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# The Survival of the Social Welfare Objective under Turkish Competition Law

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According to the ICN Report on the Objectives of Unilateral Conduct Laws, the Turkish Competition Authority (TCA) claims that the objectives of Turkish competition law are to enhance consumer welfare and maximize efficiency. This coincides with the European Commission's recent statements under the so-called modernisation of European Union competition law. This article seeks to challenge the TCA's argument concerning the objectives of Turkish competition law on the grounds that this assertion is neither is line with European Union Courts' case law nor with the broader legal and economic framework for competition at the national level in Turkey. It draws attention to two country-specific dynamics that have significantly shaped the implementation of competition rules in Turkey. First, the long-standing political dialogue between the European Union and Turkey, from the Association Agreement of 1963 all the way to the establishment of a Customs Union (CU) and eventually Turkey's EU candidacy in 1999, which requires the alignment of Turkish competition law regime with the EU *acquis communautaire*. Second, the financial downturn of 1998 triggered by the Customs Union regime, followed by another economic catastrophe in 2001. In the light of these peculiar circumstances, the paper draws upon a contextual approach and, in line with this methodology, examines various national legal tools including relevant provisions of the Turkish Constitution, the preamble of primary legislation on Turkish competition law, relevant case-law and soft-law instruments. The conclusion points out that the objectives of Turkish competition law cannot be narrowed down and defined as 'enhancing consumer welfare and efficiency'. It also posits, the internal legal, institutional, and socio-economic dynamics of an individual jurisdiction play an important role on the implementation and interpretation of substantive laws and, therefore, 'model' laws need to be acclimatized to national economic circumstances and the broader legal framework of donor jurisdictions.

## INTRODUCTION

'The Association Agreement' (Association) underpinning the bilateral relationship between the European Union (EU) and the Republic of Turkey (Turkey) has been the primary source for the introduction and amendment of various national legislation in Turkey since 1963.[1] Turkish competition law is yet one of many legal instruments formulated and adopted in accordance with the Association regime. Albeit its legal, political and social implications for Turkey, the Association regime stands out with its 'economic nature' as recently noted by Advocate General Bot in his opinion to the *Ziebell* case.[2] In essence, the legal framework for the Association Agreement sets a

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1 The 'Agreement Establishing an Association Between the European Economic Community and Turkey' (Association Agreement), Ankara, 1 September 1963.

2 Opinion of Mr Advocate General Bot delivered in *Nural Ziebell v Land Baden-Württemberg*, 14 April 2011, para 46.

'transitory' regime and the gradual establishment of an 'economic union' between the Parties. In line with this framework, 'Decision No. 1/95 of the EU-Turkey Association Council implementing the final phase of the Customs Union' (Decision No. 1/95) established the third and final stage of the Association regime in 1996, namely the 'customs union'.[3] While the introduction of this economic union lead to the enactment of Turkey's first legislation on competition, the Law on the Protection of Competition (LPC), the customs union regime triggered a downturn in the already fragile Turkish economy and eventually led to an economic crisis in the late 1990s.[4] Besides its impact on numerous industries, public bodies, and on Turkish society more generally, the economic crises imposed significant challenges on the newly established the Turkish Competition Authority (TCA) as an independent administrative agency with limited experience in the field of competition law. Shortly after the financial crisis of 1998, another economic catastrophe emerged in 2001 and thereafter led to a sharp fall in Turkey's economic growth and a rapid increase in unemployment rates[5] and inflation.[6] In the meantime, however, Turkey's on-going political dialogues with the EU lead to its EU candidacy in 1999, as reported in the 'European Council Helsinki Conclusions' (Helsinki Conclusions).[7] Successively, the first 'Accession Partnership' between the Parties was signed in 2001.[8] In the specific context of competition law, the EU candidacy requires Turkey to secure effective implementation of the EU competition law 'model' at the national level, nonetheless, against the backdrop of an institutional, economic and legal setting much different than that of the EU.

Despite previous attempts to adopt a specific legislation addressing changes in economic, social and political thinking in Turkey,[9] the first national legal framework for

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3 Decision No. 1/95 of the EU-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L035/1 (Decision No. 1/95).

4 The Law on the Protection of Competition, Law No. 4054, enacted on 7 December 1994 by the Turkish Parliament (the LPC).

5 For economic growth figures and unemployment rates between years 2000-2011, see 'The OECD Country Statistical Profile: Turkey' <http://www.oecd-ilibrary.org/economics/country-statistical-profile-turkey-2011_csp-tur-table-2011-1-en > accessed 30 November 2012

6 For inflation rates between years 2001 and 2012, see 'The Central Bank of Turkey Inflation Rate' <http://www.tcmb.gov.tr/yeni/eng/ > accessed on 30 November 2012

7 Presidency Conclusions, Helsinki European Council, 10-11 December 1999, point 12 (Helsinki Conclusions).

8 The European Council adopted its first Accession Partnership with Turkey on 8 March 2001. Since then the Accession Partnership has been revised three times (in 2003, 2006 and in 2008). The currently effective Accession Partnership is: Council Decision (2008/157/EC) on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. (Official Journal L 051, 26/02/2008 P. 0004 – 0018). The Accession Partnership does not have a legally binding nature, but rather represents a framework for unilateral measures stipulated by the EU. In principle it lays down the priorities and issues on which Turkey shall concentrate during the accession process to the EU. However, conditions imposed by the EU in the Association Partnership(s) are country specific requirements and they complement the 'Copenhagen Criteria' rendering the first a 'quasi-legal' nature.

9 Draft laws submitted to the Turkish Parliament of the time: 'Draft Bill on the Governance of Domestic and Foreign Trade' of 1978; 'Draft Bill on the Protection of Business Integrity' of 1980; the 'Draft Bill on the Governance of Commerce and the Protection of Consumers' of the late 1970's; and the 'Draft Bill on the Control of the Markets for Goods and Services and on the Protection of Competition' of 1982; the 'Draft

competition, the LPC, emerged out of this purely political background. At the same time, however, Turkey's new competition legislation was seen as an important policy tool in attaining various socio-economic objectives, such as facilitating the shift from former centrally-planned economic policies to more 'liberal', market-based economic strategies, as well as complementing other national legal and economic measures in the wake of the EU candidacy.[10] According to Article 88 of the Turkish Constitution of 1982 (TC)[11] and Article 73 of the Rules of Procedure of the Grand National Assembly of Turkey (Turkish Parliament)[12] Bills submitted to the Turkish Parliament shall include a statement of purpose. Similar to some foreign competition legislation,[13] the preamble section of the LPC submitted to the Turkish Parliament in 1993 recites a series of objectives leading to a 'mishmash' of purposes attributed to competition rules in Turkey.[14] The statement of purpose of the LPC provides:

> 'The protection of the process of competition (in Turkey) shall provide the allocation of national resources in accordance with society's demand (*allocative efficiencies*), whilst the increase in economic efficiency shall maximise general welfare (*general welfare*). Rivalry among competitors shall enhance efficiencies in the production and management of utilities, and, also, facilitate to minimise costs and resource utilization (*productive efficiencies*), and promote technological innovation and development (*dynamic efficiencies*). This, in turn, shall lead to higher quality goods and services, and, thereby, enhance the welfare of (end) consumers (*consumer welfare*) and Turkish society as a whole (*social welfare*).
>
> Along with the (primary) goals stated above, the competition system aims to achieve secondary objectives. First of all, with the elimination of hindrances to market entry, the competitive order shall facilitate the protection of small and medium enterprises *(protection of SME's).*

Bill on the Protection of Consumers' of 1984; the 'Draft Bill on Agreements and Practices Restricting Competition' of 1985.

10 National policy tools to facilitate this transition process in Turkey have been stated as, *inter alia,* competition law and policy; privatisation law and policy; public procurement law and policy; foreign trade and foreign direct investment law and policy; and, state aid policy. See, '*The Ad Hoc Report on Competition Law and Policy-The Eighth Five-Year Development Plan*, (Turkish) State Planning Agency, Ankara, 2000.

11 The Constitution of the Republic of Turkey, Law No. 2709, Official Gazette No: 17844, dated 20.10.1982 (TC). Article 88(2) TC: 'The fundamental principles and procedure on the negotiation of draft bills at the Turkish National Assembly are formulated by parliamentary law'.

12 The Rules of Procedure of the National Assembly of the Republic of Turkey, Decision Number: 584, Approval Date: 05.05.1973, Official Gazette No: 14506, dated 13.04.1973. Article 77(2): 'Draft Bills formulated by the Cabinet, endorsed by all Minsters and including a Preamble shall be submitted to the speaker of the parliament'.

13 The Canadian Competition Act incorporates a list of objectives in its purpose clause. See, E.M. Iacobucci. 'The Superior Propane Saga: The efficiencies defense in Canada'. In: B. Rodger, eds. Landmark Cases in Competition Law: Around the World in Fourteen Stories (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2013).

14 For the purposes of this work, the terms 'objective' and 'goal' have the same meaning and are used interchangeably.

> Furthermore, an economic order lacking a competition system leads to increased State intervention into economics and a high number of state-owned enterprises (*market liberalisation, privatisation*).
>
> Competitive order also aims to promote fairness and honesty in the operation of markets (*fairness*). It is also known that competitive markets help reduce inflation (*combat inflation*).
>
> Another matter to be resolved through (the LPC) is arousing entrepreneurship within the country. (*promote entrepreneurship*).
>
> … Ensuring the rights of economic entities in a marketplace can only be achieved through the help of and autonomous agency who is capable of functioning and taking decisions without (political) restraints. As a State in the ongoing process of democratization, (Turkey) is in need of such independent administrative agencies. The establishment and maintenance of free competition in Turkey shall be provided by the (Turkish) Competition Authority, and in this way free commerce and entrepreneurship shall be secured (*economic freedom*).'[15]

According to the preamble of the LPC 'protection of the process of competition (in Turkey)' constitutes the primary goal of the legislation, which, in turn, is aimed at enhancing allocative efficiencies and ultimately both 'social welfare' and 'consumer welfare'. The list continues with, at least, the following objectives: promoting market liberalisation; privatisation; entrepreneurship; fairness; economic freedom; and, protecting SMEs. On the other hand, almost 15 years following the submission of the draft LPC, the TCA stated its objectives in a questionnaire conducted by the International Competition Network (ICN).[16] According to that document, the goals of Turkish competition law are: 'ensuring an effective competitive process' as a goal in its own right; 'promotion of consumer welfare'; 'maximisation of efficiency'; and, 'ensuring a level-playing field for SMEs'.[17] However, for the purposes of the ICN questionnaire individual competition agencies attributed different economic understandings to the term 'consumer welfare', and the TCA specifically defined this term as 'the welfare of all consumers and the society' measured in terms of 'better quality goods and services at lower prices'. Evidently, the scope of the objectives of Turkish competition law provided within the LPC and ICN Report is not identical. In particular, the emphasis on 'promotion of consumer welfare' in the latter casts shadow on the 'total welfare' and 'social welfare' objectives as stipulated in preamble of the draft LPC. Neither does the text of the LPC itself provide an explicit list of objectives, or point to any direction on this matter, nor does the TC.[18] Reliance on legislative

[15] The Draft Law on the Protection of Competition, Report of the Commission for Justice, Industry, Technology, and Commerce No 1/542, the Republic of Turkey Directorate General for Law and Decrees, No: B.02.0.KKG/101-485/04689, dated 10.05.1993, 3-4 (Draft LPC).

[16] Unilateral Conduct Working Group, International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 6 (2007) 1 (ICN Report) < http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 28 November 2012.

[17] ICN Report Annex A.

[18] TC (n 11).

intent on its own may undermine the scope of objectives pursued by legislation as legal instruments, in general, are designed and adopted in order to meet the needs of societies and thus their interpretation does evolve over time. This leaves the decisional practice of the TCA and relevant case-law of the Council of State to examine and understand the objectives of the LPC in particular,[19] as well as other legal instruments to explore the goals of Turkish competition law as system in general.[20] In any case, however, the uncertainty concerning the objective(s) of Turkish competition law raises questions as to whether and to what extent an individual competition law regime is able to pursue two or more objectives simultaneously. As much as it has been encouraged by the drafters of the LPC, is Turkish competition law able to accommodate various objectives at the same time despite the potential conflict among these goals? Furthermore, what role does the prevailing economic circumstances play in the event of a trade-off between competing objectives? In the light of the above, this work aims to examine the objectives of Turkish competition law with a particular focus on 'social welfare' and 'consumer welfare', the relationship between these objectives and their role in the application of the LPC. In this context, it seeks to contribute to the recent theme of economic crisis and objectives of competition law and presents Turkish competition law and policy as a case study.[21]

Section one presents, at first, a 'map' portraying the goals of Turkish competition law, as identified by this author. As illustrated in this map, the author adopts a holistic approach and places Turkish competition law in the centre of a system comprising of wider political, legal, and economic country-specific objectives. The remainder of the work follows the structure presented in this diagram. The first section continues with the examination of the legal relationship between EU and Turkish competition laws, a discussion based mainly on Decision No. 1/95, the Helsinki Conclusions, and, Accession Partnerships established between the two jurisdictions. This analysis aims to elucidate the degree and nature of the legal relationship between two individual competition law systems and to help understand how this affiliation reflects upon the goals of Turkish competition law. Section two aims to examine the relevant provisions of the TC.[22] This relies on Article 11 TC given the provision provides that the fundamental principles and individual provisions of the TC constitute primary law in Turkey and have a binding effect on national legislative and judicial bodies, and

[19] Article 55 LPC -before amendment 05.07.2012-6352/Article 63- stated: 'Suits against final and interim decisions, and administrative fines (imposed by Turkish Competition Authority) shall be heard at the Council of State as the court of first instance.' Article 55 LPC (as amended 05.07.2012-6352/Article 63) states: 'Suits shall be filed against the administrative sanctions (of Turkish Competition Authority) at the competent administrative court.' The competent court, in this case, is the Administrative Court of Ankara. The court of appeal is still the Council of State.

[20] In this author's view, the Turkish competition law system is broader than the LPC and includes, amongst others, relevant provisions of TC; bilateral agreements and legal instruments conducted between Turkey and the EU; secondary legislation; and, soft law instruments.

[21] See, XXth CLaSF Workshop on 'Competition Law and the Economic Crisis', Edinburgh Law School, 13 September 2012; European Competition Forum 2012, (Session one, panel discussion on 'competition policy and the economic crisis'), February 2012, Brussels.

[22] TC (n 11).

executive and administrative authorities.[23] Given that Turkish competition law is a part of the national legal system, with the Turkish Constitution at the top of hierarchy, the goal(s) of Turkish competition law cannot be contrary to the objective(s) established in TC. Section three aims to examine broader economic objectives of Turkish competition law. Section four focuses on Articles 4, 5 and 6 of LPC, the primary legislation on Turkish competition law, and examines relevant decisions of the TCA and the case-law of the Turkish Council of State.[24] Particular focus is based on the decisional practice and case-law which help us to understand the objective(s) underlying these provisions, inform their interpretation and application. Section five concludes.

## A 'MAP' OF THE OBJECTIVES OF TURKISH COMPETITION LAW

In the author's view, the list of objectives stipulated in the LPC is merely a reflection of the 'broader' goals attributed to Turkish competition law and this requires the adoption of a contextual approach, i.e. to put Turkish competition law and the goals of this legal regime in its wider political, legal, and economic context. As illustrated in the 'map' below, the three components underpinning this assertion (political, legal, and economic) together with domestic legislation on competition form the wider framework for competition in Turkey. This, undoubtedly, incorporates the objectives of Turkish competition law. The rationale underlying this 'map' relies on the premise of 'Turkey as a jurisdiction in transition'.[25] The primary driving forces of this 'transition' process are twofold: Turkey's EU candidacy (political); and, the initiative to depart from its former 'centrally-planned' economic policies to a more 'liberal' market in Turkey (economic). In this case it is postulated that as a 'jurisdiction in transition' much of Turkish legislation aims to facilitate an on-going political and economic shift in the country.[26] Thus, domestic legislation works as a tool in order to achieve this political and economic transition. Turkish competition law represents only one of these legal

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[23] Article 11(1) TC: 'The provisions of this Constitution constitute the fundamental law provisions (of the Republic of Turkey) and have a binding effect on legislative and judicial bodies, as well as on executive and administrative authorities of the State'. Article 11(2) TC states: 'Acts (of the Turkish Parliament) cannot be contrary to this Constitution.'

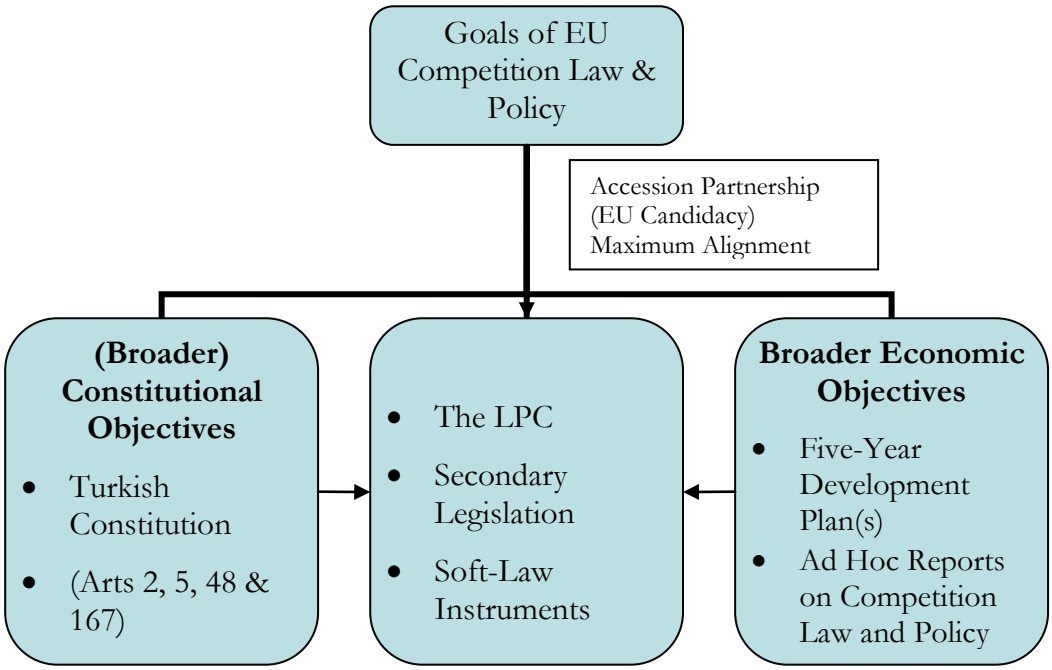
[24] Articles 4, 5, and 6 LPC consititute the national provisions corresponding to Articles 101(1), 101(3) and 102 TFEU respectively.

[25] The 'IXth Development Plan (of Turkey), (2007-2013)'(IXth DP), Official Gazette No: 26215, Official Gazette Dated: 01.07.2006, 1. The IXth DP stipulates: '(IXth DP) is the fundamental policy document which reveals the economic, social and cultural transformation Turkey aims to achieve.'

[26] This includes, but is not limited to, The Law Changing the Intellectual Property Act, Law No: 4630, enacted on 21 February 2001 by the Turkish Parliament; The Energy Market Law, Law No: 4628, enacted on 20 February 2001 by the Turkish Parliament; The Foreign Direct Investment Act, Law No: 4875, enacted on 5 June 2003 by the Turkish Parliament; The Law Changing the Act on Consumer Protection, Law No: 4822, enacted on 6 March 2003 by the Turkish Parliament; The Law Changing the Act on the Implementation of Privatisation and other Relevant Laws, Law No:5398, enacted on 21 May 2005 by the Turkish Parliament; Banking Law, Law No:5411, enacted on 19 October 2005 by the Turkish Parliament; Insurance Law, Law No:5684, enacted on 3 June 2007 by the Turkish Parliament; Turkish Commercial Code, Law No:6102, enacted on 13 January 2011 by the Turkish Parliament to enter into force as of 1 July 2012. According to '*The Ad Hoc Report on Competition Law and Policy*' legal tools facilitating this transition process are, *inter alia,* competition law and policy; privatisation law and policy; public procurement law and policy; foreign trade and foreign direct investment law and policy; and, state aid policy. '*The Ad Hoc Report on Competition Law and Policy- The Eighth Five-Year Development Plan*, (Turkish) State Planning Agency, Ankara, 2000.

instruments. Accordingly, even though each and every legal field operates through specifically designed legal instruments, a successful political, legal, and economic transition process requires the reconciliation of these legal tools in principle and consistency among the objectives of these legal instruments.[27] The ultimate objectives

**Figure 1 - Goals of Turkish Competition Law and Policy**




of this transition process, and thus the relevant legal instruments, are political and economic: to facilitate EU accession requirements (political); and, to address and overcome perennial economic problems persisting from previous economic policies in order to achieve sustainable economic development (economic). Correspondingly, the 'IXth Development Plan (2007-2013)' outlines its objectives as achieving, *inter alia*, 'a stable (economic) growth' and the 'EU accession process'.[28] In accordance with the proposition above, i.e. 'Turkey as a jurisdiction in transition', the author perceives the LPC, relevant secondary legislation and soft-law instruments in the wider political, economic and legal context and examines the objectives of Turkish competition law in the light of this wider framework.

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[27] In a similar vein, TCA has recognised LPC as a tool to attain certain 'rights' and 'freedom' provided for in the TC and to enable the operation of a 'free market' economy in Turkey. See, TCA Decision, 'TS,-TIM Telekomünikasyon Hizmetleri A.S¸ v. Turkcell Iletis¸im Hizmetleri A.S¸ and Telsim Mobil Telekomünikasyon Hizmetleri A.S¸,, File Number: SR/02-13, Decision Number: 03-40/432-186, Decision Dated: 09.06.2003.

[28] IXth DP (n 25) 3. '... (the IXth DP) has been prepared with a vision of Turkey that has provided a fair distribution of income, the ability to (economically) compete at a global level, an intellectual society, and, fulfilled the EU accession process.'

## 1. BROADER POLITICAL OBJECTIVE(S)

Following the adoption of the Treaty of Rome on 25 March 1957, establishing the (then) 'European Economic Community' (EEC), Turkey made an official application in 1959 to join this 'community'.[29] Correspondingly, the five founding members of the EEC and Turkey signed the 'Agreement Establishing an Association between the European Economic Community and Turkey' (Association Agreement) on 1 September 1963 in Ankara.[30] The Association Agreement, also referred to as the 'Ankara Agreement', lays the foundation of the legal and political relationship between Turkey and the EU. Since Annex 1 to the Association Agreement explicitly defines the 'Parties' as Turkey *vis-a-vis* the EU, or individual EU Member States, or the EU and the EU Member States together, the relationship between the Parties could be accepted as 'bilateral' in principal, as a result of which equal rights to each side are granted.[31] According to Article 2(2) of the Association Agreement, for the purposes of achieving the objectives stipulated in Article 2(1),[32] the Parties shall gradually establish a 'Customs Union' (CU) in accordance with the methods and conditions laid down in Articles 3, 4 and 5.[33] Although the first step for a closer economic and political relationship between the Parties was established with the Association Agreement, the absence of the necessary economic, political, and institutional background in Turkey delayed negotiations for establishing the CU, at least until the 1990s. Decision No. 1/95 was eventually adopted in 1996.[34] In essence, Decision No. 1/95 goes considerably beyond the 'customs union' theory in the traditional sense (i.e. the removal of imports and exports customs duties and charges having equivalent effect between two sovereign states) and incorporates further provisions on: the application of common commercial and customs tariff policies in relation to third parties;[35] the alignment of national laws with those of the EU particularly in the field of intellectual, industrial, commercial property rights;[36] and, competition and state aid law.[37] Rules on competition are dealt

[29] The founding members of the EEC were Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, and Holland.

[30] Association Agreement (n 1).

[31] Association Agreement, Annex 1.

[32] Association Agreement, Article 2(1): '(The objectives of the Association Agreement are) … to promote the continuous and balanced strengthening of trade and economic relations between the Parties.'

[33] Association Agreement, Article 2(2).

[34] Decision No. 1/95 (n 3).

[35] Decision No. 1/95, Section III 'Commercial Policy', Article 12(1): 'From the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are substantially similar to those of the Community's commercial policy set out in the following Regulations'. Section IV 'Common Customs Tariff and preferential tariff policies', Article 13(1): 'Upon the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, align itself on the Common Customs Tariff.'

[36] Decision No. 1/95, CHAPTER IV 'APPROXIMATION OF LAWS', Section I 'Protection of intellectual, industrial and commercial property', Article 31(1): 'The Parties confirm the importance they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights.' Article 31(2): 'The Parties recognize that the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights are provided in both constituent parts of the Customs Union. Accordingly, they undertake to meet the obligations set out in Annex 8.' Annex 8 on protection of intellectual, industrial and commercial property, Article 2: 'Turkey shall continue to improve

with under Chapter IV of Decision No 1/95: Section II (A), 'Competition rules of the Customs Union', lays down the competition rules which shall be applied between the Parties;[38] Section II (B), 'Approximation of Legislation', requires Turkey to adopt a legal framework for competition based on the EU competition law 'model'.[39] The LPC was adopted in accordance with Chapter IV, Section II.[40] However, the 'implementing rules' endorsing the 'Competition rules of the Customs Union' have not been adopted as yet.[41]

Following the establishment of the customs union between the Parties, Turkey's EU candidacy was declared under the Helsinki European Council Presidency Conclusions (Helsinki Conclusions) in 1999.[42] In accordance with the Helsinki Conclusions, the first 'Accession Partnership' between the Parties was published by the European Council in 2001.[43] In fact, the Accession Partnerships take a step further in terms of integrating Turkish competition law with its European counterpart. As they explicitly require further 'alignment' of the Turkish legal system with EU law, namely through the adoption of the *acquis communautaire* (*acquis*).[44] That is to say, in the specific context of competition law, the approximation of Turkish competition law with the entire body of EU competition law, including, but not limited to, the founding Treaties of the EU, primary and relevant secondary legislation adopted pursuant to the Treaties and soft-law instruments, and the case-law of the Union Courts. In accordance with this

the effective protection of intellectual, industrial and commercial property rights in order to secure a level of protection equivalent to that existing in the European Community and shall take appropriate measures to ensure that these rights are respected. To this end the following Articles shall apply.'

37 Decision No. 1/95, CHAPTER IV 'Approximation of Laws', Section II 'Competition', B. 'Approximation of legislation' Article 39(1): 'With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.'

38 Decision No. 1/95, CHAPTER IV 'Approximation of Laws', Section II 'Competition', A. Competition Rules of the Customs Union.

39 Decision No. 1/95.

40 LPC (n 4).

41 Decision No. 1/95 (n 3), Article 37(1): 'The (EU-Turkey) Association Council shall, within two years following the entry into force of the Customs Union, adopt by Decision the necessary rules for the implementation of ('Competition rules of the Customs Union') Articles 32, 33 and 34 and related parts of Article 35. These rules shall be based upon those already existing in the Community and shall inter alia specify the role of each competition authority'.

42 Helsinki Conclusions (n 7).

43 The European Council adopted its first Accession Partnership with Turkey on 8 March 2001. Since then the Accession Partnership has been revised three times (in 2003, 2006 and in 2008). The currently effective Accession Partnership is: Council Decision (2008/157/EC) on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC (Official Journal L 051, 26/02/2008 P. 0004 – 0018). The Association Partnership does not have a legally binding nature, but rather represents a framework for unilateral measures stipulated by the EU. In principle it lays down the priorities and issues on which Turkey shall concentrate during the accession process to the EU. However, conditions imposed by the EU in the Association Partnership(s) are country specific requirements and they complement the 'Copenhagen Criteria' rendering the former a 'quasi-legal' nature.

44 '*Acquis Communautaire*' is the term used to reflect the entire body of EU laws and includes *inter alia* the founding Treaties of the EU, primary and secondary legislation adopted pursuant to the Treaties as well as the case-law of the Union Courts.

requirement, the Turkish Council of Ministers of the time issued three decisions for the adoption of three individual 'National Programme in Regard to the Adoption of the *Acquis Communautaire*' (Turkish National Programmes on Convergence) in 2001, 2003, and 2008 respectively.[45] Each Turkish NPC breaks down the approximation process into 'chapters' and sets forth a time frame and scope for the 'alignment' of domestic Turkish laws with the EU *acquis*. 'Competition Policy' is dealt with under Chapters 7, 6 and 8 respectively.[46] As approved and issued by the Turkish Council of Ministers at the time and published in the Official Gazette, the Turkish National Programmes on Convergence constitute primary law in Turkey and are legally binding.[47] This in turn required the relevant authorities, the TCA in the context of competition law, and legislative bodies of the Turkish Parliament to formulate, draft, enact and provide for the enforcement of 'harmonised' national rules on competition in accordance with the Turkish National Programmes on Convergence.[48]

Nonetheless, contrary to the Association Agreement neither Decision No. 1/95 nor the Accession Partnerships were drafted in the form of a bilateral agreement. The ambiguity concerning the legal nature of Decision No. 1/95 has led to considerable debate in the Turkish literature regarding whether, from a Public International Law perspective, Decision No. 1/95 should be considered as an 'international agreement'. On the one hand, Decision No. 1/95 is argued to have the binding effect of an international agreement,[49] and, on the other, it is not endorsed as a binding legal instrument for the Parties.[50] Furthermore, according to Tekinalp Decision No. 1/95 does not even constitute a conclusive text in itself, as it only establishes the final phase of the customs union arrangement between the EU and Turkey, and is subject to further modification through on-going EU-Turkey Association Council decisions. The Association Partnership, on the other hand, has become binding for Turkey indirectly through the adoption of Turkish National Programmes on Convergence. On the basis that Decision No. 1/95 was adopted with a view to achieving the goals of the

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45 The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2001/2129, 19 March 2001; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2003/5930, 23 June 2003; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No:2008/14481, 10 Nov 2008.

46 The 2001 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with adoption of EU competition policy in Chapter 7; The 2003 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with the adoption of EU competition policy in Chapter 6; The 2008 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with adoption of EU competition policy in Chapter 8.

47 Offical Gazette of the Republic of Turkey, 24 March 2001, No: 24352; Offical Gazette of the Republic of Turkey, 24 July 2003, No: 25178; Offical Gazette of the Republic of Turkey, 31 December 2008, No: 27097.

48 In accordance with the Accession Partnership(s) and the National Programmes on Convergence, the LPC has been further harmonised with the EU competition law regime. Thence, the Draft Law on the Protection of Competition, Law No. 1/636, has been submitted to the Department of Justice of the Turkish Parliament on 06.10.2008 and is currently under debate.

49 E. Camlibel and A. Tutucu, 'An assessment on Direct Applicability of Decision 1/95 in EU Law and Direct Effect of its Competition Rules', Rekabet Dergisi 2010 (11) 2, 22.

50 Ibid 23.

Association Agreement and its Additional Protocols, i.e. to establish the final phase of the customs union between the EU and Turkey, it is asserted that it neither changes the legal relationship between the EU and Turkey established in the Association Agreement nor affects the obligations imposed upon the Parties. Accordingly, in the specific context of the EU-Turkey relationship, there is only one ultimate objective behind the formulation, adoption and enforcement of competition laws in Turkey: the political objective of advancing political dialogue with the EU. This objective has been the primary motivation and driving force for Turkey to adhere strictly to all legal instruments between the EU and Turkey, and to rigorously advance the harmonization process in accordance with the EU candidacy. Turkish competition law has been no exception during the approximation process. In this regard, three key legal instruments shed light to the scope of 'harmonization of national laws' required in accordance with the EU accession process. Firstly, the 'White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (White Paper) stipulates that the mere 'transposition' of primary legislation on competition does not suffice and that candidate countries will have to ensure their existing and future legislation on competition is aligned with the EU competition law regime.[51] More importantly, it is asserted that, the 'key elements' of EU competition law will have to be reflected into national legislation in order to secure an effective application of competition legislation.[52] The White Paper, then, clarifies the 'key elements' of EU competition law includes legal instruments in the form of 'Regulations' and 'Notices'.[53] This clearly requires candidate countries to consider, in addition to primary laws, relevant 'secondary legislation' and 'soft-law instruments' in the course of harmonising their domestic competition law with the EU regime. Secondly, the 'Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*' (Guide to Implementing the *Acquis*), draws attention to the introduction of new substantive and procedural rules under the 'modernisation' of EU competition law and thus the enhanced role of national competition authorities (NCAs) and national courts of existing Member States. [54] This, accordingly, requires candidate countries and their relevant institutions to 'familiarise' themselves with these new procedural and substantive rules.[55] The third legal instrument, the 'Negotiating Framework' governing

[51] Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95)163 final; Annexe to White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95)163 final/2.

[52] Ibid

[53] Annexe to Commission White Paper on Preparation for Integration, point 59. The legal framework for EU competition law contains various legal instruments. In addition to the relevant provisions of the Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102, a number of secondary legislation and soft law instruments have been established over time. Secondary legislation, which has a binding effect, is adopted either by the European Council or by the Commission and takes the form of a 'Regulation'. Soft law instruments, on the other hand, are adopted by the Commission and may be adopted in various forms such as 'Notices', 'Guidelines', or 'White Paper'. Soft law instruments are non-binding in nature and aim to explain in more detail the policy of the Commission on a number of competition law issues.

[54] (EU) The Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*, 2005. (The Guide to Implementing the *Acquis*)

[55] The Guide to Implementing the *Acquis,* ibid, Chapter 8.

the principles of negotiations between the EU and Turkey, on the other hand, draws attention to five important points concerning Turkey's obligations *vis-à-vis* the *acquis*.[56] First, accession to the EU implies the acceptance of the rights and obligations attached to the 'EU system' and its institutional framework, i.e. the *acquis*.[57] Second, the *acquis* incorporates the content, principles, and political objectives of the Treaties on which the EU is founded. Third, it incorporates legislation and decisions adopted pursuant to Treaties and the case law of the Court of Justice. Fourth, legally binding or not, legal instruments adopted within the EU framework such as statements, recommendations and guidelines are a fundamental part of the *acquis*. Fifth, Turkey will have to consider that the EU *acquis* is constantly evolving and it will have to adopt the *acquis* as it stands at the time of accession.[58]

In the light of the discussion above, the following conclusions are made. First, for the purposes of Turkey's EU candidacy and the accession process, the EU competition law 'model', which Turkey is required to 'adhere to', incorporates: relevant primary and secondary legislation; case-law of Union Courts; soft-law instruments; and, inevitable the decisional practice (of the EU Commission). Second, the evolving nature of the EU *acquis* requires a continuous harmonisation process at the national level. Third, and perhaps as a reflection of first two points, despite the existing debate on the legality of Decision No. 1/95 and the fact that the Accession Partnership(s) represent only a framework for unilateral measures stipulated by the EU, the TCA and the relevant legislative bodies in Turkey have rigorously formulated and adopted not only relevant primary and secondary legislation but also soft-law instruments with a view to continuously harmonizing the Turkish competition law regime with that of the EU.[59]

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[56] The 'Negotiating Framework', Luxembourg, 3 October 2005.

[57] The Negotiating Framework, ibid, point 10.

[58] Ibid

[59] Primary Law: The Law on the Protection of Competition (LPC), Law No. 4054, enacted on 7 December 1994 by the Turkish Parliament; Secondary Law: Regulation on Active Cooperation on Detecting Cartels; Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position; The Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, Communiqué No: 2010/4; Communiqué on the Framework for the Right of Access to Files and the Protection of Trade Secrets, Communiqué No: 2010/3; Communiqué on Hearings Held vis-a-vis the Competition Board, Communiqué No: 2010/2; Block Exemption Communiqué in Relation to the Insurance Sector, Communiqué No. 2008/3; Block Exemption Communiqué on Technology Transfer Agreements, Communiqué No. 2008/2; Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, Communiqué No: 2005/4; Block Exemption Communiqué on Research and Development Agreements, Communiqué No: 2003/2; Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid, Communiqué No. 1998/5.

Soft Law Instruments: Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints for the purposes of Mergers and Acquisitions, No: 11-27/535-RM(3); Guidelines on Vertical Restraints, No: 09-26/567-M; Guidelines on the Application of Articles 4 and 5 of the Law on the Protection of Competition, Law No: 4054, on Technology Transfer Agreements, No: 09-22/486; Guidelines on Certain Types of Custom Manufacturing Agreements Between Non-Competitors, No:08-05/56-M; Guidelines on the Definition of the Relevant Market, No: 08-04/56-M; Guidelines on the Clarification of the Block Exemption Regulation No 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, No:

## 2. (BROADER) CONSTITUTIONAL OBJECTIVE(S)

Even though the LPC provides the backbone of the Turkish competition law regime, the TC retains provisions on competition and other clauses which this author considers as 'indispensible' in relation to examining the objectives of Turkish competition law and understanding whether the TC points to any particular concern for the welfare of consumers and (Turkish) society.[60]

First, Article 2 TC reads: 'The Republic of Turkey is a democratic, secular and social state governed by the rule of law'.[61] Moreover, Article 5 TC provides: 'The fundamental objective(s) and obligation(s) of the State ... (is) to ensure the welfare of individuals and the (Turkish) society.' An examination of these two provisions, this author argues, may shed light on understanding the objectives of State concerning well-being of individuals *vis-à-vis* the society as a whole. Since the TC does not provide a definition of the term 'social state' or clarify the role or objectives of the State under this concept, it becomes necessary to be aware of the potential impact of a ruling by the Turkish Constitutional Court given in 1967. In that case, the Court noted that a 'social state' is:

> '… (a State) which provides and secures the well-being of its individuals; maintains the balance between individuals and the whole society; maintains a balanced relationship between labour and capital; provides a steady and secure environment for private entities; adopts social, economic and financial measures in order to provide humanely living standards for its people and a determined working environment; adopts measures to prevent unemployment and provide a fair distribution of national wealth; provides and maintains a just legal system; and, follows the rule of law and a state policy based on the notion of freedom'.[62]

Accordingly, the Turkish Constitutional Court clearly provides that it is the duty of Turkish State to ensure the well-being of its individuals but it does not place emphasis on any specific market-player – i.e. producer or end consumer - and rather considers 'individuals' as forming the Turkish society as a whole. The question, however, is: how does the State ensure the wellbeing of its individuals and maintain the balance between private persons and private entities (labour vs capital)? In the specific context of the relationship between private persons and private entities and also among private entities themselves in the marketplace, four further provisions of the TC help us to understand this 'system'. Under this 'system', the TC first enshrines the 'rights' granted to individuals (which allows the 'formation' of a 'free' market-place in Turkey) and then ensures the protection of these rights to secure the operation of the marketplace. In terms of the rights granted to individuals, while Article 35 TC provides the 'right to own properties',[63] Article 48(1) TC provides the 'right to establish private entities'.[64] In

06-90/1159; Guidelines on the Arbitrary Notification of Agreements, Concerted Practices and Decisions by Associations of Undertakings, No: 06-09/123-M.

60 TC (n 11).

61 TC (n 11) Article 2.

62 Turkish Constitutional Court, Decision No: K.1967/29, dated 16-27 September 1967.

63 TC (n 11) Article 35: 'Everyone is granted property rights and the right of inheritance.'

64 TC (n 11) Article 48(1): 'Every individual has the right to establish private entities.'

essence, therefore, it is these rights that provide and essentially form 'a free market system' within the territory of Turkey. The operation of the 'free market' is then ensured by Article 48(2) TC which requires the State to 'take necessary measures to ensure private entities operate in a secure and stable (economic) environment',[65] and Article 5 TC which stipulates it is the duty of the State 'to eliminate political, economic and social hindrances limiting the fundamental rights provided by in the Turkish Constitution'.[66] Ultimately, Article 167 TC provides: '(The) State shall take necessary measures in order to assure the orderly and healthy functioning of the markets for capital, finance, and, goods and services; and to prevent the formation of monopolies and cartels arising from agreements or decisions'. In essence, the whole operation of the system (the provision of certain rights in order to ensure the formation of a 'free' marketplace in Turkey *vis-a-vis* the assurance of the operation of the marketplace through eliminating political, economic and social hindrances and monopolies and cartels) is guaranteed through competition rules. In other words, the LPC and other relevant secondary law and soft-law instruments operate as a 'tool' in order to ensure the functioning of this system and ultimately to achieve the 'social state' as defined by the Turkish Constitutional Court.

The objective of competition rules in Turkey, therefore, is to ensure the functioning of a 'broader' system' based on a 'free market' economy and governed by a 'social state' which ultimately aims to enhance the well-being of Turkish society.

## 3. BROADER ECONOMIC OBJECTIVES

Concerns for the inadequate level of economic development in Turkey were expressed by the (then) the European Economic Community (EEC) in 1963 when Turkey applied to become a Member State: '(The parties) are '(resolved) to … reduce the disparity between the Turkish economy and the economies of the Member States (of the EEC)'; and are, '(mindful) both of the special problems presented by the development of the Turkish economy … and also (recognise) that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date'.[67]

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[65] TC (n 11) Article 48(2): 'The State shall take necessary measures to ensure that private enterprises operate in a secure and stable environment in accordance with national economic requirements and social objectives.'

[66] TC (n 11) Article 5: 'The primary objectives and tasks of the State are to ensure ... the well-being of individuals and the society, … the elimination of political, economic and social hindrances limiting the fundamental rights and freedom provided to individuals... which are not compatible with the principles of social state and justice.'

[67] Association Agreement, (n 1). The Preamble reads: '(The parties) are '(RESOLVED) to ensure a continuous improvement in living conditions in Turkey and in the (EEC) through accelerated economic progress and the harmonious expansion of trade; and to reduce the disparity between the Turkish economy and the economies of the Member States (of the EEC)'; and are '(MINDFUL) both of the special problems presented by the development of the Turkish economy and of the need to grant economic aid to Turkey during a given period; and also (RECOGNISE) that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date.'

In the light of that economic 'catastrophe' prevailing in the country, the Turkish Constitution of 1961 for the first time introduced the formulation and adoption of 'Development Programme(s)' (DPs).[68] This strategy has been maintained within the current TC.[69] In principle, the DP is a far-reaching legal instrument aimed at facilitating coherence between various State policies (monetary, financial, legal, social, cultural etc.) with the core objective of enhancing economic, social and cultural development in Turkey.[70] It does not focus on a particular field, discipline, or region but aims at the implementation of key policies at a nationwide level by all public authorities simultaneously.[71] In fact, the currently effective DP, 'The IXth Development Plan' (IXth DP), defines the nature of the document as 'the principal policy instrument which reveals Turkey's economic, social and cultural transformation based on a holistic approach.'[72] To this end, at its early stages of formulation, the drafters of the DP draw upon various 'Ad Hoc Reports' in order to ensure a pluralist approach and the harmonious application of the DP after its adoption.[73] Competition law and policy comprises one of the disciplines in which Ad Hoc Reports have been prepared for the purposes of the DP. Three individual 'Ad Hoc Report on Competition Law and Policy'

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68 The Constitution of the Republic of Turkey (of 1961), Law No: 334, dated 09.07.1961, Official Gazette No: 10859, became effective as of 20 July 1961 (TC 1961).

TC 1961, Chapter IV 'Economic and Social Order', Article 41: 'Social and economic order (in Turkey) shall be planned with a view to providing a humanely standard of living (for Turkish society) and based on the principles of justice and efficiency. It is the duty of the State shall to enhance economic, social and cultural development through democratic means; to this end, the State shall raise national savings, to utilise national sources in accordance with the primary needs of the (Turkish) society, and to formulate development plans.

TC 1961, Chapter IV 'Economic Development', Article 129: 'Economic, social and cultural development shall be based on a (development) plan. Development shall be achieved in accordance with (development) plans. The establishment and duties of the State Planning Organisation, and the fundamental principles on the formulation, enforcement, implementation, and amendment of the (development) plans and measures preventing amendments violating the integrity of the (development) plans shall be accommodated by relevant laws.'

69 TC (n 11) Article 166(1): 'It is the duty of the State: to plan economic, social and cultural development, and the steady and harmonious development of industry and agriculture throughout the nation; to assess national resources in order to facilitate their efficient allocation; and, to establish the necessary organisation for these purposes.'

TC (n 11) Article 166(2): '(Development) plans are aimed at adopting measures to facilitate national savings and production, price stability, and to enhance (national) investments and employment; provide (national) investments that safeguard the interest and necessities of (Turkish) society and the efficient utilisation of (national) resources. Development initiatives shall be based on these (development) plans.'

TC (n 11) Article 166(3): 'The fundamental principles on the formulation, enforcement, amendment of the (development) plans, and on providing measures that prevent amendments violating the integrity of the (development) plans shall be accommodated by relevant laws'.

70 Turkish Ministry of Development, State Planning Organisation. <www.dpt.org.tr> accessed 10 November 2012.

71 Turkish Ministry of Development, 'Xth Development Plan (2014-2018)', Guidance Book on Ad Hoc Commissions, July 2012.

72 IXth DP (n 25).

73 Ad Hoc Committees concerning the 'Xth Development Plan (2014-2018)' <www.onuncuplan.gov.tr> accessed 10 November 2011.

have been drafted and adopted since 1994.[74] It is arguable that the inclusion of 'Ad Hoc' reports on competition law and policy during the preparation of DP clearly indicates that the principal policy objectives of the DP, directly or indirectly, apply to competition law and policy. This is also consistent with the discussion provided at the introduction, and the argument set out in the previous section on 'Constitutional Objectives', that Turkish competition law is a part of a broader system aimed at enhancing the well-being of Turkish society. The IXth DP boldly states its objectives as ensuring 'sustainable economic development, a fair distribution of income, enhanced competitiveness at the global level, an intelligent society, the completion of the alignment process for EU membership'.[75] Clearly, the objectives of the IXth DP are in 'harmony' with the 'broader' goals discussed in previous sections on 'Broader Political Objectives' and 'Broader Constitutional Objectives'. In fact, it is submitted that, all three 'broader' objectives integrate with one and another and ultimately pursue one objective: enhancing the welfare to Turkish society.

## 4. OBJECTIVES OF THE LPC

As alluded to above, in the ICN Report the TCA stated its objectives as 'ensuring an effective competitive process' as a goal in its own right, the 'promotion of consumer welfare, 'maximisation of efficiency', and, 'ensuring a level-playing field for SMEs'.[76] Although individual competition agencies attributed different economic understandings to the term 'consumer welfare' for the purposes of the ICN questionnaire, the TCA specifically defined this term as 'the welfare of all consumers and the society' measured in terms of 'better quality goods and services at lower prices'. This position, clearly, does not correspond with the objectives posited in the preamble of the LPC. Furthermore, the decisional practice of the TCA reveals three individual objectives attributed to the LPC: 'social welfare'; 'total welfare'; and, 'consumer welfare'.[77] Neither TCA, nor the LPC defines the term 'social welfare'. Accordingly, it is necessary to draw upon the relevant decisional practice of TCA in order to understand the meaning and scope of 'social welfare' under Turkish competition law. Furthermore, the definition of 'consumer welfare' provided by the TCA (the welfare of all consumers and the society measures in terms of better quality and lower prices) does not coincide with the notion of 'consumer welfare' as defined by neoclassical economics.[78] This requires clarification

[74] Turkish State Planning Organisation, 'VIIth Development Programme, Ad Hoc Report on Competition Law and Policy' Ankara, 1996; Turkish State Planning Organisation, 'VIIIth Development Programme, Ad Hoc Report on Competition Law and Policy' Ankara, 2000; Turkish State Planning Organisation, 'IXth Development Programme, 2007-2013, Ad Hoc Report on Competition Law and Policy' Ankara, 2007.

[75] IXth DP (n 25).

[76] ICN Report Annex A. The ICN Report identifies ten separate objectives defined by thirty-five individual competition agencies: ensuring an effective competitive process; promoting consumer welfare; maximizing efficiency; ensuring economic freedom; ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets.

[77] For the purposes of Turkish competition law, and this article in particular, 'social welfare' can be defined as 'the sum of the welfare of all the individuals in the society'.

[78] Neoclassical economics defines 'consumers' surplus' as 'the monetary gain obtained by consumers because of the difference between what consumers would have been willing to pay and what they actually did pay'.

as to the content and meaning of the term 'consumer welfare' as construed by TCA, and the extent to which it has been adopted as a standard in the assessment of cases under the LPC. The discussion below aims to examine the decisional practice of the TCA in relation to Articles 4, 5 and 6 LPC with a view to clarifying the objectives of 'social welfare', 'total welfare', and, 'consumer welfare' and the extent to which they are pursued and utilised by the TCA as a standard in the assessment of cases under these provisions of LPC.[79] First, the objective of 'social welfare' is examined. This is followed by an analysis of the 'total welfare' and 'consumer welfare' objectives under LPC.

The earliest decision in which 'social welfare' was expressed as an objective of the LPC was in relation to Ankara's monopoly coal provider BELKO.[80] Commenting on the allegedly excessive pricing of exported coal by BELKO under Article 6 LPC (equivalent of Article 102 TFEU), the TCA first stated that competition rules in general are aimed at preventing the loss in 'social welfare' that occurs as a result of the concentration of economic power.[81] 'Social welfare', the TCA further stipulated, is achieved through the promotion of allocative efficiencies and the redistribution of income.[82] Having recognised that competition agencies are not price-regulating bodies, the TCA held that productive and allocative inefficiencies (i.e. high avoidable costs) caused by BELKO had disrupted income distribution and thus harmed the 'social welfare' of Turkish society.[83] The TCA's position on 'social welfare', i.e. the ultimate objective of Turkish competition law, was 'reiterated' by the appellate court. On appeal to the Council of State, the court concluded:

> 'In the light of BELKO's absolute monopoly in the relevant market and the nature of the product in question, and thereby their direct impact on the welfare of society and consumer benefit ... intervention on the grounds of competition law is not wrongful.'[84]

It is clear from BELKO that the TCA associates 'social welfare' with distributional concerns, and, at the same time, with the welfare of all of Turkish society. More

'Producers' surplus', accordingly, is defined as 'the amount that producers gain from the difference between what they were actually paid for and what they would have been willing to take. The sum of consumers' surplus and producers' surplus is 'total surplus'. It is essential to draw the line between 'customers' and '(end) consumers'. 'Customers' in most markets are not individuals but are manufacturers, distributers, or retailers. In this case, effects on customers' surplus differ from consumers' (at the end of the distribution chain) surplus. There is no common understanding of the term 'consumer welfare'. Robert Bork, who introduced the term 'consumer welfare' to competition law discourse, used the term to refer to the aggregate welfare of consumers and producers. Recently, however, in competition policy discourse, both lawyers and economists, have used the term 'consumer welfare' to refer to consumers' surplus, and the term 'total welfare' to refer to 'total surplus'

79 Articles 4, 5 and 6 LPC correspond to Articles 101(1), 101(3) and 102 of the Treaty on the Functioning of the European Union (TFEU) respectively

80 TCA Decision 'Belko Ankara Komur ve Asfalt Isletmeleri Sanayi ve Tic Ltd Sti', File Number: D1/1/H.U.-99/1, Decision Number: 01-17/150-39, Decision Dated: 26.04.2001 (BELKO).

81 BELKO 56.

82 BELKO 57.

83 Ibid

84 Danıştay 10. Daire, Karar No: 2003/4770, Karar Tarihi: 15.02.2007.

importantly, there is no specific reference to the welfare of producers, customers or consumers as the criterion for judging the legality of excessive pricing imposed by BELKO. Following BELKO, in IŞ-TIM, a decision concerning refusal to supply allegations against Turkey's two separate mobile telecommunications providers Turkcell and Telsim, the TCA established a link between 'protecting the competitive process' and the objective of 'social welfare'.[85] In its decision, the TCA first made reference to 'the freedom of contract and freedom to establish private entities' and 'the right to private ownership' as stipulated in the TC.[86] The TCA than argued that, when put in their economic context these Constitutional rights allow undertakings to enter and function in markets and dispose of their properties, i.e. the right to operate in markets and to determine the buyer, price and amount of products/services.[87] Accordingly, while the 'right to private ownership' allows companies to produce high quality products at the lowest cost possible, the 'freedom of contract and freedom to establish entities' secure the competitive process in Turkish markets.[88] This competitive process, the TCA stated, established and protected by the relevant provisions of TC and LPC, in turn, enhances social welfare.[89] TCA further stated that in order to ensure the operation of this 'system' and thus to safeguard the 'total welfare' of the whole (Turkish) society, the TC and LPC work hand in hand: Article 167 TC condemns the misuse of freedom and rights enshrined in Articles 35 and 48 TC, whereas the LPC prohibits anticompetitive conduct.[90] The TCA concluded that, all three provisions aim to protect 'public welfare' but not the interest of individuals.[91] In other words, it is submitted that, the freedom to establish private entities together with the right to ownership provides the Constitutional framework for a free market system in Turkey and the State ensures the functioning of this system through competition rules.[92] In essence, the ultimate aim of this broader system is to enhance 'social welfare'. Therefore, Turkish competition law, as a part of this broader framework, aims to ensure the functioning of a free market system in Turkey and thus to enhance the welfare of Turkish society, i.e. 'social welfare'. After IŞ-TIM, in a case concerning price-fixing allegations against Turkey's three domestic courier companies, the TCA rejected the arguments that the economic crises particularly affecting the domestic courier services should be taken into account when assessing the amount of a fine to be imposed.[93] Responding to this argument, the TCA stated a price fixing agreement not only leads to a transfer of welfare from

[85] TCA Decision, 'IŞ-TIM Telekomünikasyon Hizmetleri A.Ş. v. Turkcell Iletişim Hizmetleri A.Ş. and Telsim Mobil Telekomünikasyon Hizmetleri A.Ş.', File Number: SR/02-13, Decision Number: 03-40/432-186, Decision Dated: 09.06.2003.

[86] Ibid

[87] Ibid 1720.

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92] Ibid 1750.

[93] TCA Decision, 'Aras Kargo Yurtici ve Yurtdisi Tasimacilik A.S. ve MNG Kargo Yurtici Yurtdisi Tasimacilik A.S. ve Yurtici Kargo Servisi A.S.' File Number: 2008-4-264, Decision Number: 10-58/193-449, Decision Dated: 03.09.2010.

consumers to producers, but also harms the welfare of the whole society (social welfare) and this cannot be tolerated in a competition law system which ultimately aims to enhance social welfare.[94] Successively in MOYTAŞ,[95] and TENCEL HOLDING[96] the TCA reiterated its position on 'social welfare' as the ultimate objective of LPC.

In the light of these early cases, one can argue that 'social welfare' was deemed to be the 'ultimate objective' of Turkish competition law. Nonetheless, several questions remain unanswered. Most importantly, what is the precise meaning of 'social welfare' for the purposes of the LPC? Furthermore, is 'social welfare' the criterion for assessing the legality of allegedly anticompetitive conduct? If so, is 'social welfare' measured by changes in total surplus,[97] i.e. does an increase (decrease) in total surplus translate into an increase (decrease) in 'social welfare'?[98] Over the years, nevertheless, the TCA further clarified the scope of 'social welfare' and 'indicated' the adoption of social welfare as a standard in assessing cases under LPC. Initially, the TCA provided further clarification in assessing conduct under Article 5 LPC, the Turkish provision equivalent to Article 101(3) TFEU.[99] For the first time, in PFIZER,[100] and then repeatedly in several subsequent decisions,[101] the TCA stated that for an exemption to be granted

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94 Ibid

95 TCA Decision, "Seval Mesrubat Paz. San. ve Tic. Ltd. Sti, and Senturkler Gida Mesrubat Tekel Ur. Paz. San. ve Tic. Ltd. Sti, v. Moytas Gida Tasima Hay. Mad. Tur. Teks. San. ve Tic. Ltd. Sti and Moybak Gida Uretim Dagitim ve Paz. San. ve Tic. Ltd. Sti', File Number: 2003-3-97, Decision Number: 04-17/126-28, Decision Dated: 26.02.2004, p 15.

96 TCA Decision, 'CVC Capital Partners Group and Lenzing AG', File Number: 2005-3-109, Decision Number: 05-44/621-156, Decision Dated: 08.07.2005, para 160.

97 See (n 78).

98 For the relationship between 'social welfare' and 'total welfare', see: A. Mas-Colell, M. D. Whinston, J. R. Green, *Microeconomic Theory* (Oxford University Press 1995). For the 'social welfare function', see: P. A. Samuelson, 'Reaffirming the Existence of 'Reasonable" Bergson-Samuelson Social Welfare Functions' (1977) 44 Ecoomica 81-88.

99 Corresponding to its European counterpart, the exception clause stipulated in Article 5 LPC requires the satisfaction of four cumulative conditions.

Article 5 LPC: '... In the existence of all the conditions listed below, TCA may decide ... to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of (*Article 4 LPC*):

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefitting the consumer from the above-mentioned,

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b)'.

100 TCA Decision, 'Pfizer Ilaclari Ltd. Sti. ve Dilek Ecza Deposau Ithalat ve Ihracat Tic. A.S.', File Number: 2007-1-22, Decision Number: 07-63/774-281, Decision Dated: 02.08.2007, 1330.

101 For instance, TCA Decision, 'Roche Mustahzarlari Sanayi A.S.', File Number: 2008-1-6, Decision Number: 08-29/352-113, Decision Dated: 17.04.2008; TCA Decision, 'GlaxoSmithKline Ilaclari Sanayi ve Tic. A.S.', File Number: 2008-1-44, Decision Number: 08-40/535-201, Decision Dated: 20.06.2008; TCA Decision, 'Atlantik Gida Pazarlama Sanayi ve Ticaret A.S.', File Number: 2008-3-124, Decision Number: 08-66/1059-414, Decision Dated: 20.11.2008; TCA Decision, 'Merkez Gida Pazarlama Sanayi ve Ticaret A.S.', File Number: 2008-3-126, Decision Number: 08-66/1061-416, Decision Dated: 20.11.2008; TCA Decision,

under Article 5 LPC, the first of four cumulative conditions (Article 5(a) LPC-contribution to economic progress) requires a 'substantial contribution to social welfare'. The scope and meaning of the social welfare requirement under Article 5(a) LPC was then defined by the TCA as:

> 'economic progress not only enjoyed by the relevant undertaking itself but also economic progress reflected upon (end) consumers, competitors of the undertaking in question, the relevant market in which the undertaking operates and thus the (national) economy'.[102]

In the author's view, this indicates that 'social welfare', under the LPC, measured in terms of surplus incorporates producers' surplus, customers' surplus, and consumers' surplus in the relevant market, i.e total surplus. In DOĞAN GAZETECİLİK, a case concerning the 'failing firm defence' under Article 7 LPC,[103] the TCA first posited that the prohibition of anti-competitive agreements, and legal rules on competition in general, operate as a tool to attain the ultimate objective of enhancing social welfare.[104] The TCA went on to say that, in competition law discourse and practice, despite the creation or strengthening of a dominant position certain mergers/acquisitions are approved on the grounds that the maximisation of social welfare (as a result of the efficiency gains realised through the proposed acquisition) outweighs the harm to the competitive process (as a result of the creation or strengthening of a dominant position).[105] In essence, the TCA weighed the proportion of loss in social welfare in the absence of the proposed acquisition of the 'failing firm' against the anticompetitive effects of the creation or strengthening of a dominant position in the relevant market. Eventually, the TCA held that there will be no effect on social welfare in the case of the acquisition, and thus condemned the transaction.

After PFIZER (and subsequent decisions on Article 5(a) LPC) it could be argued that the 'social welfare' objective under Turkish competition law corresponds to 'total surplus' as defined in neoclassical economics. Furthermore, other decisions of the TCA clearly utilise the term 'total welfare' as connoting to 'total surplus'. In TÜRK TELEKOM, for instance, when Turkey's incumbent telecoms company based its arguments on 'total welfare' in support of its allegedly anticompetitive conduct, the

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'Lastik Sanayicileri Dernegi', File Number: 2010-3-79, Decision Number: 10-67/1422-538, Decision Dated: 27.10.2010.

[102] Ibid

[103] Article 7 LPC:

> '('Mergers or Acquisitions') Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited. (TCA) shall declare, through communiqués, the types of mergers and acquisitions which have to be notified to (TCA) and for which permission has to be obtained, in order them to become legally valid'.

[104] TCA Decision, 'Dogan Gazetecilik A.S.', File Number: 2007-2-141, Decision Number: 08-23/237-75, Decision Dated: 10.03.2008.

[105] Ibid 1050.

TCA stated that 'total welfare' arguments are accepted so long as total welfare is attained particularly as a result of the conduct under investigation.[106] TÜRK TELEKOM was held to have infringed Article 6 LPC as the conduct in question did not enhance total welfare contrary to TÜRK TELEKOM's assertions. In COCA-COLA, on the other hand, the TCA explicitly stipulated that the rationale behind condemning predatory pricing under Article 6 LPC is the adoption of 'total welfare' as a standard.[107] Accordingly, even if the undertaking in question does not succeed in recouping its losses in the long run, predatory pricing is condemned because the loss incurred in 'producer surplus' harms total welfare.[108] This loss in total welfare, the TCA argued, is prevented by the prohibition of predatory pricing under Article 6 LPC.[109] Moreover, both in DIGITÜRK[110] and MARS SİNEMA[111] the TCA stated that in a situation where different consumer groups are subject to different prices based on price elasticity of demand, 'if price discrimination enables a group of consumers to reach to the product/service the conduct cannot be held anticompetitive as it enhances total surplus, in other words it increases total welfare'.[112]

From the above, one may suggest that the uncertainty concerning the objectives underlying the LPC has been resolved in favour of the 'social welfare' objective measured in terms of 'total surplus'. Subsequent decisions of the TCA, however, seem to 'maintain' the ambiguity concerning the objectives of the LPC in general, and, perhaps 'deepen' the controversy relating to the legal test adopted by the TCA in assessing cases under the LPC. In ROCHE, the TCA clearly 'admitted' the ambiguity relating to the objectives of the LPC, and, particularly, to the standard of welfare ulitised in assessing the legality of cases under LPC.[113] Commenting on the difficulty in generalising all price discrimination practices as anti-competitive, the TCA made the following statement:

> '(economists argue) ... in certain cases price discrimination actually enhances total output and increases social welfare rather than harming it... For this reason, it is hard to make an *a priori* assumption that price discrimination is beneficial or harmful to welfare (of society)... Moreover, the ambiguity as to whether consumer welfare or total welfare is to be adopted as the standard (in assessing the legality of

[106] TCA Decision, 'Turk Telekomunikasyon A,S,', File Number: 2003-2-13, Decision Number: 05-10/81-30, Decision Dated: 10.02.2005, 1550-1580.

[107] TCA Decision, 'Coca-Cola Satis ve Dagitim A.S.', File Number: 03/1/T.E.-01/1, Decision Number: 04-07/75-18, Decision Dated: 23.01.2004, p 42.

[108] Ibid

[109] Ibid

[110] TCA Decision, 'Digital Platform İletisim Hizmetleri A.S.', File Number: 2010-2-287, Decision Number: 11-09/166-55, Decision Dated: 16.02.2011, paras 260-290.

[111] TCA Decision, 'Mars Sinema Turizm ve Sportif Tesisler Isletmeciligi A.S.', File Number: 2011-2-402, Decision Number: 12-03/93-32, Decision Dated: 26.02.2012, paras 40-70.

[112] Ibid

[113] TCA Decision, 'Roche Mühtahzarları A.S.' File Number: 2005-1-170, Decision Number: 08-61/996-388, Decision Dated: 30.10.2008.

> cases) perplexes the ... (decision making process). (The LPC) does not point to any direction (in terms of the welfare standard) either.'[114]

Ultimately, in IZOCAM, commenting on the assessment of exclusive purchasing agreements under Article 4 LPC, the TCA stated:

> 'Since the criterion used (in assessing the legality of exclusive purchasing agreements) is either social welfare or consumer welfare, in a situation where the relevant conduct restricts competition more than the efficiencies claimed, than the agreement will be scrutinized (by TCA). In this context, the position of the undertaking and its competitors', and their market shares (in the relevant market) are highly important ... Both the EU Commission and TCA takes into account the nature of the agreement and the dynamics of the relevant market and if (in the light of this information) it is likely that the loss in social welfare is compensated through the efficiencies, in this case the agreement is exempted (from Article 4 LPC, Article 101 TFEU)'.[115]

In the author's view, both ROCHE and IZOCAM clearly establish, as opposed to the TCA's assertion, that 'consumer welfare' is neither the ultimate objective of LPC nor the absolute criterion, i.e. legal test, in the assessment of cases under Articles 4, 5 and 6 LPC. In other words, the TCA's position in the ICN Report runs counter to its own decisions discussed above and to the Council of State's decision in BELKO.[116] Admittedly, the TCA has made reference to 'consumer welfare' on several occasions. No decision, however, indicates what is meant by 'consumer welfare', nor clarifies whether it is measured in terms of 'consumer surplus' or 'total surplus', and if it constitutes the criterion in assessing legality of conduct under the LPC. Nevertheless, it is observed that the TCA has used 'consumer welfare' 'sparingly' as a guide in the assessment of cases, and made the assumption of harm to 'consumer welfare' in the existence of various conditions. For instance, the TCA assumes harm to 'consumer welfare': in tying and bundling practices if the undertaking in question strengthens its dominant position through the conduct, or competitors of dominant undertaking are forced to leave the market, or conduct erects barriers to entry;[117] in selective distribution agreements which restrict the resale of products to only authorised dealers and thereby limit the ability of (end) consumers to access the relevant product/service that requires special assistance during purchase; in exclusive distribution agreements which do not enhance inter-band competition;[118] in a margin squeeze case if the conduct forces competitors to leave the market or creates barriers to entry or restricts

[114] Ibid

[115] TCA Decision, 'Izocam Ticaret ve Sanayi A.S.', File Number: 2008-2-156, Decision Number: 10-14/175-66, Decision Dated: 08.02.2010, 2530-2540.

[116] See (n 84).

[117] TCA Decision, 'Euroka Sigorta A,S Türkiye Garanti Bankasi A.S', File Number: 2009-4-75, Decision Number: 09-23/492-118, Decision Dated: 20.05.2009, para 230; TCA Decision, 'AXA Sigorta A.S. Turev Sigorta Acentasi', , File Number: 2009-4-119, Decision Number: 09-34/786-191, Decision Dated: 05.09.2009, para 220.

[118] TCA Decision, 'Unilever SanayiA.S', File Number: 2004-3-155/2008-3-68, Decision Number: 08-33/421-147, Decision Dated: 15.05.2008, para 2790.

the operation of competitors in the relevant market;[119] in a merger proposal which leads to the creation of a dominant position and thereby enables the dominant undertaking to increase prices and limit production;[120] and, in a refusal to supply case - save for to the indispensability and elimination of competition requirements - if the refusal hinders the production of new products/services in the downstream market.[121]

## CONCLUSION

The analysis conducted above reveals the following outcome. As opposed to what the TCA claims, 'consumer welfare' is not the objective of Turkish competition law. It is posited that the 'misuse' of 'consumer welfare' in the ICN Report, and by the TCA in general, as the objective of Turkish competition law is a result of the alignment process set forth by Turkey's EU candidacy which requires the former to alienate its national competition law and policy with the EU *acquis*. Given the contextual and teleological dimension of the LPC, the correct interpretation of national competition rules clearly establishes 'social welfare' as the primary goal of Turkish competition law.

The TCA's plea in favour of a 'consumer welfare' objective is erroneous for at least two reasons. First, the question of the objectives of EU competition law has been quite a controversial one at the EU level to begin with. Despite the Commission's recent position, one which adopts the protection of consumer welfare as the objective of EU competition law in line with its 'more economic' approach, the ECJ has retained its long-adopted view that EU competition law is concerned '(protecting) ... public interest, individual undertakings and consumers, and thereby ensuring the well-being of the European Union'.[122] This state of affairs has led to more problems than clarity as to the position of 'consumer welfare' and the objectives competition law in the EU context. In any case, however, based on the superiority of case-law over Commission's policy statements and the fundamental tenet of the 'rule of law' the alignment process at the national level in Turkey should prioritize the ECJ's interpretation on the content and objectives of EU competition law over the Commission's policy statements and decisions. The ECJ's understanding of the objectives of EU competition law is certainly broader than a 'consumer welfare and maximization of efficiency' approach and follows a teleological interpretation of competition rules in the light of the EU Treaties. On these grounds, the author suggests a revision of the alignment of laws at the national

[119] TCA Decision, 'Vodafone Telekomunikasyon A.S.', File Number: 2009-2-288, Decision Number: 10-21/271-100, Decision Dated: 04.03.2010, para 160.

[120] TCA Decision, 'Vaillant Saunier Duval Iberica SL', File Number: 2007-2-106, Decision Number: 07-65/804-299, Decision Dated: 21.08.2007, para 440.

[121] TCA Decision, 'Sanayi ve Ticaret Bakanligi', File Number: 2010-2-83, Decision Number: 10-45/813-271, Decision Dated: 24.06.2010; TCA Decision, 'Teknoform Klima Bak Ins. Taah. Tic. Ltd. Sti.', File Number: 2010-2-2, Decision Number: 10-29/446-169, Decision Dated:08.04.2010, para 390.

[122] Judgment of the Court (First Chamber) of 17 February 2011 in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, para 22; Case C-94/00 *Roquette Freres* [2002] ECR I-9011, para 42. Conerning Article 101 TFEU, see: Joined Cases (C-501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291; *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] 5 C.M.L.R. 11.

level in Turkey with a view to understanding and prioritizing the case-law of the ECJ concerning the objectives of competition law.

Second, the contextual interpretation of the LPC followed in the first three sections above clearly reveals that 'consumer welfare' is not the primary objective of Turkish competition law. As with the ECJ's approach concerning competition provisions of the TFEU, understanding the content and objectives of the LPC, and the competition law system in Turkey more generally, requires a teleological interpretation of competition rules at the national level in Turkey. In the Turkish context, the importance of this methodology lies beneath the country-specific legal framework within which the LPC is situated. 'Turkey as a jurisdiction in transition' incorporates legal instruments for the purposes of facilitating the current legal, economic, and social transition process. In any case, the ultimate and only goal of this transformation process and each legal instrument utilised during this transition is to 'enhance the welfare of Turkish society'. This is explicitly stated in the IXth DP.[123] Each and every legal instrument, nevertheless, aims to maximise the welfare of Turkish society by means of their specific legal, economic and political tools. The LPC, based on Articles 4, 6 and 7 LPC, facilitates this economic, legal and social transition process through 'protecting the process of competition' in Turkish markets. Thus, the ultimate objective of the LPC cannot be anything else but maximising 'social welfare', in terms of enhancing the sum of producers' and consumers' surplus, in Turkey. Social welfare as the objective of the LPC is not only compatible with the objectives of the TC and the IXth DP, but is also capable of accommodating all other values stipulated in the Preamble of the LPC.

This, however, does not mean that other objectives stipulated in the Preamble of LPC - such as economic freedom, fairness and ensuring a level playing field for SMEs - are irrelevant or cannot be applied during competition law analysis by the TCA. They are all legitimate objectives of Turkish competition law, but not capable of defining competitive harm in themselves. Consumer welfare, can, in certain circumstances, be utilised as a test in determining the anti-competitive nature of conduct, but still cannot be the primary objective of Turkish competition law. In essence, the list of objectives stipulated in the Preamble of the LPC are values utilised, from time to time, to assess the anti-competitive nature of conduct which, in turn, helps protect the process of competition in Turkish markets, and thus help maximise social welfare in Turkey.

[123] IXth DP (n 25).