GETTING THE DEAL THROUGH

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in 39 jurisdictions worldwide

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Dominance 2013

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Turkey

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1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The main legislation applying specifically to the behaviour of dominant firms is article 6 of Law No. 4,054 on the Protection of Competition (Law No. 4,054). It provides that '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 is unlawful and prohibited'.

Article 6 brings a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 82 of the EC Treaty). Accordingly, such abuse may, in particular, consist in:

- *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;*
- *e limiting production, markets or technical development to the prejudice of consumers.*

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The article 6 prohibition applies only to dominant undertakings. In similar fashion to article 102 of the TFEU, dominance itself is not prohibited, only the abuse of dominance is.

Structural changes through which a non-dominant firm attempts to become dominant (for example, by acquisition of other businesses) are regulated by the merger control rules in article 7 of Law No. 4,054. Nevertheless, a mere demonstration of post-transaction dominance is not sufficient for enforcement even under the Turkish merger control rules, and a 'restriction of effective competition' element is required. As for the dominance enforcement rules, 'attempted monopolisation or dominance' is not recognised under the Turkish competition legislation.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

Ever since the Turkish Competition Authority's publication in 2001 of Gönenç Gürkaynak's book, *The Prime Objective of Turkish Competition Law Enforcement from a Law & Economics Perspective*, the economic rationale is more frequently quoted in Turkish competition law circles as 'the ultimate object of maximising total welfare by targeting economic efficiency'. Recently enacted regulations, albeit not directly applicable to dominance cases, place greater emphasis on 'consumer welfare' (see Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board). Nevertheless, since the legislative history and written justification of Law No. 4,054 contains clear references to non-economical interests as well (such as the protection of small and medium-sized businesses, etc), some of such policy interests are still pursued in Turkey, especially in dominance cases, alongside the economic object.

It would be only fair to observe that the Competition Board (the Board) has been successful in blending economic and non-economic interests, and preventing one from overriding the other in its precedents.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Closely modelled on article 102 of the TFEU, article 6 of Law No. 4,054 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. That said, the indications in practice show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of article 4 of Law No. 4,054, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm. Owing to this new and peculiar concept (that is, 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, (ie, 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 it should refrain from imposing dissimilar trade conditions to its 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.

5 Sector-specific control

Is dominance regulated according to sector?

Law No. 4,054 does not recognise any industry-specific abuses or defences. However, certain sectoral regulators have concurrent powers to diagnose and control dominance in some sectors. For instance, the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority prohibits 'firms with significant market power' from engaging in discriminatory behaviour between companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility-sharing. These firms are also required to make an 'account separation' for pricing the access to their networks on a cost basis. Similar restrictions and requirements also exist for energy companies.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

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.

7 Enforcement record

How frequently is the legislation used in practice?

Cases of abuse of dominance are very frequent in the Turkish competition enforcement. In 2011, the Board decided on a total of no less than 283 antitrust infringement cases, 95 of which related to article 6, and 30 of which were mixed (involving the combination of articles 6 and 4: restrictive agreements, concerted practices and decisions of trade associations). 2012 figures are unavailable as of yet.

Some of the most important cases in the history of Turkish competition law enforcement involved article 6 infringements (for example, *Turkcell*, 01-35/347-95, 20 July 2001; *Türk Telekom*, 02-60/755-305, 2 October 2002; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Turkcell*, 09-60/1490-379, 23 December 2009; *Turkcell*, 11-34/742-230, 6 June 2011; and *Doğan Media Group*, 11-18/341-103, 30 March 2011) and resulted in substantial monetary fines imposed on the incumbent firms.

8 Economics

What is the role of economics in the application of the dominance provisions?

The Competition Authority recently established an economic analysis division where case handlers with an economist background are devoted solely to the economic analysis of antitrust matters. Although past economic, expert witness submissions of defending undertakings were not even evaluated or referred to in the reasoned decisions of the Board, the establishment of the new economic analysis division can be viewed as a positive step forward towards a more economy-oriented article 6 enforcement.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

Dominance provisions (and other provisions of Law No. 4,054) apply to all companies and individuals, to the extent that they act as an 'undertaking' within the meaning of Law No. 4,054. 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. 4,054 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 Board had placed too much emphasis on the 'capable of acting independently' prong of this definition to exclude state-owned entities from the application of Law No. 4,054 at the very early stages of the Turkish competition law enforcement (see, for example, *Sugar Factories*, 78/603-113, 13 August 1998), more recent enforcement trends make it clear that the Board now uses a much more broadening and accurate view of the definition, in a manner to also cover public entities (see, for example, *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004). Therefore, state-owned entities are also subject to the Competition Authority's enforcement pursuant to the prohibition laid down in article 6.

10 Definition of dominance

How is dominance defined?

Article 3 of Law No. 4,054 defines dominance as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers'. Enforcement trends show that the Board is increasingly inclined to somewhat 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 of dependence or interdependence (see for example, *Anadolu Cam*, 1 December 2004, 04-76/1086-271; *Warner Bros*, 24 March 2005, 05-18/224-66).

The Board considers high market shares as the most indicative factor of dominance. Nevertheless, it also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm) in assessing and inferring dominance.

11 Market definition

What is the test for market definition?

The test for market definition does not differ from the concept used for merger control purposes. The Board has issued a guideline on market definition, closely modelled after the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The guideline on market definition applies to both merger control and dominance cases. The guideline considers demand-side substitution as the primary standpoint of market definition.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

No.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

Collective dominance is covered by the Turkish competition legislation. The wording of article 6 clearly prohibits abuses of collective dominance (see question 1). Turkish competition law precedents on

collective dominance are neither abundant nor mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance would be alleged. That said, the Board has considered it necessary to establish 'an economic link' for a finding of abuse of collective dominance (see, for example, *Turkcell/Telsim*, 9 June 2003, 03-40/432-186).

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

While the law does not contain a specific reference to dominant purchasers, or a monopsony market, dominant purchasers may also be caught by the legislation, if and to the extent their conduct amounts to an abuse of their dominant position.

The enforcement track record indicates that no article 6 cases involved a finding of infringement and imposition of monetary fines on dominant purchasers. However, the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (see for example, *ÇEAS*, 10 November 2003, 03-71/874-373; *TÜPRAS*, 16 February 2002, 02-24/243-98). Agreements to exert exploitative purchasing power between non-dominant firms have also been condemned under article 4 (*Cherry Exporters*, 24 July 2007, 07-60/713-245).

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

Law No. 4,054 is silent on the definition of abuse. It only contains a non-exhaustive example list of specific forms of abuse (see question 1). Article 2 of Law No. 4,054 adopts an effects-based approach to 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, not the type of conduct.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices. It also covers discriminatory practices.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Theoretically speaking, a causal link must be shown between dominance and abuse. The Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was also employed in demonstrating the existence of dominance.

Article 6 also prohibits abusive conduct on a market different to the market subject to dominant position. The Board found incumbent undertakings to have infringed article 6 by engaging in abusive conduct in markets neighbouring the dominated market (see for example, *Türk Telekom*, 2 October 2002, 02-60/755-305; *Turkcell*, 20 July 2001, 01-35/347-95).

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

The chances of success of certain defences, and what constitutes a defence depend heavily on the circumstances of each case. It is also possible to invoke efficiency gains, as long as it can be adequately demonstrated that the pro-competitive benefits outweigh the anti-competitive impact.

Specific forms of abuse

19 Price and non-price discrimination

Both price and non-price discrimination may amount to an abusive conduct under article 6. The Board has in the past found incumbent undertakings to have infringed article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions (see for example, *TTAS*, 2 October 2002, 02-60/755-305; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008).

20 Exploitative prices or terms of supply

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 (see for example, *TTAS*, 2 October 2002, 02-60/755-305; *Belko*, 01-17/150-39, 6 April 2001). That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micro-manage pricing behaviour.

21 Rebate schemes

While article 6 does not refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute an abuse. In *Turkcell* (09-60/1490-379, 23 December 2009), the Board condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with competitors. The Board adopted a similar approach concerning the rebate schemes used by Doğan Media Group and fined the defendant for abusing its dominance through inter alia rebate schemes (11-18/341-103, 30 March 2011).

22 Predatory pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board (see, for example, TTNet, 9 October 2007, 07-59/676-235; Coca-Cola, 23 January 2004, 04-07/75-18; Türk Telekom/TTNet, 08-65/1055-411, 19 November 2008). 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.

23 Price squeezes

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 Board is known to closely scrutinise allegations of price squeezing (see, for example, *TTNet*, 9 October 2007, 07-59/676-235; *Doğan Dağıtım*, 9 October 2007, 07-78/962-364; *Türk Telekom*, 19 October 2004, 04-66/956-232; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008).

24 Refusals to deal and access to essential facilities

Refusals to deal and access to essential facilities are common forms of abuse, and the Competition Authority is very familiar with this type of abuse (see, for example, *POAS*, 20 November 2001, 01-56/554-130; *Ak-Kim*, 4 December 2003, 03-76/925-389; *Çukurova Elektrik*, 10 November 2003, 03-72/874-373).

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and single branding are normally dealt with under article 4 of Law No. 4,054 (restrictive agreements, concerted practices and decisions of trade associations). On that note, the recently revised version of 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. Therefore, a dominant undertaking is now an unlikely candidate to engage in non-compete provisions and single branding arrangements. There have also been cases in the past where the Competition Board found an infringement of article 6 on the basis of exclusive dealing arrangements (see, for example, *Karbogaz*, 23 August 2002, 02-49/634-257).

26 Tying and 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. However, the Board ordered some behavioural remedies against incumbent telephone and internet operators in some recent cases, in order to have them avoid tying and leveraging (see *TTNET-ADSL*, 18 February 2009, 09-07/127-38).

27 Limiting production, markets or technical development

Limiting output, markets or technical development is among the specific forms of abuse listed in article 6. However, the enforcement track record indicates no cases where the incumbent firms were fined as a result of limiting output, markets or technical development. Similar behaviour by multiple undertakings has been condemned under article 4 as a form of cartel (*White Meat Cartel*, 09-57/1393-362, 25 November 2009).

28 Abuse of intellectual property rights

While the precedents of the Board do not yet include a finding of infringement on the basis of abuse of intellectual property rights, abuse of intellectual property rights may constitute an infringement of article 6, depending on the circumstances. This issue has not yet been brought to the Competition Authority's attention.

29 Abuse of government process

While the precedents of the Board do not yet include a finding of infringement on the basis of abuse of a government process, this issue has not been brought to the Competition Authority's attention yet, and there is no reason why such abuses should not lead to a finding of an infringement of article 6, if adequately demonstrated.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Mergers and acquisitions are normally caught by the merger control rules contained in article 7 of Law No. 4,054. However, there have been some cases, albeit rare, where the Board found structural abuses through which dominant firms used joint venture arrangements as a back-up tool to exclude competitors. This was condemned as a violation of article 6 (see, for example, *Biryay I*, 17 July 2000, 00-26/292-162).

31 Other types of abuse

The list of specific abuses contained in article 6 is not exhaustive and other types of conduct may be deemed abusive. However, the enforcement track record shows that the 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 process innovation, failure to predisclose new technology, predatory advertising or excessive product differentiation.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The article 6 prohibition is directly applicable to companies. Law No. 4,054 allows the Board to take appropriate actions to address remedial actions against companies abusing their dominant position, and this is complementary to the directly applicable prohibition.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The national competition authority for enforcing the competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the Board, presidency and service departments. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning abuses of dominance. The Board has seven members and is seated in Ankara.

The service departments consist of five technical units. There is a 'sectoral' job definition of each technical unit. A research department, a leniency unit, a decisions unit, an information management unit, an external relations unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks.

The Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of 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 amount is 13,591 Turkish 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 the Law also authorises the 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.

The Law therefore provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the mere wording of the law allows oral testimony to be compelled of employees, case handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted in a mutually agreed timeline. 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 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 (ie, that which is written on the deed of authorisation).

Update and trends

The year 2012 witnessed several important developments with respect to the legislative structure enforced by the Turkish Competition Authority. First, the Turkish Competition Authority made an announcement on applications made to the Turkish Competition Authority that fall outside the scope of Law No. 4,054 (such as applications relating to unfair competition, protection of the consumer and regulated industries). This step in clarifying the boundaries of the Turkish Competition Authority's ambits 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 Turkish Competition Authority released Communiqué No. 2012/2 on the Application Procedure for Competition Infringements in August 2012. Communiqué No. 2012/2's main purpose is to evaluate the procedure and principles relating to the evaluation of applications that are to be made to the Turkish Competition Authority with respect to the alleged violations of articles 4, 6 and 7 of Law No. 4,054. Second, the Turkish Competition Authority published many draft guidelines for public 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 programmes and consolidate the opinions received from the public. Third, the Turkish Competition Authority published a draft block exemption communiqué for specialisation agreements.

The year in review also witnessed some very important dominance cases. In the *THY* decision (11-65/1692-599, 30 December 2011), the Board investigated whether Turkish Airlines abused a dominant position through predatory pricing in some flight routes incoming or outgoing from the Sabiha Gökçen International Airport. The Board concluded that there was not enough evidence to support a finding of abuse. In so doing, the Board confirmed that allegations of predatory pricing must be backed up with solid economic evidence.

In the *Efes* decision (13 July 2011; 11-42/911-281), the Board evaluated the allegation that Efes Pazarlama ve Dağıım Tic AŞ (EFPA), a dominant supplier of beer, and its distributors were violating Law No. 4,054 through de facto exclusivity, on grounds that they were obstructing the operations of competing products' sales points or requesting the sales of only Efes branded beers to certain sales points through various practices. The Board decided to impose an administrative monetary fine against EFPA on the finding that it was engaging in practices contrary to those prohibited in the Board's decision of 22 April 2005 (No. 05-27/317-80).

Another prominent case that merited the Board's scrutiny was the investigation that was conducted against Doğan Media Group (Board Decision of 30 March 2011, 11-18/341-103). Upon evaluating the findings and defences, the Board decided that Doğan Media Group abused its dominant position in the market for allocating advertising space in daily papers through loyalty rebate schemes and agreements with advertisement agencies.

The Board is also expected to shift its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance. Raising the merger control thresholds and seeking the existence of an affected market for notifiability were considered as solid measures to decrease the number of merger notifications and were expected to result in significantly lower numbers. Because the new thresholds, questions and concerns as to the concept of affected market and the introduction of the new Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions have reversed this trend, the Board now appears to be inclined to change the merger control thresholds once more in order to allocate more resources into the cases of abuses of dominance and fight against cartels.

Refusing to grant the staff of the Competition Authority access to business premises may 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). The minimum amount of fine is 13,591 Turkish 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.

34 Sanctions and remedies

What sanctions and remedies may they impose?

The sanctions that could be imposed for abuses of dominance under Law No. 4,054 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 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.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the abusive conduct, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement.

The highest fine imposed to date in relation to abuse of a dominant position is in the *Turkcell* case where Turkcell incurred an administrative monetary fine of just over 91.9 million Turkish lira (equal to 1.125 per cent of the relevant undertaking's annual turnover for the relevant year).

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Article 56 of Law No. 4,054 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 continuing 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.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Articles 9 and 27 of Law No. 4,054 entitle the Board to order structural or behavioural remedies, that is, 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 Board would lead it to initiate an investigation, which may or may not result in finding of infringement. The legislation does not explicitly empower the Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

A dominance matter is primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Articles 57 et seq of Law No. 4,054 entitle any person who is injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their 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 Authority, and build their own decision on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most recent high-profile dominance case is *Turkcell* (11-34/742-230, 6 June 2011), where the incumbent dominant GSM operator has been fined just over 91.9 million Turkish lira for engaging in practices that lead to de facto exclusivity and single-branding in favour of Turkcell and deny competitors access or penetration to sub-dealers.

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