruments which bring general regulations to media sector.

4.2. COMPETITION LEGISLATION REGARDING MEDIA SECTOR IN EU AND SELECTED CASE

Three European Communities were established after the Second World War which were European Steel and Coal Community, European Atomic Energy Community and European Economic Community. European Economic Community has been called as European Community and it is currently named as European Union. European Community has been established by the Treaty of Rome adopted in 1957 which is a framework treaty. Treaty of Rome is considered as the constitution of European Community and it sets out the objectives of the Community whereas it created fundamental freedoms as free movement of goods, free movement of capital, free movement of labour and freedom of establishment and services. These fundamental freedoms were created with the principle to abolish barriers between the Member States to reach so called single market. With the reason of private enterprises could jeopardize

[10] Cross ownership occurs when a person or company owns outlets in more than one medium. (i.e.,newspaper, radio and television) in the same geographical market. (Marc Edge, Sam Houston State University Researches).

the single market structure with their behaviors; competition law provisions were incorporated within the Treaty to secure these freedoms. These behaviors of the undertakings find their forms mostly as article 81 and 82 of the Treaty of Rome which deserve a special mention as the subject of this thesis.

4.2.1. Article 81 EC and Related Terms

All the agreements and concerted practices that have anti-competitive effect are considered under article 81 EC. Most vital feature of media sector in EU is joint ventures. Because companies of different field of activity desire to take place in new markets resulting from technologies in relation to transmission of media content and the developments in information sector. The other major improvement in the media sector is pay television application. Media content as films or sport events has gained more importance by pay TV.

Article 81 of Rome Treaty is as follows:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) Limit or control production, markets, technical development, or investment;
(c) Share markets or sources of supply;
(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

i. Any agreement or category of agreements between undertakings,
ii. Any decision or category of decisions by associations of undertakings,
iii. Any concerted practice or category of concerted practices,

Which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not?

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 81 EC deals with two or more undertakings that may restrict competition in the common market. Article 81 asks three main questions: (Para 1) is there an agreement between undertakings that may affect Member States, (Para 2) do this agreement have an anti-competitive object or effect and (Para 3) are the benefits of the anti-competitive action more than its cost?

Related terms of Article 81

Undertaking

European Court of Justice held that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the

way in which it is financed[11], it is irrelevant that the body is not profit making[12] , that is not set up for an economic purpose[13] or that the activity in question may be the exercise of the right to free broadcasting.[14]

Term of undertaking may include any natural or legal person or any other entity regardless of the question of its legal status in company or fiscal law, as long as they are engaged in an economic activity.[15]

Jones and Surfin (2004, p.110) indicates that;

> *An entity may be an undertaking even where it doesn't have an independent legal personality but forms part of a State's general administration[16] if it is engaged in "economic" activities. However the case law draws a sharp distinction between activities classified as "economic" in character and those where the entity "acts in the exercise of official authority". An entity, public or private, which performs tasks of a public nature, connected with the exercise of public powers or in the exercise of official authority will not be an undertaking, so will be immune from the application of the rules. The tendency of States to contract out what were considered to be public tasks to private entities has made this distinction a difficult one to draw*.

Agreement, decision and concerted practice

Agreements, decisions and concerted practices are forms of collusions which are respected as anti-competitive effects under Article 81(1).

[11] Case C-41/90 Höfner and Elser v. Macrotron GmbH [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.
[12] Case 96/82, IAZ International Belgium v. Commission [1983], ECR 3369.
[13] Case 155/73, Italy v. Sacchi [1974] ECR 409.
[14] Commission, Decision 1989/536/EEC, Film Purchases by German Television Stations (Case IV/31.734), [1989] OJ L 284/96, para.39. The Commission left it open if such a right exists in EC Law.
[15] Commission, Decision 1986/398/EEC, Polypropylene (Case IV/31.149), [1986] OJ L230/1, para. 99.
[16] Spanish Courier Services[1990] OJ L233/19, [1991] 3 CMLR 560.

Agreement

An agreement does not have to be in writing nor do they need to be legally enforceable.[17] Oral, informal and gentleman's agreements all fall within the scope of the Article 81(1). All that seems to be required is a form of consensus between two or more undertakings. It can also be referred to as a "meeting between minds" or a "concurrence of wills". Both horizontal and vertical agreements are included within the aim of the Article 81(1). It does not only issue cartels but also every kind of restrictive action in relation to vertical practices either bilateral or multi-lateral. I.e. book pricing agreements.[18]

Decisions

When a decision has been made by an association of an undertaking[19] it is interpreted widely. Term of "decision" can include resolutions, rules or regulation made by an association of undertakings contained in its constitution[20] or even recommendations by the association.[21] To give an example; the Eurovision system of EBU and the Code of Allowances of the Publisher's Association have been regarded to constitute a decision.[22]

Concerted Practice

It has been questioned whether informal contacts between undertakings are counted as "agreement" or "concerted practice". Concerted practice is deemed to comprise both: it is the co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded knowingly substitutes

[17] ECJ Cases 51, 86,96/75, EMI, [1976] ECR 811, paras 30 et seq.
[18] Net Book Agreements (Case IV/27.394), [1989] OJ L 22/12.
[19] Association is not limited to trade associations. E.g. agricultural cooperatives, public or Professional bodies have been identified as associations.
[20] Commission, Decision 80/917/EC, National Sulphuric Acid (Case IV/27.958)[1980] OJ L 260/24
[21] VDS v. Commission.
[22] Commission, Decision 2000/400/EC, Eurovision (Case IV/32.150), [2000] OJ L 151/18, para 65.

practical co-operation between them for the risks of competition.[23] According to Castendyk, Dommering, and Scheuer (European Media Law, p.130);

> *A concerted practice requires a certain mental consensus among the parties whereby practical cooperation is knowingly substituted for competition, but the consensus need not be achieved verbally and may also come about by any direct or indirect contact between the parties.*

Especially in the highly oligopolistic markets of the media sector, it is, however often difficult to find an objective proof for a concerted practice.

Distortion

In order to apprehend whether there is a distortion of competition; Commission adopts two steps. Firstly the product market and the relevant geographical market subject to the distortion should be defined. Secondly, it is investigated that an agreement, concerted practice or decision has distorted competition by the means of Article 81 EC. Before the enforcement of article 81 EC, the relevant market should be identified whether to analyze a restriction existing or to decide an exemption to be ruled under 81(3) EC. According to the Court of First Instance; the reason for defining the relevant market in the light of article 81 EC is to identify the actions affecting trade between Member States. Thus, Commission should always determine the relevant market in its decisions.
Commission Block Exemption Regulations (so called as "block exemptions") and Guidelines for the Applicability of Art. 81 of the Treaty of Horizontal Cooperation Agreements (so called as "guidelines") give a general idea for the scope of term "distortion". In relation to horizontal agreements, some examples of competition restrictions are: price fixing, sharing market and customers. In media markets; afore mentioned restrictions can be seen when undertakings are sharing exclusive rights they have in relation to premium content. Another version of restriction example in media sector can be found where a company represents other companies and which is selling media rights.

[23] Cases 48.49.51-7/69, ICI v. Commission (1972) ECR 619, (1972) CMLR 557, paras. 64 and 65.

Castendyk Dommering and Scheuer (European Media Law, p.132) indicate that;

> *Article 81(1) EC may be infringed whenever those influential associations use their collective power to either buy or sell packages of rights on an exclusive basis, thus either limiting the number of packages available in general or affecting their competitors that have not joined the association. It may also be incompatible with article 81(1) EC if a joint venture of two undertakings eliminates these parties as competitors in a given market. Finally a horizontal agreement regarding the territorial exercise of rights -as in common with collecting agencies- constitutes an infringement of article 81(1) EC if it leads to market partitioning within the EC and/or works to the detriment of the emergence of new markets*.

Restriction of competition in relation to vertical agreements is mostly seen on resale price maintenance. A very good example of competition law breach in media sector regarding vertical agreements is fixing price of books in resale sector which obstructs book sellers to carry out their own prices.[24] Since both actual and potential competition is protected; it is sufficient that the distortion is the mere effect of the action. In relation to the European Court of Justice Judgments; competition restriction has to be appreciable. Because insignificant competition restrictions are not measured in the scope of article 81 EC in accordance with the De Minimis Notice.[25]

Which may affect trade between Member States

According to Commission; "trade" is not limited to the exchange of services and goods across the borders, however it encompasses all cross-border actions. What is more; effect may be both direct and indirect. In STM Case[26]; the notion "effect on trade between Member States" was characterized by European Court as follows: "for this requirement to be fulfilled, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement

[24] Commission, Decision 1989/44/EEC, Net Book Agreements (Case IV/27.394), [1989] OJ L 22/12, para.75.
[25] Notice on Agreements of Minor İmportance which do not fall within the meaning of Article 81(1) of the Treaty establishing the European Community.
[26] Societe Technique Miniere v. Maschinenbau Ulm Case 56/65 [1996] ECR 234, 249: CMLR 357,375.

on question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"

For the requirement of article 81 to be satisfied under this subject; either the parties restricting competition should be resident in different Member States or the action effects the competition between Member States. It is assumed that an agreement between parties located in different Member States affects trade between Member States. However it is explicit from the "De Limitis Case" that an agreement which operates in only one Member State is also quite capable of affecting trade between Member States. The aim is to protect the free flow of goods and services within the common market. The article will come into action where restraint or the distortion changes the normal course of flow of goods and services. Where national law requires an agreement or where national law creates a framework eliminating any possible competitive conduct, there is no infringement of Article 81(1). In such a case the anti-competitive effect results from the national law and not the agreement, a national authority is duty bound to apply such national legislation. Where however national law merely allows or even goes so far as to encourage an anti-competitive agreement, Article 81 applies as Jones and Surfin explain. (EC Competition Law, Second Edition, 2004, p.176) In media sector; we may come across interstate breaches where there is a market partitioning of national markets or where the common market is isolated from markets in third countries.

Individual exemptions

Commission sets out the agreements defined in 81(1) EC valid and enforceable in case these agreements satisfy some conditions. These conditions are called individual exemptions which are determined in the third paragraph of Article 81 EC and can be found in the Commission Notice, Guidelines on the Application of Article 81(3) of the Treaty.

Following criteria should be satisfied in order to be involved in the exemption rule:

I. Agreement, concerted practice or decision should contribute to the production/distribution of goods and services or lead the action to an economic or technologic progress.
II. There should be a fair share of the benefit resulting from the action among the customers.
III. The benefits coming out of the anti-competitive action should be more than the negative effect of the distortion.
IV. Competition must not be eliminated in relation to a substantial part of the products in question.

Prior to 1 May 2004, only the European Commission could grant an individual exemption for an agreement which had been notified to it. EC Regulation 1/2003, which entered into force on 1 May 2004, abolished the need to apply for an individual exemption, and hence the system of notifications. The control over EC competition law was decentralized and cooperation between national competition authorities and the Commission was established.

Article 81(3) can be applied either to individual agreements or to categories of agreements by way of a block exemption regulation. When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of Article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope fulfill each of the four conditions laid down in Article 81(3).[27]

[27] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427%2807%29:EN:NOT.

In media sector; agreements on exclusive content rights may contribute to the distribution of goods and may be subject to an exemption if the availability of the content to the customers is provided.

Block exemptions

Some Community regulations provide exemptions in relation to article 81(1) to a number of agreements. Agreements of undertakings which are in the scope of block exemptions are not incompatible with competition law. Most of these regulations bringing exemptions are adopted by Commission over the authorization of Council. However; national competition authorities or Commission are competent to ignore and withdraw the exemption regulations where an agreement subject to the block exemptions is incompatible with article 81(3) EC.

In media sector; the following regulations are closely relevant regarding block exemptions:

a. Vertical Block Exemption Regulation (Regulation No:2790/1999)
b. Block Exemption Regulation for Specialization Agreements (Regulation no:2658/2000)
c. The Block Exemption Regulation on Technology-Transfer Agreements (Regulation no:772/2004)

4.2.2. Article 82 EC and Related Terms

Article 82 EC prohibits abuses of an undertaking which has a dominant position within common market. If an undertaking dominates the relevant market on the production or distribution level of a product or service; than article 82 EC should be the focal point.

Article 82 EC seems to have a limited importance comparing to article 81 EC and Merger Regulation in relation to media sector when we have a glance on the decisions taken by Commission between the years of 1998-2005. Commission does not have a single decision regarding article 82 EC from January 1998- March 2005.[28] However, one can say that; Commissions investigation actions through companies and Commissions previous decisions regarding article 82 EC has pushed companies playing more careful by not using their dominance in an abusive way which may be a threat within the market. What is more; article 82 EC enables Commission to issue new directives bringing competition to the market by its powers under article 86(3) EC.[29]

Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) Limiting production, markets or technical development to the prejudice of consumers;
(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[28] The list takes place at: http://ec.europa.eu/competition/sectors/media/documents/media_decisions_2005.pdf.
[29] For instance, Commission Directive 95/51/EC of 18 October 1995 with regard to the abolition of the restrictions on the use of cable television Networks for the provision of already liberalized telecommunication services, [1995] OJ L256/49.

Related terms

Dominance

Dominance is explained as "an undertaking in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extend independently of its competitors and customers and ultimately of its consumers" by European Court of Justice in United Brands Case 27/76, 1978. However; a company's economic strength may only be evaluated if it is subject to a particular market. Therefore; in order to assess dominance; we should first determine the relevant product and geographic market in media sector. The Commissions approach to the relevant market in media is as the following:

"The structure of media industry is multidimensional and complex. Indeed, different players such as content providers, right holders, content distributors, operate in the value chain from the production of content such as films, pay-TV programming, and music, to its delivery via theatres, pay-TV channels or internet portals"[30]

In commissions' decisions; it is easy to overview different kinds of markets regarding media sector such as music, print media, TV broadcasting. However; according to Commission, even TV broadcasting area should be subdivided as retail distribution of pay TV (subscriptions) and free-TV (advertising).[31]When it comes to acquiring content from the right owners; Commission's approach is to draw a distinction between sports and film market. However again; it should be noted that, there is a subdivision within sport events market according to the high audience numbers or audience classes.[32]

The relevant market distinctions for film right acquisitions are future films and made-for-TV programs.[33] Films released in the period of six months thereafter are called "first

[30] Commission, Case IV/M.2050, 13 October 2000, Vivendi/Canal+/Seagram,para.14.
[31] Commission, Case COMP/C.2.-38.287, 29 December 2003.
[32] Commission, Case IV/M.1574, 3 August 1999.
[33] Commission, Case IV/M.2050, 13 October 2000, Vivendi/Canal+/Seagram,para.17.

window" films. Subsequently, so called "Second window" films are shown prior to become available in free-TV market.

In music sector the Commission defined number of markets such as recording and distribution, publishing[34] and retailing. Moreover; Commission established a market for online music delivery by the emergence of internet music distribution.[35] There is also a developing market description for online music providers which enables to obtain licenses.[36]

In print media sector, we mostly encounter book markets. Since book market is composed of a chain from production to distribution and from the wholesaler to the publisher and marketer; the Commission has determined a broad market structure in terms of publishing rights, distribution services, marketing or retail level.

"The question of dominance is simply a question of economic power." (Commission, Sony/BMG, op. cit., Para. 19) Market share of the undertakings, although not being conclusive, are clearly the strongest indicator of market power. According to ECJ, undertakings with very high market shares will in the absence of exceptional circumstances indicating otherwise are considered dominant.[37] Other factors indicating dominance can be the absence of countervailing power on the demand side and the allegedly dominant undertaking's access to capital and its overall size and economic strength. Moreover vertical integration of the companies are quite common features in the media sector, as regarded as a significant indicator of dominance.[38] According to Castendyk, Dommering and Scheuer; (European Media Law, p.165-166)

> *The clear wording of Article 82 EC ("one or more undertaking") shows that the provision applies not only to single but also to joint dominance of undertakings. In the media sector, the issue of collective dominance arises in particular with regard to the music industry. So far, however, competition problems in this industry have been dealt with under the Merger Regulation rather than under Article 82 EC.*

[34] Commission, Seagram/ Poligram, op. cit., IV A .1.b.
[35] AOL/Time Warner Case, COMP/M.1845.
[36] Commission, Sony/BMG , op. cit. , para. 19.
[37] ECJ, Hoffmann-La Roche v. Commission,op.cit.,para 39.
[38] ECJ, United Brands v. Commission, op. Cit.,paras 69-81, 85-90.

Abuse

Article 82 does not merely prohibit dominance but it is further interested in the undertakings that may distort competition by using their dominance. As a general principle, any transaction by dominant firms which distorts competition or leads to a further weakening of competition will be prohibited respectively as it affects trade between member states. The European Court of Justice also indicated that; subjective intentions of dominant firms are irrelevant to a finding of abuse with its Decision on Hofmann v. La Roche Case.

There are two types of abuse: exploitative abuse which is the exploitation of consumers in the relevant market and exclusionary abuse which the undertaking prevents competition from the other competitors. Although it is not understood from the definition of the Article 82; most of the cases arising from this article is regarding exclusionary abuse which covers predatory or discriminatory pricing, tying agreements or refusal to deal and supply. Dominance and the abusive conduct do not have to be necessarily in the same market. In Tetra Pak Case; ECJ held that in case that the two markets are linked; Article 82 may be applied in the non-dominated (associated market). Considering the above, any finding of a close relation between two markets may have far-reaching consequences for undertakings dominant on either one of them. The Commission in numerous cases has described media markets as being closely related, complementary or linked. Such markets are the market for pay-TV and the market for digital interactive television services,[39] the market for the wholesale provision of the technical services and the market for pay-TV and the markets for the distribution of goods and the markets for the publishing of books.[40] Looking at the way the pay-TV and free TV broadcasting markets are related[41], one might even find these two markets being “closely “related.

[39] Commission, British Interactive Broadcasting/Open, op,cit.,para 23.
[40] Commission, Bertelsmann/Pleneta/NEB, op.cit.,para 23.
[41] Commission case IV/M.410 , 2 August 1994, Kirch/Richemont/Telepiu, para 16.

Prohibition of the abuse of the dominant position

Exclusive agreements are yet more problematic if they are concluded with dominant buyers, e.g. large television companies. If a dominant buyer of content enters into an exclusive agreement with the holder of premium content, access to such content is weaker competitors. This consequently impairs their access to the relevant market or may derive such competitors altogether out of the market. Thus, a customer who dominates the market may amortize the high sums spent for acquiring exclusive rights after taking over the market shares of the competitors he succeeded in driving out of the market.[42]

Exploitative practices are identified under article 82. For instance; the selling of the sports or film contents can be subject to article 82 EC. High costs imposed by financially bigger firms within sports or film content constitute barrier to entry the sector for the smaller firms. Holoubek Damjanovic and Traimer (Regulating Content-European Regulatory Framework for the Media and Relating Creative Sectors, p.76, 77) indicate that;

> *According to common practice, the payments that must be made do not follow a system of sales revenue sharing, which would allow market entrants to calculate their costs according to the number of customers, but are calculated on the basis of single payments that are independent of the expected sales revenues. If the holder of the rights has a dominant market position, the mere amount of these charges could constitute an abuse of a dominant position on the part of the rights holder. The need to assume a high financial risk even before a significant market share has been acquired has been held abusive in other cases.*

[42] See. D. Geradin, (2005) 30 European Law Review, 82.

4.2.3. Selected Case of Article 81: UEFA Case[43]

Premium content area achieves high audience rates for a media company. Companies providing football competitions may be regarded as providing premium content. One of the main competition law issues in the manner of sport events is collective marketing. What is meant by collective marketing is media rights are not sold individually but they are sold by collectively in bundles. UEFA Case is one of the best examples of how collective selling rights can be subject to the investigation of Commission in regards of article 81 EC.

The Notifying Party of the relevant case is UEFA, an organization including European National Football associations, organizing football tournaments. UEFA's statutes are assessed as decision of an association of an undertaking in accordance with Article 81(1) of EC Treaty. UEFA is the governing body for European Football which is registered in accordance with Swiss Law and its headquarters is located in Switzerland.
On 1 February 1999; UEFA has delivered a notification to the Commission for an exemption regarding joint selling of commercial rights of UEFA Champions League, pursuant to Articles 2 and 4 of the Council Regulation No: 17.

UEFA Champions League is one of the most prestigious club competitions of UEFA. UEFA Champions League is open to every national football association's domestic club champions and to the clubs which finish behind them in the list of domestic championship.

In UEFA's notification; commercial rights are referred to television broadcasting rights, sponsorship rights, licensing rights, supplier rights and intellectual property rights. In the notification; UEFA claims that; it has the co-owner of these commercial rights with the reason that it has founded and regulating Champions League. Additionally UEFA considers that it is responsible for all the related tournaments and it bears a considerable risk in relation to success of the Champions League in financial stage. Therefore UEFA

[43] Case No IV/37.398-UEFA, (1999/c 99/09).

argues that; as long as the term of the licenses are not too long, joint selling of these commercial rights should be exempted from Article 81 of EC Treaty. Moreover, UEFA argues that;

i. The central marketing of the commercial rights serve for the solidarity between financially stronger and weaker clubs through redistribution of the rights,

ii. UEFA's television policy embraces to broadcast the Champions League on free TV so that the consumers benefit in an equal level,

iii. Without central marketing, there wouldn't be distinctive Champions League brand.

iv. And with the above-mentioned reasons, UEFA demand an exemption with the claim that there is no restriction affects competition between member states.

UEFA defines the relevant market as the market for acquisition of commercial rights and the market should be limited to the EEA wide. After the delivery of the above mentioned notification submitted by UEFA; Commission invited interested third parties to submit their observations for the Notification. Several third parties objected to the joint selling arrangement of UEFA and submitted their opinion against joint selling pointing out the risk that would abolish the balance between rich clubs and poor clubs.

Commission's rejection of the exemption demand of UEFA regarding article 81(1) EC.

Commission has not adopted an exemption for UEFA regarding the joint selling rights of Champions League with its statement submitted on 16 November 2001. Commission has stated that; subject arrangement of UEFA was restricting competition both in vertical and horizontal aspects. Arrangement was restricting in horizontal way because it was preventing clubs from taking independent commercial action regarding their rights and in vertical way and UEFA's policy was granting an exclusive right to a single

broadcaster in a Member State covering all the rights related to UEFA. Since Free-TV broadcasters compete for advertisers and pay-TV broadcasters compete for subscribers; this arrangement may also affect downstream market. Commission has not accepted the demand of UEFA in the light of the above mentioned reasons and basically with the reason that all TV rights would be transferred solely to one broadcaster in a row in each territory for a long period which negates the competition in an unquestionable way.

UEFA's new policy

On 12 March 2002; UEFA has submitted its new proposal regarding the distribution of TV broadcasting rights and additionally all other media rights including radio, internet and mobile telecommunications system. Commission's opinion was that the objections arose from the third parties would be remedied by this new proposal as it enables the exploitation of the media rights through different channels due to their related action. What is more; splitting the rights into several packages to third parties would mean less restriction on competition. After the preliminary view of the new policy; Commission invited again third parties to suggest their opinions on the new policy. And the Commission, UEFA and third parties attended a couple of meetings and the policy has revised accordingly. New joint selling offer of UEFA can be summarized as the following:

a. UEFA will grant Champions League TV rights with a public bid to the broadcasters. And the contracts shall be concluded for a term not exceeding the period of Champions League season.

b. UEFA shall distribute its rights in smaller packages depending the on the structure of the market in each Member State.

c. UEFA will be able to sell two live packages (free TV or each may include two matches per match night where Champions League may be seen on Tuesdays and Wednesdays. These two packages will cover 61 matches from 157.

d. UEFA will have the exclusive right to sell the remaining rights for live pay-TV/pay-per-view. However in case UEFA cannot sell these rights within one week after the draw for the first group stage of the competition, it will lose its exclusive right. (Stages of Champions League shall be mentioned later on)

e. Individual home clubs who participate in a given match shall have the right to sell their matches for live-pay-TV/pay-per-view.

f. UEFA shall have the right to sell the joint rights of all the matches exclusively to be available after 22.45 on each match night.

g. One day after last match night of the match week; UEFA and the football clubs can sell deferred TV rights with the condition that; individual football clubs shall be only regarding the matches they participate as "club branded" provided that, they cannot bundle these rights with other clubs to form a competing Champions League offer.

h. UEFA shall have the right to sell all joint rights exclusively outside the EEA area.

Evaluation by the Commission

UEFA argues that relevant market in this case comprises sports events in addition to Champions League. What is more; UEFA states that; Champions League matches of domestic clubs and UEFA Champions League matches should be evaluated separately while it claims free-TV and pay-TV markets also should be differentiated. After evaluation; Commission concluded that the upstream market is a separate market for the acquisition of broadcasting football rights which comprises national league, cup events, UEFA Champions League and UEFA cup. Downstream market shall depend on audience rates/interest and pay-TV subscribers. UEFA claims and the Commission ratify that; geographic market is national in character due to the distribution, language and cultural factors. Since football clubs engage in activities like selling tickets, transferring players, making sponsorship contracts, distributing broadcasting rights;

they perform economic activities in the scope of article 81. Both football clubs and national football associations are undertakings in the scope of article 81 EC as long as they engage in economic activities. What is more; UEFA is an undertaking itself covered by Article 81 EC where its decisions constitute a decision taken by an association of associations (because the football clubs are associations) of undertakings. Commission sees football as one of the best drivers of the television. The joint rights are sold throughout the EEA. Therefore; this arrangement affects trade between member states. Following setting out the criteria of article 81 EC as ascertaining the restriction, undertaking term, affecting trade between member states; Commission further fronted to determine whether an exemption constitutes or not within the scope of article 81(3) EC. Because there might be benefits arising out of the joint selling arrangement which abolish the negative effects of the competition restriction. Commission concluded the following in respect of exemption:

a. UEFA's final modified arrangement supports the production itself and it enables the improvement of football by resulting in more competitive stage where it gives rise to a possibility for competition between the weakest and the strongest football clubs.

b. Multiple point selling of the rights would cause cost problems and communication difficulties throughout 51 members of UEFA. Therefore; joint selling reduces the cost than a single point selling and sale transaction would be performed in a more ordinary course.

c. Economic risks of the broadcasters are reduced by joint selling. Because in case of a multiple point selling, broadcasters take the risk of a reduction in the value of the right acquired from an individual club.

d. Packaging does not restrict competition as much as it does in a certain level if you bundle the rights in a later stage of the transaction.

e. Viewers enjoy the right to choose to watch the matches between various broadcasters.

f. Joint selling also reduces the costs of the football clubs. Football clubs do not have to establish their own commercial departments.

g. UEFA's brand and reputation is highly protected by joint selling rather that the multiple selling of the rights by several broadcasters.

The new arrangement improves the production and distribution of football rights. However; under package 5; there is no benefit arising where football clubs are not allowed to sell live TV rights to other broadcasters where there is not a good offer from a pay-TV, pay-per-view broadcaster. So package 5 should be evaluated under a condition in this manner.

Media operators are the consumers of media content. Media operators will have the chance to get an easier and efficient access to the content from a single point and under a qualified brand which leads a fair share of benefits. The distribution of the media rights by the way of a public bidding procedure will provide a balance in reaching the content by means of small sized and bigger sized entities. Media products of football leagues are assessed as a whole by every entity of all stages. Therefore; joint selling has a material influence to guarantee the success especially in the eyes of the audiences. It is indispensable for UEFA to joint sell the media rights of football in the sense of its nature and influence on the viewers and on the last stage for the benefit of the consumers. The rights are sold by splitting several packages and through a public bidding procedure which enables many players to compete and join the bid. What is more; these media rights are both sold by UEFA and football clubs on a non-exclusive basis. So, it is not possible to say that the competition is eliminated.

Decision of Commission:

In the light of the above-mentioned opinions of Commission; since the relevant conditions are met; Commission concluded that new joint selling arrangement of Commission can be granted an exemption in accordance with article 81 EC. However;

the exemption is given with a condition that football clubs should not be prevented from selling live TV rights to free-TV broadcasters if there is no any reasonable offer coming from pay-TV broadcasters. Commission allowed the exemption for a term of two contract periods starting from 13 May 2002 until the last notification date of new joint selling arrangement which is 31 July 2009.

Comments on the Decision of the Commission:

It is obvious that sale of entire rights in one package reduces output and limits competition. Customers would not reach the content or would not reach it with an appropriate price unless the exemptions given to the undertakings are intervened. "Sports and films are two key ingredients for television and for pay TV channels in particular. They are also providing increasingly critical role for the development of new technologies. Therefore the Commission could only exempt the joint marketing of the rights of the Champions League if the arrangements were modified to meet the conditions foreseen in Article 81(3) of the EU Treaty. This provision allows the Commission to exempt restrictive agreements if they contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."[44]

4.3 COMPETITION AUTHORITY IN EUROPEAN UNION

4.3.1 Commission and Its Powers

The decision of placing Commission in the centre of the competition policy was essential with the reason that EU needed a supranational body to protect competition by dealing anti-competitive behaviors of undertakings. It was a revealing idea that the Commission would be proper for this task as it consisted of experts competent in legal and economic aspects. It was Regulation 17/62 which defined the role of Commission in EC competition policy. Regulation 17/62 is replaced by Regulation 1/2003 to procure the decentralization of the competition policy in EU.

[44] Europa-Press Releases, 2003, IP/03/1105.

Commission is the authorized body to make law in regards of competition in EU. It is also empowered to make investigations, legal valuations, welcoming complaints or making inquiries on its own initiation. Commission has a complex structure. The Competition Directorate General (DG COMP) is dealing with the competition policy in the Commission. There are also several units in DG COMP that deal with anti-competitive acts, abuse of dominant positions or mergers separately.

4.3.2 Decisions of Commission and Its Judicial Review

Likely to Turkish Competition Board; Commission may take final decisions in regards of the termination of the anti competitive infringements, it may take procedural decisions in the course of investigations or it may take interim decisions in order to prevent an action that may cause a considerable damage. Commission gained two powers with the regulation 1/2003 which are making binding commitments without finding an infringement and to take positive finding decision. Under regulation 1/2003; Commission is empowered to impose fines and periodic penalty payments for the anti-competitive acts of the undertakings and for the procedural infringements.

Under article 230 of Rome Treaty; all the actions taken by the Commission can be challenged before European Court of Justice. Therefore all the acts taken by the Commission including final, interim and procedural decisions which have legal force are subject to judicial review. All the appeals subject to judicial review first goes to Court of First Instance and then to the European Court of First Instance. The Court of First Instance was established in 1989 created to conduct the judicial review of Commission's decisions. European Court of Justice is the top judicial pyramid in the competition system. However; a decision can only be heard before ECJ in case there is a lack of competence of CFI, there is an infringement of an essential procedural requirement or there is an infringement of Community Law by CFI. It can be seen that although all the decisions of the Commission is subject to the judicial review; CFI acts as a sieve which is entitled to make judicial review of the Commission's decisions as a specialized court before the case is brought to the ECJ. Right of jurisdiction between

national competition authorities of Member States and Commission will not be handled within the framework of the thesis. Therefore; this section is explained by considering the jurisdiction of the Commission regarding competition cases.

5. COMPETITION LAW PRACTICE REGARDING MEDIA SECTOR IN TURKEY

5.1. DEVELOPMENT OF COMPETITION IN MEDIA SECTOR IN TURKEY

Turkey had only one TV channel called TRT 1 in 1980s. In the beginning of the year of 1990; there was an increase at the number of private TV channels in Turkey. Later on; the owners of newspapers started to have operations in TV sector and there was a considerable increase in TV broadcasting sector where there were 23 channels within seven years. However situation differed for print media in Turkey. Newsprint paper was given with a high percentage of subventions to the newspaper owners before 1980. After 1980; this subvention was ceased by the government and the print media came across with high costs. The consequence of high costs caused a decrease in the pluralist structure of the print media after 1980s. This picture led the print media sector to a monopolist structure because only the financially powerful enterprises could maintain its existence. Aydın Doğan ("Doğan") who will be assessed as case law in Turkey later on; opened the oligopolistic structure of media sector when he purchased newspaper Hürriyet in 1994 after he purchased newspaper Milliyet in 1980. In this manner he became the owner of two biggest newspapers as market share in Turkey.

At the present day's media market structure; it can be said that both TV broadcasting market and the print media market still show an oligopolistic structure. There are approximately 35 national TV channels while the big market share is in the hands of four big channels. Again, there are around 25 daily newspapers where the big market share is shared by Doğan group and Sabah group. We will analyze the regulations applied in the next section where undertakings encounter entering or surviving in the media sector.

5.2. COMPETITION LEGISLATION IN REGARDS OF MEDIA SECTOR IN TURKEY AND SELECTED CASE

Turkey and European Economic Community (EEC) have signed Ankara Agreement on 1963. Parallel to this accession agreement, an Accession Council has been established. Subsequently, EC Association Council has gathered in Brussels on 6 of March 1995 and decided to establish a Customs Union between Turkey and EEC with decision number 1/95. 4th chapter of this decision which totally comprises 6 chapters is named as Approximation of Laws. And the second section of 4th chapter is regulated under the title of "Competition" Article 32 of the Customs Union Decision is regulating the agreements restricting competition. Article 32 is a parallel regulation with the article 81 of the EC Agreement and article 4 and 5 of the Law No. 4054 on the Protection of Competition .Article 32 is stating the prohibition of the agreements restricting competition or concerted practices among the undertakings and decision of undertakings to the extent that they effects between EC and Turkey. Article 33 of the Customs Union Decision is regulating the undertakings in dominant position parallel to article 82 of the EC Agreement and article 6 of the Law No. 4054 on the Protection of Competition. Article 33 determines abuse of dominant position by one or more undertakings and prohibits those abuses in case they affect trade between EC and Turkey. In accordance with Article 39/1 of the Customs Union Decision:

"With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively."

In the light of the above mentioned articles of Customs Union Decision; Turkey has adopted Law No. 4054 on the Protection of Competition on 07/12/1994. Turkey has progressed to enter into market economy with a decision taken on 24 of January 1980. Competition is a sine qua non in market economy model for the undertakings to success in product and service markets. In other words competition constitutes the basis of market economy. For the protection of competition which is vitally important in the

market economy, special legal regulations are implemented and important responsibilities are imposed on the Government. Though the market model is based on free competition, it might cause its termination with monopolization and cartelization tendencies arising under circumstances in which the government does not act as regulatory body. Therefore, the protection of competition requires various legal and institutional regulations.

Article 167 of the Constitution has imposed the duty and responsibility to 'take the necessary precautions for providing and developing healthy and regular operation of money, credit, capital, product and service markets' and 'prevent monopolization and cartelization that will arise in the markets as a result of application or agreement' to the Government.

With the enforcement of the Act on the Protection of Competition (Act No. 4054) on 13 December 1994, the Government has taken an important step for the fulfillment of the responsibility imposed by the Constitution and elimination of a deficiency for being a part of the modern world. In addition, Act No. 4054 is an important milestone in terms of Turkey's relation with the European Union.

The Competition Authority, which was authorized by the application of Act No. 4054, has become active on 05 November 1997 with the appointment of Competition Board which is the decision making body on 05 March 1997 and completion of the necessary preparations. In accordance with the mentioned Law, the Competition Authority has administrative and financial autonomy and the Competition Board, decision making body, acts independent from all effects during the decision making process. This autonomy and independency is the major factor behind the effectiveness and efficiency of the resolutions of the Competition Authority.

The Act No. 4054 and the secondary legislation consisting of the communiqué, regulation and guides accepted based on this Law constitute the Turkish competition legislation. Act No. 4054 constitutes the basic legal text determining the principals and

procedures of the competition law and the secondary legislation contributes to the basic legal text for it to become more comprehensible, more significant in terms of legal aspect and more applicable for the executors and addressees. In parallel with the similar contemporary regulations, the Act No. 4054 prohibits three basic transaction: agreements restricting competition, concerted action and association of undertakings decisions (cartel applications and vertical limitations etc.), abuse of the dominant position and mergers and acquisitions causing the significant decrease of competition aimed at creating dominant position or strengthening a current dominant position (including privatization). On the other hand, although the Act No. 4054 restricts competition, it is an exemption mechanism for agreements and decisions that have positive affects and a negative declaratory mechanism enabling the decision making as the act or transaction is not prohibited by Law. The Act No. 4054, in addition to these regulations as to proceeding, has determined an examination and investigation method that has determined start and end time for the determination of violations, has entitled right of defense to relevant parties and right to see the information within the file and has given a chance to take the opinion of all the relevant third parties. The Act No. 4054 has entitled the Competition Authority the power to request information and document, on-site examination, in case of a violation to apply administrative fine and to demand the termination of the violation, to give suggestion and to apply interim measure.

5.2.1. Article 4 of Act on Protection of Competition Law. No.4054

Article 4 of Act on Protection of Competition Law. No.4054 sets out the restriction of competition through agreements and concerted practices in Turkish legislation system. The definitions set out in Act no 4054 Regarding the Protection of Competition reveals that the definitions and the examples given to clarify each type of practices are identical to Article 81 of Rome Treaty.

The article is as follows:

Article 4- Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,

b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,

c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,

d) Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,

e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,

f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

In cases where the existence of an agreement cannot be proved, in case that the price changes in the market or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice. Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts. In accordance with Article 4 of Act no. 4054 Regarding the Protection of Competition; agreements and concerted practices among firms that aim to, directly or indirectly, prevent, distort or restrict competition in a certain market for goods and services are unlawful and prohibited. Implied or explicit collusion through price fixing, limiting output, market sharing, market foreclosure, tying are some examples from the list of activities prohibited by Article 4. Therefore both horizontal agreements and vertical agreements are subject to the Turkish Competition Law where the list is not exhaustive. Article 4 states that all agreements that are likely to restrict competition are prohibited. In cases where the existence of an agreement cannot be proven, Turkish Competition Authority can take action against undertakings if price changes or supply and demand balance in the relevant market in which these undertakings operate exhibit features of markets where competition is prevented, distorted, or restricted (the concerted practice presumption). In such cases the burden of proof remains on the parties concerned subject to the restriction of competition.

5.2.2. Article 5 of Act on Protection of Competition Law. No.4054

The article is as follows:

Article 5- The Board, in case all the terms listed below exist, may decide (Annulled: 02.07.2005-Article 5388/1)[1] (…) to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions of article 4:

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefitting the consumer from the above-mentioned,

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

(Amended: 02.07.2005-Article 5388/1)[2] Exemption may be granted for a definite period, just as the granting of exemption may be subjected to the fulfillment of particular terms and/or particular obligations. Exemption decisions are valid as of the date of concluding an agreement or committing a concerted practice or taking a decision of an association of undertakings, or fulfilling a condition if it has been tied to a condition.

In case the terms mentioned in the first paragraph are fulfilled, the Board may issue communiqués which ensure block exemptions for the types of agreements in specific subject-matters and which indicate their terms. Article 5 lists types of situations that are exempted from the application of Article 4. Under this exemption; agreements which:

i. improve production and distribution of goods or provision of services,
ii. promote technological progress and innovation,
iii. in which consumers receive a benefit thereof,
iv. and that do not eliminate competition in a significant part of the relevant market

may be exempted from application of Article 4. Article 5 of Turkish Competition Act is almost identical to Article 81(3) of EC Treaty. The exemption may be an individual exemption or block exemption regarding certain category of the situation. Competition Authority has issued several block exemptions. Exemption Communiqués that

Competition Board has adopted which are in force are; Block Exemption Communiqué On Technology Transfer Agreements (communiqué no: 2008/2), Block Exemption Communiqué In Relation To The Insurance Sector (Communiqué No: 2008/3), Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector (Communiqué No: 2005/4), Block Exemption Communiqué on Research and Development Agreements (Communiqué No: 2003/2), Block Exemption Communiqué on Vertical Agreements, Amended by the Competition Board Communiqué No. 2003/3 (Communiqué No: 2002/2). There is no specific communiqué providing an exemption for media markets.

5.2.3. Article 6 of Act on Protection of Competition Law. No.4054

The Article is as follows:
Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.

Abusive cases are, in particular, as follows:

a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,

b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,

c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,

e) Restricting production, marketing or technical development to the prejudice of consumers.

Article 6 of Turkish Competition Act is almost identical to Article 82 of EC Treaty. Article 6 defines dominant position as the power of one or more undertakings in a particular market to act independently of their competitors and customers who has the power to determine economic parameters as price, supply, and the amount of production and distribution. The Competition Law does not define the notion of abuse. Article 6 gives examples of the abuse of dominant position. This list is not exhaustive. Decisions of the Competition Authority and the case law of the Supreme Court of Administration should also be taken into consideration. The following may be determined as the examples of abusive practices of a dominant firm:

a) tying contracts that oblige a customer to purchase other goods or services that have no connection with the purchased product or service;
b) Refusal to supply goods or services to a customer on normal conditions, especially if the customer is a longstanding one, unless there is objective justification (such as non-payment or safety considerations);
c) pricing practices that have a tying effect, such as loyalty rebates and target discounts;
d) Predatory pricing;
e) Excessive pricing;
f) Discrimination between customers, that is, treating customers differently under similar conditions with regards to prices, discounts, and terms of supply;
g) Unusual long-term supply or purchase arrangements excluding competitors from a substantial portion of the market (as opposed to normal commercial considerations).

5.2.4. Selected Case Regarding Article 4 of Law No 4054: DOĞAN CASE[45]

Summary of the case:

The claim is that Doğan Dağıtım Satış ve Pazarlama A.Ş. ("Doğan") delivers products not related to media to the main vendors and Doğan refuses to supply newspaper and magazines in case that the vendors do not want to sell the said products. In the complaint letter; it is stated that regional headquarters of Doğan forces the main vendors to buy products such as lighter, toy or coffee besides media products. Then the main vendors sell these products to the last points of sales. When these points of sales declare that they have difficulties to sell these products not related to media; they claim that the supply of media products from Doğan cease too. Complainant is Mut Commercial and Industrial Chamber.

Review and Assessment of Competition Board:

Competition Board has made the following analysis regarding the above mentioned claims:

Periodicals such as news papers and magazines which lose actuality and are consumed in a short time require a considerable distribution, marketing and sales connection to maintain their existence. In Turkey distribution of media product is comprised of more than one chain. A product is first distributed to regional headquarter, and then it is distributed to the main vendors. After main vendors it is delivered to subsidiary vendors and finally the product meets with final consumer. Subsidiary vendors which can also be called as last points of sales are namely groceries, book stores and buffets. In Turkey; there are two main undertakings which deal with distribution of news papers and magazines. Therefore one might say that the market which is comprised of Doğan and Turkuvaz Dağıtım Pazarlama A.Ş. ("Turkuvaz") has a dual structure. These

[45] Case No 08-69/1122-438, 2008-2-225.

undertakings distribute their media products through same subsidiary vendors. Distribution channels which mainly sell media products distribute and market products which are not related to media at the same time. These products are mostly cell phone credits, books, toys, candies, internet packages, CD, batteries and likewise. Turkuvaz only distributes cell phone credits within these products however; Doğan distributes all the products mentioned above which have no relevance with media.

Previous decision of Competition Board Regarding Individual Exemption:

Doğan has applied to Competition Board previously to have an exemption concerning an agreement of distribution of products not related to media signed by and between Doğan and one of its main vendors. Competition Board did not give group exemption to Doğan at the time of application. Because its market share was above forty percent. However; Competition Board has given Doğan an individual exemption on 16.10.2008 with the reasons that there will be development in the service of distribution and manufacturing, consumer shall benefit thereof and competition will not be abolished in an essential part of the market.

Assessment of Competition Board:

According to the article 4 of the Competition Law No. 4054; agreements or concerted practices contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied, are illegal and prohibited. However in case the nature of the agreement and commercial usage justifies the tying practice, it will not be against law.

The parallel legislation of the article 4 of Law. No. 4054 is the article 81 of Rome Agreement. Article 81 states that; making the conclusion of contracts subject to

acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts is prohibited and shall be void. In addition to the Rome Agreement; Commission in its Notice Guidelines on Vertical Restraints states the following about tying agreements:

- Sellers' position in the market is the most material parameter to determine the anti-competitive affects of tying agreements.
- If two products can be purchased from two different markets when there is no a tying agreement; said products are separate products.
- The occurrence of the anti competitive affects of the tying agreements is strictly connected to the power of the supplier in the market.

What is more; in its Notice, Commission states that it is not possible to give exemption to an undertaking if its market share is above thirty percent, especially if there is no gain for the consumers. The problem is that the main vendors are pushed by the region headquarters to distribute irrelevant products; therefore they have to push subsidiary vendors to sell the same products. As the region headquarters are controlled by Doğan; the relation between Doğan and main vendors should be assessed under the complaint. Even though the agreement signed between Doğan and its main vendors are concerning distribution of both media products and product irrelevant with media; there is not a requirement in the agreement for buying irrelevant products when buying the newspapers and magazines. Article 4 of the Competition Law no. 4054 states that competition abuses shall arise if there is a contradiction to the commercial usage or nature of the agreement. Competition Board assessed that there is not a justification and it is not required to sell newspapers, magazines and irrelevant products like lighters or tolls together. What is more; there isn't a provision within the agreement to consider a "tying" when selling these products together. It is express that said products are separate products to be purchased from two different markets. The main reason to restrict tying agreements is to protect the commercial freedom and choice of the considerably smaller undertakings which act as buyers in our case. Tying agreements may result in the increase of the restraints of the entrance to the markets, closure of the market of the tied product and occurrence of the high prices above the competitive level. Considering

Doğan's market power, Competition Board decided that it might recall the individual exemption of Doğan in accordance with its anti-competitive affects that may incur in the market arising from the tying practices of Doğan. Therefore it is decided by the Competition Board in majority that:

- Doğan should cease its practices that may be considered as tying media products to the condition of displaying other goods not related to media.
- Otherwise an investigation will be issued regarding the recall of the individual exemption given to the agreement of Doğan concerning the distribution of media products.

There is an opposing opinion vote against the decision the Competition Board given by majority. M. Sıraç Aslan, the owner of the opposing opinion states that there is not a tying condition within the said distribution agreement and there is not any satisfactory evidence which proves that Doğan imposes its vendors to purchase irrelevant products when distributing them newspapers and magazines. Mr. Aslan further stated that it is not determined that Doğans' acts were against article 4 of Law No.4054. Therefore he is against to the Competition Board decision declaring Doğan to stop its anti-competitive acts as if this claim was proved.

5.3 COMPETITION AUTHORITY IN TURKEY

5.3.1 Competition Board and Its Powers

According to the legal justification of Competition Law no.4054, it has been stated that to secure the rights of the bodies of the Commercial life is only possible with the organs which have the ability and efficiency to take decisions independently. It is strictly required to have independent administrative organs in Turkey which maintains its democratic values. In Turkey; the development and the maintenance of competition will be realized by Competition Board which has the said specifications.

The legislation regarding the establishment of Competition Board is in compliance with the regulations setting forth the specifications that a national competition authority should bear stated in International Antitrust Code of GATT. Competition Law No. 4054 establishes Competition Authority which is comprised of Competition Board, Presidency and service units. Competition Law No. 4054 has given the authority to make legislation to the Competition Board. To give an example; under article 5 of Law No. 4054; Competition Board determines which concerted practices or agreements will be subject to an exemption and under article 7 of Law No. 4054; Competition Board issues communiqués to determine the authorized mergers and acquisitions. Therefore Competition Board is authorized to make law and give decisions in regards to the application of the Law. Since Competition Authority is assigned to prevent anti-competitive agreements and the abuse of dominant position in the good and service market; both Competition Authority and Competition Board should be given independency to actualize the said tasks.

5.3.2 Decisions of Competition Board and Judicial Review

Competition Board may give interim and final decisions. Interim decisions are comprised of decisions regarding negative clearance, request for information and examination, prior investigation and inquiry and temporary injunction. Interim decisions of the Competition Board cannot be appealed solely however they can be appealed together with final decision. Final decisions are comprised of decisions regarding rejection of filing an investigation, giving an exemption or ceasing an abuse. Final decision is the decision where Competition Board has no more authorization to proceed with that file. Therefore final decisions of the Competition Board can be solely subject to appeal. Under article 55 of Competition Law no. 4054; Competition Board decisions that are subject to judicial review are final decisions, injunction decisions, fines and periodical payments. Council of State is the appeal authority for the Competition Board decisions. Even though if there was no article 55 of Law No. 4054; since all the decisions of governmental bodies can be appealed under Administration Code of Turkey, it wouldn’t again be possible that Competition Board decisions not being subject to judicial review.

6. CONCLUSION

Competition's benefits are irresistible and numerous such as enabling entrance and existence in the industry for smaller firms, accordingly providing more choice and low prices for consumers and supporting technology and innovations. Competition enables the firms to produce products and perform services which are cheaper and of good quality. Competition also provides the distribution and usage of the limited sources of society in the most effective way by gathering of demand and supply chain freely in the market conditions. What is more; effective competition enables the undertakings to have the opportunity to gain more profit, to expand their production, to enlarge their market share.

Media, is a sector where the social welfare competes with economic welfare in regards of the anticipated results from a competition policy. Therefore the main idea of dealing with competition in media sector by preparing this study was closely related with the social goals of the competition policies that would safeguard mostly the fundamental rights of consumers. Media bears high commercial interests to save the functions of cultural diversity, public service and social responsibility without any distinction of state or country. It is for sure that each national government decides on its own competition policy. However these policies should be intervened if common interests are affected and where fair competition is required. The essence of the protection and the maintenance of competition in media sector are also important for the protection of fundamental rights such as freedom of speech, right to information of consumers, plurality, cultural diversity and freedom of choice.

It is beyond doubt that, convergence in last ten years gave rise to the requirement of protection of media sector more than before. This adoption surely may be satisfied by laws, regulations, case law and subsidiary legislation. As previously mentioned; Turkey has adopted market economy officially after February 1980. Before that date, Turkey was administered by mixed economy where it consisted of plans for a period of five years and it was government that determined the prices. Turkey and European

Economic Community have signed Ankara Agreement on 1963. EEC Accession Council decided to establish a Customs Union between Turkey and EEC with decision number 1/95 in 1995. One of the chapters of the Customs Union Decision was regarding the adoption of competition rules in consistent with EU.

Some of the obligations of Turkey arising from customs union decision 1/95 were to adopt laws regarding competition, intellectual property and consumer protection. It might be said that; Turkey has an appreciable progress in competition policy after the signing of customs union decision 1/95. Turkey has started this progress by adopting Turkish Competition Law No.4054 which is the reference code of Treaty of Rome. Other chapters of Customs Union such as intellectual property rights and consumer protection could not be adopted in Turkish national legislation as compatible as competition policy.

The decisions given by the Commission and Competition Board of Turkey have similarities with the following reasons: The main articles of EU competition law regulating cartels, abuse of dominant position and mergers are harmonized with Treaty of Rome. Therefore; Turkish competition policy is equivalent with EU competition policy. What is more; Competition Board of Turkey has similar powers with Commission acting as law-maker, policy-maker, investigator and judge. The close relationship may also be found at the decisions of Competition Board of Turkey where the Board references EU competition legislation when assessing a case before itself. This assessment can be seen at DOĞAN case in section 5.2.4 where Turkish Competition Board refers to Commission's Notice Guidelines on Vertical Restraints for the determination of tying agreements in its decision.

Although there is a very close relationship and parallel development between Turkey and European Union in competition policy; there are some issues to be adjusted and improved in terms of procedural law in Turkey. The methods of competition authorities are similar when analyzing a case. Both authorities have the power to start inquiry on its own initiation; they have the same competence when giving an interim or final decision

or imposing fine. However; it might be said that Commission's analyzing of a case is much more detailed than the Turkish Competition Board's analysis. When we have a look at UEFA case example; we can clearly see that Commission is very systematic when assessing a case. Commission first satisfies the legal requirements by setting the relevant market and then invites all the related parties and opposing parties to have an objective point of view. Accordingly UEFA amends its policy of joint selling rights to relieve the Commission which will not damage competition in the market. Consequently; Commission makes two analyses before giving a final decision regarding the exemption in the UEFA case which both procures effective competition in the market and does not prejudice the entertainment right of the consumers.

It is not possible to say, on the other hand, that the analysis of Turkish Competition Board in Doğan case is as detailed as the Commission's case examination. In Doğan case; Turkish Competition Board receives the complaint of a tying agreement, it simply makes an assessment as if previously provided exemption complies with the current competition legislation and finally gives a final decision just with these inputs. It is inevitable to agree with the opposing vote given by one of the members of the Competition Board stating that there is not any satisfactory evidence which proves that Doğan imposes its vendors to purchase irrelevant products when distributing them newspapers and magazines. Therefore it shouldn't be that simple to give a warning to Doğan to cease its tying practices and otherwise its exemption would be reversed before making a justified and satisfactory analysis.

Another variety arises from the judicial review of the decisions of Commission and Competition Board. Both the decisions of Commission and Turkish Commercial Code are subject to judicial review. However; all the appeals subject to judicial review first goes to Court of First Instance (CFI) and then to the European Court of Justice (ECJ) in EU. A decision can only be subject to ECJ's review in case there is a lack of competence of CFI, there is an infringement of an essential procedural requirement or there is an infringement of Community Law by CFI. Therefore it might be said that CFI acts as a sieve which is entitled to make judicial review of the Commission's decisions as a specialized court.

Since Competition Board is an independent regulatory agency; there are some opinions that Competition Board is a sine qua non quasi-judicial organ. However general opinion is supporting that Competition Board is an administrative organ considering the organic structure of the Board within the government. Decisions and transactions concluded by Competition Board in Turkey are subject to judicial control in accordance with article 125 of Constitution and technical decisions of Competition Board are subject to the judicial control of Council of State in accordance with article 55 of Law No.4054. Therefore, the qualification of the ultimate decisions to be given by Council of State is materially sensitive regarding the method of enriching competition law by case law.

One might say that it is not possible in every case to analyze the technical and economic decisions of Competition Board by Council of State who is under a heavy workload as also performing as Supreme Court for administrative courts in Turkey.

There are several cases that European Court of Justice decides that it has to limit its exercise of jurisdiction in the situations where the Commission's decision are complicated and technical. Turkey may progress if similar decisions might be given by the Council of State or if special chambers that comprise educated and expert judges in competition law may be formed within Council of State. Since the legislation basis of Turkish competition policy is adopted from EU competition law; there wouldn't be a compliance problem in the manner of a procedural change in the above mentioned issues. It is not far to believe that these procedural changes would carry out Turkish competition policy to an equivalent level with EU.

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