



The Concept of Concerted Practice and Its Scope from the Perspective of Turkish and European Competition Law

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Abstract

Competition arrangements, in general, prohibit collaborative practices, which restrict competition, among undertakings. Collaborative practices among undertakings include agreements among undertakings, concerted practices and decisions by association of undertakings. The merger and acquisition can be also included to collaborative practices but these practices are quite separate study matters. Except the decisions of association of undertakings, it is quite difficult without leaving any doubt and uncertainty to be able to fully separate and identify the meanings and scopes of agreements and concerted practices. However, there are significant differences in respect of the perspective of execution possibility and consequences of these two concepts. In this study, the meaning, execution possibility and consequences of these two concepts have been discussed broadly.

Keywords: *Collaborative practices, the concepts of agreement and concerted practice, proving the concerted practice, differences between concerted practice and agreement.*

INTRODUCTION

Like the Article 81/1 of the EC Treaty, in Turkey, The Article 4 of the Law on Protection of Competition¹ (hereinafter "CL" or "The Law") prohibits any kind of agreements, concerted practices and decisions by association of undertakings causing prevention, restriction and distortion of competition. Agreements, concerted practices, and decisions by association of undertakings are collective behavioral-patterns, and they emerge by involvement two or more undertakings with an intention of joint action in order to prevent, restrict or distort competition (hereinafter restriction, distortion or some other related words are used alone together with competition to represent the whole phrase, "to prevent, restrict or

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¹ Official Journal, 13.12.1994, 22140.

distort competition"). In this paper, the concepts of agreement, concerted practice and decisions by association of undertakings in The ECT 85/1 and CL 4 will be represented collectively by "collaborative practices among undertakings".

Anti-competitive agreements have been clearly stated as against The Law. Instead of overt agreements, undertakings may favor to achieve their goals by attempting to make covert, unwritten or parallel actions. In fact, in a judicial system which annuls binding and overt agreements of rival undertakings, undertakings are expected to prefer concertation as it is a more convenient way of reaching out set goals, without explicitly being against The Law. Thus, from The Competition Law perspective, to eliminate this concern, the concept of "concerted practices" has been included among illegal practices while shaping the competition regulations and laws².

Some other competition laws (Article 81/1 of the EC Treaty, Sherman Act Section 1), like CL Article 4³, prohibit concerted practices. The CL Article 4, like in agreements and decisions by association of undertakings, states that concerted practices aiming to restrict competition or having the characteristic of bringing about this effect are accepted as illegal.

If we put the association of undertakings aside, it is quite difficult to be able fully identify constituents of agreements and concerted practices and be able to fully separate them without leaving any doubt and uncertainty. According to the majority's opinion, all free will agreements aiming to restrict competition, without paying attention to reciprocal commitments settled by the undertakings and without looking at its judicial validity, can be deemed as agreements between undertakings. All conducts not having reached to the 'agreement' phase can be regarded as concerted practice⁴.

² Concerted practice within the CL is comply with the term 'concerted practices' in ECT competition law (ETA art. 81/1), and with the term "conspiracy" in USA anti-trust system. See OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, Chicago, 1971, p. 11; D. G., GOYDER, *EC Competition Law*, (Oxford, 1992,) p. 27; Penelope, KENT *Law of the European Union*, (M&E Pitman Publishing 1996), p. 180; WILBERFORCE, CAMPBELL, ELLES, *Restrictive Trade Practices & Monopolies*, (M&E Pitman Publishing 1996,) p. 57; MERKIN, Robert, *Encyclopedia of Competition Law*, Vol. 1, London, 1987, p. 1156. Also see STEINER; Josephine, *Textbook on EEC Law*, (London, 1990,) p. 109.

³ There are some conditions in order to prohibit "collaborative practices among undertakings" with in the meaning of anti-competitive agreements: (1) existence of cooperation or coordination between undertakings, (2) as the outcome competition should have been prevented, restricted or distorted, (3) the collusion between the undertakings should have considerably effected the competition. To be able to apply ECT 81/1, the commerce between the member states should have been affected as well (considerably).

⁴ See JONES, Alison, Woodpulp: Concerted Practice and/or Conscious Parallelism, *European Competition Law Review*, (1993) 6, p. 264, 275; C. S., KERSE, *EEC Antitrust Procedure*, (London, 1988,) p. 7, 8; AGNEW, J. H., *Competition Law*, (London 1985,) p. 142, 143; BELLAMY&CHILD, *Common Market Law of Competition*, (London, 1993,) para. 2-034; GOYDER, *EC Competition Law*, p. 93; J. Barry, RODGER, Angus, MACCULLOCH, *Competition Law and Policy in the EC and UK*, (London, 1999,) p. 132; TEKİNALP, Ü., (TEKİNALP/TEKİNALP), *Avrupa Birliği Hukuku*, (İstanbul, 1997,) p. 337; İ., Yılmaz ASLAN, *Rekabet Hukuku*, (Bursa, 2001,) p. 81; Ateş, AKINCI, *Rekabetin Yatay Kısıtlanması*, Rekabet Kurumu yayını, (Ankara, 2001,) p. 145; Zekeriyya, ARI, *Rekabet Hukukunda Danışıklılık Kavramı ve Hukuki Sonuçları*, (Ankara, 2004,) p. 84, 85; İKİZLER, Metin, *Rekabet Hukukunda Uyumlu Eylemler*, (Ankara, 2005), p. 60.

THE CONCEPTS OF 'AGREEMENT' AND 'CONCERTED PRACTICE'

From the legal obligation perspective, the term "agreement"⁵ is not a technical one such as contract⁶. However, in this paper, we have confined the term "practice of agreement" to only legally binding contracts. Consequently, with the term agreement, we intend to say that they are legal conducts, which emerge with reciprocal and appropriate declarations of related parties toward achieving a desired outcome⁷. As one of the economic and social rights, the freedom of contract (the Turkish Constitution, art. 48) can only be restricted by law (the Turkish Constitution, art. 13/1). Thus, article 4 of the Competition Law forbids the agreements, which restrict competition. The Law prohibiting anti-competitive but non-binding reciprocal relations have also prohibited binding free will agreements. According to the CL Article 4, agreements among undertakings aiming to restrain competition are considered as unlawful. At the Article 56 of The Law, all the agreements which are against the Article 4 are considered as invalid; hence, the fulfillment of any of the deeds which have been born due to this agreement can not be demanded.

In Article 81, which is the origin of the doctrine and CL Article 4, the term 'agreement' between undertakings has been interpreted broadly to comprise any form of coordination which is legally valid and binding, and all reciprocal intent statements not having the characteristics of a legal or formal agreement⁸. Thus, gentlemen's agreements⁹, reciprocal determination statements, commitments,

⁵ "In practice, although this concept has been used for multilateral agreements sometimes it has been used for bilateral agreements as well. Even though the term 'agreement' has been adopted for the second degree contracts a clear separation is not possible", Turkish Law Dictionary, 1991, p. 17 (from the item 'agreement').

⁶ Ivo Van, BAEL, Jean François, BELLIS, *Competition Law of the EEC*, (Oxfordshire, 1990,) p. 28; RITTER, Lennart, BRAUN, W. David, RAWLINSON, Francis, *EEC Competition Law A Practitioner's Guide*, Kluwer Law International 2000, p. 82; David, VAUGHAN, *Law of the European Communities*, Vol. 2, (London, 1986,) p. 879; BELLAMY & CHILD, *Common Market Law of the Competition*, para. 2-016. To be able to confirm this result, even though it has not been necessary, the concepts of "agreement" and "contract" have been mentioned separately by the law makers in article 57. The Turkish Board of Competition had used the term "contract" in place of 'agreement' during a trial on concertation. "... Contrary to the Turkish Law of Obligations, more broadly, with in the meaning of Turkish Competition Law, a contract includes all deals including the ones which have not been written or the ones have not done in the technical or legal manner or order to be observed in contracts. ... Although it is not legally binding, "gentlemen's agreements could be evaluated with in the meaning of Article 4", The Decision of the Turkey Competition Board, No: 93/750-159 (Rekabet Dergisi, 1, 1, p. 131).

⁷ The term contract is also defined as "legal conducts which materializes with reciprocal and fitting declarations of related parties especially toward creating, changing or remove an obligation" (TEKİNAY/AKMAN/BURCUOĞLU/ALTOP, *Tekinay Borçlar Hukuku*, (İstanbul 1993,) p. 43, 44). As is, in this terminology, the terms 'contract' and 'agreement' is defined suppletoryly.

⁸ See BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-016; Valentine, KORAH, *An Introductory Guide to EEC Competition Law and Practice*, (Oxford, 1990,) p. 226, 27; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 82; KERSE, *EEC Antitrust Procedure*, p. 7; GOYDER, *EC Competition Law*, p. 92; AGNEW, *Competition Law*, p. 142; BAEL, BELLIS, *Competition Law of the EEC*, p. 28; VAUGHAN, *Law of the European Communities*, p. 878, 879; FRAZER, Tim, *Monopoly, Competition and the Law The Regulation of Business Activity in Britain*, Europe and America, (Harvester Wheatsheaf 1992), p. 159; WHISH, Richard, *Competition Law*, (Butterworths 2003), p. 92, 93; MERKIN, *Encyclopaedia of Competition Law*, Vol.: 1, p. 1155, 1156; ASLAN, *Rekabet Hukuku*, p. 72, 73; RODGER, MACCULLOCH, *Competition Law and Policy in the EC and UK*, p. 132; Ü. TEKİNALP, (TEKİNALP/TEKİNALP), *Avrupa Birliği Hukuku*, p. 335.

⁹ Gentlemen's agreements imply the relations which do not burden any legal obligation to parties yet which are only based on moral responsibilities and on pledge. Bernard, RUDDEN, *The Gentleman's Agreement in Legal Theory and in Modern Practice*, *European Review of Law, Private European Review of*

situation appraisal memorandums and cooperative statements can be included in agreements¹⁰. In this respect, all conducts restraining economic freedom, stating mutual opinions, containing obligations and being legally binding or non-binding would be able to evaluate as agreements¹¹.

We suggest, the term "agreement" in the Article 4, should only be used for legally binding agreements. If it was interpreted in broad meaning in order to include the legally non-binding conducts as well, then it would mischief some of the judicial terms and concepts. It may be said this kind of thinking would narrow the scope of The Law, and it would prevent the impediment attempts prior to the fulfillment of agreements. Yet, it is obvious that, all non-binding reciprocal relations, including the gentlemen's agreements, which are also considered as agreements, are made covertly and not declared. Naturally, existence of these agreements could be seen during the execution stage¹². Suppose, during cocktail, two businessmen talked about market prices and their market shares in detail and eventually agreed upon a specific deal. According to doctrine and practitioners, an agreement made by making pledge between the parties has been considered as an agreement. Finding out the existence of this agreement before the execution has been a problem. On the other hand, during the execution, prohibition of this non-binding alliance would become impossible. To remember, legal acceptance this kind of relations as agreements harden its substantiation of existence. According to The Law, easiness of proving (Article 4/3, 59) can only be used for concerted practices. Hence, above businessmen incident could still be investigated using the legal authority of investigation about indication of credible evidence for concertation without constraining the implementation of The Law effectively and still without narrowing its scope.

The law prohibits all kinds of legal and actual conducts restricting the competition, which either originated deliberately or consequentially. Among the articles, article 4 is the only one engaging in prohibited actions of two or more undertakings¹³. The actions deemed as illegal are evaluated in one of the three

Private Law, (1999), 2, p. 200; KOCAYUSUFPAŞAOĞLU, Necip, *Borçlar Hukuku Dersleri*, 1. Fasikül, İstanbul, 1995, p. 105; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 83.

¹⁰ "... due to restrictive nature of 'gentlemen's agreements' and 'unwritten agreements' would be evaluated under scope of article 4 of the law numbered 4054. ATAD (ECI) accepts this kind of practices as agreements" The Decision of the Turkey Competition Board, No: 99-30/276-166 (a), (*Rekabet Dergisi*, Vol: 1, I. 2, p. 154). Also see VAUGHAN, *Law of the European Communities*, p. 879.

¹¹ Nicholas, GREEN, Aidan, ROBERTSON, *Commercial Agreements and Competition Law*, Kluwer Law International 1997, p. 292; FRAZER, *Monopoly, Competition and the Law*, p. 159; VAUGHAN, *Law of the European Communities*, p. 878, 879. The Turkish Board of Competition, in their recognised "Tilmen Hotel Agreements" decisions, they ruled mutual consent made by some LPG (Liquid Petroleum Gas) retailers in order to eliminate local retailers' competition power by selling LPG under its cost was considered as 'agreement' (the decision of the Turkey Competition Board, No: 93/750-159, *Rekabet Dergisi*, 1, 1, p. 135).

¹² The following decisions could be examined on how the illegal co-operative behaviors, which has been characterized as 'agreement' by the Board of Competition, had been uncovered [the Decision of the Turkey Competition Board, No: 93/750-159 (*Rekabet Dergisi*, 1, 1, p. 118-127; No: 99-30/276-166 (a), (*Rekabet Dergisi*, 1, 2, p. 98-135)].

¹³ Anti-competitive activities in the article 4 of The Law have been set out in its article 6 when its done by a monopolistic undertaking. If the both articles were compared a clear similarity would be observed. Also see ASLAN, *Rekabet Hukuku*, p. 211; LASOK&BRIDGE, *Law & Institutions of the European Union*, (Butterworths 1994.) p. 623; OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 32, fn. 92.

categories including agreements among undertakings, concerted practices and decisions by association of undertakings.

From the judicial perspective, legally binding contracts should be considered as 'agreements', and, the conducts, which do not provide obligatory power, should be considered as 'concerted practice'¹⁴. At the same time, in the Article 56 (Article 81/2), which sets out the legal consequences of 'agreements' and 'decisions' and which are evaluated among the prohibited, states that, contrary to the article 4, all agreements (and decisions of the associations of undertakings) are void. As known, natural consequences of judicial conducts that are against ordering judicial rules are considered as invalid, and moreover further declaration of its illegality does not needed. Of course the annulment can only apply to the anti-competitive agreements that have the characteristics of legal conducts, and it is possible to think that this situation does not prevent the interpretation of the concept of "agreement" more broadly in favor of encompassing the other conducts that do not possess obligatory power. In any case, as long as The Law has the 'concerted practice' concept, alternatively, inclusion of any incongruous notions in the concept of 'agreement' will not provide any positive effect on legal practice and will also cause spoiling of the judicial concepts.

It can not be expected that parties intending to get rid of competition will materialize their will by utilizing the means, which are considered clearly illegal and are not protected by law. However, even though this is not their single goal, agreements made among the certain parties in order to fulfill their various commercial interests (i.e. brands and patents) might twist the competition because of some unexpected consequences. Certainly, as of being against the CL article 4, this kind of agreements will clearly be prohibited. From this perspective, among all the other mentioned prohibited conducts, anti- competitive agreements have lesser scope. It is perceptive and safe to say that parties intending to restrict competition would choose to make covert agreements in order to escape from the prohibition of CL article 4 (Article 81/1). Among all the other anti-competitive collaboration methods, concerted practice has an important place. Concerted practices are illegal and unobservable parallel conducts aiming restrict competition and are started by competing parties without getting into legally valid and binding "agreements".

From The Competition Law perspective, it is a very important to determine the meaning and the boundaries of the concerted practice. Otherwise, if the meaning were not determined and filled properly then, beyond the intentions, either some competition violations would be overlooked or some undertakings would be harmed by the judicial sentences.

FACTORS CONSTITUTING 'CONCERTED PRACTICE'

Involvement of More than One Undertaking

Concerted practices are illegal parallel behavior patterns emerging between the two or more undertakings and in fact, according to the CL Article 4 and Article 81/1, the

¹⁴ See OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 9. This author's are only contented with pointing out that the article 81 of ETA includes legally binding agreements. Also see AKINCI, *Rekabetin Yatay Kısıtlanması*, p. 45, 46.

involvement more than one undertaking is necessary¹⁵. It doesn't make any difference whether an undertaking has natural or legal personality, and it is subject to private or public (unless it is stated otherwise by the Board of competition) jurisprudence. Participant undertakings of concerted practices are the ones, which fall into the jurisdiction of competition law, and they could be the subjects of unlawful activity, which is prohibited by The Law. To talk about "more than one undertaking", it must be assumed that there is no economic or legal bond between the parties. The relations between economically depended subsidiary undertakings and parent undertaking or, in general, the concertation occurring between the subsidiaries and the parent undertaking could not be considered as concerted practice¹⁶.

Concerted Practices must be Based on Coordination and Collaboration

The most important matter about determining the presence of concerted practice is to understand whether the parallel activities between the two or more undertakings are created to eliminate the uncertainties of market behavior¹⁷. The presence of parallel behavior between rival undertakings itself does not substantiate the existence of concertation, which has been the sort, prohibited by The Law. Because, to talk about concerted practice, there should be more than one undertaking, and success of the each undertaking depends on the ability of transforming the behaviours of its rivals into benefit. Under some circumstances, rival undertakings could implement similar or identical market strategies. In that case, if the decisions of the undertakings were made independently, parallel behaviors of the undertakings could not be considered as concerted practice¹⁸.

In oligopolistic markets, undertakings would be successful to the extent that they differentiate their goods and services (price, quality etc.). If there were innumerable undertakings in a market producing the same goods or service (perfectly competitive market), individual decision and behavior of the undertakings would have minuscule effect on the market. In this case, undertakings decide independently from each other, thus, this situation does not indicate concertation.¹⁹ However, in oligopolistic

¹⁵ BAEL, BELLIS, *Competition Law of the EEC*, p. 24; NIKPAY, Ali; FAULL, Jonathan, "Article 81" in FAULL & NIKPAY, *The EC Law of Competition*, (Oxford 1999,) p. 72.

¹⁶ Compare with KISHOYIAN, Bernard, The Intra-Enterprise Conspiracy Doctrine in International Business a Case for the Extraterritorial Application of Antitrust Law, *Touro International Law Review*, (1995) 6, 1, p. 215-217.

¹⁷ See VAN GERVEN, Gerwin and NAVARRO VARONA, Edurne, The Wood Pulp Case and the Future of Concerted Practices, *Common Market Law Review*, (1994) 31, p. 592; JONES, Woodpulp: Concerted Practice and/or Conscious Parallelism, p. 275, 276. Since "... holding meeting by the dates crossing legal price announcements times or exchanging price information prior to public price announcements ..." causes elimination uncertainty, it will be considered as concertation. See The Decision of the Turkey Competition Board, No: 99-6/48-17 (*Rekabet Dergisi*, Vol. 1/ 1, p. 140).

¹⁸ See GREEN, ROBERTSON, *Commercial Agreements and Competition Law*, p. 300, 301; GRILLO, Michele, Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis, (2002) 14, *European Journal of Law and Economics*, p. 153, 154; BAEL, BELLIS, *Competition Law of the EEC*, p. 30; RODGER, MACCULLOCH, *Competition Law and Policy in the EC and UK*, p. 134, 135; WHISH, *Competition Law*, p. 514; OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 12; KERSE, *EEC Antitrust Procedure*, p. 8; VAN GERVEN and NAVARRO VARONA, The Wood Pulp Case and the Future of Concerted Practices, p. 587, 588.

¹⁹ While wheat and corn markets could be considered as example to perfectly competitive markets, food, garment, restaurant and bakery businesses could be considered as example on oligopolistic markets.

markets, where there is limited number of undertakings affecting each other, rivals have to monitor and consider each other's action²⁰.

Given that there is mutual dependency of undertakings within oligopolistic markets, similarly or identically developed and implemented strategies should be judged as rational conducts and it could be expected from a businessman as long as the undertakings' policies are independent of their rivals'. Thus, in this type of markets, undertakings' involvement in parallel behavior could not be considered as concerted practice unless it is based on the alliance constructed to restrict competition²¹. Indeed, other thing aside, competition regulations especially serve to maintain competition in oligopolistic markets²². Since there is only one undertaking in monopolistic market, putting the misuse of market command by the monopolist aside, it can not be talked about maintaining the competition. Likewise, there are lots of undertakings in perfectly competitive markets which are merely able to effect market mechanism. For this reason, none of the undertakings would be able to impair the competition. Thus, to talk on concertation, it will be useful remarking only from the perspective of oligopolistic markets.

Oligopolistic Market Structure

The word oligopoly tells a type of market in which there are only few undertakings that are able to affect each other²³. Few goods and service producers mean there are only two or more undertakings, which are eventually effected from each other's unilateral decisions. The only criterion to be able to identify existence of concertation in a market is to see if the undertakings have been acting concurrently with regard to the responses coming of its rivals or to their overall ranking in the market (whether they are a big or small player) while building their own marketing strategy. No matter how many undertakings are available (five, ten, fifteen etc.) in a market, we can decide that market is an oligopoly only if the rivals' actions affect other rivals promptly²⁴.

The ground of the oligopolistic markets rests on rivalry. Undertakings may decide on to compete with each other to increase their market and eventually profit shares by using various means such as price reduction, advertisement, product differentiation, quality and/or better models. Yet, given that the undertakings were

See, TÖRE, Nahit, 'Rekabet ve Piyasalar', Türk Rekabet Hukuku ve Rekabet Kurumu Uygulamaları Semineri, Çimento Müstahsilleri İşverenleri Sendikası, (Ankara 1998,) p. 40.

²⁰ VAN GERVEN and NAVARRO VARONA, The Wood Pulp Case and the Future of Concerted Practices, p. 576, 577; LIPSEY, COURANT, PURVIS, STEINER, *Micro Economics*, Harper Collins College Publishers 1993, p. 267; CUNNINGHAM, J. P., *The Competition Law of the EEC*, (London, 1973), p. 32.

²¹ OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 12; WHISH, *Competition Law*, p. 514, 515; BAEL, BELLIS, *Competition Law of the EEC*, p. 30.

²² TÖRE, Rekabet ve Piyasalar, p. 41; VAN GERVEN and NAVARRO VARONA, The Wood Pulp Case and the Future of Concerted Practices, p. 577.

²³ See CUNNINGHAM, *The Competition Law of the EEC*, p. 32; BEGG, FISHER, DORNBUSCH, *Economics*, (İstanbul 1994,) p. 156; LIPSEY, Richard G., *An Introduction to Positive Economics*, (London, 1975,) p. 282, 283.

²⁴ VAN GERVEN and NAVARRO VARONA, The Wood Pulp Case and the Future of Concerted Practices, p. 576. There are many oligopolistic markets in Turkey such as cement, automotive and appliance. TÖRE, Rekabet ve Piyasalar, p. 40. Also see SCHWARTZ, Louis B., "Parallel Action in Oligopolistic Markets", in Cartel and Monopoly in Modern Law International Conference on Restraints of Competition, June 1960, (Karlsruhe 1961,) p. 435, 436; LIPSEY, COURANT, PURVIS, STEINER, *Micro Economics*, p. 267.

not many, they could increase their sales and profits by distorting competition, or increasing prices or holding them at the same level²⁵. There are some likely behaviors and responses having been introduced by undertakings and their rivals in oligopolistic markets. In brief: (1) Undertakings do not have the power of changing their rivals' price and production levels. In this case, in a market, the bigger the number of seller the lower the price, the smaller the number of seller in a market the higher the market price, (2) An undertaking could be sure that its rivals would make their move in the same way (like similar price or production level adjustments) when it makes a move. Thus, for instance, price level could go as high as in the monopolistic markets. (3) Rivals' responses may not be clear after an undertaking gives an independent decision to lower its price level. In this case, price level movements (whether it would decline or it would be given a collective decision on price level) in this market would be uncertain²⁶.

The characteristic elucidating the oligopolistic market is that, even sometimes they are few; undertakings present in the market are affected from each other's decisions. Thus, how does the law prove that such constant interrelations between undertakings are, in fact, concertation? Undertakings operating in oligopolistic markets may try to get some special benefits by monitoring each other's behaviour. Consequently, success of an undertaking, operating in this market, depends on whether it monitors and gives a proper response to the rivals' decisions and action²⁷. It may be possible that the strategies of rival undertakings are similar or the same. In this case, undertakings may be accused of involving in concertation.

It is clear that The Law does not prohibit any sensible and cautious behaviors of undertakings²⁸. Yet, concurrent market behaviors done by undertakings should not be the consequence of cooperation or coordination of the rivals to restrict competition. European Court of Justice, by well-known Dyestuffs Verdict, had pointed out the necessity that oligopolistic market conditions should be taken into consideration, and economic evaluations should be made with regard to partaker's behaviors and market conditions²⁹. In Dyestuffs verdict, ICI was a company, which produced aniline dyestuffs in Italy and Benelux countries. After ICI had raised the price of the dyestuff simultaneously with the other firms, concerted practice accusations emerged. ICI claimed that adaptation of the rivals actions were inevitable in oligopolistic markets. Consequently, European Court of Justice considered the oligopolistic market claim and decided to further investigate³⁰.

²⁵ TÖRE, *Rekabet ve Piyasalar*, p. 40, 41. Also see SCHWARTZ, *Parallel Action in Oligopolistic Markets*, p. 434.

²⁶ For further details see LIPSEY, *An Introduction to Positive Economics*, p. 284-286; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 577-579.

²⁷ For further details see GRILLO, *Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis*, p. 155-160; SCHWARTZ, *Parallel Action in Oligopolistic Markets*, p. 433-437; GREEN, ROBERTSON, *Commercial Agreements and Competition Law*, p. 301.

²⁸ BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-038 (the Sugar case); VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 579.

²⁹ For the case see GIJLSTRA, D. J. and MURPHY, D. F., *Leading Cases and Materials on the Competition Law of the EEC*, Netherlands, 1984, p. 149-155. Also see the Wood pulp case, which is similar JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 273-278.

³⁰ For some similar other cases see VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 586-588; JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 276-278; WHISH, *Competition Law*, p. 515, 516.

In a market, similar or identical behaviors of undertakings do not *per se* prove the existence of concerted practice. Because mere concomitant conducts could emanate due to various market conditions. In order to admit parallel behavior as concertation, it is necessary to show the existence of connection or cooperation between parties as to future market activities to eliminate uncertainty.³¹

Conscious Parallelism Matter

Conscious parallelism describes a situation that undertakings harmonize their decisions and behaviors simultaneously³². As stated before, there is a natural interaction between undertakings in oligopolistic markets due to special market conditions. In response to an undertaking's new marketing policy, others may react with similar or the same strategy, or will come up with a totally new one. The concomitant activity of undertakings has been described as parallel behavior³³. Nevertheless, this situation, at the same time, is a natural consequence of being a cautious businessman.

According to a view in doctrine, to accept the existence of concertation, conscious parallelism constitutes necessary and sufficient condition. According to the common thought of the doctrine accepting this view, consciousness is a situation that arises through the bond between undertakings. In oligopoly, undertakings accord their conducts automatically³⁴. Surely, this view has its own legitimacy. However, it could cause harmful and dangerous consequences if it had been applied to all circumstances. As mentioned before, success of undertakings in oligopolistic markets depends on effectiveness of responses to the decisions of rival undertakings and on developing appropriate strategies. Suitable strategies could either be the same or similar, as well as they could be entirely different from the rivals'. It is likely that others follow the undertaking, which has raised its price tag³⁵. Given that conscious parallelism is prohibited, as one undertaking raises sales price, other undertakings would end up not being able to raise accordingly. In this case, the same or similar conducts would be considered as concerted practice and partakers would be punished accordingly. Acceptance of this practice would cause banning of all the oligopolistic markets.

In oligopolistic markets, parallelism or ramification of behaviors (without cooperation) of undertakings is related to their marketing strategies. The Law does

³¹ VAUGHAN, *Law of the European Communities*, p. 882; OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 12.

³² See CUNNINGHAM, *The Competition Law of the EEC*, p. 32, 33.

³³ See VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 576; AKINCI, *Rekabetin Yatay Kısıtlanması*, p. 149-157; ASLAN, *Rekabet Hukuku*, p. 82.

³⁴ "If behaviors of rival undertakings became parallel or identical, either due to market conditions or due to 'connection' of undertakings in competitive a market, and by their deliberate action, there would be concerted behaviour" (ASLAN, *Rekabet Hukuku*, p. 84, 85). The 'connection' between undertakings would make existence of concertation certain. Yet It is pointed out possibility of distorting competition in perfectly competitive markets where there are many undertakings comparing to oligopolistic markets would be very much harder. See AKINCI, *Rekabetin Yatay Kısıtlanması*, p. 151. TÖRE, *Rekabet ve Piyasalar*, p. 40, 41; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 576.

³⁵ See CUNNINGHAM, *The Competition Law of the EEC*, p. 33, 34; WHISH, *Competition Law*, p. 4515, 516.

not hinder cautious and reasonable actions of the undertakings³⁶. As the Wood Pulp Case has indicated, the existence of parallel behavior does not suffice to allege undertaking's involvement in concertation. If parallel behavior occurred through the coordination and cooperation of undertakings, behaviors in question would be considered as concerted practice³⁷.

THE DEFINITION OF CONCERTED PRACTICE

Prior to giving its definition, it is beneficial to identify the basics of the concerted practice:

(a) Involvement of partakers in parallel behavior.

(b) Concerted practice must arise by cooperation of undertakings. Made agreements, discussions, information exchanges and verbal and written announcements are the clear indicators.

(c) Undertakings must aim to eliminate competition in between³⁸.

Common definition of concerted practice, which has been accepted by the doctrine and practice, is that they are parallel practices which are not having reached to a stage where a formal agreement, properly so-called, had been concluded, and which works against the risk of competition between undertakings through their practical collaboration³⁹. Besides, there are other definitions: "they are consciously created anti-competitive market behaviors of between two or more undertakings aiming to secure the same parallel practices, which are made without having an economic and rational reasoning and without being based on a formal agreement⁴⁰". "They are the similar and non-economical behaviors of undertakings of being present within a market to raise their profits by eliminating the competition instead of competing, and without having a written agreement"⁴¹. "They are formed-decisions

³⁶ See Züchner Case, GIJLSTRA and MURPHY, *Materials on the Competition Law of the EEC*, p. 161-163 (p. 14); WHISH, *Competition Law*, p. 514.

³⁷ See BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-046; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 597-599; GOYDER, *EC Competition Law*, p. 104; JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 274, 275.

³⁸ See BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-042; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 86, 87; GOYDER, *EC Competition Law*, p. 98, 99.

³⁹ AGNEW, *Competition Law*, p. 142; FRAZER, *Monopoly, Competition and the Law*, p. 159; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 589, 592-601; VAUGHAN, *Law of the European Communities*, p. 881; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 87; JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 274, 275; KERSE, *EEC Antitrust Procedure*, p. 7; Phedon, NICOLAIDES, *An Essay on Economics and the Competition Law of the European Community, Legal Issues of Economic Integration*, (2000) 27, 1, p. 13; Ü. TEKİNALP, (TEKİNALP/TEKİNALP), *Avrupa Birliği Hukuku*, p. 337.

⁴⁰ ASLAN, *Rekabet Hukuku*, p. 82-84. We consider the ASLAN's definition of concerted practice since he evaluated conscious parallelism in definition of concerted practice. As we have stated in the explanation on oligopolistic markets, this kind of definition has been against the general opinion. See VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 579; JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 276, 277; FRAZER, *Monopoly, Competition and the Law*, p. 160; WHISH, *Competition Law*, p. 100; KERSE, *EEC Antitrust Procedure*, p. 8.

⁴¹ AKINCI, *Rekabetin Yatay Kısıtlanması*, p. 145. We consider the AKINCI's definition incomplete since he does not include the component of cooperation of undertakings. Besides, it is necessary to point that the "non-economical similar behaviours" expression is vague.

and formed-behaviors of undertakings for acting likewise, and without having an agreement and contract"⁴².

Earlier, we indicated that there are significant differences between the given-definitions of 'agreement' by doctrine and us. To us, 'concerted practices' have a broader scope than the anti-competitive 'agreements'. Consequently, concerted practice may be defined as follows: "They are parallel behaviors of undertakings, which are occurred based on collaboration and are deprived of legally binding will, in order to eliminate the risk of competition".

ISSUE OF SUBSTANTIATION OF CONCERTED PRACTICES

In General

Indeed, the issue of describing a parallel behavior of undertakings as concertation will bring the question of substantiation. To prove an accusation that an agreement or a decision by association of undertakings has distorted the competition, it would be enough to submit the agreement or decision by association of undertakings as evidence. Yet, It would not be easy to substantiate the similar or successive behaviors of undertakings are originated as the result of their cooperation. Especially substantiation of concerted practice in oligopolistic markets will require some economic evaluations.

It is not easy to answer the question whether the parallel behaviors of the undertakings occurred as an outcome of concerted practices, or a natural or compulsory movement of market conditions. Because, every undertaking in an oligopolistic market thinks that the most appropriate marketing decision is the one that considers its rivals⁴³. In this case, without deviating into the aim of eliminating competition, their conscious involvement in similar or identical market behaviors will not be considered as concerted practice. Hence, the investigation phase on the availability of concerted practice could be considered as a very important step. In the end of the investigation, if it is the fact that the existing conformity in the market is the result of cooperation of undertakings aiming to distort competition, the existence of the concertation will clearly be considered⁴⁴.

Common Behaviors Substantiating the Existence of Concerted Practices

Presence of Corresponding Behaviors

The behaviors indicating concertation are parallel conducts that have been implemented between undertakings in favor of preventing, restricting or distorting

⁴² Gülören, TEKİNALP, 'Uyumlu Eylemler' Kavramı, in Hayri DOMANIÇ'e Armağan, İstanbul Üniversitesi Hukuk Fakültesi, (İstanbul 1995,) p. 203. In Tekinalp's definition, the components that both the undertaking's aim of restricting competition and cooperation have not been included in concertation. For other definitions see İKİZLER, *Rekabet Hukukunda Uyumlu Eylemler*, p. 60.

⁴³ VAN GERVEN and NAVARRO VARONA, The Wood Pulp Case and the Future of Concerted Practices, p. 576; KORAH, *An Introductory Guide to EEC Competition Law and Practice*, p. 30.

⁴⁴ JONES, Woodpulp: Concerted Practice and/or Conscious Parallelism, p. 276; BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-043, 44; G., TEKİNALP, "Uyumlu Eylemler" Kavramı, p. 206.

competition⁴⁵. Yet, parallel behaviors would be evaluated as "onset of evidence"⁴⁶, which in fact strengthen the existence of concertation⁴⁷. As The CL article 4/3 has pointed out this situation, when undertakings prove that their similar decisions or behaviors in fact are natural and necessary consequences of market forces, allegation of concertation will be nullified. Perhaps, a collective price increase might have been the result of a general hike in input or transport costs⁴⁸. However, since The Law does not prohibit the business policies made by free will of undertakings, the matter that parallel behaviors between undertakings might have been the result of their free wills can not be overruled. Still, it would be quite hard to prove that the anti-competitive parallel behaviors originated due to market conditions or free and independent wills of the parties were really necessary because of some economic reasons⁴⁹.

Exchange of Information

During the identification of behaviors constituting the existence of concerted practice, subsequent to market investigation, identification of relations between parties plays an important role. Theoretically, it can not be talked about competition in perfectly competitive markets. Competition primarily takes place in oligopolistic markets. Several undertakings, aiming to increase their profits, may try to reach this goal through a hidden agreement instead of through competition. Actually, in these markets, undertakings might behave concomitantly by using the opportunities provided by the technology and market condition. It is always a possibility for undertakings to convey their prices and competition strategies to other parties by in person or in various means like phone, internet, telex, fax or mail⁵⁰.

General condition assessments, statistical information or data of various reports published by professional organizations on an economic sector could not be considered as information exchange establishing concerted practice⁵¹.

As being clear indicators of concertation, behaviors taking place between undertakings such as price and sales information exchange or the statements on sales conditions aiming to remove competition risk are prohibited. Likewise,

⁴⁵ POKEMPNER, Dinah R., The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-abortionists, *Columbia Law Review*, (1989) 89, p. 694.

⁴⁶ Onset of evidence (substantiation on the basis of indication or circumstantial evidence) is not directly related with the incidents directly proving the existence (or nonexistence) of a right which is the subject of a dispute. In other words, onset of evidence is, with a considerable probability, showing the materialization of legal elements of the incidents without directly proving the ground of the dispute yet indirectly presenting related indications. A similar situation is present for the substantiation of adultery. Adultery may not be proven directly, yet its related indications would be sufficient. Due to privacy and secrecy of relationship, complete substantiation of adultery is not wanted. See Saim, ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol: I-II, (Istanbul, 1992,) p. 605, 606, 658.

⁴⁷ See NIKPAY; FAULL, *Article 81*, p. 78, 79; WHISH, *Competition Law*, p. 102; TEKİNALP, G., "Uyumlu Eylemler" *Kavramı*, p. 203; GOYDER, *EC Competition Law*, p. 97.

⁴⁸ Parallel behaviors which could not be explained economically indicates parties does make concertation. See BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-044; KORAH, *An Introductory Guide to EEC Competition Law a Practice*, p. 33.

⁴⁹ BAEL, BELLIS, *Competition Law of the EEC*, p. 30; WHISH, *Competition Law*, p. 515.

⁵⁰ See BAEL, BELLIS, *Competition Law of the EEC*, p. 31.

⁵¹ See VAUGHAN, *Law of the European Communities*, p. 883.

exchange of information in regard to prices, customer and sales information among distributors of a manufacturer could be considered as concertation as well⁵².

Meetings

If a stable nature were observed in attitudes of undertakings such as coming together and holding meetings by various opportunities in order to discuss some specific issues, the existence of the concerted practice would be substantiated. Finding a connection would be necessary to justify the parallel accord between the undertaking's market behaviors as concertation. Besides, connection should not need to be based on a written proceeding, on a written report or on an information exchange. In any case, gatherings, arranged private meetings held by participation of anti-competitive undertakings would be considered as sufficient evidence to the existence of collusion. The Pioneer Verdict of European Court of Justice can be considered as a clear example. In the case, the Japanese company Pioneer had distributors in France (MDF), Germany (Melchers) and England (Shriro). It was the fact that Pioneer products were sold for higher prices in France in comparison to England and Germany. Accordingly, pioneer products had been passed to France from Germany and England. After MDF, the French distributor, complained about the situation, Pioneer and the three distributors held a meeting in Antwerp. However, neither did they make a written agreement nor issued a statement about the meeting's content. Yet, distributors in Germany and England ceased selling Pioneer products to the wholesalers in France. The French wholesalers brought the issue to The Commission and yet it was declined due to lack of evidence. Thereupon, they took the case to the European Court of Justice. Despite the lack of evidence, the council acknowledged the existence of concerted practice by considering the held meeting in Antwerp by the parties⁵³.

PROVING THE CONCERTED PRACTICE

General Principles

Understanding whether a right, which is the subject of a dispute, really exists is made possible by examining the reality of the situation via positive law that sets out and determines the rules on birth and end of an incident⁵⁴. For this reason, in a trial, the post being responsible for solving a discord must be convinced that the incident and the right in question is legitimate by submitting related credible evidence. Thus, proof may be described as the submission of the necessary evidence to the court in order to give them the idea of correctness of the case in dispute⁵⁵.

⁵² GOYDER, *EC Competition Law*, p. 100; VAUGHAN, *Law of the European Communities*, p. 883; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 600, 601.

⁵³ See BELLIS, BAEL, *Competition Law of the EEC*, p. 32; BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-040. See also Polypropylene Case (2-041) in the same study.

⁵⁴ Baki, KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, (İstanbul, 1990.) p. 1352; Mehmet Kamil, YILDIRIM, *Medeni Usul Hukukunda Delillerin Değerlendirilmesi*, İstanbul, 1990, p. 35; UMAR, Bilge, Ejder, YILMAZ, *İspat Yükü*, İstanbul, 1980, p. 1.

⁵⁵ See ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol: I-II, p. 598; UMAR, YILMAZ, *İspat Yükü*, p. 1, 2.

In general, subject of substantiation is the incidents, which are based on the cases in dispute, and furthermore, it is not necessary to prove the provision of law, which is being infringed (the Turkish Code of Civil Procedure, art. 76). In this case, in a dispute, proving has to be provided either by defendant or by plaintiff depending on allegation⁵⁶. Parties are obligated to prove their claims and their basis by following the criterion set out by the general principles of civil law (the Turkish Civil Code art. 6). Therefore, the facts, which the case has been based upon, has to be proven sequentially first by the plaintiff and then by defendant⁵⁷.

In some cases, burden of proof might be determined by a special provision of Law. For example, According to the Turkish Code of Obligations article 96, a borrower, who has not been able to pay his debt fully or partially, must prove that it has not been his fault. In the Turkish Civil Code art. 3, "in cases where good intent is stipulated", instead of person claiming to be in good intent, person claiming otherwise has been obliged to prove. For example, the Turkish Civil Code art. 459, Turkish Code of Obligations art. 55, 56, 102 have this characteristics⁵⁸. The Competition Law has made another decree in this subject as well.

The Burden of Proof in Concerted Practices

There has been an important rule on burden of proof in the CL Section 5, which sets the consequences of anti-competitive behaviors (agreement, decision and concerted practice) in the field of private law. Within the framework of this rule, after a natural or a legal person harmed by anti-competitive market behaviors could declare that the competition is impaired, present evidence such as close co-movements of undertakings' conducts, upsurge of market prices in a narrow margin or rigidity of market prices for some time considered as lengthy to the authorities, then, responsibility of proving against the existence of behavior of concertation will pass to the defendant (CL, art. 59/1)⁵⁹.

As rule, as defendant has to proof that emergence of a right was legitimate, plaintiff has to proof that some obstructing facts⁶⁰ were available during the emergence⁶¹. Under these principles, person claiming the existence of concertation between undertakings will be considered as fulfilled the burden of proof by showing the actual effects and consequences of anti-competitive concertation. In fact, same or parallel market practices ground the emergence of concertation. Persons claiming the existence of concerted practice will be considered as fulfilled by just showing to

⁵⁶ See UMAR, YILMAZ, *İspat Yükkü*, p. 19; YILDIRIM, *Medeni Usul Hukukunda Delillerin Değerlendirilmesi*, p. 74.

⁵⁷ KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, p. 1358, 1359; Necip, BİLGE, Ergun, ÖNEN, *Medeni Yargılama Hukuku*, (Ankara, 1978,) p. 500, 501.

⁵⁸ For a detailed knowledge see KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, p. 1376-1379.

⁵⁹ If some indications, strengthening the existence of concertation, were found, the undertakings alleged with concertation must prove otherwise. Burden of proof, which is that they are not making concertation, would pass to the other party. The sentence that "... the burden of proof for proving that the enterprises are not engaged in a concerted practice shall be shifted to the defendants (CL art. 59/1)" implies that as if there are some other parties, which is not true, who have to defend themselves rather than the defendant parties.

⁶⁰ Against the parties claiming that they were harmed by concertation, it could be asserted that the existing parallel behaviors had occurred due to economic reasons such as price increases in oil, electricity, import and foreign currency and they could not be deemed as concertation.

⁶¹ KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, p. 1358, 1359; OĞUZMAN, M. Kemal, *Medeni Hukuk Dersleri*, (İstanbul, 1994,) p. 164.

the authorities the facts indicating the existence of parallel behaviors. Market portioning, and co-movement and rigidity of market prices has given as examples by the Law. These cases are not limited. For instance, a collective action of undertakings of refusing to deliver a commodity, or of giving price or sales privilege to a wholesaler or to a retailer would be considered as concertation.

Undertakings, which are accused of concertation, must either prove that they have not been involved in parallel behavior or that their co-movements depend on a reasonable basis. Economic justifications would be first to be considered as reasonable ground. Parties may prove their claims by all the evidence stated in the CCP articles 236-374. However, as indicated above, the Board of Competition or adversely affected parties will only be contented with showing the existence of actual effects of anti-competitive conducts, or the existence of concrete event⁶². If undertakings that are involved in concerted practice were not be able to explain their parallel behaviors on a reasonable basis, they would be sentenced. (CL, art 4/3).

Indeed, the claim of concertation would be verified if the existence of parallel behavior, the connection of the parties and as well as the existence of restriction or distortion competition were proved⁶³. However, The Law does not hold the persons responsible for proving all of these elements. The Board of Competition and adversely affected parties would be considered as fulfilled showing the existence of concerted practice without proving the facts concerning the restriction or cessation of competition and the connections between the undertakings (CL, art 59/1). In this case, in order to be saved from responsibility, defendant undertakings must prove that they did not act together or concertation was the natural consequence of market conditions, but even though they acted in accord, they must prove they either did not have any connection or their connection did not distort the competition.

As a common rule, party benefiting from the verdict of a case must prove the allegation. This party would be the plaintiff along with defendant⁶⁴. Party denying an allegation does not hold responsible for proving. Consequently, party claiming the allegation holds the responsibility of proving. Yet, for a plaintiff, it is very difficult to be able to reach the evidence while proving the existence of concerted practice. Thus, because of this difficulty, in order to ease proving the concerted practice, some principles have been provided. The first one is shifting the burden of proof to the other side⁶⁵. The other important element is easing of proving (CL art. 4/3, 59/1). According to article 59/1 of The Law, if it is the fact that, while, from one hand, contacts between the parties (like arranging meetings, plans leading to concerted practices, document and statements) could not be proven, on the other hand, if there are some indication of disturbance (similarity of prices and its movements) in competition and the supporting evidence are presented to the authorities, accused undertakings must prove that they are not involved in concertation.

⁶² Nurkut, İNAN, "Maddi Hukuk Açısından Türk Rekabet Yasası", in Türk Rekabet Hukuku ve Rekabet Kurumu Uygulamaları Semineri, Çimento Müstahsilleri İşverenleri Sendikası Yayını 1998, p. 72.

⁶³ See BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-042; BAEL, BELLIS, *Competition Law of the EEC*, p. 31.

⁶⁴ KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, p. 1376.

⁶⁵ For further situations that burden of proof has been set by the Law, see KURU, *Hukuk Muhakemeleri Usulü*, Vol: II, p. 1376-1380.

Proving the Illegality

To be able to prove a concertation, at least following two things must be evident. Firstly, parties must act together and concerted practice must not originate because of economic conditions or market structure. Secondly, it must be clear that similar or identical behaviors occurring between the parties should originate from their cooperation and close relations⁶⁶. Thus, relevant parties (in the first place adversely affected parties, The Board of Competition and others) will only present the parallel behaviors, and the indicators showing disturbance of competition. These parties do not have the responsibility of proving both concertations are really originated from close relations of the undertakings and it is against the law.

In CL article 59/1, undertakings that are accused of having been involved in concerted practice must prove that their parallel behavior does not serve to an objective, which is against the law. For this reason, first they should prove the concerted practice was originated due to economic reasons and market conditions. Even though they were not be able to prove it, the undertakings would be saved from their responsibility of concerted practice if they were be able to substantiate that their parallel behaviors emanated independently. Moreover, proving that a cooperation of undertakings is in fact against the law is the responsibility of defendants and not of plaintiff's⁶⁷.

Presumption of Concerted Practice

Presumption is an inference or judgment derived by ordinance or court about unknown incidents from known events⁶⁸. The Law has accepted a presumption about concertation: unless proven otherwise, the facts stated in articles 4/3 and 59/1 are deemed as the evidence of the case in question. "In a situation where the existence of an agreement could not be proven as concertation, finding similar markets, in which the competition has already been distorted, with regard to price variations, supply and demand equilibrium prices or regions would help proving concertation" (art. 4/3). It appears that arriving to a decision necessitates some probability. Because, in a trial, when there is no chance of having absolute accuracy to deliver the verdict, a presumption would be made by saying "comparing to the other similar situations, this is mostly true"⁶⁹.

Party having relied on presumption would be discharged from burden of proof. The defendant undertakings might prove they have not been involved in concerted practice by presenting any evidence (art. 4/4)⁷⁰. The other side, without discussing

⁶⁶ WHISH, *Competition Law*, p. 515, 516; BELLAMY&CHILD, *Common Market Law of Competition*, para. 2-043, fn. 33.

⁶⁷ See VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 604-607; JONES, *Woodpulp: Concerted Practice and/or Conscious Parallelism*, p. 276, 277.

⁶⁸ ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol: I-II, p. 608; Ejder, YILMAZ, "Rekabet Kanunu Uygulamasında Usul ve İspat Sorunları", in *Rekabet Kurumu Perşembe Konferansları*, (Ankara, Kasım 1999,) p. 98. Presumption is also defined as acceptance of correctness and distinctness of an incident in the beginning. KUNTER, Nurullah, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, (İstanbul, 1978,) p. 433.

⁶⁹ See KUNTER, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, p. 433.

⁷⁰ The law points out that "each one of the party could be freed from responsibility by substantiating that they have not involved in concertation and yet the incident in fact had occurred due to economic and social reasons". First of all, from the perspective act of proving, the phrase "economic and rational reasons" was not a correct way. (See also. Ergun, ÖZSUNAY, "Türkiye'de Karteller ve Rekabet Sınırlamalarına

the accuracy of the presumption, might prove that concertation, which the presumption is based upon, does not really exist, hence, and he might prove that presumption could not be trusted as basis⁷¹.

By examining the rule saying that party relied on presumption will be saved from burden of proof, it would be realized the word presumption has been mentioned twice. As a choice, despite the availability of presumption on the situation of concertation, The Lawmaker has set out the burden of proof⁷² with a separate article. By article 4/3 of The Law, using presumption on concertation has been introduced to ease the difficulty of determining concerted practices. However, as may be seen above, it is not possible to reach to a clear conclusion by the expression stated in the article. The Article 59/1 of The Law states the matter more clearly. Consequently, judgment of article 4/3 of The Law ought to be interpreted as follows; if parallel market behaviors and collusion committed by the undertakings in a certain market causes the revealing of suspicion of cooperation in favor of eliminating competition, it will be accepted that the undertakings have been involved in concertation⁷³.

In definite cases, persons claiming the existence of concertation between undertakings must prove that the undertakings had been acting together. For example, when the signs strengthening the suspicion of concertation such as simultaneous price increase, reciprocal withdrawal of firms from each other's market which are in distinct places, or cessation of supply of goods to a certain buyers for seemingly sensible excuses could be presented, then, proof of burden has been considered as fulfilled.

DIFFERENCES BETWEEN CONCERTED PRACTICE AND AGREEMENT

Clear revelation of the differences between concerted practice and agreement rests on how their meanings have been filled. If all kinds of compromises of will power,

İlişkin Bir Kanun Hazırlanmasına Yönelik Çalışmalar ve "Rekabetin Korunması Hakkında Kanun Tasarısı"na İlişkin Görüşler, in Avrupa Topluluğu Rekabet Politikaları Hukuk Düzeni ve Türk Rekabet Kanunu Tasarısı Uluslararası Sempozyum, (İstanbul, 1993,) p. 114). Because, the rule of rationality (reasonable, sensible) of the presented evidence, which is related to and will effect the outcome of a allegation, is not only a required by The Competition Law but also all the other laws. And, furthermore, 'economic' reasons are an important source of evidence solving the disputes in the field of competition Law. However even in this kind of cases, means of proving could not be demarcated only with the economic reasons. For instance, an allegation on concertation about market apportioning could be justified with obstruction of transport or nature. Thus, many things which might affect the outcome of a case could be presented as means of evidence. Lastly, The Law's "each one of the party" phrase indicate the defendant and plaintiff without making any separation. But, According to the third sub-paragraph of The article 3, it is the fact that burden of proving the existence of allegation of concertation should be made by the defendant.

⁷¹ A person who has not been able to disprove successfully would abide its results. In situations which have not been talked about presumption, if the other side was not successful to prove the allegation, prove of burden would not pass to the defendant and still the necessary evidence should be presented by the plaintiff to prove the concertation. See OĞUZMAN, *Medeni Hukuk Dersleri*, p. 167, fn. 55.

⁷² The "onset of evidence" within the article 59/1 of the law, which remarks on burden of prove, should not be mixed with "presumption". Since accepting a presumption means accepting the correctness of related incident exclusively and in the beginning, it could not be accepted as evidence all alone. (KUNTER, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, p. 433). The 'onset of evidence' is the kind of burden of proof which is indirectly related to the incidents in disputes. (ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol: I-II, p. 605).

⁷³ Compare with ASLAN, *Rekabet Hukuku*, p. 85, 86.

gentlemen's agreements and even to be of the same opinion have been considered as agreement, then, naturally, the question of what the concerted practice would be arises. According to nearly common judgments which have been adopted by doctrine and practice, 'agreement' comprehends all kinds of legally binding or unbinding compromises which also restricts movement of freedom⁷⁴. Henceforth, reciprocal intent statements, declarations, to be of the same opinion, gentlemen's agreements and written or oral statements are considered as agreement⁷⁵. The claim that the reciprocal compromises of will power in agreements are much higher in number than the concertations has not been a measure which could clearly help to distinguish these two concepts⁷⁶. The hardship of distinguishing the agreement and concertation has been admitted in doctrine. However, Article 81 and CL accept that their bound consequences are the same, and this distinction becomes only important from the theoretical perspective⁷⁷. The differences between the concerted practice and agreement may be expressed as follows.

From the Perspective of Judicial Consequences which the Anti-Competitive Agreements are Tied to

Agreements being against article 4 of The Law are deemed as illegal (CL art. 56/1, Article 81/2). Neither the CL art. 56, which mentions illegal agreements and judicial characteristics of the decisions, nor the Article 81/1 do remark on concerted practices.

⁷⁴ WHISH, *Competition Law*, p. 92, 93; KERSE, *EEC Antitrust Procedure*, p. 5; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 82, 83; AGNEW, *Competition Law*, p. 142; CUNNINGHAM, *The Competition Law of the EEC*, p. 43.

⁷⁵ VAUGHAN, *Law of the European Communities*, p. 879; Ü. TEKİNALP, (TEKİNALP/ TEKİNALP), *Avrupa Birliği Hukuku*, p. 335; WHISH, *Competition Law*, p. 92.

⁷⁶ RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 80, 81; KERSE, *EEC Antitrust Procedure*, p. 7. According to this view, in an anti-competitive agreement, there has been a reciprocal statement of wills even if they may not be legally binding. However, there have not been reciprocal statements of wills in concerted practices. In the last situation, there is a connection or transfer of information between parties, yet, stated connection has not reached the stage of statements of will (ASLAN, *Rekabet Hukuku*, p. 81). It is the fact that undertakings do not organize their anti-competitive activities under transparent and tangible environments. Thus, while an anti-competitive activity could be categorized as agreement or concerted practice, investigating whether the agreements between parties have reached to stage of agreement does not have a reasonable logical legal ground. Especially the existence of concertation in concrete incidents could be proved tracing the indicators such as meetings, seminars or exchange of information or documents in the market. Trying to answer the questions about whether the parties made statements of will, or whether the parties exchanged documents and information without speaking to each other would cause wasting of time. The author also adds the following related words in his study: Whether legally valid or not agreements have two consecutive stages as commitment and execution. There is no commitment stage in concerted practices. There are some preparatory conducts in order to understand each others' market behaviors. Yet this stage does not involves reciprocal concertation (p. 55). To us, it is possible that concerted practices have a commitment stage as well. The important thing is how the parties involved would be devoted and faithful to their commitments. If the parties deemed their commitments as binding, we conclude the existence of an agreement or if the parties did not deem their commitments as binding, we conclude the existence of concerted practice. This situation would also be true for the statements of free wills as well.

⁷⁷ See NIKPAY; FAULL, *Article 81*, p. 79, 80; KERSE, *EEC Antitrust Procedure*, p. 7; WHISH, *Competition Law*, p. 94, 95; RITTER, BRAUN, RAWLINSON, *EEC Competition Law A Practitioner's Guide*, p. 80, 81.

From the perspective of disagreement with law, there has been a ration behind not remarking on concerted practices, which are subject to the same judicial consequences as agreements.

In concerted practices, since parties do not carry the responsibility of acting concomitantly, it is not possible to accept the invalidity of concerted practices, which do not have binding characteristics, and, consequently, which do not attribute to judicial values. However this reasoning would be meaningful when it is evaluated with our version interpretation of agreement and concerted practices, not with that of doctrine or practice. Because when the majority's point of view has been followed, in cases where concerted practices and agreements are mixed with each other, it would not be legitimate and consistent to reach to the conclusion considering that the agreements which comprise the statements made by the bound parties as well are illegal. In this case, contrary to the logic of law concerted practices would be forced to be considered as illegal.

From the Perspective of Burden of Proof

Notwithstanding, unlike the Turkish Law, there are no similar provisions in EC practice clearly stating the presumption and burden of proof, substantiation of concerted practices has been eased by evidences related to conditions⁷⁸. Person claiming the existence of an anti-competitive agreement is bounded to prove (CL art. 59/1). However, person claiming the existence of concertation does not need to prove those undertakings acts jointly. Instead, this person would be considered as done by only showing the existence of parallel market behaviors and showing the signs leading to the suspicion of concerted practice. Related rules of the law on easing of proving through using the choice of presumption on concerted practice (art. 4/3) and burden of proof (art. 59/1) are the convenience only provided in case of concerted practices⁷⁹.

From the Perspective of Infringements

Having been in execution stage would not be necessary to be able to prohibit anti-competitive agreements. From the point of CL art 4, an agreement, which has been made between the parties aiming to restrict competition, will automatically be invalid. Involvement of parties in a lawfully binding as well as anti-competitive contract will be the necessary and sufficient justification for its prohibition. Even though, from the perspective of objective and content, a treaty between parties does not include a road map to restrict the competition, its prohibition will be introduced by conceiving its likely consequences on competition, without searching whether it is executed or not⁸⁰. Unlike agreements, desire of implementation in concerted practices can not be prohibited unless it reaches to stage of execution.

⁷⁸ See WHISH, *Competition Law*, p. 102; VAN GERVEN and NAVARRO VARONA, *The Wood Pulp Case and the Future of Concerted Practices*, p. 601-607.

⁷⁹ İNAN, *Maddi Hukuk Açısından Türk Rekabet Yasası*, p. 72.

⁸⁰ See OBERDORFER, GLEISS, HIRSCH, *Common Market Cartel Law*, p. 22; CUNNINGHAM, *The Competition Law of the EEC*, p. 51.

CONCLUSION

In Article 81, which is the origin of the doctrine and CL Article 4, the term "agreement" between undertakings has been interpreted broadly to comprise any form of coordination which is legally valid and binding, and all reciprocal intent statements not having the characteristics of a legal or formal agreement. Thus, gentlemen's agreements, reciprocal determination statements, commitments, situation appraisal memorandums and cooperative statements can be included in agreements. In this respect, all conducts restraining economic freedom, stating mutual opinions, containing obligations and being legally binding or non-binding would be able to evaluate as agreements.

From the judicial perspective, legally binding contracts should be considered as "agreements", and, the conducts, which do not provide obligatory power, should be considered as "concerted practice". If it was interpreted in broad meaning in order to include the legally non-binding conducts as well, then it would mischief some of the judicial terms and concepts. It may be said this kind of thinking would narrow the scope of The Law, and it would prevent the impediment attempts prior to the fulfillment of agreements. Yet, it is obvious that, all non-binding reciprocal relations, including the gentlemen's agreements, which are also considered as agreements, are made covertly and not declared. Naturally, existence of these agreements could be seen during the execution stage. Hence, above businessmen incident could still be investigated using the legal authority of investigation about indication of credible evidence for concertation without constraining the implementation of The Law effectively and still without narrowing its scope.

If all kinds of compromises of will power, gentlemen's agreements and even to be of the same opinion have been considered as agreement, then, naturally, the question of what the concerted practice would be arises. To us, "concerted practices" have a broader scope than the anti-competitive "agreements". Consequently, concerted practice may be defined as follows: "They are parallel behaviours of undertakings, which are occurred based on collaboration and are deprived of legally binding will, in order to eliminate the risk of competition".

Shortly, the differences between the concerted practice and agreement may be expressed as follows:

- 1) In concerted practices, since parties do not carry the responsibility of acting concomitantly, it is not possible to accept the invalidity of concerted practices, which do not have binding characteristics, and, consequently, which do not attribute to judicial values.
- 2) Related rules of the law on easing of proving through using the choice of presumption on concerted practice (art. 4/3) and burden of proof (art. 59/1) are the convenience only provided in case of concerted practices.
- 3) Unlike agreements, desire of implementation in concerted practices can not be prohibited unless it reaches to stage of execution.