The Dominance and Monopolies Review

Fourth Edition

Editors
Maurits Dolmans and Henry Mostyn

Law Business Research

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This article was first published in The Dominance and Monopolies Review, 4th edition
(published in June 2016 – editors Maurits Dolmans and Henry Mostyn).

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Editors
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Law Business Research Ltd

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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 978-1-910813-18-8

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:

ANJARWALLA & KHANNA

ANJIE LAW FIRM

BAKER & MCKENZIE LLP

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ SC

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EDITORS' PREFACE

This new edition of *The Dominance and Monopolies Review* tracks the evolution of abuse of dominance rules around the world.[1] The sheer range of global enforcement – from established agencies, such as the EU and the US FTC, to intensifying enforcement in India, China and emerging economies – makes identifying common trends difficult. But books such as the *The Dominance and Monopolies Review* make the task of comparatively analysing developments manageable.

This editorial picks out four such developments. First, the approach competition authorities over the world have taken to assessing product design improvements. Second, the possible expansion of abuse of dominance rules to cover privacy issues. Third, the application of abuse of dominance concepts to essential patents. And fourth, and probably most important, the evolution of the 'object versus effect' dichotomy under Article 102 TFEU.

The first trend is most evident in the different approach that global authorities have taken to reviewing Google's search result designs. In previous years, the US Federal Trade Commission, as well as courts in Brazil and Germany, have found that Google's search result designs improve quality and are pro-competitive.[2] In August 2015, the Taiwanese Fair Trade Commission (TFTC) – which has not shied away from enforcing competition laws against high-tech multinational companies such as Microsoft, Intel and Apple in the past[3] – reached a similar conclusion. The TFTC reviewed Google's display of a map in its search results and

1 The editors and their 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 Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc, FTC File Number 111-0163, 3 January 2013; District Court of Hamburg, Ref 408 HKO 36/13 *Verband der Wetterdienstleister v. Google*, order of 4 April 2013; and *BUSCAPE v. Google*, 18th Civil Court of Sao Paulo, Lawsuit no. 583.00.2012.131958-7, Summary Judgment Ruling.

3 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

found that the design provides 'convenience to users and is in line with users' benefits. It's hard to say it's anticompetitive and adopt the refusal to trade concept in this case.'[4] And in Canada, the Competition Bureau completed its 'extensive' investigation of Google, finding that Google's designs and algorithmic changes 'improve user experiences' and are 'beneficial to consumers'. The Bureau found no evidence that Google's designs 'had an exclusionary effect on rivals'.[5]

Likewise, the High Court of Justice of England and Wales in the *Streetmap* litigation, discussed in the United Kingdom chapter of this book, found that Google's display of a map in its search results is lawful. Mr Justice Roth held that displaying a map was 'pro-competitive' and an 'indisputable' product improvement.[6] Showing a map was not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if it had such an effect, the design change was in any event objectively justified because it improved quality. Alternative solutions to creating this improvement, such as showing rivals' maps in search results, were not 'effective or viable' because they would, among other things, create delays and reduce quality.[7] These cases are important because they involve a range of jurisdictions and products, and were based on alleged theories of harm that applied well beyond the specific facts of the case.

By contrast, in April 2015, the EU Commission issued a statement of objections focused on the allegation that Google favours its own comparison shopping service in its search results. The design the EU Commission challenges is an ad format for merchant product offers that Google shows with pictures and prices. Google's response to the statement of objections argued and showed that this design constitutes a product improvement valued by users and advertisers. It therefore represents competition on the merits.[8]

Interestingly, the statement of objections appeared to contemplate as a remedy that Google should show ads 'sourced and ranked by other companies within [Google's] advertising space'.[9] But showing rivals' ads would seem, on its face, to lead to the same quality problems as showing rivals' maps that Roth J found in *Streetmap*. And showing rivals' ads should be legally justified only where a company has a duty to supply its rivals (i.e., where an input is indispensable and there is no other way for rivals to reach customers), as the TFTC held in its investigation. Yet given the many ways that websites can attract traffic, from direct traffic to apps, and from social networks to partnerships with others sites, the statement of objections did not argue the essential facility standard applied to Google. If a duty to supply

4 PARR, 'Taiwan regulator finds no antitrust infringement in Google's search, Play Store practices', 5 August 2015, available at: http://app.parr-global.com/intelligence/view/1287782.

5 See the Canada chapter of this book; and Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google, 19 April 2016, available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

6 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 84. Leave to appeal denied, *Streetmap v. Google*, Court of Appeal (per Richards LJ), A3/2016/1210, 27 May 2016. See the United Kingdom chapter of this book.

7 Ibid., paragraphs 155, 166 and 171.

8 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

9 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

rivals is imposed beyond the essential facility situation, this would very substantially change the law and commercial practice, potentially dampening investments in new solutions and assets to the detriment of consumers.

In India, the Director General of the Competition Commission issued a preliminary report challenging various aspects of Google's search and ad businesses. The report is, in the words of former Commissioner Ashok Chawla, 'only a beginning'; it allows Google to be heard on the preliminary concerns before the Commission comes to a final decision.[10] Given the thriving competition evident in India's online sector,[11] the CCI's action arguably risks condemning a product improvement without evidence of competitive or consumer harm. As David Balto commented, the 'question is whether Indian regulators will risk chilling innovation and harming competition in such a vibrant sector, particularly as there has been no harm to Indian consumers'.[12]

As to the second development, in March 2016, the German Bundeskartellamt initiated proceedings against Facebook on suspicion that its terms of services on the use of user data constitute an abuse of dominance.[13] Intriguingly, the press release suggests that the Bundeskartellamt views Facebook's use of data to be an exploitative abuse – allegedly, because Facebook's conditions of use violate data protection provisions. The Bundeskartellamt's investigation will look at whether Facebook unlawfully collects 'large amounts of personal user data' that enables its advertisers 'to better target their advertising activities'.[14] Of course, companies using customer data to better target their ads is not a new (or even online-specific) phenomenon.[15] But the Bundeskartellamt proceedings are the first case of which we are aware where it has been suggested that this may constitute an abuse of dominance.

On its face, the Bundeskartellamt's investigation has some appeal: why should extracting and using personal data in a way that harms consumers be any different to charging an excessive price or imposing unfair terms? That Facebook's terms of service may also violate data protection laws is no barrier – a dominant company setting fire to its rival's factory to solidify its dominance can also be an abuse of dominance, even if it also violates other laws. But it is arguably an inefficient use, and perhaps even a misuse, of regulatory powers to use

10 *Economic Times*, 'Probe Report on Google only a 'beginning' says CCI chief Ashok Chawla', 18 September 2015, available at: http://articles.economictimes.indiatimes.com/2015-09-18/news/66677418_1_cci-chief-ashok-chawla-investigation-arm-director-general-google-case.

11 See, e.g., *The Economist*, *India Online*, 'The battle for India's e-commerce market is about much more than retailing', 5 March 2016, available at: www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online?cid1=cust/ednew/n/bl/n/2016033n/owned/n/n/nwl/n/n/NA/n.

12 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

13 Bundeskartellamt Press Release. 2 March 2016. www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.htm. See the Germany chapter of this book.

14 Ibid.

15 *Forbes*, K Hill, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did', 16 February 2012, available at: www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#306f377a34c6.

competition law to pursue privacy goals. This appears to be what the Court of Justice had in mind when it held that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.'[16] Indeed, the goals of privacy law – to protect individuals from government and enterprise control – differ from the goals of competition law, which is to protect the generation of consumer welfare through the competitive process.

More fundamentally, it seems questionable whether – as some have suggested[17] – data always have the inherent qualities of a 'currency' or are the 'oil' of the new economy. For example, data are not fungible; they have no durable value; and they are not freely transferrable.[18] Moreover, consumers do not give data as 'payment' because data are (typically) non-rivalrous: if I tell a service that I live in Hampstead, like to sail, and enjoy Robertson Davies' Deptford trilogy novels, nothing prevents me from telling that to another service. The data are not 'used up' like oil. Accordingly, the value that a service like Facebook might derive from data comes not from the data as such (which is ubiquitous),[19] but from the skill in extracting information from the data, translating that information into usable knowledge, and turning that knowledge into action.[20] How the Bundeskartellamt grapples with these various issues, including in its joint study on 'big data' with the French competition authority, could prove one of the more fascinating developments of 2016 and beyond.

The third development concerns the circumstances in which the owner of an SEP can seek injunctive relief for a violation of its IP. As discussed in the European Union chapter of

16 Case C-238/05, *Asnef-Equifax*, paragraph 63. See also COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 164 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.'

17 'Personal data is the currency of today's digital market', speech by Vice Commissioner Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age – Innovation Conference Digital, Life, Design', Munich, 22 January 2012. Available at: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

18 As one study found, '90 per cent of the data in the world today has been created in the last two years [...] 70 per cent of unstructured data is stale after only 90 days.' RIS, Analytics Insights Deliver Competitive Differentiation (July 2013) (quoting Citi Research 2013 Retail Technology Deep Dive).

19 Every few days, humanity now generates five exabytes worth of data. This roughly corresponds to the volume of data produced in the entire period between the dawn of time and 2003. See 'La concurrence dans l'economie numerique', Fabien Curto Millet, A Quoi Sert La Concurrence. See also EU Commission, 'Digital Economy – Facts & Figures', March 2014: 'The digitization of products and processes has made a huge and exponentially increasing amount of data available'.

20 See, e.g, EU Commission Expert Group on Taxation of the Digital Economy, 13 and 14 March. ('The existence of data alone is not sufficient to generate value; the value comes from maximising the efficacy of use from the actual data; but the challenge is deciding at which point and where the value is created. Furthermore, the data that is the lifeblood of the digital economy is increasingly being generated by users, rather than the companies themselves.')

this book, on 6 July 2015, the Court of Justice issued its *Huawei* ruling, setting out a test that aims to strike the balance between maintaining effective free competition and safeguarding proprietors' IP.[21] The ruling confirms at the highest judicial level that EU competition law matters in SEP licensing. In particular, where SEP holders are in a dominant position, and commit to grant licences on FRAND terms in the context of a standardisation procedure, they are subject to special conditions before they can seek an injunction against potential infringers without violating Article 102 TFEU.[22]

The *Huawei* judgment, however, leaves a number of issues unaddressed, including when an SEP holder will be considered dominant in the first place. The judgment provides no guidance on what amounts to FRAND terms. Instead, it requires national courts to play a greater role by assessing whether offers made by parties are objectively FRAND. And the judgment, intriguingly, by relying on a theory of harm based on 'legitimate reliance', leaves open the possibility that the principles apply beyond SEPs to other essential IPRs.

The first national decision applying the Huawei ruling was the Düsseldorf Regional Court's decision in *SISVEL v. Qingdao Haier Group*. The Court held that Qingdao was infringing SISVEL's patents in certain mobile telecommunication standards. Qingdao raised the FRAND defence set out in *Huawei*. The Court found, however, that Qingdao had not provided appropriate security nor rendered accounts when SISVEL rejected Qingdao's counter-offer. The *Huawei* conditions were therefore not satisfied. The Court left open the question whether SISVEL's offer was FRAND in the first place. That is, the Court found that the rendering of accounts and security must be complied with independently of the specific details of the offer and the counter-offer. Arguably, this finding conflicts with the Court of Justice's requirement in *Huawei* that the SEP holder's offer, and the SEP user's counter-offer, must be on FRAND terms.[23]

How national courts apply the *Huawei* ruling – including the issues of whether a SEP confers a rebuttable presumption of dominance, and what constitutes FRAND prices and terms, and whether similar principles could apply to patent assertion entities' use of non-SEP essential patents – is likely to be one of the hotly litigated issues of 2016 and onwards. In the UK, for example, the UK High Court in *Unwired Planet v. Huawei* is scheduled in October 2016 to determine how to apply FRAND licensing principles for patents said to be essential to 2G, 3G and 4G.

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21 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*.

22 These conditions are as follows: (1) SEP holders must alert SEP users of the alleged infringement; (2) SEP users must indicate a willingness to conclude a licence on FRAND terms; (3) SEP holders must present a detailed written offer for a licence on FRAND terms; (4) SEP users must respond promptly and in good faith, and not engage in delaying tactics; (5) if the SEP user does not accept the offer, it must submit, promptly and in writing, a specific counter-offer on FRAND terms; (6) if no agreement is reached, an SEP user that is already using the technology must provide appropriate security and be able to render accounts; (7) the amount of the royalty may, by common agreement, be determined by a independent third party; and (8) SEP users can challenge validity, essentiality, and infringement in parallel to licensing negotiations and also after conclusion of the licence agreement.

23 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, paragraphs 63 and 65.

As to the fourth development, the previous edition of this book commented on the threatened re-emergence in Europe of form-based analysis, at the expense of the economic analysis of foreclosure effects in abuse cases, following the General Court's decision in *Intel*. We suggest that a close reading of recent EU case law, including the Court of Justice's decision in *Cartes Bancaires*, reveals that the exemption from the obligation to show anticompetitive effects applies only in a limited set of circumstances – specifically, for conduct that is 'by its very nature' abusive. This means, effectively, that based on past practical experience and economic theory, the conduct is always restrictive and harmful to consumers, and never justified except in unusual circumstances.

This reading is reinforced by recent decisions of the Court of Justice and national courts. In *Post Danmark II*, the Court of Justice confirmed that even in the case standardised, retroactive, conditional rebates applied by a statutory monopoly in a market protected by high barriers to entry,[24] anticompetitive effects must be 'likely' or 'probable'. [25] The Court also rowed back from Advocate General Kokott's fulmination against the as-efficient competitor test – a 'disproportionate use of the resources of the competition authorities and the courts' – finding the test to be 'one tool amongst others for the purposes of assessing whether there is an abuse'.[26]

The Court did state, however, that 'fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified'.[27] But the statement is limited to conduct that it is 'by its very nature abusive'.[28] Under consistent EU case law, these exceptional cases are already exempted from the requirement to show anticompetitive effects – so the judgment in this sense is not that surprising. In addition, the Court's rationale for dismissing an appreciability threshold was that 'the structure of the market has already been weakened by the dominant undertaking, so any further weakening of the structure of competition may constitute an abuse of a dominant position.'[29] The reasoning is therefore limited to cases where the effects of the conduct are alleged to occur on the same market as which the company is dominant. The finding would not apply, for example, to related-market abuses. In the *Streetmap v. Google* judgment discussed above, Roth J distinguished *Post Danmark II* for this precise reason. Roth J held that it would be 'perverse' to find that a product improvement on a dominant market 'contravenes competition law because it may have a *non-appreciable* effect on a related market where competition is not otherwise weakened'.[30]

Roth J's finding for related market abuses appears axiomatic. As the editors of this book, we would see the law go further: like leading commentators, [31] we consider that there

24 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraph 73.

25 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraphs 67 and 74.

26 Ibid., paragraph 61.

27 Ibid., paragraph 73.

28 Ibid., paragraph 73.

29 Ibid., paragraph 72.

30 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 98. Emphasis in original.

31 See, e.g., Whish & Bailey, *Competition Law* (8th edition, 2015), page 212; and Faull & Nikpay, *The EU Law of Competition* (3rd edition, 2014), paragraph 4.929.

should be a *de minimis* threshold in all Article 102 cases, as there is for Article 101 and the assessment of mergers. This would neither undermine existing rules concerning 'by nature' abuses, nor lead to unreasonable burdens on the European Commission or national competition authorities. And it would remove the contradiction that EU competition law may theoretically apply to conduct that cannot be shown to have even a miniscule effect on competition.

We would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fourth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions 2016 holds for the next edition of this book.

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June 2016

Chapter 21

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 to the

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

2 See, for example, *General Directorate of State Airports Authority*,15-36/559-182, 9 September 2015; *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004; *Türk Telekom*, 14-35/697-309, 24 September 2014.

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 Turkish Competition Authority (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. For instance, recently the Turkish Competition Board (the Competition Board) rejected the acquisition of sole control over Beta Turizm and Pendik Turizm by Setur as it concluded that the transaction would result in the creation of a dominant position and thus, would impede effective competition.[3]

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.[4]

II YEAR IN REVIEW

According to the Competition Authority's 2015 statistics, the Competition Board decided on 41 pre-investigations or investigations out of a total of 89, 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, 29 finalised 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 Competition Board also decided on the remaining 19 investigations that 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, continue to be the area of heaviest enforcement under Turkish competition law.[5] Over the past five years, the Competition Board has shifted

3 15-29/421-118, 9 July 2015

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

5 In 2014, the Competition Board decided on a total of 163 pre-investigations or investigations. Among these pre-investigations or investigations, 91 were concerning

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,[6] where there was ultimately no finding of an abuse of a dominant position, and the shipping company UN Ro-Ro,[7] where UN Ro-Ro was fined 4 per cent of its 2011 turnover, which amounted to 841,199.70 lira. In *Turkcell*,[8] 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*,[9] the Competition Board imposed a monetary fine of 41 million lira on Mey İçki for its abusive 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[10] 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.

The following table shows the Competition Board's most recent landmark decisions regarding abuse of dominance:

Investigated party	*Date and number of the Competition Board decision*	*Summary of the case*	*Administrative monetary fine*
Solgar	No. 16-05/116-51, 18 February 2016	In 2010, the Competition Board initiated a preliminary investigation against Solgar based on the allegations that Solgar violated Articles 4 and 6 of Law No. 4054 through an alleged refusal to supply. The Board unanimously ruled that Solgar did not violate Law No. 4054 and no administrative fines were levied. The 13th Chamber of the Council of State annulled the Competition Board's decision in late 2014, on the grounds that the information and evidence obtained during the preliminary investigation was not sufficient to conclude that the case did not necessitate an in-depth investigation. Upon the Council of State's decision, the Competition Board initiated a full-fledged investigation against Solgar, by operation of administrative law, in order to determine whether Solgar has violated Article 4 or Article 6 of Law No. 4054 by refusing to supply Anadolumed's orders. At the end of this thorough and in-depth investigation, the Competition Board concluded that Solgar did not violate Law No. 4054 and, thus, it did not impose any administrative monetary fine on Solgar.	N/A

violations of Article 4 of Law No. 4054, 48 were concerning violations of Article 6 of Law No. 4054 and 24 cases were evaluated from the aspect of both Article 4 and Article 6.

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

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

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

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

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

Coca-Cola	No. 15-10/148-65, 5 March 2015	The Competition Board initiated an investigation against Coca-Cola as a result of the preliminary inquiry related to the claims that Coca-Cola made exclusive agreements with some sales points in various cities in Turkey, especially in Istanbul, Ankara, Izmir, Bursa and Antalya. During the investigation, the Competition Board analysed whether: Coca-Cola has fulfilled the requirements of the Competition Board's decision No. 07-70/864-327, 10 September 2007; Coca-Cola's existing contracts and protocols contain exclusivity provisions; and its contracts and practices in the market create *de facto* exclusivity in the market taking into account its availability and market-share data. At the end of an in-depth investigation, the Competition Board found no infringement of competition law on the part of Coca-Cola, as no information or finding was obtained showing that Coca-Cola carried out organised and systematic practices preventing its competitors from entering points of sale.	N/A
Turkish Airlines	No. 14-54/932-420, 25 December 2014	Pegasus, a low-cost rival airline company, complained that Turkish Airlines engaged in abusive behaviour through predatory pricing and obstructing rivals' flights and other abusive operations and accused Turkish Airlines of violating Article 6 of Law No. 4054 through abuse of its dominance. The case was an extension of an older fully fledged investigation in 2011, which the Competition Board closed without a fine against Turkish Airlines because of a lack of merit in the claims (*Turkish Airlines*, No. 11-65/1692-599, 30 December 2011). The Ankara Administrative Court repealed the 2011 investigation decision, arguing that the Competition Board should have engaged in a more detailed and sophisticated analysis of Turkish Airlines' pricing behaviour. As a result, the Competition Board had to reopen the case again in 2013. Following the fully fledged investigation process, the Board did not find any violation on the part of Turkish Airlines.	N/A

Additionally, the Competition Board rendered five no-fine decisions in 2015 and 2016. These five decisions concern the investigations launched against: Tırsan Kardan-Tiryakiler, active in the market for sales of cardan shaft and spare parts (No. 15-30/445-132, 10 July 2015), General Directorate of State Airports Authority, a state-owned airports administration (No. 15-36/559-182, 9 September 2015), Unilever and Advertising Self-Regulatory Board (No. 15-38/631-214, 16 October 2015), Nuh Çimento, active in the cement market (No. 16-05/118-53, 18 February 2016), and Türk Telekom-TTNet (No. 16-15/254-109, 3 May 2016).

Ongoing high-profile investigations of the Competition Authority, at the time of writing, are provided in the table below:

Investigated party	*Alleged abuse of dominance activity*	*Date of initiation*
Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San ve Tic AŞ	MFN clauses and exclusivity	18 March 2015
(i) Mozaik İletişim Hizmetleri AŞ (ii) Doğan TV Digital Platform İşletmeciliği AŞ (iii) Krea İçerik Hizmetleri ve Prodüksiyon AŞ	Refusal to provide access to satellite platform	24 April 2015
(i) Ankara Uluslararası Kongre ve Fuar İşletmeciliği Merkezi AŞ (ii) GL Events Fuarcılık AŞ	Refusal of application to organise a furniture fair	15 June 2015
(i) Turkish Pharmacists' Association (ii) Turkish Pharmacists' Association Commercial Enterprise	Practices related to import of medicines that are not supplied to the market	7 July 2015
(i) Booking.com BV (ii) Bookingdotcom Destek Hizmetleri Limited Şirketi	MFN clauses concerning the best price guarantees	9 July 2015
Mey İçki San ve Tic AŞ	Preventing competitors' activities	28 July 2015
Luxottica Gözlük Endüstri ve Ticaret AŞ	Tying and bundling practices	1 September 2015
Siemens San ve Tic AŞ	Non-compliance with the obligations under a previous decision of the Competition Board	1 September 2015
Türk Philips Ticaret AŞ	Price discrimination among equal buyers	9 September 2015
Dow Türkiye Kimya San ve Tic Ltd Şti	No information available	10 November 2015
Mey İçki Sanayi ve Ticaret AŞ	Pressurising the sale points through rebates and/or investment supports	20 April 2016
(i) Turkish Pharmacists' Association (ii) Seven Chambers of Pharmacists (İzmir 3rd District, Adana, Bursa Adıyaman, Antalya, Uşak and Giresun)	Exclusive distribution and allocation of prescriptions among pharmacies in turns and on the basis of limits	30 March 2016

The four aforementioned ongoing investigations (i.e., investigations against Mozaik İletişim Hizmetleri, Doğan TV Digital Platform İşletmeciliği and Krea İçerik Hizmetleri; Turkish Pharmacists' Association and Seven Chambers of Pharmacists; Siemens Turkey; and Ankara Uluslararası Kongre ve Fuar İşletmeciliği and GL Events) were initiated upon the annulment of the Ankara Administrative Courts or Council of State.

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.[11]

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.

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.[12]

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),

11 See, for example, *Anadolu Cam*, 04-76/1086-271, 1 December 2004; and *Warner Bros*, 07-19/192-63, 8 March 2007.

12 See, for example, *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

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). The *3M Turkey*, *Turkcell* and *Solgar* decisions are the latest examples of this same trend. In *3M Turkey*,[13] 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*,[14] 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. Likewise, in *Solgar*,[15] the Competition Board decided on a fully fledged investigation against Solgar, which looked into whether Solgar had violated Article 4 or Article 6 of Law No. 4054 by refusing to supply. The Competition Board concluded that Solgar did not violate Law No. 4054 and, thus, it did not impose any administrative monetary fine on Solgar.

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;

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 anticompetitive 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

13 *3M*, 14-22/461-203, 25 June 2014.

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

15 *Solgar*, 16-05/116-51, 18 February 2016.

market subject to dominant position is also prohibited under Article 6.[16] On the other hand, previous precedents show 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.[17] 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 *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.[18]

Furthermore, in line with the EU jurisprudence, price squeezes may amount to a form of abuse in Turkey and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.[19]

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.[20]

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*,[21] condemned the defendant for abusing its dominance by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo

16 See, for example, *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom*, 02-60/755-305, 2 October 2002; and *Turkcell*, 01-35/347-95, 20 July 2001.

17 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; *Turkey Maritime Lines,* 06-74/959-278, 12 October 2006; and *Feniks*, 07-67/815-310, 23 August 2007.

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

19 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.

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

21 *Turkcell*, 09-60/1490-37, 23 December 2009.

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.[22]

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.[23]

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.[24]

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.[25]

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.[26] 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

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

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

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

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

26 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.

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 the fine imposed on the undertaking or association of the undertaking. After the amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments, etc., in determining the magnitude of the monetary fine.

Additionally, Article 56 of Law No. 4054 provides that agreements and decisions of trade associations that infringe Article 4 are invalid and unenforceable with all their consequences. The issue of whether the 'null and void' status applicable to agreements that fall foul of Article 4 may be interpreted to extend to cover contracts entered into by infringing dominant companies is a matter of ongoing controversy. However, contracts that give way to or serve as a vehicle for an abusive contract may be deemed invalid and unenforceable because of violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,[27] 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.

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

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 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 17,700 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.[28]

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;

28 *Türk Telekom*, 16-15/255-110, 3 May 2016.

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 17,700 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.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted to judicial review before the Administrative Courts by filing a lawsuit within 60 days of the receipt by the concerned parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stay the execution of the Competition Board's decision (Article 27, Administrative Procedural Law).

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually takes more than 18 months.

Third parties can also challenge the Competition Board's decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

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

In 2013, the Competition Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation; in particular, to provide efficiency in time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete as a result of the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. It is further indicated that the Authority may take steps toward the amendment of certain articles if a new competition law is not passed by the parliament.

The Competition Authority also showed 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.

The recent enforcement trend of the Competition Authority shows that it is becoming more and more sensitive to dominant undertakings' excessive pricing and exclusionary behaviour towards new entrants or current rivals. Over the past few years, the Competition Board has launched many pre-investigations and investigations especially regarding pricing behavior of dominant undertakings. Nevertheless, the Competition Authority noted in the 2015 Annual Report that the Board did not impose any administrative monetary fines at the end of certain investigations.

Appendix 1

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Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 65 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counseling issues, with more than 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

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