The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators' antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as *The Dominance & Monopolies Review* make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The *Google* case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google's search business. In January 2013, after 19 months, the FTC

closed its investigation into Google's business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google's alleged practice of promoting its own vertical properties, the FTC found that Google's practices improved its products and were pro-competitive.[1] Indeed:

> *The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages.*

Also:

> *Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information.*

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.[2] The European Commission took a different approach: it agreed on the first point, concluding that:

> *the objective of the Commission is not to interfere in Google's search algorithm.*[3]

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google's specialised search services on the ground that these links might divert traffic from rivals,[4] and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

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1 'Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File No. 111-0163 (3 January 2013)' (FTC Google Search Statement), at www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. 'FTC to Make Announcement Concerning Its Investigation of Google', FTC press release of 3 January 2013, at www.ftc.gov/news-events/press-releases/2013/01/ftc-make-announcement-concerning-its-investigation-google. While the author represented Google in the EU case, this analysis reflects personal views only and this editorial was not written at the client's request nor discussed with Google.

2 *Verband Deutscher Wetterdienstleister e.V. v. Google*, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

3 Commissioner Almunia, statement of 5 February 2014, http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.

4 Press release of 25 April 2013, 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', IP/13/371.

determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of 'diversion' was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

> *other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals*

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers' interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity.[5] Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

5 Nick Mathiason, 'Microsoft in row over lobby tactics', *The Observer* (UK), 23 September 2007. www.theguardian.com/business/2007/sep/23/money.digitalmedia; Robert A Guth and Charles Forelle, 'Microsoft Goes Behind the Scenes', *Wall Street Journal*, 24 September 2007, http://online.wsj.com/news/articles/SB119059784609936938; www.telegraph.co.uk/technology/8184065/Dark-forces-gunning-for-Google.html; Vlad Saviv, 'What is FairSearch and why does it hate Google so much?' 12 April 2013, www.theverge.com/2013/4/12/4216026/who-is-fairsearch; Greg Keizer, 'Microsoft not fooling anyone by using FairSearch front in antitrust complaint against Google', 9 April 2013, www.computerworld.com/s/article/9238267/Microsoft_not_fooling_anyone_by_using_FairSearch_front_in_antitrust_complaint_against_Google.

highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others' efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The *Google* case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings).[6] Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola's SEPs who were supposedly willing licensees.[7] The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google's agreement with the FTC).[8] The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice's preliminary ruling in *ZTE v. Huawei*).[9] The common approach taken by both the FTC and the European Commission signals (as

6 Press release of 5 February 2014, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', IP/14/116.

7 'Agreement Containing Consent Order, In the Matter of Google Inc', FTC File No. 121-0120 (3 January 2013).

8 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014), available at http://europa.eu/rapid/press-release_IP-14-490_en.htm; EC MEMO/14/322, 'Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions' (29 April 2014), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm; 'Case Comp/C-3/39.939 – Samsung Electronics, Enforcement of UMTS standard essential patents, Final Commitments' (3 February 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf; and Commitment Decision (29 April 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

9 Case-170/13, *Huawei Technologies v. ZTE*, OJ 2013 C. 215/5.

vice president Almunia recently commented) a significant moment of convergence.[10] It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.[11]

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the 'procedural modernisation' embodied in Regulation 1/2003,[12] the Commission has so far settled two-thirds of its abuse cases by way of commitments.[13] The advantages from the defendants' perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs' perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year's editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly 'voluntary' in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it

10 Speech of 20 September 2013, 'Competition Enforcement in the knowledge economy', SPEECH/ 12/629. For an overview of the minor policy differences, see Koren W Wong-Ervin, Federal Trade Commission, 'Global Approaches To Standard-Essential Patents', 6 May 2014.

11 In the recent case of *Huawei v. InterDigital, Inc*, and the NDRC's ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI's investigation in *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, 12 November 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, 16 January 2014.

12 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

13 Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.

tends to do the reverse. This has meant that defendants do not know the Commission's theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission's concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this second edition of *The Dominance & Monopolies Review*. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* (conditional pricing) and the European Commission decision in *Gazprom*, and the US authorities' reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2014

Chapter 22

TURKEY

Gönenç Gürkaynak[1]

I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited'.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited, but 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 entities also fall within the scope of the application of Article 6. While the Turkish Competition Board (the Competition Board) had placed too much emphasis on the 'capable of acting independently' part of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of the Turkish competition law enforcement,[2] more recent enforcement trends make it clear that the Competition Board now uses a much more broadened and accurate view of

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2 See, for example, *Sugar Factories*, 78/603-113, 13 August 1998.

the definition, in a manner to also cover public entities.[3] Therefore, state-owned entities are also subject to the Competition Authority's enforcement pursuant to the prohibition laid down in Article 6.

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore certain sectoral independent authorities have competence to control dominance 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 regulated for 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 Competition Authority is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions) are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather 'a restriction of effective competition' element is required to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance.

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 Competition 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.[4]

II YEAR IN REVIEW

The year 2013 witnessed several important developments regarding the legislative architecture enforced by the Competition Authority. The Competition Authority issued the Draft Competition Law (the Draft Law) and the Draft Regulation on Administrative Monetary Fines (the Draft Regulation). The amendments to Law No. 4054 became a hot topic in Turkey when the Turkish parliament announced that the draft law including these amendments had been officially added to the list of drafts and legislative proposals to be discussed by the Turkish parliament. The purpose of these amendments is to contribute to the harmonisation of Turkish competition legislation with EU competition legislation, which constitutes the primary reference for the Turkish legislators in developing Turkish competition legislation. The Draft Law provides several new aspects and changes to the current legislation; in particular it provides efficiency in time and resource allocation in

3 See, for example, *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004.

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

terms of procedures set out under the current legislation. Similarly, the Draft Regulation also appears to be heavily inspired by the European Commission's Guidelines on the parameters for determining the fines to be imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02). The Competition Authority also issued several guidelines on assessment of horizontal agreements and concerted practices in accordance with the guidelines set out in the European Union legislation. The recently issued guidelines pertaining to horizontal agreements and concerted practices are namely Guidelines on Horizontal Cooperation Agreements (30 April 2013/13-24/326-RM (6)) and Guidelines Regarding Clarification of the Regulation on Active Cooperation for Revealing Cartels (Leniency Regulation) (17 April 2013/13-23/325-RM (2)).

Additionally, in 2014 the Competition Authority also published Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings (29 January 2014/14-05/97-RM (1)). The Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings explores criteria for specific forms of abusive behaviour and also assesses possible defences such as objective reasons. The Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings is prepared in an effort to be in line with the Competition Board's precedents. Similar to the above-mentioned guidelines, the Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings is also in line with the relevant EU guideline, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ((2009/C 45/02)).

According to the Competition Authority's 2013 statistics, which display the distribution of the Competition Board decisions according to their scope, nature and result, 117 investigations out of a total of 191 were conducted 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 of thereof; while 57 investigations have been carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits 'any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country'. The remaining 17 investigations have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to assert that cooperative offences, referring to both horizontal and vertical arrangements, have traditionally been the area of heaviest enforcement under Turkish competition law. Over the past three years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. As a reflection of this trend, the Competition Board has also shown an increased interest in the unilateral pricing behaviour of undertakings, as exemplified by recent high-profile predatory pricing investigations involving Turkish Airlines,[5] where there was ultimately no finding

5 *Turkish Airlines*, 11-65/1692-599, 30 December 2011.

of an abuse of a dominant position, and the shipping company UN Ro Ro,[6] where UN Ro Ro was fined 4 per cent of its 2011 turnover, which amounted to 841,199.70 lira. Additionally, Tupras[7] was fined 412,01,081 lira for abuse of dominant position, which is the highest amount in the Competition Board's history.

In 2013 the Competition Board imposed the record-breaking highest fine in the Competition Authority's enforcement history. By quadrupling their track record for the highest ever fine in an investigation in Turkey, the Competition Board fined 12 Turkish banks on the grounds that the defendants were infringing competition laws by colluding to harmonise their trade terms for cash deposit interest, credits, and credit card fees (Article 4 of Law No. 4054). The Competition Board also acknowledged that the violation did not constitute a cartel. The total amount of the fine is unprecedented in the history of the Authority's fines – 1.1 billion lira (around $670 million; €481 million). Taking into account this decision, it is fair to say that Competition Authority has demonstrated that they will not be intimidated by the sheer level of monetary values.

It is also clearly observable that the Competition Authority has been making substantial efforts to enrich the secondary legislation over the past four years. The main reason for this trend is that the legislation on the Turkish merger control regime is heavily inspired by the regulations of the European Commission.

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, which states that '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 Competition Board is increasingly 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 in cases where clear dependence or interdependence between either competitors or customers exists.[8]

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. For establishing a dominant position, first, the relevant market has to be defined and secondly, the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of market definition. Thus, the undertakings concerned have to be in a dominant position in relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary step for evaluating its position in the market. In theory, there is no market share threshold

6 *UN Ro Ro*, 12-47/1412-474, 1 October 2012.

7 *Tupras*, 14-03/60-24, 17 January 2014.

8 See, for example, the Competition Board's *Coal Enterprise* decision, 04-76/1086-271, 1 December 2004 and *Warner Bros* decision, 05-18/ 224-66, 24 March 2005.

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 as dominant.

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

Collective dominance is also covered by Law No. 4054, as indicated in the aforementioned definition provided in 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 Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[9]

Nevertheless, 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, the indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4 of Law No. 4054, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Competition 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 new and peculiar concept (i.e., Article 4 enforcement becoming a fall back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 (dominance provisions) enforcement, (i.e., if the engaging entity were dominant) has been reviewed and enforced against under Article 4 (restrictive agreement rules). This has recently started to allow a breach of Article 6 (dominance) by Article 4 (restrictive agreements) behaviour. Three decisions of the Board (in 2007 and 2008) warning two non-dominant entities that they should refrain from imposing dissimilar trade conditions to their distributors, and another decision (2007) not allowing a non-dominant entity to unilaterally adopt a supply regime whereby counterparts would be required to meet minimum objective criteria, are all alarming signs of this new trend.

9 See, for example, *Turkcell/Telsim* decision, 03-40/432-186, 9 June 2003.

IV ABUSE

i Overview

As mentioned above, the definition of abuse is not provided under Article 6 of Law No. 4054. Although Article 6 does not define what constitutes 'abuse' *per se*, it provides five examples of forbidden abusive behaviour, which comes as a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. Accordingly, these examples include the following:

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

b directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

c making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;

d distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; 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 anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition 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. Furthermore, abusive conduct on a market that is different from the market subject to dominant position is also prohibited under Article 6. The Competition Board found incumbent undertakings to have infringed Article 6 by engaging in abusive conduct in markets that are neighbouring to the dominated market.[10] On the other hand, it is worth mentioning that the enforcement track shows that the Competition Board has not been in a position to review any allegation of other forms of abuse, such as strategic capacity construction, predatory product design or product innovation, failure to pre-disclose new technology, predatory advertising or excessive product differentiation.

10 See, for example, *Türk Telekom* decision, 02-60/755-305, 2 October 2002, and *Turkcell* decision, 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 Competition Board.[11] That said, complaints on this basis are frequently dismissed by the Competition Authority due to its welcome reluctance to micro-manage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims.

Furthermore, in line with the EU jurisprudence, price squeezes may amount to a form of abuse in Turkey and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise allegations of price squeezing.[12]

Exclusive dealing

Despite exclusive dealing, non-compete provisions and single branding normally fall under the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6. On that note, the recently revised version of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is now 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 particular, the Competition Board, in its *Turkcell* decision,[13] has 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. In a recent decision,[14] the Competition Board condemned the biggest undertaking in the media sector in Turkey (Doğan Yayın Holding) for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.

11 See, for example, *TTNet*, 07-59/676-235, 9 October 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; *Denizcilik İşletmeleri*, 06-74/959-278, 12 October 2006; and *Feniks*, 07-67/815-310, 23 August 2007.

12 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.

13 09-60/1490-37, 23 December 2009.

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

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The enforcement track record indicates no cases where the incumbent firms were fined as a result of tying or leveraging. On the other hand, the Competition Board ordered certain behavioural remedies against incumbent telephone and internet operators in some recent cases, to have them avoid tying and leveraging.[15]

Refusal to deal

Refusals to deal and access to essential facilities are the forms of abuses that are brought before the Competition Authority frequently. Therefore, there are various decisions of the Competition Board on this matter.[16]

iii Discrimination

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.[17]

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 condemned excessive or exploitative pricing by dominant firms in the past.[18] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micro-manage pricing behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

The sanctions that could 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

15 See, for example, *TTNET-ADSL* decision, 09-07/127-38, 18 February 2009.

16 See, for example, *POAS* decision, 01-56/554-130, 20 November 2001; *Eti Holding* decision, 00-50/533-295, 21 December 2000; *AK-Kim* decision, 03-76/925-389, 12 April 2003; and *Çukurova Elektrik* decision, 03-72/874-373, 10 November 2003.

17 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002, and *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

18 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002, and *Belko*, 01-17/150-39, 6 April 2001.

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 fine imposed on the undertaking or association of the undertaking. After the recent amendments, the new version of the Competition Law makes reference to Article 17 of the Law on Minor Offences to require the Competition Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments, etc., in determining the magnitude of the monetary fine.

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 is in *Tupras*[19] where Tupras, an energy company, incurred an administrative fine of 412 million lira (equal to 1 per cent of the relevant undertaking's annual turnover for the relevant year).

As to fines, the potential and typical level of fines for abuse of dominance, as well as factors that may be considered in adjusting fines and sentences upward or downward.

In addition to the monetary sanction, the Competition Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as legally invalid and unenforceable with all its legal consequences.

ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damages.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to follow a certain method of conduct such as granting access, supplying goods or services or concluding a contract).[20] Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead it to initiate an investigation, which may or may not result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

19 *Tupras*, 14-03/60-24, 17 January 2014.

20 Ibid.

VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the case 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 Competition Board decides to conduct a pre-investigation if it finds the 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 Competition Board within 30 days after a pre-investigation decision is 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 Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). 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. The defending parties will have another 30-day period to reply to the additional opinion (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 and at most 60 days following 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 Competition 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

is 15,226 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Board can examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking. Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records are fully examined by the experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant the staff of the Competition Authority 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 is 15,226 lira. It may also lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is supplemented with private lawsuits as well. Article 57 et seq. of Law No. 4054 entitle any person who is 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 damages plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a treble damages clause exists in the law. In private suits, the incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

VIII FUTURE DEVELOPMENTS

The recent enforcement trend of the Competition Authority shows that it is becoming more and more interested in pricing behaviours of dominant undertakings, since over the past two years there have been several pre-investigations and investigations launched by the Competition Authority in relation to this aspect of the competition law principles in Turkey.

The Competition Authority published many guidelines in 2013 and at the beginning of 2014, such as the Draft Law and the Draft Regulation. Additionally, in his message for 2014, the President of the Competition Authority has stated the importance of competition policy for non-governmental organisations and associations of undertakings.

Appendix 1

ABOUT THE AUTHORS

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Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York and England and Wales (currently a non-practising solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 14 associates. He has unparalleled experience in Turkish competition law counselling issues with over 12 years of competition law experience, starting with the establishment of the Turkish Competition Authority. He files notifications to and obtains clearances from the Turkish Competition Authority in more than 40 notifications every year. He has led defence teams in several written and oral defences before the Turkish Competition Authority, represented numerous multinational companies and large Turkish entities before administrative courts and the High State Court on tens of appeals, 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. Prior to joining ELIG as a partner more than seven years ago, he worked at the Istanbul, New York, Brussels and Istanbul offices of White & Case LLP for more than eight years.

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