

THE DOMINANCE AND  
MONOPOLIES  
REVIEW

SIXTH EDITION

**Editors**

Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

THE  
DOMINANCE  
AND MONOPOLIES  
REVIEW

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# PREFACE

In last year's edition of *The Dominance and Monopolies Review*, we noted that abuse of dominance rules appeared to be entering a phase of more rapid development. For once, our predictions were not far off the mark. 2017 saw authorities reach decisions imposing record fines based on novel theories of harm applied to rapidly changing markets; overlapping parallel investigations have become the norm, rather than the exception; and 'hipster antitrust' – a call to replace the consumer welfare standard with a broader public interest test – has emerged as a serious challenge to contemporary economic orthodoxy. Carl Shapiro recently went so far to claim that 'antitrust is sexy again'.<sup>1</sup>

The sixth edition of *The Dominance and Monopolies Review* seeks to navigate these choppy waters. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and offers a prediction regarding future developments. From the thoughtful contributions of the specialist chapter authors, we identify four trends.

First, we observe growing clamour on both sides of the Atlantic for more competition enforcement. In May 2017, Senator Elizabeth Warren stated: 'It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books.' In September, *The Economist* argued that 'the world needs a healthy dose of competition to keep today's giants on their toes and to give others in their shadow a chance to grow'. And *The New York Times* has associated declining competition with rising inequality: 'with competition in tatters, the rip of inequality widens'.

These statements are sometimes accompanied by a plea to abandon consumer welfare as the lodestar of antitrust in favour of a broader, multi-factored public interest test – and even a 'fairness' test.<sup>2</sup> The underlying concern is that large corporations wield too much influence, collect too much data and undermine traditional industries by siphoning off the large majority of profits. The response, it is argued, should be to break up these companies, which would, according to Scott Galloway, 'oxygenate' the economy and 'prune [the] firms [that have] become invasive, cause premature death and won't let other firms emerge'.<sup>3</sup>

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1 Carl Shapiro, 'Antitrust in a Time of Populism', 24 October 2017, available at <https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf>.

2 M Dolmans and W Lin, 'Fairness and Competition Law, a Fairness Paradox', *Concurrences* No. 4-2017 4, 2017, available at <https://www.concurrences.com/fr/revue/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox-85119>.

3 Scott Galloway, 'The Case for Breaking Up Amazon, Apple, Facebook and Google', 8 February 2018, available at <http://www.stern.nyu.edu/experience-stern/faculty-research/case-breaking-amazon-apple-facebook-and-google>.

We are concerned that many of these calls seek to address broader societal problems – such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem in the competitive process.<sup>4</sup> We do not think that a reduction of competition is the cause or effect of these societal issues. Attempting to use antitrust to address problems not directly related to competition would backfire. Antitrust laws are ill-suited for remedying political problems in society, and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

Instead, enforcement should always focus on whether a dominant firm engages in conduct that departs from legitimate competition on the merits and that excludes equally efficient rivals. That is a fact-intensive inquiry that requires balancing procompetitive business justifications with exclusionary conduct. The analysis turns on the specific conduct at issue and its effects in the market,<sup>5</sup> not the size of a firm or its success or reach into other areas, or political issues.

In April 2018, Daniel Crane published a fascinating case study applying modern antitrust principles to the rise of fascism in 1930s Germany.<sup>6</sup> The study is especially germane given today's calls to broaden the consumer welfare standard to help arrest the decline in contemporary democracy. Crane argues that applying contemporary economically-orientated antitrust principles could have prevented the rise of *IG Farben* – the chemical cartel that supported the rise of Nazism and the perpetuation of its atrocities. He concludes: 'If the *Farben* story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.'

Secondly, the past year has seen authorities pursue an increasing number of excessive pricing cases. In the UK, the Competition and Markets Authority (CMA) fined Pfizer and Flynn £85 million for suddenly increasing the prices of an anti-epilepsy drug; the CMA has two other excessive cases against Actavis and Concordia in the pipeline. In China, the National Development and Reform Commission imposed fines on two companies for engaging in excessive pricing in the pharmaceutical sector. In Italy and in Spain, and at the European Commission, excessive pricing cases concerning Aspen's pricing of cancer drugs are ongoing.

Excessive pricing cases present the familiar paradox that it is not illegal to hold a monopoly; the natural consequence of a monopoly is to price above the competitive level; and finding a price above the competitive level to be illegal treats the monopoly as illegal. The excessive pricing cases observed during the past year traverse this paradox by following specific fact patterns in the pharmaceutical industry. In each case:

- a* the price rises were sudden and substantial;
- b* the products concerned were essential or had very high demand inelasticity;

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4 M Dolmans, R Zimbron, J Turner, 'Pandora's box of online ills: technology solutions, regulation, or competition law?', *Conurrences* No. 3-2017 (colloquium, Pembroke College, Oxford, 22 May 2017), available at <http://www.rpieurope.org/Events2017/Dolmans2.pdf>.

5 Alexander Waksman, 'Bad Science, Abuse and Effects in Online Markets', *CPI*, 29 November 2017, available at <https://www.competitionpolicyinternational.com/bad-science-abuse-and-effects-in-online-markets>.

6 Daniel Crane, 'Antitrust and Democracy: A Case Study from German Fascism', Law and Economics Research Paper Series, University of Michigan, Paper No. 18-009, April 2018.

- c the products had been in the market for a long time; and
- d the price rise does not appear to be explained by cost or market changes.

It is not obvious that these findings could be transposed to other situations. Hence, in his opinion in *AKKA/LAA* (the *Latvian collecting society* case), Advocate General Wahl advised: ‘there is simply no need to apply that provision [excessive pricing] in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.’ Accordingly, in our view, excessive pricing cases will (and should) remain rare and exceptional, other than where there are long-term barriers to entry, as in patents that are essential for standards. We hope that the renewed appetite to bring such cases does not stretch the concept of an exploitative abuse to address policy issues beyond the scope of competition law.

Thirdly, the past year was notable for the European Court of Justice’s long-awaited judgment in the *Intel* case. Intel had offered customers discounts if they exclusively installed its chipsets in categories of their computers. The European Commission found this to be abusive and imposed a €1 billion penalty. The EU General Court upheld the European Commission’s decision, treating Intel’s arrangements as akin to *per se* abusive. The Court of Justice has set that judgment aside, making clear that competition rules do not seek to protect less-efficient rivals or prevent them leaving the market. Instead, what matters is an ‘exclusionary effect on competitors considered to be as efficient’ as the dominant firm.

Advocate General Wahl in his *Orange Polska* opinion and the Court of Justice in its subsequent *MEO* judgment have reaffirmed the importance of establishing anticompetitive effects as a necessary element of an infringement of Article 102 TFEU, emphasising once more that only the exclusion of equally-efficient competitors is problematic. This mantra now appears to be firmly entrenched in the minds of the EU courts, and it will be interesting to see how the European Commission and national authorities react.

The European Commission, for example, appears to take the view that *Intel* largely imposes a procedural requirement, with Commissioner Vestager noting that ‘in practical terms, our main conclusion is that you won’t see fundamental change’. The European Commission has also argued that ‘The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost’.<sup>7</sup> However, an effects analysis can be conducted quickly and efficiently: in last year’s *Ice Cream* case, for example, the UK CMA opened and closed an investigation in six months, and conducted an effects analysis in a 13-page decision. The European Commission, for its part, frequently conducts detailed economic analyses – under significant time pressures – when assessing mergers. Stricter standards ought to apply when analysing unilateral conduct, because rights of defence are fully engaged.

Fourthly, we could not let this editorial pass without commenting on the divergent global approach to investigating Google’s conduct in search. Over the past few years, courts and authorities in the UK, Germany, Brazil, Canada, the US and Taiwan have held that Google’s search designs are procompetitive. Last year, the Competition Commission of India joined the consensus by rejecting complaints against Google’s search designs and ranking of search results (the CCI identified a narrow concern with the way that Google labels its Flights Commercial Unit, asking for Google to display an enhanced disclaimer). Similarly, in

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<sup>7</sup> European Commission submission to OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law, 5 December 2017, ¶ 15.

December 2017, the Russian Federal Antimonopoly Service authority dismissed complaints against Google's search designs.

Against this background, the European Commission's decision to impose on Google a record-breaking fine of €2.42 billion looks increasingly like an outlier, and perhaps a politically inspired one. The European Commission considers that the different way that Google ranks and displays groups of ads for product offers compared to free results for comparison shopping services amounts to unlawful favouring.

Google has appealed the decision to the General Court in Luxembourg. In Google's view, the product ads at issue are enhanced ad formats that help users find relevant products and are more efficient for advertisers. Showing ads in clearly marked advertising space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. In addition, Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility. Google also points to a thriving product search space, where Amazon (not Google) is the leading player. Finally, while the Court of Justice has espoused the equally efficient competitor benchmark, nowhere does the European Commission's *Shopping* decision discuss whether supposedly marginalised comparison shopping services were equally efficient.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this sixth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

**Maurits Dolmans and Henry Mostyn**

Cleary Gottlieb Steen & Hamilton LLP

London

May 2018

# TURKEY

Gönenç Gürkaynak<sup>1</sup>

## I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that ‘any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited’.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU) dominance itself is not prohibited: only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions as well as the other provisions of Law No. 4054 apply to all companies and individuals to the extent that they act as an ‘undertaking’ within the meaning of Law No. 4054. An ‘undertaking’ is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.<sup>2</sup>

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore, certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority (Competition Authority) is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions)

<sup>1</sup> Gönenç Gürkaynak is a founding partner at ELIG Gürkaynak Attorneys-at-Law.

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

are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather ‘a restriction of effective competition’ element is required to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, recently the Turkish Competition Board (Competition Board) rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro, as it concluded that the transaction will strengthen UN Ro-Ro’s dominant position in the market for Ro-Ro transport between Turkey and Europe; and that UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon consummation of the transaction.<sup>3</sup>

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

## II YEAR IN REVIEW

According to the Competition Authority’s 2017 statistics, the Competition Board made a decision in 37 pre-investigations or investigations, out of a total of 80, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part of thereof. Further, 29 finalised investigations were carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Competition Board also decided on 13 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. The remaining one investigation was reviewed under Articles 4, 6 and 7. Accordingly, it would be justified to state that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.<sup>5</sup>

Over the past five years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. With regards to cases on abuse of dominance, it is worth emphasising the Competition Board’s recent decision regarding Mey İçki, a subsidiary of Diageo plc, in terms of the interpretation of the *non bis in idem* principle under the Turkish competition law regime. In April 2016,

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3 *Ulusoy Ro-Ro/UN Ro-Ro*, 17-36/595-259, 9 November 2017.

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

5 In 2016, the Competition Board decided on a total of 83 pre-investigations or investigations. Among these pre-investigations and investigations, 41 concerned violations of Article 4 of Law No. 4054, 29 concerned violations of Article 6 of Law No. 4054 and 13 cases were evaluated from the aspect of both Article 4 and Article 6.

the Competition Board launched an investigation against Mey İçki aimed at exploring the validity of allegations of abuse of dominance in the Turkish markets for vodka and gin. After 18 months of investigation, the Competition Board found that:

- a Mey İçki holds dominant position in the vodka and gin markets by unanimous vote;
- b Mey İçki has violated Article 6 of Law No. 4054 in the vodka and gin markets with unanimous vote; and
- c Mey İçki has been subjected to an administrative monetary fine for the consequences of the same strategy in the raki (traditional Turkish spirit) market, and that there is no room for a further administrative monetary fine imposition by majority vote.<sup>6</sup>

With regards to the fight against cartels, the Competition Board recently levied an administrative monetary fine within an investigation launched against 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey. The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of in-depth investigation, the Competition Board unanimously concluded that Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU), ING Bank AŞ (ING) and the Royal Bank of Scotland Plc, Merkezi Edinburgh, İstanbul Merkez Şubesi (RBS) violated Article 4 of Law No. 4054 on Agreements, Concerted Practices and Decisions Limiting Competition. In this respect, the Competition Board imposed an administrative monetary fine on ING and RBS in an amount of 21.1 million lira and 66,400 lira, respectively, over their annual turnover in the 2016 financial year. However, the Competition Board resolved that BTMU should not have an administrative monetary fine imposed upon it pursuant to its leniency application granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.<sup>7</sup>

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

	Date and number of the Competition Board decision	Summary of the case
Akdeniz Elektrik Dağıtım AŞ, CK Akdeniz Elektrik Perakende Satış AŞ and AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri AŞ	No. 18-06/101-52, 20 February 2018	The Competition Board concluded that Akdeniz Elektrik Dağıtım AŞ and CK Akdeniz Elektrik Perakende Satış AŞ abused their dominant position in the Mediterranean region within the retail electricity distribution market.
Mey İçki	No.17-34/537-228, 25 October 2017	In October 2017, at the end of a full-fledged investigation launched against Mey İçki to determine whether it had abused its dominant position, thereby hindering its competitors in vodka and gin markets, the Competition Board concluded that Mey İçki abused its dominant position in the relevant market. However, it decided that there is no need to impose a further administrative monetary fine on Mey İçki, since it already had an administrative monetary fine imposed on it for the consequences of the same conduct in the raki market within the same time period (No. 17-34/537-228, 25 October 2017). To that end, the decision is candidate to set a landmark precedent in terms of the interpretation of the <i>non bis in idem</i> principle under the Turkish competition law regime.

6 Mey İçki, 17-34/537-228, 25 October 2017.

7 13 Banks decision, 17-39/636-276, 28 November 2017.



	<b>Date and number of the Competition Board decision</b>	<b>Summary of the case</b>
Luxottica Turkey	No. 17-08/99-42, 23 February 2017	As a 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.
Booking.com	No: 17-01/12-4, 5 January 2017	The Competition Board fined Booking.com and concluded that it had abused its dominant position through imposing most favoured customer (MFC) clauses in its contracts with the accommodation facilities.

High-profile investigations of the Competition Authority that are ongoing at the time of writing are provided in the table below:

<b>Investigated party</b>	<b>Alleged abuse of dominance activity</b>	<b>Date of initiation</b>
Air Ekspres Dağıtım Taşımacılık Lojistik Hizmetleri ve Tic Ltd Şti, Aras Kargo Yurtiçi Yurtdışı Taşımacılık AŞ, Asilkar Lojistik Dağ Hiz İç ve Dış Tic Ltd Şti, MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık AŞ, Paket Taşımacılık Sistemleri ve Turizm Bilgisayar Ticaret AŞ, Solmaz Nakliyat ve Ticaret AŞ, STF Kargo Nakliyat Ticaret Ltd Şti, TNT International Express Taşımacılık Ticaret Ltd Şti and Ünsped Paket Servisi San ve Tic AŞ	Restricting competition through customer allocation	15 February 2018
Arçelik Pazarlama AŞ and Vestel Ticaret AŞ	Restricting competition by exchanging competition-sensitive information	8 February 2018
Tırsan Kardan Sanayi ve Ticaret AŞ and Tiryakiler Yedek Parça Sanayi ve Ticaret AŞ	Restricting competition by abuse of dominance	8 February 2018
Oncosem Onkolojik Sistemler San ve Tic AŞ, Santek Sağlık Turz Teks San ve Tic AŞ, Meditera İthalat ve İhracat AŞ, Onkofar Sağlık Ürünleri San ve Tic AŞ, İnvotek Sağlık Teknolojileri Tic Ltd Şti and Korulu Grup Sağlık Hizmet İnşaat Taahhüt Makina Temizlik San ve Tic Ltd Şti	Restricting competition by colluding in tenders for chemotherapy medication	18 January 2018
Google Inc, Google International LLC and Google Reklamcılık ve Pazarlama Ltd Şti	Restricting competition through practices related to offering mobile operating systems and mobile applications and services	6 March 2017
Enerjisa Enerji AŞ, Toroslar Elektrik Dağıtım AŞ, Enerjisa Toroslar Elektrik Perakende Satış AŞ, Başkent Elektrik Dağıtım AŞ, Enerjisa Başkent Elektrik Perakende Satış AŞ, İstanbul Anadolu Yakası Elektrik Dağıtım AŞ and Enerjisa İstanbul Anadolu Yakası Elektrik Perakende Satış AŞ	Restricting competition through aggravating independent suppliers' activities and preventing consumers from choosing their own supplier	27 January 2017
Sahibinden Bilgi Teknolojileri Paz ve Tic AŞ	Restricting competition within the online automotive advertisement market by abusing its dominant position through predatory pricing	27 September 2017
Sony Eurasia Pazarlama AŞ	Restricting competition by resale price maintenance exercised on its distributors	7 September 2017

### III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, which states that 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers'. Enforcement trends show that the Competition Board is inclined to broaden

the scope of application of the Article 6 prohibition by diluting the ‘independence from competitors and customers’ element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.<sup>8</sup>

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. For establishing a dominant position, first the relevant market has to be defined, and secondly the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer’s point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of the market definition. Thus, the undertakings concerned have to be in a dominant position in the relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary point for evaluating its position in the market. In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors such as legal or economic barriers to entry, and the portfolio power and financial power of the incumbent firm. Thus, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or other quantitative elements: other market conditions, as well as the overall structure of the relevant market, should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.<sup>9</sup>

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a ‘discriminatory practice of even a non-dominant undertaking’ or ‘refusal to deal of even a non-dominant undertaking’ under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm.

Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain

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

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

unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) if it has been reviewed under Article 4 (restrictive agreement rules). The *Booking.com* and *Trakya Cam* decisions are the latest examples of this same trend. In *Booking.com*,<sup>10</sup> the Competition Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened competition in the said market through the ‘best price guarantee’ practices in terms of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In *Trakya Cam*,<sup>11</sup> the Competition Board assessed that Trakya Cam Sanayii AŞ *de facto* implemented distribution agreements in 2016 that had been determined to be in violation of Articles 4 and 6 of Law No. 4054 through a Board decision dated 2 December 2015,<sup>12</sup> and revoked the individual exemption granted to Trakya Cam’s industrial customer purchasing agreement that it signed with its industrialist customers. Trakya Cam was fined 17,497,141.63 lira, and it was decided that 18 of its distributors would be given written notices by Trakya Cam stating that there is no regional exclusivity, and that therefore they may conduct sales activities throughout Turkey.

## IV ABUSE

### i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes ‘abuse’ *per se*, it provides five examples of prohibited abusive behaviour, which forms a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. These examples are as follows:

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

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in

10 *Booking.com*, 17-01/12-4, 5 January 2017.

11 *Trakya Cam*, 17-41/641-280, 14 December 2017.

12 No. 15-42/704-258.

demonstrating the existence of dominance. Furthermore, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.<sup>13</sup> On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as:

- a* strategic capacity construction;
- b* predatory product design or product innovation;
- c* failure to pre-disclose new technology;
- d* predatory advertising; or
- e* excessive product differentiation.

## ii Exclusionary abuses

### *Exclusionary pricing*

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.<sup>14</sup> That said, complaints on this basis are frequently dismissed by the Competition Authority due to its welcome reluctance to micromanage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.<sup>15</sup>

Furthermore, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.<sup>16</sup>

### *Exclusive dealing*

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.<sup>17</sup>

On a separate note, Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single-branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. In *Turkcell*,<sup>18</sup> the Competition Board condemned the defendant for abusing its dominance

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

14 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Coca-Cola*, 04-07/75-18, 23 January 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Trakya Cam*, 11-57/1477-533, 17 November 2011; *Turkey Maritime Lines*, 06-74/959-278, 12 October 2006; *Feniks*, 07-67/815-310, 23 August 2007.

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

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

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

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

by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board also condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.<sup>19</sup>

### **Leveraging**

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board has assessed many tying, bundling and leveraging allegations against dominant undertakings, and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to make them avoid tying and leveraging.<sup>20</sup>

### **Refusal to deal**

Refusal to deal and grant access to essential facilities are forms of abuse that are frequently brought before the Competition Authority, and there have been various decisions by the Competition Board concerning these matters.<sup>21</sup>

### **iii Discrimination**

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.<sup>22</sup>

### **iv Exploitative abuses**

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms.<sup>23</sup> That said, complaints on this basis are frequently dismissed by the Competition Authority because of its above-mentioned reluctance to micromanage pricing behaviour.

## **V REMEDIES AND SANCTIONS**

### **i Sanctions**

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if

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

20 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009; *Türk Telekomünikasyon AŞ* 16-20/326-146, 9 June 2016.

21 See, for example, *POAS*, 01-56/554-130, 20 November 2001; *Eti Holding*, 00-50/533-295, 21 December 2000; *AK-Kim*, 03-76/925-389, 12 April 2003; *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; *Congresium Ato* 16-35/604-269, 27 October 2016

22 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *MEDAŞ* 16-07/134-60, 2 March 2016; *Türk Telekom*, 16-20/326-146, 9 June 2016.

23 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002; *Belko*, 01-17/150-39, 6 April 2001; *Soda* 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full-fledged investigation).

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 the undertaking. Following amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

- a* the level of fault and amount of possible damage in the relevant market;
- b* the market power of the undertakings within the relevant market;
- c* the duration and recurrence of the infringement;
- d* the cooperation or driving role of the undertakings in the infringement;
- e* the financial power of the undertakings; and
- f* compliance with commitments.

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

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,<sup>24</sup> where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the undertaking's annual turnover for the relevant year).

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

## **ii Behavioural and structural remedies**

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on a matter in cases where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to adhere to certain conducts, 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 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.

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

## VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds a notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2018 is 21,036 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed

a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.<sup>25</sup>

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can:

- a examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same;
- b request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- c conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records are fully examined by the experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant Competition Authority staff 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 for 2018 is 21,036 lira. It may also lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

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

After the recent legislative changes, administrative litigation cases (and private litigation cases) are now subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. A decision of a regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, a decision of a regional court will not be considered as a final decision, and the Council of State may decide to uphold or reverse the regional court's decision. If a decision is reversed by the Council of State, it will

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



be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision. As the regional courts are only newly established, we have no experience yet as to how long it takes for a regional court to finalise its review on a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system also needs to be tested before an estimated time frame can be provided.

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

## VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

## VIII FUTURE DEVELOPMENTS

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

- a* The Competition Authority completed its work on revising the Guidelines on Vertical Agreements, which were issued based on Communiqué No. 2002/2 on Vertical Agreements. It took approximately two years for the Competition Authority to finalise its work, and it published the updated version of the Guidelines on its official on 30 March 2018. The amended Guidelines on Vertical Agreements include new provisions concerning internet sales and MFC clauses.
- b* The Competition Authority published 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.
- c* Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector in Turkey, revoking 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.

The recent enforcement trend of the Competition Authority shows that it is becoming more and more interested in the review of MFN clauses. In the recent *Yataş*<sup>26</sup> case, the allegations

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26 *Yataş*, 17-30/487-211, 27 September 2017.

were concerned with 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 MFC or most favoured nation clauses. Ultimately, the Competition Board decided not to initiate a full-fledged investigation at the end of the preliminary review process. Other recent instances where the Competition Board conducted a review on MFC and most favoured nation clauses include the *Booking.com*<sup>27</sup> and *Yemeksepeti*<sup>28</sup> decisions.

In 2013, the Competition Authority prepared the Draft Competition Law (Draft Law). In 2015, the Draft Law was under discussion in the 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 regarding time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete as a result of the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law, as noted in its 2015 Annual Report. However, at the time of writing, there is no indication of whether the Draft Law can be expected to be renewed any time soon.

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27 *Booking.com*, 17-01/12-4, 5 January 2017.

28 *Yemeksepeti*, 16-20/347-156, 9 June 2016.

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Mr Gönenc 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 practise 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 counselling 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 through 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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