ANTIMONOPOLY & UNILATERAL CONDUCT 2018 KNOW HOW

Turkey

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GCR INSIGHT

Overview

1 What is the legal framework governing unilateral conduct by companies with market power?

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 does not define what constitutes "abuse" per se but 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, such abuse may, in particular, 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 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;
- distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; or
- limiting production, markets or technical development to the prejudice of consumers.

2 What body or bodies have the power to investigate and sanction abuses of market power?

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the Competition Board, presidency and service departments. 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 currently has seven members and is seated in Ankara. The service departments consist of five main units. There is a "sectoral" job definition of each main unit.

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 on 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). The minimum fine is 21,036Turkish liras for 2018 (approx. US$4,524 and €3,881 as of 3 July 2018). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed.

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

Law No. 4054 therefore grants the Competition Authority with vast authority to conduct dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking 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.

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.

Inspectors are not entitled to exercise their investigative powers (ie, copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (ie, that which is written on the deed of authorisation). 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 21,036 Turkish liras for 2018.

Monopoly power

3 What role does market definition play in market power assessment?

Under article 6, to establish a dominant position, the relevant market must be defined first and then the market position must be assessed. The definition of the relevant market constitutes the basis for the assessment concerning whether the examined undertaking has the power to behave, to an appreciable extent, independently from competitive pressures in the market (see question 5).

4 What is the approach to market definition?

The Competition Board has issued Guidelines on the Definition of Relevant Market on 10 January 2008, with the goal of minimising the uncertainties that undertakings may face and to state, as clearly as possible, the method used by the Competition Board in its decision-making practice for defining a relevant product and geographic market. The Guidelines on the Definition of the Relevant Market is 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 on the Definition of the Relevant Market applies to both merger control and dominance cases. The Guidelines on the Definition of the Relevant Market considers the demand-side substitutability as the primary standpoint of market definition. The Guidelines on the Definition of the Relevant Market also considers the supply-side substitutability and potential competition as secondary factors. The relevant market is to be determined depending on the specific facts of each case.

5 How is market power or monopoly power defined?

The definition of dominance can be found under article 3 of Law No. 4054, which defines it 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.'

6 What is the test for finding of monopoly power?

Within the framework of the above definition (see question 5), an undertaking with the power to behave to an appreciable extent independently from competitive pressure is considered to hold a dominant position. What is analysed in principle is to what extent the undertaking examined can act independently of competitive pressure. In this assessment, the specific facts of each case are taken into account.

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 (see question 8).

7 Is this test set out in statute or case law?

Article 3 of Law No. 4054 (see question 5) provides the general framework for the assessment of dominance. Guidelines on the Definition of the Relevant Market and the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guidelines on Exclusionary Abuses) also provide guidance for the assessment of dominance. On the other hand, case law also sheds light to the Board's approach and considerations in applying the prohibition of article 6 of Law No. 4054 (see question 6).

8 What role do market shares play in the assessment of monopoly power?

In assessing dominance, although high market shares are considered as the most indicative factor of dominance, the Competition Board takes other factors into account, such as legal or economic barriers to entry, the market structure, the competitors' market positions, portfolio power and financial power of the firm. Thus, domination of a given market cannot be defined solely 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 be assessed in detail.

9 Are there defined market share thresholds for a presumption of monopoly power?

In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. Pursuant to the Guidelines on Exclusionary Abuses and the Competition Board's respective precedents, an undertaking with a market share of 40 per cent is a likely candidate for dominance, subject to some exceptions (see paragraph 12 of the Guidelines on Exclusionary Abuses and, for example, Mediamarkt (12 May 2010, 10-36/575-205)), whereas a firm with a market share of less than 40 per cent would not generally be considered dominant (paragraph 12 of the Guidelines on Exclusionary Abuses and the Competition Board's decisions such as UNMAS, 2 March 2016, 16-07/136-61; Pepsi Cola, 5 August 2010, 10-52/956-335); Tirsan (10 July 2015, 15-30/445-132)). 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 (see paragraph 17).

10 How easily are presumptions rebutted?

This question is not applicable since there is no legal presumption for dominance.

11 Are there cases where companies with high shares have been found not to exercise monopoly power?

Yes. In Arçelik (17 October 2000, 00-39/436-242), the Competition Board did not find Arçelik to be in a dominant position despite its market share of around 53–54 per cent considering that it had only one competitor, who had a market share of approximately 47 per cent. In Turk Telecom (10 February 2016, 16-04/77-33) the Competition Board stated that Türk Telekom did not abuse its dominant power even if it has 83 per cent share in fixed broadband subscribers. In Ceramics (12 January 2011, 11-03/42-14), the Competition Board stated that Kalekim is not dominant even if it has a market share between 42.6 and 47 per cent mainly considering high degree of excess capacity in the market, product differentiation, countervailing buyer power, market characteristics. Finally, in a merger case (DyStar/BASF, 12 December 2000, 00-49/518-283), the Competition Board did not find the merged entity to become dominant post-transaction despite the combined market shares of the merging parties of around 70 per cent, considering in particular the other suppliers in the market, import conditions, low barriers to entry and the buyer power.

12 What are the lowest shares with which companies have been found to exercise monopoly power?

The established practice of the Competition Board, in the absence of any indication to the contrary, is to accept that undertakings holding less than 40 per cent of the market share are less likely to be dominant and more detailed examinations are conducted for undertakings with a higher market share (see Guidelines on Exclusionary Abuses, paragraph 12). Although not directly applicable to dominance cases, guidelines on mergers and acquisitions provide further insight in Competition Board's approach to market share levels. Accordingly, combined market shares remaining below 20 per cent in horizontal mergers (see paragraph 18 of the Guidelines on Horizontal Mergers) and 25 per cent in non-horizontal mergers (see paragraph 27 of the Guidelines on Non-Horizontal Mergers) are considered rather unlikely to create competition restrictive effects in the market.

13 How important are barriers to entry and expansion for the assessment of monopoly power?

Following the assessment of the market positions of the undertaking examined and its competitors, the second step in the dominant position assessment is to examine whether there are barriers to entry into the market for new undertakings or whether there are barriers to expansion for undertakings already operating in the market. This is because the likelihood of expansion of undertakings operating in the market or of entry into market by new undertakings can also exert competitive pressure on the behaviour of the undertaking examined. However, in order to be able to talk about such a pressure, expansion or entry must be likely, it must be timely and it must be sufficient (see Guidelines on Exclusionary Abuses, paragraph 12).

14 Can the lack of entry barriers negate a finding of monopoly power?

There have been cases in the past where undertakings with relatively high market shares were found not to be in a dominant position due to, in combination with other factors, low barriers to entry in the market (see, eg, TEKEL A.Ş., 15 December 2003, 03-79/965-396; DyStar/BASF, 12 December 2000, 00-49/518-283).

15 What kind of barriers to entry are typically considered in the analysis?

To set out a few examples, legal and administrative barriers such as state monopolies, authorisation and licensing requirements and intellectual property rights, sunk costs, economies of scale and scope, network effects and switching costs faced by customers, an undertaking's possession of key inputs and access to special information, spare capacity, a vertically integrated structure, a strong distribution network and a large product portfolio, high brand recognition, and financial and economic power are considered in the analysis.

16 Can countervailing buyer power negate a finding of monopoly power?

In case the customers are relatively large, sufficiently informed about alternative sources of supply and capable of switching to another supplier or creating their own supply within a reasonable period of time, then these customers may be said to have bargaining power (ie, buyer power). In this case, buyer power of the customers will present a competitive factor restricting the conduct of the undertaking examined and may prevent the finding of a dominant position. However, buyer power may not be considered to form sufficient competitive pressure if it only ensures that a limited segment of customers is shielded from the market power of the dominant undertaking (see Guidelines on Exclusionary Abuses, paragraph 21 and Tirsan, 10 July 2015, 15-30/445-132).

17 What if consumers can easily switch between suppliers?

The ability of consumers to switch between suppliers is factored in when the Competition Board analyses whether the customers have buyer power.

18 Are there any other factors that the regulator considers in its assessment of monopoly power?

The main factors taken into consideration in the dominant position assessment are the positions of the undertaking examined and its competitors in the relevant market, barriers to entry and expansion in the market, and bargaining power of buyers (see Guidelines on Exclusionary Abuses, paragraph 10). Other factors that the Competition Board has considered in its dominance assessment include the price elasticity of the demand, convergence, geographical advantages and the shareholding structure of the investigated entity (see, eg, Roaming, 20 July 2001, 01-35/347-95; BAYEK, 18 July 2002, 02-44/518-213; Safety Gloves Pre-Investigation, 14 June 2012, 12-33/973-297; Hamitabat Elektrik Uretim, 28 March 2013, 13-17/247-122).

19 Are any entities or sectors exempt from the antimonopoly regime?

Dominance provisions as well as other provisions of Law No. 4054 apply to all companies and individuals, to the extent that they qualify as an undertaking, which is defined as a single integrated economic unit capable of acting

independently in the market to produce, market or sell goods and services. Notably, state-owned entities also fall within the scope of the application of article 6.

Although Law No. 4054 does not recognise any sector-specific abuses or defences, certain sectorial independent authorities have competence to control dominance in their relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Communication Technologies Authority, firms with a significant market power are prohibited from engaging in discriminatory behaviour toward companies seeking access to their network and, unless justified, from rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also regulated for the energy sector. Therefore, although 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 and the Competition Authority remains the exclusive regulatory body that investigates and condemns abuses of dominance.

20 Can companies be deemed to hold collective monopoly power?

Companies can be deemed to hold collective dominance as per article 6 of Law No. 4054.

21 Can the exercise of joint monopoly power or tacit oligopolistic collusion be treated as an infringement?

Collective dominance is also covered by Law No. 4054. On the other hand, precedents concerning collective dominance are not abundant and mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance can be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance (eg, Biryay, 17 July 2000, 00-26/292-162; Turkcell/Telsim, 9 June 2003, 03-40/432-186). Tacit collusion is dealt with under article 4 of Law No. 4054, which prohibits anticompetitive agreements.

22 Has the competition authority published guidance on how it defines markets and assesses market power?

Guidelines on the Definition of the Relevant Market and Guidelines on Exclusionary Abuses provide guidance on how the Competition Board defines markets and assesses market power. Although not directly applicable to dominance cases, the Guidelines on the Assessment of Horizontal Mergers and Acquisitions also provides some guidance on the assessment of market power.

Abuse of monopoly power

23 Is there a general definition for what constitutes abusive conduct? What does it entail?

Article 6 of Law No. 4054 does not define what constitutes abuse per se but it provides non-exhaustive list of certain forms of abuse. Guidelines on Exclusionary Abuses (paragraph 22) defines abuse as "when a dominant undertaking takes advantages of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare". The concept of abuse covers exploitative, exclusionary and discriminatory practices.

24 What are the general conditions for finding an abuse?

For a particular conduct examined under article 6 of Law No. 4054 to be considered an infringement, not only the undertaking concerned must hold a dominant position, but the conduct in question must have an abusive nature. Theoretically speaking, 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 also employed in demonstrating the existence of dominance.

25 Is there a list of categories of abusive or anticompetitive conduct in the applicable legislation?

There is a non-exhaustive list under article 6 of Law No. 4054 (see question 1).

26 Is this list open or closed?

The list provided in article 6 of Law No. 4054 is open.

27 Has the competition authority published any guidance on what constitutes abusive conduct?

The Competition Authority's Guidelines on Exclusionary Abuses, published on 29 January 2014, provides guidance on what constitutes an exclusionary abuse.

28 Is certain conduct per se abusive (without the need to prove effects) and under what conditions?

Article 6 does not define what constitutes 'abuse' per se, it provides five examples of forbidden abusive behaviour, which comes as a non-exhaustive list (see question 1).

29 To the extent that anticompetitive effects need to be shown, what is the standard to demonstrate these effects?

The Guidelines on Exclusionary Abuses (paragraph 24) provide that 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 and that such effects may emerge in the market where the undertaking is dominant, or they may emerge in other related markets. The Guidelines further indicate that the basis of the Board's evaluation on exclusionary conduct is the examination of whether the behaviour of the dominant undertaking leads to actual or potential anticompetitive foreclosure (paragraph 25).

30 Does the abusive conduct need to harm consumers?

See question 29.

31 What defences are there to allegations of abuses of monopoly power?

The chances of success of certain defences, and what constitutes a defence depend heavily on the circumstances of each case. It is possible to invoke efficiency gains (see question 33), as long as it can be adequately demonstrated that the pro-competitive benefits outweigh the anti-competitive impact.

32 Can abusive conduct be objectively justified?

In the application of article 6, the Competition Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified.

33 What objective justifications have been successful?

Claims of justification examined by the Competition Board may be classified under the categories of objective necessity and efficiency (see Guidelines on Exclusionary Abuses, paragraph 30).

34 How is the burden of proof distributed in an abuse analysis?

Theoretically speaking, a causal link between dominance and abuse must be shown by the Competition Authority. 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 also employed in demonstrating the existence of dominance.

35 What are the legal conditions to establish an abusive tie?

When assessing whether the practice of an undertaking with dominant position in the tying market is in violation of Law No. 4054, the Competition Board looks for the presence of two factors: (i) the tying product and the tied product should be distinct, and (ii) it should be likely for the tying practice to lead to anti-competitive foreclosure (see Guidelines on Exclusionary Abuses, paragraph 86).

36 What are the legal conditions to establish a refusal to supply or refusal to license?

When assessing claims of refusal to supply, the Competition Board looks for the presence of all of the following three conditions in order to find a violation ((Nuh, 7 November 2013, 10-63/1317-494). Within this framework, (i) the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market, and (iii) the refusal should be likely to lead to consumer harm (see Guidelines on Exclusionary Abuses, paragraph 43).

37 Do these abuses require an essential facility?

When evaluating the condition of indispensability (see question 36), the Competition Board tries to determine whether the refused input is objectively necessary in order to compete effectively in the downstream market (see Guidelines on Exclusionary Abuses, paragraph 44).

38 What is the test for an essential facility?

The refused input is objectively necessary where there is no actual or potential substitute for the refused input on which competitors in the downstream market could rely so as to counter – at least in the long term – the negative effects of the refusal. When assessing whether there are actual or potential substitutes for the relevant input, the Competition Board considers whether the competitors of the dominant undertaking could effectively duplicate the input in question in the foreseeable future. In general, if the relevant input is the result of a natural monopoly, if there are significant network effects, or in case of information that can be acquired from a single source, it is generally concluded that the input in question is impossible for the competitors to duplicate. Nonetheless, the Competition Board takes the dynamic structure of the market and the sustainability of the market power provided by the relevant input into account separately for each file (see Guidelines on Exclusionary Abuses, paragraph 44).

39 What is the test for exclusivity arrangements?

The Competition Board takes into account, among others, the following factors in its assessment of exclusivity agreements signed by a dominant undertaking: (i) the scope of the conduct under examination, (ii) the level of trade, (iii) barriers to entry, (iv) the importance of the dominant undertaking for customers, and (v) the duration of exclusivity (see Guidelines on Exclusionary Abuses, paragraph 67).

40 What is the test for predatory pricing?

Predatory pricing is defined as "an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behaviour" (Guidelines on Exclusionary Abuses, paragraph 50). Neither the Guidelines nor the precedents of the Board deem recoupment a necessary element. In Kale Kilit (6 December 2012, 12-62/1633-598), the Competition Board enlisted the following factors in its assessment regarding predatory pricing: (i) financial superiority of the undertaking, (ii) unusually low price, (iii) intention to impair competitors and (iv) losses borne in a short term in exchange for long-term profits. Although there are many precedents of the Board (eg Trakya Cam (17 November 2011, 11-57/1477-533), Tüpraş (17 January 2014, 14-03/60-24), UN Ro-Ro (1 October 2012, 12-47/1413-474)), complaints on this basis are frequently dismissed by the Competition Authority due to its reluctance to micro-manage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims.

In the predatory pricing analysis, which compares the price implemented by the dominant undertaking with the costs incurred with respect to the conduct under examination, the Competition Board evaluates whether the conduct in question is likely to lead to market foreclosure for an equally efficient competitor. The first phase of the predatory pricing analysis of the Competition Board is the assessment of whether the dominant undertaking sacrificed in the short-term with its pricing practice. If, by charging a lower price for all or a particular part of its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided, this will be considered a sacrifice. Accordingly, the criterion of average avoidable cost (AAC) may be used, in determining whether a dominant undertaking incurred avoidable losses as a result of its conduct under examination. Another cost criterion that can be used by the Competition Board in the predatory pricing assessment under certain exceptional circumstances in light of the conditions of the relevant market is the long-run average incremental cost (LRAIC). In assessing the existence of sacrifice in the dominant undertaking's conduct, it may be possible to rely upon direct evidence such as a detailed plan belonging to the undertaking in question to sacrifice, which aims to exclude a competitor, to prevent entry or to pre-empt the emergence of a market. It is necessary for competitors to have actually exited the market for the Competition Board to conclude that there has been anti-competitive foreclosure through predatory pricing (see Guidelines on Exclusionary Abuses, paragraph 50 et seq).

41 What is the test for a margin squeeze?

In determining the likelihood of the conduct under examination leading to anti-competitive foreclosure by price squeeze, the Competition Board, among others, takes the following factors into account: (i) structure of the undertaking, (ii) nature of the product, (iii) position of the undertaking in the relevant market(s), and (iv) margin between prices (see Guidelines on Exclusionary Abuses, paragraph 62).

42 What is the test for exclusionary discounts?

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. In particular, the Competition Board, in its Turkcell decision (23 December 2009, 09-60/1490-37) has 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 work with the competitors. In addition to that, in a more recent decision (Dogan Holding, 30 March 2011, 11-18/341-10), the Competition Board condemned the largest undertaking in the media sector (Dogan Yayın Holding) in Turkey for the abuse of its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty inducing rebate schemes.

The following factors, among others, are taken into consideration by the Competition Board in the assessment of whether a rebate system implemented by a dominant undertaking is likely to cause anti-competitive foreclosure: (i) It is more likely for retroactive rebates to cause anti-competitive foreclosure where rebate targets are individualised, where the rebate percentage and rebate target constitute a significant part of the total demand of the consumer within the relevant reference period, and particularly where the competitors of the dominant undertaking are unable to compete with it under equal conditions for the entirety of each customer's demand, (ii) the basis of the Competition Board's assessment concerning retroactive rebates is the examination of whether, in response to the rebate, equally efficient competitors would be able to effectively compete with the dominant undertaking for the contestable portion of the customer's demand, (iii) the Competition Board's assessments concerning the restrictive effects of package rebates on competition may vary depending on the package offered by the dominant undertaking, and on whether competitors can (either alone or together with other competitors) compete by offering a reasonable alternative package (see Guidelines on Exclusionary Abuses, paragraph 69 et seq).

43 Are exploitative abuses also considered and what is the test for these abuses?

Exploitative abuses also fall under article 6 of Law No. 4054 (see question 23). Exploitative prices or terms of supply may be deemed an infringement although the wording of article 6 does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms in the past (see, for example, Tüpraş, 17 January 2014, 14-03/60-24, TTAS, 2 October 2002, 02-60/755-305; Belko, 6 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.

44 Is there a concept of abusive discrimination and under what conditions does it raise concerns?

Abusive discrimination also falls under article 6 of Law No. 4054 (see question 23). 'Directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties' is listed as an example of forbidden abusive behaviour under article 6 (see question 1). Both price and non-price discrimination may amount to an abusive conduct under article 6. The Competition Board has in the past found undertakings to have infringed article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions (see, for example, TTAS, 2 October 2002, 02-60/755-305; Türk Telekom/TTNet decision, 19 November 2008, 08-65/1055-411).

45 Are only companies with monopoly power subject to special obligations under unilateral conduct rules?

Based on the precedents of the Competition Board, under unilateral conduct rules, which is article 6 of Law No. 4054, dominant undertakings are considered to have a 'special responsibility' not to allow their conduct to restrict competition (see, for example, Mey İçki, 12 June 2014, 14-21/410-178; OPET, 17 January 2014, 14-03/60-24).

46 Must the monopoly power exist in the same market where the effects of the anticompetitive conduct are felt?

Abusive conduct on a market that is different from the market where the undertaking holds a dominant position is also prohibited under article 6.

Sanctions and remedies

47 What sanctions can the competition authority impose or recommend?

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. The minimum fine is 21,036 Turkish liras for 2018.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (ie, 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.

48 How are fines calculated for abuses of monopoly power?

In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of fine imposed on the undertaking or the association of undertakings. Law No. 4054 makes reference to article 17 of the Law on Minor Offences and there is also a Regulation on Fines. Accordingly, when calculating the 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 of the infringement, recidivism, 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.

49 What is the highest fine imposed for an abuse of monopoly power?

The highest fine imposed to date in relation to abuse of a dominant position was in the Tüpraş case where Tüpraş, a Turkish energy company, incurred an administrative monetary fine of 412 million Turkish liras, equal to 1 per cent of its annual turnover for the relevant year (Tüpraş, 17 January 2014, 14-03/60-24).

50 What is the average fine imposed over the past five years?

The Competition Board, on average, imposed administrative monetary fines of approx. 110 million Turkish liras per year over the past five years for the abuse of dominance.

51 Can the competition authority impose behavioural remedies?

The Competition Authority can impose behavioural remedies.

52 Can it impose both negative and positive behavioural obligations?

The Competition Authority can impose both negative and positive behavioural obligations.

53 Can the competition authority impose structural remedies?

The Competition Authority can impose structural remedies.

54 Can companies offer commitments or informal undertakings to settle concerns?

Technically speaking, there is no settlement mechanism under Turkish competition law regime. That said, in order to remove competition law concerns, the parties are free to propose remedies during the investigation process and acknowledgement of such commitments is solely at the discretion of the Competition Board.

55 What proportion of cases have been settled in the past five years?

This question is not applicable as there is currently no settlement procedure under Law No. 4054.

56 Have there been any successful actions by private claimants?

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 person who is injured in his or her 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 attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple-damages clause exists in the law. In private suits, the incumbent firms are adjudicated before regular courts. Because the triple-damages clause allows litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and build their own decision on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

Appeals

57 Can a company appeal a finding of abuse?

Relevant parties can submit final decisions of the Competition Board, including its decisions on interim measures and fines, to judicial review before the Administrative Courts by filing a lawsuit within 60 days after receiving 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). Parties can appeal the decision of the Administrative Court before the Regional Administrative Court within 30 days and finally, the decision of the Regional Administrative Court can be appealed before the Council of State also within 30 days.

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.

58 Which fora have jurisdiction to hear challenges?

Administrative courts have jurisdiction to hear challenges.

59 What are the grounds for challenge?

Final decisions of the Competition Board can be challenged both in terms of the substance of the decision and on procedural grounds.

60 How likely are appeals to succeed?

The success of appeals depends heavily on the circumstances of the case.

Topical issues

61 Summarise the main abuse cases of the past year in your jurisdiction.

At the end of a full-fledged investigation launched against Mey İçki in order to determine whether Mey İçki has abused its dominant position thereby hindering its competitors in vodka and gin market, the Board concluded that Mey İçki has abused its dominant position in the relevant market. Nevertheless, all alleged practices of Mey İçki had already been examined and fined by the Competition Board in its raki (traditional Turkish spirit) decision of earlier in 2017. The alleged practices in both investigations belonged to the exact same period of time and the only significant difference between the two investigations was the products concerned (ie, raki in the previous case, and vodka and gin in the second case). Therefore, based on the fact that Mey İçki was already fined based on its overall turnover in 2016 without a separation in terms of turnover generated from the relevant product market (which was raki in the previous case), the Board concluded that a second administrative monetary fine under article 16 of Law No. 4054 should not be imposed on Mey İçki owing to same conduct within the same time period in the markets for vodka and gin. In this context, it should be noted that the Competition Board explicitly acknowledged that conducts subject to investigation, ie, the rebate practices, in all three markets (raki, vodka and gin) were exercised during the same time period, were subject to the same general strategy of Mey İçki and the conducts could not be separated from each other. Yet, the Board indicated that the "non bis in idem" principle could not be imposed in the case at hand as the conducts related to different product markets but confirmed that it took Mey İçki's non bis in idem defense into consideration in deciding on the case at hand.

The Competition Board concluded a full-fledged investigation of Akdeniz Elektrik Dağıtım A.Ş., CK Akdeniz Elektrik Perakende Satış A.Ş. ve AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri A.Ş. that it had initiated upon the allegation that they abused their dominant position as per article 6 of the Law No. 4054. The Board decided that Akdeniz Elektrik Dağıtım A.Ş. ve CK Akdeniz Elektrik Perakende Satış A.Ş. abused its dominant position in several retail markets in the Mediterranean electricity distribution region and the Board imposed approximately 38 million liras in total; whereas the Board decided that AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri A.Ş. did not breach article 6 and therefore, did not impose any administrative monetary fine (18-06/101-52, 20.02.2018).

As the result of the investigation conducted against Luxottica Turkey, the Competition Board decided that Luxottica Turkey had violated article 6 of Law No. 4054 and abused its dominant position in the market for the wholesale of branded sunglasses by obstructing competitors' activities through its sales policies and other practices and imposed an administrative monetary fine of approximately 1.6 million liras (17-08/99-42, 23.02.2017).

In scope of a full-fledged investigation, the Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened the competition in the said market through the "best price guarantee" practices in terms of the booking services they offer. As a result of the investigation, the Board concluded that Booking.com had abused its dominant position through

imposing Most Favoured Customer (MFN) clauses in its contracts with the accommodation facilities fined Booking.com for violation of articles 4 and 6 of Law No. 4054 and imposed approximately 2.5 million liras administrative monetary fine (17-01/12-4, 05.01.2017).

62 What is the hot topic in unilateral conduct cases that antitrust lawyers are excited about in your jurisdiction?

2017 has been a year where the Turkish Competition Authority has covered significant grounds on harmonising the Turkish legislative framework in the field of competition law with EU legislation and this year has witnessed fundamental changes in important regulations and supporting guidelines. In this respect:

(I) The Competition Authority completed its work in progress on revising the Guidelines on Vertical Agreements, issued based on the Communiqué No. 2002/2 on Vertical Agreements. It took approximately two years for the Competition Authority to finalise its work and it has published the updated version of the Guidelines on its official website on 30 March 2018. The amended Guidelines on Vertical Agreements include new provisions concerning internet sales and MFN.

(II) The Competition Authority published the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board on 24 February 2017 on its official website.

(III) The New Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector in Turkey, revoking the Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, was published in the Official Gazette dated 24 February 2017.

63 Are there any sectors that the competition authority is keeping a close eye on?

In terms of dominance-related issues, there are no sectors that the national competition authority is keeping a close eye on.

64 What future developments can we expect?

The recent enforcement trend of the Competition Authority shows that the Authority is becoming more and more interested in the review of MFN clauses. In the recent Yataş case (17-30/487-211; 27.09.2017), the allegations were concerned with the claims that through its "best price guarantee" campaign, Yataş was restricting competition by either acting in cooperation with its independent retailers or pressuring them with abusive pricing policies. In this regard, the complainant requested the Board to ensure the application of the sanctions adopted in its past decisions concerning most favoured customer MFC/MFN clauses. Ultimately, the Competition Board decided not to initiate a full-fledged investigation at the end of the preliminary review process. Recent instances where the Competition Board conducted a review on MFN clauses is the Yemeksepeti decision (16-20/347-156; 09.06.2016) and the Booking.com decision (05.01.2017, 17-01/12-4).

Additionally, 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 owing to 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. However, at this stage, there is no indication on whether the Draft Law should be expected to be renewed anytime soon.

Gönenç Gürkaynak

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Mr Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 87 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 practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak 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 Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counseling issues with more than 20 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 15 antitrust appeal cases in the high administrative court and over 60 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.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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Ms Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LLM degree in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Ms İnanılır became a partner within the regulatory and compliance department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defenses in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Ms İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

ELİG
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ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our partner, Mr Gönenç Gürkaynak, along with three partners, three counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

During the past year, ELIG Gürkaynak has been involved in over 60 merger clearances by the Turkish Competition Authority, more than 20 defence projects in investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 50 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

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