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EUROPE, MIDDLE EAST AND AFRICA
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GCR works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review 2023* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reviews covering the Americas and the Asia-Pacific region, this report provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on abuse of dominance and article 102 of the TFEU, a deep dive into the intersection between competition law and joint ventures, and analysis of vertical agreements under the new VBER. This features alongside updates from Angola, Cyprus, Denmark, Egypt, France, Germany, Greece, Israel, Switzerland, Turkey, the United Kingdom and Ukraine.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Turkey: combating abuse of dominance

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IN SUMMARY

Unilateral conduct of a dominant undertaking is restricted under article 6 of the Law on the Protection of Competition and secondary legislation. This article provides guidance on the definition of dominance, the factors taken into account in the substantive analysis and a non-exhaustive list of abusive conduct that may be considered illegal, with reference to the Turkish Competition Board's precedent. This article also covers recent enforcement trends and landmark decisions.

DISCUSSION POINTS

- Definition of dominance
- Abusive conduct
- Enforcement, sanctions and remedies
- Recent enforcement action and landmark decisions

REFERENCED IN THIS ARTICLE

- Law No. 4054 on the Protection of Competition
- Regulation on Fines No. 27142
- Guidelines on the Definition of Relevant Market
- Block Exemption Communiqué No. 2002/2 on Vertical Agreements
- *Unmaş* (2021)
- *D-Market* (2021)
- *Unilever* (2021)
- *Biletix* (2021)

Year in review

In 2021, the Turkish Competition Board (the Board) rendered 74 decisions in which it focused on anticompetitive conduct. Of those 74 decisions, 40 were given as a result of a fully-fledged investigation, while 34 were given as a result of a preliminary investigation.

The Board concluded 23 cases within the scope of article 6 of Law on the Protection of Competition (Law No. 4054) prohibiting abuse of dominant position. Furthermore, it concluded 11 cases in which the conduct under scrutiny was assessed within both article 4 (which prohibits anticompetitive agreements, concerted practices and decisions) and article 6 of Law No. 4054.

Between 2016 and 2021, the Board concluded 152 article 6 cases and 77 cases in which the conduct under scrutiny concerned both articles 4 and 6 of Law No. 4054.

In 2021, the Board imposed administrative fines amounting to a total of 4,355,666,695.86 lira.

Tüpraș, a Turkish energy company, incurred an administrative fine of 412,015,081.24 lira, which ranks as the highest fine to date in relation to abuse of a dominant position.[1]

Law No. 4054

Unilateral conduct of a dominant undertaking in Turkey is restricted by article 6 of Law No. 4054, which 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'.

Although article 6 of Law No. 4054 does not define what constitutes 'abuse' per se, it provides five examples of forbidden abusive behaviour, which is a non-exhaustive list and is akin to article 102 of the Treaty on the Functioning of the European Union:

- directly or indirectly preventing entries into the market or hindering competitor activity in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

1 *Tüpraș*, 14-03/60-24, 17 January 2014.

- 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;
- distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and
- limiting production, markets or technical development to the prejudice of consumers.

The article 6 prohibition only applies to dominant undertakings. Dominance itself is not prohibited; only the abuse of dominance is outlawed. Thus, article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions apply to all companies and individuals to the extent that they qualify as an 'undertaking', which is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. State-owned and state-affiliated entities also fall within the scope of the application of article 6.[2]

Dominance

The definition of dominance can be found under 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'.

Dominance in a market is the primary condition for the application of article 6 of Law No. 4054. To establish a dominant position, the relevant market must be defined first and then the market position must be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view.

The Board issued Guidelines on the Definition of Relevant Market (the Guidelines) on 10 January 2008, with the aim of minimising the uncertainties that undertakings may face and stating the method used by the Board in its decision-making practice for defining a relevant product and geographical market.

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) and apply to both merger control and dominance cases. The Guidelines consider

2 *Çaykur*, 19-40/645-272, 14 November 2019; and *General Directorate of State Airports Authority*, 15-36/559-182, 9 September 2015.

the demand-side substitution as the primary standpoint of market definition, and the supply-side substitution and potential competition as secondary factors.

Under Turkish competition law, the market share of an undertaking is the primary step 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.

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. However, pursuant to the Guidelines on the assessment of exclusionary abusive conduct by dominant undertakings published by the Turkish Competition Authority (the Authority) on 29 January 2014 and the Board's respective precedent, an undertaking with a market share of 40 per cent is a potential candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.[3]

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

In addition, while mergers and acquisitions, by way of which an undertaking attempts to establish dominance or strengthen its dominant position, are regulated by the merger control rules established under article 7 of Law No. 4054, if the Board comes to the conclusion that a 'restriction of effective competition' element is present in the transaction at hand, the relevant transaction is deemed illegal and thus 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 Board rejected the acquisition of Marport Liman İşletmeleri San. ve Tic. A.Ş. by Terminal Investment Limited Sàrl as it concluded that the transaction would severely hinder competition in the market, especially by way of vertical integration in respect of terminal operators and container liner shipping companies, making the decision one of the rare cases in the Board's history where it rejected a concentration.[4]

3 See also, for example; *Unmaş*, 21-26/324-150, 20 May 2021; *D-Market*, 21-22/266-116, 15 April 2021; *Milyon Yapım*, 20-46/621-273, 15 October 2020; and *UNMAS*, 16-07/136-61, 2 March 2016.
4 *Marport*, 20-37/523-231, 13 August 2020.

Collective dominance

Collective dominance is also covered by Law No. 4054, as indicated in the aforementioned definition provided in article 6. However, the Board's precedent concerning collective dominance is not abundant and mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. Nevertheless, the Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[5]

Abuse

The definition of abuse is not provided under article 6 of Law No. 4054; this provision contains only a non-exhaustive list of certain forms of abuse. 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 abuse is the effect produced on the market, regardless of the type of conduct at issue. 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 has inferred abuse from the same set of circumstantial evidence employed in demonstrating the existence of dominance.

Furthermore, abusive conduct in a market different from the market that is subject to a dominant position is also prohibited under article 6. Accordingly, the Board has found that incumbent undertakings had infringed article 6 by engaging in abusive conduct in markets that were neighbouring the dominated market.[6]

Specific forms of abuse

Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by several decisions of the Board;[7] however, complaints on this basis are frequently dismissed by the Authority owing to its reluctance to intervene in companies'

5 *Digiturk/D-Smart*, 16-17/299-134, 18 May 2016; *Arkem/Aktaş*, 21-10/140-58, 25 February 2021; *Turkcell/Telsim*, 03-40/432-186, 9 June 2003.
6 *Türk Telekom*, 16-20/326-146, 9 June 2016; and *Volkan Metro*, 13-67/928-390, 2 December 2013.
7 *UN Ro-Ro*, 12-47/1413-474, 1 October 2012; and footnote 1.

pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims.

Furthermore, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and recent cases involved imposition of monetary fines on the basis of price squeezing. The Board is known to closely scrutinise price-squeezing allegations.[8]

In one decision, the Board concluded its preliminary investigation of Çiçek Sepeti,[9] an online retailer active in the sale of flowers, edible flowers (Bonnyfood) and gifts (Bonnygift) and cleared Çiçek Sepeti of charges laid out in a complaint in respect of:

- applying predatory prices;
- spending significant amounts on advertising (and thus raising its rivals' marketing costs); and
- initiating unfair lawsuits against its rivals.

Moreover, in another decision, the Board rejected allegations relating to Sony Eurasia,[10] the licensor of PlayStation, in respect of:

- predatory prices,
- selling certain products at higher prices and causing an increase in the costs of licence applicants; and
- abusing its dominant position by pushing other players out of the market.

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, those types of practices could also be reviewed under article 6.[11] In a number of decisions, the Board has already found infringements of article 6 on the basis of exclusive dealing arrangements.[12]

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 above 30 per cent. Thus, a dominant

8 Şişecam, 21-51/712-354, 21 October 2021; *Türk Telekom*, 21-10/139-57, 25 February 2021; *TTNet*, 07-59/676-235, 11 July 2007; and *Doğan Dağıtım*, 07–78/962–364, 9 October 2007.
9 *Çiçek Sepeti*, 18-07/111-58, 8 March 2018.
10 *Sony Eurasia*, 19-06/47-16, 7 February 2019.
11 See, for example; *Mey İçki Vodka and Gin*, 20-28/349-163, 11 June 2020; and *Türk Telekom*, 20-20/267-128, 16 April 2020.
12 *Karbogaz*, 05-80/1106-317, 1 December 2005.

undertaking is an unlikely candidate to engage in non-compete provisions and single branding arrangements.

That said, if a vertical agreement qualifies for the block exemption under Communiqué No. 2002/2, conducting exclusive dealing is one of the privileges from which the supplier can automatically benefit. Provisions that extend beyond what is permissible under an appropriately defined exclusive dealing clause, such as exclusive dealing clauses exceeding five years or envisaged for an unlimited period or expanding beyond the period of the contract as well as single branding obligations for selective distribution members, cannot benefit from the block exemption provided under Communiqué No. 2002/2.[13] Exclusive dealing clauses of undertakings that have a market share exceeding 30 per cent also cannot benefit from the block exemption provided under Communiqué No. 2002/2.

Accordingly, in its *Tuborg* decision,[14] the Board evaluated whether the individual exemption granted to the exclusive agreements of Tuborg with its decision dated 18 March 2010 (No. 10-24/331-119) should be revoked. It evaluated the current market structure and determined that the dynamics in the market differ from those in 2010, effectively altering the competitive landscape.

To that end, the Board concluded that even though Tuborg's market share at the end of 2016 was below 40 per cent, the relevant agreements no longer satisfy the condition of 'not eliminating competition in a significant part of the relevant market' and, thus, the individual exemption granted to Tuborg in 2010 should be revoked.

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. The Board, in its *Turkcell* decision,[15] condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors.

In its *Doğan Yayın Holding* decision,[16] the Board condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by also applying loyalty-inducing rebate schemes.

In its *ABBOTT* decision,[17] the Board concluded that for any rebate scheme to be deemed a violation of Law No. 4054, it should be primarily analysed whether the relevant undertaking subject to allegations is dominant in the relevant product market. It has further decided that the relevant rebate scheme should

13 *Baymak*, 20-16/232-113, 26 March 2020; and *Novartis*, 12-36/1045-332, 4 July 2012.
14 *Tuborg*, 17-36/583-256, 9 November 2017.
15 *Turkcell*, 09-60/1490-379, 23 December 2009.
16 *Doğan Yayın Holding*, 11-18/341-103, 30 March 2011.
17 *ABBOTT*, 13-08/88-49, 31 January 2013.

be evaluated within the scope of aspects as increasing proportionality and retroactivity, among other things, and it should be determined whether the applied rebate scheme actually has loyalty-inducing and foreclosure effects.

In its *Luxottica* decision,[18] the Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems. In its *Frito Lay* decision,[19] the Board conducted a preliminary investigation against Frito Lay Gıda San Tic AŞ to examine whether Frito Lay abused its dominant position through, among other things, rebate schemes and ultimately concluded that there were no grounds or factors, leading the Board to initiate a full investigation against Frito Lay in connection with its rebate systems.

Moreover, the Board found that Unilever's rebate schemes in the market for industrial ice cream market have led to de facto exclusivity, thereby giving rise to abuse of Unilever's dominant position in the relevant market.[20]

Leveraging

Tying and leveraging are among the specific forms of abuse listed in article 6 of Law No. 4054. The Board has investigated many tying, bundling and leveraging allegations against dominant undertakings and has imposed administrative fines against incumbent telephone and internet operators in some cases to ensure they avoid tying and leveraging.[21]

In the *Google Android* case,[22] the Turkish Competition Board found that Google used its dominant position in the licensable smart mobile operating systems market and abused its dominance through leveraging its market power in the respective market through tying the search and app store services, engaging in exclusivity practices and preventing use of alternative services by the manufacturers.

Refusal to deal

Refusals to deal and access to essential facilities are forms of abuse that are frequently brought before the Authority; therefore, there are several decisions by the Board concerning this matter.[23]

18 *Luxottica*, 17-08/99-42, 23 February 2017.
19 *Frito Lay*, 18-19/329-163, 12 June 2018.
20 Unilever, 21-15/190-80, 18 March 2021.
21 *Türk Telekomünikasyon* AŞ, 16-20/326-146, 9 June 2016.
22 *Google Android*, 18-33/555-273, 19 September 2018.
23 *Congresium*, 20-39/538-239, 27 August 2020; *Turkcell/Vodafone*, 20-06/67-36, 23 January 2020; and *Türk Telekom*, 20-12/153-83, 27 February 2020.

In its *Radontek* decision,[24] the Board determined that Radontek held a dominant position in the markets for spare parts and repair and maintenance for CyberKnife-branded linear accelerator devices and conducted an analysis on whether the criteria for refusal to deal was present for the case at hand. To that end, it assessed whether:

- the services provided by Radontek were indispensable for competition in the downstream market;
- refusal to deal would likely to eliminate efficient competition in the downstream market; and
- refusal to deal would likely to cause consumer harm.

The Board concluded that Radontek had abused its dominant position in the relevant markets by indirectly refusing to deal by means of charging excessive prices for its services.

Discrimination

Both price and non-price discrimination may amount to abusive conduct under article 6 of Law No. 4054. In its *Philips* decision,[25] the Board assessed whether *Philips* had abused its dominant position in the market for subtitle technologies. It concluded that Philips' conduct of not announcing its licensing fees contradicted its commitment to license its standard essential patent on fair, reasonable and non-discriminatory terms and thereby amounted to discriminatory conduct. The *Philips* decision was later annulled by the 11th Administrative Court in Ankara in 2021.[26]

Exploitative abuses

Exploitative prices or terms of supply may be deemed to be an infringement of article 6 of Law No. 4054, 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 in a number of decisions.[27]

In a 2018 decision concerning Sahibinden.com (Sahibinden),[28] a multisided online platform, the Board investigated allegations that Sahibinden abused its dominant position in the markets for online advertisement services for real

24 *Radontek*, 18-38/617-298, 11 October 2018.
25 *Philips*, 19-46/790-344, 26 December 2019.
26 11th Administrative Court's *Philips* decision numbered 2020/1525 E 2021/1121 K, 3 June 2021
27 For example, see footnote 1, *Belko*, 01-17/150-39, 6 April 2001; and *Ortadoğu Antalya Liman* İşletmeleri AŞ, 20-48/666-291, 5 November 2020.
28 *Sahibinden.com*, 18-36/584-285, 1 October 2018.

estate and vehicles through excessive pricing. The Board found Sahibinden to be in violation of article 6 and imposed an administrative fine of 10,680,425.98 lira.

The *Sahibinden* decision was overturned by the Sixth Administrative Court in Ankara. The Court concluded that the Board could not prove:

- its claim that the relevant markets were not able to correct themselves in the short, medium or long term;
- whether the determination of excessive pricing solely through analysis of high pricing behaviour constitutes a reasonable approach (particularly in multisided platform economies); and
- that suppressing prices through an intervention outside the market mechanisms could possibly have positive outcomes.

The Court's annulment decision signals a higher standard of proof in excessive pricing cases, especially in respect of multisided online platforms.

Sector-specific abuse

Law No. 4054 does not recognise any sector-specific abuse or defences; therefore, a number of sectorial independent authorities have competence to regulate certain activities of the dominant firms in their relevant sectors.

For instance, according to the secondary legislation issued by the Information and Telecommunication Technologies Authority, firms with significant market power are prohibited from engaging in discriminatory behaviour between 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, and a new law entered into force in April 2020 in response to the covid-19 pandemic, which prohibits excessive price increases and supply restriction in the retail industry (regardless of whether the relevant company is dominant).

The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market; however, they do not imply any dominance control mechanisms, and the Authority remains the exclusive regulatory body that investigates and condemns abuse of dominance.

Enforcement

The Authority is responsible for enforcing competition law in Turkey. It is a legal entity with administrative and financial autonomy. It comprises the Board, presidency and service departments.

As the decision-making body of the Authority, the Board is responsible for, among other things, investigating and condemning abuse of dominance. The Board has six members and is seated in Ankara.

Technical departments of the Authority comprise six main divisions, all of which have a mandate to investigate abuse of dominance cases (among other competition law cases). There is a 'sectoral' job definition of each main division. A research department, a leniency unit, a decision unit, an information management unit, an external relations unit and a strategy development unit assist the six technical divisions and the presidency in the completion of their tasks.

The 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 those 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 or failure to produce in a timely manner may lead to a fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision. If incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed.

The Authority is authorised to conduct on-site investigations. Accordingly, it 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.

The Authority is also authorised to conduct dawn raids. Judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Computer records and email accounts used for business purposes are fully examined by the Authority's experts, including deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board, which must specify the subject matter and purpose of the investigation. Inspectors are not entitled to exercise their investigative powers (eg, copying records or recording statements by company staff) in relation to matters that do not fall within the scope of the investigation (ie, written on the deed of authorisation).

Refusing to grant Authority staff access to business premises may lead to a turnover-based fine of 0.5 per cent. The minimum amount of the fine is 47,409 lira for 2022.

Refusing to grant Authority staff access to business premises may also lead to a daily fine of 0.05 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) for each day of the violation.

In a 2018 case,[29] the Board imposed an administrative monetary fine on Mosaş Akıllı Ulaşım Sistemleri AŞ's (Mosaş) for obstructing an on-site inspection in the scope of a cartel investigation regarding alleged bid rigging. During the on-site inspection conducted at the undertaking's premises, Mosaş's employees cut off the electricity and internet connection, deleted emails, denied access to computers and also prevented case handlers from making copies of the reviewed documents.

The Board imposed two separate administrative fines on Mosaş: a fixed fine for obstructing the on-site inspection in the amount of 0.5 per cent of Mosaş's 2017 turnover, and a proportional fine of 0.05 per cent of Mosaş's 2017 turnover for each day that the violation continued (ie, until Mosaş invited the Authority for another on-site inspection).

In a 2019 case,[30] the Board imposed a turnover-based fine on Unilever at a rate of 0.5 per cent of its 2018 turnover for hindering an on-site inspection after access to Unilever's email system was not granted for a keyword-based review via e-discovery software for approximately eight hours during the on-site inspection.

In a 2021 case,[31] the Board imposed a turnover-based fine on Pasifik at a rate of 0.5 per cent of its 2020 turnover for the hindrance of an on-site inspection by deletion of emails.

The Guidelines on examination of digital data during on-site inspections stipulate that the case handlers of the Authority are entitled to conduct their examination on the relevant undertaking's IT systems (eg, servers, desktop or laptop computers and portable devices) and all data storage apparatus and mechanisms (eg, CDs, DVDs, USB sticks, external hard disks, backup records and cloud services) and also to utilise digital forensics software or hardware during their on-site inspection.

The Guidelines also envisage that portable devices (eg, mobile phones and tablets) may be subject to examination within the scope of an on-site inspection, unless, after a quick browse on the relevant device, the case-handlers decide that the device is allocated entirely for personal use.

29 *Mosaş*, 18-20/356-176, 21 June 2018.
30 *Unilever*, 19-38/584-250, 7 November 2019.
31 *Pasifik*, 21-24/279-124, 29 April 2021.

Sanctions and remedies

The sanctions that may be imposed for abuse of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the undertakings concerned will 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.

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 Law No. 5326 on misdemeanours.

There is also a Regulation on Fines,[32] according to which, when calculating fines, the Board takes into consideration a number of factors in determining the magnitude of the fine, such as the level of fault and the amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings and compliance with the commitments, among other things.

In addition to a 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 to restore the level of competition and status as it was before the infringement. Additionally, contracts that give way to or serve as a vehicle for abusive conduct may be deemed invalid and unenforceable because of violation of article 6.

The highest fine to date in relation to abuse of a dominant position was imposed on Tüpraş, a Turkish energy company, which incurred an administrative fine of 412 million lira, equal to 1 per cent of its annual turnover for the relevant year.[33]

Availability of damages

Article 57 et seq of Law No. 4054 entitles any person who is injured in their business or property by reason of anything forbidden by the antitrust laws to sue the violators to recover up to three times their personal damage, plus litigation costs and attorney fees. In private suits, the incumbent firms are adjudicated before regular civil courts.

32 Regulation No. 27142 of 16 February 2009.
33 See footnote 1.

Because the triple-damages principle allows litigants to obtain three times their loss as compensation, private antitrust litigation has increasingly been making its presence felt in the article 6 enforcement arena.

Recent enforcement action

The recent enforcement trend at the Authority shows that it has directed its attention towards refusal to supply and exclusive dealing cases; it has conducted several pre-investigations and investigations with regard to refusal to supply. These cases include the *Daichii Sankyo* and *Türkiye Petrol Rafinerileri* pre-investigations[34] and the *Zeyport Zeytinburnu*, *Kardemir Karabük Demir Çelik* and *Radontek Medikal* investigations.[35]

In respect of exclusive dealings, the Authority has conducted several pre-investigations, including *Mars Media* and *Frito Lay*.[36] Furthermore, the Board imposed a fine of 17.5 million lira following an investigation of Trakya Cam for de facto application of the exclusive distribution agreements of 2016, which were found to be in violation of articles 4 and 6 of Law No. 4054 in the Board's Decision No. 15-42/804-258 of 14 December 2017.

Continuing investigations involving abuse of dominance allegations include high-profile investigations against:

- Facebook and WhatsApp (initiated on 11 January 2021) to determine whether the data-sharing requirement imposed on WhatsApp users constitutes a form of abuse;
- Sahibinden.com (initiated on 15 October 2020) to determine whether Sahibinden's conduct in the market for online platform services for real estate and vehicle sales amounted to abuse of dominant position; and
- Trendyol (initiated on 23 September 2021) to determine whether Trendyol's use of algorithms and handling of third-party data are aimed at favouring its own products and discriminating between sellers on its platform, and therefore constitute abuse of dominance.

More recent landmark decisions regarding abuse of dominance issued by the Board include the following:

34 *Daichii Sankyo*, 18-15/280-139, 22 May 2018; and *Türkiye Petrol Rafinerileri*, 18-19/321-157, 12 June 2018.
35 *Zeyport Zeytinburnu*, 18-08/152-73, 15 March 2018; *Kardemir Karabük Demir Çelik*, 17-28/481-207, 7 September 2017; and *Radontek Medikal*, 18-38/617-298, 11 October 2018.
36 *Mars Media*, 18-03/35-22, 18 January 2018; and *Frito Lay*, 18-19/329-163, 12 June 2018.

- in *Mey İçki*,[37] the Board concluded that Mey İçki has been in violation of abuse of dominance, but also accepted Mey İçki's defence of *non bis in idem* and did not impose a further administrative monetary fine under article 16 of Law No. 4054;
- in *Google Shopping*,[38] the Board concluded that Google has been using its dominant position in the general search engine market to unfairly prioritise its products in the online shopping comparison services market against its competitors;
- in *Google Adwords*,[39] the Board concluded that Google abused its dominant position via its updates in the general search engine market and Adwords;
- in *Google Location and Accommodation Price Comparison*,[40] the Board concluded that Google abused its dominant position in the market for general search services by excluding its competitors in the markets for local search and accommodation price comparison services;
- in *Ortadoğu Antalya Liman İşletmeleri AŞ*,[41] the Board concluded that Port Akdeniz abused its dominant position by applying excessive prices in the container handling services market;
- in *Unilever*,[42] the Board concluded that Unilever's rebate schemes in the market for industrial ice cream market have led to de facto exclusivity, thereby giving rise to abuse of Unilever's dominant position in the relevant market; and
- in *Mey İçki*,[43] the 13th Chamber of the Council of State upheld the Board's analysis within the scope of its decision regarding the allegations that Mey İçki violated article 6 of Law No. 4054 through exclusionary practices in the vodka and gin markets and affirmed that Mey İçki could not be penalised repeatedly on the basis of the same conduct.[44]

The following noteworthy investigations were closed with a no-fine decision: *Biletix*;[45] *Türk Telekom*;[46] *Turkcell & Vodafone*;[47] *Meram Elektrik*;[48] and *Tirsan/Tiryakiler*.[49]

37 *Mey İçki*, 21-13/173-74, 11 March 2021.
38 *Google Shopping*, 20-10/119-69, 13 February 2020.
39 *Google Adwords*, 20-49/675-295, 12 November 2020.
40 *Google Location and Accommodation Price Comparison*, 21-20/248-105, 8 April 2021.
41 *Ortadoğu Antalya Liman İşletmeleri AŞ*, 20-48/666-291, 5 November 2020.
42 *Unilever*, 21-15/190-80, 18 March 2021.
43 *Mey İçki*, 20-28/349-163, 11 June 2020.
44 Decisions numbered 2020/1939 E, 2020/3507 K and 2020/1941 E, 2020/3508 K and dated 2 December 2020.
45 *Biletix*, 21-04/53-22, 21 January 2021.
46 *Türk Telekom*, 20-12/153-83, 27 February 2020.
47 *Turkcell & Vodafone*, 20-06/67-36, 23 January 2020.
48 *Meram Elektrik*, 19-40/669-287, 14 November 2019.
49 *Tirsan/Tiryakiler*, 19-19/283-121, 23 May 2019.

GÖNENÇ GÜRKAYNAK

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Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. Gürkaynak graduated from Ankara University, Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. Gönenç received his LLM degree from Harvard Law School and is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, he worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Gönenç heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently comprises 47 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Gönenç represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, around 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 European Commission competition law topics.

Gönenç frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish with various international and local publishers.

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O Onur Özgümüş is a partner at ELIG Gürkaynak Attorneys-at-Law. Onur graduated from Koç University School of Law in 2008. He was admitted to the Istanbul Bar in 2009. Before joining ELIG Gürkaynak Attorneys-at-Law in 2014, Onur worked at reputable law firms in Istanbul. He has extensive experience in all areas of competition law including compliance to competition law rules, cartel agreements, abuse of dominance cases, merger control and investigations.

He has represented various multinational and national companies before the Turkish Competition Authority and before administrative courts. He is fluent in English.

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our founding partner Gönenç Gürkaynak, with four partners, eight counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases and leniency handlings and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis on a wide range of business transactions that almost always involve antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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