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Risks for dominant FMCG firms in Turkey

BASEAK White Papers: August 2015, No. 2

From the editor

The Turkish Competition Authority (TCA) has underlined the role of economics in competition law since its first days of operation. The application of sound economic methods—in order to understand both the intent of a dominant firm and the effects of its practices in the market—ensures a non-formalist competition policy. This would have been the correct principle for the TCA to decrease barriers in various FMCG sectors where a number of different companies enjoy dominant positions. However, as Tolgahan Aytemizel rightfully establishes in his paper, the TCA has relied heavily on intercompany communications and circumstantial evidence, such as general market data, without sound analysis. This approach reduces the deterrence of fines imposed on firms, because it is easy to circumvent the methodology of the TCA in future practices. The approach of the TCA is also far from being a guide for firms which may face a complaint in future.

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Introduction

by Tolga Han Aytemizel

After the revocation of the benefits of the block exemption regulations previously granted to dominant firms in various FMCG sectors, the focus of the Turkish Competition Authority (TCA) on exclusivity and related practices has intensified, as displayed in recent investigations concerning dominant firms in various FMCG markets. The current approach adopted by the TCA in its assessment of firms' distribution agreements poses a critical regulatory risk for dominant firms' business operations. Strict and per se violations that are observed by the recent decisions of the TCA have certain potential negative effects as they often lack sound economic analysis and consideration of pro-competitive effects. This paper aims to provide an overview of the issue and guidance for the market players in the FMCG industry in Turkey.

Recent investigations include those initiated against Efes Pazarlama ve Dağıtım Ticaret A.Ş ("Efes") (concluded in 2011), Frito Lay (concluded in 2013), and Mey İçki Sanayi ve Ticaret A.Ş. ("Mey İçki") (concluded in 2014), all of which resulted in the imposition of administrative fines. The most recent investigation against Coca Cola Turkey (concluded in 2015) is of a similar nature. These 'dominant' firms were all investigated due to their practices related to the sales points.

Overall all of the decisions were follow-up after the withdrawal of exemptions. In the series of the TCA decisions in the past, Frito Lay,[1] Efes[2] and Mey İçki[3] had been determined to be dominant undertakings. As a result, privileges set forth in the Vertical Agreements Block Exemption Communiqué allowing certain types of business practice, such as imposition of exclusive distribution or non-co imposition of exclusive distribution or non-compete clauses to the sellers, were taken away from these undertakings. These decisions were generally based on structural competition problems in the markets, such as high concentration levels (in some cases, duopolies) and high entry barriers due to advertising restrictions. It was evaluated that the distribution practices of dominant firms may have exclusionary effects as they prevent new firms from competing in those markets which would in return harm the competitiveness of the markets. The TCA put some restrictions on these firms' business operations. The TCA's aim was initially to facilitate active competition in the market and to encourage new entrants, which, as it turns out, also has the effect of deterring abuse of dominant position. The TCA has continued its efforts to closely monitor the competition in these markets by investigating the commercial practices of these firms. The table below provides an overview.

Firm	Withdrawal of exemption	Investigation	Decision/Fine
Efes	2005	Allegations that Efes, the dominant brewery, and its distributors demanded sales points to sell only Efes brands and obstruct competitors' practices by various practices.	**In Infringement of Article 4,** TRY 8.1 million fine (0.3% of the annual gross revenues)- 2011[4]
Frito Lay	2004	Allegations that Frito Lay breached the Competition Act in packed crisps market by foreclosing competitors and carrying out exclusivity related practices.	**Infringement of Article 4,** TRY 17.9 million fine (2.25% of the annual gross revenues)- 2012[5]
Mey İçki	2007	Allegations that Mey İçki (subsidiary of Diageo Plc.) breached the Competition Act by pressuring sales points to sell Mey İçki products exclusively at the expense of competitors and obstructing activities of the competitors by other practices.	**Infringement of Article 6,** TRY 41.5 million fine (1.5% of the annual gross revenues)- 2014[6]
Coca Cola Turkey	2007	Allegations that the bottler company violated market competition rules by entering into exclusivity agreements with its sales points.	No infringement - 2015[7]

[4]TCA decision numbered 11-42/911-281 dated 13.7.2011.
[5]TCA decision numbered 13-49/711-300 dated 29.08.2013.
[6]TCA decision numbered 14-21/410-178 and dated 12.06.2014.

[7]The reasoned decision has not been published yet. Press review of the TCA is available at http://www.rekabet.gov.tr/tr-TR/Guncel/Coca-Cola-Satis-Dagitim-AS-Hakkinda-Yurutulen-Sorusturma-Sonuclandi .

In both the Efes and the Frito Lay investigations, TCA concluded that there was an infringement of Article 4 of the Competition Act which governs anticompetitive agreements between undertakings. The TCA did not fully examine the effects of the practices on the markets and focused on the observed intent. One can say that the TCA does not wait for the actual manifestation of the exclusionary effects. From TCA's perspective, it seems that a dominant undertakings' mere capability of excluding competitors was found sufficient to be deemed abusive. In other words, although the dominant undertaking's practices are not proven to have the effect of preventing new entry or obstructing activities of existing competitors, the TCA may take into account the potential exclusion. This is a very problematic standard as a competition policy, and the immediate effect is the uncertainty generated by such kind of enforcement. In the Mey İçki decision, although the TCA evaluated that exclusivity resulted from the dominant power of Mey İçki and therefore proceeded with the investigation under Article 6 of the Competition Law No 4054, it still gave more weight to circumstantial evidence than the actual effects of Mey's behaviour in the market. Thus, it can be said that the TCA adopts a strict per se approach in exclusivity related practices irrespective of whether the investigation is within the scope of Article 4 or Article 6.

Before analysing the cases, pointing out the potential problems of the TCA's approach and focusing on what the current stance of the TCA means for the dominant firms in the FMCG sector, it is useful to review the merits of distribution contracts in question from a competition policy perspective.

1.Economics of foreclosure

Why does the Competition Law deal with exclusivity?

One of the interesting and controversial points in competition policy is whether a firm enjoying a dominant position can deter entry or obstruct the activities of its existing competitors beyond the means of the natural course of competition by some contractual or pricing practices, such as obliging its retailers to deal exclusively with itself, ensuring a certain share of their shelf space (exclusive dealing and partial exclusives), offering them discounts based on sales targets (loyalty and market share discounts) and offering bundled packages at a lower price (bundled rebates). In principle, they can be considered (at least partially) as a contractual equivalent to the vertical integration of a supplier and different final goods buyers. The concern behind these practices is the potential to be regarded as a monopolization device. It is for this reason that exclusivity related practices have overtaken predation[8] and become a more prominent topic with regard to vertical agreements.

Although the idea that a dominant firm can use the abovementioned practices to damage competition is an old one, the identification of anticompetitive exclusionary behaviour is one of the most difficult topics in competition policy. This is because such practices are also employed under competitive market environments and harmful actions cannot be easily distinguished from legitimate actions that actually benefit consumers.[9] Moreover, a more obvious difficulty is that rivals to the dominant firm may be excluded from the market, or at least from serving portions of the market, by competition on the merits (if the dominant firm is better at delivering what customers want) as well as by anti-competitive conduct.[10] This makes the task of distinguishing between good and bad exclusion even more difficult due to the challenge of identifying the subset of agreements which result in harm, without banning or deterring the majority of such agreements fostering competition.[11] Ongoing debates and literature on this topic reflect this difficulty. In the section below, a pure exclusive dealing case will be discussed because related practices that are observed in practice share a similar nature.

Explaining the concepts

All the discussions and recent developments on the topic of exclusionary abuses can be explained using a simple example.[12] Suppose a dominant firm wants to impose exclusivity on a retailer that sells its products to the final consumer, meaning that the retailer cannot trade with any other third party. In general, the retailer may not prefer exclusive dealing as it would restrict the trade with smaller alternative suppliers, as the price he pays would be higher than it would be if he was able to deal with an alternative supplier. In such a case, the dominant firm will have to purchase the retailer's exclusivity by paying a premium, possibly in the form of a price cut i.e. a discount on the goods that it sells to the retailer. This compensation should be such that the retailer becomes indifferent between exclusivity (the price would be higher as there are no alternative suppliers, but there is the discount) and no exclusivity (price would be lower as there is competition among the suppliers, but there is no discount).

In the past, it was argued that purchasing the exclusivity of the retailer would not be profitable for the dominant firm if such a deal goes against social welfare. The argument is called "single monopoly critique" in which the necessary compensation to the retailer in the presence of a more efficient alternative supplier would be higher than the profit gained by the dominant firm by imposing exclusivity.[13] Therefore the dominant firm would have no incentive to impose exclusivity unless there is an efficiency justification (because there would be losses due to exclusive dealing). Such a result implies that whenever we observe exclusive contracts, these are positive from a social standpoint because they either generate sufficient synergies or involve the most efficient firms.[14] These synergies or efficiencies might be providing incentives for a retailer to take care of the reputation of the product it sells, to offer better service and ensure profitability of the specialized investments.[15]

However, there are many studies that challenge this idea. One of the most important—also the one most relevant in terms of the current assessment of exclusive dealing by the competition authorities—is called "divide and rule" exclusion.[16] Using the same example as above, suppose that there are many retailers. In such a case, it is argued, the dominant firm may not need to compensate all

the retailers for the harm caused by exclusivity because it can exploit lack of coordination in retailers' decision. If a potential entrant needs a certain share of retailers to cover fixed costs, an incumbent can deter entry simply by offering exclusive contracts to some, but not all, retailers. Moreover, when every retailer believes that a sufficient portion of the others will sign an exclusive contract anyway (due to lack of coordination and the belief that the dominant firm can compensate enough retailers to deter entry if necessary), each would lose nothing by signing it as well, since entry is expected to be prevented irrespective of one's decision. Hence, although in the end they will all be harmed, the dominant firm would not need to compensate any retailer for signing an exclusive contract. Scope for exclusion may be greater if the dominant firm can discriminate among buyers and engage them sequentially.[17]

Economics suggest that exclusive dealing can be used anti-competitively by a dominant firm but under a specific set of circumstances. The most important is the notion of economies of scale. The decrease in the residual demand of potential competitors must be large enough to prevent reaching minimum efficient scale and deter entry. Basically a rule of reason analysis is required to determine anticompetitive effects even in a case of exclusive dealing. This means looking at the share of the foreclosed market and deciding whether it is large enough to induce exclusion (characteristics of the contracts and cost structures) and whether exclusion will increase market power in order to explain why it is difficult for the adversely affected parties to come up with alternative non-exclusive contracts.

Raising Costs Rivals'

Discussion regarding exclusive dealing above generally relates to entry-deterrence (when an alternative supplier is not present and there is some uncertainty). Outright exclusivity is not practical (neither for procompetitive nor anticompetitive motives) when the competitor is already present. In that case the concern, as it is put forward by the competition authorities frequently, is obstructing competitors' activities, which refers to the economic concept of Raising Rivals' Costs (RRC).[18] Under this concept, a dominant firm engages in practices not to aim for exclusivity, but instead to make competitors' production or distribution more costly to its benefit. It is considered that exclusive dealing arrangements can raise small rivals' costs of distribution if there are scale economies or other entry barriers in retailing.[19] The effect of such strategies depends on how much disputed practices can change the costs of the competitor, to the extent that their production decreases, and whether this is compensated by dominant firms demand increase. For the determination of an anticompetitive effect, RCC paradigm requires (i) that the conduct of the challenged firm "unavoidably and significantly" increases the costs of its

competitors and (ii) that the raising of rivals' costs enables the dominant firm to increase profitability at the expense of consumer benefit.[20]

Practices such as loyalty rebates, market share discounts, slotting allowances, equipment placement and category management, which are commonly observed in practice, especially in the FMCG industry, can be considered under this category, as they fall short of full-fledged exclusivity. The distinction between economics and the relevant competition policy in EU and Turkey is apparent here. Although these practices require even more careful analysis than the analysis of outright exclusivity, since the procompetitive justifications are more likely and possible anticompetitive effects are more indirect, formalistic approaches tend to have been used in treating some of them as per se illegal.

The issue of loyalty rebates has been drawing a lot of attention lately because there is an ongoing debate of its treatment in the EU. It deserves an analysis from an economic perspective here as it reflects the core of the issue in Turkey. This will be explained below.

Loyalty rebates

There are many forms of discounts which have a wide variety of procompetitive uses, such as incentivizing retailers, paying a premium for higher share of shelf space, etc. From a competition policy perspective, when a dominant supplier applies a discount on all units it sells in the event that a retailer achieves a certain level of sales (threshold) determined specifically to the retailer in the reference period,[21] it raises antitrust scrutiny. Such conditional discounts can deter dealers to purchase from smaller competitors (and thereby raise their costs) by the following reasoning. As dominant firms' products generally constitute an important part of a retailer's product portfolio, they have an "assured base of sales" where no competitive pressure exists. Competitors could only compete in the residual part of the retailer's demand (so-called "contestable share of demand"). Retroactive discounts lower the price of dominant firms' units in the contestable share and create switching cost for the retailers when buying from smaller supplier. The effective price that the retailer actually pays to the dominant firm for incremental units around the sales target becomes very low due to the discount applied on all units, which would be foregone if a retailer decides to purchase from the smaller competitors. In order to compensate for this switching cost, the smaller competitors have to offer even lower prices compared to those of the dominant firm, because smaller firms cannot compete for the entire demand of a retailer but only the contestable share, which restricts their ability to cut prices. It follows that the smaller the contestable share, the lower the range that a competitor can allocate the switching cost lowering the price it has to offer to dealers to compete in the market. If the contestable share is considerably low compared to the discount rate, smaller firms cannot profitably sell to the retailer as they have to cut prices even lower than marginal cost and therefore be excluded from that retailer.[22]

Hence, on top of the typical analysis for any exclusive dealing case, establishing a competitive harm for discounts and similar practices requires demonstrating further: (i) that equally efficient competitors cannot match those discounts, and (ii) that excluding rivals will harm consumers. However, loyalty rebates and some other practices which have similar necessary conditions for a convincing competitive harm theory, instead receive a very formalistic approach and those practices (called "loyalty inducing") are treated as per se illegal. Even if they are not, the negative outlook which has weaker ground in economic theory creates inertia and prevents the application of objective standards and safe-harbours. This issue is dealt with in the section below.

[17]The seminal papers in economics literature are E Rasmusen, J Ramseyer, and J Wiley, "Naked Exclusion" (1991) 81(5) American Economic Review 1137–45; and I Segal and M Whinston, "Naked Exclusion: Comment" (2000) 90(1) American Economic Review 296–309.

[18]RRC paradigm has been used as predation as a more restrictive legal standard. See Salop, Steven C. "Exclusionary conduct, effect on consumers, and the flawed profit-sacrifice standard." Antitrust Law Journal (2006): 311-374.

[19]Steven C. Salop & David T. Scheffman, Raising Rivals' Costs, 73 American Economic Review. 267 (1983).

[20]Tom, Willard K., and Gregory F. Wells. "Raising Rivals' Costs: The Problem of Remedies." George Mason Law Review 12 (2003): 389.

[21]Called individualized and retroactive rebates

[22]For a detailed treatment for the subject see Faella, Gianluca.
"The antitrust assessment of loyalty discounts and rebates."
Journal of Competition Law and Economics 4.2 (2008): 375-410.

2. Approach in the US and the EU

As in the economic literature, there has been debate on the legislation side on how to assess exclusion from an antitrust perspective. The two most famous laws regulating monopolization are Section 2 of the Sherman Act in the United States and Article 102[23] of the European Community Treaty of the Functioning of the European Union.

The US

The approach in the US regarding monopolization relies on the rule of reason analysis where various proposed standards are underlined by economic principles. As both the law and literature on monopolization are older and more developed in the US, it shows a modern approach which has evolved throughout the years alongside the advances in economics and empirical methods. Section 2 of the Sherman Act states:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [. . .]"

In general, there are two approaches distinguishing lawful from unlawful monopolization, the specific intent approach and the welfare balancing approach.[24] The key difference is that the specific intent approach condemns monopolizing acts when it appears that the dominant firm's sole purpose was to destroy competition. The welfare balancing approach condemns monopolizing acts after weighing anticompetitive effects against some notion of procompetitive benefit. The specific intent approach is a more traditional application of Section 2 of the Sherman Act, whereby intent is inferred by conduct that cannot be justified on the basis of legitimate competitive goals, conduct that can be understood only as an effort to destroy competition from rivals.[26] The specific intent test puts the evidentiary burden on the alleged firm, as practices in question should be justified before courts. This conservative approach is transformed into a balancing approach,[27] where the specific intent test is no longer required under Section 2, and violations will be determined by balancing the procompetitive and anticompetitive effects of the defendant's conduct. A dominant firm may have substantial efficiency justifications for its conduct, although anticompetitive exclusion may be present, but the decision depends on how the selected welfare measure is changed.[28]

It should be noted that modern applications of both approaches in the US rely on economic analysis heavily, reflecting the discussion in the section above. Even the traditional specific intent approach is reflected in various modern tests,[29] and welfare balancing takes the analysis one step further by looking at market outcomes as a whole. Furthermore, the most recent approaches put more weight to the procompetitive effects. For instance, Joshua Wright, who is the current commissioner of the Federal Trade Commission, has the view that distribution contracts such as exclusive dealing, slotting contracts and other exclusivity related practices are observed in many competitive markets and adopted by firms without significant market power, and they are more likely to be procompetitive than anticompetitive, and therefore argues that antitrust policy should be based more on empirical evidence.[30]

EU

In the EU, the situation is different because the historical approach with regard to exclusivity was per se illegal, and the transition that is observed in the US is still in its early stages. The strict approach to exclusive dealing under Article 102 (previously 82) EC is reflected in a number of leading cases,[31] where practices that are loyalty inducing were found illegal. But over time, a more consistent approach towards a rule of reason approach started to be applied where the actual or likely effects of a particular arrangement in the relevant market and its impact on consumers were more carefully looked at.

But the most important reform on the application of Article 102 on exclusivity and related practices is the Discussion Paper[32] published by the EC in 2009, in which a new and full rule of reason approach was adopted and the importance of economic analysis noted. A number of general principles regarding exclusivity related practices are set out in the Discussion Paper. It is stated that the Commission will require evidence of likely or actual foreclosure effects on the market in order to asses when the capability of exclusive dealing amounts to

foreclosure in an individual case by evaluating whether existing and possible future competitors can counteract the dominant firm's conduct, and whether the dominant firm may put forward evidence showing why the exclusive dealing requirements did not materially harm competition or, if they did, whether they were necessary to achieve certain efficiencies.[33] This resembles both the specific intent and welfare balance approaches in the US described above.

However, implementation of this rule of reason approach has not been without problems. The most concrete example is the recent Intel decision,[34] the first investigation in which the Commission explicitly used an effects-based approach to assess the competitive consequences of exclusivity related practices of loyalty rebates. It was a test trial of what is proposed in the Guidance paper. The Commission concluded that that chip producer breached competition rules by granting anti-competitive rebates (that induce exclusivity) to computer manufacturers ("OEMs") in an attempt to exclude its rival AMD from the market. The Commission applied the "as efficient-competitor test" and found that even an equally efficient competitor could not compete against Intel's rebates for the contestable share of demand (described above). However, when Intel took the case to the General Court, this approach was found redundant although the decision was confirmed. The General Court stated that Intel's rebates had an exclusivity inducing nature which should automatically be considered illegal and that the effects-based analysis is largely unnecessary for these types of rebates. This re-asserted the form-based standard of the past and created an uncertainty on the transition.[35]

All in all, what we observe regarding exclusivity related practices is a transition from a form-based approached to a more sophisticated and advanced rule of reason approach, although the progress is still lagged in the EU compared to the US Developments in Turkey closely resemble what has been happening in the EU, which is marked with a considerable lag, and will be explained in detail below.

[23]Exclusivity practices can be assessed under the Article 101 of the EC Treaty governing anticompetitive agreements between firms, however exclusionary anticompetitive effects generally require a dominant firm therefore we focus on abuse of dominance.

[24]For an overview see Hylton, K.N., The Law and Economics of Monopolization Standards, Antitrust Law and Economics, s.1., and for a detailed treatment of some specific standards from an economic perspective, see Steven C. Salop, Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard, 73 Antitrust Law Journal 311 (2006).

[25]Hylton, K.N., The Law and Economics of Monopolization Standards, Antitrust Law and Economics, s.1.

[26]This view is established first in Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[27]With Alcoa decision, United States v. Alum. Co. of America, 148 F.2d 416 (2d Cir. 1945).

[28]Hylton, K.N., The Law and Economics of Monopolization Standards, Antitrust Law and Economics, s.7.

[29]Profit sacrifice test and equally efficient competitor test can be given as examples. For instance if the practice of a dominant firm does not foreclose an equally efficient competitor, even the special intent becomes questionable, and the practice is presumed to be lawful even without looking at the overall impact on welfare.

[30]See his articles: Joshua D. Wright, Slotting Contracts and Consumer Welfare, 74 Antitrust Law Journal 439 (2007), Joshua D. Wright, An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts, Global Competition Policy, July 2009, Joshua D. Wright, Moving Beyond Naïve Foreclosure Analysis, 19 George Mason Law Review. 1163 (2012).

[31]The most famous one is Hoffmann-La Roche and Co AG v Commission [1979] ECR 461

[32]European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 (C45) 07.

[33]O'Donoghue, Robert, and Atilano Jorge Padilla. The law and economics of Article 82 EC. Hart, 2006.

[34]Case COMP/37.990 Intel dated 13/05/2009.

[35]See Intel and the future of Article 102*, CRA Competition Memo, available at http://www.crai.com/ecp/assets/Intel_and_the_future_of_Article_102.pdf

3. Approach of the TCA

The competition policy in Turkey is closely linked to the legislation and developments in the EU. The Competition Law No 4054 is similar to Article 101 and 102 of Treaty on the Functioning of the European Union (TFEU), and even recent developments, such as the Guidance Paper described above, are often adopted on the same grounds. Therefore, in terms of dealing with exclusivity related cases, we see a similar transition as in the EU, but the situation is more problematic in terms of establishing a consistent standard.

Efes decision

The first example is the Efes decision which is an important decision for the TCA. Efes, the market leading beer brewery in Turkey, was alleged to be in breach of competition law by imposing vertical restraints such as requesting off-trade sales points to sell only Efes branded beers for the delivery of the product, quantity forcing, discounts and monetary support equipment placement, therefore obstructing the activities of its competitor BİMPAŞ (producer of the *Tuborg* brand).

The investigation was closely linked to the previous decisions regarding whether such practices benefit from block exemption. In its 2005 decision, the TCA concluded that due to structural problems, such as entry barriers as a result of excess capacity, advertising restrictions and closed duopoly structure that is stable over time, single brand clauses in distribution agreements which directly or indirectly include elements of exclusivity (obligations, minimum purchase agreement, credits and discounts contingent on single branding) restrict competition in the beer market. Therefore, such obligations in distribution agreements should be considered non-compete clauses and they were determined to be unlawful even though they caused sales points to direct only a small portion (even if it is considerably smaller than the 80% threshold specified in the block exemption regulations) of their regular purchases to one of the firms. Also, the fact that two undertakings prevented placement of the competitor's products in the coolers they gave to the sales point was also determined to be restrictive of competition.

In 2010, BİMPAŞ applied for the benefit of the block exemptions again in order to use exclusivity related practices, arguing that the market conditions changed in favour of Efes as it increased its market share after the decision in 2005. The TCA found this argument legitimate and allowed BİMPAŞ to use single brand restrictions for a period not exceeding 5 years.[36] This decision is considered an important twist. Although the decision of withdrawal in 2005 aimed to achieve competitive functioning of the market once there was an asymmetric regulation favoring smaller competitors, it implied that Efes had the responsibility of a dominant firm. However, its actions became tightly controlled, not by Article 6 of the Competition Act which governs abuse of dominant position as it should, but by Article 4 which governs agreements between undertakings that restrain competition. This approach, despite producing negative consequences for the standards of assessing practices of dominant firms, was taken one step further with the investigation against Efes.

The TCA's investigation against Efes reflected the first signs of the problem because it opened on the basis of Article 4.[37] On the one hand, this approach can be considered appropriate since the allegations were that Efes continued practices which did not benefit from the block exemption. On the other hand, the TCA implied that the source of the problem is the concern of abuse of dominant position, since the same actions were regarded to be legally justifiable for a small competitor, Tuborg. Furthermore, some practices of Efes were considered to have the capability of restraining competition attributable to its dominant position as direct exclusive dealing arrangements were not common after 2005.
The TCA has determined that Efes breached its obligations arising from the withdrawal decision and moreover evaluated that Efes maintained de facto exclusivity primarily through indirect practices based on providing bonuses, discounts and giving free products to the sales points in return of the purchase of large quantities of Efes beers. It could also be argued that the case deserved a rule of reason approach that looks specifically to the effects under Article 6 to create consistent standards in determining which practices should be legal and which should not be legal.

Instead, the decision only admitted e-mails displaying aggressive strategies used by sales personnel at the local level to increase the share

of Efes's products at point of sales as evidence. These e-mails were said to imply potential foreclosure of the relevant market. All the defences regarding the limited effect of the practices and competition on merits were found irrelevant by the TCA as the investigation concerned Article 4.[37] However, irrespective of the final decision, it can be argued that for quasi-exclusivity practices the intent and the effect should be looked at using economic methods exclusively to draw a line between competitive and anticompetitive practices, thereby limiting the possibility that the precedence of the decision could have an impact on competitive use of the practices. Instead of accepting that some forms of practices are exclusivity inducing and therefore illegal, it could have been shown by using economic arguments that the contracts with the sales points cannot be justified by anything else but a monopolization attempt, and they create a burden for the competitor because of minimum efficient scale in distribution.

In the end, Efes was enforced with an administrative fine of TRY 8.1 million. The base fine was 0.5% of Efes' annual gross revenues, but after taking into account the aggravating factor that the breach lasted longer than one year, as well as the mitigating factor that the practices were not common, the resulting fine was decided to be 0.3% of Efes' annual gross revenues. This decision creates an uncertainty by imposing a fine to a practice that is anticompetitive because it could be an abuse of dominant position and therefore in breach of an article that does not govern the abuse of dominant position. Furthermore, this approach created a precedent which causes uncertainty in the standard for cases related to abuse of dominance, as circumstantial evidence alone was considered sufficient to conclude an infringement without looking at the actual effects of the alleged practices.

Frito Lay Decision

This approach continued with the Frito Lay (dominant actor in the supply of packaged chips in Turkey) decision in 2013. An investigation was conducted to determine whether or not Frito Lay's practices were aimed at ensuring exclusive sales of its products at sales points. This investigation, which was concluded with a fine of TRY 17.9 million on the undertaking, also had similar motivations as the Efes decision: (i) the Frito Lay investigation was initiated following a previous determination that its practices did not benefit from the block exemption, (ii) the TCA, instead of conducting an analysis pursuant to the rules governing abuse of dominant position, determined that exclusivity practices aimed at preventing or removing competitors from entering sales points violate Article 4 of the Competition Act which regulates anti-competitive agreements,.

The TCA determined that Frito Lay engaged in various practices aimed at preventing the entry of the competing producer Kraft into Frito Lay points of sale and reducing the playing field. It was observed that performance evaluations of the Frito Lay sales team took into account how successful they were in realizing the "Frito Lay/Kraft co-existence" target, that it was intended to decrease the presence of Kraft from certain points. These documents were found to be a part of Frito Lay's institutional plan to ensure the above goal. There were other documents which showed that competing producers were excluded from points of sales which were ensured by the TL value of free products given to the points of sales. The TCA did not perform an analysis pursuant to the rules governing abuse of dominant position. It was concluded that these practices were in violation of the decision that revoked the exemption, but the approach was again form-based.

Mey İçki Decision

The most recent decision of the TCA was a result of the investigation into Mey İçki, Diageo's subsidiary in Turkey who is a dominant actor in the rakı market, and is a clear signal of the TCA's continued approach in evaluating dominance cases. This investigation was based upon claims that Mey İçki abused its dominant position by adopting practices which obstructed competitors' activities in the rakı market, in violation of Article 6 of the Competition Act. As a result of the investigation, the TCA imposed a TRY 41 million fine on the undertaking, citing practices leading to exclusivity in sales points (Article 4) and practices leading to exclusion of competitors and foreclosure (Article 6). Although this time the TCA assessed the merits of the case by evaluating these practices as abuse and stating that the infringements were the result of unilateral conduct, its analysis and conclusions were mainly form-based.

In its analysis of whether Mey İçki abused its dominant position by offering various type of concessions (discounts and target rebates via

agreements) to the off-trade sales points conditional upon targets, the TCA focused mostly on circumstantial evidence namely company internal e-mails between the sales personnel and regional / higher level managers which contained expressions determined to be aggressive. From this perspective, the assessment was similar to the previous decisions since the TCA looked for and gave great weight to signals of intent.

On the other hand, it cannot be said that the TCA provided a sufficient assessment of the effect, which is a must for abuse of dominance cases within the scope of Article 6 consistent with the economic analysis described above. Although in the reasoned decision, the TCA stated that it considered both the potential and actual effects, it seemed to conclude that the sufficient reasons to expect for potential effects primarily linked with Mey İçki's super dominance in the rakı market and existing entry barriers amounted to actual effects. However, no assessment of the actual link between the behaviour and the anticompetitive harm was portrayed. The TCA did not analyse whether the concessions have the potential to foreclose the off-trade sales points to equally efficient competitors, or the scope of the discounts and the expected magnitude of market foreclosure in actualization of the potential. Instead, the TCA relied on a pre-selected sample of sales points to support the intent and although market indicators (such as market shares and availability rates at the sales points) did not strongly suggest that competitors were harmed, the TCA concluded that Mey İçki abused its dominant position by obstructing activities of other undertakings.

Despite the fact that the TCA's recent Guidelines on Exclusionary Abuses recommends portrayal of the actual effect by applying an efficient competitor test regarding the discounts and the relevant practices, the TCA did not follow the methodology. As a result, even though the TCA appropriately assessed the merits of the case by applying Article 6 of the Competition Act as opposed to Article 4, its analysis and conclusions were mainly form-based. This may be because the TCA considered all the actions of Mey İçki as a part of an exclusionary strategy.

Coca Cola investigation

The outcome of the investigation against Coca-Cola, a dominant actor in the FMCG market in Turkey, is pending. Similarly, in 2007, the TCA had revoked the block exemption granted to distribution contracts of Coca-Cola Turkey in relation to carbonated soft drinks. The TCA considered that, due to large market share, unique brand recognition and barriers to entry, the exclusivity provisions in the agreements and practices such as target/growth rebates and cooler exclusivity should be considered as limiting competition. In addition, the TCA concluded that Coca-Cola shall provide 20 percent free space in coolers so that competitors' products can be stored. Despite the fact that this decision was considered as commencement of a new period in which the TCA applied de facto exclusivity when making decisions on rebate or exclusivity practices of dominant undertakings, the follow-up analysis of the TCA did not follow this approach, as seen from the Frito Lay, Efes and Mey İçki cases. However, pursuant to the withdrawal of Coca-Cola's block exemption in 2007, the TCA initiated an investigation into the undertaking this year to determine whether its practices are in violation of Article 4 or 6 of the Competition Act. This investigation has concluded that there was no infringement. The reasoned decision has not been published as of May 2015.

[36]TCA decision numbered 08-28/321-105 dated 10.4.2008.

[37]TCA decision numbered 11-42/911-281 dated 13.7.2011, paragraphs 1180-1210, 1240,1250.

[38] For a discussion for loyalty rebates, see Intel and the future of Article 102*, CRA Competition Memo, avaliable at http://www.crai.com/ecp/assets/Intel_and_the_future_of_Article_102.pdf

4.Conclusion: implications for firms

For dominant firms, the current approach of the TCA makes it unclear how exclusivity related practices are going to be assessed from now on. First, it is not well defined when the TCA will proceed with a possible investigation under Article 4 and when it will choose Article 6. Second, the TCA does not seem to be following its Guidance paper prepared by the European standards with regards to exclusionary abuse of dominance.

Therefore, increased caution regarding internal communication seems to be the safest option regarding distribution contracts. It can be concluded from the recent case law in Turkey that any use of direct exclusivity inducing practice is unlikely to be justified.

Regarding indirect quasi exclusivity related practices, such as rebate systems, slotting allowances and equipment placement, the standard of determination of the elements of exclusivity by the TCA still poses a risk for dominant firms. The current approach can still create a regulatory shield that benefits smaller firms (protecting the competitor instead of competition), as the competitive responses of the dominant rivals will be dampened by the efforts to remain compliant with the competition law. It could also be the case that this policy environment may generate spurious litigation, as less efficient competitors may try to prevent their more efficient rivals from using the from using the same instruments that they themselves can employ.[38]

Unfortunately, the gap between the TCA's effects-based standard on paper and its form-based policy is wide. It must be admitted that this gap will continue to make compliance work a challenging task for the dominant firms that intend to use such practices to compete in their business operations. Here, outside counsel on technical matters seem especially crucial. Dominant firms should be aware that their typical sales and distribution operations can be found illegal, and their internal communication poses a risk in case of an investigation even when exclusionary effect of the practices remain to be questionable.

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CS28234-Risks for dominant FMCG firms in Turkey_V2 — 02/12/2015