The Dominance and Monopolies Review

Editor
Maurits Dolmans

Law Business Research

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For further information please email
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Maurits Dolmans

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Adam Sargent, Nick Barette

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EDITOR'S PREFACE

This publication is a testament to the proliferation of abuse of dominance legislation around the world. Its coverage considers legislative provisions that have, in the case of the United States, been in existence since 1890, to some, in jurisdictions such as China and India, that have been introduced in the past few years or, in Malaysia's case, last year. This diversity of jurisdictions has led to a multiplicity of differing approaches and indicates, as underlined by the national and supra-national surveys contained in this book, the real need for greater legal certainty and clarity in both the future drafting and application of laws governing abuse of dominance.

The disparities in the approaches taken by different and even well-established jurisdictions can be significant. As an example, a contrast may be drawn between the law of the United States and the European Union.

In the United States, Section 2 of the Sherman Act[1] is in certain respects being narrowly construed and applied by the courts, the Department of Justice (most notably through its Guidelines) and, to some extent, the Federal Trade Commission ('FTC'). This may be attributed to a wish to reduce the burdens of US litigation, in light of the costs imposed by the discovery system and the risks created by trial by jury, awards of treble damages, as well as the litigation incentives inherent in contingency fees and class actions.

By contrast, the approach taken by the European Union in the application of Article 102 of the Treaty of the Functioning of the European Union ('TFEU') goes too far in the opposite direction. For much of the life of Article 102 TFEU and its predecessors, the European Commission and courts have embraced a form-based rather than effects-based approach. The high-water mark of this may be seen in the

1 15 USC Section 2.

Commission decisions and subsequent court judgments in *British Airways*[2] and *Tomra*,[3] where it was sufficient to show that the conduct in question was merely liable to affect competition, rather than having to prove actual effects and harm to consumers. This form-based application may stifle pro-competitive conduct, taking into account the essentially political decision-making in large cases, the risk of confirmation bias (where the investigator is the prosecutor, judge and executioner), the slow and therefore costly procedure, the risk of high fines and opportunistic follow-on damage claims, and the marginal judicial review of prohibition decisions by the General Court and the Court of Justice of the European Union. The combination of these factors is a powerful disincentive for a possibly dominant undertaking to engage in any competitive conduct that may be found to constitute abuse.

Given the influence of European Union abuse of dominance law, particularly on emerging jurisdictions such as India and China (where similar factors apply to an even larger extent), the use of a form-based analysis may have a negative impact on the development of the law far beyond Europe's borders.

A happy medium or Mid-Atlantic point needs to be found between these divergent approaches. The law of abuse of dominance in Europe (and all jurisdictions that emulate Europe) needs to move away from the form-based approach that has characterised the analysis of abuse of dominance in favour of an effects-based analysis. The institutional groundwork for a turn towards the application of a more economic analysis may have been put in place by the creation of the office of the Chief Competition Economist in 2003 and the publication of the 'Guidance on the Commission's Enforcement Priorities'.[4] Subsequently, in the decisions of the European Commission and judgments of the courts, there have been signs of an incipient analytic shift; both *Microsoft*[5] and, more recently, *Post Danmark*[6] show a growing acceptance of the need for a more effects-based consideration of the abuse of dominance. As the European Court of Justice commented in *Post Danmark*:

> *[…] not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.*[7] *[…] in order to assess the existence of anti-competitive effects […] it is necessary to consider whether that pricing policy, without*

2 Case C-95/04 P, *British Airways plc v. Commission* ('*British Airways*'), judgment of 15 March 2007.

3 Case C-549/10P, *Tomra*, judgment of 19 April 2012.

4 OJ, C45/7, 24 February 2009.

5 Case T-201/04, *Microsoft Corporation v. Commission* ('*Microsoft*'), judgment of 17 September, 2007.

6 Case C-209/10 *Post Danmark v. Konkurrencerådet* ('*Post Danmark*'), judgment of 27 March 2012. Note that this was the Grand Chamber of the Court.

7 Ibid., paragraph 22.

> *objective justification, produces an actual or likely exclusionary effect, to the detriment of competition, and, thereby, of consumers' interests.*[8]

It is hoped that the change of tack signalled by *Post Danmark* will be continued in future abuse of dominance cases. The forthcoming decision of the court in *Intel* should act as a marker of the progress of this change, hopefully confirming the growing acceptance and, indeed, necessity of the adoption of an effects-based analysis in the enforcement of European abuse of dominance law. For those jurisdictions that have drawn heavily on the European legal framework in the creation of their own systems for the regulation of abuse of dominance, most notably India and China, further lessons concerning the need to abandon the *per se* approach and adopt an effects-based approach should be taken from the recent European experience.

On both sides of the Atlantic, the European and FTC Commissioners have, when dealing with the practicalities of abuse of dominance enforcement, in some cases shown a laudable willingness to find practical solutions in fast-moving markets. The growth, in particular, of the innovative use of consent decrees in the United States and commitment decisions within the European Union, is to be welcomed. These settlement tools create advantages for both competition authorities and market parties in reducing not only the regulatory and enforcement burden but in cutting the timelines for cases from up to 10 years (resulting in remedies that may be too late to keep pace with developments in the market) to periods of months or a few years. At the same time, we cannot ignore the fact that the use of such settlement procedures also brings some disadvantages for the development of the law; in an area where there are limited numbers of decisions, a lack of new precedents or guidance is of some concern.

As highlighted by the European Court of Justice in *Alrosa*,[9] settlement procedures may afford competition authorities a wide degree of discretion in the resolution of abuse of dominance cases. Especially given the absence of any in-depth judicial analysis of commitments, this discretion must be exercised with care and responsibility. The factors mentioned above may drive the Commission into adopting adventurous and novel interpretations of the law, and compel companies to agree to settlements to refrain from energetic rivalry that could, in fact, harm the interest of consumers.

Despite the scope for a harmonisation of approaches, there will probably never be total convergence between the law and practice governing the regulation of abuse of dominance in the United States and the European Union or, more generally, on a worldwide basis. There are some important differences between the relevant provisions of US and EU law. As can be seen in the different analysis of the *Rambus* 'patent trap', the respective concepts of 'monopolisation' (which does not require a dominant position at the time the offensive conduct occurs) and 'abuse' (which requires a finding of dominance) can lead to very different assessments of the same conduct.[10] The total lack of a concept of an exploitative abuse in US law is another fundamental difference. The purpose of

8 Ibid., paragraph 45.

9 Case C-441/07P, *Commission v. Alrosa Company Limited* ('*Alrosa*'), judgment of 29 June 2010.

10 *Rambus Inc v. FTC*, 522 F.3d 456 (D.C. Cir 2008) and Case COMP/ 38.636 *Rambus Inc*.

this book, as shown by the contributions it contains, is to allow for the beginning of an understanding of the differences and similarities, and their implications, between laws governing unilateral conduct in some of the major competition jurisdictions of the world.

In the coming year, there are likely to be further interesting case law developments, notably from the technology and energy sectors, areas that have been the subject of increased scrutiny by competition authorities. Of particular note will be the forthcoming decisions from the European General Court in *Intel*[11] and of the European Commission in *Samsung*[12] and *Motorola*.[13] More generally, both patent trolling and privateering are likely to come under increased scrutiny from not only the US and EU competition authorities but, probably, the competition authorities in many of the jurisdictions analysed in this book. Watch this space.

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 the inaugural edition of *The Dominance and Monopolies Review*. I am personally grateful for the invaluable assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what 2013 holds for future editions of this work.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2013

11 T-286/09 *Intel v. Commission*.

12 Case COMP/39.939 *Samsung – Enforcement of UMTS standards essential patents*.

13 Case COMP/39.985 *Motorola – Enforcement of GPRS standard essential patents*.

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

1 Gönenç Gürkaynak is a partner at ELIG, Attorneys-at-Law.

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

2012 witnessed several important developments with respect to the legislative architecture enforced by the Competition Authority. First, the Competition Authority made an announcement on applications made to the Competition Authority that fall outside the scope of Law No. 4054 (such as applications relating to unfair competition, protection of the consumer, and regulated industries). This step in clarifying the boundaries of the Competition Authority's ambit might indicate the overwhelming number of irrelevant submissions that the Authority has had to process and evaluate in the past. In a similar vein, the Competition Authority released Communiqué No. 2012/2 on the Application Procedure for Competition Infringements in August 2012. The main purpose of Communiqué No. 2012/2 is to evaluate the procedure and principles relating to the

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.

evaluation of applications that are to be made to the Competition Authority with respect to the alleged violations of Articles 4, 6 and 7 of Law No. 4054.

According to a recent report published by the Competition Authority dated 5 February 2013, summarising the investigations carried out by the Competition Authority since its inception, 146 investigations out of a total of 189 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 38 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 five 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. That said, the number and volume of abuse of dominance cases in Turkey hit all-time highs in 2011. Over the past two 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 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.

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

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

6 *UN Ro Ro*, 12-47/1412-474, 1 October 2012 (reasoned decision has not yet been published).

to infer dominance even in cases where clear dependence or interdependence to either competitors or customers exists.[7]

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 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.[8]

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'

7 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.

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

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 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 (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.

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.[9] 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.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.[10] 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.[11]

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,[12] 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

9 See, for example, *Türk Telekom* decision, 02-60/755-305, 2 October 2002, and *Turkcell* decision, 01-35/347-95, 20 July 2001.

10 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.

11 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.

12 09-60/1490-37, 23 December 2009.

that work with its competitors. In a recent decision,[13] 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.

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, in order to have them avoid tying and leveraging.[14]

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.[15]

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.[16]

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.[17] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micro-manage pricing behaviour.

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

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

15 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.

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

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

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 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 the *Turkcell* case, where Turkcell incurred an administrative fine of just over 91.9 million lira (equal to 1.125 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).

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.

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 amount of the fine is 14,651 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 14,651 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 draft guidelines for the public's opinion in 2012. The final guidelines are expected to shed light on the interpretation of some of the most important aspects of the Turkish antitrust regime such as the leniency programme and consolidate the opinions received from the public. The Competition Authority also published a draft block exemption communiqué for specialisation agreements. Additionally, the President of the Competition Authority has stated in his message for 2013 that there are some areas related to secondary regulations that had begun to be developed in the previous session and are planned to be completed in 2013, such as evaluation of abuse of dominant position as well as amendments to the regulations on fines and active cooperation.

Appendix 1

ABOUT THE AUTHORS

GÖNENÇ GÜRKAYNAK

ELIG, Attorneys-at-Law

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 15 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.

ELIG, ATTORNEYS-AT-LAW
Çitlenbik Sokak No. 12 Yıldız Mahallesi Beşiktaş
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com