# The European, Middle Eastern and African Antitrust Review **2019**

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# The European, Middle Eastern and African Antitrust Review 2019

A Global Competition Review Special Report

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The European, Middle Eastern and African Antitrust Review 2019

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*Global Competition Review* is delighted to publish 2019 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

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# Turkey: Cartels

Gönenç Gürkaynak and Öznur İnanılır
ELIG Gürkaynak Attorneys-at-Law

The statutory basis for cartel prohibition is the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures to secure a free market economy. The Turkish cartel regime by nature applies administrative and civil (not criminal) law. The Competition Law applies to individuals and companies alike, if they act as an undertaking within the meaning of the Competition Law.

## Substantive provisions for cartel prohibition

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Similar to article 101(1) TFEU, the provision does not give a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity. Unlike the TFEU, however, article 4 does not refer to 'appreciable effect' or 'substantial part of a market', and thereby excludes any de minimis exception as of yet. Therefore, for an infringement to exist, the restrictive effect need not be 'appreciable' or 'affecting a substantial part of a market'. The practice of the Competition Board (the Board) to date has not recognised any de minimis exceptions to article 4 enforcement either, though the enforcement trends and proposed changes to the legislation are increasingly focusing on de minimis defences and exceptions.

Article 4 also prohibits any form of agreement that has the 'potential' to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power to the Board.

As is the case with article 101(1) TFEU, article 4 brings a non-exhaustive list of restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption issued by the Board. To the extent not covered by the protection brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in article 4.

The block exemption rules currently applicable are:

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

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector sets out revised rules for the motor vehicles sector in Turkey, overhauling the Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector. Restrictive agreements that do not benefit from either block exemptions under the relevant communiqué, or individual exemptions issued by the Board, are covered by the prohibition in article 4.

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

The Turkish competition regime also condemns concerted practices. The Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The definition of concerted practice in Turkey does not fall far from the definition used in EU competition law. A concerted practice is defined as a form of coordination between undertakings which, without having reached the stage where an agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. Therefore, this is a form of coordination, without a formal 'agreement' or 'decision', by which two or more companies come to an understanding to avoid competing with each other. The coordination does not need to be in writing; it is sufficient if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through exchange of letters.

## Enforcement

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy. It consists of the Board, Presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 130 case handlers. The other service units comprise the department of decisions; the economic analysis and research department; the information management department; the external relations, training and competition advocacy department; the strategy development, regulation and budget department; and the cartel and on-site inspections support division

(the leniency division). As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members. The Presidency handles the administrative works of the Competition Authority.

A cartel matter is primarily adjudicated by the Board. Administrative enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

## Proceedings

The Turkish cartel regime does not recognise de minimis exceptions and there is currently no threshold for opening an investigation into cartel conduct. The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. The Competition Authority included an online system in which the complaints may be submitted by the online form in the official website of the Competition Authority. In the case of a notice or complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected should the Board remain silent on the matter for 60 days. The Board will decide to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days of a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation or not. If the 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 by the Board only once, for an additional period of up to six months.

Once the notice has been formally served, the investigated undertakings have 30 days to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once this is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (this is the second written defence). The investigation committee will then have 15 days to prepare an additional opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When this reply is served on the Competition Authority, the investigation process will be completed (ie, the written phase of investigation involving the claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also ex officio decide to hold an oral hearing. Oral hearings are held between 30 and 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 Board will render its final decision within 15 days of the hearing, if an oral hearing is held; otherwise, the decision is rendered 30 days from the completion of the investigation process. It usually takes around two to three months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

## Effect theory

Turkey is one of the 'effect theory' jurisdictions where what matters is the effect a cartel activity has produced on Turkish markets, regardless of the nationality of the cartel members; where the cartel activity took place; or whether the members have a subsidiary in Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (eg, *The suppliers of rail freight forwarding services for block trains and cargo train services*, 16 December 2015,15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; *Imported Coal*, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009, 09-31/668-156) in the past, so long as there was an effect in the Turkish markets. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly owing to enforcement handicaps (such as difficulties of formal service to foreign entities).

## Powers of investigation

The Competition Law provides a vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid, which would also result in a fine. While the mere wording of the Competition Law provides for employees to be compelled to provide verbal testimony, 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 that a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Competition Authority, including, but not limited to, deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the 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 (ie, that which is written on the deed of authorisation).

The sole category of people participating in on-site inspections is the staff of the Competition Authority. The staff has no duty to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to come but may impose certain conditions (eg, to seal file cabinets or disrupt email communications).

## Sanctions

In the case of a proven cartel activity, the companies 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 and managers of the undertakings or association of undertakings 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 undertaking. 2018 is 21,036 lira.

The Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as:

- the level of fault and the amount of possible damage in the relevant market;
- the market power of the undertaking within the relevant market;
- the duration and recurrence of the infringement;
- cooperation or driving role of the undertaking in the infringement;
- the financial power of the undertaking; and
- compliance with the commitments in determining the magnitude of the fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) was enacted by the Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision). Aggravating and mitigating factors are then factored in. The Regulation on Fines also applies to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damages.

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but no criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (ie, manipulation through misinformation or other fraudulent means) may also be punished with up to two years' imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

The above-mentioned sanctions may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees or board members or executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Other than these, there is no sanction specific to individuals.

## Leniency programme

The Competition Law has undergone significant amendments, enacted in February 2008. The current legislation brings about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism – namely, the Regulation on Active Cooperation for Discovery of Cartels (the Regulation on Leniency) – was put into force on 15 February 2009. Further, the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels were published in April 2013.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringement. A definition of cartel is also provided in the Regulation on Leniency for this purpose. A cartelist may apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both the undertakings and its employees and managers, with the exception of the 'rig-leader' which can only benefit from a second degree reduction of the fine. The conditions for benefiting from the immunity or reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees and managers can apply for leniency.

A manager or employee of a cartelist may also apply for leniency until the 'investigation report' is officially served. Such an application would be independent from applications by the cartelist itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of a fine for such manager or employee. The requirements for such individual application are the same as stipulated above.

## Appeal process

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the justified (reasoned) decision of the Board. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide the stay of the execution if the execution of the decision is likely to cause serious and irreparable damages; and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Administrative Court usually takes about 12 to 24 months. If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

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 lasts 24 to 30 months.

A significant development in competition law enforcement was the change in the competent body for appeals against the Competition Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts (as explained above), regional courts (appellate courts) and the High State Court, the regional courts will: (i) go through the case file both on procedural and substantive grounds; and (ii) investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

### Damages actions

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Article 57 et seq of the Competition Law entitle any person who shall be injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While article 25 of Law No. 4077 on the Protection of Consumers allows class action by consumer organisations, these actions are limited to the violations of Law No. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under article 57 et seq of the Competition Law.

### Legislative developments

The most recent changes with respect to the Turkish cartel regime were the publication of the amended Guidelines on Vertical Agreements, which concluded the two-year work of the Competition Authority in this regard. The amended version of the Guidelines now include internet sales, which are acknowledged to provide a wider data set that allows price comparison to the consumers. Furthermore, revisions are concerning most favoured customers (MFN) clauses, a contemporary topic deemed significant by competition authorities around the globe, were also made.

In addition to that, the most significant development regarding Turkish competition law is the Draft Proposal for the Amendment of the Competition Law (the Draft Law), which was submitted to the Grand National Assembly of Turkish Republic on 23 January 2014. In 2015, the Draft Law became obsolete due to the general elections in June 2015. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the reinitiation of the legislative procedure concerning the Draft Law. If the Turkish parliament does not pass the Draft Law, it is noted in the 2015 Annual Report of the Competition Authority that the Competition Authority may take steps toward the amendment of certain articles.

### Recent cases

Even though the Turkish Competition Board does not have many recent precedents where it imposed an administrative monetary fine due to restrictive agreements or concerted practices pursuant to article 4 of the Competition Law, the Board has recently levied an administrative monetary fine within the investigation launched against 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey (28 November 2017, 17-39/636-276). 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 an in-depth investigation, the Board has 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) have violated article 4 of Law No. 4054. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million lira and 66.4 thousand lira, respectively, over their annual turnover in the financial year of 2016. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine. Another recent decision was made by the Competition Board upon the investigation for allegations that 10 undertakings that are active in producing ready-mix concrete in İzmir region in Turkey would have artificially increased the prices of ready-mix concrete by entering into an anticompetitive agreement or concerted practice (22 August 2017, 17-27/452-194). It is important to indicate that the Competition Board took into account that the economic evidence that show the relevant undertaking was not involved in any kind of anticompetitive agreement or concerted practices and it is understood that the Board took the view of the defendants that it is implausible to reach into an agreement within the alleged duration of the agreement, which was three months. Moreover, it could be argued that the decision constitutes a good example that the undertakings subject to investigation, based on the allegations on anticompetitive agreements or concerted practice, are able to defend themselves based on economic and legal evidence even under the presumption of concerted practice of article 4 of the Competition Law and marks the importance of economic evidence.

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ELIG Gürkaynak Attorneys-at-Law

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.

Öznur İnanılır
ELIG Gürkaynak Attorneys-at-Law

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.

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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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