The Dominance and Monopolies Review

Third Edition

Editor
Maurits Dolmans

Law Business Research

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This article was first published in
The Dominance and Monopolies Review - Edition 3
(published in June 2015 – editor Maurits Dolmans)

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Third Edition

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-52-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

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

ADVOKATFIRMAN ÖBERG & ASSOCIÉS AB

ANJARWALLA & KHANNA

ANJIE LAW FIRM

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EDITOR'S PREFACE

As this new edition of *The Dominance and Monopolies Review* will show, several of the trends that were apparent in the previous few years have continued – except that commitment decisions in Europe seem to be falling out of favour and the Commission is returning to more old-fashioned punitive enforcement. Most obvious perhaps is the ongoing disruption of traditional sectors of the economy by the emergence of digital services and online distribution. This has led to a series of cases and pending investigations in various jurisdictions involving online and IT firms, including companies as diverse as Amazon (Germany, India); HRS (Germany); Booking.com (Germany, France); Expedia (Germany); Intel (EU); Motorola (EU); Samsung (EU); Google (EU, Brazil, Canada, India); PMU (France); Vente-privee.com (France); OnlinePizza Norden (Sweden); Snapdeal and Flipkart (India); Qualcomm (China, EU, Korea, Taiwan, US); IDC (China); and Tencent (China).[1]

Two trends in this context deserve special attention. The first is the threatened re-emergence of form-based analysis, at the expense of the economic analysis of dominance and foreclosure effect in abuse cases; the second is the ongoing politicisation of the competition process.

The first trend is perhaps the most surprising and disappointing. When the Commission adopted its decision in *Intel* in 2009, it followed in part its own guidance as set out in the notice on the application of Article 102 of the TFEU[2] by including a

1 The editor and his firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 European Commission, Guidance on enforcement priorities in applying Article 82 of the EC Treaty, 2009/C 45/02, available at: http://ec.europa.eu/competition/antitrust/art82/guidance.pdf.

detailed analysis of the restrictive effects of Intel's discounts. [3] Although there is debate about the finding of facts in the case, the Commission at least tried to demonstrate actual foreclosure of equally efficient competitors. On appeal, however, the General Court of the European Union held that this was unnecessary, because the rebates in question were 'by their very nature' abusive.[4] There was no need to review the exclusionary effects, the Court held, or to apply an 'equally efficient competitor' test.

The court thus threw cold water on the hopes of the antitrust community that the court would apply a 'more economic approach'. It can be argued that the judgment was no surprise since exclusivity discounts had always been considered an abuse, or that it was not as bad as it sounded since the judgment was still based on economic theories. It is true, for instance, that where it can be shown that a customer's full demand is contestable, the judgment can be distinguished on the facts because the dominant firm does not leverage market power.[5] Moreover, as pointed out in the EU chapter of this book, the court stated that the 'as-efficient competitor' test is still relevant for non-conditional pricing practices. Finally, we still have the *Post Danmark* case, where the court held that Article 102 does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market […]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient.'[6]

Even that scant comfort, however, is now under threat. The recent opinion of the Advocate-General in *Post Danmark II*, which came out in May 2015, includes unhelpful statements.[7] Advocate-General Kokotte rejects arguments that the 'as-efficient competitor' test should be applied, fulminating not only against the test, but against 'expensive economic analyses' more generally and the 'disproportionate use of the resources of the competition authorities and the courts'.[8] The Advocate-General also opines that there is no need for foreclosure to exceed any *de minimis* threshold,[9] leaving open the question of why competition law should be applied to conduct that cannot be shown to have had much of an effect at all on competition. Perhaps she was impressed by the thought that the case involved retroactive discounts, leveraging a non-contestable share of 70 per cent protected by a statutory monopoly. It is to be hoped that this kind of thinking is applied only where 'the abusive nature is immediately shown' (i.e., in the

3 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009, paragraphs 1,002 to 1,577.

4 Case T-286/09 *Intel*, judgment of 12 June 2014, paragraphs 85, 88.

5 See various articles in the first issue of the *Competition Law & Policy Debate*, 2015/1 CLPD.

6 Case C-209/10, *Post Danmark A/S v. Konkurrenceradet*, judgment of 27 March 2012, EU:C:2012:172, paragraphs 21–22.

7 Case C-23/14, *Post Danmark A/S II*, Opinion of Advocate General Kokott delivered on 21 May 2015, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=164331&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=480796.

8 Ibid., paragraphs 66–73.

9 Ibid., paragraph 85-94.

case of clear *per se* abuses)[10] but recent developments in pending EU cases are worrying – with the Commission issuing a statement of objections in the *Google* case for supposed foreclosure in product comparison services in spite of the dynamic nature of that sector and the great success of competitors such as Amazon, eBay and others in the shopping sector, which dwarf Google's shopping service.

The chapter on US developments contains a similarly troubling case. In a judgment concerning an exclusive dealing policy of a pipe-fitting manufacturer – admittedly, under Section 5 of the Federal Trade Commission (FTC) Act – the US Court of Appeals for the Eleventh Circuit in April 2015 affirmed the FTC's decision that the conduct was illegal because: '[t]he governing Supreme Court precedent speaks not of "clear evidence" or definitive proof of anticompetitive harm, but of "probable effect".'

Perhaps surprisingly, the chapter on China shows a spark of hope for economists. It discusses the case of *Qihoo 360 v. Tencent*, following Qihoo 360's accusing Tencent of abusive practices in instant messaging. The Supreme Court of China conducted a careful analysis, including a review of economic factors. It held that while the usage share of Tencent's instant messaging services was above 80 per cent, it nonetheless could not be found dominant in the market for instant messaging services. It took into account that in a two-sided market for free services, Tencent had no power over price, and had to keep innovating in order to counter dynamic competition, in a market where users engaged in multi-homing and could switch if the quality of Tencent's service deteriorated relative to that of its rivals. *Qihoo 360 v. Tencent* is rightly branded a landmark case and an example for other authorities and courts to consider.[11]

As to the second trend, politicians' attempts to influence competition cases are not new, of course. But 2014 saw a worrying intensification, at least at the European level. The French and German governments, for instance, at the instigation of national publishers and others, have put private and public pressure on the European Commission to pursue new and unprecedented theories of harm in the IT sector.[12] They are targeting in particular what is called the 'GAFA', an acronym for some of the main non-EU online service companies, demanding extraordinary remedies including trade secret disclosures and structural measures.[13] They solicited support from the

10 Ibid., paragraph 75.

11 Other such examples can be found in Germany and Brazil: *Verband Deutscher Wetterdienstleister eV v. Google*, Reference No. 408 HKO 36/13, Rechtbank Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

12 Joint Letter from Ministers Sigmar Gabriel (Germany) and Arnaud Montebourg (France), to Commissioner, Joaquin Almunia on 16 May 2014, available at www.magazinemedia.eu/wp-content/uploads/Translation_Letter_SG-AM_2014-05-28.pdf. See also the letter sent to the Commission by four German ministers in May 2015, available at www.bmwi.de/BMWi/Redaktion/PDF/A/anschreiben-der-minister-an-eu-kommissare,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

13 'Projet de loi pour la croissance, l'activité et l'égalité des chances économiques (EINX1426821L)'; see: www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=E1BDCC

European Parliament, which went as far as adopting a resolution requesting the break-up of an internet company based outside the EEA for alleged abuse of dominance, without any investigation (let alone proper review) of facts, law, or economics.[14] The notion of 'punishment before trial' may be amusing as literary entertainment,[15] but is profoundly troubling when coming from a European institution. Nor is the European Parliament alone in Brussels in raising questions. A commissioner was reported making statements in a pending case suggesting that complaints are 'well-founded' before a statement of objections was even sent.[16] He is said to have stated: 'We [Europe] need two to three global players. This applies to software, and hardware and all of these [online sectors].' 'If you look at America, which is comparable in size, or Korea, Japan, China, they have very strong powers and we need that too.'[17] On another occasion, he is quoted saying that 'The European Union should regulate internet platforms in a way that allows a new generation of European operators to overtake the dominant US players' and the goal was to 'replace today's web search engines, operating systems and social networks'.[18] Such statements could be understood not only to prejudge the outcome, but also to suggest protectionist objectives.

Competition Commissioner Vestager wisely tried to calm the waters,[19] and the President of the European Commission appears to be aware of the risks.[20] Nonetheless, every Commissioner has a vote in competition cases. Article 41 of the Charter of

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E5C4C26E5B3A7E9115CBB2458B.tpdila07v_2?idDocument=JORFDOLE000029883713&type=general&typeLoi=proj&legislature=14.

14 European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0071+0+DOC+XML+V0//EN&language=EN.

15 'Let the jury consider their verdict,' the King said […]. 'No, no,' said the Queen. 'Sentence first — verdict afterwards.' *Alice's Adventures in Wonderland,* Lewis Carroll.

16 *Welt am Sonntag,* 12 April 2015, p. 1, 'EU will härter gegen Google vorgehen', available at www.welt.de/print/wams/article139419627/EU-will-haerter-gegen-Google-vorgehen.html.

17 29 September 2014, Oettinger's Comments to EU Parliament; video recording of the Parliament hearing: www.elections2014.eu/en/new-commission/hearing/20140917HEA64706, relevant statements at 2:04:50.

18 Speech by Commissioner Oettinger at Hannover Messe, 'Europe's future is digital', https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en; *Economist*, 'Nothing to stand on', 18 April 2015, at www.economist.com/news/business-and-finance/21648606-google; *New York Times*, 'Europe's Google problem', 28 April 2015, www.nytimes.com/2015/04/28/opinion/joe-nocera-europes-google-problem.html?_r=0.

19 Statement by Commissioner Vestager on antitrust decisions concerning Google, Brussels, 15 April 2015. 'We will be exclusively guided by the facts, the evidence and by the EU's antitrust rules.' Available at: http://europa.eu/rapid/press-release_STATEMENT-15-4785_en.htm.

20 Minutes of the 2122nd meeting of the Commission held in Brussels (Berlaymont) on Wednesday 15 April 2015, http://ec.europa.eu/transparency/regdoc/rep/10061/2015/EN/10061-2015-2122-EN-F1-1.PDF.

Fundamental Rights of the European Union therefore requires every Commissioner, and the College as a whole, to handle proceedings impartially.[21] Thus, before a Commissioner reaches a conclusion, she or he should examine every element and each piece of evidence with an open mind, and reserve judgment until all rights of defence have been exhausted. Even the *appearance* of pre-judgment should be avoided.[22] And 'it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence'.[23]

Statements that appear to prejudge the outcome of the case, or even prejudge elements of a decision such as whether a defendant has a '*de facto* monopoly' before the firm has been fully heard, undermine the credibility of the law, the process and the European Commission itself.[24] A legitimate question arises whether a Commissioner in such a situation should not be recused from the decision-making, to avoid the appearance of bias. The Hon Justice Barling (now a chairman of the UK Competition Appeals Tribunal) recently set an example of integrity when he recused himself in *Sky v. Ofcom* merely on the ground that he had given a thoughtful speech on a relevant topic after the case had been decided by the CAT, and before it was remitted back to the CAT by the Court of Appeal.[25] He stated, appropriately, that 'my own view of whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context'.[26]

Questions about appearance of pre-judgment are even more sensitive when, as in the European Commission, the team that investigates the defendant is also the one conducting the hearing, briefing the College of Commissioners, and writing the decision.[27] The requirement of impartiality encompasses not only 'subjective

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21 Article 41(1)(a) of the CFR guarantees 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. Under Article 6(1) of the TFEU, the CFR 'shall have the same legal value as the Treaties'.

22 See, e.g., ECtHR, Appl. No. 22330/05, *Olujić v.Croatia*, 5 February 2009, paragraph 63 ('in respect of the question of objective impartiality even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done"').

23 See, e.g., ECtHR Appl. No. 58442/00, *Lavents v. Latvia*, 28 November 2002, paragraphs 118–121; and ECtHR Appl. No. 22330/05, *Olujić v. Croatia*, 5 February 2009, paragraphs 61–68.

24 See, e.g., Levy and Rimsa, 'Why Competition Commissioners Should Be Cautious in Commenting Publicly On Active Antitrust Cases', 36 *ECLR* 1 (2015).

25 Ruling (Constitutional Tribunal), 26 and 27 March 2014, *Sky UK Limited, Virgin Media, the Football Association Premier League and British Telecommunications plc v. Office of Communications & Ors*. Available at http://catribunal.org.uk/files/1156-59_Judgment_CAT_9_060515.pdf.

26 Ibid., paragraph 83.

27 See, e.g., *R v.Gough* [1993] UKHL 1 (Lord Goff) ('But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was

impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice' but also 'objective impartiality, insofar as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the *institution* concerned'.[28] Even with the best of intentions, and recognising the excellence and intellectual integrity of many Commission officials, is it humanly possible for a team that has spent one or two years intensely investigating and prosecuting a case, to avoid the risk of unconsciously interpreting and screening information in a way that confirms their beliefs or hypotheses? Where investigation, hearing and decision are prepared by the same team, there is a serious risk of confirmation bias.[29] Reinforcing this concern is the longstanding, but still surprising, fact that the College of Commisisoners does not read the parties' briefs and does not attend oral hearings. Not even the Commissioner for Competition participates. In other words, the decision is prepared by a Commissioner (and is adopted by a College) without direct personal knowledge of the facts and the proceedings, based on hearsay, set out in internal documents and summaries to which the parties have no access, and that are prepared by a team that has acted as detective and prosecutor. As the OECD warned, '[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique'.[30] Incidental internal procedures, such as devil's advocate teams and peer review panels, are useful, but are only stopgaps. In light of the quasi-criminal nature of EU infringements proceedings, under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,[31] the proper solution would be to separate the investigative team from the team that prepares the Commission decision, which should include the Commissioner, and for the latter team to review the statement of objections and the response, as well as to attend the oral hearing. There is no chance that this will happen in the coming year, but it is hoped that the discussion on this topic will finally be taken seriously.

I would like to thank my colleagues Nicholas Levy and Andris Rimsa for their thoughts, as well as all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this third edition of *The Dominance and Monopolies Review*. I look forward to seeing what evolutions 2015

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acting impartially, his mind may unconsciously be affected by bias […]').

28 Emphasis added, Case C-439/11 P *Ziegler v.Commission*, EU:C:2013:513, paragraphs 154–155; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v.UFEX and Others*, EU:C:2008:375, paragraph 54; and Case C-308/07 P *Gorostiaga Atxalandabaso v.Parliament*, EU:C:2009:103, paragraph 46.

29 See, e.g., RS Nickerson, 'Confirmation bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175–220 ('the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand').

30 'OECD Country Studies – Competition Law and Policy in the European Union' (2005), p. 62, see also pp. 61, 63–69, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

31 See, e.g., Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures?' (2009) 34 *European Law Review* 817.

holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* and *Post Danmark II* (conditional pricing) and the European Commission decision in *Gazprom* and *Google*, the *Qualcomm* investigations in various countries, and the US authorities' reviews of practices of patent assertion entities and privateers, which are also directly relevant for the EEA and other jurisdictions.

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June 2015

Chapter 25

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 and state-affiliated entities also fall within the scope of the application of Article 6.[2]

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according

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

2 See, for example, *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004; *Türk Telekom*, 14-35/697-309, 24 September 2014.

to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The 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, a 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 Turkish Competition Board (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.[3]

II YEAR IN REVIEW

The Competition Authority issued the Draft Competition Law (the Draft Law) and the Draft Regulation on Administrative Monetary Fines (the Draft Regulation) in 2013. The Draft Law is currently under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The purpose of these amendments is to advance to the harmonisation of Turkish competition legislation with EU competition legislation. The Draft Law provides various changes to the current legislation; in particular, it provides efficiency in time and resource allocation in terms of procedures set out under the current legislation. The Draft Regulation also appears to be heavily inspired by the European Commission's Guidelines on the methods of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003.[4]

The Competition Authority also issued several guidelines on assessment of horizontal agreements and concerted practices in accordance with the guidelines set out in the EU legislation. The recently issued guidelines pertaining to horizontal agreements and concerted practices: are Guidelines on Horizontal Cooperation Agreements[5]

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

4 2006/C 210/02.

5 30 April 2013/13-24/326-RM (6).

and Guidelines Regarding Clarification of the Regulation on Active Cooperation for Revealing Cartels (Leniency Regulation).[6]

Additionally, in 2014 the Competition Authority also published the Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings.[7] The Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings explores criteria for specific forms of abusive behaviour and also assesses possible defences such as objective reasons. The Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings is prepared in an effort to be in line with the Competition Board's precedents. The Guideline on Evaluation of Abusive Exclusionary Conduct by Dominant Undertakings is in line with the relevant EU guideline.[8]

According to the Competition Authority's 2014 statistics, 91 investigations out of a total of 163 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. Further, 48 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 24 investigations have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to assert that cooperative offences, referring to both horizontal and vertical arrangements, have traditionally been the area of heaviest enforcement under Turkish competition law. Over the past three years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. As a reflection of this trend, the Competition Board has also shown an increased interest in the unilateral pricing behaviour of undertakings, as exemplified by recent high-profile predatory pricing investigations involving Turkish Airlines,[9] where there was ultimately no finding of an abuse of a dominant position, and the shipping company UN Ro-Ro,[10] where UN Ro-Ro was fined 4 per cent of its 2011 turnover, which amounted to 841,199.70 lira. In *Turkcell*,[11] the Competition Board analysed the market foreclosure allegations against Turkcell, Turkey's dominant GSM operator. It concluded that Turkcell had violated the law by preventing its competitors' activities through exclusive practices for vehicle-tracking services, imposing a monetary fine of 39 million lira. Similarly, in *Mey İçki*,[12] the Competition Board imposed a monetary fine of 41 million lira on Mey İçki for its abusive

6 17 April 2013/13-23/325-RM (2).

7 29 January 2014/14-05/97-RM (1).

8 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

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

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

11 *Turkcell*, 13-71/988-414, 9 December 2013.

12 *Mey İçki*, 14-21/410-178, 12 June 2014.

conduct of preventing sales points from selling competitors' products, exclusivity imposed on sales points and obstructing competitors' activities on the market for the alcoholic beverage rakı. Finally, Tüpraş[13] was fined more than 412 million lira for the abuse of its dominant position through excessive pricing; the Competition Authority had launched the investigation in 2012. Ongoing investigations involving abuse of dominance allegations at the time of writing include a high-profile investigation against Yemek Sepeti, a Turkish online food order and delivery platform (initiated on 18 March 2015) and Solgar, a health supplement retailer (initiated on 26 March 2015).

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 inclined to broaden the scope of application of the Article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.[14]

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, it 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 be solely 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.

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

14 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.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[15]

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, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm. Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) has been reviewed under Article 4 (restrictive agreement rules). *3M Turkey* and *Turkcell* decisions are the latest examples of this same trend. In *3M Turkey*,[16] the Competition Board analysed whether 3M Turkey, which was not found to be in a dominant position in the work safety products market, discriminated against some of its dealers under Article 4 and not under Article 6. *3M Turkey* was cleared without a fine. In *Turkcell*,[17] the Competition Board assessed whether Turkcell's exclusive contracts foreclosed the market, based on both Article 6 and Article 4, eventually finding that Turkcell did not violate either Article 6 or Article 4.

IV ABUSE

i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes 'abuse' *per se*, it provides five examples of prohibited abusive behaviour, which 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 entry into the market or hindering competitor activity in the market;

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

16 *3M*, 14-22/461-203, 25 June 2014.

17 *Turkcell*, 14-28/585-253, 13 August 2014.

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.[18] On the other hand, the enforcement track shows that the Competition Board is yet 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.[19] 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. Nonetheless, in the recent *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.[20]

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

18 See, for example, *Türkiye Denizcilik İşletmeleri* decision, 10 45/801-264, 24 June 2010, *Türk Telekom* decision, 02-60/755-305, 2 October 2002, and *Turkcell* decision, 01-35/347-95, 20 July 2001.

19 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.

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

on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.[21]

Exclusive dealing

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.[22]

On a separate note, 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 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. The Competition Board, in *Turkcell*,[23] condemned the defendant for abusing its dominance by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board has condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes. [24]

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board assessed many tying, bundling and leveraging allegations against dominant undertakings and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to have them avoid tying and leveraging.[25]

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 by the Competition Board concerning this matter.[26]

21 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Doğan Dağıtım*, 07–78/962–364, 9 October 2007; *Türk Telekom*, 04-66/956-232, 19 October 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

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

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

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

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

26 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.

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.[27]

iv Exploitative abuses

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Board has condemned excessive or exploitative pricing by dominant firms.[28] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micro-manage pricing behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of 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

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

28 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002, and *Belko*, 01-17/150-39, 6 April 2001.

that give way to or serve as a vehicle for an abusive contract may be deemed invalid and unenforceable because of violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,[29] where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the relevant undertaking's annual turnover for the relevant year).

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

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 to 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 event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition 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 of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition 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. Subsequently, the main

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

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 days 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 Competition 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 Competition 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 Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 16,765 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 Competition 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 16,765 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 also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the 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 the pricing behaviour of dominant undertakings, since over the past three years there have been many pre-investigations and investigations launched by the Competition Authority in this area.

The Competition Authority published many guidelines in 2013 and 2014 and is expected to further enhance the secondary legislation in keeping with the developments in EU competition law, as the president of the Competition Authority noted in the 2015 annual report of the Competition Authority. Furthermore, the Draft Law is expected to enter into force in the near future.

The Competition Authority has also shown an increasing willingness at the beginning of 2015 to develop its relations with other governmental agencies in Turkey, signing a cooperation protocol with the Energy Market Regulatory Authority and enlarging the scope of its cooperation protocol with the Information and Communication Technologies Authority.

Appendix 1

ABOUT THE AUTHORS

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Gönenç Gürkaynak is the managing partner of ELIG, Attorneys-at-Law. He holds an LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, and England & Wales (at present, a non-practising solicitor). Mr Gürkaynak heads the competition and regulatory department of ELIG, and has unparalleled experience in all matters of Turkish Competition Act counselling, with over 16 years' experience dating from the establishment of the Turkish Competition Authority. Before founding ELIG more than 10 years ago, he worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at two universities, and gives lectures in other universities in Turkey. He has had many international and local articles published in English and in Turkish, and is the author of a book published by the Turkish Competition Authority.

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