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ABUSE OF DOMINANCE THROUGH EXCLUSIVE DEALING CONTRACTS AND REBATES(*)

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Abstract: Several transactions and practices that are commonly used in commercial activities and that represent a significant part of commercial life may result in abuse of dominance when applied by a dominant undertaking. By virtue of their exclusionary nature, exclusive dealing contracts and rebates exemplify this type of conducts and practices. The supplier in dominant position on the relevant market may conclude exclusive dealing contracts with the customers or offer a number of rebates and bonuses to them by setting certain conditions. In this case, exclusion of other competitors will most likely arise as a problem. The dominant supplier may through its exclusive dealing agreements and discounts with exclusivity effect distort effective competition by restricting actual or potential rivals on the relevant market. Hereby, this topic has emerged as an issue that needs to be examined under EU and Turkish competition laws.

Keywords: Abuse of Dominance, Abuse of Dominant Position, Exclusive Dealing Contracts, Rebates, Rebate Systems.

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TEK SATICILIK SÖZLEŞMELERİ VE İNDİRİMLER YOLUYLA HAKİMİYETİN KÖTÜYE KULLANILMASI

Öz: Ticari faaliyetlerde sıklıkla kullanılan ve ticari hayatın önemli bir parçasını oluşturan birtakım işlem ve uygulamalar, hakim teşebbüs tarafından kullanıldığında hakimiyetin kötüye kullanılmasıyla sonuçlanabilmektedir. Dışlayıcı doğalarından dolayı tek satıcılık sözleşmeleri ve indirimler, bu tür davranış ve uygulamalara örnek oluşturur. İlgili pazarda hakim durumdaki tedarikçi, müşterilerle tek satıcılık sözleşmeleri akdedebilir veya belirli şartlar öngörerek onlara birtakım indirim ve primler sunabilir. Bu takdirde, diğer rakiplerin dışlanması, büyük olasılıkla, bir sorun olarak ortaya çıkacaktır. Hakim tedarikçi, tek satıcılık sözleşmeleri ve münhasırlık etkili indirimleri ile ilgili pazardaki mevcut veya muhtemel rakipleri kısıtlayarak etkin rekabeti bozabilmektedir. Böylelikle bu konu, Avrupa Birliği ve Türk rekabet hukuklarında incelenmesi gereken bir mesele olarak ortaya çıkmaktadır.

Anahtar Kelimeler: Hakimiyetin Kötüye Kullanılması, Hakim Durumun Kötüye Kullanılması, Tek Satıcılık Sözleşmeleri, İndirimler, İndirim Sistemleri.

I. INTRODUCTION

An undertaking with a superior power to define competitive elements such as prices, quality of products, sales strategies to a considerable extent independently of consumers, customers and other competitors has a great opportunity to distort effective competition on the relevant market where it operates. Leaving dominant undertakings unrestrained in their activities would impede effective competition, herewith harm consumers. In this context, dominant undertakings' abusive behaviours are able to restrict effective competition and harm consumers.

Dominant firms can abuse their dominant position by acting various ways. One of the means of abuse of dominance may be exclusive dealing contracts and rebates with exclusivity effect. A dominant undertaking may utilize these vehicles to exclude potential or actual rivals from the relevant market. Exclusive dealing contracts and conditional rebates require the customers to purchase their all requirements or the significant part thereof only from the dominant supplier. Their common point is binding customers exclusively to the dominant undertaking and, in this way, excluding competitors from the market by blocking their opportunity to access the customers. Thus, these practices foreclose the market to new entrants and

thwart the existing competitors' chance of growth. Consequently, these conduct and practices carried out by the dominant supplier, unless there are justifications for them, constitute abuse of its dominant position.

In the focus of exclusive dealing contracts and rebates under the matter of abuse of dominance, an identified problem that constitutes the basis of this paper "How are exclusive dealing contracts and rebates evaluated within the scope of abuse of dominance under EU and Turkish competition laws?" is to be attempted to be answered. To this purpose, the questions of what the steps are to identify and investigate abuse of dominance through exclusive dealing contracts and rebates, when exclusive dealing contracts and rebates constitute abuse of dominance, whether there are any justifications to apply in relation to exclusive dealing contracts and rebates in order to rebut abuse of dominance arguments, will be tried to be solved.

Within the scope of this article the abuse of dominance through exclusive dealing contracts and rebate systems will be examined in EU Competition law and Turkish competition law. In this respect, the relevant provisions of Treaty on the Functioning of the European Union ('TFEU'), Guidance of 24 February 2009 on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, decisions and judgements of the Commission and the EU Courts as well as Turkish sources on the topic, i.e., Code No: 4054 on the Protection of Competition, Guidance of 07 April 2014 on the Assessment of Abusive Exclusionary Behaviours of Dominant Undertakings and decisions of the Competition Board will be analyzed.

One of the good examples which illustrates the approach of the EU competition authorities to exclusive dealing contracts and exclusive rebates of a dominant undertaking with regard to abuse of dominance is the *Tomra* case. This case will also be useful to understand the approach of the Turkish competition authority, which operates in a similar method with the EU competition authorities.

First of all, to be able to comprehend the basics of the article, the fundamental concepts, such as dominance, abuse of dominace, exclusive dealing contract and rebates will be explained under Chapter II. Afterwards, in Chapter III, which is the main part of the article, the subject matter will be discussed in detail. In the first subheading thereof the investigation methods of the Commission, the EU Courts, and the Competition Board will be

examined. Determination of dominant position, conducts which can be abusive and possible defences against abuse claims fall under this subheading. Thereafter, in the second subheading the result of these investigation steps, namely the result whether the behaviour in question is abusive or not will be discussed. Finally, in Chapter IV by means of the findings reached throughout this process the article will be concluded.

II. BASIC CONCEPTS

1. Dominance

Dominance, in a quite number of occassions dominant position, has been defined in several sources in a similar way. First of all, in the document where the Commission presents its official attitute towards the enforcement of the provision prohibiting abuse of dominance on the common market dominance has been defined as follows: "A position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[1]

In essence, the term of dominance is defined by the Code No: 4054 on the Protection of Competition[2] in a similar vein to the definition of dominance by the Commission in the Commission Guidance on Art. 102 TFEU. In this context, Article 3 of the Code defines the dominant position as "the power of one or more undertakings in a certain market to determine economic parameters such as price, supply, production and distribution amount by acting independently of their competitors and customers".

From these definitions some fundamental elements of the concept of dominance which an undertaking holds on a relevant market can be extracted. The first component can be expressed as "economic power". To be considered in dominant position, an undertaking need to possess a certain economic power. The answer of the question what extent of this power should be is unclear. Yet, the power in question should suffice for the

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1 Communication from the Commission 2009/C 45/02 of 24 February 2009 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 10. This source will hereinafter be referred to as "Commission Guidance on Art. 102 TFEU".

2 OJ 22140-13.12.1994. It will in the rest of the paper be referred to as "The Code".

undertaking to act arbitrarily out of both existent and potential market conditions. There is a general view expressing that the required power should originate from monopoly.[3] However, it is not to be narrowly defined as an absolute monopoly power, since it is possible for only few number of sectors to attain such a power.[4] The second component of the definiton of dominance can be stated under the phrase of "power of independence". The power of independence of an undertaking means the authority to behave to an appreciable extent independently from its competitors, customers and also its consumers. In contrast to the aforementioned provision of the Commission Guidance on Art. 102 TFEU, Art. 3 of the Code does not count consumers among the persons who can be acted independently. It refers solely to competitors and customers of the related undertaking or undertakings. Nevertheless, the concept of customer does not necessarily embody the notion of consumer. Indeed, a consumer is an end user who can not resell the product or service he or she purchased. On the other hand, a customer may be a wholesaler, distributor etc, who resells the purchased product or service.[5] Therefore, it would be more appropriate to specify distinctly the relevant persons as in the case of the Commission Guidance on Art 102 TFEU. Furthermore, as Aslan pointed out that in Art. 3 of the Code independency from suppliers should also be emphasised.[6] The third component can be identified as 'the ability and opportunity to prevent effective competition'. In this point, continuity of the economic strength has a determining impact on whether to be able to prevent competition on the relevant market. In other words, temporary monopoly status hinders undertakings to be able to hold a dominant position. If in a duration, actions to prevent the competition can be taken, it can be said that this time period is long enough to be regarded as sufficient for dominance.[7] Art. 3 of the Code specifies a number of, but not a limited number of, economic factors to be

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3 ASLAN İ. Yılmaz, **Rekabet Hukuku Dersleri**, 7th edn, Ekin Basın Yayın Dağıtım, Bursa, 2020, p. 178.

4 CANELLOS Peter C./ SILBER Horst S., "Concentration in the Common Market", **Common Market Law Review**, (1970) Volume 7, Issue 2, pp. 138-166, pp. 160-61, <https://kluwerlawonline-com.uaccess.univie.ac.at/api/Product/CitationPDFURL?file=Journals\COLA\COLA1970012.pdf> (Access Date: 25.07.2021).

5 BYJU's, Difference Between Customer and Consumer, <https://byjus.com/commerce/difference-between-customer-and-consumer/ > (Access Date: 08.11.2021).

6 ASLAN, p. 178.

7 ASLAN, p. 180.

able to prevent efficient competition on the relevant market, such as "price, supply, production and distribution amount".

It can be stated that these components create a loop. Economic power enables an undertaking to be able to behave to a considerable extent independently of their competitors, customers and consumers on a relevant market. That independence provides the undertaking in question with an opportunity and ability to determine the economic parameters by itself such as pricing strategies, supply, production, and distribution amounts, quality of the products or services regardless of its competitors, customers and consumers. This freedom creates a suitable environment for the prevention of effective competition on the relevant market. And again this situation enhances the economic strength of the undertaking. As a result, the undertaking concerned enjoys its dominant position on the relevant market.

The determination of dominance constitutes the major element for ascertaining whether a dominant position has been abused or not. In this respect, the European Commission ("the Commission"), the General Court of the European Union ("the General Court") and the Court of Justice of the European Union ("the Court of Justice") initially clarify the status of the undertaking under investigation with regard to its dominant position on the market. They define the concept of dominance as above.[8] On the other hand, in the scope of the investigation of infringement relating to *Google* the Competition Board moved on in accordance with the definition of dominant position in Art 3 of the Code.[9]

In a relevant market it is possible that not only one undertaking may hold a dominant position but two or more undertakings may also possess dominance. When one undertaking holds dominance, it calls "single dominance", if two or more undertakings holds it, then "collective dominance" will be the case.[10] Art 102 TFEU[11] (formerly Art. 82 TEC) prohibits abuse of dominance by one or more undertakings. In the light of

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8 See for example, Case AT.40099 *Google Android* [2018] C (2018) 4761, paras 210, 431; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para 38, 44; Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, paras 30, 37.

9 Decision No. 19-38/575-243 Decision Date: 07.11.2019.

10 The Commission Guidance on Art. 102 TFEU, para 4.

11 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47. It is abbreviated as TFEU all along this work.

the provision, it appears that several undertakings may jointly hold a dominant position. These dominant undertakings may jointly violate Art 102 through a connection between each other.[12] This connection may be in the form of an agreement or of a joint behaviour. Beside abusing dominance collectively, it is possible for each of these dominant undertakings to abuse its dominance seperately.[13] Art. 3 of the Code expresses the probability of a collective dominance on a certain market in the definition of dominant position. It states that one or more undertakings may hold dominance on a specific market.

2. Abuse of Dominance

An important point to be considered is that holding a dominant position is not prohibited; rather, it is prohibited to abuse that dominant position.[14] By utilizing its own capacity and facilities, a firm may obtain dominance and may likewise advance and strengthen this dominant position on a relevant market.[15] Such a legitimate achievement may be possible through unique high-level production and distribution techniques, innovative breakthroughs or significant entrepreneurial activities.[16] A firm in a dominant position, moreover, can not be deprived of "its entitlement to protect its own commercial interests when they are attacked". Hence, such a

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[12] LORENZ Moritz, **An Introduction to EU Competition Law**, Cambridge University Press, New York, 2013, p. 208.

[13] İNAN Nurkut/PİKER Mehmet B., **Rekabet Hukuku El Kitabı (Competition Law Manual),** Banka ve Ticaret Hukuku Araştırma Enstitüsü T. İş Bankası A.Ş. Vakfı, Ankara, 2007, p. 57.

[14] The Commission Guidance on Art. 102 TFEU, para 1; Competition Board, Guidance on the Assessment of Abusive Exclusionary Behaviours of Dominant Undertakings, 07 April 2014, paras 1-2. It will be referred to as "Guidance on Abusive Exclusionary Behaviours" in this paper; VAN BAEL&BELLIS (eds), **Competition Law of the European Union,** 6th edn, Wolters Kluwer, Alphen aan den Rijn, 2021, p. 800; KOENIG Christian/ DENNIS Sandra/SCHREIBER Kristina, **European Competition Law in a Nutshell: A Concise Guide**, Lexxion Verlagsgesellschaft, Berlin, 2011, p. 87; LORENZ, p. 189; Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* [2003] ECR 2003 II-04653, para 90.

[15] GÜNAY Cevdet İlhan, **Rekabet Hukuku Dersleri**, Yetkin, Ankara, 2014, p. 89; The Guidance on Abusive Exclusionary Behaviours, para 2.

[16] ANDERSON Robert / DANIEL Timothy / HEIMLER Alberto / JAKOB Thinam, "Abuse of Dominance" in KHEMANI R. Shyam (ed), **A Framework for the Design and Implementation of Competition Law and Policy**, The World Bank Washington, D.C. and Organisation for Economic Co-operation and Development (OECD) Paris, 1999, p. 69, <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf > (Access Date: 25.04.2021).

firm must be enabled to protect its interests by taking reasonable measures which it considers necessary and proper for safeguarding these interests in question.[17] In other words, "such a dominant undertaking is entitled to compete on the merits".[18]

On the other side of the coin, a "special responsibiliy" is imposed on dominant undertakings. A dominant undertaking is responsible not to impair competition through its conducts.[19] This special responsibility implies that the same behaviour regarded as legitimate for others may be considered as illegal and prohibited for the dominant undertaking due to its special status.[20] As the EU jurisdiction, Commission practices, the Commision Guidance on Art. 102 TFEU, the Turkish jurisdiction, Competition Board practices and the Guidance on Abusive Exclusionary Behaviours have expressed that a firm holding a dominant position on the relevant market has a special responsibility not to behave in a manner that distorts effective competition on the internal market. In other words, it is responsible not to lead by its activities to an impairing impact on the competition.[21]

Art.102 TFEU regulates abuse of dominance by undertakings. Whereas Art. 101 TFEU (ex Art. 81 TEC) covers all undertakings doing business in the EU, Art 102 deals only with undertakings possessing a dominant position in a part or the whole of the internal market.[22] In addition, it should be noted that Art. 101 TFEU addresses restrictions of competition which appear in form of bi- or multilateral conducts or transactions; Art. 102 TFEU contrarily engages in restrictions on competition realized through unilateral conducts.[23] Art. 102 (1) TFEU is as follows: "Any abuse by one or more

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17 Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR 1999 II-02969, para 112.

18 The Commision Guidance on Art. 102 TFEU, para 1.

19 KOENIG Christian/SCHREIBER Kristina, **Europäisches Wettbewerbsrecht**, Mohr Siebeck, Tübingen, 2010, p. 123.

20 ATEŞ Mustafa, **Rekabet Hukukuna Giriş**, 2nd edn, Adalet Yayınevi, Ankara, 2019, p. 131.

21 The Commission Guidance on Art. 102 TFEU, para 1; The Guidance on Abusive Exclusionary Behaviours, para 2; Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR 1999 II-02969, para 112; *Nederlandsche Banden Industrie Michelin v Commission* (Michelin I), para 57; T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] 1993 II-00389, para 67; Decision No. 21-15/190-80 Decision Date: 18.03.2021 (*Unilever*) para 160.

22 KOENIG/DENNIS/SCHREIBER, p. 88.

23 LORENZ, p. 188.

undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

The major two elements of this provision are the existence of a dominant position and of an abuse. In the case that both conditions have materialized, the Commission may impose a sanction on the related dominant firm. Some main requirements can be extracted from the wording of Art. 102 (1) TFEU. First of all, there must be one or more undertakings holding a dominant position; secondly, the dominance must be present in the internal market or in a substantial part of it; thirdly, this dominant position must be abused; lastly, the abuse of dominance must have an actual or potential influence on trade between Member States. As a matter of course, before all these conditions, the entities subject to this provision have to be undertakings. A dominant position within the internal market is required to be held individually by one undertaking or collectively by multiple undertakings. There must be an abuse of dominant position by those undertakings. Finally, the abuse of dominance has to have an impact on trade between Member States.[24] If these conditions are met, any abuse of dominance, because of its incompatibility with the internal market, will be prohibited.

On the other hand, the issue of abuse of dominant position is regulated in Art. 6 of the Code. The first paragraf thereof is as follows: "The abuse by one or more undertakings of their dominant position in the whole or a part of the country alone or through agreements with others or through concerted practices is illegal and prohibited." As comprehended from its wording, the provision contains a number of elements quite similar to the requirements mentioned above within Art. 102 TFEU. The major elements in the related provision of the Code can be described as

- one or more undertakings in a dominant position,
- holding dominance within the whole or a part of Turkey,
- an abuse of dominant position,
- abuse through agreements, concerted practices with others or through unilateral conducts.

[24] LORENZ, pp. 189-90.

When these conditions are fulfilled, the abuse of dominance becomes illegal and it is prohibited by the Code.

Two factors are different from Art. 102 (1) TFEU. Firstly, while Art 102 (1) does not specify the acts leading to abuse particularly, Art. 6 (1) of the Code points out the ways to abuse dominance. It can be said that this paragraph incorporates the activities indicated in Art. 101 TFEU into the provision relating to abuse of a dominant position. Second difference, which can be regarded as an important matter, is absence of the element of actual or potential effect on trade. In contrast to Art. 102 TFEU, Art. 6 of the Code does not require for an abuse to have an effect on trade. In order to clarify the second issue, the Guidance on Abusive Exclusionary Behavious should be taken into consideration. It defines abuse as behaviours of dominant undertakings which have potential to cause direct or indirect decrease in the consumer welfare. In this context, the decrease in question may arise not only on reseller-level but also on end user-level. Abusive conducts affect effective competition and lead to a decline in the consumer welfare.[25] Indeed, it can be stated that there is a relationship between the requirement of having an effect on trade between Member States of Art. 102 TFEU and the effect on competition and consumer welfare.[26] As inferred from the teleological interpretation of Art. 102 TFEU by Nazzini, dominance is the capability of one or several undertakings to damage "long-term social welfare". These undertakings or only one undertaking through unilateral acts constrain(s) competiton, abuse(s) customers or impair(s) the efficient performance of the downstream and also upstream market.[27] By means of these conducts a dominant undertaking can abuse its position.

The concept of abuse of dominance can be vague in some cases and requires to be clarified, in particular, for the purpose of legal certainty. Legal certainty serves especially undertakings to determine whether their conducts are permitted. As a primary source EU legislation (the TFEU) describes the concept as a basis; the Commission with its guidance and practices as well as European jurisprudence have over time contributed to the improvement and clarity of the concept. The behaviours classified as abusive are neither in

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25 The Guidance on Abusive Exclusionary Behaviours, paras 22-23.

26 The Commission Guidance on Art. 102 TFEU, paras 19, 30, 86.

27 NAZZINI Renato, **The Foundations of European Union Competition Law: The Objective and Principles of Article 102**, Oxford University Press, New York, 2011, p. 395.

a limited number nor unchangeable. In line with economic, social, political and judicial developments, new sorts of abusive conduct can evolve and join the current notion of abuse of dominance.[28]

A list of sample conducts which may constitute abuse of a dominant position follows the general part (i.e., first paragraph) of Art. 102 TFEU. Art. 6 of the Code comprises, likewise, a general part, as examined above, and a follow-up list representing exemplary abusive behaviours. The abusive conducts displayed in the lists are non-exhaustive, only examples.[29]

The non-exhaustive list of examples of abusive conducts, which are prohibited, is regulated under Art. 102 TFEU as follows: "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."

The other non-exhaustive list of abusive behaviours is present in Art. 6 (2) of the Code: "Abuse cases are, in particular, those:

a. Foreclosing directly or indirectly another undertaking entering into the commercial business area or actions aiming to complicate the activities of competitiors in the market,

b. Discriminating directly or indirectly by asserting dissimilar conditions for same and equivalent rights, obligations and deeds to equal buyers,

c. Impose restrictions in relation to purchase and sale conditions in the event of resale such as purchasing goods or services with other goods or

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[28] KOENIG/DENNIS/SCHREIBER, p. 94.

[29] MONTI Giorgio, **EC Competition Law**, Cambridge University Press, New York, 2007, p. 160.

services or stipulating display conditions for other goods or services by the buyer to the goods or services demanded by intermediary undertakings, or restrictions on purchase and sale conditions in the case of resale, such as not to sell purchased goods under a certain price,

d. Actions aiming to distort competition conditions in another product or service market by utilizing financial, technological and commercial advantages, which have been created in a sprecific market,

e. Limiting production, marketing, or technical improvement to the detriment of the consumer."

Instead of describing each exemplary abusive conduct one by one, it would be more convenient to classify all of these into two primary broad headings: exploitative abuse and exclusionary abuse. Exploitative abuse refers to the "unfair treatment" by a dominant firm to other firms operating in a downstream or upstream industry. A principle example of such abuse is the unfair pricing for purchase or sales.[30] Exclusionary abuse, on the other hand, takes place by means of practices aiming competitiors to force out of markets and/or to foreclose new entries.[31] Exclusive dealing arrangements such as exclusive purhasing and conditional rebates, and also tying and bundling, predation, refusal to supply and margin squeeze are some of the examples of that type of abuse.[32]

In the Guidance on Abusive Exclusionary Behaviours abuse of dominance is, in general, classified in three categories: exclusionary, exploitative and discriminatory abuse. In the Code any classification as such has not been made. Furthermore, it should be expressed that in practice it is difficult to divide these abuse types with clear lines. A behaviour may fall into several categories in the list of Art 6 of the Code, that is it may at the same time demonstrate characteristics of multiple sample conducts.[33] Discriminatory behaviours, which arise in the form of direct or indirect discrimination, mean applying dissimilar conditions to equivalent transactions, rights, obligations and deeds of equal buyers,[34] may fall under the other two.[35]

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30 KOENIG/DENNIS/SCHREIBER, p. 95.

31 MONTI, p. 173.

32 The Commission Guidance on Art. 102 TFEU, para 32 et seq.

33 The Guidance on Abusive Exclusionary Behaviours, para 5.

34 ATEŞ, p. 330.

35 ASLAN, p. 198.

Every case has distictive features to be considered during the investigation of abuse of a dominant position. For this reason, the use of "*per se* rule" (namely, the principle requires to accept that certain behaviours such as refusal to deal, exclusive dealing or discriminatory pricing in any event cause abuse) has lately become a subject to criticism. As a result, the Commission has turned from "a more formal approach" towards "a more economic approch". By adopting a more economic approach, the Commission has begun analysing the effects of conducts of a dominant undertaking on a relevant market.[36] A significant example on the matter is *Intel Corp. v European Commission.* In this case, while the Commission and the Court of Justice gave importance to analysing economic and factual grounds in the examination of abusive conducts (in the case it is loyalty rebates), the General Court did not consider these factors, prefering a more formal approach. The Court of Justice, therefore, referred the case back to the General Court.[37] The Guidance on Abusive Exclusionary Behaviours also expresses that the Competition Board investigates cases by employing an economic approach. The Board examines by employing an economic perspective whether an undertaking has abused its dominance, without trying to fit the concrete case into the examples within the list.[38]

3. Exclusive Dealing Contracts and Rebates

A. Exclusive Dealing Contracts

The notion of "exclusive dealing" covers exclusive purchasing obligations, some rebates and exclusive supply obligations.[39] In connection with that, as defined vertical agreements in Art 1 (1) a of the Commission Regulation on Vertical Agreements and Concerted Practices, exclusive dealing contracts can be qualified as vertical agreements since these are agreements "entered into between two or more undertakings each of which operates (...) at a different level of the production or distribution chain". Exclusive dealing contracts are "relating to the conditions under which the

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36 KOENIG/DENNIS/SCHREIBER, p. 95.

37 Case C-413/14 P, Judgment of the Court (Grand Chamber) of 6 September 2017, *Intel Corp.v European Commission*.

38 The Guidance on Abusive Exclusionary Behaviours, para 5.

39 The Commission Guidance on Art. 102 TFEU, f. n. 4, para 32; for the approach in the same direction, see the Guidance on Abusive Exclusionary Behaviours, f. n. 16, para 64, p. 14.

parties may purchase, sell or resell certain goods or services".[40] Exclusive dealing contracts can be classified also under Art 2 of the Communication on the Block Exemption as a vertical agreement.[41] It defines vertical agreements along the same lines with the Commission Regulation on Vertical Agreements and Concerted Practices. As for rebates or discounts which have an exclusive character, saving the fact that exclusive dealing contracts bring about more serious anti-competitive issues than these rebates do, exclusivity rebates may be regarded as equivalent to exclusive dealing contracts.[42]

Exclusive dealing contracts are agreements concluded between a supplier (manufacturer/ producer) and a customer or buyer for the purposes of purchasing or supplying certain products (goods and services) exclusively.[43] The customer/buyer is the firm to sell products that it purchased from the supplier, within a certain region.[44] This firm can be a retailer or a distributor.[45] Exceptionally, instead of the producer, the main distributor of the product may conclude this agreement.[46] Exclusive dealing contracts, also known as "single branding" agreements, "have as their main element that the buyer is obliged or induced to concentrate his orders for a particular type of product with one supplier".[47] The agreements in question

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40 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1. It will be called hereinafter as "Commission Regulation on Vertical Agreements and Concerted Practices".

41 OJ 24815-14.07.2002, Competition Board Communication amended by the Competition Board Communications No 2003/3 and 2007/2, Communication on the Block Exemption relating to Vertical Agreements, Communication No 2002/2. It will be cited as "Communication on the Block Exemption" in this paper.

42 FUMAGALLI Chiara/MOTTA Massimo/CALCAGNO Claudio, **Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance**, Cambridge University Press, Cambridge, 2018, p. 313.

43 YANIK Mehmet, "Rekabet Hukukunun Hakim Durum ve Hakim Durumun Kötüye Kullanılması Uygulamalarında Piyasa Giriş Engelleri", **Competition Authority No: 0101**, 2003, <https://www.rekabet.gov.tr/Dosya/uzmanlik-tezleri/19-pdf > (Access Date: 13.05.2021).

44 İNAN T. Nurkut, "Exclusive Distribution Agreements and Third Parties", **Banking and Commercial Law Journal** (1993) XVII (2), pp. 55-77, p. 57, <https:// heinonline-org.uaccess.ac.at/ (Access Date: 12.05.2021).

45 BERNHEIM B. Douglas/WHINSTON Michael D., "Exclusive Dealing", **Journal of Political Economy**, (1998) 106 (1), pp. 64-103, p. 65 < https://www.jstor.org/stable/10.1086/250003?seq=1 > (Access Date: 14.05.2021).

46 İNAN, p. 57.

47 Commission Notice 2010/C 130/01 of 19 May 2010 Guidelines on Vertical Restraints [2010] OJ C 130, para 129.

describe the cases when a supplier lays down a condition to a buyer or a customer to do business exclusively or in a great extent with itself. It can be made by inserting a clause into the contract as "legal exclusivity" or by exclusive practices, e. g., through discounts, bonuses, in the form of "*de facto* (actual) exclusivity".[48]

There are a number of fundamental elements composing an exclusive dealing contract.[49] The first component is recognizing a sales monopoly in a specific area. This area may be a country, a town, a group of countries or even a continent. The second is the existence of a continuous general agreement. Both parties, i.e., the supplier and the buyer, mutually commit to perform their obligations on a constant basis.[50] Acting on its own behalf and own account is the next element. It means that the buyer or customer is both economically and legally independent from the supplier. The customer purchases products from the supplier and sells them to third parties on its own name and for its own account. Finally, for the customer has, in a determined area, a monopoly right on the sales of the products purchased from the producer, it must engage in sales increasing activities, such as marketing, advertising, advancing customer relationships and after sales service. This element serves balancing the restrictions on the producer.[51]

Exclusive dealing contracts are synallagmatic agreements. The parties undertake mutual obligations. The primary obligation of the buyer is the purchase of the product and the payment of the price.[52] The factor that attributes the exclusive nature to the agreement is the commitment "not to make any purchase from a competing seller" and to purchase all or most of its requirements determined in the agreement from the contracting supplier.[53] In return, the supplier commits to sell its products only to the contracting buyer, thus the buyer sells them in the defined region. Likewise,

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48 ÖZTUNALI Aydın, **Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması**, Seçkin Yayıncılık, Ankara, 2014, p. 128.

49 For the comprehensive basic information on the fundamental elements of exclusive dealing contracts, see İŞGÜZAR Hasan, **Tek Satıcılık Sözleşmesi (Alleinvertriebsvertrag)**, Dayınlarlı Hukuk Yayınları Ltd. Şti, Ankara, 1989, pp. 14-19.

50 TANDOĞAN Haluk, "Exclusive Sales Contracts", **Banking and Commercial Law Journal** (1982) XI (4), pp. 1-36, pp. 2-3, 5, <https://heinonline-org.uaccess.univie.ac.at > (Access Date: 12.05.2021).

51 İNAN, pp. 58-59.

52 TANDOĞAN, p. 15.

53 FUMAGALLI/ MOTTA/CALCAGNO, p. 239.

the buyer is not allowed to sell these products with an exclusivity commitment somewhere other than agreed.[54] The supplier is obliged to provide the products on a regular basis with the buyer. In terms of exclusivity, it is essential to note that the supplier is under the obligation not to sell the products in the agreement area directly or through others. The substance of this obligation is assigned pursuant to the scope of the exclusive dealing contract. In this context, the supplier commits not to sell the products directly itself in the area defined by the agreement or to ensure that other exclusive buyers do not sell them in that region, or to take actions to prevent third parties, i.e., the customers of other exclusive buyers, from selling relevant products in the region concerned.[55] Here, the objective of the exclusivity is two sided. The first is the exclusive purchase of the products by the buyer from the supplier, the second is the exclusive sale of the products in the defined region only by the buyer.

Besides these principal obligations, the buyer has a loyalty and non-competition obligation to the supplier. The buyer has to show loyalty to the supplier by avoiding selling the competing products in the contract area. The buyer, furthermore, is obliged not to sell products of the supplier's competitors which are identical or similar to the supplier's products. It is possible to add a non-compete clause also for the term after the end of the exclusive dealing contract provided that it is limited with regard to duration, location and subject matter.[56]

Exclusive dealing contracts have not only positive but also negative effects on competition. These agreements may represent an anti-competitive feature when concluded by a dominant supplier but also some benefits, such as organizing distibution methods, offering after sale services, and providing facilities for consumers to reach related products more readily.[57] In addition, as the buyer focuses on a single brand and/or product, it obtains an opportunity to promote the product more efficiently. Consequently, it

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[54] FRENZ Walter, **Handbuch Europarecht Band 2: Europäisches Kartellrecht**, 2nd edn, Springer-Verlag, Berlin Heidelberg, 2015, p. 553.

[55] TANDOĞAN, pp. 22, 24.

[56] TANDOĞAN, pp. 18, 21-22.

[57] YEŞİLTEPE Salih Önder, "Claiming of the Monopoly Right in the Executive Distribution Agreements Against Third Parties", **İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi** (2017) 4(2), pp. 133-151, p. 134, <https://dergipark.org.tr/tr/download/article-file/1102246> (Access Date: 13.05.2021).

establishes a more robust inter-brand competition atmosphere. This pro-competitive environment can contribute to the interest of consumers by bringing about an increase in product quality.[58] On the other hand, exclusive dealing contracts concluded by a dominant undertaking have "the effect of preventing the entry or expansion of competing undertakings". Due to this foreclosure impact it is obvious that exclusive dealing arrangements will affect consumers in a negative manner and the consumers will not benefit from these anti-competitive practices.[59]

B. Rebates

Undertakings apply rebates (discounts) on their sales almost as a commercial custom.[60] These rebates may be either direct, in other words unconditional or tied on certain conditions, i.e., conditional. The price reductions offered when buyers act in a certain way are referred to as "rebate systems" or "conditional rebates".[61] Suppliers grant conditional rebates to customers/buyers as a reward for a specific purchasing activity. The Commission Guidance on Art. 102 TFEU cites two types of rebates: "retroactive rebates" which are valid for all purchases and "incremental rebates" being granted on purchases exceeding the threshold, the achievement of which is necessary to be able to acquire a rebate.[62] According to the Guidance on Abusive Exclusionary Behaviours, the basic classification of rebates is "single-product rebates" and "packet rebates". If to be able to gain a rebate buying only a single product is necessary, this kind of rebates are accepted as single-product rebates. In addition to this, if a purchasing condition contains multiple products or markets, then it is considered as a packet rebate. Another categorization in this Guidance is "retroactive rebates" and "top-slice rebates". For retroactive rebates the explainations above in relation to the Commission Guidance on Art. 102 TFEU is valid. When a buyer can acquire rebates for only the part exceeding the discount target, these rebates are called as top-slice rebates.[63]

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58 The Guidance on Abusive Exclusionary Behaviours, para 65.

59 The Commission Guidance on Art. 102 TFEU, para 34.

60 İNAN/PİKER, p. 69.

61 ÖZTUNALI, pp. 112-13.

62 The Commission Guidance on Art. 102 TFEU, para 37.

63 The Guidance on Abusive Exclusionary Behaviours, para 70.

In competition issues "loyalty rebates", "loyalty-inducing rebates" and "permissible rebates" are of notable importance. First of all, loyalty rebates (fidelity rebates) can be defined as conditional rebates granted providing that a buyer within a specific time period will purchase all of its requirements or a considerable part of it exclusively from the supplier granting rebates. On the other hand, even though it is not expressly stipulated by the supplier, there are a few rebates inducing loyalty. These can be counted as "target rebates" and "quantity rebates" with loyalty impacts. The royalty-creating effect of each can vary depending on the rebate type.[64] Loyalty-enhancing rebates show a de facto exclusive character. Because these rebates encourage and urge buyers to be loyal to the supplier giving the rebates in question.[65] As one of the loyalty-inducing rebates, target rebates can be defined as discounts or bonuses granting from the supplier to the buyer which have attained a specific sales target.[66] As in *British Airways* expressed by the General Court and approved by the Court of Justice that target rebates and bonuses may generate an exclusionary effect due to its "fidelity-building effect".[67] Quantity rebates, when they enhance loyalty to a certain supplier may be qualified as loyalty-inducing rebates. Quantity rebates, as a rule, are given per se for each purchase on an objective basis.[68] Although that is the rule, a supplier may offer quantity rebates to a buyer by causing discrimination against other competing buyers.[69] Last but not least, some rebates may be justified by objective reasons in relation to Art. 102 TFEU such as by cost savings. These discounts and bonuses can be described as permissible rebates.[70]

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64 ÖZTUNALI, p. 113.

65 LORENZ, p. 227.

66 ESİN Arif, **Rekabet Hukuku**, ESC Consulting Ltd., İstanbul, 1998, p. 194.

67 Case C-95/04 P *British Airways plc v Commission of the European Communities* [2007] ECR 2007 I-02331, para 90.

68 YANIK

69 ASLAN, p. 212.

70 LORENZ, pp. 229-30.

III. ABUSE OF DOMINANCE THROUGH EXCLUSIVE DEALING CONTRACTS AND REBATES

1. Investigation Steps

In order to decide whether an exclusive dealing contract or a rebate scheme constitutes abuse of dominance, an investigation process consisting of a number of steps must be carried out. In this context, analyses begin with the identification of the market where dominance is to be questioned. For that, it is vital to define both product market and geographic market.[71] The Commission[72] and the Competition Board identifies, at first, the relevant market when analysing abuse of dominance cases. After defining relevant market, the position of the undertaking under investigation on the relevant market is subject to examination. If it is established that it holds a dominant position on the relevant market, then the next step is to explore whether the conducts subject to investigation can be considered as abuse of this dominant position. This procedure pursued by the Competition Board also suits to the essence of Art. 6 of the Code.[73] As required by Art. 102 (1) TFEU, the last step is to assess the effect of the abusive conducts under examination on competition and trade between Member States. Such an investigation method is, also, enforced by EU authorities.[74] These investigation steps will be discussed in detail and applied to the analysis of the problem of abuse of dominance through exclusive dealing contracts and rebates.

A. Determination of Dominance

Is the undertaking in a dominant position on the relevant market? To be able to answer this question, firstly relevant market then, the market power of the undertaking on this relevant market must be specified.

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71 ASLAN, p. 196.

72 Commission Notice 97/C 372/03 of 09 December 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5 (Commission Notice on Relevant Market) para 11.

73 ASLAN, pp. 196-97. See in that context for example, Decision No: 18-19/329-163 Decision Date: 12.06.2018 (Fritolay); Unilever; Decision No: 10-57/1152-437 Decision Date: 2.9.2010 [*Linde Gaz A.Ş. (previously Karbogaz Karbondioksit ve Kurubuz San. A.Ş*)].

74 See for example, *Hoffmann-La Roche v Commission*; *Nederlandsche Banden Industrie Michelin v Commission* (Michelin I); C-549/10 P *Tomra Systems and Others v Commission* [2012] ECLI:EU:C:2012:221; AT.40220 - *Qualcomm (Exclusivity payments)* [2018] C (2018) 240 final.

a. Relevant Market

In order to comprehend where the undertaking under investigation holds a dominant position, it is a must to ascertain where the undertaking operates. The concept of relevant market has two principal dimensions: relevant product market and relevant geographic market.[75] The Commission Notice on Relevant Market defines relevant product and relevant geographic market by quoting. According to this definition, "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."[76] Similarly, the Guidance on the Definition of Relevant Market describes relevant product market with a quotation to the statement in Communication No: 1997/1 as folllows: "In definition of the relevant market, the market consisting of goods and services subject to the merger and acquisition, the goods and services regarded as same in the eyes of consumers in terms of their price, purpose of usage and qualifications is taken into consideration; the other factors which may affect the identified market are also evaluated."[77]

On the other hand, the concept of relevant geographic market is defined in the Commission Notice on Relevant Market by way of quotation as follows: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area."[78]

The Guidance on the Definition of Relevant Market by way of quotation describes geographic market likewise the Commission Notice on Relevant Market as follows: "The geographic market is the regions where the enterprises operate in the supply and demand of their goods and services, the competition

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75 The Commission Notice on Relevant Market, para 4.

76 The Commission Notice on Relevant Market, para 7. A temporal demarcation may also be added into these dimensions. A temporal market can be described as a market of products for which timing is decisive to become available to be supplied or be demanded, such as the products which are accessible in a certain season. (KOENIG/DENNIS/SCHREIBER, p. 33).

77 Competition Authority, Guidance on the Definition of Relevant Market, 10.01.2008, 08-04/56-M, para 3.

78 The Commission Notice on Relevant Market, para 8.

conditions are sufficiently homogeneous and especially the competition conditions are appreciably different from the neighbouring regions, which can be easily distinguished from those areas."[79] Indeed, these two definitions of relevant geographic market are to a substantial extent similar.

In identifiying the relevant product market, interchangeability and substitutability play a decisive role. In demand substitutability, the criteria of price, characteristics and intented purpose of the product (goods or services) are employed to determine the relevant product market. The influence of the price strategies of undertakings on demand substitutability can be figured out by using the SSNIP (small but significant non-transitory increase in price) test. In this method a small (in the range 5% to 10%) but significant permanent price increase is imposed on the relevant product. If consumers or customers as a result of this price increase prefer the products of other suppliers, then it can be concluded that there is a demand substitution between the product of the undertaking under investigation and the one of competitors to which consumer preferences have been switched because of that price increase.[80] Besides demand substitutability, supply substitutability may also be taken into consideration in defining relevant product market. If suppliers or producers are able to switch in the short term their production from one product to another without paying notable additional costs or encountering production risks[81], it can be concluded that these two products are substitutes for each other, therefore, they are in the same relevant market and consequently, potential rivals.[82] To be able to ascertain the relevant product market, the high substitution elasticity of the products in terms of both demand and supply is to be considered. The products demonstrating high level-substitutability with each other may be on the same relevant product market.[83]

When the relevant product market is identified, the next stage is to identify the relevant geographic market. The relevant geographic market is substantially characterized, as in the definitions above, by the existence of competition conditions those are adequately homogeneous and can be distinguished from neighbouring areas because of the noticeable difference between their competition conditions. In this context, transportation methods

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79 The Guidance on the Definition of Relevant Market, para. 3.

80 GÜNAY, pp. 76-77.

81 The Commission Notice on Relevant Market, para. 20.

82 İNAN/PİKER, p. 15.

83 ESİN, pp. 184-85.

and costs, distribution techniques between the neighbouring regions[84] and perishable nature of products restricting their mobility in long distances with ease[85] are to be taken into account. Furthermore, the characteristics of the relevant product, price differences and consumer or customer preferences in the concerned market and in its neighbours are also decisive in determining the relevant geographic market. As regards to customer preferences, likewise SSNIP test in defining the relevant product market, if a price increase leads customers to switch to the product in a region other than the relevant market, then the relevant geographic market covers also this new region. Beside consumer preferences, the features of the relevant product, price differences, entry barriers between the neighbouring areas are also taken into account in defining the relevant geographic market.[86]

As in Art 102 (1) TFEU it is clearly notified, the relevant geographic market for undertakings operating in the EU will be the whole of the internal market or a substantial part of it. In the similar manner, according to Art 6 (1) of the Code the relevant geographic market will cover the whole of Turkey or only a part of it. Nonetheless, the relevant geographic market can also, under certain circumstances, be outside Turkey as it was in the *Arçelik case*, which was related to a cross-border acquisiton. While the Competition Board was defining the relevant geographic market, it emphasized the importance of analyzing the existence of an interregional trade flow. In the case the Competition Board identified the relevant geographic market as "EU borders" by considering that one of the parties of the acquisition transaction was in Turkey; the other parties were in Germany and the trade flow between Turkey and the EU was in significant amount. It also added that for each product market relevant geographic markets should be examined seperately by taking into account the cross-border trade flow.[87]

In the *Vitamins* case (in the phase of the General Court[88] it was referred to as *Hoffmann-La Roche v Commission*)[89] the Commission specified the

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84 GÜNAY, pp. 82-83

85 ANDERSON/DANIEL/HEIMLER/JAKOB, p. 70.

86 GÜNAY, pp. 82-83.

87 Decision No: 02-32/367-153 Decision Date: 28.5.2002, p. 4.

88 At the date of the decision it used to be referred to as the Court of First Instance. With the entry into force of the Lisbon Treaty on 1 December 2009, it was renamed as the General Court. (EUR-Lex, "Glossary of Summaries: General Court" https://eurlex.europa.eu/summary/ glossary/general_court.html#:~:text=The%20purpose%20of%20these%20courts,the%20Court%20of%20First%20Instance. (Access Date: 25.05.2021).

relevant product markets for each group of vitamins individually. Accordingly, per group of vitamins constitutes separate relevant product markets, i.e., "A, B2, B6, C, E, Biotin (H), and pantothenic acid (B3)" markets. The reason behind this specification is the non-interchangeability of these vitamin groups with the other vitamin groups or products due to the fact that each group has "specific metabolic functions" and therefore is suitable for satisfying distinct constant requirements. On the other hand, the relevant geographic market in the case was ascertained as the whole of the common market.[90]

b. Market Power

After identifying the relevant product and relevant geographic market of the undertaking under investigation where it operates, the next step to take is determining the market power of this undertaking on the relevant market. To be able to comprehend its market power, several components must be taken into consideration.

The first element is market shares both of the undertaking concerned and of its competitors on the relevant market.[91] "Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market."[92] The relationship between the market share of the potentially dominant undertaking in question and those of its rivals on the relevant market is decisive to assess the market power of the undertaking under investigation.[93] The market share of the undertaking concerned should be compared to the market shares of its competitors to be able to make an assessment of the alleged dominance.[94]

It is almost impossible to set a precise threshold to be able to decide if the undertaking holds dominance or not.[95] There is a general acceptance that

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89 Hoffmann-La Roche v Commission.

90 Commission Decision of 9 June 1976 relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020 - *Vitamins*) OJ No L 223/27, para 20.

91 KOENIG/SCHREIBER, p. 126; ASLAN, p. 184.

92 The Commission Guidance on Art. 102 TFEU, para 13; for the Competition Board, The Guidance on Abusive Exclusionary Behaviours, para 11.

93 KOENIG/SCHREIBER, p. 126.

94 MONTI, p. 144.

95 ANDERSON/DANIEL/HEIMLER/JAKOB, p. 71.

low market shares are an indicator to the low market power. The Commission's experience shows that the possibility of the undertaking to hold a dominant position is quite low if its market share is below 40 % in the relevant market. However, it is not a rule. "There may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations." The Commission should pay particular attention to such cases to be able to accurately evaluate the market power.[96]

The duration and stability of high market shares on the relevant market are also determinative. When the undertaking consistently preserves its high market share for a long time on the relevant market, it may be regarded as a dominant undertaking on this relevant market.[97] Generally, the higher the market shares of the undertaking, the more probably it enjoys market power.[98] Despite a great market share maintained steadily over a long time period, the existence of the domestic and/or import based substitutability and the effective competition do not allow even the undertaking retaining the great market share to behave independently from its competitors. In that case, the undertaking concerned is not in a dominant position.[99] Even though market shares are a good indicator for market power, they are not an absolute criterion.[100]

Since the analysis of market shares alone is not sufficient to come to a final conclusion about market power, the other factors should be investigated as well. The most prominent of those are as follows: Entry or expansion barriers and counterbalancing buyer power.[101] Firstly, entry barriers into and expansion barriers within the relevant market provide the undertaking alleged to be in a dominant position with a market power to be able to behave to an appreciable extent independently from the actual or potential competitors. As a result, these obstacles serve the dominance of that undertaking on the relevant market.[102] It can be expressed that

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96 The Commission Guidance on Art. 102 TFEU, para 14. In the same direction, see the Guidance on Abusive Exclusionary Behaviours, para 12.

97 GÜNAY, p. 86.

98 ANDERSON/DANIEL/HEIMLER/JAKOB, p. 71.

99 ASLAN, p. 185; GÜNAY, p. 86.

100 MONTI, p. 143.

101 The Commission Guidance on Art. 102 TFEU, paras 15-18; The Guidance on Abusive Exclusionary Behaviors, paras 15-21.

102 KOENIG/SCHREIBER, p. 127.

permanent high market shares may be a sign of the presence of entry or expansion hindrances. These barriers may emerge in various forms. For instance, in the form of legal barriers such as quotas and tariffs or of advantages belonging especially to the undertaking under investigation such as high technologies, the privilege of access to substantial facilities or natural resources, developed distribution methods and broad sales systems. In addition to these, the undertaking potentially holding a dominant position may also create entry or expansion barriers by its own activies such as by concluding long term agreements with a noticeable foreclosing impact or by making such a considerable investment with which it is stringent for entrants or competitors to compete.[103] Exclusive dealing contracts and rebate systems fall under such entry or expansion preventing actions due to its foreclosing character.[104] Last but not least, the power of buyers to sufficiently bargain, to switch promptly to competing suppliers, hence, to support new entries or vertical integrations, or to intimidate the dominant undertaking doing so is a significant factor for this undertaking to take into account by attempting to act to an appreciable extent independently of such customers with sufficient counterveiling buying power.[105]

c. Dominant or not?

Following the phases described above, a Commission decision is to be briefly discussed in order to illustrate the issue whether an undertaking under investigation holds a dominant position or not.[106]

In the *Tomra* case[107], Tomra was found dominant by the Commission. The Commission, at first, identified the relevant product and geographic market where Tomra operated. It, subsequently, examined the market share

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[103] The Commission Guidance on Art. 102 TFEU, para 17; In the same course see, Guidance on Abusive Exclusionary Behaviours, paras 17-19.

[104] ANDERSON/DANIEL/HEIMLER/JAKOB, p. 72.

[105] The Commission Guidance on Art. 102 TFEU, para 18; The Guidance on Abusive Exclusionary Behaviours, para 21.

[106] The method followed by the Competition Board regarding whether an undertaking is in a dominant position is the same as that followed by the Commission in this regard. See abuse of dominant position cases, for example Decision No: 21-15/190-80 Decision Date: 18.03.2021 (Unilever); Decision No: 20-49/675-295 Decision Date: 12.11.2020 (Google).

[107] Commission of the European Communities Brussels, 29.03.2006 C (2006)734 Decison relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (Case COMP/E-1/38.113 - Prokent-Tomra) <https://ec.europa.eu/competition/antitrust/cases/dec_docs/38113/38113_250_8.pdf> (Access Date: 31.07.2021).

of Tomra as well as the other considerations relating to Tomra's market position, such as market share of its competitors, the barriers to entry and expansion and lastly the buyer power. From the analysis of the Commission, the following conclusions have been drawn as to whether Tomra was in a dominant position in the relevant market or not.

Relevant Product Market: The Commission defined the relevant product market broadly, as such a definition provided more advantageous figures for Tomra. In this context, the relevant product market was specified as the market for high-end reverse vending machines (RVMs) or systems, inclusive, especially, "all RVMs that can be installed through a wall and can be connected to backroom equipment" and also "an overall market including high-end and low-end machines".[108] They were utilized for collecting and recycling of used beverage containers.[109]

Relevant Geographic Market: With regard to the relevant geographic market, the Commission found that the conditions of competition were not uniform across the EEA, where Tomra which is a Norway based-company gained very high market shares, in the period under investigation and that the relevant geographic markets were national in scope.[110]

Market Shares: The Commission found that Tomra was a market leader with very high market shares. While in Europe in the years before 1997 Tomra's market shares continuously exceeded 70%, at world-wide level its market shares were even higher in those years. At that time period Tomra's most significant competitor in Europe was Halton with a market share of 30 % before it was acquired by Tomra. After 1997 Tomra's market share in Europe exceeded 95% and likewise on all the relevant markets. In the years of 2001 and 2002, it held about 80-90% of market shares. Tomra's market shares were several times greater than those of their competitors, such as new entrants Prokent and Bevesys.[111]

Barriers to entry and expansion: The Commission concluded that on the relevant market there were barriers to entry and expansion. Potential competitors that tried to enter all national markets encountered "an

[108] (Case COMP/E-1/38.113 - Prokent-Tomra) para 46, p. 15.

[109] (Case COMP/E-1/38.113 - Prokent-Tomra) para 1, p. 4.

[110] (Case COMP/E-1/38.113 - Prokent-Tomra) paras 47, 55, pp. 15-17.

[111] (Case COMP/E-1/38.113 - Prokent-Tomra) para 60, pp. 19-20.

experienced, well established and powerful incumbent". Tomra aimed to keep competition weak to be able to maintain its market leadership, in particular against potential powerful rivals. Its take-over of Halton in 1997 and Eleiko in 2001, and also its attempt to acquire Prokent in September 2001 may be referred in this context, although the Commission does not regard acquisitions as being anti-competitive. On the other hand, Tomra held patents and other intellectual property rights, which are crucial in this sector. "Tomra has been able to patent its technology and in a few instances used alleged patent infringement proceedings to meet the increasing competition from comparatively successful competitors."[112]

Buyer Power: The Commission reached a conclusion that for the time period analysed buyers did not have substantial countervailing power of sufficient size which would have been able to deter Tomra from behaving an appreciable extent independently of its competitors and customers in any of the relevant markets. That is to say, in any individual market, customers were not able to outweigh Tomra's strong position on the supply side.[113]

Result: Tomra held a dominant position in the sense of Art 102 TFEU, as it was "a dominant undertaking in the common market and in the territory of the EEA as well as in substantial parts of the common market and the territory of the EEA".[114]

B. Abusive Conducts

Are conducts of the dominant undertaking abusive?

Assume that on the relevant market there is an incumbent supplier (or producer) holding a dominant position and a number of buyers (or customers) concluding exclusive dealing contracts with this incumbent. According to the agreement the contracting buyer, for a reference period, is obliged to purchase the whole or the most of its requirements exclusively from the contracting incumbent firm holding dominance. In return for this obligation the incumbent is obliged to sell its products exclusively to the contracting buyer in a specific region. It commits also not to supply the products subject to the agreement by itself and commits to prevent its other exclusive buyers or the customers of

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[112] (Case COMP/E-1/38.113 - Prokent-Tomra) paras 86-87, p. 34.

[113] (Case COMP/E-1/38.113 - Prokent-Tomra) paras 88-89, pp. 34-35.

[114] (Case COMP/E-1/38.113 - Prokent-Tomra) para 96, p. 37.

these exclusive buyers from selling the relevant products in the referred area. Thus, the contracting buyer will be able to sell the products of the dominant firm on the determined region exclusively.

In addition, this exclusive dealing agreement may contain some rebate systems or without such an agreement a number of rebates and bonuses may be granted to the buyer as de facto exclusive practices. In such case, the supplier may offer the buyer rebates and bonuses in condition that it will purchase all or most of its requirements from the supplier. The supplier, on the other hand, may grant discounts on the condition that the buyer has to reach the target set by the supplier. It may also provide rebates for a specific quantity purchased by the buyer.

Exclusivity may emerge in the form of a regular exclusive contract or rebates offered as a reward of exclusivity.[115] Exclusive dealing contracts preclude the buyer from purchasing from alternative suppliers for a given period of time. Hence, the buyer that concludes the exclusive dealing agreement can not purchase from competing suppliers by switching the dominant supplier. On the other hand, regarding rebates with exclusivity effect, the buyer is not obliged to buy from the dominant supplier offering rebates based on the purchasing behaviours of the buyer. The buyer has an opportunity to change the supplier to an alternative one. In that case, it is apparent that it will lose the rebates. "[T]he ex ante commitment" of the buyer is the decisive and essential factor for the ability of the dominant supplier to exploit long-term agreements in order to impete efficient entries.[116] In relation to rebates, to be able to assess the exclusive character of rebate systems, as ECJ discussed in its Hoffmann-La Roche decision, one should come to a conclusion whether discounts or bonuses granted by the dominant undertaking are able to create exclusionary effects, in other words whether these rebates can produce an entry barrier for potential competitors of the dominant supplier and complicate or make it impossible for the contracting buyer to be able to select between different supply sources or alternative suppliers.[117] All these conducts when carried out by a dominant

[115] WITT Anne C., "The European Court of Justice and the More Economic Approach to EU Competition Law: Is the Tide Turning?", **The Antitrust Bulletin** (2019) 64(2), pp. 172-213, p. 194, < https://doi.org/10.1177/0003603X19844637 > (Access Date: 18.05.2021).

[116] FUMAGALLI/MOTTA/CALCAGNO, pp. 312-13.

[117] LORENZ, pp. 228-29.

undertaking constitute abuse of dominance because they hinder consumers from accessing alternatives.[118]

Exclusive contracts and practices enable a dominant undertaking by exploiting its competitive superiority to exclude competitors from a relevant market.[119] Exclusionary conducts may be defined as follows: "Exclusionary practices are contracts, pricing strategies and more generally actions taken by dominant firms to deter new competitors from entering an industry, to oblige rivals to exit, to confine them to market niches, or to prevent them from expanding, and which ultimately cause consumer harm."[120]

The most fundamental element of exclusionary abuse is foreclosing the market to new entries or forcing existing competitors out of the market. Long-term exclusive dealing contracts and rebate systems are some examples of exclusionary conducts and practices. The foreclosure of the market may occur in two levels: "horizontal foreclosure" and "vertical foreclosure". Exclusionary abuses like in the cases of exclusive dealing contracts and rebate schemes take place as a horizontal foreclosure.[121] To put it more clearly, by virtue of the exclusionary obligation in its vertical relationship with the buyer, the dominant supplier either prevents or restricts its rivals on the horizontal level.[122]

By the entry into force of the Commission Guidance on Art 102 TFEU in the examination of exclusionary conducts, including exclusive dealing contracts and rebate systems, an efficiency and economy focused approach has been adopted.[123] This approach is described as a "more economic approach".[124] Before the Commission Guidance on Art. 102 TFEU, it was

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[118] ANDERSON/DANIEL/HEIMLER/JAKOB, p. 72.

[119] CALZOLARI Giacomo/ DENICOLÒ Vincenzo, "Exclusive Contacts and Market Dominance", **The American Economic Review**, (2015) 105 (11), pp. 3321-51, p. 3332 < http://www.jstor.org/stable/43821376 > (Access Date: 16.05. 2021).

[120] FUMAGALLI/MOTTA/CALCAGNO, p. 1.

[121] ÖZTUNALI, pp. 80-82.

[122] KOENIG/SCHREIBER, p. 150.

[123] ÖZTUNALI, p. 117. The same viewpoint applies also in the Guidance on Abusive Exclusionary Behaviours. Accordingly, the Competition Board is to take an economic approach in abuse of dominance cases. In this connection, the as efficient competitor test is to be performed.

[124] VAN WIJCK Peter, "Loyalty Rebates and the More Economic Approach to EU Competition Law", **European Competition Journal**, (2021) 17(1), pp. 1-22, p. 13 <https://doi.org/10.1080/17441056.2020.1834973 > (Access Date: 18.05.2021).

deemed that the foreclusure of any actual or potential competitor is sufficient for an exclusionary abusive conduct. This standpoint required also the protection of competitors operating inefficiently. Therefore, by the Commission Guidance on Art. 102 TFEU in the evaluation of abusive conducts in the form of exclusionary practices, competitors operating at least as efficient as the dominant undertaking will be taken as a standard. For the as efficient competitor test, the data of the dominant undertaking is to be used. The Commission, subsequently, will investigate if the dominant firm forecloses the relevant market to the competitors which function at least as efficient as the dominant firm.[125] It will decide on the merits of the matter heavily on a case by case basis.[126] The economy-based approach to the application of Art 102 TFEU imposes more effect-oriented arguments. Art 102 TFEU is to be enforced as required by the more economic approach pursuant to the Commission Guidance on Art 102 TFEU.[127]

"The transition towards a more economic approach to abuse of dominance, effectively amounts to a transition from a form-based approach to a more effects-based approach." In the form-based approach the assessment of abuse of a dominant position is realized on the basis of first impression. To clarify, if a contract or a rebate seems an exclusivity contract or an exclusivity rebate system, it will be regarded being abusive. On the other hand, in a more economic approach, in other words in a more effects-based approach, the appearance of practices is not sufficient to detect abuses. According to this approach an agreement or a rebate scheme must appear as an exclusivity conduct and also cause a welfare reduction or harm consumers to be considered abusive.[128]

In conclusion, in order to determine the abuse of dominance through exclusive dealing contracts or rebate systems, the as efficient competitor test and the more economic approach are to be applied. In this context, if an exclusive dealing contract or a conditional rebate or bonus scheme of a dominant undertaking excludes a competitor that would be able to become at

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[125] ÖZTUNALI, p. 117. For the relating provisions of the Commission Guidance on Art. 102 TFEU see for instance paras 23, 25, 67.

[126] MORELL Alexander, **(Behavioral) Law and Economics im Europäischen Wettbewerbsrecht: Missbrauchsaufsicht über Zielrabatte**, Nomos Verlagsgesellschaft, Baden-Baden, 2011, p. 18.

[127] VAN WIJCK, pp. 10, 13.

[128] VAN WIJCK, p. 10.

least as efficient as the dominant undertaking in a reasonable time period, this contract or rebate scheme is regarded as "prima facie abusive". To this end, the actual foreclosure of possibly at least equally efficient rivals must be proved. In terms of unconditional rebates, if they contribute to another anti-competitive conduct or if they are enforced by a dominant firm in the scope of an exclusionary activity, provided that these have an impact to obstruct the competition for at least as efficient competitors and lead to conservation and reinforcement of the dominance, then these rebates are considered to be abusive.[129] In addition to these factors, the effects of exclusive dealing contracts and rebate systems on consumer welfare are to be investigated in the meaning of the more economic approach.

Finally, an abuse by one or more undertaking(s) in a dominant position will be prohibited only if "it may affect trade between Member States". Exclusive dealing contracts and rebate systems of dominant suppliers may be prohibited in so far as they potentially affect trade between Member States in a negative manner. On the other side, Art 6 of the Code prohibits abuse by one or more undertaking(s) of its/their dominant position in the whole or a part of Turkey.

C. Defences

Are there any justifications for these abusive conducts and practices?

Although above focused mainly on the anti-competitive, i.e., abusive aspects of exclusive conducts, some justifications may convert these practices into pro-competitive, i.e., non-abusive behaviours.[130] In contrast to Art 101 (3), Art. 102 TFEU does not provide any legislative exemption framework for dominant undertakings ascertained to have abused its dominance under Art. 102. Nevertheless, the Commission and European courts have specified a number of grounds of justification to distinguish between an abusive conduct and a conduct becoming non-abusive by meeting certain conditions.[131]

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[129] NAZZINI, pp. 397-98.

[130] FUMAGALLI/MOTTA/CALCAGNO, p. 320.

[131] LORENZ, p. 216; VAN BAEL&BELLIS, p. 808.

To justify an exclusive dealing contract or a rebate system which at first sight looks like an abuse of dominance "efficiency rationales" and "objective justifications" behind these acts are to be examined. In relation to efficiencies, it is argued on an economic basis that exclusive agreements and practices can produce significant positive efficiency impacts.[132] In the Commission Guidance on Art. 102 TFEU this issue is regulated under the heading of "objective necessity" and "efficiencies" as follows: "In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking."[133]

In a similar vein, the Guidance on Abusive Exclusionary Behaviours under the concept of "justification" commands the Competition Board to consider also the justification arguments of the dominant undertaking in relation to its conduct under investigation. These grounds of justification can be classified under two categories: "objective necessity" and "efficiency".[134]

Dominant suppliers on one side lead to consumer harm by foreclosing the relevant market to potentially at least as efficient competitors by means of exclusive dealing contracts and rebate systems, on the other side, these conducts and practices can produce efficiency gains. In such cases competition authorities are to compare anticompetitive impacts of exclusive dealing contracts and rebates, such as increased wholesale prices, with efficieny gains which may emerge as a result of buyers' duties on service or sales efforts. Only when efficiency gains outweigh anti-competitive effects, exclusive agreements and rebates may be considered being pro-competitive, i.e., being not abusive.[135]

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[132] FUMAGALLI/MOTTA/CALCAGNO p. 320.

[133] The Commission Guidance on Art 102 TFEU, para 28. For the justification conditions of "objective necessity" and "efficiencies" see further paras 29-31.

[134] The Guidance on Abusive Exclusionary Behaviours, para 30.

[135] GRATZ Linda/REISINGER Markus, "On the Competition Enhancing Effects of Exclusive Dealing Contracts", **International Journal of Industrial Organization**, 2013, 31(5), pp. 429-437, p. 429, <https://doi.org/10.1016/j.ijindorg.2013.07.008> (Access Date: 17.05.2021).

The Commission on its Guidance on Art 102 TFEU has developed a framework for application of efficiency defences. This framework is similar to the structure of Art 101(3) TFEU. If it is evidenced by the alleged dominant supplier that efficiency gains are wider than losses of consumer welfare, the provision on efficiencies of the Commission Guidance on Art. 102 TFEU will enable an anti-competitive behaviour to become pro-competitive.[136]

Another type of objective justification regulated in the Commission Guidance on Art 102 TFEU is objective necessity. This matter is expressed as follows: "The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product."[137]

In conclusion, the assertion that exclusive dealing contracts and rebate schemes of a dominant undertaking are abusive, hence anti-competitive and prohibited, may be rebutted by proving an objective justification.[138]

2. Result: Abuse of Dominance or Not?

It will be examined whether Tomra, which was determined being in a dominant position at the end of the investigation steps, abused its dominant position or not. In the Tomra case, the Court of Justice upheld the decision of the General Court[139] which upheld the Commission's decision. The Court of Justice found in its decision on appeal on 19 April 2012 that the dominant undertaking in question abused its dominant position by "exclusivity

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[136] LORENZ, p. 221.

[137] The Commission Guidance on Art. 102 TFEU, para 29.

[138] VAN WIJCK, p. 18.

[139] Judgment of the General Court of the European Union of 9 September 2010 in Case T-155/06 Tomra Systems and Others v Commission [2010] ECR II-4361, <https://curia.europa.eu/juris/document/document.jsf?docid=82549&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=386522> (Access Date: 12.08.2021).

agreements, quantity commitments and loyalty rebates" without any justification.[140] In its infringement decision of Art. 102 TFEU the Court of Justice specified the following: "The conducts and practices of Tomra which held a dominant position on the relevant product market of high-end and low-end reverse vending machines and systems for collecting and recycling used beverage containers and on the separate national relevant geographic markets consisted of a large number of agreements between it and several supermarket chains concluded between 1998 and 2002 in the form of 'exclusivity agreements, agreements containing individualised quantity commitments and agreements establishing individualised retroactive rebate schemes'."[141]

The behaviours of Tomra were found abusive, as they served Tomra's general monopoly-creating policy. Despite the fact that the agreements, clauses and provisions comprised certain different features such as explicit or de facto exclusivity or a combination of those features, all these agreements and requirements must be seen within the scope of Tomra's general strategy aiming at "preventing market entry, market access and growth opportunities for existing and potential competitors and, ultimately, at driving them out of the market so as to create a situation of virtual monopoly".[142]

First of all, since exclusivity agreements and clauses require customers to purchase all or a substantial part of their requirements from a dominant supplier, they produce as such a foreclosure effect. Tomra, as the dominant supplier on the market, applied exclusivity clauses to a significant part of the total demand. The Commission inferred, therefore, that the exclusivity agreements concluded by Tomra were likely to have, and indeed had, a market-foreclosure effect distorting effective competition. It was expressed in the decision that there were no conditions that were capable exceptionally of justifying exclusivity or equivalent arrangements and that Tomra had also failed to justify its conducts and practices by its arguments of cost savings.[143]

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[140] Judgment of the Court (Third Chamber) 19 April 2012 Case C-549/10 P < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0549&from=EN> (Access Date: 13.08.2021).

[141] Case C-549/10 P para 11, p. 3.

[142] Case C-549/10 P para 12, p. 3.

[143] Case C-549/10 P para 13, p. 4.

Furthermore, as discounts offered for individualised quantities equivalent to the whole or almost whole demand induce the customer to purchase entire or nearly entire its requirements from a dominant undertaking, they function as loyalty rebates, in other words, rebates that ensure loyalty to the dominant undertaking by stipulating conditions on customers to purchase all or a large proportion of their requirements from this dominant supplier. Thereby, they have the same effect as explicit exclusivity agreements or clauses. According to the Commission, even though the amount of purchasing commitment is not represented in definite terms or as a certain percentage, the related agreements or provisions may still possess an exclusionary character. With regard to Tomra's agreements, although the quantity targets set out within the individualised commitments were diverse for each customer, irrespective of its magnitute and purchasing amount, all of these corresponded to the customer's whole requirements or to most of them, or even exceeded them. The Commission also considered that Tomra had the sufficient knowledge on the RVM market to appreciate realistically the approximate demand of each customer. It was evident from the negotiations between Tomra and its customers, its offers to them and the documents in relation to these practices that Tomra's strategy was binding its customers, especially its major customers, with agreements that directed at excluding competitors from the market and not giving them any opportunity of growth.[144]

Finally, concerning the individualised retroactive rebates, in addition to being individual to each customer, these rebate systems set certain thresholds linked to the entire requirements of each customer or a substantial part thereof based on the customer's estimated requirements and/or purchasing capacity attained in the past. By virtue of the strong incentive power for the customer of "the combination of a retroactive rebate scheme with a threshold or thresholds corresponding to the customer's entire requirements or a large proportion thereof" to meet its all or almost all demand exclusively from Tomra and of the resulting artificial raise of the cost of substitution with another supplier, even for a minor part of units, the Commission came to the conclusion based on the case-law that, the rebate systems under examination had to be characterized as a loyalty creating instrument and thereby as loyalty rebates.[145]

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[144] Case C-549/10 P para 14, p. 4.

[145] Case C-549/10 P para 15, p. 4.

Since Tomra's, as the dominant supplier on the RVM market, exclusionary practices throughout the period from 1998 to 2002 had a foreclosure effect on the market to the existing and potential competitors and there were no justification of these practices, they were identified as anti-competitive behaviours resulting in abuse of dominance because of their entry and expansion blocking nature. Moreover, there were no justifications for these conducts. Tomra's arguments of cost efficiency could not justify its exclusionary practices. In addition to that, there was no benefit to consumers either, as the price of Tomra's products did not fall despite the increase of sales volume, rather prices stagnated or even escalated over the period at issue.[146]

The Commission's decision and the judgements of the General Court and the Court of Justice are based on a more formal approach instead of a more economic approach. The exclusive dealing contracts and exclusive rebates were regarded prohibited as a result of a very formalistic analysis.[147]

IV. CONCLUSION

In conclusion, the problem of "How are exclusive dealing contracts and rebates evaluated within the scope of abuse of dominance under EU and Turkish competition laws?" is to be answered as follows: Exclusive dealing contracts and rebates with exclusivity effect are evaluated as being conducts which bring about exclusionary abuse when undertaken by a dominant supplier on the relevant market. As exclusive dealing contracts and rebate schemes of the dominant incumbent supplier have a foreclosure impact to potential and existing competitors that are at least as efficient as this dominant firm, by preventing the new entries into the market and the expansion of the actual rivals in the market, they represent one of the significant examples of exclusionary abusive behaviours under both EU competition law and Turkish competition law. The commitment not to make any or large amount of purchase from a competing seller and to purchase all or most of its requirements exclusively from the dominant supplier which is the contracting or offering party provides the exclusive agreement and rebate or bonuses under discussion with that exclusive nature. Beside the exclusivity obligation of the customer in the exclusive dealing contract,

[146] Case C-549/10 P para 16, pp. 4-5.

[147] FUMAGALLI/MOTTA/CALCAGNO, p. 329.

loyalty rebates and loyalty-inducing rebates, such as target rebates and quantity rebates, incentivize the customer to purchase its entire or almost entire requirements solely from the dominant undertaking. In that case, if they can not be justified through objective reasons and efficiencies and they may affect trade between Member States, or they are performed in the whole or a part of Turkey, exclusive dealing contracts and rebate systems of the dominant supplier are to be prohibited as being anti-competitive.

In order to identify and investigate abuse of dominance through exclusive dealing contracts and rebates, an investigation procedure consisting of a number of steps must be followed up. To that end, initially dominance, then abuse of this dominance are to be examined. In this sense, the first move is identifying both the relevant product and geographic market where dominance is to be inquired. When dealing with abuse of dominance cases the Commission and the Competition Board detects in first place the relevant market. Subsequently, the position of the undertaking concerned on the relevant market is to be analyzed. For this, its market power, inclusive its market share and the market shares of competitors and other factors which are decisive for ascertaining its market power is to be taken into account. If it is determined that it holds a dominant position on the relevant market, then the next step is to explore whether the practices subject to investigation can be assessed as abuse of this dominant position. This investigation method is enforced by both EU authorities and the Competition Board.

If the practices in question are exclusive dealing contracts and rebates, as a result of a more economic approach, in other words a more effects-based approach, it must be inquired into whether these conducts have a foreclosure effect to the competitors which are at least as efficient as the dominant incumbent firm. In this regard, exclusive dealing contracts and exclusivity rebates must prevent the entry and expansion of potential and actual rivals. If no justification is acceptable for these practices and these exclusionary abusive conducts may affect trade between Member States or they are carried out in whole Turkey or a part thereof, it can be expressed that the dominant undertaking abuses its dominant position through its exclusive dealing contracts and rebates.

Finally, it is possible to rebut arguments of abuse of dominance in relation to exclusive dealing contracts and rebates by proving a number of grounds of justification. If these exclusionary practices can be justified successfully, they may not be regarded as abusive, in other words anti-

competitive. That is to say, some justifications may convert these practices into pro-competitive, i.e., non-abusive behaviours. To justify an exclusive dealing contract or a rebate system which at first sight appears as an abuse of dominance, "efficiency rationales" and "objective necessities" behind these behaviours are to be questioned. Both the Commission Guidance on Art. 102 TFEU and the Guidance on Abusive Exclusionary Behaviours point out these grounds of justification. When exclusive dealing agreements and exclusive rebates which establish exclusionary abuse can be justified by means of above-mentioned justification grounds, they may be considered being non-abusive, i.e., being pro-competitive.

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