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**MARKETING AND COMPETITION LAW: IN THE PERSPECTIVE OF TURKISH
COMPETITION AUTHORITY CASES**

ABSTRACT

Increasing competition in many economies in the world brings back new strategy seekings. Sometimes these seekings cause "aggressive" or suicidal" applications. Since these applications negatively affect competition, legal arrangements about these subjects have been made with competition law in Turkey as in many countries. In this study the relationship between marketing and competition law was investigated by analyzing the decisions of Turkish Competition Authority. At the same time Turkish Competition Law is explained for marketing decision makers of firms and also marketing academicians. All the decisions from the Authority's foundation date are analysed. The analysis has been made by Nvio package program. Findings of this study are; There is an important relationship between marketing and antitrust law, marketing strategies play an important role in Turkish Competition Authority's decisions, decision makers in marketing should be aware of the regulations of competition law while they are giving important strategical decisions.

Keywords: Marketing, Marketing Strategies, Turkish Competition Authority, Turkish Competition Law, Content Analysis

**PAZARLAMA VE RAKEBET HUKUKU: TÜRK REKABET KURULU KARARLARI
PERSPEKTİFİNDEN**

ÖZ

Tüm dünya ekonomilerinde olduğu gibi ülkemizde de firmalar arası artan rekabet, pazarlama alanında etkili strateji arayışlarını da beraberinde getirmektedir. Ancak yeni strateji arayışları kimi zaman "saldırgan" ve hatta "yok edici" uygulamaları doğurabilmektedir. Bu uygulamalar, rekabeti olumsuz yönde etkilediği için dünyanın birçok ülkesinde olduğu gibi ülkemizde de bunlara ilişkin yasal düzenlemeler Rekabetin Korunması Hakkında Kanun ile getirilmiştir. Bu çalışmada öncelikle pazarlama ve rekabet hukuku arasındaki ilişki ortaya konulmuş ardından Rekabet Kurulu'nun kurulduğu tarihten bu yana (1997-2012) almış olduğu kararlar pazarlama stratejileri açısından incelenmiştir. Çalışmanın bulguları sonucunda; pazarlama ve rekabet hukukunun önemli derecede ilişkili olduğu, pazarlama stratejilerinin Rekabet Kurulu kararlarında önemli bir yer tuttuğu, pazarlama alanında karar vericilerin aldıkları önemli stratejik kararlarda rekabet hukukunu dikkate almaları gerektiği, ortaya çıkmıştır.

Anahtar Kelimeler: Pazarlama, Pazarlama Stratejileri, Rekabet Kurulu, Türk Rekabet Hukuku, İçerik Analizi



1. INTRODUCTION (GİRİŞ)

Wants and needs of consumers are changing rapidly today. So companies have to think strategically in view of these changes. Especially in present days' competitive markets, creating competitive advantages and sustain them in long term is very important. While planning these strategies one of the most important factors are environmental factors. Political and legal environment which are one of these factors are critically important. The strategies developed by firms may change according to rivals and markets. But legal regulations do not tolerate all kinds of strategies. Because fair competitive regulation is more important than firms' individual interests. For this reason as many countries in the World also in Turkey legal regulations were made by Competition Law. Because there are serious sanctions in this law about competition violations, marketers should be aware of these regulations while they are planning their strategies. In this context the aim of this study is to analyse the relationship between marketing and competition law. Than giving information about Turkish Competition Law. And after that analysing the relationship of marketing and competition law by analysing the decisions of Turkish Competition Authority between 1997-2012.

2. RESEARCH SIGNIFICANCE (ÇALIŞMANIN ÖNEMİ)

In todays competition environment firms trying to develop the best marketing strategies to be succesfull. But while designing these strategies sometimes they are giving some decisions intersect with legal structure. Nowadays many firms encounter problems because of their unconscious of competition law. This study firstly aims to give information about competition law to marketers who give important decisions and develop critical strategies for their firms. And then the importance of this study is also explain the relationship between marketing and competition law.

3. SUBJECT (KONU)

3.1. General Information About Turkish Competition Law (Act no. 4054 on the Protection of Competition) (Türk Rekabet Hukuku Hakkında Genel Bilgi)

As it generally gains acceptance, restriction of competition appears in three ways. The first one is the restriction of competition directly or indirectly by the "prearranged" facilities of different firms in the market. This can be vertical or horizontal restrict. The second is the abuse, by one or more firms, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices which are illegal and prohibited. And the third one is mergers and acquisitions which would result in significant lessening of competition in a market for goods or services within the whole or a part of country (Aslan, 2005:31).

- In Turkish Competition Law Article No 4 arranges the first situation. The examples of these kinds of restricts are as follows:
- Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,
- Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,
- Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,



- Complicating and restricting the activities of competing undertakings, or excluding undertakings operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market,
- Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,
- Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.
- In Turkish Competition Law Article No 6 arranges the second situation. The examples of these kinds of restricts are as follows:
 - Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,
 - Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,
 - Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,
 - Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market, restricting production, marketing or technical development to the prejudice of consumers.

In this study the third situation is an exception because these kind of strategies are seen as managerial level strategy instead of marketing strategy (Eren, 2002:35).

3.2. Relationship of Marketing With Competition Law (Pazarlamanın Rekabet Hukuku ile Olan İlişkisi)

A climate of increasing competitive intensity and increasing aggressive applications of marketing indicate that marketers should be aware of legal aspects of their strategies (Gundlach, 1990:130). In the World, after the end of 1990s marketing practices received increased antitrust study. Also the scope of government policies and legal arrangements that arrange marketing facilities are broadening in many of developed countries. So marketing managers should take into consideration competition law while they are thinking how to compete effectively (Darren, 2005:75). For example making agreements about price fixing and sharing markets, abuse of dominant position in the market, mergers and arrangements that restrains competition in an important scope or making facilities that restrain the competition in large scope like relational marketing are unlawfull facilities for marketers. But in many case marketers may not realize the increasing likelihood of violating competition laws (Darren, 2005:73). However there isn't enough academic study in this subject in Turkey yet.



Nonetheless when the high fines of Turkish Competition Authority are considered the importance of legal arrangements about marketing is staired.

So it is important to deal the relationship between marketing and competition law. According to Gundlach and Philips (2002), this relationship can be examined across five domains: their subject matter, role in society, underlying processes, informing foundations, and principle methodologies. The subject matter of marketing is exchange and delivering superior value to customers. For this reason it views competition as important as exchange. And also the subject matter of antitrust is market structure and competition, too. In the aspect of the role in society, the role of marketing is to provide a higher living standard to customers by providing superior value in exchange. But in some exchanges marketers elevate their own interests and for this aim they can jeopardize customers' welfare. These attitudes are interest of antitrust.

As the aspect of underlying processes, antitrust process provides a framework for understanding competitive conduct and its consequences for competition and consumer welfare. And marketing management process provides a usefull framework for analyzing, planning, and executing a firm's marketing effort to compete with rivals. Understanding competitive conduct is an important outcome of the antitrust proccess, the marketing management process seems it as important (Gundlach and Philips, 2002:250-251). So "understanding the competitive conduct" is an important instrument for both disciplines but it can not be said for aims. The aim of marketing is developing the strategies and tactics that will maximize companies profits. The aim of antitrust is to assess if these applications restrict competition or if consumer welfare and social welfare decrease by this way. Consequently two disciplines interests same subject from different aspects (Sullivian, 2002:247). So the instruments of two disciplines are parallel to each other but there are differences and sometimes conflicts between their aims. In other words the aims of marketing usually in the inspection of by antitrust.

Alternatively the relationship between two disciplines can be observed by marketing mix (4P). These four areas are product, price, promotion and place. Even though all these areas bases on consumer needs and wants, sometimes some decisions given by marketing managers may restrict competition or make the facilities of rivals difficult. These kinds of marketing applications are the subjects of antitrust (Shocker, 2007:95 and Hughes, 1978:41). In other words antitrust deals with how the products are sold, how are they distrubuted and how the companies make collaborations with each other (Ashton and Pressey, 2006:156).

Another converging point for marketing and antitrust is relationship marketing. In relationship maketing, company make close ties with few suppliers and customers instead of making close ties with all suppliers and customers (Fontenot ve Hyman, 2004:1211). For example tying aggrements, price discrimination, and sharing information with rivals are the applicaitons of relationship marketing that cause competition restrict. One of the aims of relationship marketing is present barriers to entry by making some aggreements with rivals which reduce competition. If these relations restrict competition or cause discrimination between the channel members than they may cause violation of competition. Because in this situation dealers, customers, channel members, rivals and indirectly general economy may suffer damage. Generally if these kinds of aggreements are made by small firms competition will not affected negatively but this



can not be said for big firms (for especially oligopolistic markets) (Fontenot ve Hyman, 2004:1211-1215). Also there are some studies that display the paralelism between increasing relationship marketing applications and aggressive marketing strategies (Paswan, 2011:316).

4. FINDINGS AND DISCUSSIONS (BULGULAR VE TARTIŞMALAR)

4.1. Aim of The Study And Methodology

(Çalışmanın Amacı ve Metodoloji)

The aims of this study are:

- Giving information about competition law to marketers.
- Explain the relationship between marketing and competition law.

There are 4273 cases that Turkish Competition Authority analysed between 1997 (authority establishment date) and 2012. These cases fall under the heading of merger and acquisition, negative clearance and exemption, competition violations, and privatization. In this study 1696 cases which are related to article 4 and article 6 are analysed. The reason for this is the thought of these articles can be related with marketing. The other articles are excluded from this study because they are related with managerial strategies (Eren, 2002:35).

Firstly these 1696 cases are defined as "marketing related" and "not marketing related". For this initial content analyses NVivo 8 programme was used. Identified codes are "price (pricing, price-fixing, price determination), promotion, sales, discount, company image, loyalty, advertisement, and brand (Ashton and Pressey, 2006:157). In addition to content analyses all the cases analysed for these key words manually. Because sometimes these words can be used in different meaning instead of the meaning taken in this study. And at the end all cases are classified according to "marketing related", "not marketing related", and "include financial fine" or "not include financial fine". For this analyse also SPSS (Statistical Package for Social Sciences) 11.5 package programme was used.

4.2. Findings (Bulgular)

Table 1. Relations of cases with marketing and financial fines
(Tablo 1. Kararların pazarlama ve para cezaları ile olan ilişkisi)

	Relation with Marketing		
	Number of marketing related cases	Number of not marketing related cases	Total
Financial fine			
Cases include financial fine	146	42	188
Cases not include financial fine	1051	392	1443
Total	1197	434	1631*

*Because Council of State revoked 65 cases total number of cases is written as 1631.

The distribution of 1631 cases according to relation with marketing and financial fine can be seen from Table 1. Based on the data from this table it can be said that the number of cases that include financial fine is 188 and 78% of these are related with marketing. 73% of cases not include financial fine and number of these is 1051. Consequently 73% of analysed cases are related with marketing.

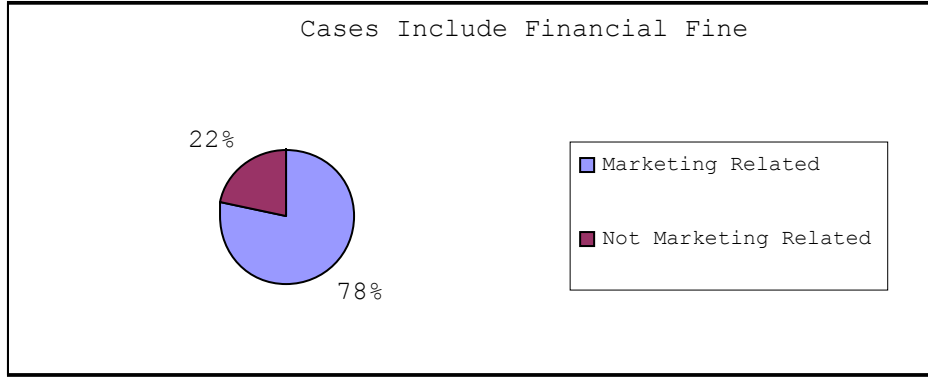


Figure 1. Relation of cases that include financial fines with marketing
(Şekil 1. Para cezası içeren kararların pazarlama ile olan ilişkisi)

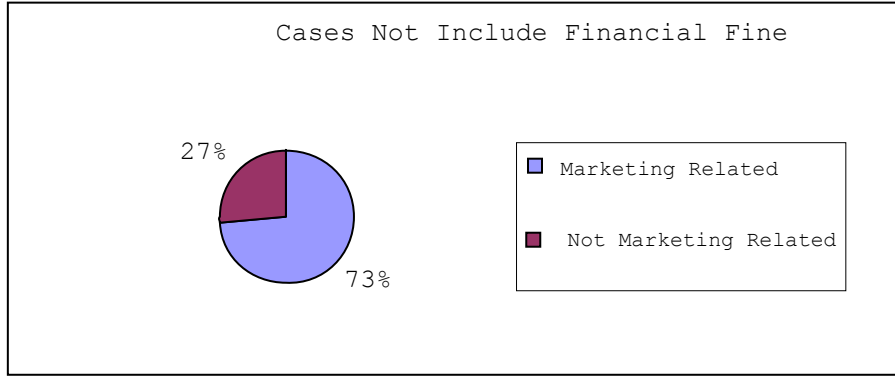


Figure 2. Relation of cases that do not include financial fines with marketing
(Şekil 2. Para cezası içermeyen kararların pazarlama ile olan ilişkisi)

These data state that competition law cases are associated with marketing. And marketing managers need to be cognizant of competition law. And need to shape marketing activities according to these rules.



4.3. Analysing the Cases According to the Types of Violations (Kararların İhlal Türlerine Göre İncelenmesi)

Table 2. Violation types according to turkish competition law
 (Tablo 2. Türk rekabet hukukunda ihlal türleri)

Violation Type	Explanation of Violation Type	Frequencies of Violation
6/2a	To inhibit entering the market, making the rivals facilities difficult.	17
6/2b	discrimination (Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts)	3
6/2c	Lay down additional (extra ordinary) obligations and conditions (Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price)	1
6/2d	Actions which aim at distorting competitive conditions in another market	7
6/2e	Restricting production, marketing or technical development to the prejudice of consumers	1
Predatory pricing	Decreasing prices of dominant firm up to the level that rivals can not tolerate.	6
Excessive price	Pricing of dominant firm above the market price.	4
Rebate systems	Loyalty discounts (discounts to ensure that all sales of customers are made from itself).	1
4/2a	Defining price and other sales conditions.	105
4/2b	Partitioning agreements for sharing markets.	50
4/2c	Controlling supply and demand.	22
4/2d	Exclusionary applicaitons (Complicating and restricting the activities of competing undertakings, or excluding undertakings operating in the market by boycotts or other ehaviour, or preventing potential new entrants to the market).	18
4/2e	Discrimination (Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,)	4
4/2f	Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied	1

Types of violations according to the Turkish Competition Law are seen in Table 2. And also the frequencies of these violations are given in this table. 17 of these violations are because of inhibiting



entering the market and making the rivals facilities difficult. Generally the concentration of the violations are in act 4. And the mostly seen violation is act 4/2a: defining price and other sales conditions. The frequency of this is 105 cases from 146 cases. The second mostly seen act is 4/2b "Partitioning agreements for sharing markets" which is seen in 50 cases. And the third one is act 4/2c "controlling the supply and demand". The concentration of violations on act 4 shows that firms are also applying strategies with their rivals furthermore to their individual strategies.¹

Table 3. The Frequencies of Key Marketing Terms in Decisions of Competition Authority
(Tablo 3. Rekabet Kurulu Kararlarında Pazarlamadaki Anahtar kelimelerin Görülme Sıklığı)

Violation Types	Price	Place	Promotion	Sales	Disc-ount	Company image	Loyalty	Advertisement	Brand	Total
6/2a	16 (94)	12 (71)	9 (53)	7 (41)	12 (71)	8 (47)	7 (41)	9 (53)	8 (47)	17
6/2b	3 (100)	2 (67)	1 (33)	3 (100)	3 (100)	1 (33)	2 (67)	2 (67)	2 (67)	3
6/2c	1 (100)	1 (100)	1 (100)	1 (100)	1 (100)	0 (0)	0 (0)	1 (100)	0 (0)	1
6/2d	7 (100)	6 (86)	5 (71)	7 (100)	4 (57)	0 (0)	2 (28)	5 (71)	2 (28)	7
6/2e	1 (100)	1 (100)	0 (0)	1 (100)	1 (100)	1 (100)	1 (100)	1 (100)	1 (100)	1
Predat-ory Pricing	6 (100)	3 (50)	2 (33)	6 (100)	6 (100)	1 (17)	2 (33)	2 (33)	3 (50)	6
Excess-ive Pricing	4 (100)	4 (100)	0 (0)	4 (100)	1 (25)	1 (25)	1 (25)	3 (75)	3 (75)	4
Rebate Systems	1 (100)	1 (100)	2 (100)	1 (100)	1 (100)	1 (100)	1 (100)	1 (100)	1 (100)	1
4/2a	103 (98)	59 (56)	33 (31)	95 (90)	85 (81)	24 (23)	8 (8)	30 (29)	42 (40)	105
4/2b	48 (96)	33 (66)	15 (30)	45 (90)	40 (80)	15 (30)	5 (10)	8 (16)	20 (40)	50
4/2c	21 (96)	12 (55)	10 (45)	21 (96)	16 (73)	9 (41)	0 (0)	7 (32)	7 (32)	22
4/2d	16 (89)	9 (50)	5 (28)	18 (100)	13 (72)	6 (33)	3 (17)	11 (61)	7 (39)	18
4/2e	4 (100)	3 (75)	2 (50)	4 (100)	4 (100)	1 (25)	1 (25)	2 (50)	3 (75)	4
4/2f	0 (0)	1 (100)	0 (0)	1 (100)	0 (0)	0 (0)	0 (0)	0 (0)	1 (100)	1

*The explanations of violation types in this table are given in Table 2.

The frequencies of the key terms in the decisions are seen in Table 3. For example the frequency of "price" is 16 and the frequency of "place" is 12 in 17 decisions that include penalty. The numbers that are given in parenthesis the percentages of the frequencies of

¹ These strategies are not analysed much in marketing literature in Turkey.



these key terms in decisions. For example in the 94% of the violations in act 6/2a include "price" and 71% include "place".

4.4. Distrubion of Cases According the Penalties (Kararların Cezalara Göre Dağılımı)

Table 4. Distribution of the cases in the concept of act 4 and act 6
(Tablo 4. Kararların madde 4 ve madde 6'ya göre dağılımı)

Years	Cases include penalty in the concept of act 4	Cases include penalty in the concept of act 4	Total number of cases that include penalty ²	Penalty Value (TL)*
1999	1	-	1	24.000
2000	6	1	6	1.948.791
2001	3	1	4	544.061
2002	2	-	2	14.394
2003	2	-	2	5.193.959
2004	-	1	1	2.482.665
2005	12	4	14	16.051.419
2006	34	3	36	74.051.579
2007	27	5	31	39.641.897
2008	6	1	7	17.960.910
2009	9	6	15	70.187.969
2010	17	2	19	39.579.448
2011	6	2	8	456.426.572
Top.	122	26	146	724.083.688

It is seen that the penalties are concentrated in act 4. After 2005 there is an increase in the number of cases that include penalties. But also the number of these cases are only 8 in 2011, the value of these penalties (456.426.572 TL) are nearly twice of the value of penalties up to this year (456.426.572 TL). 78% of the decisions that are analysed between 1997-2012 by Turkish Competition Authority and include penalty are related with marketing and 73% of the decisions that are analysed between 1997-2012 by Turkish Competition Authority and not include penalty are related with marketing, is the most dramatic conclusion of this section. And totally 73% of these decisions are related with marketing.

These findings emphasize two important results. First one is, marketing managers or employees must take in consideration competition law while they are defining marketing strategies. The second is the importance of analysing the cases in the terms of marketing by competition authority. The other important point is the frequency of violations. The frequency of act 4 is more than the frequency of act 6. And also the concentration of violations in act 4 is in act 4/2a and 4/2b. According to these data mostly used strategies of firms are defining price and other conditions and partitioning agreements for sharing markets which are made with rivals. The mostly seen violation in the concept of act 6 is act 6/2a. The mostly used strategy of dominant firms are to inhibit entering the market, making the rivals facilities difficult.

² The total number of cases that include penalty can be smaller than the sum of cases in act 4 and act 6. Because there can be a penalty for both act 4 and act 6 in a same case.



5. CONCLUSION AND RECOMMENDATIONS (SONUÇ VE ÖNERİLER)

In many economies the increasing competition brings the need of new and effective marketing strategies with it. But these seekings sometimes causes "aggressive" or suicidal" applications which affect competition negatively. At this point the question of "how applicable are these strategies in the boundary of competition law" is arised. These legal arrangements may differ across different countries but it can be said that the actions that damage, constrain and prevent the competition in the markets are prohibited in all arrangements. In Turkey this subject is arranged by the act no 4054. By this act the anticompetitive behaviors (also include some marketing strategies) are defined and sanctions for these behaviors are suggested. So the importance of taking into consideration to legal aspects while planning marketing strategies becomes a critical subject. prical assesment of Turkish competition cases key findings are as these. 73% of the cases between 1997 and 2012 are associated with marketing.

This finding emphasize two important results. First one is, marketing managers or employees must take in consideration competition law while they are defining marketing strategies. The second is the importance of analysing the cases in the terms of marketing by competition authority. By this way the effect of violations to firms are defined more effectively. The other finding is the frequency of violations. The frequency of act 4 is more than the frequency of act 6. And also the concentration of violations in act 4 is in act 4/2a and 4/2b. According to these datas mostly used strategies of firms are defining price and other conditions and partitioning agreements for sharing markets which are made with rivals. In literature there is an absense in these kinds of strategies so new studies can be made in this area by marketing researchers. The mostly seen violation in the concept of act 6 is act 6/2a. The mostly used strategy of dominant firms are to inhibit entering the market, making the rivals' facilities difficult. The third finding is the increase of the number of the cases that include penalty and the volume of penalties in recent years. This bring a question with it: Is the penalties enough for preventing violations? Because it is seen that some firms repeat the same or related violations. So taking preventions before the violation occurs is more rational.

As a result we can say that there is an important relationship between marketing and competition law. So marketers should be aware of competition law and take into consideration while they are making plans and strategies.

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