Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Dominance 2018

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2005
Fourteenth edition
ISBN 978-1-78915-016-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

Turkey

Gönenç Gürkaynak and Hakan Özgökçen
ELİG, Attorneys-at-Law

General questions

1 Legal framework

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

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

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

2 Definition of dominance

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

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

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

3 Purpose of the legislation

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

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

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

4 Sector-specific dominance rules

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

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

5 Exemptions from the dominance rules

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

Dominance provisions (and other provisions of Law No. 4054) apply to all companies and individuals, to the extent that they act as an 'undertaking' within the meaning of Law No. 4054. An 'undertaking' is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054, therefore, applies to individuals and corporations alike, if they act as an undertaking. State-owned entities also fall within the scope of the application of article 6. While the Board placed too much emphasis on the 'capable of acting independently' aspect of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of the Turkish competition law enforcement (see, for example, *Sugar Factories* (13 August 1998, 78/603-113)),

the recent enforcement made it clear that the Board now uses a much broader and more accurate view of the definition, in a manner that also covers public entities and sport federations (see, for example, *Turkish Coal Enterprise* (19 October 2004, 04-66/949- 227); *Turkish Underwater Sports Federation* (3 February 2011, 11-07/126- 38); *Türk Telekom* (24 September 2014, 14-35/697-309) and *Devlet Hava Meydanları İşletmesi* (9 September 2015, 15-36/559-182)). Therefore, state-owned entities are also subject to the Competition Authority's enforcement, pursuant to the prohibition laid down in article 6.

6 Transition from non-dominant to dominant

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

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

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

7 Collective dominance

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

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

8 Dominant purchasers

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

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

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

9 Market definition and share-based dominance thresholds

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

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

Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50 per cent may be presumed to be dominant. The Competition Authority's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guidelines on Exclusionary Abuses), published on 29 January 2014, and the Board's past and recent precedents, make it clear that an undertaking with a market share lower than 40 per cent is unlikely to be in a dominant position (paragraph 12 of the Guidelines on Exclusionary Abuses and the Board's decisions such as *Mediamarkt* (12 May 2010, 10-36/575-205); *Pepsi Cola* (5 August 2010, 10-52/956-335) and *Egetek* (30 September 2010, 10-62/1286-487)). That said, the Board's decisions and Guidelines on Exclusionary Abuses are clear that market shares are the primary indicator to the dominant position, but not the only one. The barriers to entry, the market structure, the competitors' market positions and other market dynamics, as the case may be, should also be considered. The undertakings may refute the assumption through demonstrating that they do not have market power to act independently of market parameters. Economic or market studies are important in this regard.

Abuse of dominance

10 Definition of abuse of dominance

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

Law No. 4054 is silent on the definition of abuse. It only contains a non-exhaustive list of specific forms of abuse. Moreover, article 2 of Law No. 4054 adopts an effects-based approach to identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of conduct.

11 Exploitative and exclusionary practices

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

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

12 Link between dominance and abuse

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

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

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

13 Defences

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

The chances of success of certain defences and what constitutes a defence depend heavily on the circumstances of each case. It is also possible to invoke efficiency gains, as long as it can be adequately

demonstrated that the pro-competitive benefits outweigh the anticompetitive impact.

Specific forms of abuse

14 Rebate schemes

While article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute an abuse. In *Turkcell* (23 December 2009, 09-60/1490-379), the Board condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that cooperate with competitors. The Board adopted a similar approach concerning the rebate schemes used by Doğan Media Group and fined the defendant for abusing its dominance through, inter alia, rebate schemes (30 March 2011, 11-18/341-103)

15 Tying and bundling

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

16 Exclusive dealing

Although exclusive dealing normally falls under the scope of article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be scrutinised within the scope of article 6. Indeed, the Competition Board has already found in the past infringements of article 6 on the basis of exclusive dealing arrangements (eg, *Karboğaz*, 1 December 2005; 05-80/1106-317). Similarly, the Board imposed a fine on Mey İçki (the allegedly dominant undertaking in the market for the alcoholic beverage rakı), for its abusive conduct through which it prevented sales points from selling Mey İçki's competitors' products through exclusivity clauses and therefore foreclosed the market (*Mey İçki*, 12 June 2014, 14-21/470-178).

17 Predatory pricing

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

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

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

18 Price or margin squeezes

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

19 Refusals to deal and denied access to essential facilities

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

20 Predatory product design or a failure to disclose new technology

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

21 Price discrimination

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

22 Exploitative prices or terms of supply

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

23 Abuse of administrative or government process

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

24 Mergers and acquisitions as exclusionary practices

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

25 Other abuses

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

Enforcement proceedings

26 Enforcement authorities

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

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. As the competent body of the Competition

Authority, the Competition Board is responsible for, inter alia, investigating and condemning abuses of dominance.

The Competition Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information or failure to produce 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). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed. The administrative monetary fine may not be lower than 21,036 lira for 2018.

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

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

27 Sanctions and remedies

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

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

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

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

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

28 Enforcement process

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

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

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The recent enforcement trend of the Competition Authority showed that the Authority is becoming more and more interested in the refusals to supply or contract of dominant undertakings. There have been several pre-investigations and investigations launched by the Competition Authority in relation to this aspect of the competition law principles in Turkey over the past year. These instances include *Ankara Uluslararası Kongre ve Fuar İşletmeciliği* (27 October 2016, 16-35/604-269) and *Türk Telekomünikasyon* (9 June 2016, 16-20/326-146). Other high-profile cases involving abuse of dominance allegations in the past year are *Yemeksepeti* (9 June 2016, 16-20/347-156) and *Türk Eczacıları Birliği* (9 December 2016, 16-42/699-313). In *Yemeksepeti* (an online meal order platform), the Board concluded that the use of most favoured customer clauses violated article 6 of the Law No. 4054 as these clauses gave rise to exclusionary effects in the relevant market. In *Türk Eczacıları Birliği*, the Board decided that the agreements executed with the pharmaceutical suppliers that contain exclusivity clauses violated article 6 of the Law No. 4054.

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

30 Contractual consequences

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

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

31 Private enforcement

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

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

Update and trends

It is worth re-emphasising the 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 Turkish competition law regime. In April 2016, the Board launched an investigation against Mey İçki, aiming at exploring the validity of allegations of abuse of dominance in the Turkish markets for vodka and gin.

After 18 months of investigation, the Board found that:

- Mey İçki holds dominant position in vodka and gin markets with unanimous vote;
- Mey İçki has violated article 6 of Law No. 4054 in the vodka and gin markets with unanimous vote; and
- Mey İçki has been subjected to an administrative monetary fine for the consequences of the same strategy in the rakı (traditional Turkish spirit) market and that there is no room for further administrative monetary fine imposition with majority vote, through its decision of 25 October 2017.

The case handlers alleged that Mey İçki enjoyed dominance in the Turkish markets for vodka and gin. Mey İçki allegedly engaged in exclusionary practices against competitors through rebate schemes, cash payment supports and visual arrangements at sales points.

All these alleged practices of Mey İçki had already been examined and fined by the Competition Board in its rakı decision of earlier in 2017. The alleged practices belong to the exact same period of time in both decisions and the only significant difference between the two investigations is the products concerned.

The defendant, Mey İçki, demonstrated the lack of both procedural and substantial grounds, emphasising the *non bis in idem* principle in particular, and utilised economic arguments to fortify its oral and written defences. Mey İçki argued that the investigation was crippled for double-jeopardy as the Turkish Competition Authority carried out a second investigation on the same allegations that belong to the same period of time, and it created the risk of repetitive fine. Eventually, the Board found a violation through abuse of dominance but accepted *non bis in idem* Mey İçki's defence and concluded that Mey İçki should not be subject to an administrative monetary fine under article 16 of Law No. 4054.

While the reasoned decision is not yet available, the Board acknowledged that the *non bis in idem* principle should be taken into account while rendering a second decision on the same allegations against the same firm about the same time period, though the relevant product market concerning the second decision is different than the product market examined in the first one. Therefore, the decision is a candidate to set a landmark precedent and the reasoned decision is likely to provide insight on the direction the Turkish competition enforcement will be heading towards in the coming years concerning the approach on the *non bis in idem* principle.

Most favoured customer clauses as exclusionary abuses

In a milestone decision in *Yemeksepeti* (9 June 2016, 16-20/347-156), the Board has recognised the exclusionary effects of most favoured nation (MFN) clauses. The Board ruled that the major online food platform Yemeksepeti abused its dominant position through the imposition of MFN clauses in its contracts with restaurants and imposed a monetary fine. In a more recent *Booking.com* decision (5 January 2017, 17-01/12-4), the Board fined Booking.com as it had abused its dominant position though imposing MFN clauses in its contracts with the accommodation facilities.

Excessive pricing

In a recent decision in *Soda Sanay*ii (20 April 2016, 16-14/205-89), the Board evaluated excessive pricing allegations against Soda by applying a two-staged economic value test. The Board initially found that Soda maintained a strong and steady market share over the years despite there being no barriers to entry to the market. However, despite the Board's finding that Soda's products cost more than competing products and that Soda's domestic prices and profits were higher than its export prices and profits, the Board stated that the stable market power of Soda may be explained by the fact that Soda's products are more qualified than competing products. The Board thus rejected the allegations against Soda and decided not to initiate a full-fledged investigation. The Soda Sanayii decision is important because it gives a glimpse of the Board's approach to excessive pricing cases. Inter alia, the Board held that prohibiting excessive pricing may deter the ability of dominant undertakings to determine prices for the purposes of profit maximisation and that interference should be limited to markets with major barriers to entry and where competitive structure is not expected to be established in the long run.

The Board is currently investigating excessive pricing allegations regarding an online classified advertisement platform, Sahibinden.com. The outcome of this investigation will determine the Board's approach to excessive pricing cases in dynamic markets, such as e-commerce, traditionally characterised with high profits and low costs.

performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

32 Damages

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

A dominance matter is primarily adjudicated by the Competition Board. The Competition Board does not decide whether the victims of the abusive practices merit damages. These aspects are supplemented with private lawsuits. Articles 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 principle exists in the law. In private suits, the incumbent firms are adjudicated before regular civil courts. Because the triple-damages principle 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 of the civil courts wait for the decision of the Competition Board in order to build their own decision on the Competition Board's decision. The decision of the Competition Board is not binding on the court. However, the existence of a Competition Board decision becomes relevant in a number of aspects of civil litigation. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

33 Appeals

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

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

Unilateral conduct

34 Unilateral conduct by non-dominant firms

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

Closely modelled on article 102 of the TFEU, article 6 of Law No. 4054 is theoretically designed to apply to the unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in article 6. That said, the indications in practice show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of article 4 of Law No. 4054, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer and that this allows article

4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited as it is not engaged in by a dominant firm. Owing to this new and rather peculiar concept (that is, article 4 enforcement becoming a fall-back to article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to article 6 (dominance provisions) enforcement, (ie, if the engaging entity were dominant) has been reviewed and enforced against under article 4 (restrictive agreement rules).

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

Gönenç Gürkaynak **gonenc.gurkaynak@elig.com**
Hakan Özgökçen **hakan.ozgokcen@elig.com**

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş 34349
Istanbul
Turkey

Tel: +90 212 327 1724
Fax: +90 212 327 1725
www.elig.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-016-2