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# Vertical Agreements & Dominant Firms

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## Eighth Edition

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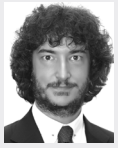
# Q&A Chapters

# Turkey/Türkiye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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 Türkiye 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 investigating and enforcing the laws governing vertical agreements and dominant firm conduct.

### 1.2 What investigative powers do the responsible competition authorities have?

The Authority may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations with specific deadlines.

Article 15 of Law No. 4054 on Protection of Competition ("**Law No. 4054**") authorises the Authority to conduct on-site investigations. The Authority can examine the physical records as well as those in electronic and IT systems, mobile devices, paperwork and documents of the investigated undertakings and, if need be, take copies and request undertakings to provide written or verbal explanations on certain matters. The Board can also examine personal email accounts, if these are also used for business correspondence (*Aşkaynak*, December 26, 2019, 19-46/793-346; and *Ege Gübre*, February 7, 2019, 19-06/51-18), and mobile correspondence, which includes correspondence though applications such as WhatsApp (*Auto Expertise*, July 9, 2020, 20-33/439-196; and *Ege Konteyner*, January 2, 2020, 20-01/3-2). According to Article 16 of Law No. 4054, an administrative fine may be imposed if the on-site inspection is hindered or complicated (*Kınık*, March 3, 2022, 22-11/161-65; and *Eti Gıda*, April 29, 2021, 21-24/278-123). A common way to hinder or complicate an on-site inspection is to delete email correspondence (*Canon*, April 28, 2023, 23-19/365-127; and *Teknosa*, April 28, 2023, 23-19/364-126), WhatsApp messages (*Ufuk/DYM/Kösem*, August 17, 2023, 23-39/743-257; *Aydın Seramik*, August 17, 2023, 23-39/742-256; *Wahl*, May 11, 2023, 23-21/410/140; *Sahibinden*, May 27, 2021, 21-27/354-174; *ÇiçekSepeti*, May 27, 2021, 21-27/354-173; and *P&G*, July 8, 2021, 21-34/452-227), and documents that could contain evidence.

The Turkish Constitutional Court examined an individual application regarding the on-site inspections conducted by the Authority without obtaining a decision of a judge/court (i.e. 2019/40991, 23.03.2023). The Turkish Constitutional Court decided that conducting an on-site inspection without obtaining a court decision violates the immunity of domicile and is against the relevant articles of the Turkish Constitution. Despite the Turkish Constitutional Court's decision, the Authority continues to conduct on-site inspections without obtaining any court decision.

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

The Board can launch an investigation into alleged anti-competitive conduct *ex officio* or in response to a complaint or leniency application. The Board will decide to conduct a pre-investigation if it finds the allegations to be serious. The preliminary report of the Authority's experts will be submitted to the Board within 30 calendar days after the Board's decision to commence a pre-investigation. The Board will then decide within 10 calendar days whether to launch a full-fledged investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 calendar days from the date of its decision.

The investigated undertakings have 30 calendar days as of the formal service of the notice to submit their first written defences. Subsequently, the Authority issues the investigation report (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) 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 Authority will then have 15 calendar days (extendable for a further 15 calendar days) to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period (extendable for a further 30 calendar days) to reply to the additional opinion (third written defence). 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 proven anti-competitive conduct or agreements, the undertakings concerned shall be separately subject to administrative monetary fines of up to 10% of their turnover generated in the financial year preceding the date of the infringement decision. Employees and/or managers of the undertakings or associations of undertakings that had a decisive

influence in the infringement are also fined up to 5% of the fine imposed on the undertaking or association of undertakings.

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 to restore the level of competition and status as before the infringement. Such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. The Board is authorised to take interim measures until the final resolution of the matter, in the case that there is a possibility of serious and irreparable damages. The Board can order structural remedies for anti-competitive conduct, provided that behavioural remedies were applied first and have failed.

### 1.5 How are those remedies determined and/or calculated?

In determining the monetary fine, the Board considers factors such as the duration and recurrence of infringement, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments, whether they assisted with the investigation, and the severity of the damage.

The Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance sets out detailed guidelines for the calculation of monetary fines.

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

According to Article 43 of Law No. 4054 and Communiqué No. 2021/2 ("**Commitment Communiqué**"), the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. The commitment mechanism is not applicable to "hard core" violations including price-fixing, territory or customer sharing, and restriction of supply. In terms of vertical violations, commitments will be accepted for restrictions except for resale price maintenance ("**RPM**") (e.g. *Arnica*, September 30, 2021, 21-46/671-335; and *Singer*, September 30, 2021, 21-46/672-336). A commitment request can be submitted to the Authority after three months from the service of the investigation notice. If the parties decide to submit commitments to the Authority, the Authority will decide on the deadline for submission of the commitments. If the Board decides that the submitted commitments are sufficient to address the competitive concerns, the Board may decide to terminate the (pre)investigation process or seek the opinions of the third parties concerning the commitments (i.e. market testing). If the commitments are rejected by the Board, the Board may grant the parties an additional timeframe for submitting amended commitments to the Board (but only once).

According to the Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anticompetitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance ("**Settlement Regulation**"), the Board can also, *ex officio* or upon parties' request, initiate the settlement procedure. A settlement can only be offered within the scope of a full-fledged investigation, and the parties can only apply for a settlement after the service of the investigation report. Once the parties officially confirm their intentions for settlement by a written application to the Authority, the Board will set a definitive deadline for the submission of the settlement letter. If the Board accepts the written application and decides to settle, then the investigation will be closed with a final decision, including the finding of a violation and administrative monetary fine, which may be reduced by between 10% and 25% as a result of the settlement procedure. Once an investigation has been finalised with a settlement, the parties may not bring a dispute on the settled matters.

### 1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

The Board adopted its first-ever settlement decision on August 5, 2021 (*Philips*, August 5, 2021, 21-37/524-258). Consequently, the Board has accepted settlements in numerous cases (e.g. *Kınık*, April 14, 2022, 22-17/283-128; *Beypazarı*, May 18, 2022, 22-23/379-158; *Olka/Marin*, June 30, 2022, 22-29/488-197; *Numil*, June 30, 2022, 22-29/483-192; *DyDo*, July 7, 2022, 22-32/508-205; *Hayırlı El Kozmetik*, July 21, 2022, 22-33/523-210; *Korkmaz*, November 10, 2022, 22-51/754-313; *Miele*, November 10, 2022, 22-51/753-312; *Natura*, November 23, 2022, 22-52/771-317; *Aslan Ticaret*, December 8, 2022, 22-54/834-344; *Hiksan*, December 22, 2022, 22-56/882-365; *Panek*, December 29, 2022, 22-57/899-369; *NAOS*, January 12, 2023, 23-03/29-12; and *Electrical Engineers*, January 5, 2023, 23-01/25-11; *Gerçek Kozmetik*, March 23, 2023, 23-15/269-91; *Letgo*, July 20, 2023, 23-32/629-211; *Arabam Com*, July 20, 2023, 23-32/630-212; *Elca*, August 17, 2023, 23-39/738-253; *Kosan Kozmetik*, March 30, 2023, 23-16/284-98; *Engingrup*, February 23, 2023, 23-10/154-48; *Ashley Joy*, August 3, 2023, 23-36-676-231; *Avon*, March 9, 2023, 23-13/223-72; *Sunny*, January 5, 2023, 23-01/12-7; *Eczacıbaşı*, March 9, 2023, 23-13/212-68; *Farmasi Enternasyonel*, February 16, 2023, 23-09/143-42; *Kozmoklinik*, March 2, 2023, 23-12/185-61; and *Colastin*, February 23, 2023, 23-10/166-52). In a similar vein, the Board has also evaluated commitments in various cases so far (e.g. *Ege Teknoloji*, July 7, 2023, 23-29/561-189; *Biota*, April 6, 2023, 23-17/314-104; *Yıldırımoğlu Fermentasyon*, July 5, 2023, 23-29/568-193; *Pierre Fabre Dermo*, March 9, 2023, 23-13/214-70; *Farmasi Enternasyonel*, March 2, 2023, 23-12/187-63; *Engingrup*, March 2, 2023, 23-12/186-62; *Mavili*, March 30, 2023, 23-16/285-99; *Şişecam*, October 21, 2021, 21-51/712-354; *Çiçeksepeti*, April 8, 2021, 21-20/250-106; *Coca Cola*, September 2, 2021, 21-41/610-297; *Havaş*, November 5, 2020, 20-48/655-287; *MNG*, December 10, 2020, 20-53/746-334; *S Sistem*, December 10, 2020, 20-53/751-335; and *TSB/OSEM*, January 7, 2021, 21-01/8-6). Commitments proposed in *TSB/OSEM* included both behavioural and structural commitments. *Şişecam* (October 21, 2021, 21-51/712-354) became the first case to be concluded during the pre-investigation stage as a result of the commitments proposed by the parties.

### 1.8 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?

The Board's decisions can be appealed before the administrative courts. The administrative courts undertake a form of judicial review rather than carrying out a reassessment of the case on merits. As per Law No. 2577 on Administrative Procedure ("**Law No. 2577**"), the Board's decisions must be in compliance with the law in terms of all of the following five elements: jurisdiction; form; reason; subject matter; and purpose.

### 1.9 What is the appeals process?

The Board's decisions can be submitted to judicial review before the administrative courts by filing an appeal within 60 calendar days after the receipt of the Board's reasoned decision.

According to Article 27 of Law No. 2577, 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.

Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the Council of State.

### 1.10 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 anti-competitive conduct merit damages. These aspects are supplemented with private lawsuits. Law No. 4054 permits any party injured in its business or property because of a competition law violation to sue the violators for up to three times its actual damages or the profits gained or likely to be gained by the violators, plus litigation costs and attorney fees.

### 1.11 Describe any immunities, exemptions, or safe harbours that apply.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from the protective cloak of the general and specific block exemptions and/or individual exemptions granted by the Board. Communiqué No. 2021/3 ("**De Minimis Communiqué**") envisages a "*de minimis*" rule enabling the Board to opt for not initiating an investigation or terminating an ongoing investigation relating to anti-competitive agreements, if the market share of each undertaking does not exceed 15% in case of vertical agreements, except for RPM.

### 1.12 Does enforcement vary between industries or businesses?

There are no industry-specific offences or defences in the Turkish jurisdiction. Law No. 4054 applies to all industries.

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

The Board considers the regulatory context to assess the nature of the market and whether the investigated undertaking's conduct is justified based on these regulations (*Türk Telekomünikasyon*, September 30, 2021, 21-46/667-332; *İşveren Sendikası*, January 21, 2022, 22-06/69-32; *İsttelkom*, April 11, 2019, 19-15/214-94; *Bereket Enerji*, October 1, 2018, 18-36/583-284; and *Enerjisa*, August 8, 2018, 18-27/461-224). There are also separate cooperation protocols between the Authority and Energy Market Regulatory Authority and Information and Communication Technologies Authority governing the cooperation, information exchange and seeking opinion.

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

The current political climate in Türkiye does not have an impact on the Turkish competition law regime.

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

The Authority continues to closely monitor digital markets with ongoing investigations. The Authority also closely scrutinises the labour markets with ongoing investigations in line with the global trends on this front (*Labour Markets*, July 26, 2023, 23-34/649-218; *IT Firms*, February 27, 2024, 24-10/170-66; *Private Hospitals*, February 24, 2022, 22-10/152-62; *Ege Container Shippers*, January 2, 2020, 20-01/3-2). The Authority also continues to focus on hub-and-spoke type infringements (*Retail*, December 15, 2022, 22-55/863-357). The Authority has also been consistently dealing with restriction of online sales and/or RPM cases (*Ege Teknoloji*, July 7, 2023, 23-29/561-189; *Biota*, April 6, 2023, 23-17/314-104; *Kosan*, March 30, 2023, 23-16/284-98; *Sunny*, January 5, 2023, 23-01/12-7; *Gençler/Korkmaz/Punto*, November 10, 2022, 22-51/754-313; *Market Chains*, December 28, 2021, 21-53/747-360; *Singer*, September 30, 2021, 21-46/672-336; *Deva Holding*, July 1, 2021, 21-33/446-222; *DYO*, April 15, 2021, 21-22/267-117; *Hepsiburada*, April 15, 2021, 21-22/266-116; and *Groupe SEB*, March 4, 2021, 21-11/154-63).

### 1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

In *Nadirkitap* (April 7, 2022, 22-16/273-122), the Board found that by limiting access to and portability of the book data that the seller's members upload to nadirkitap.com without reason, the company violated Article 6 of Law No. 4054 – the Board consequently imposed a fine. The ruling outlines the critical importance of data in digital markets, particularly those that are multi-sided, and provides analytical analyses of the implications of limits on data portability in these markets on anti-competitive behaviour.

In *Olka/Marlin* (June 30, 2022, 22-29/488-197), the Board assessed the allegations that Olka (which had been distributing products branded Skechers in Türkiye) and Merlin (which had been distributing products branded Asics and Fila in Türkiye) had been restricting online sales through online marketplaces for over two years. In the relevant decision, the Board considers RPM practices as a "by object restriction" in line with its precedent where the restrictions imposed on online sales were categorised within the scope of the restriction of passive sales.

## 2 Vertical Agreements

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

The increasing trend of scrutinising vertical agreements has been continuing over the last two years, in particular, regarding RPM and concerning online sales.

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

Law No. 4054 avoids providing a complete definition of "agreement", since an agreement may occur in various ways. The reasoning of Law No. 4054 indicates that the term "agreement" refers to all kinds of compromise or accord to which the parties feel bound (i.e. concurrence of wills). Vertical agreements are defined as agreements that are concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of the purchase, sale or resale of particular goods or services.

### 2.3 What are the laws governing vertical agreements?

Article 4 of Law No. 4054 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.

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

The Board typically granted negative clearance to both direct and indirect export restrictions (*Roche*, June 16, 2022, 22-27/432-177; and *Roche*, September 26, 2018, 18-34/577-283). In *Bayer* (July 28, 2020, 20-36/488-214) and *Johnson & Johnson* (September 3, 2020, 20-40/553-249), the Board did not assess export restrictions, on the grounds that they were out of the scope of Law No. 4054.

The Board has considered RPM as a "by object restriction" over the last few years (*Arçelik*, August 3, 2023, 23-36/682-235; *Elca*, August 17, 2023, 23-39/738-253; *Gerçek Kozmetik*, March 23, 2023, 23-15/269-91; *Pierre Fabre Dermo*, March 9, 2023, 23-13/214-70; *Avon*, March 9, 2023, 23-13/223-72; *Engingrup*, February 23, 2023, 23-10/154-48; *Panek*, December 29, 2022, 22-57/899-369; *Miele*, November 10, 2022, 22-51/753-312; *Olka/Marlin*, June 30, 2022, 22-29/488-197; *Duru*, February 17, 2022, 22-09/130-50; *Philips*, August 5, 2021, 21-37/524-258; *Groupe SEB*, March 4, 2021, 21-11/154-63; *Singer*, September 30, 2021, 21-46/672-336; *DYO*, April 15, 2021, 21-22/267-117; *Hepsiburada*, April 15, 2021, 21-22/266-116; *Baymak*, March 26, 2020, 20-16/232-113; *Bellona*, March 26, 2020, 20-16/231-112; and *Fuel Oil*, March 12, 2020, 20-14/192-98).

### 2.5 What is the analytical framework for assessing vertical agreements?

The first step would be to determine whether the agreement would benefit from block exemption. If the agreement does not benefit from such exemption, it is necessary to analyse whether the agreement restricts competition by its object or effects and if so, whether the agreement satisfies the cumulative conditions for an individual exemption.

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

The Guidelines on Market Definition consider demand-side substitution as the primary standpoint of market definition, and supply-side substitution and potential competition as secondary factors.

### 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?

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, are considered vertical agreements.

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

Vertical agreements could benefit from block exemption if the market share of the supplier is below 30% in the relevant market. 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?

Unless the vertical restraint is classified as a "by object restriction", economic analysis might come into play in terms of relevant market definitions as well as the evaluation of market shares and the alleged effects of the vertical restraints.

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

Vertical agreements falling outside block exemption are not automatically deemed to be in violation of Law No. 4054 and the undertakings may plead the efficiencies defence. Article 5 of Law No. 4054 sets out cumulative conditions for individual exemption: (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 by more than what is necessary 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?

If a vertical agreement concerns the 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, such 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?

It is sufficient for either the effect or the object to exist for an infringement finding.

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

The Board considers potential efficiencies or benefits for consumers to decide whether a restrictive agreement could benefit from individual exemption. 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". Therefore, possible defence scenarios would heavily depend upon case-specific parameters.

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

The Board issued the Guidelines on Vertical Agreements on June 30, 2003 and amended them on March 29, 2018.

### 2.16 How is resale price maintenance treated under the law?

Please see the answer to question 2.4.

### 2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements (i.e. single branding obligations) could benefit from block exemption if the market share threshold is not exceeded and their duration does not exceed five years.

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

Tying is exempted under block exemption if the market shares of the supplier on both the market of the tied product and the market of the tying product do not exceed 30%. If the market share threshold is exceeded, the analysis for individual exemption would be based on the market position of the supplier on the market of the tying product, competitive constraints by the competitors, countervailing buyer power, and efficiencies.

### 2.19 How do enforcers and courts examine price discrimination claims?

Differentiated pricing is not abusive *per se* and can only constitute violation where the conduct is capable of distorting competition. The assessment would be to determine whether dissimilar conditions are being applied to equivalent transactions with other trading parties and thereby placing them at a competitive disadvantage. Accordingly, the application of differentiated prices and commercial terms should be justifiable based on legitimate, rational and objective reasons.

### 2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty rebates are not considered *per se* illegal. The foreclosing effects of rebate systems are analysed on a case-specific basis. In *Mey İçki* (April 30, 2020, 20-21/281-135), the Board did not grant individual exemption to the agreement between Mey İçki and sales points, on the grounds that the rebate scheme, along with the minimum purchase system, could result in *de facto* exclusivity. In *Red Bull* (December 19, 2019, 19-45/767-329), the Board concluded that the rebate system implemented by Red Bull is not anti-competitive in nature given that the system does not result in *de facto* exclusivity.

### 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 a narrower portfolio of products. The Board has so far assessed bundled discount practices under Article 6 of Law No. 4054 (*Luxottica*, February 23, 2017, 17-08/99-42; *TTNET*, February 5, 2015, 15-06/74-31; and *Doğan Yayın*, March 30, 2011, 11-18/341-103).

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

Non-compete obligations could be considered restrictive under Law No. 4054. In principle, non-compete obligations longer than five years or designed to remain in effect post-termination cannot benefit from an exemption. The Board indicates that non-compete obligations' scope should be limited to goods or services that compete with goods or services which are the subject of the agreement (*Bfit*, February 7, 2019, 19-06/64-27; *Novo Nordisk/Abdi İbrahim*, July 28, 2020, 20-36/493-218; and *Novartis*, April 1, 2021, 21-18/216-89). Non-compete obligations should not bind any person other than the buyer and people who have control relations with the buyer (*Roche*, October 13, 2016, 16-33/569-247), and their geographic scope should be proportionate to the territory where efficiency gains are expected to be obtained (*MSD*, November 14, 2019, 19-40/648-275). The restriction of cross-supplies between resellers within a selective distribution system cannot benefit from block exemption. Suppliers operating selective distribution systems cannot impose exclusive purchase obligations on the members of their selective distribution system.

### 2.23 How are MFNs treated under the law?

The Guidelines on Vertical Agreements recognise the pro-competitive nature of MFN clauses and adopt a "rule of reason" approach to the analysis of anti-competitive effects of these clauses. The guidelines provide that in the analysis of these clauses (i) the undertakings' and their competitors' positions in the relevant market, (ii) the object of the MFN clause in the agreement, and (iii) the specific characteristics of the market, should be considered. In *Booking.com* (January 5, 2017, 17-01/12-4), the Board concluded that Booking.com's

wide MFN clauses were in violation of Article 4 and could not benefit from individual exemption. The Board also determined that narrow MFN clauses could result in entry barriers in *Yemek Sepeti* (January 28, 2021, 21-05/64-28). In *DSM* (January 5, 2023, 23-01/2-2), *Getir* (September 15, 2022, 22-42/606-254), *DSM Grup* (May 18, 2022, 22-23/364-154), *Travel Agents* (October 25, 2018, 18-40/645-315), *Kitapyurdu* (November 5, 2020, 20-48/658-289) and *Hepsiburada* (April 15, 2021, 21-22/266-116), the Board indicated that the relevant agreements/practices benefitted from block exemption, and in *HDI* (November 10, 2022, 22-51/752-311) from individual exemption.

## 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)?

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

### 3.2 What are the laws governing dominant firms?

The main legislation governing dominant firms is Article 6 of Law No. 4054. Paragraph 22 of the Guidelines on Exclusionary Abuses articulates that "abuse" may be defined as when a dominant undertaking takes advantage of its market power to engage in activities that are likely, directly or indirectly, to reduce consumer welfare. Article 6 provides a non-exhaustive list of specific forms of abuse.

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

The Guidelines on Market Definition 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?

There is no market share threshold above which an undertaking will be considered dominant. The Board's case law and the Guidelines on Exclusionary Abuses indicate that an undertaking with a market share lower than 40% is unlikely to be in a dominant position in the absence of any sector-specific dynamics.

### 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?

Dominance itself is not prohibited, only the abuse of dominance is. Article 6 of Law No. 4054 does not define what constitutes "abuse" *per se*, but it provides examples of abusive behaviour.

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

Economic analysis might provide further insight into the competitive landscape of the market and evidence of the competitive constraints faced by the allegedly dominant undertaking.

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

Market shares are the primary (but not the sole) indicator of a dominant position. Barriers to entry and expansion, buyer power, the competitors' market positions and other market dynamics are also considered.

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

It is possible to invoke efficiency gains, if it can be demonstrated that pro-competitive benefits outweigh anti-competitive impacts.

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

For efficiency justifications, the undertakings should prove that: (i) the efficiencies will be realised or likely to be realised as a result of the conduct; (ii) the conduct will be indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct outweigh any possible negative effects on competition and consumer welfare in the affected markets; and (iv) the conduct does not eliminate effective competition by removing all or most of the existing sources of actual/potential competition.

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

Collective dominance is also covered by Law No. 4054. For collective dominance to exist, two or more undertakings should behave in a way to form collectiveness from an economic viewpoint (*Digiturk/D-Smart*, May 18, 2016, 16-17/299-134; *Arkem/Aktaş*, February 25, 2021, 21-10/140-58; and *Tuna*, January 19, 2022, 22-04/58-27).

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

Article 6 of Law No. 4054 also applies to dominant purchasers. The Board found that TEB abused its dominance by entering into exclusive agreements with suppliers and imposing exclusive supply obligations upon them, thereby foreclosing the market to its competitors (*TEB*, December 6, 2016, 16-42/699-313).

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

Article 6 of Law No. 4054 does not define what constitutes "abuse" *per se*; it, instead, provides a non-exhaustive list of abusive behaviour.

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

The Board considers that although having an intellectual property right may give an undertaking market power, it does not indicate the existence of market power *per se* and a case-by-case analysis must be made. In *Philips* (December 26, 2019, 19-46/790-344), the Board stated that owning an SEP is not sufficient to conclude that the SEP owner enjoys a dominant position.

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

Market shares are the primary (but not the sole) indicator of a dominant position. The Board would assess the market power of an undertaking considering the dynamic structure of the relevant market and various market characteristics as indicators of competitive pressures in the market, which can potentially offset or abate the effects of high market shares and concentration levels.

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

Besides an online platform's market share, the Board would also take into account network effects, entry barriers, innovation as well as the multi-sided aspects of the relevant activities.

### 3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The Authority published the preliminary report regarding the sector inquiry for online advertising services on April 7, 2023. The Authority published the Final Report Regarding the Sector Inquiry for E-Marketplace Platforms on April 14, 2022. The Authority has been exerting efforts in the pursuit of reaching a Digital Markets Act type legislation in Türkiye. A comprehensive amendment to Law No. 4054 regarding this issue is currently in progress and awaits enactment by the Grand National Assembly of Türkiye.

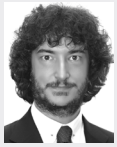
### 3.17 Under what circumstances are refusals to deal considered anticompetitive?

The refusal should: (i) relate to a product or service that is indispensable for competing 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. The Board also examines whether the refusal is based on an objective justification (*Türk Telekom*, February 27, 2020, 20-12/153-83; and *Maysan Mando*, June 20, 2019, 19-22/353-159). The Board has typically rejected refusal to supply allegations that concerned supplier/reseller relations on the grounds that there was no meaningful competition between a supplier and a reseller (*Allergan*, September 8, 2022, 22-41/594-248; *Novartis*, April 11, 2019, 19-15/215-95; and *Baymak*, September 6, 2018, 18-30/523-259).

## 4 Miscellaneous

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

This is not applicable.



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