Dominance
2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Turkey

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GENERAL FRAMEWORK

Legal framework

1 What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The main legislation governing behaviour of dominant firms is the Law No. 4054 on the Protection of Competition (Law No. 4054), which has recently been amended on June 24, 2020 (the Amendment Law).

Under article 6 of Law No. 4054, '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'. Article 6 of Law No. 4054 does not define what constitutes 'abuse' per se but it provides a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the Treaty on the Functioning of the European Union (TFEU). Accordingly, abuse may, in particular, consist of:

> *(a) directly or indirectly preventing entries 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 or; acceptance by the intermediary purchasers of displaying 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;*
> *(e) limiting production, markets or technical development to the prejudice of consumers.*

Definition of dominance

2 How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 3 of Law No. 4054 defines dominance 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 Turkish Competition Board (the Board) is increasingly inclined to somewhat 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 of dependence or interdependence (see, for example, *Anadolu Cam* (1 December 2004, 04-76/1086-271) and *Warner Bros* (24 March 2005, 05-18/224-66).

The Board considers a high market share as the most indicative factor of dominance. Nevertheless, it also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm) in assessing and inferring dominance.

On the other hand, within scope of the merger control analysis, the Amendment Law replaces the dominance test with the significant impediment of effective competition (SIEC) test. Accordingly, the change in merger control analysis is expected to have some effects on assessment of unilateral practices – namely, determination of abuse of dominance.

Purpose of legislation

3 Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Influenced by the Turkish Competition Authority's publication in 2001 of *The Prime Objective of Turkish Competition Law Enforcement from a Law & Economics Perspective* (by Gönenç Gürkaynak), the economic rationale is more typically described in Turkish competition law circles as 'the ultimate object of maximising total welfare by targeting economic efficiency'. Regulations that were enacted in previous years, albeit not directly applicable to dominance cases, place greater emphasis on 'consumer welfare' (see Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board). Moreover, adoption of the SIEC test under the merger control rules signals a more economic outlook. Nevertheless, because the legislative history and written justification of Law No. 4054 contain clear references to non-economic interests as well (such as the protection of small and medium-sized businesses, etc), some of these policy interests are still pursued in Turkey, especially in dominance cases, alongside the economic object.

Overall, the Board is observed to blend economic and non-economic interests and prevent one from overriding the other in its precedents.

Sector-specific dominance rules

4 Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Law No. 4054 does not recognise any industry-specific abuses or defences. However, certain sectorial regulators have concurrent powers to diagnose and control dominance in their relevant sectors. For instance, the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority prohibits 'firms with significant market power' from engaging in discriminatory behaviour between companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility-sharing. These firms are also required to make an 'account separation' for costs they incur regarding their networks such as energy air conditioning and other bills. Similar restrictions and requirements also exist for energy companies.

Exemptions from the dominance rules

5 To whom do the dominance rules apply? Are any entities exempt?

Dominance provisions (and 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 entities also fall within the scope of the application of article 6. While the Board placed too much emphasis on the 'capable of acting independently' aspect of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of the Turkish competition law enforcement (see, for example, *Sugar Factories* (13 August 1998, 78/603-113)), the Board's enforcement shows that it uses a broader and more accurate view of the definition, in a manner that also covers public entities and sport federations (see, for example, *Turkish Coal Enterprise* (19 October 2004, 04-66/949- 227); *Turkish Underwater Sports Federation* (3 February 2011, 11-07/126-38); *Türk Telekom* (24 September 2014, 14-35/697-309) and *Devlet Hava Meydanları İşletmesi* (9 September 2015, 15-36/559-182). Therefore, state-owned entities are also subject to the Competition Authority's enforcement, pursuant to the prohibition laid down in article 6.

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

The article 6 prohibition applies only to dominant undertakings. In similar fashion to article 102 of the TFEU, dominance itself is not prohibited, only the abuse of dominance.

Moreover, article 7 of Law No. 4054, which previously explicitly focused on structural changes for creating or strengthening dominance currently foresees SIEC test and is expected to provide an outlook on assessment of dominance. As for the dominance enforcement rules, 'attempted monopolisation or dominance' is not recognised under the Turkish competition legislation.

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Collective dominance is covered by the Turkish competition legislation. The wording 'any abuse on the part of one or more undertakings' of article 6 clearly prohibits abuses of collective dominance. Turkish competition law precedents on collective dominance are neither abundant nor sufficiently mature to allow for a clear inference of a set of minimum conditions under which collective dominance would be alleged. That said, the Board has considered it necessary to establish 'an economic link' for a finding of abuse of collective dominance (see, for example, *Biryay* (17 July 2000, 00-26/292-162) and *Turkcell/Telsim* (9 June 2003, 03-40/432-186)).

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

While the law does not contain a specific reference to dominant purchasers, or a monopsony market, dominant purchasers may also be covered by the legislation, if and to the extent that their conduct amounts to an abuse of their dominant position.

The enforcement track record indicates that no article 6 cases involved a finding of infringement and imposition of monetary fines on dominant purchasers. However, the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (see, for example, *ÇEAS* (10 November 2003, 03-72/874-373)). Agreements to exert exploitative purchasing power between non-dominant firms have also been condemned under article 4 (*Cherry Exporters*, 24 July 2007, 07-60/713-245).

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The test for market definition does not differ from the concept used for merger control purposes. The Board issued the Guidelines on the Definition of the Relevant Market (Guidelines) on 10 January 2008, with the goal of stating, as clearly as possible, the method used for defining a market and the criteria followed for taking a decision by the Board, in order to minimise the uncertainties undertakings may face. The Guidelines are closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The Guidelines apply to both merger control and dominance cases. The Guidelines consider demand-side substitutability as the primary standpoint of market definition. They also consider supply-side substitutability and potential competition as secondary factors.

Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50 per cent may be presumed to be dominant. In this scope, the sum of the parties' shares may be taken into account for cases of collective dominance. The Competition Authority's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guidelines on Exclusionary Abuses), published on 29 January 2014, and the Board's past and recent precedents, make it clear that an undertaking with a market share lower than 40 per cent is unlikely to be in a dominant position (paragraph 12 of the Guidelines on Exclusionary Abuses and the Board's decisions such as *Mediamarkt* (12 May 2010, 10-36/575-205); *Pepsi Cola* (5 August 2010, 10-52/956-335) and *Egetek* (30 September 2010, 10-62/1286-487)). That said, the Board's decisions and Guidelines on Exclusionary Abuses are clear that market shares are the primary indicator of the dominant position, but not the only one. The barriers to entry, the market structure, the competitors' market positions and other market dynamics, as the case may be, should also be considered. The undertakings may refute the assumption through demonstrating that they do not have market power to act independently of market parameters. Economic or market studies are important in this regard.

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Law No. 4054 is silent on the definition of abuse. It only contains a non-exhaustive list of specific forms of abuse. Nevertheless, paragraph 22 of the 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 that are likely, directly or indirectly, to reduce consumer welfare. Moreover, article 2 of Law No. 4054 adopts an effects-based approach to 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 conduct. In parallel, as per paragraph 24 of the Guidelines on Exclusionary Abuses: 'In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well.'

Exploitative and exclusionary practices

11 | Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices. It also covers discriminatory practices.

Link between dominance and abuse

12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Theoretically, a causal link must be shown between dominance and abuse. However, the Turkish Competition Board (the 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 also employed in demonstrating the existence of dominance.

Article 6 also prohibits abusive conduct on a market different to the market subject to dominant position. Accordingly, the Board found incumbent undertakings to have infringed article 6 by engaging in abusive conduct in markets neighbouring the dominated market (see, for example, *Google Shopping*, (13 February 2020, 20-10/119-69), *Google Android*, (19 September 2018, 18-33/555-273), *Volkan Metro* (2 December 2013, 13-67/928-390), *Türkiye Denizcilik İşletmeleri* (24 June 2010, 10-45/801-264), *Türk Telekom* (2 October 2002, 02-60/755-305) and *Turkcell* (20 July 2001, 01-35/347-95)).

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The chances of success of certain defences and what constitutes a defence depend heavily on the circumstances of each case. Paragraph 30 of the Guidelines on Exclusionary Abuses provides that the Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified through 'objective necessity' or 'efficiency', or both. In this regard, it is possible to invoke efficiency gains, as long as it can be adequately demonstrated that the pro-competitive benefits outweigh the anticompetitive impact.

As for the question whether the defences are available when exclusionary intent is shown, objective justifications such as 'objective necessity' or 'efficiency', or both, can be utilised as a defence on that front. Moreover, as per paragraph 24 of the Guidelines on Exclusionary Abuses: 'In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well.' In this regard, in order to determine that an undertaking has carried out an abusive conduct, an actual (or potential) effect of the alleged conduct on the relevant market should be demonstrated.

SPECIFIC FORMS OF ABUSE

Types of conduct

14 | Rebate schemes

While article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute an abuse. In *Turkcell* (23 December 2009, 09-60/1490-379), the Board condemned the defendant for abusing its dominance by, inter alia, applying incremental rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that cooperate with competitors. The Board adopted a similar approach concerning both retroactive and incremental rebate schemes used by Doğan Media Group and fined the defendant for abusing its dominance through, inter alia, rebate schemes (30 March 2011, 11-18/341-103). Another similar decision was rendered in relation to rebate scheme adopted by Luxottica which pertained to all unit discounts and retroactive discounts (23 February 2017, 17-08/99-42). Recently, the administrative court annulled the Board's earlier decision regarding Mey İçki's practices in the vodka and gin market and upon its re-assessment, the Board found that the defendant abused its dominance by applying retroactive rebate schemes which amounted to exclusionary practices (11 June 2020, 20-28/349-163). A similar assessment was made in the past in relation to, inter alia, exclusivity enhancing and exclusionary rebate schemes applied by Mey İçki in the rakı (a Turkish alcoholic drink) market (12 June 2014, 14-21/410-178).

15 | Tying and bundling

Tying and bundling are among the specific forms of abuse listed in article 6. The Board assessed many tying, bundling and leveraging allegations against dominant undertakings. However, the Board has limited case law where the incumbent firms were fined based on tying or leveraging allegations (*Google Android*, (19 September 2018, 18-33/555-273); *Google Shopping*, (13 February 2020, 20-10/119-69)). In the *Google Android* case, the Board found that Google used its dominant position in the licensable smart mobile operating systems market and abused its dominance through its practices in the said market as well as other markets such as search and app store services market by tying the search and app store services, engaging in exclusivity practices and preventing use of alternative services by the manufacturers. Similarly, in the *Google Shopping* case, the Board concluded that Google has been using its dominant position in the general search engine market to unfairly prioritise its product in the online shopping comparison services market against its competitors. There are also decisions where the Board ordered some behavioural remedies against incumbent telephone and internet operators in some cases, in order to have them avoid tying and leveraging without imposing a fine (*TTNET-ADSL*, 18 February 2009, 09-07/127-38).

16 | Exclusive dealing

Although exclusive dealing normally falls under 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 scrutinised within the scope of article 6. Indeed, the Board has already found in the past infringements of article 6 on the basis of exclusive dealing arrangements (eg, *Karboğaz*, 1 December 2005; 05-80/1106-317). The Board investigated Trakya Cam in order to determine whether Trakya Cam violated articles 4 and 6 of Law No. 4054 through the de facto implementation of its dealership system. The relevant dealership system was also subject to a Board decision where the Board did not grant an individual exemption to Trakya Cam's relevant conduct

(2 December 2015, 15-42/704-258). As a result of the investigation, the Board considered Trakya Cam's conduct as abuse of dominance (14 December 2017, 17-41/641-280).

17 | Predatory pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board (see, for example, *TTNet* (July 11, 2007, 07-59/676-235); *Denizcilik İşletmeleri* (12 October 2006, 06-74/959-278); *Coca-Cola* (23 January 2004, 04-07/75-18); *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411); *Trakya Cam* (17 November 2011, 11-57/1477-533); *Tüpraş* (17 January 2014, 14-03/60-24); *THY* (30 December 2011, 11-65/1692-599) and *UN Ro-Ro* (1 October 2012, 12-47/1413-474)). 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 as seen in the Board's *Sony Eurasia* recent decision where the Board concluded that prices set below the costs for a limited amount of time was not enough to determine an article 6 violation (7 February 2019, 19-06/47-16).

In predatory price analysis, the Board primarily evaluates whether there is an anticompetitive foreclosure for the competitors. Neither the Guidelines nor the precedents of the Board deem recoupment a necessary element. Overall, it is foreseen that predatory pricing may be established based on the following four criteria (*Kale Kilit*, 6 December 2012, 12-62/1633-598):

- financial superiority of the undertaking;
- unusually low price;
- intention to impair competitors; and
- losses borne in a short term in exchange for long-term profits.

18 | Price or margin squeezes

Price squeezes may amount to a form of abuse in Turkey and recent precedents have resulted in the imposition of fines on the basis of price squeezing. The Board is known to closely scrutinise allegations of price squeezing. (See *Türk Telekom* (19 October 2004, 04-66/956-232); *TTNet* (11 July 2007, 07-59/676-235); *Dogan Dağıtım* (9 October 2007, 07-78/962-364); *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411) and *Türk Telekomünikasyon A Ş* (3 May 2016, 16-15/254-109)).

19 | Refusals to deal and denied access to essential facilities

Refusals to deal and access to essential facilities are common forms of abuse, and the Competition Authority is very familiar with this type of abuse [see, for example, *Eti Holding* (21 December 2000, 00-50/533-295); *POAS* (20 November 2001, 01-56/554-130); *Ak-Kim* (4 December 2003, 03-76/925-389); *Çukurova Elektrik* (10 November 2003, 03-72/874-373); *BOTAŞ* (27 April 2017, 17-14/207-85); *Sanofi* (29 March 2018, 18-09/156-76); *Lüleburgaz* (7 September 2017, 17-28/477-205); *Akdeniz/CK Akdeniz Elektrik* (20 February 2018, 18-06/101-52); Enerjisa (8 August 2018, 18-27/461-224) *Aydem/Gediz* (01 October 2018, 18-36/583-284); *İsttelkom* (11 April 2019, 19-15/214-94)]. In the Board's recent decision, Varinak was found to be in a dominant position in the market for maintenance and repair of linear accelerator devices as well as treatment control devices and it was concluded that Varinak abused its dominance by way of refusing access to training certifications of the relevant devices and effectively foreclosing the market to its competitors (19 December 2019, 19-45/768-330). A similar decision was rendered in relation to Medsantek's practices in the sequence analysis devices market (28 March 2019, 19-13/182-80).

20 | Predatory product design or a failure to disclose new technology

The list of specific abuses contained in article 6 is not exhaustive, and other types of conduct may be deemed abusive. However, the enforcement track record shows that the Board has not been in a position to hand down an administrative fine on any allegations of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to disclose new technology, predatory advertising or excessive product differentiation.

21 | Price discrimination

Price and non-price discrimination may amount to an abusive conduct under article 6. The Board has found incumbent undertakings to have infringed article 6 in the past by engaging in discriminatory behaviour concerning prices and other trade conditions [see, for example, *TTAŞ* (2 October 2002, 02-60/755-305) and *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411)]. There is no other law that specifically regulates the price discrimination.

22 | Exploitative prices or terms of supply

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 Board condemned excessive or exploitative pricing by dominant firms in the past (eg, *Tüpraş* (17 January 2014, 14-03/60-24); *TTAŞ* (2 October 2002, 02-60/755-305); and *Belko* (9 April 2001, 01-17/150-39)). However, complaints filed on this basis are frequently dismissed because of the Competition Authority's reluctance to micromanage pricing behaviour.

23 | Abuse of administrative or government process

While the precedents of the Board do not yet include a finding of infringement on the basis of abuse of a government process, and this issue has not been brought to the Competition Authority's attention yet, there seems to be no reason why such abuses should not lead to a finding of an infringement of article 6, if adequately demonstrated.

24 | Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are normally caught by the merger control rules contained in article 7 of Law No. 4054. However, there have been some cases, albeit rare, where the Board found structural abuses through which dominant firms used joint venture arrangements as a backup tool to exclude competitors. This was condemned as a violation of article 6 (see *Biryay I* (17 July 2000, 00-26/292-162)).

25 | Other abuses

The list of specific abuses present in article 6 is not exhaustive, and it is very likely that other types of conduct may be deemed as abuse of dominance. However, the enforcement track record shows that the Board has not been in a position to review any allegation of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to disclose new technology, predatory advertising or excessive product differentiation.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. The structure of the Competition Authority slightly changed in the past years and currently, six divisions with sector-specific work distribution handle competition law enforcement work through approximately 160 case handlers. A research and economic analysis department, a leniency unit, a decisions unit, an information-technologies unit, an external-relations unit, a management services unit, a strategy development unit, an internal audit unit, a consultancy unit, a media and public relations unit, a human resources unit and a cartel and on-site investigation support unit assist the six technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Competition Board is responsible for, inter alia, investigating and condemning abuses of dominance.

The Competition Board has relatively broad investigative powers. It 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 or failure to produce in a timely manner 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). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed. The administrative monetary fine may not be lower than 34,809 lira for 2021.

Article 15 of Law No. 4054 also authorises the Board to conduct on-site investigations. Accordingly, the Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking. Additionally, as stipulated under the Amendment Law and the Guidelines on Examination of Digital Data during On-site Inspections, the Board can also inspect and make copies of all information and documents held in the electronic mediums and information systems of the companies.

Law No. 4054, therefore, grants the Competition Authority vast authority to conduct dawn raids. A judicial authorisation is obtained by the Board only if the undertaking concerned refuses to allow the dawn raid. While the mere wording of the law allows oral testimony to be compelled of employees, case handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided a written response is submitted in a mutually agreed timeline. Computer records as well as phone records such as email and other messaging (eg, Whatsapp) correspondences are fully examined by the experts of the Competition Authority, including deleted items. Refusing to grant the staff of the Competition Authority access to business premises and such records may lead to the imposition of fines.

Sanctions and remedies

27 What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In case of a proven abuse of dominance, the incumbent undertakings concerned shall be (each 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 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 undertakings. In this respect, Law No. 4054 makes reference to article 17 of the Law No. 5326 on Minor Offences and there is also a Regulation on Fines (Regulation No 27142 of 16 February 2009). Accordingly, when calculating fines, the Board takes into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments and so on, in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the abusive conduct, 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.

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 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 conduct may be deemed invalid and unenforceable because of violation of article 6.

Furthermore, article 43 of the Amendment Law states that the Board, ex officio or upon parties' request, can initiate a settlement procedure. Parties that admit to an infringement can apply for the settlement procedure until the official notification of the investigation report. If a settlement is reached, a reduction up to 25 per cent of the administrative monetary fine may be applied. The parties may not bring a dispute on the settled matters and the administrative monetary fine once an investigation finalises a settlement.

Article 43 also foresees that undertakings or association of undertakings can voluntarily offer remedies during a preliminary investigation or full-fledged investigation to eliminate the Competition Authority's competitive concerns in terms of articles 4 and 6 of Law No. 4054. Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. In any event, the commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or and the restriction of supply governed under article 4 of the Law No. 4054.

The highest fine imposed to date in relation to abuse of a dominant position is in the *Tüpraş* case where Tüpraş, a Turkish energy company, incurred an administrative monetary fine of 412 million lira, equal to 1 per cent of its annual turnover for the relevant year (*Tüpraş*, 17 January 2014, 14-03/60-24).

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Board is entitled to impose sanctions directly. Article 27 of the Law No. 4054 deems taking necessary measures for terminating infringements and imposing administrative fines within the duties and powers of the Board. A preliminary approval or consent of a court or another authority is not required.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

The Competition Authority was observed to have directed its attention toward refusal to deal/access to essential facilities cases [see, for example: *Türk Telekom* (27 February 2020, 20-12/153-83), *Akdeniz/CK Akdeniz Elektrik* (20 February 2018, 18-06/101-52); Enerjisa (8 August 2018, 18-27/461-224) *Aydem/Gediz* (01 October 2018, 18-36/583-284); *İsttelkom* (11 April 2019, 19-15/214-94)], *Varinak* (19 December 2019, 19-45/768-330), *Medsantek* (28 March 2019, 19-13/182-80), *Daichii Sankyo* (22 May 2018, 18-15/280-139), *Türkiye Petrol Rafinerileri* (12 June 2018, 18-19/321-157), *Pharmaceuticals* (8 March 2019, 19-11/126-54), *Zeyport Zeytinburnu* (15 March 2018, 18-08/152-73) and *Kardemir Karabük Demir Çelik* (7 September 2017, 17-28/481-207)] and exclusive dealing cases [see, for example: *Tırsan* (23 May 2019, 19-19/283-121), *Mars Media* (18 January 2018; 18-03/35-22), *Frito Lay* (12 June 2018; 18-19/329-163), *Trakya Cam*(14 December 2017; 17-41/641-280)]. The Competition Authority has also been investigating rebate schemes.

Moreover, in the past year, the Competition Authority initiated various investigations against technology firms with the focus on article 6 infringements and, inter alia cases against Google, and very recently, the Competition Authority announced it launched an *ex officio* investigation against Facebook and WhatsApp in relation to its data sharing arrangement (11 January 2021, 21-02/25-M).

The length of abuse of dominance proceedings depends on the specific dynamics of each case and the workload of the Board. However, it is fair to say that the average length of these proceedings is one and one-and-a-half years.

Contractual consequences

30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Article 56 of Law No. 4054 ordains that any agreements and decisions of associations of undertakings, contrary to article 4 of Law No. 4054, are invalid and unenforceable with all their consequences. The agreement stands if the clause that is inconsistent with the legislation may be severed from the contract according to severability principles.

Recently in the decision whereby the Board decided İsttelkom abused its dominance in the electronic communication infrastructure instalment market in Istanbul through the terms in the Facility Sharing Protocol entered with the operators, İsttelkom was requested to remove the clauses that required it to own the infrastructure whose setup cost was absorbed by the operators and which hindered use, rental or transfer of the infrastructure whose costs were born by the operators to third parties(11 April 2019, 19-15/214-94). Moreover, the Competition Authority requested certain contractual changes in the *Google Android* case, and ruled amendment to pre-instalment and exclusivity terms in the manufacturer contracts and addition of an explicit statement to enable competition on app store (19 September 2018, 18-33/555-273).

Private enforcement

31 | To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is available to the extent of seeking damages. However, Law No. 4054 does not envisage a way for private lawsuits to enforce certain behavioural and other remedies.

Article 9 of the Amendment Law introduces application of the remedy mechanism to articles 4 and 6, and changes the mechanism previously applicable to article 7. Accordingly, in cases where the behavioural remedies are failed, structural remedies may be applied for anti-competitive conducts.

Failure by a dominant firm to meet the requirements so ordered by the Board would lead it to initiate an investigation, which may or may not result in the finding of an infringement. The legislation does not explicitly empower the Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

Damages

32 | Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

A dominance matter is primarily adjudicated by the Board. The Board does not decide whether the victims of the abusive practices merit damages. These aspects are supplemented with private lawsuits. Pursuant to article 57 of Law No. 4054, real or legal persons that bear losses owing to distortion of competition might compensate the loss from the parties causing the loss. Article 58/1 of Law No. 4054 provides that the damage is the difference between the cost the injured parties paid and the cost they would have paid if competition had not been limited and thus, indicate that the actual losses suffered by the claimant would be subject to compensation. Furthermore, the same article stipulates that the competitors who were not involved in the competition law violation and suffered because of the violation may claim compensation for 'all of their damages' (ie, actual damages and loss of profit). Moreover, as for the damages exceeding the amount of the claimant's loss, the most distinctive feature of the Turkish competition law regime is the rule of triple damages (also known as 'treble damages'). As per article 58/2 of Law No. 4054, which regulates the treble compensation, is as follows: 'If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by treble of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.' In order for the application of the treble damages, (1) the damage should be the result of an agreement or decision of the parties, or an act of gross negligence of them; and (2) only the material damage (and not moral) could be subject to compensation threefold. Besides, the damage should be actual damages. However, it should be noted that the issue regarding the enforcement method of this article is controversial in practical terms. To wit, certain opinions in the doctrine argue that the judge can solely conclude a treble compensation if the conditions are fulfilled, thus a different multiplier cannot be used. Nevertheless, the prevailing opinion in the doctrine and the practice of the local courts are in the direction that the judge has discretion to conclude 'up to' treble compensation. There are decisions of courts of first instance where the court ruled for (1) onefold compensation (Istanbul 12th Consumer Court, 6 June 2017, 2016/82 E, 2017/220 K),

(2) twofold compensation (Istanbul Anatolian 4th Commercial Court of First Instance, 12 December 2017, 2015/1008 E. 2017/1325 K); and (3) threefold compensation (Marmaris 1st Civil Court of First Instance in the capacity of Consumer Court, 14 November 2017, 2017/17 E, 2017/494 K).

Article 58 of Law No. 4054 determines the general rule to follow in the calculation of the damages (ie, 'the difference between the cost the injured paid and the cost the injured would have paid if competition had not been restricted'). This is also called the 'difference theory'. This reference specifically concerns the artificially increased prices that resulted from the competition law violations and aims to compensate the damage suffered by the purchasers who paid more than the normal price of a product because of the increase in the prices applied by the cartelists.

Most of the civil courts wait for the decision of the Board in order to build their own decision on the Board's decision. The 19th Civil Chamber of the Court of Appeals has annulled the decision of the court of first instance, through its decision of 1 November 1999 (decision No. 99/3350 E, 99/6364 K) given that the action on damages based on the abuse of dominant position allegation was rendered without considering whether there was any application filed to the Competition Authority and concluded that the application before the Competition Authority should have been considered as a preliminary issue (also see 11th Civil Chamber of the Court of Appeals, 5 October 2009, 2008/5575 E, 2009/10045 K). The decision of the Board is not binding on the court. However, the existence of a Board decision becomes relevant in a number of aspects of civil litigation.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board according to Law No. 2577. Decisions of the Board are considered to be administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

Closely modelled on article 102 of the TFEU, article 6 of Law No. 4054 is theoretically designed to apply to the 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. That said, the indications in practice show that the Turkish Competition Board (the 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 of Law No. 4054, 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 Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited as it is not engaged in by a dominant firm. Owing to this new and rather peculiar concept (that is, article 4 enforcement becoming a fallback 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 (dominance provisions) enforcement, (ie, if the engaging entity were dominant) has been reviewed and enforced against under article 4 (restrictive agreement rules).

Recently, this has begun to allow a breach of article 6 (dominance) by article 4 (restrictive agreements) behaviour. There are several decisions where the Board warned non-dominant entities to refrain from imposing dissimilar trade conditions to its distributors or did not allow a non-dominant entity to unilaterally adopt a supply regime whereby counterparts would be required to meet minimum objective criteria. Such decisions are all alarming signs of this new trend. The Board's *3M Turkey* and *Turkcell* decisions are the latest examples of the same trend. In *3M Turkey*, the Board analysed whether 3M Turkey, which was not found to be in a dominant position in the work safety products market, discriminated against some of its dealers under article 4 (restrictive agreements) and not under article 6 (dominance) (9 June 2016, 16-20/340-155). In *Turkcell*, the Board assessed whether Turkcell's (Turkey's dominant GSM operator) exclusive contracts foreclosed the market, based on both article 6 and article 4 (13 August 2014, 14-28/585-253). The Board found that Turkcell did not violate either article 6 or article 4. The court did not engage in a review of the nuances between articles 4 and 6.

UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

In 2013, the Competition Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was discussed before the Turkish Parliament but it became obsolete because of the general elections. The discussion processes were reinitiated at the Competition Authority's request and the Draft Law was officially approved by the Turkish Parliament on 16 June 2020. The Amendment Law, which entered into force on 24 June 2020, introduces following key changes, inter alia changes explained below:

- De minimis principle: the Competition Board (the Board) can decide not to launch a full-fledged investigation for agreements, concerted practices or decisions of association of undertakings, or both, that do not exceed the market share or turnover thresholds that will be determined by the Board, or both.
- Self-assessment procedure: the amendment provides legal certainty to the individual exemption regime as it is sets forth that the 'self-assessment' principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.
- Time extension for the additional opinions: the 15-day period for submission of the Competition Authority's additional opinion can be now doubled if deemed necessary.

Overall, clarification of the majority of the amendments via enactment of the secondary legislation is pending. The Competition Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems, during the on-site inspections. Furthermore, the Competition Authority conducted its public consultations in relation to the Draft Communique for De Minimis Practices and the Draft Communique for Commitments.

Similar to the rest of the world, technologies and digital platforms are under the Authority's radar. The Authority announced the plans for strategy development unit to focus to digital markets on May 2020 and launched a sector inquiry focused on electronic marketplace platforms on July 16, 2020. Moreover, over the past year, the Competition Authority made covid-19 pandemic-related infringement warnings to various stakeholders.

Coronavirus

36 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No specific legislation, relief programme or initiative has been implemented to address the pandemic through competition law rules. Moreover, the Competition Authority has announced no limitations to their operational capacity and they have not requested applicants' cooperation regarding the special circumstances related to the ongoing pandemic. As usual, the Competition Authority encouraged use of the electronic submission system in order to continue day-to-day activities without a problem.

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