# THE DOMINANCE AND MONOPOLIES REVIEW

Tenth Edition

**Editors**
Maurits Dolmans, Henry Mostyn and Patrick Todd

THE LAWREVIEWS

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TENTH EDITION

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# PREFACE

It seems apt that in the preface to *The Dominance and Monopolies Review*'s 10th edition we confront the existential question facing the law governing unilateral conduct. That is: is *ex post* antitrust enforcement dying out?

Antitrust enthusiasts have three main reasons to be nervous. First, a decade of debate about under-enforcement has resulted in a wave of multi-jurisdictional regulatory initiatives to constrain the behaviour of large digital platforms and open up digital markets to more competition. These proposals vary, but tend to govern conduct that would traditionally have been subject to *ex post* antitrust enforcement. Second, authorities are turning to alternative tools to tackle unilateral conduct, such as market studies. Third, some perceive that authorities face a high evidentiary burden of successfully bringing abuse cases. Put together, these trends could leave a diehard abuse of dominance practitioner in low spirits about antitrust's future, at least in digital markets.

But other developments give cause for hope. Authorities remain adamant that digital regulations will complement rather than replace their existing abuse toolboxes, and that they will continue to investigate conduct that falls outside the scope of new regulation. Agencies, in particular the UK Competition and Markets Authority (CMA), have used their existing enforcement powers nimbly to open investigations and secure commitments from defendant companies quickly. And recent cases affirm that the abuse toolbox is not inflexible, putting into practice the classic mantra that the categories of abuse are not closed. There is space for abuse of dominance rules to be applied flexibly to conduct not previously explored, for example in relation to sustainability, although this raises separate issues regarding certainty for businesses.

As these trends and developments show, the law governing abuses of dominance, and the role it plays in competition policy, are constantly evolving and becoming more complex, bringing new challenges for businesses and practitioners to navigate. To provide some respite, this 10th edition of *The Dominance and Monopolies Review* seeks to provide 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, as previewed above.

## i Antitrust v. regulation

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. Mostly, these proposed regulations cover similar themes, such as prohibiting leveraging and self-preferencing, mandating interoperability and maximising user control over choices online.

Perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), has formulated *ex ante* 'dos and don'ts' for large gatekeeper platforms. The UK has set up a digital markets unit (DMU) to create enforceable conduct requirements for companies with 'strategic market status'. While the legislation giving the DMU necessary enforcement powers has not yet been introduced, the DMU is operating in 'shadow' form to operationalise enforcement of the new regime. The CMA has also conducted two market studies into digital advertising and online platforms and mobile ecosystems to identify activities that should be subject to the regime. In Germany, the German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'paramount cross-market significance' (PCMS). In essence, the law enables the Bundeskartellamt to designate firms as holding PCMS, and then to impose *ex ante* prohibitions on certain defined practices. The Bundeskartellamt adopted its first PCMS decision against Google in 2021, and a second PCMS decision against Meta in 2022. In the US, the American Innovation and Choice Online Act, which would regulate similar conduct as its foreign counterparts, is currently before the US Senate.

It is perhaps understandable that regulators and legislators seek to regulate rather than pursue individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex and require proof that harm has or is likely to occur. As Commissioner Vestager has explained as the motivation for 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.'

The DMA will prohibit conduct directly covered by past and current abuse of dominance cases. For example, the DMA's prohibition on self-preferencing targets conduct that was the subject of the Commission's 2017 *Google Shopping* decision, currently on appeal to the CJEU. The DMA's prohibition on gatekeepers using non-publicly available data generated or provided by their business users to compete with those business users would address the conduct challenged in the Commission's ongoing investigations into Amazon and Meta. And the prohibition on gatekeepers requiring business users to use the gatekeeper's own payment service would address conduct alleged in the Commission's ongoing investigation into Apple.

Rules that are set to be enacted in the UK and US are similarly expected to displace antitrust enforcement against digital platforms like Amazon, Meta, Apple and Google. Unlike in the EU, though, these regimes appear to 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 regime 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. That seems a better approach – for competition and consumers – and it is troubling that the DMA does not contain any analogous provision.

How will these new rules affect antitrust enforcement in digital markets? Will abuse of dominance give way completely to *ex ante* regulation?

We think not. As Commissioner Vestager said recently, antitrust and regulation 'are complementary – both will remain necessary. No one should expect the new [DMA] to replace Article 101 and 102 enforcement actions.' There are at least three reasons why there is space for antitrust enforcement to carry on – and expand – when regulation provides additional recourse.

First, though the DMA is broad, it applies to a discrete set of firms (those designated as gatekeepers), products/services (designated as 'core platform services') and practices (set out in the text of the DMA). Forms of conduct that fall between the cracks will therefore have to be addressed by traditional antitrust enforcement. For example, the DMA focuses on consumer-facing digital products and services, and practices involving business-to-business services could potentially slip through the net. The Commission is currently investigating various practices by Microsoft in relation to its collaboration software, Teams, and infrastructure-as-a-service software, Azure, following allegations of unlawful tying, bundling, and denial or degradation of interoperability. The Commission and the CMA also recently announced concurrent investigations into an agreement between Meta and Google (Jedi Blue), alleging that it could distort competition in the online display advertising market. And that's just digital markets. Antitrust enforcement has played, and will continue to play, a role in traditional markets. Recent cases in the EU and UK cover non-digital industries such as pharmaceuticals, electricity trading services and electric vehicle charge points.

Second, at least in the near term, antitrust enforcement remains the only recourse even for conduct that may be covered by forthcoming regulation. The DMA does not come into force until 2024, and UK and US equivalent laws are likely to be further away still. In February 2022, the chair of the House of Lords Communications and Digital Committee wrote to the CMA, urging it to take a 'more robust approach to using [its] existing enforcement powers' given that the 'new legislation could take a significant amount of time to come into force'. By way of reply, in March 2022, the CMA stated that it had 'identified options for taking further action in digital markets under [its] market investigation and competition enforcement tools, ahead of the DMU receiving its powers'.

Third, recent cases showcase the potential for abuse of dominance cases to be opened, investigated and closed quickly, parrying the oft-cited concern that abuse of dominance cases close the stable door after the horse has bolted. In the UK, the CMA opened an investigation into Google's proposal to remove third-party cookies from its Chrome browser, tested two rounds of commitments and closed its case in just over one year. It quickly opened an investigation into exclusivity contracts for electric vehicle charge points on motorways and secured commitments from the parties following a market study.

We therefore expect antitrust cases to continue to play an important role in maintaining competitive markets, even in the digital sector.

### ii The evidentiary burden for authorities in abuse of dominance cases

Antitrust law has long suffered from the criticism that the existing abuse toolbox is too unwieldy – and the standard of proof for authorities too high – for necessary antitrust cases to be sustainable, in particular in the US. In its 2020 report on digital markets, for example, the US House of Representative antitrust subcommittee said, 'In the decades since Congress

enacted [the Sherman, Clayton, and FTC Acts], the courts have significantly weakened these laws and made it increasingly difficult for federal antitrust enforcers and private plaintiffs to successfully challenge anticompetitive conduct and mergers'.

In recent years, the perception that antitrust cases are prohibitively hard to bring appears to have subsided as authorities have opened more cases. In 2021 and early 2022, the CMA opened seven new abuse of dominance cases, having not opened any in 2020. The European Commission, for its part, opened six new abuse of dominance investigations, and US authorities have also been relatively active recently, following years of inaction compared with their European counterparts.

The European Commission has been the pioneer of big ticket antitrust cases in the past decade, issuing record-breaking fines to Intel, Google and Qualcomm. In 2022, though, the General Court partially annulled the Commission's 2009 decision imposing a €1.06 billion fine on Intel for abusing its dominant position through the granting of exclusivity-conditioned rebates. The judgment followed an initial General Court judgment in 2014 concluding that exclusivity rebates by dominant undertakings are per se abusive, regardless of the circumstances of the case, and that the Commission did not therefore have to establish that Intel's conduct was capable of restricting competition and there was no need for the General Court to review the Commission's as-efficient competitor (AEC) test. In 2017, the CJEU overturned the General Court's judgment, explaining that, although exclusivity rebates are presumptively unlawful, the presumption is rebuttable if the defendant shows that the conduct is not capable of restricting competition and foreclosing AECs.

In 2022, the General Court rendered a *renvoi* judgment annulling in part the Commission's decision and the fine in full. Applying the CJEU's judgment, the General Court found that the Commission had not established to the requisite legal standard that the rebates were capable of having, or were likely to have, anticompetitive effects. In particular, the Court identified errors in the AEC tests carried out by the Commission and found that the decision failed to properly consider two of the five criteria identified by the Court of Justice to assess rebates' ability to restrict competition, namely their market coverage and duration. Because it was not possible to identify the amount of the fine that related solely to the 'naked restrictions', which in the General Court's view the Commission correctly qualified as per se unlawful, the General Court annulled the entire fine.

The case establishes – at least in respect of exclusionary discounts – that if authorities choose to assess the anticompetitive effects of presumptively unlawful conduct, they must get that assessment right. Officials have claimed that the judgment raises the bar of enforcement to an unacceptably high level. Andreas Mundt, head of the German competition authority, said that the judgment 'might lead to a situation where the law becomes unenforceable because it takes even more time, it gets even more complex'. We disagree. The case establishes a roadmap for authorities to follow and guardrails to operate within when assessing exclusionary discounts. For example, the General Court criticised the Commission for running its AEC analysis in respect of a short time period, then extrapolating its analysis to cover a longer period. That approach is insufficient, which authorities will recognise going forward. Cases like *Microsoft (Windows Media Player)* show that, where the Commission appreciates that an effects-based analysis is required, it can undertake such an analysis and survive judicial review.

### iii Expanding the abuse toolbox

Finally, recent EU and UK cases have shown that the abuse toolbox can be applied flexibly to new forms of conduct not previously examined by the courts.

In November 2021, the General Court upheld the Commission's decision finding that Google had committed an abuse by favouring its own comparison shopping service (CSS). The Commission previously found that Google positioned and displayed, in its general search results pages, its own CSS more prominently than competing CSSs. The Commission imposed on Google a fine of €2.42 billion. In the judgment, the General Court largely dismissed Google's appeal against the Commission's decision and confirmed the amount of the fine.

The General Court rejected Google's argument that the Commission should have established the legal conditions for a duty to supply (indispensability and risk of eliminating competition), because the case related to the issue of access to prominent placement on Google's results pages. The General Court accepted that the case is not 'unrelated to the issue of access', but it found the conduct 'can be distinguished in their constituent elements from the refusal to supply'. On that basis, the General Court held that the conduct constituted an 'independent' abuse, separate from a refusal to supply. Accordingly, the Commission was not required to show that the duty to supply conditions were met.It remains to be seen whether this legal test will survive on appeal, but it shows the Commission can apply the existing tools flexibly.

Another case showcasing the elasticity of the abuse toolbox comes from the UK. In October 2021, the Competition Appeal Tribunal (CAT) certified opt-out collective proceedings and rejected a claim for summary dismissal in *Justin Gutmann v. First MTR South Western Trains and Stagecoach South Western Trains*. The proceedings arose out of allegations that certain rail companies failed to use their best endeavours to ensure awareness among their customers of boundary fares (i.e., fares for travel to and from outer boundaries of Transport for London's rail zones) so that customers who took journeys beyond the outer zone covered by their Travelcard would not purchase a fare covering the totality of their journey (thereby paying for parts of their journeys twice). This, the proposed class representative claimed, constituted an exploitative abuse of dominance.

In response to the defendants' claim for strike out, the CAT held that the case on abuse was reasonably arguable. If the charging of unfair and excessive prices, or the use of unfair trading terms, by a dominant company can constitute an abuse, the CAT did not regard it as 'an extraordinary or fanciful proposition to say that for a dominant company to operate an unfair selling system, where the availability of cheaper alternative prices for the same service is not transparent or effectively communicated to customers, may also constitute an abuse'. In doing so, it held that the 'law on what constitutes unfair trading conditions, in particular, is in a state of development'.'

It also referred to the 2019 decision of the German Federal Cartel Office that Facebook had abused its alleged dominance by not giving its users a genuine choice over whether it could engage in unlimited collection of their personal data from non-Facebook accounts as one that was 'challenged as an extension of the boundaries of the law on abuse of dominance'. That case is making its way through the German appellate courts, and is pending the outcome of a preliminary ruling by the CJEU.

These cases remind us that, at least in the EU and UK, the existing abuse of dominance toolbox can be adapted to confront novel abuses (albeit with a high risk of judicial scrutiny). There is, for example, no inherent reason why sustainability could not be incorporated into an abuse of dominance assessment. Analyses of pricing practices could take environmental costs into account: the concept of 'competition on the merits' could include competition on sustainability (and reject competition based on overexploitation of public goods), and there

could be *sui generis* abuses that involve unsustainable business practices that also restrict competition. In addition, conduct that might otherwise be abusive could be excused because of sustainability-based objective justification.

With extensions of the case law, however, come increased uncertainty for businesses planning their practices. *Google Shopping*, for example, extends the law governing the circumstances in which dominant firms will be forced to provide access to a facility to their rivals, without that asset necessarily being indispensable for those rivals to compete.

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 10th edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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Cleary Gottlieb Steen & Hamilton LLP
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June 2022

**Chapter 22**

# TURKEY

*Gönenç Gürkaynak*[1]

## I INTRODUCTION

The main legislation governing behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054), which was last amended on 24 June 2020 (Amendment Law). 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

1 Gönenç Gürkaynak is the founding partner of 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.

note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance, in acquisitions) 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: 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 an abuse of dominance. For instance, in 2020, the Turkish Competition Board (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 has rejected an acquisition or a merger. In this instance, the Board 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] In addition, in a recently published decision, the Board conditionally approved the acquisition of shares of HAL Optical Investments BV, a fully controlled subsidiary of Hal Holding NV, under GrandVision NV, by EssilorLuxottica SA (Essi-Lux),[5] as a result of its findings, among others, that certain customers may fulfil most of their supply needs via Essi-Lux, which may lead to customer foreclosure and strengthen Essi-Lux's leading position in these markets. The Board, in the end, found that the behavioural commitments of Essi-Lux adequately addressed these competitive concerns.

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.[6]

Finally, on developments related to the digital sector, the president of the Competition Authority announced on 8 April 2021 that the Competition Authority had initiated a digital markets legislation study to quickly identify the competition problems stemming from digital transformation and to take the necessary steps to resolve these problems in a timely manner.

## II YEAR IN REVIEW

According to the Competition Authority's statistics for 2021, the Board rendered a decision in 40 pre-investigations or investigations, out of a total of 74, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Further, 23 finalised (including preliminary and full) investigations were carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position

3 The significant impediment of effective competition test.

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

5 *Essilor Luxottica*, 21-30/395-199, 10 June 2021.

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

in a market for goods or services within the whole or part of the country. The Board also decided on 11 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.

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 provide access to essential facilities.[7]

The first cases to be concluded through the application of the commitment mechanism took place in 2020. 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 and 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 issued 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.

In another important decision where both settlement and commitment mechanisms were implemented, the Board had initiated a full-fledged investigation against Singer sewing machines on 4 March 2020.[8] In its investigation, the Authority assessed that the dealership agreements Singer had with its resellers included a non-compete clause that exceeded the time limit set by the legislation (i.e., five years), alongside resale price maintenance practices. During the investigation, Singer applied both settlement and commitment mechanisms. While Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied to the Authority for conclusion of the investigation through a settlement mechanism by accepting its resale price maintenance violation. The Board accepted Singer's commitments, as it was deemed that the commitments were adequate to restore competition.[9] Further to its acceptance of the commitments, the Board evaluated Singer's settlement application, accepting the settlement application and rendering its decision to decrease the administrative monetary fine by 25 per cent for a resale price maintenance violation.[10]

7 *MDF/Chipboard*, 21-18/229-96, 1 April 2021, *D-Market* , 21-22/266-116, 15 April 2021, *Türk Telekom II* (16 April 2020, 20-20/267-128), *Türk Telekom I*, 20-12/153-83, 27 February 2020; *Varinak*, 19-45/768-330, 19 December 2019, *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.

8 Decision No. 21-11/147-M.

9 *Singer* 21-42/614-301, 9 September 2021.

10 *Singer* 21-46/672-336, 30 September 2021.

High-profile investigations of the Competition Authority regarding abuse of dominance that were ongoing at the time of writing are listed 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 |
| DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (Trendyol) | Self-favouritism and discriminating between sellers on its platform | 23 September 2021 |

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 |
| Unilever Sanayi ve Ticaret Türk AŞ (21-15/190-80, 18 March 2021) | Causing de facto exclusivity by preventing sales of competitor products | The Board concluded that Unilever's rebate schemes in the market for industrial ice cream had led to de facto exclusivity, thereby giving rise to an abuse of Unilever's dominant position in the relevant market |
| Mey İçki San ve Tic AŞ (21-13/173-74, 11 March 2021) | Hindering the activities of a competitor | The Board concluded that Mey İçki is in a dominant position in the raki market and abused its dominant position by way of complicating the activities of a competitor. However, the Board accepted Mey İçki's defence of *ne bis in idem* and did not impose a further administrative monetary fine under Article 16 of Law No. 4054 |
| Ortadoğu Antalya Liman İşletmeleri AŞ (22-11/169-68, 3 March 2022) | Hindering the activities of a competitor | The Board concluded that Ortadoğu Antalya Liman İşletmeleri AŞ is in a dominant position in the market for container handling services, and that the practices of Ortadoğu Antalya Liman İşletmeleri AŞ led to the hindrance of the activities of its competitors within that market |

## III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054: '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.[11]

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 and 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 position 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 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.[12]

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

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

12 See, for example, *ArkemAktaş*, 25 February 2021, 21-10/140-58; *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) has been reviewed under Article 4 (restrictive agreement rules). The *Booking.com* and *Trakya Cam* decisions are examples of this trend. In *Booking.com*,[13] 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 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*,[14] 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,[15] 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 form a non-exhaustive list, and fall 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;

*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 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

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

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

15 No. 15-42/704-258.

dominance. Further, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.[16] 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.[17] 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.[18] High standards are usually observed for bringing forward predatory pricing claims as seen in the Board's *Sony Eurasia* decision, in which the Board concluded that prices being set below cost for a limited amount of time was not enough to determine an Article 6 violation.[19]

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.[20]

#### *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.[21]

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 30 per cent. Therefore, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single-branding arrangements.

16 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.

17 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.

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

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

20 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.

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

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*,[22] 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 daily newspapers by applying loyalty-inducing rebate schemes.[23] In 2017, the Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems.[24]

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.[25] Moreover, in terms of single branding obligations, one of the most recent decisions of the Board scrutinises Unilever's rebate schemes in the market for industrial ice cream, which the Board found led to de facto exclusivity.[26]

***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.[27] In the *Google Android* 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.[28]

***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.[29]

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

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

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

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

26 *Unilever*, 21-15/190-80, 18 March 2021.

27 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.

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

29 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,

***Role of economics, in particular the as-efficient competitor test in investigations and litigation involving exclusionary abuses***

The Board usually uses the as-efficient competitor test to analyse whether competitors could be excluded from the market due to predatory pricing. Accordingly, in cases where the Competition Authority finds that an equally efficient competitor can effectively compete with an undertaking imposing predatory prices, in principle, it will not intervene based on the consideration that the pricing practice of the relevant undertaking does not have a negative effect on effective competition, and therefore consumers.[30] If, however, the pricing of the relevant undertaking has the potential to exclude equally efficient competitors, then the Competition Authority will consider this in its assessment of general anticompetitive foreclosure, taking into account other relevant quantitative and qualitative evidence. More specifically, the pricing strategies of the undertaking would be considered exclusionary for as-efficient competitors if its competitors are not able to apply effective counter-strategies for the contested portion of customers' demands (without pricing below cost). For completeness, the Competition Authority may also consider the impact on less efficient competitors.[31] However, this is exceptional, and the Board generally favours the as-efficient competitor test to avoid false positives and deterring competition.[32]

In addition, for the assessment of whether there is anti-competitive foreclosure through a price squeeze, the Guidelines on Abuse of Dominance state that the margin between the upstream and downstream products must be so low as to ensure that a competitor that is as efficient as the undertaking dominant in the upstream market would be unable to profit and operate in the downstream market on a lasting basis.[33]

### 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.[34]

### 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.[35] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its

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, *MDF/Chipboard*, 21-18/229-96, 1 April 2021, *D-Market*, 21-22/266-116, 15 April 2021, *Türk Telekom II*, 16 April 2020, 20-20/267-128.

30 See *Çiçek Sepeti* 18-07/111-58, 8 March 2018.

31 *UN Ro-Ro* 12-47/1413-474, 1 October 2012.

32 *Türk Telekom* 16-15/254-109, 3 May 2016.

33 The Guidelines on Abuse of Dominance, paragraph 62. Also see *Knauf* 09-59/1441-376, 16 December 2009.

34 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.

35 See, for example, *Port Akdeniz*, 20-48/666-291, 5 November 2020, *Sahibinden*, 18-36/584-285, 1 October 2018, *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 Board did not initiate a full investigation in *Soda*).

above-mentioned reluctance to micromanage pricing behaviour. Additionally, Ankara's 6th Administrative Court overturned the Board's judgment that Sahibinden's pricing behaviour in the market for online platform services for vehicle sales and real estate sales and rental had been excessive due to the lacking standard of proof, recognising that interference in pricing behaviour is a rare occurrence.[36]

## 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 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*,[37] 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.

36 E. 2019/946, K. 2019/2625, 18 December 2019.
37 *Tüpraş*, 14-03/60-24, 17 January 2014.

### 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.

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. The parties are allowed to submit commitments until three months following the official service of the investigation notice. 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 there is a substantial alteration in any of the factors on which the decision was based; the relevant undertakings or associations of undertakings act in violation of the commitments given; or 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 2022 is 47,409 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. 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.

Additionally, as stipulated under the Amendment Law and the Guidelines on Examination of Digital Data during On-site Inspections, the Board can also inspect and make copies of all information and documents held in the electronic mediums and information systems of the companies. The Guidelines also enable the Competition Authority to examine mobile devices (such as mobile phones and tablets) unless it is determined that such devices are solely for the personal use of a given employee. Regardless, the Board is authorised to conduct a quick review of any portable electronic device to ascertain the intended purpose.

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 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. 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 2022 is 47,409 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. In 2020, the Board imposed an administrative fine of 0.5 per cent of its gross revenues on Medicana Samsun Özel Sağlık Hizmetleri AŞ for hindering on-site inspections.[38] In addition, in its recent *Sahibinden* and *Pasifik* decisions, the Board once again imposed an administrative fine of 0.5 per cent of their gross revenues in 2020 pursuant to Article 16 of Law No. 4054 on the basis of hindering on-site inspections.[39]

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.[40]

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.

38 *Medicana Samsun* 21-31/400-202, 17 June 2021.

39 *Sahibinden* 21-27/354-174, 27 May 2021 and Pasifik 21-24/279-124, 29 April 2021.

40 Article 27, Administrative Procedural Law.

## 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 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.

## 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, inter alia, the following key changes:

*a* the *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* a 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; and

*c* a 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.

Furthermore, the Board has enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position published on 16 March 2021 alongside the Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 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 the electronic media and information systems during on-site inspections. Lastly, as per Communiqué No: 2021/3 on Agreements, Concerted Practices and Decisions and Practice of Associations of Undertakings That Do Not Significantly Restrict Competition, promulgated

in the Official Gazette on 16 March 2021, the *de minimis* principle would apply to following agreements that are deemed not to restrict competition in the market significantly:

*a* the agreements signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement; and

*b* the agreements signed between non-competing undertakings, if the market share of each of the parties does not exceed 15 per cent in any of the relevant markets affected by the agreement.

Moreover, the *de minimis* principle is not applicable to 'naked and hardcore violations', which are:

*a* price fixing between competitors; allocation of customers, suppliers, regions or trade channels; restriction of supply amounts or imposing quotas; collusive bidding in tenders; and sharing competitively sensitive information including future prices, output or sales amounts; and

*b* resale price maintenance between vertically related undertakings (i.e., setting fixed or minimum resale price levels for purchasers).

In addition, as a very recent development, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board was amended by Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (Amendment Communiqué), which was published in the Official Gazette on 4 March 2022 and will enter into force on 4 May 2022. In accordance with the Amendment Communiqué, transactions that will be closed (i.e., a concentration will be realised) as of or after 4 May 2022 will be required to be notified in Turkey if one of the following alternative turnover thresholds is met:

*a* the combined aggregate Turkish turnover of all the transaction parties exceeds 750 million lira and the Turkish turnover of each of at least two of the transaction parties exceeds 250 million lira; or

*b* the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira; or the Turkish turnover of any of the parties in mergers exceeds 250 lira million and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

Further to the Amendment Communiqué, the 'Turkish turnover threshold of 250 million Turkish liras' mentioned therein will not be sought for acquired undertakings active in certain fields or assets related to these fields if they:

*a* operate in the Turkish geographical market;

*b* conduct research and development activities in the Turkish geographical market; or

*c* provide services to Turkish users.

The fields and related assets include:

*a* digital platforms;

*b* software or gaming software;

*c* financial technologies;

*d* biotechnology;

*e* pharmacology;

*f* agricultural chemicals; and
*g* health technologies.

In Turkey, similar to the rest of the world, technologies and digital platforms are on 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. The president of the Competition Authority announced on 8 April 2021 that the Authority has initiated a digital markets legislation study to quickly identify the competition problems stemming from the digital transformation and to take the necessary steps to resolve these problems in a timely manner. On 7 May 2021, the Competition Authority published its preliminary report on the e-marketplace sector inquiry. Moreover, during the past year, the Competition Authority has issued covid-19 pandemic-related infringement warnings to various stakeholders. Finally, the Authority published its assessment report regarding financial technologies in payment services, which focuses on payment services and fintech ecosystems, on 9 December 2021.

**Appendix 1**

# ABOUT THE AUTHORS

## GÖNENÇ GÜRKAYNAK

*ELIG Gürkaynak Attorneys-at-Law*

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 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 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, 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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