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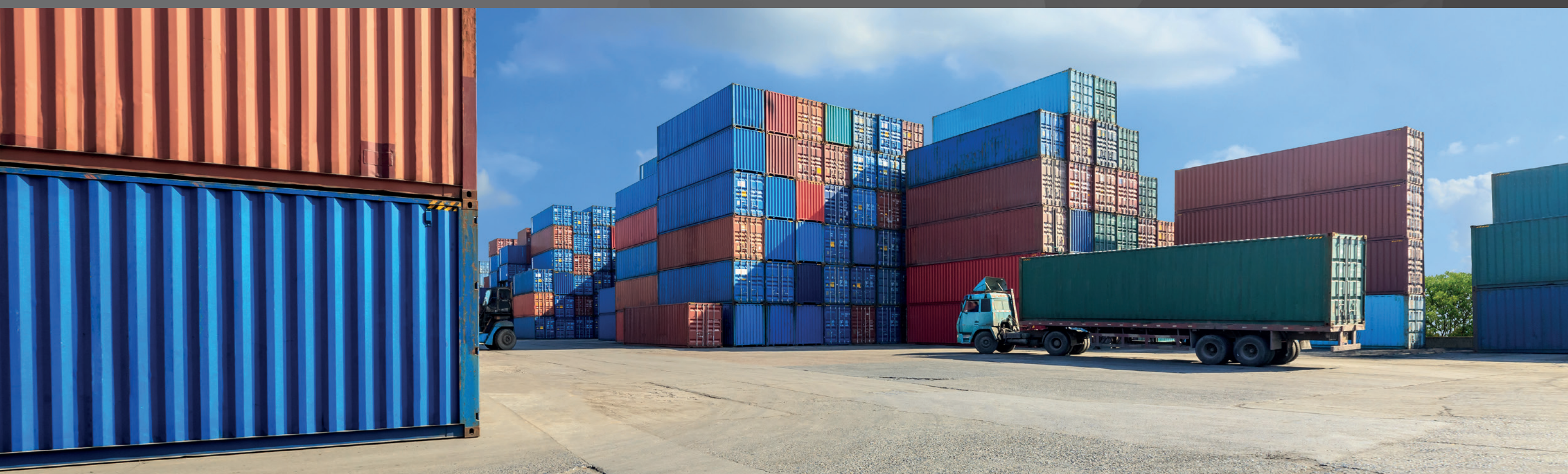

Vertical Agreements and Dominant Firms 2020

A practical cross-border insight into vertical agreements and dominant firms

Fourth Edition

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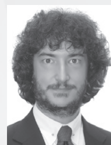

Gönenç Gürkaynak

O. Onur Özgümüş

ELIG Gürkaynak Attorneys-at-Law

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The national competition authority for enforcing competition law in Turkey is the Competition Authority ("**Authority**"), a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board ("**Board**"), presidency and service departments. As the competent body of the Authority, the Board is responsible for investigating and enforcing the laws governing vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The Authority may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations with specific deadlines.

Article 15 of Law No. 4054 on Protection of Competition ("**Law No. 4054**") authorises the Authority to conduct on-site investigations. Accordingly, the Authority can examine the physical records as well as those in electronic space and IT systems, paperwork and documents of the investigated undertakings and, if need be, take copies of the same and request undertakings to provide written or verbal explanations on specific topics. The Board can also examine personal e-mail accounts if these are used for business correspondence (*Askaynak*, December 26, 2019, 19-46/793-346) and WhatsApp correspondence (*Ege Konteyner*, January 2, 2020, 20-01/3-2; and *Burdur Akaryakıt*, January 9, 2020, 20-03/28-12).

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The Board is entitled to launch an investigation into alleged anti-competitive conduct *ex officio* or in response to a complaint or a leniency application. The Board decides to conduct a pre-investigation if it finds the allegations to be serious. The preliminary report of the Authority's experts will be submitted to the Board within 30 calendar days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 calendar days whether to launch a full-fledged investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 calendar days.

The investigated undertakings have 30 calendar days as of the formal service of the notice to submit their first written defences. Subsequently, the Authority issues the main investigation report (within six months – if deemed necessary, this period may be extended once only, for an additional period of up to six months by the Board) and once it is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 calendar days (second written defence). The investigation committee will then have 15 calendar days (extendable for a further 15 calendar days as per recent legislative amendments) to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period (extendable for a further 30 calendar days) to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Authority, the written phase of the investigation will be completed. An oral hearing may be held *ex officio* or upon request by the parties. The 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.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the case of proven anti-competitive conduct or agreements, the undertakings concerned shall be separately subject to administrative monetary fines of up to 10% of their turnover generated in the financial year preceding the date of the infringement decision. Employees and/or managers of the undertakings or associations of undertakings that had a decisive influence in the infringement are also fined up to 5% of the fine imposed on the undertaking or association of undertakings.

The Board is also authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as legally invalid and unenforceable with all its legal consequences. Similarly, the Board is authorised to take interim measures until the final resolution of the matter, in the case that there is a possibility of serious and irreparable damages. In the face of the recent amendments, the Board has now been granted further powers to order structural remedies for anti-competitive conduct, provided that behavioural remedies were applied first and have failed.

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1.5 How are those remedies determined and/or calculated?

In determining the magnitude of the monetary fine, the Board considers factors such as the duration and recurrence of infringement, the market power of undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they assist with the investigation, and the severity of the actual or possible damage.

The Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance, which applies to restrictive agreements, concerted practices and abuses of dominance, sets out detailed guidelines for the calculation of monetary fines.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

After the recent legislative amendments to Law No. 4054, depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. Commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or the restriction of supply. The recent legislative amendments enable the Board, *ex officio* or upon parties' request, to initiate the settlement procedure. A settlement can only be offered within the scope of a full-fledged investigation, and the parties can apply for a settlement until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and if settled, the investigation will be closed with a final decision including the finding of a violation and an administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25%.

1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

Settlement and commitment procedures were only introduced as of June 24, 2020.

1.8 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The Board's decisions can be appealed before the administrative courts. The administrative courts undertake a form of judicial review rather than carrying out a reassessment of the case on merits. As per Law No. 2577 on Administrative Procedure ("**Law No. 2577**"), the Board's decisions must be in compliance with the law in terms of all of the following five elements: (i) jurisdiction; (ii) form; (iii) reason; (iv) subject matter; and (v) purpose.

1.9 What is the appeals process?

The Board's decisions can be submitted to judicial review before the administrative courts by filing an appeal within 60 calendar days after the receipt of the Board's reasoned decision.

According to Article 27 of Law No. 2577, filing an administrative action does not automatically stay execution of the Board's decision. However, on request by the plaintiff, the court may stay execution if the decision is likely to cause irreparable damage or contravene the law.

Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the Council of State.

1.10 Are private rights of action available and, if so, how do they differ from government enforcement actions?

The Board does not decide whether the victims of anti-competitive conduct merit damages. These aspects are supplemented with private lawsuits. Law No. 4054 permits any party injured in its business or property because of a competition law violation to sue the violators for up to three times its actual damages or the profits gained or likely to be gained by the violators, plus litigation costs and attorney fees.

1.11 Describe any immunities, exemptions, or safe harbours that apply.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from the protective cloak of the general and specific block exemptions and/or individual exemptions granted by the Board.

1.12 Does enforcement vary between industries or businesses?

There are no industry-specific offences or defences in the Turkish jurisdiction. Law No. 4054 applies to all industries, without exception.

1.13 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Board takes into account the regulatory context to assess the nature of the market and whether the investigated undertaking's conduct is justified based on these regulations (*İsttelkom*, April 11, 2019, 19-15/214-94; *Bereket Enerji*, October 1, 2018, 18-36/583-284; *Enerjisa*, August 8, 2018, 18-27/461-224; and *CK Enerji*, February 20, 2018, 18-06/101-52).

1.14 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The current political climate in Turkey does not have an impact on the Turkish competition law regime.

1.15 What are the current enforcement trends and priorities in your jurisdiction?

The Authority maintains its attention towards refusal to supply (*Duygu*, April 16, 2020, 20-20/266-127; *Johnson*, November 14, 2019, 19-40/642-270; *Türk Telekom*, February 27, 2020, 20-12/153-83; and *Novartis*, April 11, 2019, 19-15/215-95) and resale price maintenance cases (*Yataş*, February 6, 2020, 20-08/83-50; *Kubota*, January 9, 2020, 20-03/21-11; *Red Bull*, December 19, 2019, 19-45/767-329; and *Maysan Mando*, June 20, 2019, 19-22/353-159).

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1.16 Describe any notable recent case law developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

In *Philips* (December 26, 2019, 19-46/790-344), the Board found that Philips, a SEP holder, abused its dominance by contravening FRAND commitments, which is one of the very first decisions on this front. The other notable development concerns the Board's emerging case law in terms of vertical restrictions on online sales (e.g. *Yataş*, February 6, 2020, 20-08/83-50).

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The increasing trend of scrutinising vertical agreements has been continuing over the last two years, in particular with respect to resale price maintenance and concerning online sales.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Law No. 4054 avoids providing a complete definition of "agreement", since an agreement may occur in various ways. The reasoning of Law No. 4054 indicates that the term "agreement" refers to all kinds of compromise or accord to which the parties feel bound (i.e. concurrence of wills). Vertical agreements are defined as agreements which are concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of the purchase, sale or resale of particular goods or services.

2.3 What are the laws governing vertical agreements?

Article 4 of Law No. 4054 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. The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected? Are there any types of vertical agreements or restraints that are *per se* unlawful?

Over the last five years, the Board typically granted negative clearance to both direct and indirect export restrictions (*Roche*, September 26, 2018, 18-34/577-283; *Johnson*, July 3, 2017, 17-20/319-141; and *Toshiba*, November 24, 2016, 16-41/666-299). Although the Board indicates that both direct and indirect export restrictions do not restrict competition either by object or effect, *Roche* implies that if it is possible for the exported products to be imported back into Turkey, export restrictions might have an effect on the Turkish market.

For over a decade, the Board typically conducted "rule of reason" analysis with respect to resale price maintenance (*Duru Bulgur*, March 8, 2018, 18-07/112-59; *Aygaz*, November 16, 2016, 16-39/659-294; *Dogati*, October 22, 2014, 14-42/764-340; and *UFO*, October 27, 2011, 11-54/1380-490), with only a few exceptions (*Consumer Electronics*, November 7, 2016, 16-37/628-279; and *Anadolu Elektronik*, June 23, 2011, 11-39/838-262). The Board's approach started to shift over the last two years when it considered resale price maintenance as a by object restriction in several cases (*Maysan Mando*, June 20, 2019, 19-22/353-159; *Henkel*, September 19, 2018, 18-33/556-274; and *Sony*, November 22, 2018, 18-44/703-345). However, the Board's more recent cases indicate a return to effects analysis (*LB Börekçilik*, November 14, 2019, 19-40/646-273; and *Bfit*, February 7, 2019, 19-06/64-27).

2.5 What is the analytical framework for assessing vertical agreements?

The first step would be to determine whether the agreement would benefit from the block exemption. If that is not the case, it is necessary to analyse whether the agreement restricts competition by its object or effects and if so, whether the agreement satisfies the cumulative conditions for an individual exemption.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The Guidelines on the Definition of the Relevant Market ("**Guidelines on Market Definition**") consider demand-side substitution as the primary standpoint of market definition, and supply-side substitution and potential competition as secondary factors.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Agreements where the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a manufacturer of the competing products of the buyer, are considered as vertical agreements (i.e. non-reciprocal dual distribution situations).

2.8 What is the role of market share in reviewing a vertical agreement?

Vertical agreements could benefit from the block exemption if the market share of the supplier is below 40% in the relevant market. For cases of exclusive supply obligation, both the buyer's and the supplier's market share are taken into consideration.

2.9 What is the role of economic analysis in assessing vertical agreements?

Unless the vertical restraint is classified as a "by object restriction", economic analysis might come into play in terms of relevant market definitions as well as the evaluation of market shares and the alleged effects of the vertical restraints.

2.10 What is the role of efficiencies in analysing vertical agreements?

Vertical agreements falling outside the block exemption are not automatically deemed to be in violation of Law No. 4054 and the undertakings may plead the efficiencies defence. The cumulative conditions for an individual exemption set out under Article 5 of Law No. 4054 are as follows: (i) the agreement must

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contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) the agreement must allow consumers a fair share of the resulting benefit; (iii) the agreement should not eliminate competition in a significant part of the relevant market; and (iv) the agreement should not restrict competition by more than what is necessary for achieving the goals set out in (i) and (ii).

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

If a vertical agreement concerns the sale and resale of goods and services and also includes provisions on the transfer of intellectual rights to the buyer or the exercise of such rights by the buyer, the relevant vertical agreement might benefit from the block exemption under Communiqué No. 2002/2, provided that the relevant intellectual rights directly concern the use, sale or resale, by the buyer or the customers of the buyer, of the goods or services which constitute the substantial matter of the agreement, and that the transfer or use of such intellectual rights does not constitute the main purpose of the agreement. If these conditions are not met, the relevant agreement needs to be evaluated within the scope of technology transfer block exemption rules.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

It is sufficient for either the effect or the object to exist in order for there to be an infringement. The Board typically conducts effects analysis in order to evaluate whether the vertical agreement results in any effects on the market and whether positive effects outweigh restrictive effects.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The Board takes into account potential efficiencies or benefits for consumers to decide whether a restrictive agreement could benefit from an individual exemption. Restrictions should not be more than what is necessary to reach efficiencies and benefits, and the agreement should not eliminate competition in a significant part of the relevant market.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

The Guidelines on Vertical Agreements do not refer to any specific defences in addition to the "efficiency defence". Therefore, possible defence scenarios would heavily depend upon case-specific parameters.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The Board issued the Guidelines on Vertical Agreements on June 30, 2003 and amended these Guidelines on March 29, 2018 (focusing on (i) MFN clauses, and (ii) online sales).

2.16 How is resale price maintenance treated under the law?

Please see the answer to question 2.4.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements (i.e. single branding obligations) could benefit from the block exemption provided that the market share threshold is not exceeded and their duration does not exceed five years.

2.18 How do enforcers and courts examine tying/ supplementary obligation claims?

Tying is exempted under the block exemption if the market shares of the supplier on both the market of the tied product and the market of the tying product do not exceed 40%. It may be combined with other vertical restraints which are not hardcore restrictions (e.g. such as non-compete obligations, exclusive sourcing, etc.). If the market share threshold is exceeded, the analysis for a potential individual exemption would be primarily based on the market position of the supplier on the market of the tying product, competitive constraints by the competitors, countervailing buyer power, and efficiencies that will be passed on to the consumers.

2.19 How do enforcers and courts examine price discrimination claims?

Differentiated pricing is not abusive *per se* and can only constitute a violation where the conduct at stake is actually capable of distorting competition. The primary analysis is to determine whether dissimilar conditions are being applied to equivalent transactions with other trading parties and thereby placing them at a competitive disadvantage. Accordingly, the application of differentiated prices and commercial terms should be justifiable based on legitimate, rational and objective reasons.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty rebates are not considered *per se* illegal. The foreclosing effects of rebate systems are analysed on a case-specific basis, taking into account the competitive dynamics of the relevant sector as well as the parameters of the relevant rebate system (e.g. retroactivity, conditionality, reference period, relevant ranges, etc.). In *Mey İçki* (April 30, 2020, 20-21/281-135), the Board decided not to grant an individual exemption to the agreement between Mey İçki and sales points, on the grounds that the envisaged rebate scheme, along with the minimum purchase system, could result in *de facto* exclusivity and violate Article 4 of Law No. 4054. In *Paşabahçe* (July 9, 2015, 15-29/431-126), the Board granted an individual exemption to the authorised dealer agreement, indicating that the rebate scheme would increase intra-brand competition.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Bundled rebates can cause competition law concerns where they permit the dominant undertaking to leverage a wider portfolio to the disadvantage of competitors who are only able to compete with respect to one, or at least a narrower, portfolio of products. The Board has so far assessed bundled discount practices under Article 6 of Law No. 4054 which governs abuse of dominance (*TTNET*, February 5, 2015, 15-06/74-31; and *Doğan Yayın*, March 30, 2011, 11-18/341-103).

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2.22 What other types of vertical restraints are prohibited by the applicable laws?

Non-compete obligations could be considered as restrictive under Law No. 4054. In principal, non-compete obligations longer than five years or designed to remain in effect post-termination cannot benefit from an exemption. Furthermore, the Board indicates that the scope of the non-compete obligations in terms of their subject should be limited to goods or services that compete with goods or services which are the subject of the agreement (*Bfit*, February 7, 2019, 19-06/64-27). Non-compete obligations should not bind any person other than the buyer and people who have control relations with the buyer (*Roche*, October 13, 2016, 16-33/569-247), and their geographic scope should be proportionate to the territory where efficiency gains are expected to be obtained (*MSD*, November 14, 2019, 19-40/648-275). The restriction of cross-supplies between resellers within a selective distribution system cannot benefit from the protective cloak of the block exemption. Similarly, suppliers operating selective distribution systems cannot impose exclusive purchase obligations on the members of their selective distribution system.

2.23 How are MFNs treated under the law?

The Guidelines on Vertical Agreements recognise the pro-competitive nature of MFN clauses and adopt a "rule of reason" approach to the analysis of anti-competitive effects of these clauses. The relevant guidelines provide that in the analysis of these clauses, (i) the relevant undertakings' and their competitors' positions in the relevant market, (ii) the object of the MFN clause in the relevant agreement, and (iii) the specific characteristics of the market, should be taken into consideration. In *Booking.com* (January 5, 2017, 17-01/12-4), the Board concluded that Booking.com's wide MFN clauses were in violation of Article 4 and could not benefit from an individual exemption. On the other hand, in *Travel Agents* (October 25, 2018, 18-40/645-315), the Board indicated that the agreements between travel agents and hotels which included wide MFN clauses benefitted from the block exemption under Communiqué No. 2002/2.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Dominant undertakings have a "special responsibility" not to allow their conduct to restrict competition and, therefore, the Board continuously monitors the conduct of the dominant firms.

3.2 What are the laws governing dominant firms?

The main legislation governing dominant firms is Article 6 of Law No. 4054. It provides that "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 is unlawful and prohibited". Paragraph 22 of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines on Exclusionary Abuses**") articulates that "abuse" may be defined as when a dominant undertaking takes advantage of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare. Article 6 provides a non-exhaustive list of specific forms of abuse.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The Guidelines on Market Definition also apply to dominance cases.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no market share threshold above which an undertaking will be considered to be dominant. The Board's case law and the Guidelines on Exclusionary Abuses indicate that an undertaking with a market share lower than 40% is unlikely to be in a dominant position in the absence of any sector-specific dynamics.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Dominance itself is not prohibited, only the abuse of dominance is. Article 6 of Law No. 4054 does not define what constitutes "abuse" *per se*, but it provides examples of abusive behaviour.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis might provide further insight into the competitive landscape of the market and evidence of the competitive constraints faced by the allegedly dominant undertaking.

3.7 What is the role of market share in assessing market dominance?

Market shares are the primary indicator of a dominant position, but not the only one. The barriers to entry and expansion, buyer power, the competitors' market positions and other market dynamics are also considered.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Possible defence scenarios depend on the circumstances of each case. It is possible to invoke efficiency gains, as long as it can be demonstrated that pro-competitive benefits outweigh anti-competitive impacts.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

When assessing the efficiency justifications, the Board will expect the undertaking to prove that the following conditions are fulfilled: (i) the efficiencies should be realised or likely to be realised as a result of the conduct; (ii) the conduct should be indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets; and (iv) the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition.

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3.10 Do the governing laws apply to "collective" dominance?

Collective dominance is also covered by Law No. 4054. In order for collective dominance to exist, two or more undertakings should behave in a way to form collectiveness from an economic viewpoint (*Digiturk/D-Smart*, May 18, 2016, 16-17/299-134). The market structure and forms of interaction, cooperation agreements or shareholding interests may lead to economic links and collective dominance. Moreover, in order to find abuse of collective dominance, the Board must demonstrate that the undertakings follow a common policy in the market or at least for the purposes of the abusive conduct.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Article 6 of Law No. 4054 also applies to dominant purchasers. The Board found that TEB abused its dominance by entering into exclusive agreements with suppliers and imposing exclusive supply obligations upon them, thereby foreclosing the market to its competitors (*TEB*, December 6, 2016, 16-42/699-3139).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 6 of Law No. 4054 does not define what constitutes "abuse" *per se*; it provides a non-exhaustive list of abusive behaviour.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The Board considers that although having an intellectual property right may give an undertaking market power, it does not indicate the existence of market power *per se* and a case-by-case analysis must be made. In *Philips* (December 26, 2019, 19-46/790-344), the Board stated that owning a SEP is not sufficient to conclude that the SEP owner enjoys a dominant position.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Market shares are the primary indicator of a dominant position, but not the only one. The Board would assess the market power of an undertaking in terms of the dynamic structure of the relevant product market and consider various market characteristics as indicators of competitive pressures in the market which can potentially offset or abate the effects of high market shares and concentration levels.

3.15 How is "platform dominance" assessed in your jurisdiction?

Besides an online platform's market share, the Board would take into account network effects, entry barriers, innovation as well as the multi-sided aspects of the relevant activities. All in all, the Board's dominance analysis is still somewhat similar to its analyses in brick and mortar markets.

3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The Authority launched a study for its *Digitalisation and Competition Policy Report* in January 2020, which foreshadows its intention to put the digital economy, including big tech platforms, under scrutiny in the near future. Indications of the Authority's intention can also be observed from its enforcement track record in recent years concerning platforms (*Google Shopping*, February 13, 2020, 20-10/119-69; *Sahibinden*, October 1, 2018, 18-36/584-285; *Google Android*, September 19, 2018, 18-33/555-273; and *Çiçek Sepeti*, March 8, 2018, 18-07/111-58).

3.17 Under what circumstances are refusals to deal considered anticompetitive?

The refusal should: (i) relate to a product or service that is indispensable in order to be able to compete in a downstream market; (ii) be likely to lead to the elimination of effective competition in the downstream market; and (iii) be likely to lead to consumer harm. The Board also examines whether the refusal is based on an objective justification (*Türk Telekom*, February 27, 2020, 20-12/153-83; and *Maysan Mando*, June 20, 2019, 19-22/353-159). The Board has typically rejected refusal to supply allegations which concerned supplier/reseller relations on the grounds that there was no meaningful competition between a supplier and a reseller (e.g. *Novartis,* April 11, 2019, 19-15/215-95; and *Baymak*, September 6, 2018, 18-30/523-259).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The amendments to Law No. 4054 which entered into force on June 24, 2020, introduced the *de minimis* principle.

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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 LL.M. 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 200 articles in English and Turkish with 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.

ELIG Gürkaynak Attorneys-at-Law
Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey

Tel: +90 212 327 17 24
Email: gonenc.gurkaynak@elig.com
URL: www.elig.com

O. Onur Özgümüş is a counsel at the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law. He graduated from Koç University School of Law in 2008. He has been a member of the Istanbul Bar since 2009. He has been working in the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law since 2014. He has extensive experience in areas of merger control, compliance to competition law rules, cartel agreements and abuse of dominance cases. He has represented various multinational and national companies before the Turkish Competition Authority and before Administrative Courts. He is fluent in English.

ELIG Gürkaynak Attorneys-at-Law
Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey

Tel: +90 212 327 17 24
Email: onur.ozgumus@elig.com
URL: www.elig.com

ELIG Gürkaynak Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. ELIG Gürkaynak's competition law and regulatory department is led by the founding partner, Mr. Gönenç Gürkaynak, and consists of three partners, four counsel and 90 associates. ELIG Gürkaynak is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Board in all phases of an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, in addition to significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well-equipped to represent clients before the High State Council, both on the merits of a case, and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising, and toll manufacturing. During the past year, ELIG has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence project investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

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