THE DOMINANCE AND MONOPOLIES REVIEW

NINTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance. This is driven in large part by developments in the digital sector, as well as an increasing awareness of the urgency of the climate crisis, environmental degradation and loss of biodiversity.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It is] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued 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.' Similarly, Professor 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'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged, commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorienting the goals of antitrust policy away from the consumer welfare standard towards a broader societal welfare test; reversing the burden of proof in merger control; per se bans on certain categories of conduct in the digital sector (including prophylactic controls on vertical integration); lowering the standard of judicial review to give competition authorities more leeway; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly evolving rules concerning abuse of dominance? Helpfully, this ninth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by specialist local experts – 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 main trends to watch out for over the next year.

Sustainability and abuse of dominance

The past year has seen sustainability become a new and important focus for competition regulators. The Dutch competition authority started the trend by setting 'sustainability' as a key priority and proposing a more permissible review for certain environmental agreements. The Hellenic Competition Commission followed, advocating for far-reaching policy changes to promote sustainability goals across all areas of competition policy. The European Parliament has called on the European Commission to 'urgently take the concrete action needed in order to fight and contain the threat of climate and environmental catastrophe before it is too late'. As Commissioner Vestager has noted, 'everyone is called upon to make our contribution to the necessary change – including enforcers'. The European Commission initiated a consultation, and the Organisation for Economic Co-operation and Development held several events to discuss the integration of climate and environmental goals in competition policy. Chinese competition law already provides an explicit exemption for 'agreements between undertakings which they can prove to be concluded for . . . serving public interests in energy conservation, environmental protection and disaster relief'.

At core, the cause of the climate crisis is a market failure: the cost of pollution of air, water and land, and the damage wrought by greenhouse gas emissions to the climate today and in the future are generally not included in the price of goods and services. Because the market price of a polluting product excludes the social cost, production is higher than the social optimum, taking into account that consumption of natural resources now exceeds what the regenerative capacity of the Earth can sustain.

To address this market failure, the discussion around including environmental goals in competition law has, so far, mostly focused on state aid, horizontal cooperation and merger control. For example, it has been argued that the consumer welfare analysis in merger control could include whether the merger could be expected to raise or lower the environmental price that consumers pay, which is not reflected in the market price in monetary terms or in quality (which could take account of non-market externalities such as emissions). Likewise, horizontal guidelines could be revised to allow cooperation in pursuit of environmental goals, where individual producers are willing to invest in greening production, but may be held back by the fear that they will be undercut by those who do not invest, or by cheaper imports.

There is no inherent reason, however, why sustainability could not be incorporated into an abuse of dominance assessment, too. This could be done in a number of ways.

First, pricing analysis (for example, for loyalty rebates, predatory pricing, margin squeeze) could take into account the actual costs incurred by the dominant company and by society, including not only the total costs of production, but also the environmental cost. A company may be able to price lower than its rivals because it is employing polluting or greenhouse gas emitting technology, at great societal cost, which is not reflected in its traditional variable and fixed costs.

Second, a dominant provider with an incumbent polluting technology might commit an abuse by excluding rival, greener technologies by means other than competition on the merits. Such conduct should already violate dominance rules. In this case, however, 'competition on the merits' should be defined so as to exclude competition that relies on avoidable pollution or greenhouse gas emissions. Also, the assessment should take into account that consumer harm would be even higher from the abuse because of the exclusion of a greener technology. The theory would be not dissimilar to that pursued by the European Commission in its *Car Emissions* cartel investigation, albeit that case concerns horizontal collusion to restrict competition on innovation for emission cleaning systems.

Third, there may be *sui generis* abuses that involve unsustainable business practices that also restrict competition. For example, a dominant producer might employ cheap and polluting means of production, and thereby price cheaper than its rivals. A dominant raw materials producer might make misleading representations to an environmental agency to secure a licence to extract minerals. And a dominant chemical producer could illegally dump products in rivers, thereby gaining an advantage over rivals that dispose of waster safely. All these might conceivably be an abuse of dominance because they distort competition, via means other than competition on the merits. The fact that they may also infringe other laws is no bar to bringing an abuse of dominance claim, just as a dominant factory owner burning down a rival's factory can be both arson and an abuse of dominance. Rivals should have a cause of action, especially where environmental rules are inadequate or insufficiently enforced.

Fourth, there may be situations where conduct that might otherwise be abusive could be excused because of sustainability-based objective justification, just as Article 101(3) of the Treaty on the Functioning of the European Union is being considered to exempt otherwise anticompetitive agreements that promote sustainability. For example, a dominant e-commerce platform might prioritise in its ranking green products (including green technologies sold by its downstream subsidiary) over polluting products (sold by its rivals). Provided that greenwashing is avoided, a regulator might consider that even if such conduct has the potential to restrict competition, it should be objectively justified because of the overall benefits it creates for society.

Regulation versus antitrust enforcement

Over the past year, regulators and legislators have moved from consultation to action, as they have set out competing proposals for regulation to address perceived competition problems caused by concentration in digital markets. In broad terms, the concerns with digital markets are that certain market characteristics (such as network effects and tipping, lack of switching, and lock-in effects) lead to high concentration, insurmountable entry barriers and exploitation of market power, especially (but not only) when combined with abusive conduct.

The German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'cross-market significance'. The UK is setting up a digital markets unit to create an enforceable code of conduct for companies with 'strategic market status'. And perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), is formulating *ex ante* dos and don'ts for large 'gatekeeper' platforms.

It is perhaps understandable that regulators and legislators seek to go down the route of regulation, rather than pursuing individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex. As Commissioner

Vestager has explained as the motivation of the DMA: 'We need regulation to come in before we have illegal behaviour and to be able to say these are the rules of the game and this is what you must do.'

At the same time, regulation can also come with risks to competition and society. This is because ill-crafted or insufficiently flexible regulation can impede innovation, snuffing out pro-competitive conduct before it takes place or raising barriers to entry. As the UK Competition and Markets Authority (CMA) has explained, 'Greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.'

Accordingly, it is particularly important that new rules of the road allow companies the opportunity to justify their behaviour, on the grounds of consumer benefits or that alternatives would lead to harm. For example, the CMA recognises that 'conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits', and it has advised that conduct should be exempted under its new code of conduct if it 'is necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings'. Likewise, the new German rules allow a company to justify its practices.

It is therefore troubling that the draft DMA does not contain any analogous provision. As currently framed, the prohibited behaviours and obligations are extremely broad. They touch on almost all aspects of competition and have far-reaching consequences for consumers in Europe. But the draft DMA includes no safeguards to protect against unintended adverse consequences, even to protect users from privacy violations or exposure to fraudulent activity, or preventing other harmful behaviour. It is difficult to see the benefit of this approach. It is positively harmful.

A proportionality safeguard would be a simple way to improve the draft regulation, without impeding any of its objectives. Including a proportionality safeguard would also be consistent with general principles of EU law. Under Article 16 of the Charter of Fundamental Rights (which is a binding source of EU law under Article 6(1) of the Treaty on European Union), companies (even alleged gatekeeper platforms) have a right to conduct their own business. Interference with that right is only permitted if it is proportionate. By implication, it should therefore be open to companies to justify their practices, on the grounds of proportionality. A blanket refusal to engage with justifications at all is disproportionate to the aims of the DMA, and harmful.

Advocate General Pitruzzella rightly commented in March 2021 on the draft DMA that 'too much rigidity could hinder efficiency and introduce a disproportionate limitation on the freedom to conduct a business'. Rather, rebuttable presumptions together with justification defences strike the balance between 'the need for certainty' and 'the need to avoid false positives in antitrust enforcement and undue limitations of fundamental rights'.

Mandatory arbitration as a mechanism to solve FRAND disputes

A third theme of the past few years' dominance enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Refusing a licence or seeking an injunction is considered an abuse of dominance, unless the SEP owner is a 'willing licensor' or the implementer is an 'unwilling licensee'. In August 2020 in the UK, the Supreme Court handed down an important judgment in *Unwired Planet*, finding that an English court can set the royalty rates and

terms of a FRAND licence on a worldwide basis, to determine whether a licensor or licensee is 'willing'. In Europe, the EU Commission's expert group wrote a 230-page report on the licensing and valuation of SEPs on FRAND terms.

A problem has emerged, however, that the current legal framework does not incentivise parties to reach a negotiated outcome as to the FRAND rate. This is because for both implementers and SEP holders, the best alternative to a negotiated agreement (the BATNA) is to litigate: for SEP holders, the BATNA is usually to seek an injunction and offer a high royalty, thus threatening a high penalty while limiting risk by appearing to follow the sequence requirements of the European Court of Justice's *Huawei/ZTE* judgment. Implementers, on the other hand, may have an incentive to challenge the validity or infringement of the patents at issue. So the BATNA of an implementer may therefore be to seek judgment for invalidity or non-infringement, thus threatening long delays, while limiting risk by also appearing to follow the sequence of the *Huawei/ZTE* case.

As a result, parties are not incentivised to reach settlements as to the FRAND rate. In our view, the best way to address this problem is to ensure that the BATNA is no longer a positive outcome, but a possible negative one for each party. This could be achieved by ensuring that, absent agreement within a reasonable time period, a third party sets the rate for the parties (for example, by standard-setting organisations requiring arbitration or rate setting as a fallback for the FRAND undertaking). Parties tend to be much more willing to negotiate and ready to reach agreement on a balanced solution if the fallback is someone else deciding the rate.

For this reason, a refusal to agree to rate setting should be seen as rebuttable presumption of being an 'unwilling' licensor (and an abuse of dominance) for the purpose of the question of whether an injunction is available on an SEP. Conversely, an offer to have an independent third party set the rate and key terms should be seen as a rebuttable presumption of being a 'willing' licensor or licensee. The advantage of such mandatory arbitration as a fallback is that it encourages a reasonable outcome. Both parties have an incentive to agree on a rate to avoid an arbitrator setting a rate for them. And even if they cannot agree on a rate, the rate will be set. Abuse of dominance can thus be avoided. Arbitration in this respect is better than litigation because it is faster, more flexible, reduces forum shopping and results in awards that are enforceable worldwide. Arbitration also allows the parties to address IP rights implicating multiple national jurisdictions in a single proceeding. We believe that this solution could solve the endless FRAND disputes and end abusive hold-up and hold-out.

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 ninth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2021

Chapter 24

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 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 2020, the Turkish Competition Board (the Board) rejected the acquisition of Marport Liman İşletmeleri San ve Tic AŞ by Terminal Investment Limited Sàrl, as it concluded that the transaction would severely hinder competition in the market especially by way of vertical integration with regards to terminal operators and container liner shipping companies, making the decision one of the rare cases in the Board's history where it rejected an acquisition or a merger. In this instance, the Board has clearly indicated that the notification in question has been evaluated under the SIEC test,[3] rather than solely relying on the dominance test, in line with the amendments made in terms of Law No. 4054.[4]

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 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.[5]

II YEAR IN REVIEW

According to the Competition Authority's statistics for 2020, the Board rendered a decision in 36 pre-investigations or investigations, out of a total of 65, 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, 22 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 Board also decided on seven investigations that were 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.

3 The significant impediment of effective competition test.

4 *TIL/Marport*, 20-37/523-231, 13 August 2020.

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

Over the past few years, the Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and abuse of dominance. With regard to abuse of dominance, the Board has focused on cases in which the focal point has been refusal to deal or access to essential facilities.[6]

In a recent decision, the Board found Varinak 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.[7] A similar decision was rendered in relation to Medsantek's practices in the sequence analysis devices market.[8]

The first cases to be concluded through the application of the commitment mechanism have taken place in the past year. One such case is the investigation against Havaalanı Yer Hizmetleri AŞ (Havaş), MNG Havayolları ve Taşımacılık AŞ, S Sistem Lojistik Hizmetler AŞ and Türk Hava Yolları AO (Turkish Airlines) operating in the field of bonded temporary storage or warehouse services at airports. Following Havaş' application for the commitment mechanism, a meeting was scheduled for 13 October 2020 at the Competition Authority's premises within the scope of the commitment discussions. At this meeting, which was attended by Havaş representatives and Competition Authority case handlers, the case handlers conveyed the competition concerns pertaining to the subject matter of the case. Following the meeting, Havaş submitted its commitment package to the Competition Authority on 19 October 2020. The Board granted its decision on 5 November 2020. As the commitment proposed by Havaş was deemed suitable and sufficient to eliminate the competition law concerns, the Board decided to accept its commitments. In this respect, the Board concluded that the ongoing investigation into Havaş could be terminated.

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

Investigated party	Alleged abuse of dominance activity	Date of initiation
Facebook Inc, Facebook Ireland Ltd, WhatsApp Inc and WhatsApp LLC	Tying and bundling	11 January 2021
Sahibinden Bilgi Teknolojileri Paz ve Tic AŞ	Excessive pricing	1 October 2018

6 *Türk Telekom*, 20-12/153-83, 27 February 2020; *Akdeniz/CK Akdeniz Elektrik*, 18-06/101-52, 20 February 2018; *Enerjisa*, 18-27/461-224, 8 August 2018; *Aydem/Gediz*, 18-36/583-284, 1 October 2018; *İsttelkom*, 19-15/214-94, 11 April 2019; *Varinak*, 19-45/768-330, 19 December 2019; *Medsantek*, 19-13/182-80, 28 March 2019; *Daichii Sankyo*, 18-15/280-139, 22 May 2018; *Türkiye Petrol Rafinerileri*, 18-19/321-157, 12 June 2018; *Pharmaceuticals*, 19-11/126-54, 8 March 2019; *Zeyport Zeytinburnu*, 18-08/152-73, 15 March 2018; *Kardemir Karabük Demir Çelik*, 17-28/481-207, 7 September 2017.

7 *Varinak*, 19-45/768-330, 19 December 2019.

8 *Medsantek*, 19-13/182-80, 28 March 2019.

Recent significant decisions of the Board regarding abuse of dominance are provided below.

Investigated party and case information	Case type	Conclusion
Google LLC (20-10/119-69, 13 February 2020)	Tying and bundling	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
Türk Telekomünikasyon AŞ (20-12/153-83, 27 February 2020)	Refusal to deal/ access to essential facilities	The Board concluded that Türk Telekom did not abuse its dominant position by indirectly refusing to deal; however, it found it necessary to send Türk Telekom an opinion letter regarding the 'reference leased circuit proposal' to ensure fair application of the relevant provisions to the operators
Ortadoğu Antalya Liman İşletmeleri AŞ	Excessive pricing	The Board concluded that Ortadoğu Antalya Liman İşletmeleri AŞ (Port Akdeniz) abused its dominant position by applying excessive prices in the container handling services market

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 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 where clear dependence or interdependence between either competitors or customers exists.[9]

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 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 is 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 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

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

set of minimum conditions under which collective dominance should be alleged. That said, the Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[10]

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 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 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 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 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*,[11] the 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 of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In *Trakya Cam*,[12] the 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 Board decision of 2 December 2015,[13] 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:

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

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

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

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

13 No. 15-42/704-258.

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 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.[14] On the other hand, previous precedents show that the Board is yet to review any allegation of other forms of abuse, such as:

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 Board.[15] 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.[16] High standards are usually observed for bringing

14 See, for example, *Türk Telekom*, 16-20/326-146, 9 June 2016; *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Türk Telekom*, 02-60/755-305, 2 October 2002; *Turkcell*, 01-35/347-95, 20 July 2001.

15 See, for example, *TTNet*, 07-59/676-235, 11 July 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.

16 *UN Ro-Ro*, 12-47/1412-473, 1 October 2012.

forward predatory pricing claims as seen in the Board's *Sony Eurasia* decision, in which the Board concluded that prices set below cost for a limited amount of time was not enough to determine an Article 6 violation.[17]

Further, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and precedents have involved an imposition of monetary fines on the basis of price squeezing. The Board is known to closely scrutinise price-squeezing allegations.[18]

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.[19]

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*,[20] the 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 Board also condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.[21] In 2017, the Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems.[22]

Recently, the administrative court annulled the Board's earlier decision regarding Mey İçki's practices in the vodka and gin market, and upon its reassessment, the Board found that the defendant abused its dominance by applying retroactive rebate schemes, which amounted to exclusionary practices.[23]

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The 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.[24] In the *Google Android*

17 *Sony Eurasia*, 19-06/47-16, 7 February 2019.

18 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; *Türk Telekomünikasyon AŞ*, 16-15/254-109, 3 May 2016.

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

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

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

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

23 *Mey İçki*, 20-28/349-163, 11 June 2020.

24 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009; *Türk Telekomünikasyon AŞ*, 16-20/326-146, 9 June 2016; *Google Android*, 18-33/555-273, 19 September 2018; *Google Shopping*, 20-10/119-69, 13 February 2020.

case, which is one of the limited instances of the Board fining the incumbent firms based on tying or leveraging allegations, 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 that market as well as other markets, such as the search and app store services markets, by tying the search and app store services, engaging in exclusivity practices and preventing use of alternative services by the manufacturers.[25]

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 Board concerning these matters.[26]

iii Discrimination

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Board has, in the past, found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.[27]

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 Board has condemned excessive or exploitative pricing by dominant firms.[28] 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 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

25 *Google Android*, 18-33/555-273, 19 September 2018.

26 See, for example, *Eti Holding*, 00-50/533-295, 21 December 2000; *POAS*, 01-56/554-130, 20 November 2001; *Ak-Kim*, 03-76/925-389, 4 December 2003; *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; *BOTAŞ*, 17-14/207-85, 27 April 2017; *Sanofi*, 18-09/156-76, 29 March 2018; *Lüleburgaz*, 17-28/477-205, 7 September 2017; *Akdeniz/CK Akdeniz Elektrik*, 18-06/101-52, 20 February 2018; *Enerjisa*, 18-27/461-224, 8 August 2018; *Aydem/Gediz*, 18-36/583-284, 1 October 2018; *İsttelkom*, 19-15/214-94, 11 April 2019; *Medsantek*, 19-13/182-80, 28 March 2019; *Varinak*, 19-45/768-330, 19 December 2019.

27 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.

28 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*).

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 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*,[29] 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 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 Board to take interim measures until the final resolution on a matter where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Board to order structural or behavioural remedies (i.e., require undertakings to adhere to certain conduct standards, 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 Board would lead to an investigation, which may result in a finding of infringement. The legislation does not explicitly empower the Board to demand performance of a specific obligation through a court order.

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 of 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.

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

Article 43 also foresees that undertakings or associations of undertakings can voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Competition Authority's competitive concerns. However, this mechanism is not applicable to hardcore violations (such as price-fixing between competitors, sharing of territories or customers and the restriction of supply). Furthermore, it should be noted that there is no time limitation for the utilisation of the commitment mechanism and no need to admit to a violation. Nevertheless, the Board may relaunch an investigation if (1) there is a substantial alteration in any of the factors on which the decision was based, (2) the relevant undertakings or associations of undertakings act in violation of the commitments given or (3) the decision was based on missing, false or misleading information presented by the parties.

VI PROCEDURE

The 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 Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The 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 Board within 30 days of a pre-investigation decision being taken by the Board. It will then decide within 10 days whether to launch a formal investigation. If the 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 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, extendable for a further 15 days. The defending parties will have another 30 days to reply to the additional opinion, again, extendable for a further 30 days (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 days, and at most 60 days, of the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. 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. 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 Board to serve a reasoned decision on the counterparty.

The 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 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 2021 is 34,809 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Board imposed a monetary fine of 7.55 million lira on Türk Telekom for providing false or misleading information and documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.

Article 15 of Law No. 4054 also authorises the Board to conduct on-site investigations. Accordingly, the 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 Board only if the subject undertaking refuses to allow the dawn raid. Computer records, including deleted items, are fully examined by the Competition Authority experts.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the 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 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 2021 is 34,809 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. Also, in its recent *Unilever* and *Groupe SEB* decisions, the Board imposed an administrative fine of 0.5 per cent of their gross revenues in 2018 pursuant to Article 16 of Law No. 4054 on the basis of hindering on-site inspections.

Final decisions of the 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 Board's reasoned decision. Filing an administrative action does not automatically stay the execution of the Board's decision.[30]

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 these 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 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 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 Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitles 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 damage 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 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.

30 Article 27, Administrative Procedural Law.

VIII FUTURE DEVELOPMENTS

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 election. The discussions 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 the following key changes, inter alia.

a De minimis principle: the Board can decide not to launch a full-fledged investigation for agreements, concerted practices or decisions of undertakings or associations of undertakings that do not exceed the market share or turnover thresholds, or both, which will be determined by the Board.

b Self-assessment procedure: the amendment provides legal certainty to the individual exemption regime as it sets forth that the 'self-assessment' principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.

c Time extension for additional opinions: the 15-day period for submission of the Competition Authority's additional opinion can be now doubled if deemed necessary.

The Communiqué on the Commitments for Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position (Communiqué No. 2021/2) and the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings that do not Significantly Restrict Competition (Communiqué No. 2021/3) were published on 16 March 2021. 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 electronic media and information systems, during on-site inspections.

Similar to the rest of the world, technology and digital platforms are under the Competition Authority's radar. The Competition Authority announced plans for a strategy development unit to focus on digital markets in May 2020 and launched a sector inquiry focused on electronic marketplace platforms on 16 July 2020.

Appendix 1

ABOUT THE AUTHORS

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ELIG Gürkaynak Attorneys-at-Law

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. He 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 200 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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