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Turkey: Regulation Of Dominant Conduct

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General

1 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. 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 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 82 of the EC Treaty. Accordingly, such abuse may, in particular, consist of:

(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 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 82 of the EC Treaty, dominance itself is not prohibited, only the abuse of dominance is.

Structural changes through which a non-dominant firm attempts to become dominant (eg, by acquisition of other businesses) are regulated by the merger control rules in article 7 of Law No. 4054. 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/dominance' is not recognised under the Turkish competition legislation.

3 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 of Gönenç Gürkaynak's book in 2001 *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 maximizing total welfare by targeting economic efficiency'. Nevertheless, since the legislative history and written justification of Law No. 4054 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 Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 82?

Closely modelled on article 82 of the EC Treaty, article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When a 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 a purely unilateral conduct of a non-dominant firm in a vertical supply relation 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 Board has in the past attempted to condemn unilateral conduct that normally should not be prohibited since it is not engaged in by a dominant firm. Due to this new and peculiar concept (ie, 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, only 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) territory by article 4 (restrictive agreements) territory. Three recent (2007 and 2008) decisions of the Board warning two non-dominant entities that it should refrain from imposing dissimilar trade conditions to its distributors, and another recent 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 Is dominance controlled according to sector?

Law No. 4054 does not recognise any industry-specific abuses or defences. However, certain sectoral regulators have concurrent powers to diagnose and control dominance in some sectors. The secondary legislation issued by the Telecommunications 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 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 How frequently is the legislation used in practice and what is its practical impact?

Cases of abuse of dominance are very frequent in the Turkish competition enforcement. In 2007, the Board decided on a total of not less than 148 antitrust infringement cases, 48 of which related to article 6, and 21 of which were mixed (ie, involving the combination of articles 6 and 4 (restrictive agreements, concerted practices and decisions of trade associations)). 2008 figures are unavailable as of yet.

Some of the most important and major cases in the history of the Turkish competition law enforcement involved article 6 infringements (eg, *Turkcell*, 01-35/347-95, 20 July 2001; and *Türk Telekom*, 02-60/755-305, 2 October 2002), resulted in substantial monetary fines imposed on the incumbent firms.

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

The Competition Authority does not have an economic analysis division (or any economist devoted solely to the economic analysis of antitrust matters), and past economic expert witness submissions of defending undertakings were not even evaluated or referred to in the reasoned decisions of the Board. Therefore, economic expert witnesses are now used very rarely by defending dominant entities.

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

Dominance provisions (and other provisions of Law No. 4054) apply to all companies and individuals, to the extent 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 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. 4054 at the very early stages of the Turkish competition law enforcement (see, eg, *Sugar Factories*, 78/603-113, 13 August 1998), 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 eg, *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 How is dominance defined?

Article 3 of Law No. 4054 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 inter-dependence (see eg, *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, financial power of the incumbent firm) in assessing and inferring dominance.

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

No.

13 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 eg, *Turkcell/Telsim*, 9 June 2003, 03-40/432 -186).

14 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 eg, *ÇEAS,*, 10 November 2003, 03-71/874-373; *TÜPRAS,*, 16 February 2002, 02-24/243-98).

Abuse in general

15 How is abuse defined?

Law No. 4054 is silent on the definition of abuse. It only contains a non-exhaustive example list of specific forms of abuse (see question 1).

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

The concept of abuse covers both exploitative and exclusionary practices.

17 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 which was also employed in demonstrating the existence of dominance.

Article 6 also prohibits abusive conduct on a market different than 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 eg, *Türk Telekom*, 2 October 2002, 02-60/755-305; *Turkcell*, 20 July 2001, 01-35/347-95).

18 What defences may be raised to allegations of abuse of dominance?

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, so 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 eg, *TTAS*,, 2 October 2002, 02-60/755-305).

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 eg, *TTAS*,, 2 October 2002, 02-60/755-305). That said, complaints on this basis are frequently dismissed by the Competition Authority because of their welcomed 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. To date, no article 6 cases involved a finding of infringement concerning rebate schemes.

22 Predatory pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board (see eg, *TTNet*, 9 October 2007, 07-59/676-235; *Coca Cola*, 23 January 2004, 04-07/75-18). That said, complaints on this basis are frequently dismissed by the Competition Authority due to their welcomed reluctance to micro-manage pricing behaviour. Quite high standards are observed for bringing forward predatory-pricing claims.

23 Price squeezes

Price squeezes may amount to a form of abuse in Turkey. The Board is known to scrutinise closely allegations of price squeezing (see, eg, TTNet 19 November 2008, *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).

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, eg, *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. 4054 (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, eg, *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. However, the enforcement track record indicates no cases where the incumbent firms were fined as a result of tying or leveraging.

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.

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 been brought to the Competition Authority's attention yet.

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. 4054. However, there have been some, albeit rare, cases where the Board found structural abuses through which dominant firms use joint-venture arrangements as a back-up tool to exclude competitors. This was condemned as a violation of article 6 (see, eg, *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 strategic capacity construction, predatory product design or process innovation, failure to pre-disclose new technology, predatory advertising, or excessive product differentiation.

Enforcement proceedings

32 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. 4054 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 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 four technical units and one research unit. There is a 'sectoral' job definition of each technical unit.

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 amount of fine is TRY 11,200 (around EUR 5,350). 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, paper works 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. 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 authorization 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). Refusing to grant the staff of the Competition Authority access to business premises may lead to the imposition of a daily-based periodic 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 amount of fine is TRY 11,200 (around EUR 5,350).

34 Which sanctions and remedies may they impose?

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 undertaking(s) 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 and/or members of the executive bodies of the undertakings/association of undertakings 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/association of undertaking. After the recent amendments, the new version of the Competition Law makes reference to Article 17 of the Law on Minor Offenses 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 undertaking(s) within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the

undertaking(s) in the infringement, financial power of the undertaking(s), 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 remains the *Turkcell/Telsim* case where Turkcell incurred an administrative monetary fine of just over TRY21.8 million (approximately US$18 million; equal to 1 per cent of the relevant undertaking's annual turnover of the relevant year).

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

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 to abusive contract may be deemed invalid and unenforceable because of violation of article 6.

36 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. 4054 entitle the Board to order structural or behavioural remedies, ie, require undertakings to follow a certain way 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 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. 4054 entitle any person who is injured in his 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.

Recent enforcement action

38 What is the most recent high-profile dominance case?

There is a significant and easily-detectable decline in the sum of monetary fines imposed on abuses of dominance over the past years (TRY 246,458 in 2007, TRY 0 in 2006 and 2005, compared to TRY 2.482.665 in 2004). So the track record shows that the Board has not dealt with a high-profile dominance case for a relatively long time.

BOXOUT

Update and trends

Are changes to the legislation or other measures that will have an impact on this area in the near future expected? *Also, are there shifts of emphasis in the enforcement practice, eg, that enforcement is expected to focus on a particular business sector in the time to come, or that, more generally, economic considerations are given greater weight than in the past?*

Law No. 4054 has undergone significant modifications, which resulted in a more deterrent fining regime for abuses of dominance. More modifications are expected in the near future, which could be summarized as follows:

The lawmaking body of Turkey and/or the Competition Board contemplates to

- Bring the "appreciable effect" test to Article 4 enforcement, recognizing de minimis exceptions and defenses.
- Allow (i) the Competition Authority a 60 day-period to finalize their pre-investigation report instead of 30 days; (ii) the Competition Board a 10 business day-period instead of 10 calendar days to decide whether to initiate an investigation; (iii) the investigation committee a four month-period instead of six months to finalize the investigation; the parties' obligation to reply (first written defence) will be removed; (iv) corporations 60 days instead of 30 days to submit their second written defense; and (v) other revisions in the timing-structure of the investigation process.