Dominance
2019

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Getting The Deal Through

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Turkey

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GENERAL FRAMEWORK

Legal framework

1 What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The main legislation applying specifically to the behaviour of dominant firms is article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited'. Article 6 of Law No. 4054 does not define what constitutes 'abuse' per se but it provides a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 82 of the EC Treaty). Accordingly, abuse may, in particular, consist of:

(a) directly or indirectly preventing entries into the market or hindering competitor activity in the market;
(b) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
(c) making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services or; acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;
(d) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market;
(e) limiting production, markets or technical development to the prejudice of consumers.

Definition of dominance

2 How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 3 of Law No. 4054 defines dominance as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers'. Enforcement trends show that the Turkish Competition Board (the Board) is increasingly inclined to somewhat broaden the scope of application of the article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases of dependence or interdependence (see, for example, *Anadolu Cam* (1 December 2004, 04-76/1086-271) and *Warner Bros* (24 March 2005, 05-18/224-66).

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

Purpose of the legislation

3 Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Influenced by the Turkish Competition Authority's publication in 2001 of The Prime Objective of Turkish Competition Law Enforcement from a Law & Economics Perspective (by Gönenç Gürkaynak), the economic rationale is more typically described in Turkish competition law circles as 'the ultimate object of maximising total welfare by targeting economic efficiency'. Regulations that were enacted in previous years, albeit not directly applicable to dominance cases, place greater emphasis on 'consumer welfare' (see Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board). Nevertheless, because the legislative history and written justification of Law No. 4054 contain clear references to non-economic interests as well (such as the protection of small and medium-sized businesses, etc), some of these policy interests are still pursued in Turkey, especially in dominance cases, alongside the economic object.

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

Sector-specific dominance rules

4 Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Law No. 4054 does not recognise any industry-specific abuses or defences. However, certain sectorial regulators have concurrent powers to diagnose and control dominance in their relevant sectors. For instance, the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority prohibits 'firms with significant market power' from engaging in discriminatory behaviour between companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility-sharing. These firms are also required to make an 'account separation' for costs they incur regarding their networks such as energy air conditioning and other bills. Similar restrictions and requirements also exist for energy companies.

Exemptions from the dominance rules

5 To whom do the dominance rules apply? Are any entities exempt?

Dominance provisions (and 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 entities also fall within the scope of the application of article 6. While the Board placed too much emphasis on the 'capable of acting independently' aspect of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of the Turkish competition law enforcement (see, for example, *Sugar Factories* (13 August 1998, 78/603-113)), the recent enforcement made it clear that the Board now uses a much broader and more accurate view of the definition, in a manner that also covers public entities and sport federations (see, for example, *Turkish Coal Enterprise* (19 October 2004, 04-66/949- 227); *Turkish Underwater Sports Federation* (3 February 2011, 11-07/126- 38); *Türk Telekom* (24 September 2014, 14-35/697-309) and *Devlet Hava Meydanları İşletmesi* (9 September 2015, 15-36/559-182)). Therefore, state-owned entities are also subject to the Competition Authority's enforcement, pursuant to the prohibition laid down in article 6.

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

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

Structural changes through which a non-dominant firm attempts to become dominant (for example, by acquisition of other businesses) are regulated by the merger control rules in article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance is not sufficient for enforcement even under the Turkish merger control rules, and a 'restriction of effective competition' element is required. As for the dominance enforcement rules, 'attempted monopolisation or dominance' is not recognised under the Turkish competition legislation.

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Collective dominance is covered by the Turkish competition legislation. The wording 'any abuse on the part of one or more undertakings' of article 6 clearly prohibits abuses of collective dominance. Turkish competition law precedents on collective dominance are neither abundant nor sufficiently mature to allow for a clear inference of a set of minimum conditions under which collective dominance would be alleged. That said, the Board has considered it necessary to establish 'an economic link' for a finding of abuse of collective dominance (see, for example, *Biryay* (17 July 2000, 00-26/292-162) and *Turkcell/Telsim* (9 June 2003, 03-40/432-186)).

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

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

The enforcement track record indicates that no article 6 cases involved a finding of infringement and imposition of monetary fines on dominant purchasers. However, the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (see, for example, *ÇEAS* (10 November 2003, 03-72/874-373)). Agreements to exert exploitative purchasing power between non-dominant firms have also been condemned under article 4 (*Cherry Exporters*, 24 July 2007, 07-60/713-245).

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

The test for market definition does not differ from the concept used for merger control purposes. The Board issued the Guidelines on the Definition of the Relevant Market (Guidelines) on 10 January 2008, with the goal of stating, as clearly as possible, the method used for defining a market and the criteria followed for taking a decision by the Board, in order to minimise the uncertainties undertakings may face. The Guidelines are closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The Guidelines apply to both merger control and dominance cases. The Guidelines consider demand-side substitutability as the primary standpoint of market definition. They also consider supply-side substitutability and potential competition as secondary factors.

Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50 per cent may be presumed to be dominant. The Competition Authority's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guidelines on Exclusionary Abuses), published on 29 January 2014, and the Board's past and recent precedents, make it clear that an undertaking with a market share lower than 40 per cent is unlikely to be in a dominant position (paragraph 12 of the Guidelines on Exclusionary Abuses and the Board's decisions such as *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)). That said, the Board's decisions and Guidelines on Exclusionary Abuses are clear that market shares are the primary indicator to the dominant position, but not the only one. The barriers to entry, the market structure, the competitors' market positions and other market dynamics, as the case may be, should also be considered. The undertakings may refute the assumption through demonstrating that they do not have market power to act independently of market parameters. Economic or market studies are important in this regard.

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 | How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Law No. 4054 is silent on the definition of abuse. It only contains a non-exhaustive list of specific forms of abuse. Nevertheless, paragraph 22 of the Guidelines on Exclusionary Abuses articulates that 'abuse' may be defined as when a dominant undertaking takes advantage of its market power to engage in activities that are likely, directly or indirectly, to reduce consumer welfare. Moreover, article 2 of Law No. 4054 adopts an effects-based approach to 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 conduct. In parallel, as per paragraph 24 of the Guidelines on Exclusionary Abuses: 'In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well.'

Exploitative and exclusionary practices

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

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

Link between dominance and abuse

12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

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

Article 6 also prohibits abusive conduct on a market different to the market subject to dominant position. Accordingly, the Board found incumbent undertakings to have infringed article 6 by engaging in abusive conduct in markets neighbouring the dominated market (see, for example, *Volkan Metro* (2 December 2013, 13-67/928-390), *Türkiye Denizcilik İşletmeleri* (24 June 2010, 10-45/801-264), *Türk Telekom* (2 October 2002, 02-60/755-305) and *Turkcell* (20 July 2001, 01-35/347-95)).

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The chances of success of certain defences and what constitutes a defence depend heavily on the circumstances of each case. Paragraph 30 of the Guidelines on Exclusionary Abuses provides that the Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified through 'objective necessity' or 'efficiency', or both. In this regard, it is possible to invoke efficiency gains, as long as it can be adequately demonstrated that the pro-competitive benefits outweigh the anticompetitive impact.

As for the question whether the defences are available when exclusionary intent is shown, objective justifications such as 'objective necessity' or 'efficiency', or both, can be utilised as a defence on that front. Moreover, as provided in response to question 10, as per paragraph 24 of the Guidelines on Exclusionary Abuses: 'In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well.' In this regard, in order to determine that an undertaking has carried out an abusive conduct, an actual (or potential) effect of the alleged conduct on the relevant market should be demonstrated.

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

While article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute an abuse. In *Turkcell* (23 December 2009, 09-60/1490-379), the Board condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that cooperate with competitors. The Board adopted a similar approach concerning the rebate schemes used by Doğan Media Group and fined the defendant for abusing its dominance through, inter alia, rebate schemes (30 March 2011, 11-18/341-103). In a more recent decision, the Board conducted a preliminary investigation against Frito Lay Gıda San Tic A Ş (Frito Lay) to examine whether Frito Lay has abused its dominant position through, inter alia, rebate schemes and ultimately concluded that there were no grounds or factors leading the Board to initiate a full-fledged investigation against Frito Lay in connection with its rebate systems (12 June 2018, 18-19/329-163).

15 | Tying and bundling

Tying and bundling are among the specific forms of abuse listed in article 6. The Board assessed many tying, bundling and leveraging allegations against dominant undertakings. However, so far, there have been no cases where the incumbent firms were fined based on tying or leveraging allegations. However, the Board ordered some behavioural remedies against incumbent telephone and internet operators in some cases, in order to have them avoid tying and leveraging (*TTNET-ADSL*, 18 February 2009, 09-07/127-38).

16 | Exclusive dealing

Although exclusive dealing normally falls under 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 scrutinised within the scope of article 6. Indeed, the Competition Board has already found in the past infringements of article 6 on the basis of exclusive dealing arrangements (eg, *Karboğaz*, 1 December 2005; 05-80/1106-317). Similarly, the Board imposed a fine on Mey İçki (the allegedly dominant undertaking in the market for the alcoholic beverage rakı), for its abusive conduct through which it prevented sales points from selling Mey İçki's competitors' products through exclusivity clauses and, therefore, foreclosed the market (*Mey İçki*, 12 June 2014, 14-21/470-178). Recently, the Board investigated Trakya Cam for the purpose of determining whether Trakya Cam had violated articles 4 and 6 of Law No. 4054 through the de facto implementation of its dealership system. The relevant dealership system was also subject to a Board decision where the Board did not grant an individual exemption to Trakya Cam's relevant conduct (2 December 2015, 15-42/704-258). As a result of the investigation, the Board considered Trakya Cam's conduct as abusive and imposed an administrative monetary fine in the amount of 17.5 million lira (14 December 2017, 17-41/641-280).

17 | Predatory pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board (see, for example, *TTNet* (July 11, 2007, 07-59/676-235); *Denizcilik İşletmeleri* (12 October 2006, 06-74/959-278); *Coca-Cola* (23 January 2004, 04-07/75-18); *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411); *Trakya Cam* (17 November 2011, 11-57/1477-533); *Tüpraş* (17 January 2014, 14-03/60-24); *THY* (30 December 2011, 11-65/1692-599) and *UN Ro-Ro* (1 October 2012, 12-47/1413-474)). That said, complaints on this basis are frequently dismissed by the Competition Authority owing to its welcome reluctance to micromanage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims.

In predatory price analysis, the Board primarily evaluates whether there is an anticompetitive foreclosure for the competitors. Neither the Guidelines nor the precedents of the Board deem recoupment a necessary element. The Board has decided that predatory pricing may be established based on the following four criteria (*Kale Kilit*, 6 December 2012, 12-62/1633-598):

- financial superiority of the undertaking;
- unusually low price;
- intention to impair competitors; and
- losses borne in a short term in exchange for long-term profits.

18 | Price or margin squeezes

Price squeezes may amount to a form of abuse in Turkey and recent precedents have resulted in the imposition of fines on the basis of price squeezing. The Board is known to closely scrutinise allegations of price squeezing. (See *Türk Telekom* (19 October 2004, 04-66/956-232); *TTNet* (11 July 2007, 07-59/676-235); *Dogan Dağıtım* (9 October 2007, 07-78/962-364); *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411) and *Türk Telekomünikasyon A Ş* (3 May 2016, 16-15/254-109)).

19 | Refusals to deal and denied access to essential facilities

Refusals to deal and access to essential facilities are common forms of abuse, and the Competition Authority is very familiar with this type of abuse (see, for example, *Eti Holding* (21 December 2000, 00-50/533-295); *POAS* (20 November 2001, 01-56/554-130); *Ak-Kim* (4 December 2003, 03-76/925-389); *Çukurova Elektrik* (10 November 2003, 03-72/874-373); *BOTAŞ* (27 April 2017, 17-14/207-85); *Sanofi* (29 March 2018, 18-09/156-76) and *Lüleburgaz* (7 September 2017, 17-28/477-205)).

20 | Predatory product design or a failure to disclose new technology

The list of specific abuses contained in article 6 is not exhaustive, and other types of conduct may be deemed abusive. However, the enforcement track record shows that the Board has not been in a position to hand down an administrative fine on any allegations of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to disclose new technology, predatory advertising or excessive product differentiation.

21 | Price discrimination

Price and non-price discrimination may amount to an abusive conduct under article 6. The Board has found incumbent undertakings to have infringed article 6 in the past by engaging in discriminatory behaviour concerning prices and other trade conditions (see, for example, *TTAS* (2 October 2002, 02-60/755-305) and *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411)). There is no other law that specifically regulates the price discrimination.

22 | Exploitative prices or terms of supply

Exploitative prices or terms of supply may be deemed to be an infringement of article 6, although the wording of the law does not contain a specific reference to this concept. The Board condemned excessive or exploitative pricing by dominant firms in the past (eg, *Tüpraş* (17 January 2014, 14-03/60-24); *TTAŞ* (2 October 2002, 02-60/755-305); and *Belko* (9 April 2001, 01-17/150-39)). However, complaints filed on this basis are frequently dismissed because of the Competition Authority's reluctance to micromanage pricing behaviour.

23 | Abuse of administrative or government process

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

24 | Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are normally caught by the merger control rules contained in article 7 of Law No. 4054. However, there have been some cases, albeit rare, where the Board found structural abuses through which dominant firms used joint venture arrangements as a backup tool to exclude competitors. This was condemned as a violation of article 6 (see *Biryay I* (17 July 2000, 00-26/292-162)).

25 | Other abuses

The list of specific abuses present in article 6 is not exhaustive, and it is very likely that other types of conduct may be deemed as abuse of dominance. However, the enforcement track record shows that the Board has not been in a position to review any allegation of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to disclose new technology, predatory advertising or excessive product differentiation.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy and consists of the Competition Board, presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 130 case handlers. A research department, a leniency unit, a decisions unit, an information-management unit, an external-relations unit, a management services unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Competition Board is responsible for, inter alia, investigating and condemning abuses of dominance.

The Competition Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of

these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information or failure to produce in a timely manner 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). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed. The administrative monetary fine may not be lower than 26,027 lira for 2019.

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054, therefore, grants the Competition Authority vast authority to conduct dawn raids. A judicial authorisation is obtained by the Competition Board only if the undertaking concerned refuses to allow the dawn raid. While the mere wording of the law allows oral testimony to be compelled of employees, case handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Competition Authority, including deleted items. Refusing to grant the staff of the Competition Authority access to business premises may lead to the imposition of fines.

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In case of a proven abuse of dominance, the incumbent undertakings concerned shall be (each separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. In this respect, Law No. 4054 makes reference to article 17 of the Law No. 5326 on Minor Offences and there is also a Regulation on Fines (Regulation No 27142 of 16 February 2009). Accordingly, when calculating fines, the Competition Board takes 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 and so on, in determining the magnitude of the monetary fine.

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

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 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 conduct 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 is in the *Tüpraş* case where Tüpraş, a Turkish energy company, incurred an administrative monetary fine of 412 million lira, equal to 1 per cent of its annual turnover for the relevant year (*Tüpraş*, 17 January 2014, 4-03/60-24).

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Board is entitled to impose sanctions directly. Article 27 of the Law No. 4054 deems taking necessary measures for terminating infringements and imposing administrative fines within the duties and powers of the Board. A preliminary approval or consent of a court or another authority is not required.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

The recent enforcement trend of the Competition Authority showed that the Authority has directed its attention toward refusal to supply and exclusive dealing cases. The Competition Authority has conducted several pre-investigations and investigations with regard to refusal to supply. These instances include *Daichii Sankyo* (22 May 2018; 18-15/280-139), *Türkiye Petrol Rafinerileri* (12 June 2018; 18-19/321-157) pre-investigations and *Zeyport Zeytinburnu* (15 March 2018; 18-08/152-73) and *Kardemir Karabük Demir Çelik* (7 September 2017; 17-28/481-207) investigations. As for exclusive dealings, the Competition Authority has conducted several pre-investigations including *Mars Media* (18 January 2018; 18-03/35-22) and *Frito Lay* (12 June 2018; 18-19/329-163). Furthermore, the Competition Board has imposed a fine in the amount of 17.5 million lira in the investigation conducted against *Trakya Cam* for de facto application of the exclusive distribution agreements as of 2016, which have been determined to be in violation of articles 4 and 6 of Law No. 4054 through the Competition Board's decision dated 2 December 2015 and numbered 15-42/704-258 (14 December 2017; 17-41/641-280).

The length of abuse of dominance proceedings depends on the specific dynamics of each case and the workload that the Competition Board has. However, it is fair to say that the average length of these proceedings from initial investigation to final decision is between one and one-and-a-half years.

Contractual consequences

30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Article 56 of Law No. 4054 ordains that any agreements and decisions of associations of undertakings, contrary to article 4 of Law No. 4054, are invalid and unenforceable with all their consequences. The agreement stands if the clause that is inconsistent with the legislation may be severed from the contract according to severability principles.

Private enforcement

31 To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is available to the extent of seeking damages. However, Law 4054 does not envisage a way for private lawsuits to enforce certain behavioural and other remedies. Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies in case of violation of article 6 of Law No. 4054. Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead it to initiate an investigation, which may or may not result in the finding of an 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.

Damages

32 Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

A dominance matter is primarily adjudicated by the Competition Board. The Competition Board does not decide whether the victims of the abusive practices merit damages. These aspects are supplemented with private lawsuits. Pursuant to article 57 of Law No. 4054, real or legal persons that bear losses owing to distortion of competition might compensate the loss from the parties causing the loss. Article 58/1 of Law No. 4054 provides that the damage is the difference between the cost the injured parties paid and the cost they would have paid if competition had not been limited and thus, indicate that the actual losses suffered by the claimant would be subject to compensation. Furthermore, the same article stipulates that the competitors who were not involved in the competition law violation and suffered because of the violation may claim compensation for 'all of their damages' (ie, actual damages and loss of profit). Moreover, as 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'). As per article 58/2 of Law No. 4054, which regulates the treble compensation, is as follows: 'If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by treble of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.' In order for the application of the treble damages, (i) the damage should be the result of an agreement or decision of the parties, or an act of gross negligence of them; and (ii) only the material damage (and not moral) could be subject to compensation threefold. Besides, the damage should be actual damages. However, it should be noted that the issue regarding the enforcement method of the this article is controversial in practical terms. To wit, certain opinions in the doctrine argue that the judge can solely conclude a treble compensation if the conditions are fulfilled, thus a different multiplier cannot be used. Nevertheless, the prevailing opinion in the doctrine and the practice of the local courts are in the direction that the judge has discretion to conclude 'up to' treble compensation. There are decisions of courts of first instance where the court ruled for (i) onefold compensation (Istanbul 12th Consumer Court, 6 June 2017, 2016/82 E, 2017/220 K), (ii) twofold compensation (Istanbul Anatolian 4th Commercial Court of First Instance, 12 December 2017, 2015/1008 E. 2017/1325 K); and (iii) threefold compensation (Marmaris 1st Civil Court of First Instance in the capacity of Consumer Court, 14 November 2017, 2017/17 E, 2017/494 K).

Article 58 of Law No. 4054 determines the general rule to follow in the calculation of the damages (ie, 'the difference between the cost the injured paid and the cost the injured would have paid if competition had not been restricted'). This is also called the 'difference theory'. This reference specifically concerns the artificially increased prices that resulted from the competition law violations and aims to compensate the damage suffered by the purchasers who paid more than the normal price of a product because of the increase in the prices applied by the cartelists.

Most of the civil courts wait for the decision of the Competition Board in order to build their own decision on the Competition Board's decision. The 19th Civil Chamber of the Court of Appeals has annulled the decision of the court of first instance, through its decision of 1 November 1999 (decision no. 99/3350 E, 99/6364 K) given that the action on damages based on the abuse of dominant position allegation was rendered without considering whether there was any application filed to the Authority and concluded that the application before the Authority should have been considered as a preliminary issue (also see 11th Civil Chamber of the Court of Appeals, 5 October 2009, 2008/5575 E, 2009/10045 K). The decision of the Competition Board is not binding on the court. However, the existence of a Competition Board decision becomes relevant in a number of aspects of civil litigation. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board according to Law No. 2577. Decisions of the Competition Board are considered to be administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

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

Closely modelled on article 102 of the TFEU, article 6 of Law No. 4054 is theoretically designed to apply to the unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in article 6. That said, the indications in practice show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of article 4 of Law No. 4054, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer and that this allows article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited as it is not engaged in by a dominant firm. Owing to this new and rather peculiar concept (that is, article 4 enforcement becoming a fallback to article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to article 6 (dominance provisions) enforcement, (ie, if

the engaging entity were dominant) has been reviewed and enforced against under article 4 (restrictive agreement rules).

Recently, this has begun to allow a breach of article 6 (dominance) by article 4 (restrictive agreements) behaviour. There are several decisions where the Board warned non-dominant entities to refrain from imposing dissimilar trade conditions to its distributors or did not allow a non-dominant entity to unilaterally adopt a supply regime whereby counterparts would be required to meet minimum objective criteria. Such decisions are all alarming signs of this new trend. The Board's *3M Turkey* and *Turkcell* decisions are the latest examples of the same trend. In *3M Turkey*, the 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 (restrictive agreements) and not under article 6 (dominance) (9 June 2016, 16-20/340-155). 3M Turkey was handed a fine of 0.5 per cent of its turnover. In *Turkcell*, the Board assessed whether Turkcell's (Turkey's dominant GSM operator) exclusive contracts foreclosed the market, based on both article 6 and article 4 (13 August 2014, 14-28/585-253). The Board found that Turkcell did not violate either article 6 or article 4. The court did not engage in a review of the nuances between article 4 and 6.

UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

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 because of the general elections in June 2015. The Competition Authority has requested the reinitiation of the legislative procedure concerning 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 should be expected to be renewed anytime soon.

Finally, as a recent development, Communiqué No. 2019/1 on the increase being effective until 31 December 2019 in the minimum limit of the amount of the administrative monetary fine provided in article 16(1) of Law No. 4054 was published in the Official Gazette on 12 December 2018. Pursuant to article 1 of this Communiqué, the minimum amount of the fine that may be imposed under Law No. 4054 became 26,027 lira for 2019.

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