

# Restraints of trade and dominance in Turkey: overview

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A Q&A guide to restraints of trade and dominance in Turkey.

This Q&A is part of the global guide to restraints of trade. Areas covered include monopolies and abuses of market power, regulatory authorities and the regulatory framework, the scope of rules, exemptions, exclusions, statutes of limitation, notification, investigations, penalties and enforcement, third party damages claims, EU law, joint ventures and proposals for reform.

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Merger Control: [www.practicallaw.com/mergercontrol-guide](http://www.practicallaw.com/mergercontrol-guide).

Cartel Leniency: [www.practicallaw.com/leniency-guide](http://www.practicallaw.com/leniency-guide).

## Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

### Regulatory framework

The relevant legislation that regulates cartels is the Law on Protection of Competition No. 4054 dated 13 December 1994 (Competition Law). The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The Turkish cartel regime is administrative and civil in nature, not criminal. The Competition Law applies to individuals and companies, provided that they act as an undertaking within the meaning of the Competition Law.

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which provides the basic principles of cartel regulation. The provision is closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It 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, or within a part of, a Turkish product or services market. Similarly to Article 101(1), the provision does not provide a definition of cartel. It rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity.

Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Similar to Article 101(1) of the TFEU, Article 4 of the Competition Law provides a non-exhaustive list of restrictive agreements, such as directly or indirectly fixing purchase or selling prices or other trading conditions, market sharing, output or demand restrictions.

### **Regulatory authority**

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Turkish Competition Authority (Competition Authority). The Competition Authority has administrative and financial autonomy. It consists of the Competition Board, Presidency and service departments. There are five divisions, with sector-specific work distribution, that handle the Competition Law enforcement work through approximately 130 case handlers. The other service units consist of the following:

- The department of decisions.
- The economic analysis and research department.
- The information management department.
- The external relations, training and competition advocacy department.
- The strategy development, regulation and budget department.
- The cartel and on-site inspections support division.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

A number of horizontal restrictive agreements, such as price-fixing, market allocation, collective refusals to deal (group boycotts) and bid-rigging, have consistently been deemed to be illegal.

The Turkish anti-trust regime also covers concerted practices and shifts the burden of proof in connection with concerted practice allegations onto the accused party. A concerted practice is a form of coordination, without a formal agreement or decision, by which two or more companies come to an understanding to avoid competing with each other. Such coordination does not need to be in writing.

### **Exemptions**

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption issued by the Competition Board.

The block exemption rules currently applicable are the:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements.
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector.
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements.
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements.

The Competition Board can grant, on the parties' application, an individual exemption for agreements between undertakings if the agreement fulfils all of the following requirements:

- It ensures new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services.
- It allows the consumer to benefit from these developments and improvements.
- It does not eliminate competition in a significant part of the relevant market.
- It does not impose a restraint on competition that is more than what is necessary to attain the objectives in the first two bullets above.

## **Exclusions and statutes of limitation**

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

### **Exclusions**

Unlike the TFEU, Article 4 of the Competition Law does not refer to an appreciable effect or a substantial part of a market, and therefore excludes any *de minimis* exception.

### **Statutes of limitation**

Article 20/3 of the Law on Misdemeanours No. 5326 provides a limitation period of eight years for offences that are punishable with proportional administrative monetary fines. Infringements set out under the Competition Law are subject to proportional administrative monetary fines. Therefore, the limitation period for infringements arising from the Competition Law, such as violation of Article 4 (that is, restrictive agreements between competitors), is eight years, commencing from the date of the infringement. In the case of continuing or repeated infringements, time begins to run as from the day on which the infringement ceases or on the last day of the repeated infringement.

### **Notification**

5.What are the notification requirements for restrictive agreements and practices?

### **Notification**

Individual exemption notification is not mandatory. The undertakings are responsible for compliance with the Competition Law either by means of self-assessment or by formal individual exemption application to the Competition Authority.

### **Informal guidance/opinion**

No informal guidance or opinion is available. Notification (if made) must be formal.

### **Responsibility for notification**

Persons or undertakings that are parties to the transaction, or their authorised representatives, can make the filing, jointly or severally.

### **Relevant authority**

The Competition Authority is the relevant authority.

### **Form of notification**

One copy of the notification form (which is attached to the Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings) must be submitted to the Competition Board, together with some additional documents, such as:

- The executed copies and sworn Turkish translations of the agreement or decision subject of the negative clearance application/notification.

- Annual reports showing the parties' activities, balance sheets, revenue charts and accounts of the last three years.
- Market research and relevant studies made by the parties or third persons, which contain information on the market and competitive conditions, and on current and potential competitors.

### **Filing fee**

There is no filing fee.

### **Investigations**

6. Who can start an investigation into a restrictive agreement or practice?

### **Regulators**

The Competition Board can launch an investigation into an alleged cartel activity ex officio. The Competition Authority also conducts market monitoring and prepares sector reports.

### **Third parties**

Third parties can file a complaint to the Competition Board verbally or through a petition, as there are no special formalities for making a complaint.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

### **Representations**

The complainants can attend the oral hearing if they make a written request within the period determined by the Competition Board. Third parties can attend the oral hearing by submitting a petition and presenting information and documents that show their interest in the subject matter of the oral hearing. The Competition Board notifies its decision to the relevant persons before the hearing.

On the request of the investigation committee or ex officio, the Competition Board can also invite to the oral hearing other natural or legal persons whom it deems to be relevant, or from whom it needs to receive information.

### **Document access**

The complainants and other third parties have a right to access the file (*Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3)*). The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement.

### **Be heard**

See above, [Representations](#).

### 8. What are the stages of the investigation and timetable?

The Competition Board rejects a 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.

### **Pre-investigation**

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 (that is, an unannounced on-site inspection), the undertakings concerned are not notified that they are under investigation.

The Competition Authority's experts' preliminary report is submitted to the Competition Board within 30 days after a pre-investigation decision is taken. The Competition Board will then decide, within ten days from the receipt of the preliminary report, 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.

### **Formal investigation**

The investigation must be completed within six months. If deemed necessary, the Competition Board can extend this period only once up to six months.

The following are the main stages of the formal investigation:

- The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defence.
- Subsequently, the Competition Authority issues its main investigation report.
- 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 then has 15 days to prepare an opinion concerning the second written defence (additional opinion).
- The defending parties 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 (that is, the written phase of investigation involving claim/defence exchange will close with the submission of the third written defence).

### **Oral hearings**

An oral hearing can be held on the parties' request. The Competition Board can also ex officio decide to hold an oral hearing.

Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process.

The Competition Board renders its final decision within either:

- 15 calendar days from the hearing, if an oral hearing is held.
- 30 calendar days from the completion of the investigation process, if no oral hearing is held.

It usually takes around six to eight months, from the announcement of the final decision, for the Competition Board to serve a reasoned decision.

### **Publicity and confidentiality**

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

#### **Publicity**

The reasoned decisions of the Competition Board are published on the Competition Authority's website (<https://www.rekabet.gov.tr/tr/Kararlar>) after confidential business information is redacted.

The main legislation regulating the protection of commercial information is Communiqué No. 2010/3. Communiqué No. 2010/3 places the burden of identifying and justifying information or documents as commercial secrets on the undertakings.

#### **Automatic confidentiality**

The Competition Board can evaluate information or documents ex officio. However, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

#### **Confidentiality on request**

Undertakings must request confidentiality in writing from the Competition Board. They must justify their reasons for the confidential nature of the information or documents that they request to be treated as commercial secrets.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Competition Law gives the Competition Authority considerable authority to conduct dawn raids. A judicial authorisation must be obtained by the Competition Board only if the relevant undertaking refuses to allow the dawn raid (in which case the undertaking would be subject to monetary fines).

Officials conducting a dawn raid must have a deed of authorisation from the Competition Board that specifies the subject matter and purpose of the investigation.

The Competition Authority can also use formal information request letters when investigating potentially restrictive agreements or practices.

### Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

Other than in relation to leniency (*see Question 13, [Immunity/leniency](#)*), the Competition Board does not enter into plea bargain arrangements.

Mutual agreements (which must take the form of an administrative contract) on other liability matters have not been tested in Turkey.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

There is no settlement procedure.



## Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

The sanctions that can be imposed under the Competition Law are administrative in nature. Therefore, breaches of the Competition Law lead to administrative fines (and civil liability), but not to criminal sanctions. However, there are circumstances where the matter is referred to a public prosecutor after the competition law investigation is complete. For example:

- Bid-rigging activity can be subject to criminal prosecution under section 235 of the Criminal Code.
- Illegal price manipulation can also carry up to two years' imprisonment and a civil monetary fine under section 237 of the Criminal Code.

### Orders

The Competition Board is authorised to take all necessary measures to:

- Terminate the restrictive agreement.
- Remove all factual and legal consequences of every action that has been taken unlawfully.
- Take all other necessary measures to restore the level of competition and status as before the infringement.

Article 9 of the Competition Law, which generally entitles the Competition Board to order structural or behavioural remedies to restore competition as before the infringement, also sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched.

### Fines

In the case of a proven cartel activity, the companies concerned are separately subject to fines of up to 10% 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 is taken into account).

Article 17 of the Law on Minor Offences requires the Competition Board to take a number of factors into consideration in determining the amount of the monetary fine.

In line with this, the Competition Authority enacted the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (Regulation on Fines). The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an anti-trust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations.

### Personal liability

In the case of a proven cartel activity, employees and managers of the undertakings, or association of undertakings, who had a determining effect on the creation of the violation, are also fined up to 5% of the fine imposed on the undertaking or association of undertakings. The Regulation on Fines also applies to managers or employees who had a determining effect on the violation, and provides for certain reductions in their favour (*see above, Fines*).

### **Immunity/leniency**

The Regulation on Active Co-operation for Discovery of Cartels (Regulation on Leniency) provides the main principles of the immunity and leniency programmes. The leniency programme is only available for cartel participants. It does not apply to other forms of anti-trust infringements. A cartel participant can apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or a reduction of, a fine. This immunity or reduction covers both the undertakings and their employees/managers, with the exception of the ringleader, who can only benefit from a second degree fine reduction.

### **Impact on agreements**

A restrictive agreement is deemed legally invalid and unenforceable, with all its legal consequences. Similarly, the Competition Board can take interim measures until the final resolution on the matter, if there is a possibility of serious and irreparable damage.

### **Third party damages claims and appeals**

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

### **Third party damages**

Under Article 57 of the Competition Law, real or legal persons who/which suffer losses due to distortion of competition can claim compensation for the loss from the parties causing the loss. The damages amount is the difference between the cost the injured parties paid and the cost they would have paid if competition had not been limited (*Article 58(1), Competition Law*). Further, Article 58(1) of the Competition Law stipulates that the competitors who were not involved in the competition law violation and suffered due to the violation can claim compensation for both actual damages and loss of profit.

For the damages exceeding the amount of the claimant's loss, the most distinctive feature of the Turkish competition law regime is the rule of triple damages (also known as "treble damages"). For the treble damages rule to apply:

- The damage must be the result of an agreement or decision of the parties, or an act of gross negligence by them.
- Only the material damages (and not moral damages) are relevant.
- The damage must be actual damages.

(Article 58(2), Competition Law.)

However, the enforcement method of Article 58(2) of the Competition Law is controversial in practice. It has been argued that the judge can only order treble compensation if the conditions are fulfilled, thus preventing a different multiplier being used. However, the prevailing legal opinion and the practice of local courts conclude that the judge has discretion to order "up to" treble compensation and thus can use any multiplier up three times the standard amount of compensation.

For example, decisions of courts of first instance where the relevant court followed the opinion that only treble compensation can be ordered or followed the opinion that the court has discretion to order "up to" treble compensation are provided below:

- One-fold compensation (*Istanbul 12th Consumer Court, 06 June 2017, 2016/82 E., 2017/220 K*).
- Two-fold compensation (*Istanbul Anatolian 4th Commercial Court of First Instance, 12 December 2017, 2015/1008 E. 2017/1325 K*).
- Three-fold compensation (*Marmaris 1st Civil Court of First Instance in the capacity of Consumer Court, 14 November 2017, 2017/17 E., 2017/494 K*).

### Special procedures/rules

Most of the civil courts wait for the decision of the Competition Board before making their own decision on the Competition Board's decision (*see 11th Civil Chamber of the Court of Appeals, October 5, 2009, 2008/5575 E., 2009/10045 K*).

### Collective/class actions

Procedural law denies the possibility of any class actions or procedures. The courts do not grant class certification requests.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

### Rights of appeal and procedure

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*). However, on request of the claimant, the court, providing its justifications, can decide the stay of execution of the decision if its execution is likely to cause serious and irreparable damage and if the decision is highly likely to be against the law (that is, the showing of a prima facie case). The judicial review period before the administrative courts usually takes about

12 to 24 months. If the challenged decision is annulled in full or in part, the administrative court remands it to the Competition Board for review and reconsideration.

After the recent legislative changes to the Law on Establishment and Duties of Regional Administrative Courts, Administrative Courts and Tax Courts No. 2576 and Law on Establishment, Duties and Powers of First Instance Courts and Regional Courts of Justice No. 5235, administrative litigation cases (and private litigation cases) are now subject to judicial review before the newly established regional courts. The amendments have created a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the Court of Appeals for private cases). The regional courts will:

- Go through the case file both on procedural and substantive grounds.
- Investigate the case file and render their decision considering the merits of the case.

The regional courts' decisions are considered as final in nature. The decision of the regional court is subject to the Council of State's review in exceptional circumstances, which are provided in Article 46 of the Administrative Procedure Law. In this case, the decision of the regional court is not considered as a final decision and the Council of State can decide to uphold or reverse it. If the decision is reversed by the Council of State, it will be remanded back to the deciding regional court, which will in turn issue a new decision taking into account the Council of State's decision.

### **Third party rights of appeal**

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

## **Monopolies and abuses of market power**

### **Scope of rules**

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law?  
If so, what are the substantive provisions and regulatory authority?

### **Regulatory framework**

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of the Competition Law. It provides that any abuse of dominance on the part of one or more undertakings, individually or through joint agreements or practices, in a market for goods or services within the whole or part of Turkey, is unlawful and prohibited.

Article 6 of the Competition Law provides a non-exhaustive list of specific forms of abuse, similar to Article 102 of the TFEU. Abuse can consist of:

- Directly or indirectly preventing entries into the market or hindering competitor activity in the market.

- Directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties.
- Making the conclusion of contracts subject to acceptance of restrictions concerning resale conditions, such as the purchase of other goods and services by other parties.
- Displaying other goods and services, or maintenance of a minimum resale price by intermediary purchasers.
- Distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market.
- Limiting production, markets or technical development to the prejudice of consumers.

### **Regulatory authority**

The Competition Authority is the regulatory authority.

17. How is dominance/market power determined?

Dominance is defined as the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers (*Article 3, Competition Law*).

Enforcement trends show that the Competition Board is increasingly inclined to infer dominance even in cases of dependence or inter-dependence (see, for example, *Anadolu Cam*, 1 December 2004, 04-76/1086-271 and *Warner Bros*, 24 March 2005, 05-18/224-66).

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

The Competition Board's past and recent precedents make it clear that an undertaking with a market share lower than 40% is unlikely to be in a dominant position (see, for example, *Mediamarkt*, 12 May 2010, 10-36/575-205, *Pepsi Cola*, 5 August 2010, 10-52/956-335 and *Egetek*, 30 September 2010, 10-62/1286-487).

18. Are there any broad categories of behaviour that may constitute abusive conduct?

The Competition Law contains a non-exhaustive sample list of specific forms of abuse. Article 2 of the Competition Law 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 conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices.

### Exemptions and exclusions

19. Are there any exemptions or exclusions?

Exemptions and exclusions are not available.

### Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no notification mechanism.

### Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

This is the same as for restrictive agreements and practices (see [Question 6 to 9](#) and [Question 11 to 12](#))

22. What are the regulator's powers of investigation?

This is the same as for restrictive agreements and practices (see [Question 10](#)).

### **Penalties and enforcement**

23. What are the penalties for abuse of market power and what orders can the regulator make?

This is the same as for restrictive agreements and practices (see [Question 13](#)).

### **Third party damages claims**

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

### **Third party damages**

This is the same as for restrictive agreements and practices (see [Question 14](#), [Third party damages](#)).

### **Special procedures/rules**

See [Question 14](#), [Third party damages](#).

### **Collective/class actions**

See [Question 14](#), [Third party damages](#).

## **EU law**

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

## Joint ventures

26. How are joint ventures analysed under competition law?

Joint ventures that permanently meet all the functions of an independent economic entity are deemed notifiable to the Competition Board (*Article 5/III, Communiqué*), provided that the turnover thresholds are exceeded. To qualify as a concentration subject to merger control, a joint venture must be full function and satisfy the following criteria:

- Joint control exists in the joint venture.
- The joint venture is an independent economic entity established on a lasting basis (that is, having adequate capital, labour and an indefinite duration).

Cooperative joint ventures are also subject to a merger control notification and analysis, as well as an individual exemption analysis, if warranted (*Article 13, Communiqué*). However, there have been cases (albeit rarely) where the Competition Board found structural abuses where dominant firms use joint venture agreements as a backup tool to exclude competitors, which is prohibited under Article 6 of the Competition Law (see, for example, *Biryay*, 17 July 2000; 00-26/292-162).

## Inter-agency co-operation

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The Competition Authority can notify and request the European Commission to apply relevant measures if the Competition Board believes that cartels organised in the territory of the EU adversely affect competition in Turkey (*Article 43, Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95)*).



The provision grants reciprocal rights and obligations to the parties. There are also a number of bilateral cooperation agreements between the Turkish Competition Authority and the competition agencies in South Korea, Bulgaria, the Russian Federation, Egypt, Ukraine, Serbia, Albania and the EU, among others. These cooperation agreements are signed and implemented for various purposes, such as:

- Enhancing cooperation in applying competition law rules to increase the efficiency of product and service markets.
- Exchanging documents and information on certain topics between authorities.
- Improving cooperation and facilitating the exchange of information between the authorities with respect to competition law enforcement and policy.

The Competition Authority's research department has periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition. In this respect, a cooperation protocol was signed on 14 October 2009 between the Competition Authority and the Public Procurement Authority, to procure a healthy competition environment in relation to public tenders by cooperating and sharing information.

## Recent cases and trends

28. What are the recent developments, trends or notable recent cases concerning abuse of market power?

### Unilateral pricing practices and refusals to supply

Over the past five years, the Competition Board has shifted its focus from merger control cases to concentrate on the fight against cartels and on cases of abuse of dominance. Consequently, the Competition Board has shown increased interest in refusal to supply cases. The Competition Authority has conducted several pre-investigations and investigations with regards to refusal to supply. Examples of pre-investigations include:

- *Daichii Sankyo* (22 May 2018, 18-15/280-139).
- *Türkiye Petrol Rafinerileri* (12 June 2018, 18-19/321-157).

Examples of investigations include:

- *Radontek* (11 October 2018, 18-38/617-298).
- *Zeyport Zeytinburnu* (15 March 2018, 18-08/152-73).
- *Kardemir Karabük Demir Çelik* (7 September 2017, 17-28/481-207).

### Technology and online markets

In *Çiçek Sepeti* (8 March 2018, 18-07/111-58), the Competition Board examined the allegations that Çiçek Sepeti abused its dominant position in the online flower sales market and obstructed its competitors' activities by way of:

- Applying predatory prices.
- Spending significant amounts on advertising.
- Initiating unfair lawsuits against its rivals.

Çiçek Sepeti is an online retailer active in the sale of flowers, edible flowers (bonnyfood) and gifts (bonnygift). To understand the market power of Çiçek Sepeti and evaluate the conducts subject to the complaint, the Competition Board assessed the markets in which Çiçek Sepeti are active. The Competition Board stated that since the products subject to the pre-investigation (that is, flowers, bonnyfood and bonnygift) have different supply processes, there is no supply substitution between these products. Further, since these products have different qualifications and usage areas, the demand substitution between these products is also very limited. In this regard, the Competition Board stipulated that these products cannot be considered under the same market definition. Additionally, the Competition Board also evaluated whether the traditional flower sales (the sales made by supermarkets and traditional flower stores and street corner flower sales) are substitutable to the online flower sales. The Competition Board referred to its previous Çiçek Sepeti decision dated 16 December 2010 (10-78/1623-623) and concluded that the relevant product market is defined as "online flower sales", which excludes traditional flower sales. Following the assessments, the Competition Board concluded that Çiçek Sepeti can be presumed to be in a dominant position in the relevant market based on:

- The low possibility of Çiçek Sepeti's rivals to establish competitive constraints.
- The entry barriers caused by the network effects in the market.
- Çiçek Sepeti's wide distribution network.

With regard to the allegation on applying predatory prices, the Competition Board evaluated whether the conduct in question is likely to lead to market foreclosure for an equally efficient competitor. After conducting a price-cost analysis on products, the Competition Board decided that an anti-competitive foreclosure cannot be established. In relation to the allegation on spending significant amounts on advertising and marketing expenses (and thus raising its rivals' costs), the Competition Board concluded that Çiçek Sepeti's advertisement expenses do not possess any exclusionary effect given that they do not decrease consumer welfare. Lastly, with regard to the allegation that Çiçek Sepeti is initiating unfair lawsuits against its rivals who had allegedly exploited Çiçek Sepeti's trade mark in Google Adwords, the Competition Board concluded that lawsuits initiated by Çiçek Sepeti have only served to protect its own brand rights and that there is no evidence indicating that Çiçek Sepeti initiates these lawsuits for the purpose of obstructing its rivals' activities.

After the pre-investigation phase, the Competition Board decided that there was no evidence of an Article 6 (*Competition Law*) violation, and decided not to initiate a full-fledged investigation against Çiçek Sepeti.

### **Other recent cases**

In 2018, the Competition Authority conducted several pre-investigations in relation to exclusive dealings, including *Mars Media* (18 January 2018, 18-03/35-22) and *Frito Lay* (12 June 2018, 18-19/329-163). Further, the Competition Board imposed a fine of TL17,497,141.63 on *Trakya Cam* for violating Articles 4 and 6 of the Competition Law by implementing the exclusive distribution agreements since 2016, which according to a previous decision of the Competition Board (2 December 2015, 15-42/704-258) was in violation of the Competition Law (14 December 2017, 17-41/641-280).

## Proposals for reform

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

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 due to the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure for the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. However, at this stage, there is no indication on whether the Draft Law is expected to be renewed or when.

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**Professional qualifications.** Istanbul, 1998; New York, 2002; Brussels, 2003; England and Wales, 2004 (non-practising)

**Areas of practice.** Regulatory and compliance; competition law; white collar irregularities; internet law; general corporate/contracts; litigation.

#### Recent transactions

- Represented Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. (Sahibinden) in an investigation conducted by the Turkish Competition Authority to determine whether Sahibinden has violated Article 6 of the Competition Law by excessive pricing conducts in the markets for online platform services towards vehicle and estate sale / rental services.
- Merger control filing with the Competition Board for the merger of Luxottica Group S.p.A. and Essilor International (*Compagnie Générale d'Optique*) S.A.

- Merger control filing with the Competition Board for the acquisition of sole control of Time Warner Inc. by AT&T Inc.

**Languages.** English, Turkish

**Professional associations/memberships.** Istanbul Bar Association (since 1998); New York Bar Association (since 2002); American Bar Association (since 2002); Law Society of England and Wales (since 2004); Brussels Bar Association (since 2003).

### Publications

- *"Testing Justification for Segment Based Relevant Product Market Definition in Merger Control: Evidence From Turkey"*, by Gönenç Gürkaynak, Esq. and Dr. Ekrem Kalkan, *Journal of Competition Law and Economics*, Oxford University Press, June 2017.
- *"Shady Contours of Cartel Liability of Service Providers"*, by Gönenç Gürkaynak, Esq., Ceren Özkanlı, Su Şimşek and Nazlı Ceylan Mollaoğlu, *IBA Competition Law International*, Volume 13, No. 1, April 2017.
- *"Multisided markets and the challenge of incorporating multisided considerations into competition law analysis"* (Article by Gönenç Gürkaynak, Esq., Öznur İnanılır, Sinan Diniz and Ayşe Gizem Yaşar), doi: 10.1093/jaenfo/jnw007, *Journal of Antitrust Enforcement*, Oxford University Press, June 30, 2016.
- *"Call for unified anti-corruption law and competition law compliance programme: Why compliance programmes should be viewed as a mitigating factor"*, (Article by Gönenç Gürkaynak, Esq., C# Olgu Kama, Ceren Özkanlı and Burcu Ergüven), *Journal of Business Compliance* 01/02 2016 – Special Issue.
- *"Most-favored-nation Clauses in Commercial Contracts: Legal and Economic Analysis and Proposal For a Guideline"*, by Gönenç Gürkaynak, Esq., Ayşe Güner, Esq., Sinan Diniz and Janelle Filson, Esq., *European Journal of Law and Economics*, October 27, 2015.

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**Recent transactions**

- Represented Media Saturn İstanbul İç ve Dış Tic. Ltd. Şti., the Turkish subsidiary of Media-Saturn-Holding GmbH, in an investigation conducted by the Turkish Competition Authority against seven companies active in the consumer electronics market.
- Merger control filing with the Competition Board for the acquisition of sole control by The Walt Disney Company over certain businesses of Twenty-First Century Fox, Inc. including its film and television studios, cable entertainment networks, and international television businesses.
- Merger control filing with the Competition Board for the acquisition of Gemalto N.V. by Thales S.A.

**Languages.** English, German, Turkish

**Professional associations/memberships.** Istanbul Bar Association (since 2005).

### **Publications**

- *"Complainant's Position in Competition Law Investigations: Considerations on the Balance Between Parties' Interests and Finding the Truth"*, by Gönenç Gürkaynak, Esq., Hakan Özgökçen, Esq., Sinan Diniz and Zeynep Ortaç, *Rekabet Derneği, Rekabet Forumu, Issue 72, March 2013.*
- *"A Discussion on Proof Matters in Turkish Competition Law Focusing on Proof of Concerted Practices"*, by Gönenç Gürkaynak, Esq., K. Korhan Yıldırım, M. Hakan Özgökçen and A. Buğra Aydın, *Competition Journal, Volume 12, Number 4, October 2011.*
- *"Flexible Legal and Economic Approaches on the Control of Concentrations: Opinions on the New U.S. Horizontal Merger Guidelines"*, by Gönenç Gürkaynak, Esq., Dr. İsmail Serdar Dalkır, M. Hakan Özgökçen, A. Buğra Aydın, Ceren Yıldız, *The Competition Journal, No. 12, The Turkish Competition Authority Press, Ankara, p. 123 – 161, January 2011.*
- *Thoughts on the Significance and Effects of the Theory of Abuse of Dominant Position Within the Context of Microsoft Case*, by Gönenç Gürkaynak, Esq., M. Hakan Özgökçen and Öznur İnanılır, *Bilgi University Faculty of Law, Istanbul, 22 June 2010.*

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