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The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2018

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A practical cross-border insight into vertical agreements and dominant firms

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Turkey

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The national competition authority for enforcing competition law in Turkey is the Competition Authority ("Authority"), a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board ("Board"), presidency and service departments. As the competent body of the Authority, the Board is responsible for, *inter alia*, investigating and enforcing the laws governing vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The 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 Board.

Article 15 of the Law No. 4054 on Protection of Competition ("Competition Law") authorises the Board to conduct on-site investigations. Accordingly, the Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same and request undertakings and trade associations to provide written or verbal explanations on specific topics.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The Board is entitled to launch an investigation into an alleged anti-competitive conduct *ex officio* or in response to a complaint. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. The preliminary report of the Authority experts will be submitted to the Board within 30 calendar days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 calendar days whether to launch a fully-fledged investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 calendar 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 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 Authority and once it is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 calendar days (second written defence). The investigation committee will then have 15 calendar days to prepare an 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 the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed. An oral hearing may be held *ex officio* or upon request by the parties. The 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.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the case of a proven anticompetitive conduct or agreement, the undertakings concerned shall be separately subject to administrative monetary fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision. Employees and/or 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% of the fine imposed on the undertaking or association of undertakings.

The Board is also 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 as legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution of the matter, in case there is a possibility of serious and irreparable damages.

1.5 How are those remedies determined and/or calculated?

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 undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement,

the financial power of the undertakings and compliance with the commitments, etc., in determining the magnitude of the monetary fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance, which applies to restrictive agreements, concerted practices and abuse of dominance, sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. Accordingly, fines are calculated by first determining the basic level, which is between 2% and 4% for cartels and 0.5% and 3% for other violations; aggravating and mitigating factors are then factored in. The Regulation on Monetary Fines also applies to managers or employees that had a determining effect on the violation and provides for certain reductions in their favour.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The settlement procedure is not regulated under the Turkish competition law regime. The commitments are available only for concentrations under the Turkish competition law regime. Article 14 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board enables the parties to provide commitments to remedy substantive competition law issues of a concentration.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

If a Board decision is appealed, the Board has a right to defend its decision before the administrative courts by way of submitting response petitions to the plaintiff's claims.

Article 2/1(a) of Law No. 2577 on Administrative Procedure sets out that "*annulment actions concerning administrative acts that are brought by a person whose interests were violated by the act, with the claim that the act is illegal due to a mistake made in one of the elements of competence, form, reason, subject and purpose*". In other words, an administrative act must be in compliance with the law in terms of all of the following five elements: (i) jurisdiction; (ii) form; (iii) reason; (iv) subject matter; and (v) purpose.

1.8 What is the appeals process?

According to Article 55(1) of the Competition Law, administrative penalty decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal within 60 calendar days on receipt of the Board's reasoned decision. The Board's decisions are considered administrative acts, and thus legal actions against them must be taken in accordance with the Administrative Procedural Law.

According to Article 27 of Law No. 2577 on Administrative Procedure, filing an administrative action does not automatically stay execution of the Board's decision. However, on request by the plaintiff, the court may stay execution if the decision is likely to cause irreparable damage or contravene the law.

The judicial review period before the Ankara administrative courts usually takes about 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the Council of State. As the regional courts are newly established, it has not been yet evidenced 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) should also be tested before providing an estimate time period. The appeal period before the Council of State usually takes about 24 to 36 months.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

The Board does not decide whether the victims of the anti-competitive conducts merit damages. These aspects are supplemented with private lawsuits. Articles 57 *et seq.* of the Competition Law 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. Most of the civil courts wait for the decision of the Board in order to build their own decision on the Board's decision.

1.10 Describe any immunities, exemptions, or safe harbors that apply.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption issued by the Board and/or an individual exemption. The applicable block exemption rules are: (i) Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("Communiqué No. 2002/2"); (ii) Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) Block Exemption Communiqué No. 2016/5 on R&D Agreements; (iv) Block Exemption Communiqué No. 2008/3 for the Insurance Sector; (v) Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and (vi) Block Exemption Communiqué No. 2013/3 on Specialization Agreements.

1.11 Does enforcement vary between industries or businesses?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law (i.e. a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of the Competition Law.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Board, in particular in the telecommunications and energy sectors, takes into account the regulatory context within its competitive analysis (e.g. in terms of entry barriers) in order to assess the nature of the market and if the investigated undertaking could justify its conducts based on these regulations.

The decisional practice of the Board and the court decisions indicate that if the conducts of professional organisations remain in the framework of powers granted by law and the related legislation, the Board will not establish any decisions regarding the relevant conducts (e.g. *Türkiye Barolar Birliği*, November 13, 2003, 03-73/876(a)-374; *Türk Tabipler Birliği*, September 22, 2005, 05-

59/877-236). However, in terms of competition advocacy, the Board could send an opinion to the relevant institutions regarding the conducts which have legal grounds and the potential to restrict competition.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The current political climate in Turkey does not have an impact on the Turkish competition law regime as the Authority continues to function in the same usual manner.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The Authority has amended the Guidelines on Vertical Agreements within the scope of the ongoing re-evaluation studies of Communiqué 2002/2. The amendment mainly focuses on (i) MFN clauses, and (ii) online sales. The recent enforcement trend of the Authority also supports that the Authority is becoming more interested in the MFN clauses (e.g. *Yataş*, September 27, 2017, 17-30/487-211; *Booking.com*, January 5, 2017, 17-01/12-4; *Yemeksepeti*, June 9, 2016, 16-20/347-156).

1.15 Describe any notable case law developments in the past year.

The Board conducted an investigation against Booking.com in order to determine whether Booking.com violated the provisions of the Competition Law through the "best price guarantee" practices in terms of the booking services they offer. The Board concluded that the agreements of the Booking.com including the price and availability parity clause as well as the best price guarantee clauses violate the provisions of the Competition Law (January 5, 2017, 17-01/12-4).

In October 2017, at the end of a fully-fledged investigation launched against Mey İçki in order to determine whether Mey İçki has abused its dominant position thereby hindering its competitors in the vodka and gin market, the Board concluded that Mey İçki has abused its dominant position in the relevant market. However, the Board decided that there is no need to impose a further administrative monetary fine on Mey İçki since it has already had an administrative monetary fine imposed for the consequences of the same conduct in the raki market (traditional Turkish spirit) within the same time period (October 25, 2017, 17-34/537-228). To that end, the decision is a candidate to set a landmark precedent in terms of the interpretation of the "*non bis in idem*" principle under the Turkish competition law regime.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

According to the Authority's Activity Report of 2016 (the Activity Report 2017 is not yet available), the number of decisions based on vertical and horizontal agreements considerably reduced between 2012 and 2015. Nevertheless, the decline within the number of decisions decelerated in 2016. Furthermore, the Report stated that an exception was made in 2016 since the number of decisions based on vertical agreements was more than the number of decisions for each year between 2012 and 2015.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Reasoning of the Competition Law indicates that, for the purposes of the Competition Law, the term "agreement" refers to all kinds of compromise or accord to which the parties feel bound, even if these do not meet the conditions for validity as regards the Civil Law.

Article 2 of Communiqué No. 2002/2 defines vertical agreements as agreements which are concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services.

2.3 What are the laws governing vertical agreements?

Article 4 of the Competition Law 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. The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption issued by the Board (please see the answer to question 1.10 above) and/or an individual exemption.

2.4 Are there any type of vertical agreements or restraints that are absolutely ("*per se*") protected?

The Board's established practice adopts a very sensitive approach in connection with all resale price maintenance arrangements. Indeed, Communiqué No. 2002/2 does not exempt agreements that directly or indirectly restrict the buyer's ability and freedom to determine its own resale prices.

Despite certain decisions where the Board somehow signalled "*rule of reason*" analysis by considering the market structure, competition level and effect on consumers (e.g. *Çilek* August 20, 2014, 14-29/597-263; *Dogati* October 22, 2014, 14-42/764-340), the Board's established precedent clearly points towards viewing resale price maintenance as a *per se* violation (e.g. *Anadolu Elektronik*, June 23, 2011, 11-39/838-262; *Akmaya*, May 20, 2009, 09-23/491-117; *Kuralkan*, May 27, 2008, 08-35/462-162).

2.5 What is the analytical framework for assessing vertical agreements?

Article 4 of the Competition Law 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.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The Board issued the Guidelines on the Definition of the Relevant Market ("Guidelines on Market Definition") on January 10, 2008. The Guidelines on Market Definition is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03), and

it considers demand-side substitution as the primary standpoint of market definition and supply-side substitution and potential competition as secondary factors.

Pursuant to paragraph 59 of the Guidelines on Vertical Agreements, the Guidelines on Market Definition is taken into consideration in terms of market definition regarding vertical agreements. In addition, certain specific conditions of vertical restrictions which might concern market definition are discussed under the Guidelines on Vertical Agreements.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so called "dual distribution")? Are these treated as vertical or horizontal agreements?

Similar to Article 2(4) of the European Commission's Block Exemption Regulation, Article 2 of Communiqué No. 2002/2 covers agreements where the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a manufacturer of the competing products of the buyer. Article 2 of Communiqué No. 2002/2 considers these agreements as vertical agreements and, accordingly, they could benefit from block exemption under Communiqué No. 2002/2.

2.8 What is the role of market share in reviewing a vertical agreement?

Vertical agreements could qualify for block exemption under Communiqué No. 2002/2 if the market share of the supplier is below 40% in the relevant market. However, for cases of exclusive supply obligation, both the buyer's and the supplier's market share are taken into consideration.

2.9 What is the role of economic analysis in assessing vertical agreements?

The Authority recently established an economic analysis division in previous years where case handlers with a background in economics are devoted solely to the economic analysis of antitrust matters. The establishment of the new economic analysis division can be viewed as a positive step towards more economics-oriented competitive analyses.

2.10 What is the role of efficiencies in analysing vertical agreements?

Pursuant to paragraph 47 of the Guidelines on Vertical Agreements, vertical agreements falling outside the scope of Communiqué No. 2002/2 are not automatically deemed to be in violation of the Competition Law and the undertakings may plead efficiencies defence.

The conditions for an individual exemption set out under Article 5 of the Competition Law are similar to the conditions existing under the EU law, and are namely: (i) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) the agreement must allow consumers a fair share of the resulting benefit; (iii) the agreement should not eliminate competition in a significant part of the relevant market; and (iv) the agreement should not restrict competition more than what is compulsory for achieving the goals set out in (i) and (ii).

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

As per Article 2 of Communiqué No. 2002/2, if a vertical agreement concerns sale and resale of goods and services and also includes provisions on the transfer of intellectual rights to the buyer or the exercise of such rights by the buyer, the relevant vertical agreement might benefit from block exemption under Communiqué No. 2002/2 provided that the relevant intellectual rights directly concern the use, sale or resale, by the buyer or the customers of the buyer, of the goods or services which constitute the substantial matter of the agreement, and that the transfer or use of such intellectual rights does not constitute the main purpose of the agreement.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

According to Article 4 of the Competition Law, it is sufficient for either the effect or the object to exist in order for there to be an infringement within the meaning of Article 4 of Competition Law. That said, the investigated parties might argue that a restrictive agreement could benefit from an individual exemption under Article 5 of the Competition Law (please see the answer to question 2.10 above).

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The Board takes into account potential efficiencies or benefits for consumers to decide whether a restrictive agreement could be subject to an individual exemption. Pursuant to Article 5 of the Competition Law, restrictions should not be more than what is necessary to reach efficiencies and benefits and the agreement should not eliminate competition in a significant part of the relevant market.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

The Guidelines on Vertical Agreements do not refer to any specific defences in addition to the "efficiency defence". To that end, possible defence scenarios would heavily depend upon the circumstances of each case.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The Board introduced the "Guidelines Explaining the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector, No 2017/3" on January 19, 2017. Recently, the "Guidelines on Vertical Agreements" which aims to revise the former guidelines was published on 30 March 2018.

2.16 How is resale price maintenance treated under the law?

See the answer to question 2.4 above.

2.17 How do enforcers and courts examine exclusive dealing claims?

If a vertical agreement qualifies for the block exemption under Communiqué No. 2002/2, the supplier can automatically benefit from certain privileges, such as conducting exclusive dealing. Provisions that extend beyond what is permissible under an appropriately defined exclusive distribution system, such as the restriction of passive sales and restriction on the sales of customers of the buyers, cannot benefit from the block exemption provided under Communiqué No. 2002/2 (e.g. *Mey İçki*, June 12, 2014, 14-21/410-178; *Novartis*, July 4, 2012, 12-36/1045-332).

In its recent Tuborg decision, the Board evaluated whether the individual exemption granted to the exclusive distribution agreements of Tuborg with its decision of March 18, 2010 (no. 10-24/331-119) should be revoked. The Board has evaluated the current market structure and determined that the dynamics in the market differ from those in 2010, effectively altering the competitive landscape. To that end, the Board concluded that even though Tuborg's market share at the end of 2016 was below 40%, the relevant agreements no longer satisfy the condition of "not eliminating competition in a significant part of the relevant market" set forth under Article 5 of the Competition Law and thus, the individual exemption granted to Tuborg in 2010 should be revoked (November 9, 2017, 17-36/583-256).

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Paragraph 208 of the Guidelines on Vertical Agreements states that tying may constitute vertical restriction under Article 4 of the Competition Law if it results in a single branding type of obligation for the tied product. If the supplier's market share does not exceed the 40% threshold, both for the tied and the tying product, a vertical agreement which contains tying obligations could benefit from the block exemption under Communiqué No. 2002/2.

2.19 How do enforcers and courts examine price discrimination claims?

The Guidelines on Vertical Agreements state that exclusivity clauses and exclusive customer allocation in a vertical agreement might constitute price discrimination by reducing intra-brand competition and market partitioning. According to the Guidelines on Vertical Agreements, a combination of exclusive distribution and exclusive buying might also create the same competition law concerns.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty rebates are not considered *per se* illegal under the Competition Law. The protective cloak of Communiqué No. 2002/2 also applies to arrangements containing loyalty-inducing rebates, if the undertaking applying loyalty rebates has a market share lower than 40%. The Board does not tend to forbid implementation of rebate systems altogether, without engaging in a market analysis to assess their potential or actual foreclosing effects. All in all, loyalty discounts and their potential impacts are analysed on a case-by-case basis.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Bundled rebates can cause competition law concerns where they permit the dominant undertaking to leverage a wider portfolio to the disadvantage of competitors who are only able to compete with respect to one or at least a narrower portfolio of products. In *Doğan Yayın* (March 30, 2011, 11-18/341-103), where the dominant undertaking which owned a set of different newspapers provided a rebate for those customers who advertised with multiple newspapers owned by it, the Board regarded the relevant rebate as loyalty-inducing as competitors were deemed to possess narrower portfolios of publications and therefore unable to respond with similar bundles.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Non-compete obligations could be considered as restrictive under the Turkish competition law regime. As per Article 5 of Communiqué No. 2002/2, non-compete obligations for more than five years and non-compete provisions that are designed to remain in effect post-termination cannot benefit from the block exemption (e.g. *Takeda*, April 3, 2014, 14-13/242-107; *Sanofi Aventis*, November 22, 2012, 12-59/1570-571). However, as per the paragraph 45 of the Guidelines on Vertical Agreements, non-compete obligations for the buyer could be maintained for one year at most following the expiration date of the agreement, provided that certain conditions are fulfilled.

Also, Article 4 Communiqué No. 2002/2 provides that restrictions on (i) a wholesaler's sales to end users and (ii) the sales by the member of a selective distribution system to unauthorised distributors could be considered as restrictive and cannot benefit from the block exemption provided under Communiqué No. 2002/2.

2.23 How are MFNs treated under the law?

Under the current Turkish competition law, there is no statutory provision explicitly allowing or disallowing MFNs. On the other hand, the Guidelines on Vertical Agreements recognises the pro-competitive nature of MFN clauses and adopts a rule of reason approach for the analysis of the anti-competitive effects of these clauses. The relevant guidelines provide that in the analysis of these clauses, the factors, such as (i) the relevant undertakings' and their competitors' position in the relevant market, (ii) the object of the MFN clause in the relevant agreement, and (iii) the specific characteristics of the market, should be taken into consideration. However, MFNs, especially when used by a strong market player, might raise competition law concerns if and to the extent they "artificially increase market transparency", "raise barriers to entry" or "raise the rivals' costs".

The Board's Booking.com (January 5, 2017, 17-01/12-4) and Yemek Sepeti (June 9, 2016, 16-20/347-156) decisions could be indicated as significant examples regarding the practice of MFN clauses within the Turkish competition law (for details of the Booking.com decision, see the answer to question 1.15).

The Board concluded that Yemek Sepeti holds a dominant position in the online meal order-delivery platform services market. The Board has further decided that preventing restaurants from offering better/different conditions to rival platforms through MFN practices creates exclusionary effects in the relevant market and thus constitutes an abuse of dominant position.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

According to the decisional practice of the Board, the dominant undertakings have a "special responsibility" not to allow their conduct to restrict competition and, therefore, the Board continuously monitors the conducts of the dominant firms.

3.2 What are the laws governing dominant firms?

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of the Competition Law. 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*". The article 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 TFEU. Accordingly, these examples include the following: (i) directly or indirectly preventing entries into the market or hindering competitor activity in the market; (ii) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties; (iii) 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; (iv) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and (v) limiting production, markets or technical development to the prejudice of consumers.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The Guidelines on the Definition of the Relevant Market (see the answer to question 2.6 above) also apply to dominance cases.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50% may be presumed to be dominant. The Board's precedents and the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("Guidelines on Exclusionary Abuses") indicates that an undertaking with a market share lower than 40% is unlikely to be in a dominant position (e.g. *Mediamarkt*, May 12, 2010, 10-36/575-205; *Pepsi Cola*, August 5, 2010, 10-52/956-335).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

In similar fashion to Article 102 of the TFEU, dominance itself is not prohibited, only the abuse of dominance. Article 6 of the Competition Law does not define what constitutes 'abuse' *per se*, but it provides five examples of forbidden abusive behaviours (see the answer to question 3.2 above).

3.6 What is the role of economic analysis in assessing market dominance?

The answer to question 2.9 above is also applicable to Article 6 enforcement.

3.7 What is the role of market share in assessing market dominance?

The Board's decisions and the 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.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

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 anti-competitive impact.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

As per paragraph 32 of the Guidelines on Exclusionary Abuses, when assessing the efficiency justification put forward by the investigated undertaking, the Board will expect from the undertaking to prove that all of the following four conditions are fulfilled: (i) the efficiencies should be realised or are likely to be realised as a result of the conduct; (ii) the conduct should be indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets; and (iv) the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition.

3.10 Do the governing laws apply to "collective" dominance?

Collective dominance is also covered by the Competition Law. However, precedents concerning collective dominance are not abundant and mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance (e.g. *Turkcell/Telsim*, June 9, 2003, 03-40/432-186 and *Biryay*, July 17, 2000, 00-26/292-162).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

While the Competition Law does not contain a specific reference to dominant purchasers, dominant purchasers may also be caught by the legislation, if and to the extent their conduct amounts to an abuse

of their dominant position as the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (e.g. *ÇEAS*, November 10, 2003, 03-72/874-373).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 6 of the Competition Law does not define what constitutes 'abuse' *per se*; it provides five examples of forbidden abusive behaviour, which comes as a non-exhaustive list and falls to some extent in line with Article 102 of the TFEU (see the answer to question 3.2 above).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The market power in relation to intellectual property rights is discussed in secondary legislation, although the discussion is limited and relates mainly to the assessment of the effects of agreements on competition and does not directly relate to the application of rules on unilateral conduct.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Market shares are the primary indicator of the dominant position, but not the only one. The Board would assess the market power of an undertaking in terms of the dynamic structure of the relevant product market and consider various market characteristics as indicators of competitive pressures in the market which can potentially set-off or abate the effects of high market shares and concentration levels.

3.15 How is "platform dominance" assessed in your jurisdiction?

"Platform dominance" has not been categorically assessed by the Board so far. Although, in *Yemek Sepeti* (June 9, 2016, 16-20/347-156), the Board found that Yemek Sepeti was in a dominant position in "the online meal order-delivery platform services", but it did not mention "platform dominance".

3.16 Under what circumstances are refusals to deal considered anticompetitive?

As per paragraph 43 of the Guidelines on Exclusionary Abuses, the Board looks for the presence of all of the following three conditions in order to find a violation through refusal to deal conducts: the refusal should (i) relate to a product or service that is indispensable in order to be able to compete in a downstream market; (ii) be likely to lead to the elimination of effective competition in the downstream market; and (iii) be likely to lead to consumer harm (e.g. *Lüleburgaz Şoförler ve Otomobilciler Esnaf Odası*, August 7, 2017, 17-28/477-205; *Congresium*, October 27, 2016, 16-35/604-269 and *Türk Telekomünikasyon*, June 9, 2016, 16-20/326-146).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

Unlike the TFEU, the Competition Law does not refer to "appreciable effect" or "substantial part of a market" and thereby excludes any *de minimis* exception.

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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, and consists of 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.

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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/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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