THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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This article was first published in July 2019
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-036-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANJARWALLA & KHANNA

ANJIE LAW FIRM

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PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'. Nobel Prize economist Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets

out a prediction for future developments. From those thoughtful contributions, we identify three themes in 2018 enforcement.

Scrutiny of digital platforms

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

Focus on pharmaceutical sector

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

a The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

b The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

c When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to

reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

Standard-essential patents

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

a The 'no licence, no chips' policy is anticompetitive.

b Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

c Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

d Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this seventh edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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June 2019

Chapter 26

TURKEY

Gönenç Gürkaynak[1]

I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited'.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited: only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions, as well as the other provisions of Law No. 4054, apply to all companies and individuals to the extent that they act as an 'undertaking' within the meaning of Law No. 4054. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.[2]

Further, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore, certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance, in cases of acquisitions)

1 Gönenç Gürkaynak is a founding partner at ELIG Gürkaynak Attorneys-at-Law.

2 See, for example, *General Directorate of State Airports Authority*, 15-36/559-182, 9 September 2015; *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004; *Türk Telekom*, 14-35/697-309, 24 September 2014.

are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather 'a restriction of effective competition' element is required to deem the relevant transaction as illegal and prohibited. Therefore, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, in 2017, the Turkish Competition Board rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro, as it concluded that the transaction would strengthen UN Ro-Ro's dominant position in the market for Ro-Ro transport between Turkey and Europe; and that UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon consummation of the transaction, making the decision the third rejection decision issued by the Competition Board in its decisional history.[3]

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.[4]

II YEAR IN REVIEW

According to the Competition Authority's statistics for 2018, the Competition Board rendered a decision in 46 pre-investigations or investigations, out of a total of 88, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Further, 23 finalised (including preliminary and full) investigations were carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Competition Board also decided on 19 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to state that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.[5]

Over the past few years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance.

3 *Ulusoy Ro-Ro/UN Ro-Ro*, 17-36/595-259, 9 November 2017.

4 See, for example, *Biryay*, 00-26/292-162, 17 July 2000.

5 In 2017, the Competition Board decided on a total of 80 pre-investigations or investigations. Of these, 37 concerned violations of Article 4 of Law No. 4054, 29 concerned violations of Article 6 of Law No. 4054, 13 cases were evaluated from the aspect of both Articles 4 and 6 of Law No. 4054 and one case related to Articles 4, 6 and 7 of Law No. 4054.

With regards to cases on abuse of dominance, the Competition Board focused on cases where the focal point was the refusal to supply, conducting multiple pre-investigations and investigations.[6]

With regards to the fight against cartels, the Competition Board levied an administrative monetary fine within an investigation launched against 13 financial institutions in 2017, including local and international banks, active in the corporate and commercial banking markets in Turkey. The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of in-depth investigation, the Competition Board unanimously concluded that Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU), ING Bank AŞ (ING) and the Royal Bank of Scotland Plc, Merkezi Edinburgh, İstanbul Merkez Şubesi (RBS) violated Article 4 of Law No. 4054 on Agreements, Concerted Practices and Decisions Limiting Competition. In this respect, the Competition Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million lira and 66,400 lira, respectively, calculated on the basis of their annual turnover in the 2016 financial year. However, the Competition Board resolved that BTMU should not have an administrative monetary fine imposed upon it pursuant to its leniency application granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.[7]

The following table shows the Competition Board's most recent landmark decisions regarding abuse of dominance.

Company	Competition Board decision number and date	Summary of the case
Çiçek Sepeti İnternet Hizmetleri AŞ	No. 18-07/111-58, 8 March 2018	The Competition Board has concluded its preliminary investigation of Çiçek Sepeti, which is an online retailer active in the sale of flowers, edible flowers (Bonnyfood) and gifts (Bonnygift). The Competition Board cleared Çiçek Sepeti of charges laid out in a complaint with respect to applying predatory prices, spending significant amounts on advertising (and thus raising its rivals' marketing costs) and initiating unfair lawsuits against its rivals
Frito Lay Gıda San ve Tic AŞ	No. 18-19/329-163, 12 June 2018	The Competition Board decided not to initiate a full investigation towards Frito Lay for its behaviour in the 'packaged chips' market, which was described as a tight oligopoly. Frito Lay was assessed for abuse of dominance through *de facto* exclusivity and resale price maintenance (RPM) practices implemented through handheld terminals
TTNET AŞ	No. 18-39/621-301, 17 October 2018	Another decision where the Competition Board did not initiate a full investigation is the preliminary investigation into exclusionary behaviour claims towards TTNet, which is active in the market of retail and wholesale sales of fixed broadband access services

6 *Daichii Sankyo*, 18-15/280-139, 22 May 2018; *Türkiye Petrol Rafinerileri* ,18-19/321-157, 12 June 2018; *Radontek* 18-38/617-298, 11 October 2018; *Zeyport Zeytinburnu*, 18-08/152-73, 15 March 2018.

7 *13 Banks* decision, 17-39/636-276, 28 November 2017.

Company	Competition Board decision number and date	Summary of the case
Enerjisa Enerji AŞ, İstanbul Anadolu Yakası Elektrik Dağıtım AŞ, Başkent Elektrik Dağıtım AŞ, Toroslar Elektrik Dağıtım AŞ, Enerjisa İstanbul Anadolu Yakası Elektrik Perakende Satış AŞ, Enerjisa Başkent Elektrik Perakende Satış AŞ, Enerjisa Toroslar Elektrik Perakende Satış AŞ	No. 18-27/461-224, 8 August 2018	The Competition Board also concluded a full investigation against Enerjisa and its subsidiaries who were: deemed in a dominant position in their respective distribution areas; in breach of Article 6 of Law No. 4054 for preventing consumers from switching to independent supply companies; and impeding market transparency through incorrect meter readings in order to mislead consumers who were eligible to be supplied by independent supply companies
Akdeniz Elektrik Dağıtım AŞ, CK Akdeniz Elektrik Perakende Satış AŞ, AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri AŞ	No. 18-06/101-52, 20 February 2018	The Competition Board concluded that Akdeniz Elektrik Dağıtım AŞ and CK Akdeniz Elektrik Perakende Satış AŞ abused their dominant position in the Mediterranean region within the retail electricity distribution market

High-profile investigations of the Competition Authority that are ongoing at the time of writing are provided in the table below.

Investigated party	Alleged abuse of dominance activity	Date of initiation
Türk Telekomünikasyon AŞ	Abuse of dominance through exclusionary behaviour	3 March 2019
BP Petrolleri AŞ, OPET Petrolcülük AŞ, Petrol Ofisi AŞ ve Shell & Turcas Petrol AŞ	Restricting competition	27 August 2018
Red Bull Gıda Dağıtım ve Pazarlama Tic Ltd Şti	Restricting competition through *de facto* exclusivity and RPM practices	18 July 2018
Air Ekspres Dağıtım Taşımacılık Lojistik Hizmetleri ve Tic Ltd Şti, Aras Kargo Yurtiçi Yurtdışı Taşımacılık AŞ, Asilkar Lojistik Dağ Hiz İç ve Dış Tic Ltd Şti, MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık AŞ, Paket Taşımacılık Sistemleri ve Turizm Bilgisayar Ticaret AŞ, Solmaz Nakliyat ve Ticaret AŞ, STF Kargo Nakliyat Ticaret Ltd Şti, TNT International Express Taşımacılık Ticaret Ltd Şti, Ünsped Paket Servisi San ve Tic AŞ	Restricting competition through customer allocation	15 February 2018
Tirsan Kardan Sanayi ve Ticaret AŞ, Tiryakiler Yedek Parça Sanayi ve Ticaret AŞ	Restricting competition by abuse of dominance	8 February 2018
Oncosem Onkolojik Sistemler San ve Tic AŞ, Santek Sağlık Turz Teks San ve Tic AŞ, Meditera İthalat ve İhracat AŞ, Onkofar Sağlık Ürünleri San ve Tic AŞ, İnvotek Sağlık Teknolojileri Tic Ltd Şti, Korulu Grup Sağlık Hizmet İnşaat Taahhüt Makina Temizlik San ve Tic Ltd Şti	Restricting competition by colluding in tenders for chemotherapy medication	18 January 2018

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers'. Enforcement trends show that the Competition Board is inclined to broaden the scope of application of the Article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.[8]

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. To establish a

8 See, for example, *Anadolu Cam*, 04-76/1086-271, 1 December 2004; *Warner Bros*, 07-19/192-63, 8 March 2007.

dominant position, first the relevant market has to be defined, and second the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of the market definition. Therefore, the undertakings concerned have to be in a dominant position in the relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary point for evaluating its position in the market. In theory, there is no market-share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors, such as legal or economic barriers to entry, and the portfolio power and financial power of the incumbent firm. Therefore, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or other quantitative elements; other market conditions, as well as the overall structure of the relevant market, should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[9]

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm.

Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) if it has been reviewed under Article 4 (restrictive agreement rules). The *Booking.com* and *Trakya Cam* decisions are the latest examples of this trend. In *Booking.com*,[10] the Competition Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened competition in the said market through the 'best price guarantee' practices in terms

9 See, for example, *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

10 *Booking.com*, 17-01/12-4, 5 January 2017.

of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In *Trakya Cam*,[11] the Competition Board assessed that Trakya Cam Sanayii AŞ *de facto* implemented distribution agreements in 2016 that had been determined to be in violation of Articles 4 and 6 of Law No. 4054 through a Competition Board decision dated 2 December 2015,[12] and revoked the individual exemption granted to Trakya Cam's industrial customer purchasing agreement that it signed with its industrialist customers. Trakya Cam was fined 17,497,141.63 lira, and was ordered to provide 18 of its distributors with written notices stating the absence of regional exclusivity, and advising them that they may conduct sales activities throughout Turkey.

IV ABUSE

i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes 'abuse' *per se*, it provides five examples of prohibited abusive behaviour, which forms a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. These examples are as follows:

a directly or indirectly preventing entry into the market or hindering competitor activity in the market;

b directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

c making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions, such as:
- the purchase of other goods and services;
- acceptance by intermediary purchasers of the display of other goods and services; or
- maintenance of a minimum resale price;

d distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and

e limiting production, markets or technical development to the prejudice of consumers.

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in demonstrating the existence of dominance. Further, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.[13] On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as:

11 *Trakya Cam*, 17-41/641-280, 14 December 2017.

12 No. 15-42/704-258.

13 See, for example, *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom*, 02-60/755-305, 2 October 2002; *Turkcell*, 01-35/347-95, 20 July 2001.

a strategic capacity construction;
b predatory product design or product innovation;
c failure to pre-disclose new technology;
d predatory advertising; or
e excessive product differentiation.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.[14] That said, complaints on this basis are frequently dismissed by the Competition Authority owing to its welcome reluctance to micromanage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.[15]

Further, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.[16]

Exclusive dealing

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.[17]

On a separate note, Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share of above 40 per cent. Therefore, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single-branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. In *Turkcell*,[18] the Competition Board condemned the defendant for abusing its dominance by, inter alia, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board also condemned Doğan Yayın Holding for abusing its dominant position in the market for

14 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Coca-Cola*, 04-07/75-18, 23 January 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Trakya Cam*, 11-57/1477-533, 17 November 2011; *Turkey Maritime Lines*, 06-74/959-278, 12 October 2006; *Feniks*, 07-67/815-310, 23 August 2007.

15 *UN Ro-Ro*, 12-47/1412-474, 1 October 2012.

16 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Doğan Dağıtım*, 07–78/962–364, 9 October 2007; *Türk Telekom*, 04-66/956-232, 19 October 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

17 See, for example, *Mey İçki*, 14-21/410-178, 12 June 2014.

18 *Turkcell*, 09-60/1490-37, 23 December 2009.

advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.[19] In 2017, the Competition Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems.[20]

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board has assessed many tying, bundling and leveraging allegations against dominant undertakings, and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to make them avoid tying and leveraging.[21]

Refusal to deal

Refusal to deal and grant access to essential facilities are forms of abuse that are frequently brought before the Competition Authority, and there have been various decisions by the Competition Board concerning these matters.[22]

iii Discrimination

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.[23]

iv Exploitative abuses

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms.[24] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its above-mentioned reluctance to micromanage pricing behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

The sanctions that can be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if

19 *Doğan Holding*, 11-18/341-103, 30 March 2011.

20 *Luxottica*, 17-08/99-42, 23 February 2017.

21 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009; *Türk Telekomünikasyon AŞ*, 16-20/326-146, 9 June 2016.

22 See, for example, *POAS*, 01-56/554-130, 20 November 2001; *Eti Holding*, 00-50/533-295, 21 December 2000; *AK-Kim*, 03-76/925-389, 12 April 2003; *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; *Congresium Ato*, 16-35/604-269, 27 October 2016

23 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *MEDAŞ*, 16-07/134-60, 2 March 2016; *Türk Telekom*, 16-20/326-146, 9 June 2016.

24 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002; *Belko*, 01-17/150-39, 6 April 2001; *Soda*, 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full investigation in *Soda*).

this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings, or both, that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of the undertaking. Following amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

a the level of fault and amount of possible damage in the relevant market;
b the market power of the undertakings within the relevant market;
c the duration and recurrence of the infringement;
d the cooperation or driving role of the undertakings in the infringement;
e the financial power of the undertakings; and
f compliance with commitments.

Additionally, Article 56 of Law No. 4054 provides that agreements and decisions of trade associations that infringe Article 4 are invalid and unenforceable with all their consequences. The issue of whether the 'null and void' status applicable to agreements that fall foul of Article 4 may be interpreted to extend to cover contracts entered into by infringing dominant companies is a matter of ongoing controversy. However, contracts that give way to or serve as a vehicle for an abusive contract may be deemed invalid and unenforceable because of violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,[25] where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the undertaking's annual turnover for the relevant year).

In addition to monetary sanctions, the Competition Board is authorised to take all necessary measures to terminate infringements, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition and status to the condition they were in before the infringement.

ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on a matter in cases where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to adhere to certain conducts, such as granting access, supplying goods or services, or concluding a contract). Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead to an investigation, which may result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation through a court order.

25 *Tüpraş*, 14-03/60-24, 17 January 2014.

VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds a notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2019 is 26,027 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed

a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.[26]

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can:

a examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same;

b request undertakings and trade associations to provide written or verbal explanations on specific topics; and

c conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records, including deleted items, are fully examined by the experts of the Competition Authority.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant Competition Authority staff access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2019 is 26,027 lira. It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, as above, the turnover generated in the financial year nearest to the date of the fining decision) for each day of the violation. The Board has recently fined Mosaş Akıllı Ulaşım Sistemleri AŞ 89,650 lira for hindering on-site inspections.[27]

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of receipt by the concerned parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stay the execution of the Competition Board's decision (Article 27, Administrative Procedural Law).

After the recent legislative changes, administrative litigation cases (and private litigation cases) are now subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. A decision of a regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, a decision of a regional court will not be considered as a final decision, and the Council of State may decide to uphold or reverse the regional court's decision. If a decision is reversed by the Council of State, it will

26 *Türk Telekom*, 16-15/255-110, 3 May 2016.

27 *Mosaş*, 18-20/356-176, 21 June 2018.

be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision. As the regional courts are only newly established, it is not yet known how long it will take for a regional court to finalise its review on a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system also needs to be tested before an estimated time frame can be provided.

Third parties can also challenge a Competition Board decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on allegations of refusal to supply.

VIII FUTURE DEVELOPMENTS

During 2018, the Turkish Competition Authority has covered significant ground on harmonising the Turkish legislative framework in the field of competition law with EU legislation, and the year witnessed fundamental changes in important regulations and supporting guidelines. The most important development was that the Competition Authority completed its work on revising the Guidelines on Vertical Agreements, which were issued based on Communiqué No. 2002/2 on Vertical Agreements. It took approximately two years for the Competition Authority to finalise its work, and it published the updated version of the Guidelines on its official website on 30 March 2018. The amended Guidelines on Vertical Agreements include new provisions concerning internet sales and most-favoured customer clauses.

In 2018, the Competition Authority conducted several pre-investigations in relation to exclusive dealings, including into Mars Media[28] and Frito Lay.[29] Further, the Competition Board imposed a fine of 17,497,141.63 lira on Trakya Cam for violating Articles 4 and 6 of the Competition Law by implementing exclusive distribution agreements since 2016, which, according to a previous decision of the Competition Board,[30] was in violation of the Competition Law.[31]

28 *Mars Media*, 18-03/35-22, 18 January 2018.

29 *Frito Lay*, 18-19/329-163, 12 June 2018.

30 *Trakya Cam*, 15-42/704-258, 2 December 2015.

31 *Trakya Cam*, 17-41/641-280, 14 December 2017.

Appendix 1

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Mr Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York and Brussels, as well as in England and Wales, where he is currently a non-practising solicitor. Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues, with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, approximately 15 antitrust appeal cases in the high administrative court and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish through various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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ISBN 978-1-83862-036-3