Abuse of Market Dominance in Turkey: The Law and Commercial Practice

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Undertakings in Turkey that are dominant in their market must be careful not to abuse this position, or their conduct may become scrutinised by local regulatory authorities. Undertakings can abuse their dominance in a range of ways under Turkish law.

Recent guidelines published by the Turkish Competition Authority (Authority) give undertakings increased information about how the Turkish Competition Board (Board) will view certain circumstances. Previously, undertakings were required to look to past decisions for this type of guidance. While the Board generally displays consistency between decisions, it also assesses circumstances on a case-by-case basis to take into account the unique characteristics of specific industries and business models.

Legislation and regulatory bodies

The primary piece of legislation in Turkey addressing abuses of dominance is the Law on Protection of Competition, No. 4054 (Competition Law). The Competition Law's provisions addressing abuse of dominant positions are closely modelled on similar provisions in the Treaty on the Functioning of European Union (TFEU).

In early 2014, the Authority published a Guideline on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guideline) which can be considered as secondary legislation on this topic. The Guideline is closely modelled on the Guidance on the European Commission's Enforcement Priorities in Applying Article 82 of the European Commission Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.

The Authority is responsible for enforcing anti-trust rules in Turkey. It is an independent regulatory authority with administrative and financial autonomy. The Competition Board is the decision making body within the Authority. Both the Authority and Board must act independently in fulfilling their duties with no organ, authority, or person influencing the Board's decisions. Legal actions against the Board's decisions are brought before administrative judicial bodies.

The assessment of market dominance

The Competition Law defines a dominant position as the power of one (or more) undertakings in a particular market to determine economic parameters by acting independently of their competitors and customers. These parameters include price, supply, amount of production, and distribution.

A range of factors are taken into account when determining the existence of a dominant position. The Board primarily assesses the following factors to determine the extent to which an undertaking can act independently of competitive pressure.

Market positions of the undertaking and its competitors

A high market share is the primary indicator for the Board when considering whether an undertaking holds a dominant position. Market share is generally calculated based on either the monetary value of sales, or sale volume.

As with EU anti-trust law, Turkish anti-trust legislation has no specific market share thresholds to indicate when a dominant position should be inferred. However, the Guideline states that an undertaking with a market share below 40% is not deemed to have a dominant position. However, some recent Board decisions have been contrary to the Guideline, deeming undertakings to have dominant positions despite holding less than a 40% market share. In reaching these decisions, the Board gave weight to the relevant markets' structure, characteristics, and dynamics.

Turkey is an "effects doctrine" jurisdiction, which means the Board is only authorised to intervene where extraterritorial applications lead to anti-competitive effects in Turkey. The Board consistently defines the related geographical market as Turkey. Therefore, the Board's examination is limited to the Turkish market when it considers whether abuse of dominance exists.

Barriers to entry and expansion

When considering whether a dominant position exists, the Board considers whether there are:

- Barriers to entry for new undertakings.
- Barriers to expansion for undertakings already operating in the market.

The Board takes into account the relevant market's specific dynamics and characteristics. Barriers can be more visible in markets which are governed by specific regulations.

Buyer power

The Board considers buyer power when assessing whether a dominant position exists and takes this as a factor in deciding on the existence of abusive conduct by the undertaking. Subject to the specifics of each set of circumstances, an undertaking's customers are deemed to have bargaining power if they are:

- Relatively large.
- Sufficiently informed about alternative sources of supply.
- Capable of switching to another supplier or creating their own supply within a reasonable period of time.

Conduct that constitutes an abuse

Simply having a dominant position does not infringe competition laws on its own. Such a position is not prohibited unless it is abused by the undertaking. The Guideline defines abuse as existing where a dominant

undertaking takes advantage of its market power by engaging in activities which are likely (directly or indirectly) to reduce consumer welfare. The harmful consequences of abuse of dominance for consumers include:

- Price increases.
- Decreases in product quality.
- Decreases in innovation level.
- Reduction in the variety of goods and services.

The Competition Law provides a non-exhaustive list of different types of abuse, including (Article 6, Competition Law):

- Preventing (directly or indirectly) another undertaking from entering the area of commercial activity (exclusionary conduct).
- Actions intended to complicate competitors' activities in the market.
- Directly or indirectly discriminating between purchasers with equal status by offering different terms for the same rights, obligations, or acts.
- Tying practices, such as:
- purchasing another good or service together with a good or service;
  tying a good or service requested by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser;
- imposing limitations on the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price.
- Actions intended to distort the competitive conditions in another market via exploitation of financial, technological, or commercial advantages created by dominance in a particular market.
- Restricting production, marketing, or technical development to the prejudice of consumers.
- The Board assesses the specific conditions of the relevant market and the undertaking's conduct, together with the actual or potential effects of such conduct (either in that market or related markets). Such assessment is particularly important in the context of alleged exclusionary conduct.

When the Board evaluates exclusionary conduct, it primarily examines whether the dominant undertaking's actions lead to actual or potential anti-competitive foreclosure. During this evaluation, the Board considers:

- The position of the dominant undertaking.
- The conditions in the relevant market.
- The position of the dominant undertaking's competitors.
- The position of customers or suppliers.
- The scope and duration of the conduct in question.
- Evidence of actual foreclosure.
- Direct or indirect evidence of an exclusionary strategy.

Justifications

The primary method for an undertaking to defend itself during the examination of an alleged abuse of dominance is by submitting an objective justification claim. The Board must consider such justification claims in its examination. The undertaking's justification claim should provide proof that the conduct in question protects a legitimate benefit and is indispensable for achieving that benefit.

In addition to these general justification claims, an undertaking can also choose to submit an efficiency justification which proves the undertaking's conduct meets the following conditions:

- Efficiencies will be realised (or are likely to be realised) as a result of the conduct.
- The conduct is indispensable to realisation of those efficiencies.
- The likely efficiencies brought about by the conduct outweigh any possible negative effects on competition and consumer welfare in the relevant markets.
- The conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

Refusal to supply

The Board's decisions show a cautious and detailed approach when assessing claims arising from refusal to supply in sectors which are strictly regulated, or where there are only a few actors. Therefore, before refusing a supply request, dominant undertakings in such sectors must carefully consider:

- Alternative supply sources.
- Whether the goods and/or services of such undertakings are indispensable for others which intend to operate in the same sector.
- The effect of refusal in the downstream markets linked to the relevant market.
- The consequences of such refusal for consumers.
- Whether conditional refusal to supply may lead to other infringements prohibited by the Competition Law (such as tying and exclusivity).
- Whether their behaviour causes an indirect refusal. For example, undue delay, restriction of product supply, or imposition of unreasonable conditions.

Refusal to supply was specifically introduced into Turkish anti-trust legislation by the Guideline. However, even before this, the Board emphasised that refusal to supply was a form of abuse of dominance infringement within the scope of Article 6 of the Competition Law (Unilever decision, No. 12-42/1257-409, dated 28 August 2012).

When the Guideline became integrated into the Turkish anti-trust rules, refusal to supply was defined and explained in detail. Accordingly, the following are considered to be instances of refusal to supply:

- An undertaking refusing to supply the goods or services it produces to another undertaking.
- An undertaking refusing (either directly or indirectly) to supply tangible or intangible business inputs in its possession to other undertakings.

In principle, an undertaking has exclusive discretion to determine which persons it will carry out business activities with under the principle of contractual freedom under Article 40 of the Turkish Constitution. However, in certain cases a refusal to supply may lead to an infringement within the scope of anti-trust law. This is particularly the case if the undertaking refusing to supply has a dominant position in the relevant market and the refusal negatively effects both the downstream market and consumers.

A dominant undertaking may attach conditions to its refusal to supply, but conditional refusals to supply generally lead to other anti-trust law infringements, such as tying and exclusivity.

The Board takes into account both short- and long-term effects when analysing refusals to supply. If the following criteria are all met, the undertaking's conduct is considered an abuse of dominance:

- The refusal relates to a product or service that is indispensable to being able to compete in a downstream market (as in the Turkcell-Telsim, Allergan, and Roaming decisions (see below)).
- The refusal is likely to lead to elimination of effective competition in the downstream market (as in theYaysat, Digiturk, andCNR decisions (see below)).
- The refusal is likely to lead to consumer harm.

In the Turkcell-Telsim decision (No. 03-40/432-186, dated 9 June 2003), the Board concluded that two GSM operators (Turkcell and Telsim) had abused their dominant positions by refusing an agreement request from a new company operating in the telecommunications market (IS-TIM). IS-TIM requested to enter an agreement regarding access infrastructure owned by Turkcell and Telsim. The Board considered the absence of alternative sources and the specific requirements of businesses in the telecommunications sector. Accordingly, the Board concluded that the infrastructure was indispensable for IS-TIM to compete in the relevant market. The Board held that Turkcell and Telsim had provided no objective and reasonable ground for refusing to supply and had therefore abused their dominant positions.

The Board treats the absence of a current or potential alternative source of supply as a key factor in determining whether the subject matter goods or services are indispensable. Accordingly, the Board has stated that if an alternative for supply will be available in the foreseeable future, the refused goods or services are not indispensable (Allergan decision, No. 13-01/3-3, dated 3 January 2013).

However, the Roaming decision (No. 03-40/432-186, dated 9 June 2003) shows the Board choosing not to consider a future supply source as a factor which prevented the goods and services from being deemed indispensable. In this decision, Turkcell and Telsim (holding dominant market positions) refused a request from Aria regarding roaming. Aria concluded a concession agreement with another undertaking that agreed to achieve a full roaming coverage within five years. However, the Board held that such an investment was not an alternative supply source and determined that Turkcell and Telsim had abused their dominant positions by refusing to supply Aria.

The Board's approach to undertakings eliminating effective competition in the downstream market can be seen in the Yaysatdecision (No. 07-63/777-283, dated 2 August 2007). Yaysat, Biryay, and BBD were dominant in the periodic publications market and would not allow other undertakings to use their distribution network. The Board deemed the distribution network essential and indispensable to competing in the periodic publications market. It stated that in order to be able to operate in the market, undertakings must have access to the distribution network (considered to be a downstream market). Therefore, the Board held that the dominant undertakings had abused their positions.

The Board does not consider every refusal to be an abuse of dominant position, but rather assesses the facts of each case in detail. In the Digiturk decision (No. 12-24/710-198, dated 3 May 2012), Cine5 (a TV channel) claimed Digiturk (a TV platform including many TV channels) obstructed Cine5's activities by not allowing it to participate in the Digiturk platform. Cine5 claimed the refusal had led to a decrease in its advertising income, on the basis that advertisers did not prefer Cine5 because the channel was not available on the Digiturk platform. During the course of the investigation, Digiturk allowed Cine5 to join its platform. The Board evaluated the importance and indispensability of advertisements in this context, determining that advertisers prefer to invest into TV channels which have higher ratings. The Board noted that Cine5's ratings had continued to fall despite joining the Digiturk platform. Therefore, the Board decided that access to the Digiturk platform was not essential for Cine5 to increase its ratings and concluded Digiturk had not abused its dominant position by refusing an agreement with Cine5.

Refusing to make an agreement without any objective ground for refusal may be considered an abuse of dominance. In theCNR decision (No. 14-29/596-262, dated 28 August 2014), the Board decided that CNR had infringed anti-trust law by refusing to make an agreement with NTSR. CNR was a dominant undertaking in the fairground management market with regard to yachting and watersports, organising an annual fair. CNR refused NTSR's request to lease a fairground in CNR's facilities, stating the requested periods were already reserved. After examination, it was understood the requested periods were not actually reserved. However, CNR issued fictitious contracts and pretended the requested periods were reserved for third parties. The Board concluded the refusal grounds were not objective and that CNR had discriminated against NTSR.

Predatory pricing

To avoid problems with predatory pricing, dominant undertakings which intend to make sales with low prices should consider the average avoidable cost and try to avoid conducting sales at prices lower than this threshold. Undertakings which operate in markets such as network industries, technology markets and markets that require high R&D investments should pay particular attention to keeping sale prices higher than the long-run average incremental cost.

The Guideline defines predatory pricing as a pricing strategy where a dominant undertaking, with a view to maintaining or strengthening its market power, accepts losses (or sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or punish one or more of its actual or potential competitors, or otherwise prevent competitive behaviour.

The Board primarily assesses predatory pricing cases by comparing the price applied by the dominant undertaking to the costs incurred with respect to the conduct under examination. The Board evaluates whether the conduct in question is likely to foreclose the market to an equally efficient competitor.

The Board may use a range of criteria and information in identifying and evaluating predatory pricing, including:

- Whether the dominant undertaking charged a lower price for all or part of its output over a specific time period, thus incurring losses that could have been avoided.
- The average avoidable cost, which may be assessed in determining whether a dominant undertaking has incurred avoidable losses.
- The long-run average incremental cost, which may be assessed under certain circumstances. This is generally higher than average avoidable cost and is more suitable for assessments made in markets with very low variable costs and very high fixed costs, such as network industries, technology markets, and markets that require high R&D investments.

The Board primarily evaluates the existence of anti-competitive foreclosure for the dominant undertaking's competitors. However, it is not necessary for competitors to actually leave the market due to a dominant undertaking's predatory pricing for it to constitute anti-competitive foreclosure. Rather, a dominant undertaking may simply prevent its competitors from efficiently competing and have these competitors follow its own pricing. Such conduct is also considered anti-competitive foreclosure and is prohibited.

The Board has held that four factors must exist to constitute predatory pricing (Kale Kilit decision, No. 12-62/1633-598, dated 6 December 2012):

- Financial superiority of the undertaking being examined.

- Unusually low price.
- Intention to impair competitors.
- Losses borne in a short term in exchange for long-term profits.

In the UN Ro-Ro decision (No. 12-47/1413-474, dated 1 October 2012), the Board found UN Ro-Ro held a dominant position in the market for scheduled marine transportation services provided on the roll-on/roll-off routes between Turkey and Europe. The Board established that UN Ro-Ro had excluded its main rival from the market by implementing predatory pricing on the Pendik-Marseilles route. The UN Ro-Ro decision shows how the Board evaluates claims regarding predatory pricing. It evaluated whether the conduct in question was likely to lead to market foreclosure for an equally efficient competitor. The Board used the average avoidable cost criterion in determining whether UN Ro-Ro incurred avoidable losses. The Board ultimately concluded that UN Ro-Ro had incurred four months' of avoidable losses by applying predatory pricing.

The Board also examined UN Ro-Ro's intention with regard to predatory pricing, although it stated that such intention was not necessary to constitute a violation of Article 6 of the Competition Law. Based on a press statement by UN Ro-Ro's CEO and some e-mails, the Board resolved that UN-Ro-Ro intended to exclude the competitor from the relevant market. The Board noted that applying prices which were lower than costs would constitute an anti-competitive foreclosure of the relevant market and decrease consumer welfare.

Excessive pricing

Dominant undertakings should avoid large margins between the total cost and the sale price, since such a margin is the primary indicator of excessive pricing. When determining sale prices, dominant undertakings should consider the specific characteristics of the relevant market. These include the degree of barriers to entry, position of other companies, and prices of relevant products in different geographical markets.

The Competition Law does not specifically refer to "excessive pricing" as an abuse of dominance under Article 6. However, the Board has held excessive pricing to be prohibited on the basis that the list of practices considered as abuse under Article 6 is not exhaustive. The Board considers a large margin between the sale price and the total cost (excessive profit) as a possible sign of excessive pricing (Belko decision, No. 01-17/150-39, dated 6 April 2001).

There is no rule or threshold for determining whether a price qualifies as excessive. Therefore, the Board assesses this on a case-by-case basis. The Board evaluates many factors, including the degree of barriers to entry, positions of other companies, and prices of relevant products in different geographical markets.

The most significant recent Board decision on excessive pricing is the Tupras decision (No. 14-03/60-24, dated 17 January 2014) where the Board issued the highest administrative fine in its history (TRY412 million). Tupras is a large Turkish energy company holding a dominant position in the energy market. The Board evaluated Tupras' pricing behaviours and contractual conduct, taking into account that the market is regulated by the Energy Market Regulatory Authority (EMRA). The Board evaluated decisions by the Council of State and EMRA authorities, concluding that competition rules did apply to Tupras, despite EMRA's rules also applying.

The Board compared Tupras' export prices and costs for diesel fuel, to Tupras' sale prices for unleaded gas to Platt Italy CIF-MED. It concluded that Tupras had abused its dominant position by excessive pricing for a period between October 2008 and January 2009.

The Board also examined Tupras' conduct related to some of the contracts executed between Tupras and the distribution companies. It concluded that Tupras conditioned the sale of its products on the buyers' agreement to purchase other products from Tupras. The Board determined Tupras had also abused its dominant position through these tying conditions.

Price or margin squeezes

A dominant undertaking that carries out activities in both upstream and downstream markets should consider its sale prices to ensure other undertakings are also able to compete in these markets. If the upstream market product is indispensable to competition in the downstream market, squeezing margins and selling products or services under cost price will likely be considered a restriction of competition.

A price squeeze exists where an undertaking is active in vertically relevant markets and dominant in the upstream market, and sets the margin between the prices of the upstream and downstream products at a level that prevents an equally efficient competitor in the downstream market from trading profitably on a lasting basis.

If an undertaking holds a dominant position in the upstream market, it may cause a margin squeeze by increasing the price for the upstream product and/or decreasing the price for the downstream product. The dominant undertaking would then transfer its market power over the upstream product to the downstream market, leading to restriction of competition.

According to the Guideline, the following factors must exist to constitute anti-competitive foreclosure by price squeeze:

- The undertaking being examined must operate in both upstream and downstream markets which are connected by a production chain and the undertaking has an economic integrity within this scope.
- The upstream product must be indispensable for operating in the downstream market.
- The undertaking must be dominant in the upstream market (dominance in the downstream market is not necessary).
- The margin between the upstream and downstream products must be so low as to ensure that a competitor which is as efficient as the dominant upstream undertaking would be unable to profit and operate in the downstream market on a lasting basis.

The Board has shown consistency in its approach to evaluating price squeeze claims, applying these criteria even before the Guidelines specifically introduced them (Turkcell price squeeze decision, No. 10-21/271-100, 4 March 2010)

In the TTNET-Turk Telekom decision (No. 08-65/1055-411, dated 19 November 2008), the Board examined the anti-competitive foreclosure effects of a margin squeeze arising from a dominant undertaking's campaign. The Board resolved that Turk Telekom and TTNET constituted an economic unit and were dominant in the markets of wholesale broadband internet access and retail broadband access. Turk Telekom started a campaign in which the packages subject to the campaign were sold below cost price. The Board decided the margin between the wholesale and retail prices did not allow competitors to survive in the market, since competitors could not make any profits under such conditions. The campaign might also have led to anti-competitive foreclosure for other undertakings active in the relevant market. Therefore, the Board concluded that TTNET and Turk Telekom had abused their dominant positions by applying a margin squeeze.

Exclusivity or single branding agreements

If the dominant undertaking is an unavoidable trading partner for a significant part of the customer's demand, even a short-term exclusivity provision may lead to anti-competitive foreclosure. Therefore, dominant undertakings which intend to execute exclusivity or single brand agreements should consider the level of the trade and avoid long-term exclusivity provisions.

Exclusivity agreements are generally regulated as vertical restrictions (Article 4, Competition Law). However, if the supplier has a dominant position in the relevant market, Article 6 of the Competition Law applies.

The Guideline defines exclusivity agreements as those which place a buyer under an obligation to purchase the entirety (or a significant portion) of its requirements for a product (or group of products) from a single supplier.

The Board does not require a written agreement regarding the sale of a single brand. Oral agreements or dominant undertaking practices which may lead to de facto exclusivity are also included (such as obligations placed on the buyer, or indirect provisions in agreements).

The Board specifically considers the following factors in its assessment:

- Scope of the conduct under examination.
- Level of trade.
- Barriers to entry.
- Importance of the dominant undertaking for customers.
- Duration of exclusivity.
- Positions of the dominant undertaking and its competitors.
- Duration of the conduct examined.

In the Turkcell exclusivity decision (No. 09-60/1490-37, dated 23 November 2009), the Board decided Turkcell had abused its dominant position by applying de facto exclusivity in the mobile marketing services market through the following actions, constituting an abuse of dominance:

- Turkcell refused to allow participation of other operators in campaigns involving bonus airtime minutes being given as gifts.
- Turkcell prevented other undertakings from presenting any kind of benefits in those campaigns (including bonus airtime minutes).
- Turkcell did not provide rebates to purchaser companies which did not work exclusively with Turkcell in the campaigns.
- Turkcell gave discounts to the undertakings which used the Turkcell logo.

In the Turkcell vehicle tracking decision (No. 13-71/988-414, dated 19 December 2013), the Board concluded Turkcell had abused its dominant position through exclusive practices in the vehicle tracking field. Turkcell prevented vehicle tracking companies co-operating with Turkcell's competitors. Turkcell also prevented vehicle tracking companies from participating in campaigns run by Turkcell's competitors. The Board requested that Turkcell make an announcement declaring that vehicle tracking companies carrying out business with Turkcell could co-operate with Turkcell's competitors and participate in competitors' campaigns.

According to the Guideline, a dominant undertaking which introduces exclusivity arrangements for a retail buyer may lead to more anti-competitive foreclosure effects than a similar arrangement for wholesale buyers. The closer the level of trade with exclusivity to the end-user, the more likely the relevant market will be foreclosed to actual or potential competitors.

Rebate systems

Rebate systems refer to discounts offered to customers in return for them engaging in a certain purchasing behaviour.

Some rebate systems have standardised purchase targets which are applied to all customers, whereas other systems have purchase targets specifically determined for each customer, or certain groups of customers. Dominant undertakings should prefer standardised rebate systems rather than individualised systems on the basis that individualised rebate systems are more likely to restrict competition.

There are two main types of rebate systems:

- Single-product rebates. Discounts are tied to the purchase of a single product. Provided the system does not limit the purchase condition to a certain period, buyers do not risk losing the discount on the basis that the reference period will have expired. Therefore, buyers have a reasonable chance to purchase from other undertakings. However, rebate systems which limit fulfilment of a purchase condition to a certain reference period may lead to predatory pricing.
- Package rebates. Discounts are tied to the purchase of more than one product or market. According to the Guideline, the Board's assessments of the restrictive effects of package rebates on competition can vary depending on:the package offered by the dominant undertaking;
  whether competitors can compete by offering a reasonable alternative package (either alone or together with other competitors) .

Rebate systems are also classified depending on the scope of the discount applied:

- Retroactive rebates. Customers receive discounts for all purchases from the undertaking offering the rebate within the relevant period if it hits the rebate target.
- Top-slice rebates. Customers only receive discounts for purchases over the rebate target.

A significant recent Board decision regarding rebate systems is the Mey Icki decision (No. 14-21/410-178, dated 12 June 2014). Mey Icki abused its dominant position in the raki market by limiting its competitors' visibility and sales by introducing rebates and down-payments to sales points. The Board concluded that Mey Icki prevented its competitors from efficiently competing in the relevant market by giving discounts to sales points, introducing rebates within the scope of the supply agreements, and preventing the visibility of competitors' products at sales points within the conventional channel. The Board heavily relied on evidence obtained from Mey Icki's internal correspondence in reaching its decision. The Board considered this correspondence, particularly between members of the sales team, as evidence of an intention to restrict competition. The Board appeared to give more weight to this correspondence than assessment of the conduct's economic effects.

In the Doğan Media Group decision (No. 11-18/341-103, dated 30 March 2011), the Board held that Doğan Media Group violated the Competition Law through rebate systems it applied in establishing prices for advertisement sites in daily newspapers, its practices related to premiums in agreements, and contracts it concluded with media planning and purchasing agencies. The Board determined that Doğan Media Group was

dominant within advertisement sites in daily newspapers and concluded that Doğan Media Group designed and applied its discount system so that it had potential to induce loyalty and exclude competitors. The Board held this reflected Doğan Media Group's intent to stabilise its existing dominant position in the market, exclude its competitors, or foreclose the market, thus strengthening its dominant position. The Board also commented that it was highly likely that the rebate systems would have anti-competitive exclusionary and foreclosure effects and such anti-competitive potential would be contrary to Article 6 of the Competition Law. Similar analyses were made with respect to agreements between Doğan Media Group and media planning and purchasing agencies, with the same results.

Dominant undertakings should additionally try to shorten the reference periods for rebates. For instance, a rebate system with three months' duration may be tolerated, while the Board may consider the same rebate system with a one-year reference period as an infringement. The Board has specifically noted that long-term rebates constitute a competition risk (Frito Lay decision, No. 06-24/304-71, dated 6 April 2006).

Undertakings should ensure that any products introduced as a promotion are the same as the main products being sold. The Board has noted the exclusionary effect increases when an undertaking transfers its power in a market to another market (Ulker decision, No. 05-38/487-116, dated 2 June 2005).

Tying arrangements

Tying usually refers to situations where customers that purchase one product (the tying product) from a dominant undertaking are also required to purchase another product from the undertaking (the tied product). Tying can be implemented by integrating what may be recognised as two separate products (technical tying) or through contractual arrangements (contractual tying).

When deciding on the existence of tying, the Board examines whether:

- The tying product and the tied product are distinct.
- The tying practice is likely to lead to anti-competitive foreclosure.

In the Philips decision (No. 09-07/128-39, dated 18 February 2009), the Board stated that making the purchase of a medical monitoring equipment conditional on the purchase of the technical servicing of the equipment could cause significant obstacles to competition. Philips had created passwords for the monitoring equipment which prevented other undertakings from providing technical services for the equipment. The Board prohibited such actions and emphasised that such actions could lead to exclusionary effects for competitors.

In a similar situation, the Board concluded that creating passwords for medical monitoring equipment and making the purchase of this equipment conditional on the purchase of its technical services constituted an abuse of a dominant position, unless the condition was based on objectively reasonable grounds (Siemens decision, No. 14-29/613-266, dated 20 August 2014).

According to the Guidelines, the risk of anti-competitive foreclosure stemming from conduct is greater where the dominant undertaking undertakes a lasting strategy in this respect. Technical tying that is costly to reverse is an example to this. Therefore, if avoidance of tying is not possible, dominant undertakings should shorten or limit their tying conduct as far as possible.

The possibility of anti-competitive foreclosure increases where undertakings hold a dominant position in more than one product.

Related Practices

- Antitrust and Competition
- Commercial Contracts
- Distribution, Franchising and Agency Agreements