The Turkish Competition Authority adopts a notice on the definition of relevant market (Notice 08-04/56-M)

Turkey, Unilateral practices, Geographic market, Relevant market, Abuse of dominant position, All business sectors

The Turkish Competition Authority (hereinafter referred as “Authority”) has recently adopted the “Guidelines on the Definition of Relevant Market” (hereinafter referred as “Notice”) on the basis of the European Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)(OJEC C 372, 9 December 1997, pp. 5-13) (hereinafter referred as “Commission Notice”).

The purpose of the Notice is to provide guidance as to how the Authority applies the concept of relevant product and geographic market in its ongoing enforcement of Turkish competition law. It is underlined in its preamble, parallel to the Introduction of the Commission Notice, that the market definition is a tool to identify and define the boundaries of competition between undertakings that serves to establish the framework within which competition policy is applied by the Authority.

Thus, the goal in defining a market in both product and geographic dimensions is to ascertain which competitors have the power to restrict the behaviour of the undertakings under examination, and to prevent these from behaving independently of an efficient competitive pressure. In relation to market power, market definition facilitates the market share calculation, which are particularly important for the implementation of Articles 6 (concerning the abuse of dominant position) and 7 (concerning mergers and acquisitions) of the Act n° 4054 on the Protection of Competition, dated 07 December 1994 (hereinafter referred as the “Competition Act”).

Definition of the Relevant Market

The Notice is not the first legal document [1] concerning the definition of the relevant market. However, it is the only document focused on the principles and the criteria that may be used in the determination of the relevant market.

In Communiqué n° 1997/1, it is stated that the following factors shall be taken into consideration when determining the relevant product market:

“In determining the relevant product market, the market comprising the goods or services which are the subject of a merger or an acquisition, and the goods or services which are deemed identical in the eye of consumers in terms of their prices, intended use and characteristics is taken into account; other factors that may affect the market determined shall also be assessed.”

The definition of relevant geographical market in Communiqué n° 1997/1 is as follows:

“The geographical markets are areas where undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighbouring areas, as the conditions of competition are appreciably different from these areas.”
The Board takes the above referred criteria into consideration both in the interpretation of the aforementioned definitions and in the application of the Competition Act and the communiqués related to the relevant market concept [2].

Basic Principles of Market Definition

The basic principles of market definition stipulated under Art.1(3) of the Notice are mainly in line with the provisions of Art. II paragraph (13-24) of the Commission Notice.

Demand Substitution

The evaluation of demand substitution requires a determination of other products which consumers deem substitutable for the relevant product. A way to determine this is to assume a small, non-transitory change in prices and assess the potential responses of the consumers to this change. Thus, the market definition shall start from the products and sales regions of the relevant undertakings.

Supply Substitution

Supply substitution may also be taken into consideration where it has equivalent effect to demand substitution. For this purpose, suppliers must be able to switch their production to other products when faced with small and non-transitory increases in relative prices and they must be able to market these products without tolerating significant additional costs and risks in the short term.

Potential competition

Since it is not equally efficient as demand substitution in terms of fast results, potential competition is not generally taken into consideration for market definition.

Factors Which May Be Used in the Definition of Relevant Product Market

The Notice examines the factors that may be used in the definition of relevant market and underlines that the characteristics and intended use of the relevant product is the first step in determining substitute products. Notwithstanding, the Notice also states that the mere possibility to use one product instead of another one and existence of similar characteristics between products are not decisive factors, when the definition of the relevant product market is concerned. In such a case, the response of the customers to relative prices may be determined by the effect of other factors.

The Board shall take into consideration the following criteria, when assessing whether or not two products have demand-side substitutability :

Quantitative tests specifically developed for determining the market

Opinions of the customers and competitors

Consumer choices [3]

Costs and barriers related to switching the demand to potential substitute products [4]
Different customer categories and price discrimination

The Board shall take into consideration the following criteria, when assessing geographical market:

Findings indicating that orders were switched to different regions in the past [5]

Quantitative tests specifically developed for determining the market

Basic characteristics of demand such as regional preferences, loyalty to local brands and the necessity for an active presence in the regional market.

Opinions of customers and competitors

Existing geographical trends of purchases [6]

Trade flow / Goods delivery trends

Barriers related to shifting orders to undertakings at other regions and switching costs such as high shipping costs or various limitations caused by the nature of the product

The Notice also underlines the importance of the information gathering process for the determination of the relevant market and states that where a definitive market definition must be made, chief customers and undertakings in the industry and professional organizations or undertakings in the downstream/upstream markets may be contacted, in order to acquire the necessary information for the relevant market definition.

Calculation of Market Shares

It is properly stated in the Notice that the definition of relevant product market and relevant geographic market enables the determination of suppliers and buyers/consumers active in that market. Thus, the total market size and the market share of each supplier may be calculated based on the suppliers' sales of the relevant product in the relevant region. The Notice clarified that even though the reference point in determining market shares are generally sales numbers, depending on the characteristics of the relevant product or industry, other indicators such as capacity, number of actors in the tender market, fleet size in aviation or the amount of reserves controlled in sectors like mining can provide useful information.

Other Points That Must Be Taken into Consideration

The Notice also underlined that some situations require additional care in the application of the foregoing principles. In particular, when it is necessary to examine the behaviours of undertakings under Article 6. This is a consideration in the assessment of primary and secondary markets. In such cases, the method used is that of assessing the responses of the consumers to the changes in relative prices. Pursuant to the Notice, the assessment of the limitations on product substitution caused by the conditions in connected markets and the existence of substitution chains also require additional care in the above explained context. In practice, in order to enlarge the relevant market, the concept of substitution chains must be verified through sound findings (for instance, findings indicating interdependency between the prices at the fringes of substitution chains). Price levels at the fringes of the chains must display a similar structure as well.

Conclusion

In the light of the aforementioned explanations, we may come to a conclusion that the notice follows the same route of the
Commission Notice and accepts similar principles and criteria regarding the determination of the relevant product and geographical market.

The concept of "market" may have different meanings for undertakings during the course of their activities and commerce. Although the product and geographical market definitions were already given in the Act and secondary legislation and moreover CB has dealt with this concept in its decisions; still the concept of "market" under the Competition Law can be misunderstood by the undertakings. By this notice, the possibility of confusion and misunderstanding for the undertakings would be significantly reduced, since the method of examination and the criteria taken into consideration by the CB, while the determination of the relevant product and geographical market are explained in detail.

[1] The Communiqué n° 1997/1 on the Mergers and Acquisitions Which Require the Authorization of the Competition Board (hereinafter referred as "Communiqué n° 1997/1"), published in the Official Gazette n° 23078, dated 12 August 1997, includes, in its Art. 4, the definitions of relevant product and relevant geographical markets; See Prof. Dr. Ercüment Erdem, Turkish merger and privatization regime: An overview, e-Competitions, n° 13159.

[2] Such as Communiqué n° 1997/1, Communiqué n° 1998/4 on the Procedures and Principles to be pursued in Pre-Notifications and Authorization Applications to be filed with the Competition Authority in order for Acquisitions via Privatization to become legally Valid, Block Exemption Communiqué n° 2002/2 on Vertical Agreements, Block Exemption Communiqué n° 2003/2 on Research and Development Agreements and others; See Prof. Dr. Ercüment Erdem, Overview on Turkish Competition Law, e-Competitions, n° 13152.

[3] As clarified in the Notice, consumer surveys conducted by the relevant undertakings or their competitors specifically for an examination/investigation under the Competition Act shall be examined in a very thorough manner. This is because these surveys are not prepared to serve as a basis to the commercial decisions of the undertakings.

[4] It is not possible to make a full list of the factors which prevent substitution and the costs for switching from one product to the other. Limitations arising from various legal regulations and state interventions, limitations in the downstream markets, significant capital investments, areas where the customers live, investments to the production process, investments to training and human resources, reprocessing costs may be given as examples to this subject.

[5] Price differences between different regions and customer responses provide important information concerning the definition of geographical market.

[6] As clarified in the Notice, in general, where customers purchase from undertakings situated at different parts of Turkey under the same terms, or where they can meet their needs via tenders in which undertakings operating at any part of Turkey may bid, the geographical market is the Republic of Turkey.

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