THE DOMINANCE AND MONOPOLIES REVIEW

ELEVENTH EDITION

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THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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ISBN 978-1-80449-176-8

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

BAKER & MCKENZIE LLP

BECCAR VARELA

BERNITSAS LAW

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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VINGE

Chapter 20

TURKEY

Gönenç Gürkaynak[1]

I INTRODUCTION

The main legislation governing the 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 Authority is working on digital market regulations and mentions the Digital Markets Act (DMA) as a basis for these regulations. The amendment is expected to constitute the most drastic change to the law on digital markets and is speculatively expected to compound the EU DMA with increasing antitrust focus on digital markets. However, the proposed text of the Act is not publicly available, and its details remain unknown.

II YEAR IN REVIEW

According to the Competition Authority's statistics for 2022, the Board rendered a decision in 58 pre-investigations or investigations, out of a total of 78, 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, 14 finalised (including preliminary and full) investigations were carried out on the basis of allegations regarding

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.

violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Board also decided on six 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]

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.

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]

In a recent investigation concerning whether Tadım Gıda Maddeleri San ve Ticaret AŞ (Tadım), a supplier of packaged dried nuts, violated Article 4 of the Law No. 4054 through resale price maintenance and Article 6 of the Law No. 4054 through abusing its dominant position in the packaged dried nuts market with exclusionary practices and making it difficult for its competitors to operate in the market, the Board decided that Tadım's discount and display practices are likely to create de facto exclusivity at the final points of sale in the traditional channel, preventing the sale of competing products and excluding competitors from the packaged dried nut market in Turkey. The investigation was finalized upon Tadım's commitment application, as the Board decided that the commitments offered by Tadım were appropriate to eliminate the competition law concerns identified during the preliminary investigation and full-fledged investigation phases, and therefore no administrative monetary fine was imposed against Tadım.[11]

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
DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (regarding the brands TrendyolMilla, TrendyolMan and TrendyolKids)	Self-favouritism and discriminating between sellers on its platform	23 September 2021
DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (regarding the Dolap brand)	Self-favouritism	13 June 2022
Align Tech Turkey Tıbbi Cihazlar Limited Şirketi	Excessive pricing	17 June 2022
Sahibinden Bilgi Teknolojileri Paz ve Tic AŞ	Excessive pricing	30 June 2022
Tetra Laval Holding – Finance SA	Abuse of dominant position by exclusionary practices	29 December 2022
Alphabet Inc, Google LLC, Google International LLC, Google Ireland Limited and Google Reklamcılık ve Pazarlama Ltd Şti (23-03/27-M)	Tying and self-favouritism (general search services market)	12 January 2023
Alphabet Inc, Google LLC, Google International LLC, Google Ireland Limited ve Google Reklamcılık ve Pazarlama Ltd Şti (23-23/432-M)	Tying and self-favouritism (online video advertising and ad technology services)	18 May 2023

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.

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

11 *Tadım*, 22-32/505-202, 07 July 2022.

Investigated party and case information	Case type	Conclusion
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.
Krea İçerik Hizmetleri ve Prodüksiyon AŞ (22-03/48-19 of 13 January 2022)	Excessive pricing and discriminating between buyers	The Board concluded that Digiturk had not abused its dominant position in the absence of sanction mechanisms or evidence of excessive pricing practices and discrimination among its buyers.
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.
Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik AŞ (22-23/366-155 of 18 May 2022)	Causing de facto exclusivity by discriminatory practices	The Board concluded that there was no need to conduct a fully-fledged investigation against Yemek Sepeti. However, Board remarked that from 2019 onwards, the market structure of the 2015–2020 period has changed by means of the new entries into the market.
Tadım Gıda Maddeleri San ve Tic AŞ (22-32/505-202 of 7 July 2022)	Hindering the activities of a competitor	The Board concluded that Tadım had abused its dominant position in the packaged dried nuts market. Further to commitments offered by Tadım, the board concluded the investigation by approving the proposed commitments and making them binding on Tadım.
Nadirkitap Bilişim ve Reklamcılık AŞ (22-15/273-122 of 7 April 2022)	Causing de facto exclusivity by preventing sales of competitor products	The Board concluded that Nadirkitap had violated Article 6 of Law 4054 by hindering the activities of competitors through its failure to provide the data sets of seller members that wished to market their products through rival intermediary service providers. The board imposed an administrative monetary fine on Nadirkitap.

Investigated party and case information	Case type	Conclusion
Krea İçerik Hizmetleri ve Prodüksiyon AŞ (22-44/652-281 of 29 September 2022)	Excessive pricing and discriminatory practices	The Board concluded that Digiturk had a dominant position in terms of broadcasting rights regarding TFF Super League and First League matches, and decided on interim measures to ensure that Digiturk granted summary and news footage to interested undertakings on a non-discriminatory basis.
Facebook Inc, Facebook Ireland Ltd, WhatsApp Inc and WhatsApp LLC	Tying and bundling	The Board concluded that the economic entity consisting of Meta Platforms, Inc, Meta Platforms Ireland Limited, and WhatsApp LLC, known as 'Facebook', holds a dominant position in the markets of personal social networking services, consumer communication services, and online video advertising. It has been determined that Facebook, through the consolidation of data collected from its core services, namely Facebook, Instagram, and WhatsApp, hinders the activities of its competitors.

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.[12]

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. According to the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position, while there is not any specific market share threshold evidencing dominant position, it is accepted that market shares less than 40 per cent are regarded less likely to indicate dominance, hence market share is considered along with other factors, such as vertical foreclosure or barriers to entry, as an indication of dominant position in a relevant product market.

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

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

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.[13]

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, indications show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm.

Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fallback to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) has been reviewed under Article 4 (restrictive agreement rules). The Booking.com and Trakya Cam decisions are examples of this trend. In Booking.com,[14] 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*,[15] 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,[16] 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 Turkish 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.

13 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.

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

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

16 No. 15-42/704-258.

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 dominance. Further, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.[17] 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.

17 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.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Board.[18] 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.[19] 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.[20]

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.[21]

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.[22]

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.

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*,[23] 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.[24] In 2017, the Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems.[25]

18 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.

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

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

21 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.

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

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

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

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

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.[26] 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.[27]

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.[28] 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.[29]

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.[30]

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 because of 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.[31] If, however, the pricing

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

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

28 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.

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

30 See, for example, *Eti Holding*, 00-50/533-295, 21 December 2000; *POAS*, 01-56/554-130, 20 November 2001; *Ak-Kim*, 03-76/925-389, 4 December 2003; *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; *BOTAŞ*, 17-14/207-85, 27 April 2017; *Sanofi*, 18-09/156-76, 29 March 2018; *Lüleburgaz*, 17-28/477-205, 7 September 2017; *Akdeniz/CK Akdeniz Elektrik*, 18-06/101-52, 20 February 2018; *Enerjisa*, 18-27/461-224, 8 August 2018; *Aydem/Gediz*, 18-36/583-284, 1 October 2018; *İsttelkom*, 19-15/214-94, 11 April 2019; *Medsantek*, 19-13/182-80, 28 March 2019; *Varinak*, 19-45/768-330, 19 December 2019; *MDF/Chipboard*, 21-18/229-96, 1 April 2021; *D-Market*, 21-22/266-116, 15 April 2021; *Türk Telekom II*, 20-20/267-128, 16 April 2020.

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

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.[32] However, this is exceptional, and the Board generally favours the as-efficient competitor test to avoid false positives and deterring competition.[33]

In addition, for the assessment of whether there is anticompetitive 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.[34]

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.[35]

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.[36] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its 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 because of the lacking standard of proof, recognising that interference in pricing behaviour is a rare occurrence.[37]

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

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

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

35 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.

36 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).

37 *E.* 2019/946, K. 2019/2625, 18 December 2019.

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*,[38] where Tüpraş incurred an administrative fine of 412 million Turkish lira (equal to 1 per cent of the undertaking's annual turnover for the relevant year).

In addition to monetary sanctions, the Board is authorised to take all necessary measures to terminate infringements, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition and status to the condition they were in before the infringement.

ii Behavioural and structural remedies

The Amendment Law – Article 9(1) of the Competition Law – states that, should the Board find any infringement of Article 4, 6 and 7 it shall inform the parties concerned, by a resolution, of the behaviour that should be followed or avoided to establish competition and of structural remedies, such as the transfer of certain activities, shareholdings or assets.

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

The amendment introduces a 'first behavioural, then structural remedy' rule for Article 7 violations; therefore, where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Board within a minimum period of six months.

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 fully-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 2023 is 105,688 Turkish 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 Turkish 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. In terms of providing false or misleading information, the Board in its *Martı* decision[39] decided to impose an administrative fine on Martı on the ground that the information submitted by Martı in response to the Authority's information requests constituted providing false or misleading information.

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.

39 *Martı* 22-33/527-213, 21 July 2022.

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 2023 is 105,688 Turkish 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.[40] In addition, in its *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.[41]

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.[42]

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.

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

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

42 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 the 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, 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 entered into force on 4 May 2022. In accordance with the Amendment Communiqué, transactions are 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 Turkish lira and the Turkish turnover of each of at least two of the transaction parties exceeds 250 million Turkish lira; or

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

Further to the Amendment Communiqué, the 'Turkish turnover threshold of 250 million Turkish lira' mentioned therein is no longer 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. The Authority is working on the Digitalisation and Competition Policy Report, which aims to enlighten the competition policies that it will be implementing in the future. On 7 May 2021, the Competition Authority published its preliminary report on the e-marketplace sector inquiry, and published its Final Report on the Sector Inquiry Regarding E-marketplace Platforms on 14 April 2022 to address the developments in digitalization in light of competition law. In the Final Report, the Authority clarified the relevant competitive concerns in relation to e-marketplace platforms and proposed relevant policy recommendations.

Moreover, on 7 April 2023, the Authority published its Preliminary Report on Online Advertising Sector Inquiry which was initiated in January 2021 together with the speculatively expected to compound a DMA-type legislation in Turkey. Also, on 18 April 2023, the Authority published the Study on the Reflections of Digital Transformation on Competition Law which provides an overview of the competition law framework for digital markets and highlights the challenges posed by data practices, algorithmic collusion, interoperability and platform neutrality.

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, and published its final report on the review regarding fast-moving consumer goods sector on 30 March 2023.