REPUBLIC OF TURKEY
BAHÇEŞEHİR UNIVERSITY

ABUSE OF A DOMINANT POSITION IN THE FRAMEWORK OF EUROPEAN UNION AND TURKISH COMPETITION LAW TURKISH PETROLEUM MARKET

MA Thesis

MURAT SAYIN

İSTANBUL 2009

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Prof. Dr. Selime Sezgin
Director

I certify that this thesis meets all the requirements as a thesis for the degree of Master of Arts.

Prof. Dr. Ayşe Nuhoğlu
Program Coordinator

This is to certify that we have read this thesis and that we find it fully adequate in scope, quality and content, as a thesis for the degree of Master of Arts.

Examination Comittee	**Signature**
Title, Name and Surname	
Assist. Prof. Dr. Selin Özoğuz	…….
Assist. Prof. Dr. Selcen Öner	…….
Dr. Emin Köksal	…….

T.C.

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SOSYAL BİLİMLER ENSTİTÜSÜ

AB İLİŞKİLERİ

Tezin Adı: Avrupa Birliği ve Türk Rekabet Hukuku Çerçevesinde Hakim Durumun Kötüye Kullanılması, Türk Petrol Pazarı
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Enstitü Müdürü

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Program Koordinatörü

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Yard. Doç. Dr. Selcen Öner	…….
Dr. Emin Köksal	…….

ABSTRACT

ABUSE OF A DOMINANT POSITION IN THE FRAMEWORK OF EUROPEAN UNION AND TURKISH COMPETITION LAW – TURKISH PETROLEUM MARKET

Sayın, Murat

European Union Public Law and European Integration

Supervisor: Assist. Prof. Dr. A. Selin ÖZOĞUZ

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This thesis studies the abuse of dominant position in the framework of European and Turkish Competition Law. Also, Turkish Petroleum Market as an example sector in Turkish competition practise will be analysed. Competition law is a very important factor for the European Union so as to facilitate the creation of a single market within its realm. In the light of the European Union Competition rules, Turkey adopted "The Act on the Protection of Competition" on December 7, 1994. Afterwards the Competition Board was established on November 5, 1997.

Effective competition will be analysed with its all aspects. How the competition law was created and its historical background will be given. Article 81 and Article 82 of EC Treaty outline the primary framework for the regulation of Competition in the European Union. Firstly, agreements between two or more firms which restrict competition and cartel between competitors which may involve price-fixing or market sharing are prohibited by Article 81. Secondly, the Article 82, the main subject of the thesis, prevents undertakings that hold a dominant position in a market from abusing that position. Abuse of market power is a central concern of competition law. The list of types of abuse in the Article 82 is non-exhaustive*;* so certain types of conduct constituting abuse of a dominant market position have evolved by European Court of Justice. Also, to fully understand the idea of dominant position and its abuse, this idea must be wieved in the context of of its application and definition in the European Court of Justice case law. For this reason, the case law is the crucial point to determine the dominance. How the dominance, product market and geographic market will be determined will be analysed in the light of the respective case law. Turkish Competition regulates abuse of dominant position in the Article 6 which is modeled on the relevant text of Article 82. This thesis gives examples from Turkish practise and some important decisions of Turkish Competition Board. Finally, Turkish petroleum sector, as an example sector, is examined with its abusing practices.

Keywords: European Union Competition Law, Turkish Competition Law, Turkish Petroleum Market, Abuse of a Dominant Position.

ÖZET

AVRUPA BİRLİĞİ VE TÜRK REKABET HUKUKU ÇERÇEVESİNDE HAKİM DURUMUN KÖTÜYE KULLANILMASI

Sayın, Murat

Avrupa Birliği Kamu Hukuku ve Entegrasyonu

Tez Danışmanı: Yrd.Doç.Dr. A. Selin ÖZOĞUZ

Haziran 2009, 83 sayfa

Bu çalışmada, Avrupa Birliği ve Türk Hukuku çerçevesinde, hâkim durumun kötüye kulanılması yolu ile rekabetin ihlal edilmesi konusu derinlemesine incelenmektedir. Bu bağlamda, örnek bir sektör olarak Türk Petrol Pazarı da ayrıca incelenecektir. Avrupa Birliği'nin kuruluş amacı olan "ortak pazar" ilkesinin gelişmesinde, rekabet uygulamaları büyük önem arz etmektedir. Türkiye, Avrupa Birliği rekabet kuralları ışığında, 7 Aralık 1994 tarihinde Rekabetin Korunması Hakkındaki Kanunu kabul etmiştir. Sonrasında, 5 Kasım 1997 tarihinde Rekabet Kurumu kurulmuştur.

Bu çalışmada etkin rekabet tüm yönleri ile tanımlanmıştır. Rekabet hukukunun nasıl oluştuğu ve tarihsel gelişimi de ele alınacaktır. Avrupa Birliği Rekabet Hukuku, 81 ve 82. maddelerde düzenlenen iki temel rekabet ilkesi üzerine temellendirilmiştir. İlk olarak, iki ya da daha fazla firma arasında rekabeti kısıtlayıcı anlaşmaların ve kartel oluşturmanın yasaklanmış olması 81. maddede yasaklanmıştır. İkincisi ise, bu tezin ana konusu olan ve 82. maddede düzenlenen hâkim durumda olan şirketlerin bu durumlarını kötüye kullanmalarının yasaklanmış olmasıdır. Pazardaki hâkim durumun kötüye kullanılması, rekabet hukukunun en temel konularından birisidir. 82. maddede sayılan kötüye kullanma örnekleri sınırlı sayıda ve kısıtlayıcı değildir. Ayrıca hakim durum ve onun kötüye kullanılmasının en iyi şekilde anlaşılmasında, içtihat hukukunda belirtilen tanımların ve çıkarımların da rolü büyüktür. Bu nedenle, içtihatlarla oluşturulan hukuk, rekabet hukukunda hakim durumun kötüye kullanılması açısından son derece önem arz etmektedir. Hakim durumun, ürün pazarı ve coğrafi pazarın nasıl belirleneceği, içtihat hukukuyla ortaya konulmuştur. Türk Rekabet Kanunu'nun 6. maddesinde, 82. maddeyi model alacak şekilde kaleme alınmış olan, hakim durumun kötüye kullanılması konusu düzenlenmiştir. Bu tez, Türk rekabet hukuku uygulaması ile Rekabet Kurumu'nun örnek kararlarını içermektedir. Son olarak, rekabet hukukunun uygulama alanlarından Türk petrol sektörü de, ele alınacaktır.

Anahtar Kelimeler: Avrupa Birliği Rekabet Hukuku, Türk Rebaket Hukuku, Türk Petrol Pazarı, Hakim Durumun Kötüye Kullanılması

ABBREVIATIONS

Competition Authority of Turkey	: CA
Competition Board of Turkey	: CB
European Coal and Steel Community	: ECSC
European Competition Law Review	: ECLR
European Community Merger Regulation	: ECMR
The Council of the European Union	: Council
The European Commission	: Commission
The European Court of Justice	: ECJ
The European Union	: EU
The United States of America	: US
Treaty on European Union	: TEU

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1. INTRODUCTION

The EC Competition Law has with the help of its aspiration to achieve the most important future goal of the Community, that is, forming a single market further established new doctrines in the field of competition law. The free market economy has to adopt certain restrictive rules against the economic actors in favor of consumers' benefits. Competition law aims to protect the process of competition between enterprises in a free market economy or an economy which is not directed by government regulation. What the objective of a country's competition law should be and how that objective can best be achieved by maintaining the balance between different interests are the main questions while determining the necessity and the application extent of competition law and policy. As stated by Whish, competition law may not be so much about any particular policy –for example the promotion of consumer welfare or protection of weak- but about who should actually make decisions about the way in which business should be conducted (Whish, R., 1986, p.20).

These restrictive rules are set forth under the Treaty establishing the European Economic Community. The European Competition Law covers two main prohibition rules set out in the Treaty: Article 81 prohibits agreements and concerted practices involving appreciable restrictions of competition that affect trade between Member States. When determining the infringement of Article 81, the key question, "have the parties reached and acted on a common understanding restricting competition?" must be answered. On the other hand, Article 82 prohibits the abusive practices. This thesis will only study the prohibition on "abuse of a dominant position" by one or more undertakings. Article 82 is exposed, analyzed and explored from a variety of perspectives. In order to better understand this prohibition and when to implement the same, commission decisions, rules laid by learned judges in the Court of First Instance (CFI) and the European Court of Justice (ECJ), and the scholarly work of the legal philosophers will be evaluated.

There are two critical elements in the Article 82 regime. The first is that of dominance: the allegedly infringing undertaking must occupy a dominant position within the market in question, as defined. The second is that of *abuse*: the dominant undertaking, occupying this advantaged position, must in some way abuse it. Article 82 is concerned with *the protection and promotion of effective competition* within the relevant market. It involves a triangle of three interests: those of the dominant undertaking, the smaller rival undertaking/s and consumers. Abuse of a dominant position typically occurs where a firm holds a position of such an economic power that allows it to operate in a market without being significantly affected by competition. Although being in a dominant position is not illegal, abusing the same will definitely create an infringement of the Competition Law. For this reason, enterprises enjoying a significant market power should pay special attention to this rule.

The aim of this thesis is to introduce and analyze the actions of one or more undertakings abusing a dominant position within the market or substantial part of it. The development of competition law in European Union and Turkey, the competition legislation of European Union and Turkey will also be evaluated. The elements of abusing of a dominant position will be particularly examined with its all details. With the deductive method used in this thesis, the definition of competition law, the historical background of competition law in European Union and Turkey, the competition legislation and the infringement types of competition will briefly be represented. Finally, the abuse of a dominant position in European Union and Turkish Competition Law will be analyzed in the light of the leading cases. The reader will find answers on how the competition authorities check out the market dominance.

The Turkish petroleum market which is a good example sector for the application of Article 6 is also scrutinized by its dominance practices. Law No.5015 on Petroleum Market, adopted in 2002, brings obligations to the market actors to protect competition and establish a free market. The undertakings refining and distributing of petroleum in Turkey are under the pressure of competition authority. According to a Competition Board decision, TUPRAS is dominant in Turkish petroleum refining market. The acts of TUPRAS which has effects of abusing of dominant position will be stated. This

dominance also constitutes infringements because of the vertical integration of the TUPRAS and two distributing undertakings. As conclusion, there will be some leading cases in Turkish competition law practice.

2. COMPETITION LAW

2.1.The Objectives of Competition Law

An introduction to the meaning of competition law and its very objectives must be the starting point, this author thinks, of a study regarding the same. Competition law that first aims the consumer welfare needs a particular system drafted and enforced by the governments.

An economic system, in which allocation of resources is determined completely by supply and demand and, that, is not directed by government regulations are defined as free market economy. It is none but competition law that will eventually protect the process of competition within such a market structure and thus its subsistence is a necessity. Competition between enterprises produces the greatest benefits to society and competition law serves the goal of consumer welfare. Undertakings have to lower their prices and upgrade the quality of their products in order to be able to survive in a competitive environment. Those undertakings which can not lower their costs and fall behind their competitors in terms of price and quality, confront the risk of losing their market share in a competitive market which is running defined in competition law policies. If there is not a competitive area which is controlled by competition law policies with the power of government, there is no chance to survive for an undertaking with the uncompetitive practices of big undertakings.

Competition law is an intervention policy of governments to establish and protect the free market economy. It is prohibited for enterprises restricting competition through agreements, mergers or abusing of dominant position. Thereby, it is provided for enterprises entering into a market with equal opportunity and interference freedom. For free markets, competition law can be accepted as the constitution of economy. (Aslan 2007, p.4)

Competition aims at ensuring a market in which the undertakings operate under the equality of opportunity and determine their output and price in accordance with the consumer choices and foreseen business conditions. Only though such a competitive environment, diversity of products at lower prices and better qualities can be provided. As a result, undertakings will try to improve their competitive strength through technology, efficiency and productivity that would eventually lead to efficiency in resource allocation (Akıncı 2001, p.355)

The first aim of competition law is to promote and maintain a process of effective competition so as to achieve a more efficient allocation of resources. (Vickers & Hay 1987, p.2)

The preservation of liberty supports competitive markets and may in some markets result in economic efficiency. In other cases the goals may be inimical. Competition laws which are aimed at the dispersal of power as a matter of ideology may favor small businesses and seek to protect them from big business. Instead of protecting competition the tendency may instead be to use the competition rules to protect competitors. For example, competition law could be used to protect small firms from the dominant firm's low pricing, or to force a dominant firm to give access to resources it controls to smaller firm in order to allow the latter compete with it. (Jones & Surfin 2004, p.16)

Competition is an essential element in the efficient working of the market. As we can see from the above definitions, the theorists try to answer in different ways how the market works and why the legal intervention should prohibit commercial practices that damage the operation of free market.

Economists generally distinguish between three broad classes of efficiencies all of which are relevant for the analysis of competition: allocative, productive (or technical) and dynamic (or innovation) efficiency.

Allocative efficiency is achieved when the existing stock of (final or intermediate) goods are allocated through the price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption possibilities. At an allocatively efficient outcome, market prices are equal to the real resources costs of producing and supplying the products.

Productive (or technical) efficiency is a narrower concept than allocative efficiency, and focuses on a particular firm or industry. It addresses the question of whether any given level of output is being produced by that firm/industry at least cost or, alternatively, whether any given combination of inputs is producing the maximum possible output. Productive efficiency depends on existing technology and resource prices. The state of technology determines what alternative combinations of resources can produce a given amount of output. Resource prices determine which combination of resources is the most efficient one in that it gives rise to the lowest production cost. Productive efficiency, is achieved when output is produced in plants of optimal scale (or minimum efficient scale) given the relative prices of production inputs.

Dynamic (or innovation) efficiency in antitrust economics is connected to whether appropriate incentives and ability exist to increase productivity and engage in innovative activity over time, which may yield cheaper or better goods or new products that afford consumers more satisfaction than previous consumption choices. (Mano 2002, pp. 8-14)

As we can see from above definitions, to provide effective competition, all three types of efficiency has to be main factors in the market. Otherwise cartels or dominant firms can infringe competition. In other words, one firm can have market power. According to Mano, market power is defined as the ability of one or more firms profitably to maintain prices above the level corresponding to perfect competition for a significant period of time. Market power matters partly because it may lead allocative inefficiency and partly because it may worsen productive inefficiency. On the other hand, the impact of market power on innovation remains controversial. (Mano, 2002, pp. 8-14)

2.2 The Historical Background of Competition Law

The engine of the free enterprise is competition. The market economy functions well, when competition works. Numerous sellers, vying for customers, must produce goods and services of sufficient quality, and at acceptable prices, or be driven out of business. That necessity forces them to be efficient, to buy at the lowest possible prices, and to use these inputs in such a way that total production costs are kept to a minimum. Where competition fails, government can protect the consumer from market abuse by directly regulating the firm with monopoly power or restore the vigor of competition through antitrust enforcement that prevents competitors from conspiring to fix prices or individual firms from dominating market.

Early precedents for government action to preserve a competitive marketplace, the focus of the primer, are to be found in the early English treatment of monopolistic practices. Various common law proscriptions of those trade restrains came across the ocean with the English settlers of the New World. But it was not until after the Civil War that Americans became truly anxious about the lack of effective tools to limit the abuse of monopoly. (Shenefield v. Stelzer, 2003, p.8)

President Benjamin Harrison's 1889 call for "penal legislation" to control dangerous conspiracies against the public good resulted in the Sherman Act in 1890.

The USA was the first jurisdiction to adopt a proper modern system of competition law, so it is impossible to discuss competition law without some references to US competition law. The first comprehensive legal regulation on the prohibition and prevention of the anti trust (or anti competitive) behavior is the Sherman Act, which is followed by the Clayton Act. The US congress passed the Sherman Act in 1890, which is still in force and the Clayton Act in 1914. American law applies at two layers as federal and state. Most states have antitrust laws designed in a parallel form with the Federal antitrust law. These state laws generally apply to violations that occur wholly in one state. Federal antitrust law is principally found in three key statutes. These three

pillars of American antitrust law are the Sherman Act, the Clayton Act and the Federal Trade Commission Act.

The purpose of the Sherman Act was to appose the combination of entities that could potentially harm competition, such as monopolies or cartels. Its reference to trusts today is an anachronism. At the time of its passage, the trust was synonymous with monopolistic practice, because the trust was a popular way for monopolists to hold their businesses, and a way for cartel participants to create enforceable agreements.

The Section 1 of the Sherman Act states;

> *Every contract, combination in the form of the trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be guilty of a felony, and, on conviction thereof, shall be punished fine not exceeding $10.000.000 if a corporation, or, if any other person, $350.000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.*

Section 2 states;

> *Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony and, on conviction thereof, shall be punished fine not exceeding $10.000.000 if a corporation, or, if any other person, $350.000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.*

The most popular explanation for the passing of the Sherman Act is that it was to combat the power of the trusts. It had become common for the owners of stocks held in competing companies to transfer those stocks to trustees who then controlled the activities of those competitors and consequently lessened competition between them. It is because of that this is known as American Anti Trust Law. (Jones & Surfin 2004, p.19)

The activities of the railroad companies gave raise to particular concern. It is also claimed, however, that the Sherman Act was more of a protectionist measure passed in the response to pressure by farmers, small businesses, or those desiring to stop the transfer of wealth from consumers to big business.

Principal character of the Sherman Act has been described as the "Magna Carta" of the free enterprises since it expresses a national commitment to free market economy. *They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental freedoms.* (United States v. Topco Associates, Inc., 405 United States 596-610, 1972)

American experience that has been developed over a century through decisions of the Federal Trade Commission and precedents of the Supreme Court constitutes a major source for any kind of research related to competition law.

As the main subject of this thesis is the European Union competition law, it has to be examined that the differences between US antitrust law and EC competition law. There are three particular features of US antitrust law which should be noted as differing from EC law. These differences are the most crucial. First, the US competition authorities, the Department of Justice Antitrust Division and the Federal Trade Commission, enforce the antitrust laws by bringing actions before the ordinary courts. They are primarily prosecutors rather than decision-makers. This is in contrast to the EC competition authority, the Commission, which enforces the rules by taking decisions binding on the firms concerned, acting as both prosecutor and judge. Secondly, in the US the antitrust laws are the subject of a very significant amount of private litigation, again before the ordinary courts. This contrasts with the position in Europe where private litigation, although possible, has hitherto been relatively rare. The result of these two factors is that the US law has been developed by an administrative authority with the Court acting only to review the legality of the authority's action. The third matter to note at the outset is that, section 2 of the Sherman Act forbids monopolization and attempts to monopolize. It is thus crucially different from the corresponding provision in EC law, Article 82, which forbids the "abuse of a dominant position".

In order to grasp the importance and wide-spread application of private law instrument one can look at the American system in where it is said that ninety percent of all enforcement is private enforcement, the other ten percent being carried out by public authorities. (Hoseinian, 2004, p.4, Clifford 1999, p.79). More than eight hundred federal antitrust cases were filled in 2004. In addition, many indirect purchaser cases are filled in state courts each year. (Whish 1986, p.277). Common law that enables broad application of liability law and America's high industrialization level are playing outstanding part in these figures.

2.3 The Social Policies of Competition Law

Competition law also has to take measures to protect social equality in the fields of for example environment, employment and industry. Mergers, which will cause big job losses, can be prohibited or agreement, which is fairly restrictive but in the other hand brings efficiency, can be allowed.

But as the main objective of competition law is to provide economic efficiency, to protect consumers from high prices or poor quality seems to be a tool for this aim, also to protect small businesses from big business, competition law has to take measures to achieve economic efficiency. The social policy of competition law is a kind of different role of competition. The market must be under control for public interest.

The competition law regulates the behaviors of enterprises and takes measures to protect enterprises. For this reason the articles of competition law make reference to enterprises, not to the consumers. But the consumers benefits from the competition law much more than enterprises. The main conclusion of competition is for benefit of consumers. Another party benefits from the competition law as much as consumer is "small and medium sized enterprises", which is not mentioned in the primary regulations of the competition law. The small and medium sized enterprises try to survive in the market together with big sized enterprises. The small and medium sized enterprises are defined to be protected by European Union competition law policies. (Aslan 2007, p.8-9)

Through many of the years of antitrust, some supporters of aggressive enforcement closely linked high concentration in markets and sectors with lessened competition. Many perceived that when few sellers dominate a market, consumers are worse off because they have fewer options, thus less choice. Moreover, prices are likely to be high, perhaps because competitive pressures are less intense; possibly due to effectively controlled costs. As a result, consumers are exploited for the profit or ease of producers. When few sellers are also industrial behemoths, many concluded, small and aspiring sellers as well as the citizens of our political democracy are worse off. Entrepreneurs, especially creative and efficient ones, are likely to be the targets of strategic exclusionary prices. Moreover, the political process is manipulated, predominantly in the interests of the large corporations. When, in addition, it is difficult for new sellers to establish themselves in the market, the social, political, and economic cost are magnified. Consumers, entrepreneurs, and the public are the losers. (Fox & Sullivan 1987, pp.936-942)

As we can see above approach, the competition law is mostly beneficial to the small and medium sized enterprises. The power of big and large enterprises is likely to be *exterminatory*. This also causes for the consumers to be exploited. Fox and Sullivan conclude their thoughts on the very matter as: "Finally, the producer-plus-consumer-welfare paradigm presses the analyst to think only in terms of aggregate outcomes or wealth of the nation. But this concept is static and outcome-oriented, while the antitrust laws are dynamic and process-oriented. They protect not an outcome, but a process – competition. Antitrust laws set fair rules of the game. They give rights of access and opportunity. The antitrust laws preserve and foster dynamic interactions among those in the market. They deal with aggregate national wealth, but with the expectations and behavior of the people who participate in the markets."

The process-oriented competition law means that, the competition law regulates the process of the market in which the enterprises play their role.

In its early years, the European Competition law was influenced by German scholarship and German officials played a key role in the development of competition law.

Underpinning the German approach to competition was a unique economic philosophy, called ordoliberalism. (Chalmers & others 2006, p.935.) Ordoliberalism is a school of liberalism emphasizing the need for the state to ensure that the free market produces results close to its theoretical potential. Ordoliberal theory holds that the state must create a proper legal environment for the economy and maintain a healthy level of competition through measures that adhere to market principles. (Megay 1970, p.422) The concern is that, if the state does not take active measures to foster competition, firms with monopoly (or oligopoly) power will emerge, which will not only subvert the advantages offered by the market economy, but will also possibly undermine good government since strong economic power can be transformed into political power.

According to the Möschel, a German theorist, "The actual goal of the competition policy of Ordo-liberalism lies in the protection of individual economic freedom of action as a value in itself, or vice versa, in the restrain of undue economic power. Franz Böhm once illuminated this idea by the aphoristic formula, "the one who has power has no right to be free and the one who wants to be free should have no power". Economic efficiency as a generic term for growth, for the encouragement and development of technical progress and for allocative efficiency, is but an indirect and derived goal. It results generally from the realization of individual freedom of action in a market system."

As we can see from the approach of ordoliberalists, if an enterprise has the market power, their power must be under control to provide public security of economy. The access and opportunities for new businesses is valued by the policy of competition as a result of welfare of consumers and small medium sized enterprises.

3. COMPETITION LAW PROVISIONS

To get better understanding, European Union and Turkish Competition law provisions must be held in general. European Union competition law provisions are laid down in the EC Treaty. The Turkish competition law provisions are laid down in the Act No.4054.

3.1 European Union Competition Law Provisions

The tasks and activities of the Community and foundations of all Community policies are set out in Article 2,3 and 4 of the Treaty. Article 3(1)(g) (ex Article 3(f)) provides that the activities of the Community shall include "a system ensuring that competition in the internal market is not distorted". This aim is crucial when interpreting the Treaty provisions which set out the common competition rules in greater detail.

In Continental Case (Case 6-72), the European Court of Justice stated:

> *Article [82] is part of Chapter devoted to the Common rules on the Community's policy in the field of competition. This policy is based on Article [3(1)(g)] of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted. The applicants' argument that this provision merely contains a general programme devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in Article [3(1)(g)], the Treaty in several provisions constrains more detailed regulations for the interpretation of which this aim is decisive.*

As a result, in Continental Can Case, the European Court of Justice determined that a merger could constitute abusive behavior under Article 82 even though the acquiring firm had not used its dominant position to initiate the merger.

The main competition rules are contained in Chapter 1 of the Title VI of the Treaty. Section 1 (Article 81-86) deals with rules applying to undertakings. Section 2 (Article 87-89) deals with State Aids. Article 31 deals with state monopolies of a commercial

character. A general power to control mergers is not expressly contained in the Treaty. Provisions for merger control is now set out in Council Regulation 139/2004, called Merger Regulation.

The substantive competition provisions of the Treaty are stated in the Article 81-86. Abuse of dominant position is regulated under the Article 82. Now, the general provisions will be summarized here.

Article 81 (Ex. Article 85) is set out in three parts. Article 81(1) prohibits agreements, decisions of associations of undertakings and concerted practices which have as their object of effect the pretention, restriction, or distortion of competition and which may affect trade between Member States. Article 81(2) states that such agreements are void. Article 81(3) provides, however, that Article 81(1) may be declared inapplicable in respect of agreements, decisions, concerted practices or of categories of such agreements which on balance beneficial since they satisfy the criteria set out in that provision. The provisions governing the analysis of an agreement are split, therefore, between Article 81(1) and Article 81(3). This makes Article 81 difficult to understand of differences between 81(1) and 81(3).

> *Article 81*
>
> 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:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- 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 82 (Ex Article 86) prohibits an undertaking which holds a dominant position in the common market, or a substantial part of it, from abusing that position in so far as it may affect inter-Member State trade. It contains no provisions for exception or exemption. Article 82, which regulates abusing of dominant position, will be determined in detail as it is the main subject of this thesis. The text of Article 82 is;

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.

Article 83 (Ex. Article 87) confers a general power on the Council to adopt secondary legislation to give effect to the principle laid down in Article 81 and Article 82. It provides:

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article.

Article 84 (Ex. Article 88) enables Member States to apply Article 81 and 82 in certain circumstances.

This Article confers power on authorities in Member States to apply the competition rules prior to the Council's adoption of implementing rules. In the Case 127/73, Nouvelles Frontieres, the European Court of Justice held that the term authorities refers to either the administrative authorities entrusted, in most Member States, with the task of applying domestic legislation on competition subject to the review of legality carried out by competent courts, or else the courts to which, in other Member States, the task has been especially entrusted. This provision does not, however, apply to an ordinary national court before which the direct effect of an EC competition provision is pleaded.

Article 84 appears to have been designed as a transitional provision. It has, however, remained significant in conferring power on the national competition authorities to act whenever EC implementing legislation does not apply. A major example of this prior to 1 May 2004 was international flights between Community and non-Community airports. (Jones & Surfin 2004, p.97)

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Article 85 (Ex. Article 89) imposes a general duty on the Commission to ensure compliance with the competition rules.

> 1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

> 2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

Article 86 (ex. Article 90) deals with the application of competition rules to public undertakings and those given special or exclusive rights by Member States. Article 31 (Ex. Article 37) is situated in the part of the Treaty concerned with the free movement of goods. It requires Member States which have State monopolies of a commercial character to eliminate discrimination between national of Member States regarding the conditions under which goods are procured and marketed. (Jones & Surfin 2004, p.94). Article 86 states that:

> 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
>
> 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Article 31 states that:

> 1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
>
> The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
>
> 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of

> the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
>
> 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

The other important competition provision, Council Regulation 1/2003, also known as the modernization of regulation, is the main document setting out procedures for the enforcement of the Article 81 and Article 82 prohibitions. In 1999, the Commission published a White Paper on Modernization, which proposed reform along the following lines: to abolish the system of notification, to declare Article 81(3) directly effective, and to compel national competition authorities to the apply EC competition law. These significant changes were agreed by the Council and came into effect on 1 May 2004 by Regulation 1/2003.

The Regulation lays down rules implementing the provisions of the EC Treaty relating to agreements, decisions by associations of undertakings and concerted practices which may restrict competition (Article 81) and abuses of a dominant position (Article 82). It sets out neither to amend Articles 81 and 82 of the EC Treaty nor to prevent the Member States from adopting stricter national laws and implementing them on their territory.

With the Regulation 1/2003, the Member States are now able to enforce Community competition law independently along with their national competition laws, and carry out investigations and prosecute infringements under Article 81, either individually or in combination with other national authorities. Accordingly, national courts now can fully adjudicate Community competition law (called as "*decentralization*"). In other words, individuals can bring action before their national courts on the merits of violations of Article 81 and 82. As a result, national tort law provisions shall apply to the civil liability cases of both Community competition law as well as national competition law.

This regime has brought new questions to the application of the Community competition law. First of all, national authorities are now in a position to decide whether an infringement is falling within the scope of Community law. The courts of the Member State must ensure the effectiveness of Community rights and it is not difficult to predict that as the integration deepens and widens infringements that of nature to affect trade between the Member States would increase. However, national courts' private enforcement of Community competition law provisions leads to a considerable difficulty, as it may be necessary to analyze the market in order to assess the effect of an agreement or the conduct of a dominant firm on competition and frequently, it may not be simple to tell whether a provision infringes Article 81 or may be enforced (Korah, V., 1997, p.22, 23).

3.2 Turkish Competition Law Provisions

Turkish competition law provisions states in the Act on the Protection of Competition. (Law No 4054) Turkish competition law is modeled from EU Competition law system. It is obvious that the systematic build of legislation is about the same.

The substantive competition provisions of the Competition Act are stated in the Article 4, 6 and 7. Abuse of dominant position is regulated under the Article 6. Now, the general provisions will be summarized here.

The main purpose of the Turkish Competition Act is stated in Article 1:

> "The purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end."

The Article 4 of the Act No 4054 is modeled from Article 81 of EC Treaty. The Article 4 states that:

> **"**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 behaviour, 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, 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."

The Article 5 of the Act No 4054 regulates the exemptions to the application of Article 4. The Article 5 of the Act No 4054 corresponds to Article 81(3).

The Article 6 of the Act No 4054 regulates abuse of dominant position. The text of the article will be given in the next parts.

The Article 7 of the Act No 4054 regulates mergers:

> "Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.
>
> The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid."

3.3 Restrictive Agreements Stated in Article 81

The European Competition Law covers two prohibition rules set out in the Treaty. First, agreements between two or more firms which restrict competition and cartel between competitors which may involve price-fixing or market sharing are prohibited by Article 81. Secondly, the Article 82 prevents undertakings that hold a dominant position in a market from abusing that position. Article 82 will be scrutinized above.

In Continental Can Case, the European Court of Justice stated that, Article 81 and 82 EC, in common, "…*seek to achieve the same aim on different levels viz. the maintenance of effective competition within the common market*."

Without going into further detail, Article 81 EC has focused on agreements and arrangements made between undertakings or groups of undertakings. The Article 4 of the Turkish Competition Law corresponds to Article 81 EC. The prohibition of Article 81 EC, at the same time Article 4 of Act No 4054, requires four elements: Firstly, there must be two or more undertakings. Secondly, "collusion" (explicit collusion, i.e. agreement, decision, or concerted practice) is needed. Thirdly, collusion must have as its object or effect the prevention, restriction or distortion of competition. Finally, this must be an appreciable effect or object on competition and trade between Member States. The cases coming into European Court of Justice must be examined accordingly by four elements defined above. In one of the leading case, the ECJ formulated the following test:

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

Thus, it has been observed that the crucial element is the diversion of trade flows from the pattern which they would follow naturally in a unified market. In a given case, this will give rise to an interesting and challenging exercise in comparisons.

4. ABUSE OF A DOMINANT POSITION IN THE EUROPEAN UNION COMPETITION LAW

Article 82 is designed to deal with both monopoly and excessive market power - which may lead to a dominant position – that will ultimately distort competition. It focuses not on agreements between undertakings but on undertakings that hold a dominant position. Enterprises holding significant market power should receive considerable scrutiny by competition authorities. From an economic perspective, firms that dominate market have the kind of economic power that normally reduces efficiency since there are no competitive pressures to prevent them from raising prices and reducing output.

Article 82 does not have comprehensive definitions and all infringement examples with its text. As we will see below, the ECJ judgment and EC Commission decision defining Article 82 and its text.

4.1 The Text and the Scheme of Article 82

Article 82 prohibits undertakings from committing an abuse of a dominant position held within a substantial part of the common market where that abuse has an effect on trade between Member States.

Let's remember the text of the 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.

A number of paradoxes confront the student of Article 82. First, while the economic case against dominance is strong, Article 82 does not ban dominance outright; secondly, the abuse prohibition has been applied relatively infrequently (approximately fifty decisions by the Commission) when compared to the voluminous case law under Article 81 EC, where the competition concerns are less prominent. Four examples of abuse are listed in Article 82 EC, but this list is not an exhaustive catalogue of what behavior is considered abusive. (Chalmers & others 2006, p.1026) As it will be seen, the Commission and Court of Justice have found an ever-increasing number of practices abusive.

Article 82 prohibits undertakings from committing an abuse of a dominant position held within a substantial part of the common market where that abuse has an effect on trade between Member States. Although sub-paragraphs (a) to (d) set out examples of abuses, they are only illustrative and do not provide an exhaustive list. The essential elements of Article 82 are set out in its first sentence.

Article 82 thus prohibits dominant undertakings from engaging in certain conduct. The provision does not set out a procedure for declaring an undertaking to be dominant and so subject to Article 82. An undertaking is dominant simply when it is satisfies the definition set out by the European Court of Justice. (Jones & Surfin 2004, p.255) We will see the legal definition of dominant position in the next title.

As we can derive from the text of Article 82, there is no exception provision. But the dominant position must be established in Common Market or in the substantial part of it.

The Article 82 has five elements that are required for the application of the prohibition. The five elements are:

i. one or more undertakings;

ii. a dominant position;

iii. the dominant position must be held within the common market or a substantial part of it;

iv. an abuse; and

v. an effect on inter-State trade.

It is often extremely difficult to determine whether an undertaking is dominant, that is, defining the market on which the undertaking is alleged to be dominant is a prerequisite, and the problems of market definitions are notorious. The undertakings' position on the market must then be assessed. It is crucial that these definitions and assessments are made properly. (Jones & Surfin 2004, p.256)

Article 82 is directly effective. It is possible, therefore, that an entity injured by a breach of Article 82 may bring proceedings before a national court seeking an injunction or damages in respect of loss resulting from the breach. Further, a party to a contract concluded with a dominant undertaking may claim that clauses within it are prohibited by Article 82 and consequently void or unenforceable. That party may also bring proceedings to recover benefits conferred under a prohibited provision.

4.2 The Interpretation of Article 82

The abuse of dominant position has main factors defined above. It is very important to understand the scope of Article 82 to get the conclusions and establishing of abusing of

dominant position. Being in a dominant position is not a fault, dominant undertakings must be careful not to abuse of it.

Interpretation is the discovery of the meaning of a text. Legislation is the creation of a new text. They are different things, though in some situations the line between them may be a fine one. (Hartley 2004, p.118) For this reason, the interpretation of the text of Article 82 is set out in the jurisdiction of the ECJ and the decisions of the Commission.

4.2.1 The Meaning of One or More Undertaking

An undertaking, as it has been defined in Article 81, has been constructed broadly and encompasses every entity engaged in an economic activity. As engaging in an economic activity is a very broad term, it must be understood that every kind of entity which has economic activity supposed to be an undertaking. If an entity is not engaged in an economic activity, the fact that the members who comprise it do carry out such activity will not render the entity itself an undertaking for the purpose of Article 82. European Court of Justice, in Wouters case, stated that the Dutch Bar was not itself an undertaking although the individual members of the Bar were undertakings for the purpose of Article 81.

Two points of particular importance arise while considering the meaning of the term "undertaking" within the context of Article 82. First, since State regulation is a frequent source of an entity's market power, it is crucial to know to what extent public bodies or bodies with a special connection with the State will be characterized as undertakings and so potentially subject to Article 82. Secondly, it must be considered what is meant by "one or more undertakings" in Article 82. So far, reference has been made to the problems caused by monopoly and market power held by an individual undertaking. The fact that an undertaking's market power has been created by State action is no defense to an action based on Article 82 unless the narrow exception set out in Article 86(2) applies. This provision states that "undertakings entrusted with operation set put of services of general economic interest or having the character of a revenue-producing monopoly" are subject to the competition rules unless those rules "obstruct the

performance, in law or in fact, of the particular tasks assigned to them." (Jones & Surfin 2004, p.258)

The term of "one or more undertaking" means collective dominance. The European Court of Justice held a clear position in the Continental Can Case and Commercial Solvent Case. In Continental Can case, a US company held a 85.8 percent share in a German company (SLW). It formed a wholly owned Belgian subsidiary through which it acquired a Dutch company, which was a competitor of SLW. The Commission held that the American parent had, through SLW, a dominant position was committed when it used its Belgian subsidiary to take over the Dutch company.

In similarly, in Commercial Solvent Case, a US parent and its 51 percent owned Italian subsidiary were involved in a refusal to supply a third party in Italy with a raw material produced by parent. The subsidiary followed the policy laid down by the parent and both were held to have abused a dominant position.

4.2.2 The Meaning of Dominant Position

An undertaking that holds the "dominant position" is the main subject of the Article 82, so that the dominant position is of central importance to Article 82. For applying to an undertaking Article 82, it is very important to determine the dominant position.

Perfect competition is rarely encountered outside textbooks; almost all firms have some market power, though most have very little. Accordingly, the relevant question in antitrust cases is not whether market power is present, but whether it is important. (Schmalensee 1981, p.2)

There are two tests common to assessing whether Article 82 prohibition applies:

i. Whether an undertaking is dominant, and

ii. If it is, whether it is abusing that dominant position.

So, we can say that, the meaning of dominant position and abuse are crucial to the applying of Article 82.

A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market. Under EU competition law, it is not illegal to hold a dominant position, since a dominant position can be obtained by legitimate means of competition, for example by inventing and selling a better product. Instead, competition rules do not allow companies to abuse their dominant position. The European merger control system (merger control procedure) differs insofar from this principle, as it prohibits merged entities from obtaining or strengthening a dominant position by way of the merger. A dominant position may also be enjoyed jointly by two or more independent economic entities being united by economic links in a specific market. This situation is called collective (or joint or oligopolistic) dominance. As the Court has ruled in Gencor, there is no reason in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which those parties are in a position to anticipate each one another's behavior and are therefore strongly encouraged to align their conduct in the market.

Economics provides a variety of tools to measure degrees of market power. Market power is the power to raise prices by restricting output without a significant loss of sales – i.e., the power to fix prices or exclude competition. Any firm facing an inelastic demand or downward-sloping demand curve has some market power in an economic sense. But economics does not define – except at the extreme – at what point that market power becomes "monopoly power". Thus economics does not provide the means to resolve the essentially legal question whether the market power of a firm is sufficiently great to constitute a "dominant position" or "monopoly power". Like

relevant market definition, dominant position and monopoly power are legal constructs based on policy considerations which suggest where the line should be drawn between acceptable market power and suspect monopoly power. For example, there could be an inverse sliding scale between the degree of power required and the invidiousness of the abusive or monopolizing conduct. Or broad definitions of what constitute abusive conduct might prompt a higher threshold of market power, particularly where broad definitions of abuse capture competitively ambiguous conduct and run the risk of inhibiting desirable competitive conduct. (Hawk 1990, p.788)

A dominant undertaking need not monopolize the entire market. Such an extreme degree of dominance is possible when an undertaking is given a monopoly by the state, for instance if the state grants the right to operate job centers exclusively to one undertaking. In Case C-41/90 Höfner and Elser v. Mactoron GmbH, the ECJ stated that:

> *4. In connection with the provision of business executives is the Bundesanstalt fuer Arbeit [Federal Employment Office] subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?"*
>
> *28 It must be remembered, first, that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (see judgment in Case 311/84 CBEM [1985] 3261) and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market (judgment in Case 322/81 Michelin [1983] ECR 3461, paragraph 28).*
>
> *29 Secondly, the simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty (see Case 311/84 CBEM, above, paragraph 17). A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.*

A dominant position exists when the dominant enterprise is able to use its economic power to obtain benefits or to practice behavior which it could not obtain or practice in conditions of reasonably effective competition, i.e., dominant power is power of which unfair advantage can be taken, or power which is great enough to be “abused”. This

principle also implies a link between the concept of dominance and concept abuse. It is the ability to contain competition, not the ability to ignore it, which is characteristic of dominance. Dominant firms can overcome competition, but very few of them can disregard it. The power to plan and choose a controlled response to competitors' efforts, sufficient to ensure no significant long term loss of market share, is typical of dominant firms. As market leader a dominant is often able to adopt a strategy advantageous to itself and disadvantageous for the rest of the industry, without using overtly exclusionary practices, which will maintain its market in spite of its market in spite of some competition. Such a strategy may be adopted on the dominant firm's own initiative or in response to competitors' actions. Since dominance does not mean absence of competition, or even absence of effective competition, clearly it does not mean absence of competition. It follows that dominance can exist even if the dominant firm is compelled to react to its competitors' activities. (Lang 1973, p.9)

4.2.3 Legal Definition of Dominant Position

To fully understand the idea of a dominant position and its abuse, as discussed in Article 82 of the EC Treaty, the idea of a dominant position and its abuse must be viewed in the context of its application and definition in ECJ case law. Therefore, the discussion that follows will provide a case law context in which to understand the application of Article 82 with respect to the case law development of the following three issues: a) What constitutes a dominant position?; b) What factors are relevant in assessing the existence of a dominant position?; and b) What type of conduct will be deemed an abuse of a dominant position?

The ECJ has determined that the "dominant position" referred to in Article 82 describes "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition [from] being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." The primary feature of a dominant position is an undertaking's ability to take actions without having to consider its competitors' undertakings in the market with respect to its market strategy and without "suffering

any detrimental effects from such [independent] behavior." A dominant position does not mean that an undertaking deemed to be in a dominant position has no competitors; it simply means that an undertaking is in a position to have an "appreciable influence on the conditions" under which conduct in the relevant market will develop and to act largely in disregard of its competition "so long as such conduct does not operate to its detriment." It is not illegal for an undertaking to have a dominant position; however, where a firm is found to be in a dominant position it "has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market."

According to the ECJ, there are two primary factors involved in assessing the existence of a dominant position. The first factor is a determination of the relevant market and the competitive conditions of supply and demand and interchangeability of products in that market. This determination allows for, and must include, an analysis of the totality and interchangeability of products in the relevant market. The second factor is the relationship between the market shares of undertakings in the relevant market. This factor allows for a determination of a particular undertaking's competitive strength both in general and with respect to its next largest competitor. Many of the ECJ decisions involving Article 82 demonstrate that the ECJ places a tremendous amount of importance on the existence of a large market share held by one main undertaking in relation to its competitors. In Hoffman-La Roche, where the ECJ considered the issue of whether a vitamin manufacturer had a dominant position in seven relevant vitamin markets, the ECJ stated that "although the importance of market shares may vary from one market to another, the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position." In United Brands, where the ECJ considered whether a large, international banana import/export company (UBC) occupied a dominant position in a specific banana market, the ECJ stated that an undertaking in the relevant market "can only be in a dominant position on the market for a product if [it] has succeeded in winning a large part of this market." The ECJ then illustrated the importance of an undertaking's market share in relation to its next largest competitor in determining the existence of a dominant position. Finally, in Michelin, where the ECJ considered whether Michelin NV occupied a dominant position on the Dutch market for new,

heavy vehicle replacement tires, the ECJ stated that the Commission correctly considered Michelin NV's market share of fifty seven to sixty five percent in comparison to the market share of its next largest competitor of four to eight percent in determining that it had a dominant position in the market for new, heavy vehicle replacement tires.

The ECJ has already applied the two-factor test illustrated above to the airline industry. The first part of the test determining the relevant market and the interchangeability of products on the market in the airline industry involves a determination of whether a "scheduled flight on a particular route can be distinguished from the possible alternatives" because of its specific characteristics which make it "not interchangeable with those alternatives" and cause it only to be minimally affected by competition from them. Furthermore, within the context of the first part of the test, the determination of an airline's market power on a specific route will depend on both its "economic strength" and on the "competitive position of other carriers operating on the same route or on a route capable of serving as a substitute."

In analyzing whether a dominant undertaking has engaged in the abuse of its dominant position, the necessary determination is whether the dominant undertaking has used its position in a manner that allowed it to obtain competitive advantages or benefits that it could not have obtained through "normal and sufficiently effective competition." In general, abusive behavior may be found where a firm in a dominant position strengthens that position to an extent that "substantially obstructs" the competitive ability of competitor undertakings in the relevant market. Within this context, where an undertaking occupies a dominant position, and where that dominant position has already weakened the competitive structure of the relevant market, any additional weakening of the competitive structure on that market may constitute an abuse of a dominant position. Specific abuses that are illustrated in ECJ case law include: tying purchasers to an exclusive distributor, predatory pricing, discriminatory prices, restrictive contract clauses enforced by a dominant competitor, and conditional discounts. (Mcshea 2004, pp.79-82)

Both the Commission and the ECJ have concentrated on the ability of a dominant undertaking to act independently on a market.

4.2.4 Essential Cases Regarding to Article 82

Continental Can Case

In Continental Can case, the Commission described market power in terms of independence and power over price. The ECJ determined that a merger could constitute abusive behavior under Article 82 even though the acquiring firm had not used its dominant position to initiate the merger. (Utton 2003, p.192)

Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position, when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or the control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behavior, even if there are differences in intensity in their influence on the different partial markets.

In Continental Can case, the ECJ stated that:

> *12. The list of abuses contained in article 86 of the treaty is not an exhaustive enumeration of the abuses of a dominant position prohibited by the treaty.*
>
> *Article 86 is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure such as is mentioned in article 3 (f) of the treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially*

fetters competition, i.e., that only undertakings remain in the market whose behavior depends on the dominant one.

If it can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer' s freedom of action in the market, such a case necessarily exists if practically all competition is eliminated.

United Brand Case

In United Brand Case, the ECJ set out a definition of dominant position which it has frequently relied upon in subsequent cases. It held that an undertaking would hold a dominant position where it could prevent effective competition being maintained by virtue of its ability to behave independently of the usual competitive constraints facing an entity operating on a market. In United Brand Case, the ECJ stated that;

1. The opportunities for competition under article 86 of the treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated . for the product to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

2. The dominant position referred to in article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors , customers and ultimately of its consumers . In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.

3. A trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market. However an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position.

In United Brand Case, the ECJ confirmed the Commission's definition of a relevant market as the retail market for the sale of fresh bananas to consumers. It also confirmed that United Brands had a dominant position in respect of its trade with distributors, and

it is the terms of supply to distributors rather than any activity in the retail market as such that were considered abusive. Paragraph 65 of the judgment is often quoted as a characterization of a dominant position: “The dominant position referred to in Article 82 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition in being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”

The main points of law used by the Court to reach its decision on dominant position were as follows:

a- Market share of 40-45 percent does not however permit the conclusion that UBC automatically controls the market. It must be determined having regard to the strength and number of the competitors." (Paragraphs 109-110)

b- An undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position. (Paragraph 113)

c- An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition. (Paragraph 126)

The main facts relied on to confirm United Brands' dominant position were:

United Brands had control of (or easy access to) all its inputs: it is "vertically integrated to a high degree" (paragraph 70) with effective control over all stages of transport and ripening (paragraph 71, paragraphs 78-86), "owns large plantations" (paragraph 72), "can obtain supplies without any difficulties from independent planters" (paragraph 73) and has significant influence over independent planters (paragraph 74), is sufficiently diversified to withstand natural disasters (paragraphs 75-76).

These capabilities have enabled it to develop Chiquita as a trusted must-have brand, thereby placing distributors and ripeners in a degree of dependency. United Brands had "attained a privileged position by making Chiquita the premier banana brand name on the relevant market with the result that the distributor cannot afford not to offer it to the consumer" (paragraph 93).

The robustness of United Brands' business has enabled it to withstand competitive attacks by rivals (paragraph 121). Given the inherent challenges of entry into the market (paragraph 122), this means that new entrants "come up against almost insuperable practical and financial obstacles" (paragraph 123).

Hoffmann – La Roche Case

In Hoffman – La Roche Case, the ECJ emphasized that a position of dominance did not preclude some competition and particularly focused on the ability of the undertaking to influence the conditions of competition occurring on the market.

In Hoffman – La Roche Case, the ECJ stated that:

> *1. Observance of the right to be heard is in all proceedings in which sanctions , in particular fines or penalty payments , may be imposed a fundamental principle of community law which must be respected even if the proceedings in question are administrative proceedings.*
>
> *In the matter of competition and in the context of proceedings for a finding of infringements of articles 85 or 86 of the treaty , observance of the right to be heard requires that the undertakings concerned must have been afforded the opportunity to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the commission in support of its claim that there has been an infringement.*
>
> *2. The obligation on the commission under article 20 (2) of regulation no 17 to observe professional secrecy must be reconciled with the right to be heard . by providing undertakings from whom information has been obtained with a guarantee that their interests, which are closely connected with observance of professional secrecy , are not jeopardized , that provision enables the commission to collect on the widest possible scale the requisite data for the fulfillment of its task of supervision without the undertakings being able to prevent it from doing so ; the commission may not however use , to the detriment of an undertaking in proceedings*

> *for a finding of an infringement of the rules on competition , facts or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking ' s opportunity to make known effectively its views on the truth or implications of those facts or documents or again on the conclusions drawn by the commission from them .*

This is an early case of abuse of a dominant position (Article 82), which is frequently quoted as a characterization of competition law infringements by reference of a "prejudice to consumers".

Hoffmann-La Roche was found to have dominant position on markets for certain vitamins, and to have abused that position by entering into exclusive agreements or agreements containing exclusionary fidelity rebates with purchasers of vitamins.

The judgment (amended to reflect the new numbering of Treaty articles) states that:

> *125. The prohibitions contained in Article 81 and Article 82 must be interpreted and applied in the light of Article 3(1)(g) of the Treaty which provides that the activities of the Community shall include the 'institution of a system ensuring that competition in the common market is not distorted' and Article 2 of the Treaty which gives the Community the task of promoting 'throughout the Community a harmonious development of economic activities'. By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, Article 82 therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(1)(g) of the Treaty.*

The principle that a finding of direct prejudice to consumers is not necessary to find an infringement of EC competition law has been subsequently confirmed in a number of cases, including in the UK in the Burgess case in 2005.

4.3 Dominant Position within a Substantial Part of the Common Market

According to Article 82, the dominant position of the undertaking must be held within the common market or within “a substantial part” of it. The purpose of this requirement is to exclude from the Article’s scope purely localized monopoly situations in which there is no Community interest. Together with the necessity that the abuse of a

dominant position has an effect on trade between Member States, the requirement determines the limit of the Community jurisdiction.

In Suiker Unie Case, the ECJ stated that; for the purpose of determining whether a specific territory is large enough to amount to 'a substantial part of the common market' within the meaning of article 86 of the treaty the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.

Article 86 of the treaty refers in each case to the position occupied by the undertaking concerned on the common market as the time when the latter acted in a way which is alleged to amount to an abuse.

In order to determine in the case of a complaint made against an undertaking under this article whether a specific area is a substantial part of the common market it is therefore only necessary to compare the statistical data relating to this area with the corresponding data relating to the common market as it was when the facts giving rise to these proceedings existed; any subsequent enlargement of the common market cannot be taken into consideration.

If an economic operator adopts a system of loyalty rebates leading to the application of different net prices to two customers who bought the same amount from the said operator if one of them purchased from another producer as well, such a system amounts to 'applying dissimilar conditions to equivalent transactions with other trading parties' within the meaning of article 86(c).

4.4 The Meaning of Abuse

The Article 82 does not forbid the holding of a dominant position, but only an abuse of it. So, the meaning of abuse is crucial. Article 82 gives main examples of type of abusing dominant position.

The definition of abuse is repeated by the Court and the Commission as it was described in Hoffmann – La Roche Case:

> *The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*

In Europemballage Corp and Continental Can Co Inc. v. Commission Case, the ECJ stated that about the view of Article 82:

> *19. The applicants maintain that the commission by its decision, based on an erroneous interpretation of article 86 of the EEC treaty, is trying to introduce a control of mergers of undertakings, thus exceeding its powers. Such an attempt runs contrary to the intention of the authors of the treaty, which is clearly seen not only from a literal interpretation of article 86, but also from a comparison of the EEC treaty and the national legal provisions of the member states. The examples given in article 86 of abuse of a dominant position confirm this conclusion, for they show that the treaty refers only to practices which have effects on the market and are to the detriment of consumers or trade partners. Further, Article 86 reveals that the use of economic power linked with a dominant position can be regarded as an abuse of this position only if it constitutes the means through which the abuse is effected. But structural measures of undertakings - such as strengthening a dominant position by way of merger - do not amount to abuse of this position within the meaning of article 86 of the treaty. The decision contested is, therefore, said to be void as lacking the required legal basis.*
>
> *20. Article 86 (1) of the treaty says "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". The question is whether the word " abuse " in article 86 refers only to practices of undertakings which may directly affect the market and are detrimental to production or sales, to purchasers or consumers, or whether this word refers also to changes in the structure of an undertaking, which lead to competition being seriously disturbed in a substantial part of the common market.*

The judgment clarified that Article 82 did not set out an exhaustive list of prohibited conduct and, on the contrary, it could prohibit a dominant undertaking from merging with another. The finding that the provision might prohibit mergers was crucial to the Commission since it had no direct means of controlling mergers until 1990. Secondly, the ECJ established that the conduct was prohibited irrespective of the fact that the dominant undertaking had not exploited, or otherwise used, its market power in

concluding the merger transaction. Thus anti-competitive conduct which excludes competitors, strengthens the dominant position and weakens competition on the market is within the prohibition. (Jones & Surfin 2004, p.274)

According to J. Temple Lang, "A dominant enterprise may act contrary to Article 82 for any of the following reason: a- if its behavior takes advantage of economic power to obtain benefits or to impose burdens not obtainable or imposable in conditions of normal and reasonable effective competition, at the expense of the interests of customers (or in case of a dominant buyer, of suppliers). These are "exploitative" abuses. b- if its behavior significantly restricts intra-brand competition, or alters the market in such a way that competition is likely to be significantly reduced, or increases or reinforces the dominant firm's economic power. However, normal and legitimate competition is lawful, even if it increases the market share or economic power of the dominant enterprise. These are "anti-competitive" abuses. c- if its behavior is calculated to damage or seriously interfere with the business of another enterprise. If these abuses are to be regarded as a separate category, they can be called reprisal abuses."

In the United Brands Co and United Brands Continental BV v. Commission Case, the ECJ stated that:

> *189. Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.*
>
> *190. Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.*

4.5 Establishing Dominance

It is very important how it is decided whether or not a particular undertaking is dominant. In Hoffmann – La Roche Case, the ECJ stated that:

> *38. Article 86 is an application of the general objective of the activities of the community laid down by article 3 (f) of the treaty namely, the institution of a system ensuring that competition in the common market is not distorted.*
>
> *Article 86 prohibits any abuse by an undertaking of a dominant position in a substantial part of the common market in so far as it may affect trade between member states.*
>
> *The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.*
>
> *39. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.*

In Continental Can Case, the ECJ stressed that dominance, or market power, exists only in relation to a particular market and not in the abstract. It held that "the definition of the relevant market is of essential significance" to the determination of whether or not an undertaking is dominant. In accordance with this judgment the practice of the Commission in ascertaining dominance is, first to identify the relevant market and then to assess the undertaking's position or power on that market. The position on the market is generally determined by looking at the market share of the undertaking concerned and at other factors indicating dominance. (Jones & Surfin 2004, p.297)

4.5.1. Market Power and Market Definition

As with Article 81, to determine the way of applying of Article 82, the market definition is a crucial. Market definition is arguably the most important part of any competition case brought under Article 82. However, it is also one of the most complex areas. If the market is defined too widely then it will contain more firms and substitutable products making a finding of a dominant position for one firm unlikely. Likewise if it is defined too narrowly then there will be a presumption that the defendant company will be found to be dominant. In practice, market definition will be left to economists, rather than lawyers to decide.

The EC Competition law is an essential instrument of single market for each Member State undertakings. It differentiates EC law from any domestic competition law system. Domestic competition law systems concerns about domestic competition policy.

The role of EC competition law advancing the single market is shown in the Regulation No.1475/95. After the regulation, the Competition Commissioner, Mario Monti, said of the new regulation:

> *...The Commission also needs to play its role as an initiator of change where markets do not function satisfactorily in the light of the Treaty objectives. The adoption in July of new exemption regulation for motor vehicle distribution can serve as a concrete example. It is high time we had a genuine single market in cars, for the benefit of consumers but also in the interests of the competitiveness of European industry. A review had clearly shown that the market integration pursued by old regulation applicable to the sector had not been achieved to the extent hoped for, and that consumers were receiving their share of the benefits deriving from the exempted restrictions. Thus, a new system has been put in place to give a fresh boost to market integration, so that consumers can benefit from better prices, wider choice and improved services.*

Also, the Commission's Report on Competition Policy (EC Commission, 1998) illustrates that EC competition policy is concerned both with efficiency and market integration. Sometimes a single market is differentiated as a more advanced form of common market. In comparison to common, a single market envisions more efforts geared towards removing the physical (borders), technical (standards) and fiscal (taxes) barriers among the member states. These barriers obstruct the freedom of movement of the four factors of production.

The market power may be defined as a firm's capacity to profitably raise prices above marginal costs. Firms will be deemed having market power if they are, individually or collectively, able to restrict output, increase prices above the competitive level, and earn monopoly profits. This ends to an inefficient result for society as a whole. A firm that has market power can raise prices without losing sales. Whether or not achiving this end is possible for any given firm will depend on a number of factors: in particular, whether or not if it raises prices consumers will purchase other products instead from elsewhere (what other products exist on the market), the number of other operators, if any, on the market and their respective market shares; the existence of barriers to enter to the

market and the ability of potential competitors to enter the market. Market power arises only in relation to a market. (Jones & Surfin 2004, p.47)

In competition law, the relevant market defines the market in which one or more goods compete. Therefore, the relevant market defines whether two or more products can be considered substitute goods and whether they constitute a particular and separate market for competition analysis.

The relevant market combines the product market and the geographic market, defined as follows.

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

The notion of relevant market is used in order to identify the products and undertakings which are directly competing in a business. Therefore, the relevant market is the market where the competition takes place. The enforcement of the provisions of Competition law would be not possible without referring to the market where competition takes place. The extent to which firms are able to increase their prices above normal competition levels depends on the possibility for consumers to buy substitute goods and the ability for other firms to supply those products. The fewer the substitute products and/or the more difficult it is for other firms to begin to supply the same, the less elastic the demand curve is and the more probable is to find higher prices thus. For all these reasons it is necessary to define the relevant market for each and every different case.

The Relevant market contains all those substitute products and regions which provide a significant competitive constraint on the products and regions of interest. An interesting guiding principle provided by Bishop and Darcey (1995) states that a relevant market is

something worth monopolizing, in the sense that the relevant market includes all the substitute products and therefore control of that market would allow the monopolizer to profitably increase the prices of the products to the monopoly level. This can only be possible if the products in this "market" are not subject to significant competitive constraints by products outside of that market.

The elements to be taken into consideration when defining the relevant geographic market include the nature and characteristics of the concerned products, the existence of entry barriers, consumer preferences, differences among the market shares of undertakings in the neighboring geographic areas, as well as significant differences between suppliers' prices and transport costs level.

Interesting aspects to which competition authorities look at are transport costs, given that high transport costs may explain why trade between two regions is economically infeasible.

Defining relevant market is at outmost importance in finding dominance. It is often difficult to decide which products or services are in the same market. Bishop and Walker explain the importance of the relevant market:

"The definition of the relevant market is merely a tool for aiding the competitive assessment by identifying those substitute products or services which provide an effective constraint on the competitive behavior of the products or services being offered in the market by the parties under investigation. In effect, the relevant market seeks to restrict attention only to those products or services which have a significant impact on competition. As such, the definition of the relevant market represents only intermediate step in the investigation."

The European Court of Justice has recognized the importance of the market definition. The Court has stressed that it is necessary to define the relevant market before a breach of Article 82 of the EC Treaty can be established as the application of that Article

requires the existence of a dominant position in a given market which presupposes that such a market has already been defined.

The Court defines the relevant market in terms of substitutability or interchangeability. It has thus adopted a definition of a relevant market which would accord whit that given by an economist. It describes the market as consisting of products which are interchangeable with each other but not (or only to a limited extent) interchangeable with those outside it. This interchangeability may be with other products or with the same products from elsewhere. The relevant market therefore has both a product aspect (the product market), a geographical aspect (the geographical market), and sometimes a temporal aspect as well. (Jones & Surfin 2004, p.47)

The Court of Justice defines the relevant market in *Europemballage Corp and Continental Can Co Inc v. EC Commission Case (Case 6/72)* as:

> *... The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristic 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 extent interchangeable with other products.*

The Court of Justice also defines the relevant market in *Hoffmann-La Roche Co AG v. EC Commission Case (Case 85/76)* as:

> *... The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as a specific use of such products is concerned.*

In *Netherlandsche Banden – Industrie Michelin v. EC Commission Case (Case 322/81),* The Court of Justice defines the relevant market as:

> *... For the purpose of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.*

In *United Brands v. EC Commission Case (Case 27/76),* The Court of Justice sets out the following definition of the geographic relevant market:

> *The opportunities for competition under Article [82] of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated. ... The conditions for the application of Article [82] to an undertaking in a dominant position presuppose the clear delimitation of the substantial part of the Common Market in which it may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders.*

The Case Law in competition law is so important that many definitions and conclusions in the field of competition can be derived from the jurisdiction of the Court of Justice. In later chapters, these cases will be examined in detail with their effect on competition law improvement period.

When identifying the relevant market, the ECJ has stressed the importance of the notion of interchangeability. Effective competition operates between products which are interchangeable with one another.

In Hoffmann – La Roche Case, the ECJ stated that:

> *if a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may , according to the circumstances, belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition. However this finding does not justify the conclusion that such a product together with all the other products which can replace it as far as concerns the various uses to which it may be put and with which it may compete, forms one single market. The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.*

The United Brand case and the Michelin case are the most important Article 82 Cases with their identification the sufficient degree of interchangeability.

In the United Brands Case, the ECJ stated that:

> *12. As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit.*
>
> *13. The applicant submits in support of its argument that bananas compete with other fresh fruit in the same shops, on the same shelve, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals.*
>
> *14. The statistics produced show that consumer expenditure on the purchase of bananas is at its lowest between June and December when there is a plentiful supply of domestic fresh fruit on the market.*

In the Michelin Case, the ECJ stated that:

> *35. The applicant claims that the definition of the relevant market on which the commission based its decision is too wide, inasmuch as in the eyes of the consumer different types and sizes of tyres for heavy vehicles are not interchangeable, and at the same time too narrow inasmuch as car and van tyres are excluded from it although they occupy similar positions on the market. It further argues that the commission's reasoning in its decision is contradictory in so far as it puts itself alternately in the shoes of the ultimate consumer and in those of the dealer. However, at the level of dealers' total sales, the average proportion of sales of Michelin heavy-vehicle tyres represents only 12 to 18 percent, which rules out the existence of any dominant position.*

In the United Brands case, the ECJ was concerned with the question of whether the banana could be "singled out by such special features distinguishing it from other fruits that it is only to a limited extend interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

In Michelin case, the Commission found that Michelin had committed an abuse of a dominant position on the market for new replacement tyres for lorries, buses, and similar vehicles. Michelin claimed that the Commission's definition of the market was narrow and arbitrary and that Michelin did not hold a dominant position on the wider tyre market. Michelin also challenged the definition of the geographic market as being the Netherlands. The ECJ had to determine whether or not the Commission had correctly defined the market. In considering this question a number of facts had to be

taken into account; that lorries and buses need larger tyres that cars and vans; that there are different size of lorry and bus manufactures and to dealers who fit tyres on lorries and buses as replacement; and that tyre dealers also fit retreated or remolded tyres to vehicles whose owners do not want new replacement tyres. (Jones & Surfin 2004, pp.301-303)

The introduction of the SSNIP test in the US Department of Justice 1982 Merger Guidelines resulted in the development of new methods for defining markets and for measuring market power directly. The EU Commission has adopted the SSNIP formulation in its Notice on Market Definition.

The SSNIP test seeks to identify the smallest market within which a hypothetical monopolist or cartel could impose a small but significant non-transitory increase in price and defines this as the relevant market. Effectively it asks whether such a monopolist or cartel could sustain a price increase of five percent for at least one year on a *ceteris paribus* assumption that 'the terms of sale of all other products are held constant'. If sufficient numbers of consumers are likely to switch to alternative products as to make the price increase unprofitable, then the firm or cartel lacks the power to raise price. The relevant market therefore needs to be expanded. The next closest substitute is added and the process is repeated until the point is reached where a hypothetical cartel or monopolist could profitably impose a five percent price increase. The range of products or the geographic area so defined constitutes the relevant market.

4.5.2 The Product Market

As we seen from the above part, the purpose of defining the relevant market is to identify those products and services that are such close substitutes for one another that they operate as a competitive constrain on the behavior of the suppliers of those respective products and services. The relevant market has both a product market and a geographical aspect. (Jones & Surfin 2004, p.298)

The term ‘product’ and ‘product market’ may not always refer to the same thing. While determination of the product market commences with the product, it often exceeds the confines of the product and includes a range of other goods. In the Notice on Relevant Market, the Commission defined a relevant product market as one that “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”

We can also derive the definition of relevant product market from the European Court of Justice case law. For example, the United Brands Case discusses if the relevant product is banana or fresh fruit.

> *“As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit.”*

The basis of reasonable interchangeably standard is the views of consumers. In considering these, the Court of Justice noted that the banana was a particularly unique fruit for certain segments of the population – babies, old people and the sick, all of whom might struggle to sink their teeth into a hard apple or peel an orange. In summary, while economic evidence appears to offer an objective set of data to determine the relevant product market, the information can be ambiguous and subject to different interpretation. (Chalmers & others 2006, p.1030)

4.5.3 The Geographic Market

The Case law of the Court indicates that the geographic market will encompass all areas in which the conditions of competition are sufficiently homogenous. In United Brand case, the ECJ held that “the opportunities for competition under Article 82 of the Treaty must be considered … with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently

homogenous for the effect of the economic power of the undertaking concerned to be able to be evaluated". Thus, "the objective conditions of competition applying to the product in question must be same for all traders". In that case France, Italy and the UK were excluded from the consideration of the banana market because they had special arrangements with their former colonies. In Deutsche Bahn Case, the CFI held that "the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogenous. It is sufficient if they are similar of sufficiently homogenous and accordingly, only areas in which the objective conditions of competition are heterogenous may not be considered to constitute a uniform market. (Jones & Surfin 2004, p.326)

According to Sir Leon Brittan, market power makes no sense whatsoever as a concept unless a market is first defined, both in product or service terms and in geographical terms. Geography here is not political, it is economic. For some products or services, there is a Community market; for others, there are still markets covering one or more Member States. There are even world markets for some products or services.

Where necessary, therefore, the "substantial part" requirement of Article 82 is not to be assessed on a simple geographic basis, but in terms of an area which is important enough in an economic sense (in product or service terms) to fulfill the requirement. In Suiket Unie (Sugar) case, there was a significant volume of business in sugar in Belgium and Luxembourg, the area in which wrongful economic pressure had been brought to bear on Belgian dealers.

4.5.4 Substitutability

Substitutability of the products plays a significant role in determining whether two or more products are part of the same product market. The first stage in determining whether an undertaking is dominant is to determine the relevant product market, based on the interchangeability and substitutability of products. Where products are regarded as interchangeable or substitutable from a consumer's standpoint, they are considered to belong to the same product market. Interchangeability is measured on the basis of the

intended use of the products, the price of the products and their physical characteristics. Once the relevant product market is defined, the relevant geographical market can be analyzed.

As we explained above, the relevant market depends on the determination of which products in which areas are substitutes for one another. If a product has perfect substitutes the sole producers of such a product has no market power, because if that supplier tries to exploit his monopoly by raising the price, his customers will turn to the substitutes. There are two aspects to substitutability: Demand substitution is concerned with the ability of users of the product to switch to substitute products. Supply substitution is concerned with the ability of producers of similar products to produce the product. When determining the relevant market both demand and supply substitutability have to be considered. (Jones & Surfin 2001, p.65)

4.5.5 Market Share

If an undertaking has a statutory monopoly over a relevant market, that is the end of the matter. It is in a dominant position. In the absence of statutory monopoly the Court and Commission begin the assessment of market power by looking at market shares. The calculation of market shares is dealt with in the Commission's Notice on market definition which explains that in some industries sales figures may not be the most appropriate basis for calculation.

Market shares are used as a preliminary filter to determine whether there is dominance. Their significance was explored in Hoffmann – La Roche Case. The Commission found that Roche held a dominant position in a number of vitamin markets and had abused it by entering into distribution contracts that granted purchasers fidelity rebates if they bought their vitamin requirements exclusively or almost exclusively from Roche, thereby excluding other vitamin suppliers. The Court of Justice confirmed that Roche was dominant in the vitamin markets and that its commercial practices constituted an abuse. (Chalmers & others 2006, p.1042)

The ECJ stated that in Hoffmann – La Roche Case:

> *(A) The vitamin A group*
>
> *50. The parties both concede that Roche's market share within the common market may be put at 47 percent both as to value and quantity.*
>
> *According to the data produced by the Commission, which Roche does not dispute, the shares of the other producers in 1974 may be put at 27 percent, 18 percent , 7 percent, and 1 percent.*
>
> *51. Since the relevant market thus has the particular features of a narrow oligopolistic market in which the degree of competition by its very nature has already been weakened, Roche's share, which is equal to the aggregate of the shares of its two next largest competitors, proves that it is entirely free to decide what attitude to adopt when confronted by competition.*
>
> *Roche's technical lead over its competitors due to the fact that it is the proprietor of several patents relating to vitamin a , even after the expiration of these patents , is a further indication that it occupies a dominant position.*
>
> *As has been indicated above the same applies to the absence of potential competition from new manufacturers, whereas the competition derived from the surplus manufacturing capacity of existing undertakings rather favors Roche as is apparent from an extract from management information of the middle of august 1971 which reads "Although BASF will continue to intensify its activities, we expect to achieve a further steady increase of our turnover. However, the present overcapacity of production is such that a fixing of prices cannot be expected for the next few years. Such a development would, of course, be accelerated if one of our smaller competitors ceased production".*
>
> *52. Therefore the Commission was right to find that the applicant occupies a dominant position on the market in vitamin A.*

According to the judgment of Hoffmann – La Roche Case:

i. 75-87 per cent were found to be so large that they are in themselves evidence of a dominant position;

ii. 84-90 percent were "so large that they prove the existence of a dominant position;

iii. 93-100 per cent had the result that it in fact has a monopoly.

When considering market shares of the undertaking concerned, it is also important to consider the market shares of competitors. The market power of an undertaking with a market share of 51 per cent will be considerably different depending on whether, for example, it is simply has one competitor with a 49 per cent share of the market, three competitors which have 16, 16 and 17 per cent of the market respectively or forty-nine competitors each with 1 per cent of the market. The differentials in market share are extremely important. A market where there are two undertakings, A with 51 per cent and B with 49 per cent, is an oligopoly. It is not dominated by A alone, although there may be a position of collective dominance with B.

4.5.6 Pricing Policies

Many of cases and decisions on Article 82 concern the pricing policies of dominant firms. One of the most serious consequences of a firm being found to be in a dominant position is that its pricing policies may be condemned as abusive.

Article 82 (a) specifically prohibits the imposition of "unfair purchase or selling prices". So, unfairly high or low pricing is the one way of abusing of dominant position.

Predatory pricing is the practice whereby an undertaking prices its product so low that competitors cannot live with the price and are driven from the market. Once the competitors are excluded from the market the undertaking is able to increase prices to monopoly levels and recoup its losses.

The Court has decided AKZO had been guilty of predatory pricing:

> *46. Assuming that the organic peroxides market must be taken to be the relevant market, AKZO further criticizes the Commission for failing to carry out a thorough investigation on that market. Firstly, it did not analyze the alleged offers of AKZO at predatory prices in that sector, despite the fact that many of ECS's accusations related to such offers. Secondly, the Commission did not ascertain whether AKZO's position in the sector had been strengthened by reason of its behavior in relation to flour additives.*

> *66. AKZO disputes the relevance of the criterion of lawfulness adopted by the Commission, which it regards as nebulous or at least inapplicable. It maintains that the Commission should have adopted an objective criterion based on its costs.*
>
> *67. In that respect, it states that the question of the lawfulness of a particular level of prices cannot be separated from the specific market situation in which the prices were fixed. There is no abuse if the dominant undertaking endeavours to obtain an optimum selling-price and a positive coverage margin. A price is optimum if the undertaking may reasonably expect that the offer of another price or the absence of a price would produce a less favourable operating profit in the short term. Furthermore, a coverage margin is positive if the value of the order exceeds the sum of the variable costs.*

Selective low pricing is another way of abusing of a dominant position. The essential factor in these cases where selective low prices have been held abusive is that the prices did not involve the dominant undertakings in making losses. The crucial question is whether it is possible to identify when selective price-cutting constitutes an abuse. This affects the extent to which dominant undertakings may defend themselves against competition rather than act to increase their dominance. The first relevant case on this matter is Eurofix - Bauco. In this case the Commission found that the dominant undertaking, Hilti, had lowered its prices in order to tie customers for its nail guns into buying its consumables also. (Jones & Surfin 2004, p.404)

4.6 Barriers to Entry

Barriers to entry are designed to block potential entrants from entering a market profitably. They seek to protect the monopoly power of existing (incumbent) firms in an industry and therefore maintain supernormal (monopoly) profits in the long run. Barriers to entry have the effect of making a market less contestable.

The economist Joseph Stigler defined an entry barrier as "A cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry"

This emphasizes the asymmetry in costs between the incumbent firm (already inside the market) and the potential entrant. If the existing businesses have managed to exploit some of the economies of scale that are available to firms in a particular industry, they

have developed a cost advantage over potential entrants. They might use this advantage to cut prices if and when new suppliers enter the market, moving away from short run profit maximization objectives - but designed to inflict losses on new firms and protect their market position in the long run.

Barriers to entry are very important because they are relevant every kind of competition infringement. It is necessary to consider entry barriers when accessing dominance, when determining whether unilateral conduct might deter new firms from participating in a market, and when analyzing the likely competitive effects of mergers, to name a few examples.

Most significant, entry barriers may retard, dampen, or nullify the market's usual mechanism for checking market power: the attraction and arrival of new competitors. If a merger will substantially increase concentration to the point where a competition agency is concerned about anticompetitive effects, for example, entry barriers matter because competition will not be reduced if new firms would enter easily, quickly and significantly. Consequently, agencies seeking to block a merger will usually need to show that entry barriers make quick, usually necessary to prove that a high market share translates into market power in monopolization or abuse of dominance cases. Arguments among economists over how to define barriers to entry began decades ago, however, yet to be settled. In general, the term means an impediment that makes it more difficult for a firm to enter a market.

A controversy has persisted, though, about the types of impediments that should qualify as "barriers to entry". Some scholars and practitioners have argued that an obstacle does not count as an entry barrier unless it is something that the incumbent firms did not face when they entered. Others contend that an entry barrier is anything that hinders entry and has the effect of reducing or limiting competition, regardless of its other characteristics. A number of other definitions have been proposed over the years, but so far none of them has emerged as a clear favorite, at least not among economists. (OECD – Organization for Economic Co-Operation and Development 2005, p.9)

The essential examples of “barriers to entry” are those: Patents (Giving the firm the legal protection to produce a patented product for a number of years), Limit Pricing (Firms may adopt predatory pricing policies by lowering prices to a level that would force any new entrants to operate at a loss), Cost Advantages (Lower costs, perhaps through experience of being in the market for some time, allows the existing monopolist to cut prices and win price wars), Advertising and Marketing (Developing consumer loyalty by establishing branded products can make successful entry into the market by new firms much more expensive.

This is particularly important in markets such as cosmetics, confectionery and the motor car industry), Research and Development Expenditure (Heavy spending on research and development can act as a strong deterrent to potential entrants to an industry. Clearly much R&D spending goes on developing new products but there are also important spill-over effects which allow firms to improve their production processes and reduce unit costs. This makes the existing firms more competitive in the market and gives them a structural advantage over potential rival firms), Presence of Sunk Costs (Some industries have very high start-up costs or a high ratio of fixed to variable costs. Some of these costs might be unrecoverable if an entrant opts to leave the market. This acts as a disincentive to enter the industry), International Trade Restrictions (Trade restrictions such as tariffs and quotas should also be considered as a barrier to the entry of international competition in protected domestic markets), Sunk Costs (Sunk Costs are costs that cannot be recovered if a businesses decides to leave an industry.

Examples include: “Capital inputs that are specific to a particular industry and which have little or no resale value " Money spent on advertising / marketing / research which cannot be carried forward into another market or industry When sunk costs are high, a market becomes less contestable. High sunk costs (including exit costs) act as a barrier to entry of new firms which risk making huge losses if they decide to leave a market)

A good example of substantial sunk costs occurred in 2001 when British Telecom announced it was scrapping its loss-making joint venture with US telecoms firm AT&T. The closure was estimated to lead to the loss of 2,300 jobs - almost forty percent of

Concert's workforce. And, it will cost BT $2bn (£1.4bn) in impairment charges and restructuring costs, and AT&T $5.3bn.

ABUSE OF A DOMINANT POSITION IN TURKISH COMPETITION LAW

Turkish Competition Law follows European Union's lead on competition. The main legal fundamental of Turkish Competition Law is the Article 167 of the Constitution of dated 1982. The Article 167 states that:

> *The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.*
>
> *In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce or lift additional financial impositions on imports, exports and other foreign transactions in addition to tax and similar impositions.*

The other main requirement of Turkish Competition Law is the requirements arising from Customs Union process of Turkey with the European Union. According to the Customs Union Turkey has the obligation to enact a competition law in compliance with the competition rules of the EC and to establish a well-functioning Competition Authority with financial and administrative authority. Legislation and some Competition Authority decisions will be determined in this chapter.

5.1. Legislation and Practice

Turkish competition law is regulated by "The Act on the Protection of Competition." This act contains articles similar to those of the EC Treaty. The purpose of the Turkish Competition Law is set out in the Article 1 of the Act number 4054:

> *The purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end.*

The aim of the Act is to prevent agreements, decisions and practices that destroy or restrict competition, to prevent the abuse of dominant position, to control concentrations and to preserve competition by preparing secondary legislation.

The Act covers freedom to trade, entrance into relevant markets and productivity as well as the effective distribution of the country's resources through privatization. There are now eight communiqués in force as secondary legislation, mainly regarding the areas of mergers and acquisitions, vertical agreements, research and development, administrative fines and privatization. (Erdem, 2006)

Turkish competition law concerns four principal subjects;

i. Prohibition of agreements, concerted practices and decisions restricting competition (Act article 4) and exemptions (Act article 5),

ii. Prohibition of the abuse of a dominant position (Act article 6),

iii. Mergers and acquisitions (Act article 7),

iv. Privatization (Communiqué no: 1998/4 and 1998/5).

Law enforcement procedures can be triggered by a complaint or at the Competition Board's own initiative. The Competition Authority has broad investigative powers, including powers to search corporate premises based on a court order.

The abuse of a dominant position is set out in the Article 6 of Act number 4054.

> *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"

There is no provision on the essential facilities doctrine in this act but the doctrine is applied by the so-called 'Competition Board.' The conditions for applying the doctrine may be articulated as follows:

i. The undertaking which controls the facility must be in a dominant position.

ii. There must be no alternative to the facility (no duplication).

iii. The undertaking controlling the facility must reject the request of the plaintiff to access the facility.

iv. There must be valid business justification to refuse the access.

The doctrine is assessed under Article 6 of the above-mentioned act which regulates the "abuse of a dominant position." It is mostly applied in cases of 'refusal to deal' conduct which is a subset of exclusionary conduct under Turkish competition law. However,

some commentators recognize the doctrine as an independent circumstance under abuse of dominant position.

In parallel with EU law, Turkish Competition law also prohibits abuse of dominant position by violating the rights of other actors and consumers. However, being in dominant position is not prohibited. An undertaking can be in a dominant position by its market size, technological dominance, high productivity or good quality products.

5.2 Turkish Competition Authority

The Competition Authority is the competent governmental body in the area and has an autonomous statue. The Authority began operations in 1997. Although, at that time there was not much experience of competition policy and law in Turkey, Competition Authority made a good start and continues to make progress by developing a reputation as one of the Turkey's most effective autonomous agencies, winning respect and support from the business community and establishing a competition culture through its publications, investigations, decisions and competition advocacy.

Competition Authority, since its establishment, has carried out lots of activities in the area of international relations. On one hand the Authority maintains the relations between EU; on the other hand it has an active role in international platforms such as OECD, UNCTAD, WTO, ICN and ECN. In OECD Competition Committee Global Forum on Competition, held on February 17, 2005, “Review of Turkish Competition Law and Policy” was opened to discussion and the report, in which Turkey volunteered to be supervised in a sense, was announced in a press conference on September 19, 2005. 5th Conference to review the set of competition rules agreed by the members, which is organized by UNCTAD every five years, was hosted by Turkey in Antalya in 2005.

The Competition Act vests the Competition Authority's decision-making competence in the Competition Board formed of seven members, which is the executive body of the

Competition Authority. Board members serve for a term of six years. The Competition Board's decisions can be considered as semi-judicial decisions granted by an administrative body. This status is similar to that of the European Commission. Thus, these decisions are subject to the appeal procedure before the State Council which is the supreme administrative court. In practice many Competition Board decisions are appealed before the State Council. Thus, in 2004 a special chamber was created in the State Council to deal with appeals against Competition Board decisions so as to gain specialist knowledge and to cope with the volume of case.

5.3 Some Leading Case on Dominant Position

i. Roche Preparations Inc. (30.10.2008, 08-61/996-338)

As a result of the reexamination of the complaints that Roche Preparations Inc. abused its dominant position by preventing warehouses other than Beşer Pharmaceutical Warehouse from entering the tenders of SSK (Social Insurance Institution) as concerns biotechnology products, had practices such as market sharing, price setting and discrimination between warehouses, and acted in contradiction with the national competition legislation in the tenders, after the Council of State Chamber No. 13 took a decision on 31.3.2008 to repeal the Board Decision taken on 4.5.2006 as a result of the evaluation of various complaint letters received about Roche Müstahzarları A.Ş., it has been decided; that all of the claims directed against Roche Müstahzarları A.Ş. are the same as those which have been decided upon by the previous Board decisions, and the petitions and the annexes including the report of the Prime Ministry Inspection Board, the internal audit reports of Roche, minutes of court and police testimonies as well as various news items and comments published by press agencies and other documents contain no new evidence which would require the Competition Board decisions to be re-taken up.

Prof. Dr. Ercüment Erdem has interpreted the case as follow;

“In the complaints against Roche, it was alleged that Roche was preventing the pharmaceutical warehouses other then Beser Ecza Deposu (hereinafter referred to as "Beser") from entering into the Social Security Institutions (hereinafter referred to as "SSI") tenders on the biotech goods and was further violating the competition legislation by partitioning the market, fixing prices and discriminating between the pharmaceutical warehouses.

In the evaluation of the file, CB decided that all the allegations in this case had been dealt within previous decisions of CB and there is no new evidence to be evaluated. Therefore, CB rejected the complaints by majority of votes. The Vice-President of the CB stated in his dissenting opinion that the annulment decision of the 13th Chamber of the State Council numbered 31.03.2008 had been appealed. CB should have first awaited the outcome of the said appeal before concluding any decision and should have considered and discussed the merits of the appeal award in its final decision.

Although this decision was taken by CB after detailed investigations in the relevant market by taking into consideration the unique features of the market, competitors and products, it is not possible not to agree with the dissenting opinion of the CB's Vice-President, in order to (i) achieve the coherent decisions at different decision making levels, (ii) not to cause any vagueness on the dependability of the CB's decisions and (ii) prevent any further time prolongations.” (Prof. Dr. Ercüment Erdem, e-Competitions, N° 23818 www.concurrences.com Page ¾)

ii. Belko Coal Inc. (06.04.2001, 01-17/150-39)

The decision regards the abuse of dominant position by Belko, a subsidiary of the Ankara Municipality. Belko had the exclusivity to distribute coal in Ankara. Thus, it was selling the coal for sixty percent to seventy percent more than the coal sold in other cities. The Competition Board has annulled Belko's exclusivity and pronounced a fine on the company. This decision immediately showed the affirmative effects on competition by causing coal prices in Ankara to fall.

iii. The BBD - Biryay - Yaysat (14.12.2000, 00-49/529-291)

The BBD and Biryay and Yaysat decision is also a landmark. These companies were in a dominant position in the newspaper and magazine distribution market. They had forced their agents to not sell newspapers and magazines distributed by other undertakings. The Competition Board has assessed this prohibition as an abuse of dominant position. (Erdem 2006, IFLR)

iv. Armada Computer - Novell Italy (18.09.2008, 08- 54/852-340)

Competition Board Decision no 05–79/1099–316, dated 24.11.2005, which was taken based on the claim that Armada Computers Industry and Trade Inc., together with Novell Italy and Novell Inc. (USA), violated Act no 4054 by preventing parallel imports of Beyaz Communications Systems Foreign Trade and Industry Ltd. and abusing their dominant position, was annulled as a result of the suit filed by Beyaz with the Decision no 2006/2047 E., 2007/7581 K. of the 13th Chamber of the Council of State, dated 20.11.2007. In the reevaluation of the case conducted due to this finding, it was decided That Armada did not hold dominant position within the relevant product market, that sufficient information and documents suggesting an oral agreement between Armada and Novell Italy Office aimed at preventing parallel imports could not be gathered, and that therefore there was no behavior in violation of the provisions of the Act no 4054 on the Protection of Competition.

5.4 Abuse of Dominant Position in Turkish Petroleum Market

The Turkish petroleum market has two sections, refining and distributing. Firstly, the historical background and the structure of Turkish petroleum market will be examined and then the dominant position in the refining and distributing will be analised respectively.

The European Coal and Steel Community was founded in 1951 by France, Germany, Italy, Belgium, the Netherlands and Luxemburg to pool the steel and coal resources of its member state's. Steel and coal were the basic and fundamental energy sources at that time. Robert Schuman and Monnet, in the knowledge of that, tried to establish a common energy market to stop wars and disputes between the states.

In the course of time, the importance of energy sources has increased. By the day, the most important energy sources have changed from steel and coal to petroleum, gas, electricity and atomic energy. Notwithstanding the role of the EU has increased in the energy sector in the world. The European Union is a key actor on the international energy market as the largest importer and as the second largest consumer in the world. The European Union is, however, dependent on imports for half of its supplies, while this dependence could even reach 70% by the year 2030, under current projections and policy. That shows that global demand for energy is increasing.

When we look at the history of the EU and the last situation, we can show that the European Union calls for various measures in the energy sector which should aim at a more stable flow of energy, ultimately underpinning the Union's efforts to ensure peace, stability, security and prosperity.

Turkey, after the World War II, could not be able to keep up with the improvements in energy sector in the world. Although Turkey has had many energy sources diversity, with the demands increasing, it could not be possible to use them effectively except coal. The coal has been the most important energy sources for Turkey from heating to transportation. It comes amazing to nationals why Turkey does not have petroleum and gas discovery although the reach petroleum resources in the south, east and northeast of Turkey. In recent years, Turkey has been increasingly made effort on this sector with the new legislation in the field of petroleum and gas discovery.

The period of negotiating for EU membership, Turkey has regulated many legislation, regulation and directives. One of the most important improvements was the establishment of "Energy Market Regulatory Authority" in 2001 with the enactment of

the Electricity Market Law as an administratively and financially autonomous public institution. EMRA is related with the Ministry of Energy and Natural Resources. EMRA is currently responsible for the regulation of Electricity, Natural Gas, Petroleum and LPG Markets. EMRA's objective is to establish a sustainable liberal energy market that is financially sound, stable and transparent, operating in a competitive environment to ensure the delivery of sufficient continuous and reliable energy of high quality to consumers, at competitive prices. EMRA's decision-making body is the Board, comprising of 9 members including the President and the Vice-President. The president of the Board is also the president of the Authority.

The EMRA has started to work effectively in recent years to regulate the sector in Turkey. After the completion of legislation acts, the punishment system has been introduced and the changes have started in Turkey with these improvements.

EMRA had been established as per Law no. 4628 and it was later renamed as Energy Market Regulatory Authority as per the provisions of Natural Gas Market Law no. 4646. With the enactment of the Petroleum Market Law no. 5015 and Liquefied Petroleum Gas (LPG) Market Law no. 5307, the Authority has been commissioned to regulate and supervise the petroleum and LPG markets. Members of the Energy Market Regulatory Board assumed duty on November 19, 2001.

The Turkish national energy system is developed in accordance with the EU Energy Law system. Also globalization, privatization, efficiency and authorization are those major topics that national authority EMRA is dealing with. Institutional and legal framework for the organization of the energy sector in Turkey follows on the EC model. In particular, the recent improvements and dangers, climate changes, exhaustion of energy sources and common demands call new remedies in the field of energy market in Turkey.

In consideration of the current structural administration of the EU Turkish petroleum sector is disciplined in structure and administration by the establishment of EPDK. In this context, 5015 numbered and 20.12.2003 dated Petroleum Market Act became

effective after being published in the 25322 numbered Official Gazette. The purpose of the Act, which is set forth in the first Article, is as follows:

> *Article 1. The objective of this Law is to regulate the guidance, surveillance and supervision activities in order to ensure the transparent, non-discriminatory and stable performance of market activities pertaining to the delivery of petroleum supplied from domestic and foreign resources to consumers, directly or after processing, in a reliable, cost-effective manner within a competitive environment.*

This Law covers the regulation, guidance, surveillance and supervision procedures to ensure and improve the sound and regular operation of the markets pertaining to petroleum.

Authority and duty to ensure that the aims cited under the Act are achieved is granted to the EPDK. Moreover, various responsibilities is regulated against the players in the sector. Formation of the Turkish fuel market illustrates a vertical formation. Refinery, sonar distributers, dealers who buys from the distributers and the end-buyers/consumers are the part of the chain.

According to the Law No. 5015, refining undertaking is a capital company which has been granted the right to perform refining and petroleum trade activities due to its license. The distribution undertaking is a capital company authorized to distribute liquid fuel and may perform storage, transportation, bunker and lube oil production activities provided that they are included in their licenses, A vendor is real or legal people having the necessary equipment to perform vendor activities. And consumer is real or legal persons utilizing petroleum,

Refinery companies acting in petroleum market are those that are belonged to ATAŞ and TÜPRAŞ. ATAŞ refinery ceased its refining activities with a decision taken on 01.09.2004 and started to only act in the filed of petroleum storing. As of this date, TÜPRAŞ remained as the sole entity that offers refinery services in the sector. The fact that TÜPRAŞ is in a dominant position in the sector is denoted by the Competition Authority and this will be analysed later in this thesis. Hence, Competition Authority

closely monitors whether TÜPRAŞ misuse its advantages created by its dominant position.

At first glance a more competitive market structure is seen in distribution. There are almost 50 companies in fuel distribution sector. However, %90 market share owned by only 5 distributers amongst 50 companies makes one to naturally incline to think about an oligopolistic market structure. Reports prepared by Competition Authority denotes that this position in market shares for distribution remains unchanged for a long period of time and this creates important problems in terms of competition law.

Retailers entitle to act in the market after acquiring a licence provided that they fulfil all necessary provisions laid down under the Act. Subsequent to signing an exclusive purchase agreement with a distributor, it is only then they may use this right to act in the market. It is mandatory that the retailers purchase fuel solely from their distributor company of which the retailer is an agent. This is a result of the need and aim to discipline the sector, to prevent illegal fuel sales, and does not create a case against competition law as it emanates from the Act.

It has been studied in this paper above that identifying relevant geographical and product markets are primarily important in order to find a dominant position. Relevant geographical market in fuel sector is identified as Turkey. In a decision of Competition Authority the reason to identify the relevant geographical market as whole Turkey is explained as the ability to transport fuel – which is either purchased from 5 main refineries (TÜPRAŞ İzmit, Aliağa, Kırıkkale, Batman and ATAŞ Mersin) or imported - to retailers across the country after being stored in proper fuel tanks and the disadvantage to purchase from another refinery as this increase freight costs.

Relevant product market is defined by the Competition Authority. Accordingly, Product market covers the goods or services which are the subject of the agreement, and the goods or services considered, in terms of the purchaser, to be interchangeable with or substitutable for them as to their product characteristics, prices and intended uses.

According to 5015 numbered Petroleum Market Act, definition of petroleum includes all types of petroleum such as naphtha, paraffin, jet fuel, and types of crude petroleum, types of fuel oil and other products determined by the Authority. In this regard, petroleum market is partitioned into smaller markets within itself. Therefore, identifying a dominant position within petroleum market requests an analysis in accordance with the relevant market, which is determined according to the merits of every single case. Following evaluation appears in a decision of Competition Authority:

> *Petroleum products industry has an integrated structure which starts with storing crude oil in refinery tanks and refining the product, and ends with delivering the goods to the consumer by distributor companies. While prospecting for and extracting oil is accepted as upper market, refinery, distribution, and marketing is described as sub-market.*

Refining is the production phase which affects crude oil into end-product as per above decision. Distribution; however, is the activity of delivering to consumers end-products through distribution network, which is composed of retailers either directly from refineries or from storage facilities. On this account, refining sector and distribution activities are regarded as different markets. (Aslan, İ; Enerji Hukuku, 2008)

It is seen under the decisions of Competition Authority that the Authority defines the relevant product market according to the product against which there are complaints. Sales and marketing structure for that very product is analyzed, and relevant market, particular to that product is found.

5.4.1 Dominant Position in Refining (TÜPRAŞ)

As it has previously been mentioned in this thesis, subsequent to closure of ATAŞ, TÜPRAŞ remained as the sole refining company in the market. Market share of TÜPRAŞ has increased to %100 while it was previously %85. Moreover, Competition Authority decided that TÜPRAŞ is in a dominant position. Petroleum Market Act cleared obstacles for importing fuel by the distributor companies. Hence, substitute of products sold by TÜPRAŞ in Turkey is products imported by distribution companies. Nonetheless, relying on the statistics of total amount of fuel sold by distributor

companies to their retailers, it can be said that only %30 of total fuel is imported and %70 is still purchased from Tüpraş. Consequently, TÜPRAŞ is in a dominant position in Turkish Market both in refining and also in sales of all types of fuel to distributors.

In 16.04.2002 dated decision, based on a complaint against TÜPRAŞ, Competition Authority not only decided that the said company is in a dominant position but also made a market analysis. Accordingly, as of the date of the decision, TÜPRAŞ, a state economic enterprise then, had a market share of %86 and the remaining market share of %14 belonged to Mersin province based refinery company, ATAŞ.

During the efforts of liberalizing petroleum market, government decided to privatized TÜPRAŞ. After a few failed attempts, state owned shares of TÜPRAŞ was sold to Koç – Shell joint venture. An application requesting permission for this sale was made to Completion Authority and the Authority conditionally permitted the privatization and acquisition (Turkish Petroleum Refineries Corporation, 21 October 2005, No. 05-71/981- 270).

The Competition Board decided that the acquisition of TUPRAS by a joint venture group that already owned operations in the relevant markets and the affected markets would strengthen the existing dominant position of TUPRAS in the refining market. However, the Competition Board permitted the transaction on the condition that LPG distribution firms' access to LPG infrastructure in the Izmir refinery should be allowed for three years for direct imports, in addition to the practice based on the current protocol signed between TUPRAS and LPG distribution firms enabling such distribution firms to make purchases from imports by TUPRAS. Under these circumstances, the Competition Board concluded that no significant distortion of competition would arise, though the dominance would be strengthened.

Following evaluation is made under the decision given by the Competition Authority:

> *Two main issues draw attention regarding mergers & acquisitions prohibited by Section. 7 of the Act:*

-tend to create dominant position or strengthen existing dominant position

-result in significant decrease in competition

Competition Authority has always evaluated permissions for privatization regarding acquisitions over above-mentioned two main components.

Competition Authority analyzed acquisition of Tüpraş by Koç particularly under two different products: Petroleum and Liquid Petroleum Gas (LPG). This was mandatory as in petroleum distribution OPET and in LPG distribution AYGAZ was market leaders. It is clear that separate legal personalities of these two companies - which are under the paternal umbrella of Koç Holding – are ignored in competition law.

In consideration with current storage and export conditions Competition Authority has decided that, albeit this acquisition would increase dominant position of TÜPRAŞ, it would not create a result that would have eventually infringe competition.

When it is seen that importation is a competitor and in this regard OPET and AYGAZ are direct competitors to TÜPRAŞ, it is clear that current dominant position of TÜPRAŞ will strengthen after the acquisition by Koç. In this case, whether said acquisition will result in 'a significant decrease in competition' within the meaning of Section 7 of the Act must be particularly evaluated.

There is not any legal obstacle to import petroleum products. At this juncture, emerging two important issues are capacity of storage facilities suitable for importation and its logistics. This subject is differently analyzed for LPG and other petroleum products since means for importation and logistics are varied for these products.

Companies such as Aytemiz and Delta alongside POAŞ and other distributor companies, which have considerable market share in distribution, possess larger storage facilities then that of some very large leading enterprises.

As part of the 'Licensed Storage Business' that is introduced by 5015 numbered Act, it is understood that storage business will develop since new entities that merely perform storage activities will emerge along with distributor companies and this licenced companies will provide their services to all distributors.

Under current circumstances, when usage of storage capacities for the purposes of importation is analyzed, it is seen that stock rotation speed is very fast and thus there does not exist any technical obstacle against importation in terms of storing

products. Moreover, new investments are on going so as to increase storage capacity.

Due the fact that Turkey is in a very convenient geographical position in terms of importing petroleum products it was decided that joint TÜPRAŞ and OPET their forces will not 'result in significant decrease in competition' regarding purchasing petroleum products.

...Even though discrimination between equals is not permissible under LPG Market Act, the fact that acquirer (AYGAZ) is the leading company in distribution with a market share of %32 and that the same company performs %31 of total importation can not be underestimated. Hence, LPG be it imported or produced by TÜPRAŞ still maintains its importance for other distributors. Although import share of TÜPRAŞ is decreasing over against large LPG distributors, former exercises particularly that was implemented in İzmir Refinery resulting due to difficulties in LPG procurement, is worthy of attention. Experience of these exercises reveals the need to take further measures in order to deal with the negative effects which will be created by the concentration in LPG procurement following the acquisition.

A Protocol drafted for Izmir region, dated 22.06.1992 is signed between TÜPRAŞ and LPG distributor companies. According to this protocol, LPG importation facilities were decided to be built in İzmir region, investment costs of which will be paid by distributors in order to tackle technical problems that may happen in İzmit region. LPG that is imported by TÜPRAŞ in İzmir region is being supplied since 1995.

3 years period that was pointed out in the decision is extended until all import restrictions in Izmir region is eliminated. Competition Authority declared this extension in its 20.06.2008 dated and 08.40/537-202 numbered decision following an application by MİLANGAZ.

When the situation after privatization is analyzed, it is clear that the decision given by the Competition Authority is applicable. Distribution companies are trying to create alternatives by importing fuel. This is possible only with the storage facilities. However, due to the fact that major shareholders of TÜPRAŞ are in petroleum sector vertical integration happens and thus, possibilities to perform certain actions that would prevent or distort completion arise.

In this context it is evident that TÜPRAŞ may offer different supply amounts, supply plans, and payment alternatives to different purchasers, which are in similar conditions.

This will create different operation conditions for companies that must work and compete in the same conditions.

Following regulation is set forth under Section 5. (Refiner) of 5015 numbered Petroleum Market Act:

> *Refining undertaking licensees shall also be able to perform the activities specified below in addition to the activities defined in Article 9:*
>
> *Provided that it is registered in the license, processing and storage activities within the facility or in the vicinity, and transportation activities to other facilities in the vicinity via pipelines,*
>
> *Liquid fuel distribution activities via its distribution company. The refining undertaking licensee should offer, on category basis, the same conditions to those demanding liquid fuel from himself as he does to his own distribution company.*

As it is understandable from the wording of the Section even though TÜPRAŞ establishes its own distribution company, it is obliged to offer the same conditions to all distribution companies in the sector. Such a situation was foreseen by the lawmakers and obligations were set forth against TÜPRAŞ and, if established and licensed other refinery companies. Monitoring the application of this section and assessing complaints thereof is executed by Competition Authority.

Situation of TÜPRAŞ is mentioned in a 2008 dated report (Petroleum Sector Report) which was prepared by Competion Authority and presented to EPDK. It is noted that TÜPRAŞ is in a dominant position particularly in the field of refining. Hence, it is advised that applications for refining licences should be finalised as soon as possible. It is further submitted that price policies decided by TÜPRAŞ prevents competition. TÜPRAŞ is denounced for immediately reflecting increases in international oil prices and not doing the same when internationally traded oil prices decrees.

Distributors and consumers hope that current dominant position of TÜPRAŞ will cease to exist when applications for refinery licences are positively finalised. Completion

Authority was not reluctant to very passionately advise to speed up the procedures for refinery licences.

5.4.2 Dominant Position in Distribution

Distribution companies are an important part of petroleum market. Subsequent to 5015 numbered, sector is disciplined and numbers of petroleum distribution companies gradually increased. This is indeed a very important step for realization of competition in this sector.

According to 2008 "Petroleum Market Report" which is published by EPDK, largest share holder in the market is Petrol Ofisi (PO), which possesses an approximate market share of %30 over all petroleum products. PO is followed by Shell&Turcas A.Ş (%19), BP A.Ş (%15), OPET Petrol A.Ş (% 12.5), and TOTAL Oil A.Ş (%5.4). Total market share of these five companies is roughly %82. Rapid decrease in PO's shares after its privatization introduced new market shares for other players in the market..

It is submitted that although there are almost 50 petroleum distribution companies in the sector, 5 major companies possess a very large percentage of the whole market and this forms an oligopolistic structure creating a situation preventing competition. This oligopolistic structure was criticized by the Competition Authority in its 2008 Petroleum Sector Report. It is briefly submitted as:

> *Rigid structure created by contracts such as beneficial ownership and registered lease constitute significant barriers to entry; Although there are 47 companies licensed by EPDK as of the date of this report, only 5 companies possess %90 share of the market and this is a long-standing fact. Hence, one of the most important problems of petroleum sector is the current oligopolistic market structure. In order to form a permanent competitive market this market structure should definitely change*

Section 7 of 5015 numbered Petroleum Market Act defined petroleum distribution companies. According to this definition:

> *Distribution licensees shall have the right to distribute products defined as liquid fuel. Distribution licensees shall also be able to perform transportation activities via pipelines to the facilities within the vicinity of storage facilities and liquid fuel wholesale activity to eligible consumers, besides liquid fuel distribution to the stations of vendors under their ownership or to be established by contracts. They shall not be able to distribute to vendors of other liquid fuel distributors.*

Further in Section 7, market activities and shares of petroleum distribution companies are restricted:

> *The sale of distribution undertakings made through stations under their ownership shall not exceed 15% of the distributor's total domestic market share. The domestic market share of the distribution undertaking shall not exceed 45% of the total domestic market. Distribution undertaking shall not grant subsidies to stations under their ownership or treat them differently from vendor stations.*

These limitations under Petroleum Market Act have been criticized by the Competition Authority in its Petroleum Sector Report. It is cited that;

> *Even though there is not any tendency for a vertical merger between distributor-retailer levels, Act numbered 5015 creates limitations to sales made by distribution companies to their self-operated retailers and thus form a model restricting vertical mergers. However, when financial advantages of vertical mergers are considered this model – which separates distribution and retail profits – is not an efficient one ,n terms of generating "price competition". Thus, % 15 limits should be revised in consideration with the average limits in the EU countries and relevant section of the Act numbered 5015 should be changed accordingly.*

> *It is further submitted that regulation under the Act that limits market shares of distribution companies to %45 is unnecessary. Furthermore, companies are not anticipated to exceed this limit unless an acquisition takes place. If an acquisition takes place, Section 7 of Act numbered 4054 may work to achieve the same end. Over and above the foregoing reasons, it has been noted that efficient enterprises should not be prevented from enlarging if they operate in accordance with the rules of liberal market and the competition law. Hence, removing this limitation from the Act is advised.*

Relying and evaluating on the foregoing implications in this thesis, it can be said that an oligopolistic market structure in petroleum distribution is evident. Unfortunately, this is a long-standing fact. Turkey, follow up developments in the European Union legislations regarding both competition and energy laws. Therefore, EU system will be implemented in Turkey in the course of time.

It is plainly indicated by the Competition Authority that EU applications are taken as an example for Turkey. It is further noted that decision about the Spanish Petroleum Company, REPSOL, and subsequent decisions based on the same case had its place in Turkish legislation.

Petroleum distributor companies create an absolute control over its retailers by signing long term contracts such as registered lease and beneficial ownership contracts. This creates a long and absolute control over the retailers that prevents retailers from choosing the distributor company together which they want to work.

> *It is cited that this market appearance indicate a rigid vertically united structure when it is compared with member state averages. 5 years exemption limit which was introduced in Block Exemption Communiqué on Vertical Agreements (2002/2) is also exceeded by these contracts. For this reason, beneficial ownership and registered lease contracts should be considered as prohibited contracts whatever their terms may be under civil law. These contracts and other contracts achieving the same or similar ends should be prohibited.*

> *EU countries have solved this problem long ago within the regulations regarding vertical agreements. REPSOL, a company based in a respectively late member state, Spain, signed similar agreements with retailers. This similar problem regarding agreements is seen by the Commission. The Commission ignored the context and terms of the agreements and decided over the competition prohibition. This decision creates a very good example for the situation in Turkey.*

If it is decided that 5 largest companies in distribution sector do together create a dominant position, possibility that these 5 companies abuse dominant position with constructive (implicit) agreements may be considered. Under these circumstances relevant undertakings may be punished for their joint actions that distort competition.

Legal and economical analysis regarding dominant position extracted from 5015 numbered Petroleum Market Act and 2008 dated report of the Competition Authority is cited above. In consideration with EU implementations efforts continue in order to remove structural obstacles that prevent competition.

6. CONCLUSION

This dissertation analyzed the legal status of abuse of a dominant position in the framework of the European Union and Turkish Competition Law. Greater emphasis is placed on the statutory provisions, regulations and the case law of the former since the latter's Competition Law developed on the fundamental principals of the former. The goals and historical background of Competition Law has also been showed. In this context the foremost example of the modern competition law, American anti-trust law, is studied.

In order to better evaluate the EC competition law, fundamental institutes and the legal structure of the European Community has been briefly illustrated. Subsequent to the necessary elaboration on the foregoing so as to facilitate a better understanding and a more fluent reading in the later chapters, each and every single word carrying a substantial legally important meaning in the treaty articles such as, 'undertaking', 'abuse', 'market', 'effect' are literally extracted and discussed.

Placing emphasis on these otherwise innocent words is at outmost importance since it is almost impossible to determine whether an undertaking is actually a dominant one and whether it distorts competition. Explaining the meaning of these words indeed is not only a scholarly work but demands in-depth analysis of the commission decisions and the ECJ judgments. Hence, this author methodologically spared more of his time and most of this dissertation for such quotations.

Economic reasons played an important role in the establishment of the European Community. One does not deserve to be blamed, this author supposes, for even claiming that the economic concerns were in the centre of all other reasons that lead to the establishment of the Community. Therefore, both the commission and the ECJ sensitively dealt with competition law issues be it drafting regulations, reports and like or judging on the relevant cases.

Today, creating national champions and being proud of the same is long forgotten and such an understanding is fiercely denied. Reason being, although national champions will reflect a minor glory to the country they are established in, they will infringe the competition within that very state and will be an impediment to the permanent growth.

The author is of the opinion that regulators, decision makers and the judges should not let by any corporation distortion of competition by using and abusing their dominant position. However, this author, equally place emphasis on careful investigations so as to achieve a just outcome while determining whether an undertaking is in a dominant position within a given market, in order not to punish efficient undertakings.

Article 6 of the Act No.4054 has a lot in common with Article 82 EC. A reflection of this condition is seen in decisions of the Board on the dominant position utilizing the interpretation of European Court of Justice and the Commissin. As we described above by some leading cases, the Case Law is essentially important to the European Competition Law and The Turkish Competition Law. Hoffmann-La Roche Case, Continental Can Case, United Brands Case and etc. have a big effect to determine the later infringements. In addition, the Case Law has inside many definitions those can never be stated in law text on competition. These definitions can be derived from jurisdictions of European Court of Justice and decisions of European Commission. For these reason, both European Union and Turkish Competition Law development and application has been affected from the European Court of Justice and the other Authorities' decisions.

Considering the fact that the competition is new in Turkey, Turkish petroleum market is heavily controlled by Turkish Competition Board in recent years. Especially after the privatization period of TUPRAS, the sector is protected against anti competitive behaviors.

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CURRICULUM VITAE

Name, Surname	**:** Murat SAYIN
Current Address	**:** Murat M. Ata C. No: 100/7 Bayrampasa - İST
Place of Birth and Date	**:** Karabuk – 18.04.1981
Foreign Language	**:** English
Primary School	**:** Mimar Sinan İlköğretim Okulu, 1995
High School	**:** Demir Çelik Foreign Language High School,1999
Undergraduate	**:** Marmara University, Faculty of Law, 2003
Graduate	**:** Bahçeşehir University
Name of Institute	**:** Institute of Social Sciences
Name of Programme	**:** EU Public Law and Integration Master Pragramme
Professional Experience	**:**

- Bölünmez Petrolcülük A.Ş, Lawyer, 01.12.2008 –
- Altınbaş Petrol ve Ticaret A.Ş, Lawyer, 01.06.2007 – 31.11.2008
- Altınbaş Holding A.Ş, Lawyer, 01.06.2005 – 01.06.2007
- Coşar Ortak Avukatlık Bürosu, Intern Lawyer, 01.10.2003 – 31.03.2004