



## Dominance Comparative Guide

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## Dominance Comparative Guide

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## 1. Legal and enforcement framework

### 1. 1. Which legislative and regulatory provisions regulate dominance in your jurisdiction?

#### Turkey

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Abuse of dominance is primarily governed by Article 6 of Law 4054 on the Protection of Competition. Article 6 of Law 4054 sets out a non-exhaustive list of specific forms of abuse, which is similar to Article 102 of the Treaty on the Functioning of the European Union. ‘Dominance’ is defined under Article 3 of Law 4054 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”. Dominance itself is not prohibited – only the abuse of dominance. In a similar vein, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance. The Guidelines on the Definition of the Relevant Market and the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings published by the Turkish Competition Authority also provide guidance on the assessment of dominance and abuse of dominance.

### 1. 2. Do any special regimes apply in specific sectors?

#### Turkey

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No sector-specific abuses or defences are provided under the framework of Law 4054. There are no exemptions and/or sector-specific rules in terms of abuse of dominance cases. Although Law 4054 does not recognise any sector-specific abuses or defences, certain sectoral independent authorities have the competence to control dominance in their relevant sectors. By way of example, in the communication sector, the Information and Telecommunication Technologies Authority’s secondary legislation prevents companies from engaging in discriminatory behaviour when other companies seek access to their network and rejecting requests for access, interconnection or facility sharing without justification. The authority is the only regulatory body that investigates and condemns abuses of dominance.

### 1. 3. Is the legislation intended purely to protect economic interests or does it have other aims?

#### Turkey

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The object of the legislation is to maximise total welfare by targeting economic efficiency. The Guidelines on Exclusionary Abuses define ‘abuse’ as “when a dominant undertaking takes advantages of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare”. The concept of abuse covers exploitative, exclusionary and discriminatory practices.

## 1. 4. Which authorities are responsible for enforcing the legislation?

Turkey

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The Turkish Competition Authority is a legal entity with administrative and financial autonomy. It is comprised of the Turkish Competition Board, the presidency and service departments. The board is responsible for investigating and condemning abuses of dominance.

## 1. 5. How active are the enforcement authorities in taking action against abuse of dominance in your jurisdiction? What key decisions have the enforcement authorities adopted most recently?

Turkey

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The Turkish Competition Authority actively monitors the markets and takes action where necessary, either *ex officio* or as a result of the complaints it receives. Accordingly, as set out in the statistics published by the authority for 2022, during the 2022 calendar year the Turkish Competition Board finalised 14 investigations (both preliminary and fully fledged) conducted on the basis of allegations regarding violations of Article 6 of Law 4054, which prohibits abuse of dominance. It also decided on six investigations that were initiated on the basis of both Article 4 and Article 6 of Law 4045 in 2022.

Significant decisions in 2022 on the abuse of dominance included the following:

- In *TFF Broadcasting* (Decision 22-44/652-281 of 29 September 2022), the Turkish Competition board found that Digiturk had a dominant position in terms of broadcasting rights regarding TFF Super League and First League matches, and decided on interim measures to ensure that Digiturk granted summary and news footage to interested undertakings on a non-discriminatory basis. In a previous decision concerning excessive pricing and discriminatory practices (Decision 22-03/48-19 of 13 January 2022), the board concluded that Digiturk had not abused its dominant position in the absence of sanction mechanisms or evidence of excessive pricing practices and discrimination among its buyers.
- In *Nadirkitap* (Decision 22-15/273-122 of 7 April 2022), the board found that Nadirkitap had violated Article 6 of Law 4054 by hindering the activities of competitors through its failure to provide the data sets of seller members that wished to market their products through rival intermediary service providers. The board imposed an administrative monetary fine on Nadirkitap.
- In *Ortadoğu Antalya Liman İşletmeleri* (Decision 22-11/169-68 of 3 March 2022), the board concluded that Ortadoğu Antalya Liman İşletmeleri had abused its dominant position in violation of Article 6 of Law 4054 in the market for container stuffing services through practices that hindered the activities of competitors by creating *de facto* exclusivity through rebate schemes. The board imposed monetary fines on the undertaking.
- In *Tadım Gıda* (Decision 22-32/505-202 of 7 July 2022), the board assessed allegations that Tadım had abused its dominant position in the packaged dried nuts market. Further to commitments offered by Tadım, the board concluded the investigation by approving the proposed commitments and making them binding on Tadım.
- In the last quarter of 2021, the board decided on and approved commitments at the preliminary

investigation stage for the first time in *Sisecam* (Decision 21-51/712-354 of 21 October 2021). In its decision, the board assessed whether Şişecam, through its subsidiary, had abused its dominant position in the market for glass manufacturing by excluding competitors in the upstream market for recycled glass, utilising its buyer power to narrow the margin between competitors' input and output and hindering competitors' activities by restricting the supply of waste glass. The investigation concluded with the approval of the commitments proposed by Şişecam at the preliminary investigation stage.

The Turkish Competition Authority has also stepped up its scrutiny of Article 6 infringements in the digital sectors. On 11 January 2021, it announced the launch of an *ex officio* investigation against Facebook and WhatsApp (now Meta) in relation to their data-sharing arrangement. In its *Meta* decision (Decision 22-48/706-299 of 20 October 2022), the Turkish Competition Board found that Meta had abused its dominant position by creating entry barriers and hindering competitors' activities through merging the data it collected from Facebook, Instagram and WhatsApp. Based on this, the board imposed an administrative monetary fine of TL 346,717.193,40 on Meta.

In another example concerning the digital sector, the board assessed in *Yemeksepeti* (Decision 22-23/366-155 of 18 April 2022) whether online food delivery/ordering application Yemek Sepeti had violated Article 6 of Law 4054 by punishing restaurants with unilateral practices such as reduced visibility on search result pages, lowered scores and restricted use of advertising space. Further to its in-depth assessments, the board concluded that there was no need to conduct a fully fledged investigation against Yemek Sepeti.

## 2. Definitions and scope of application

2. 1. What parties are covered by the dominance legislation? Are any exemptions available?

Turkey

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Along with the other provisions of Law 4054, dominance provisions apply to all entities, provided that they qualify as an 'undertaking' within the meaning of Law 4054. Under the law, an 'undertaking' is defined as a single integrated economic unit that is capable of acting independently in the market to produce, market or sell goods and services. State-owned entities also fall within the scope of the application of Article 6 of Law 4054.

2. 2. How is 'dominance' defined in your jurisdiction?

Turkey

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'Dominance' is defined under Article 3 of Law 4054 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". Dominance itself is not prohibited; only the abuse of dominance is outlawed.



## 2. 3. How important is market share in assessing dominance in your jurisdiction? Do specific thresholds apply in this regard?

Turkey

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Market share is the primary, but not the sole indicator of a dominant position. There is no market share threshold above which an undertaking will be considered to be dominant. That said, the Turkish Competition Board's case law and the Guidelines on Exclusionary Abuses indicate that an undertaking with a market share of less than 40% is unlikely to be in a dominant position in the absence of any sector-specific dynamics (eg, see the decisions in *MediaMarkt* (Decision 10-36/575-205 of 12 May 2010); *Pepsi Cola* (Decision 10-52/956-335 of 5 August 2010); *Egetek* (Decision 10-62/1286-487 of 30 September 2010); *Unmaş* (Decision 21-26/324-150 of 20 May 2021); *D-Market* (Decision 21-22/266-116 of 15 April 2021); and *Aort* (Decision 21-06/70-31 of 4 February 2021) decisions).

## 2. 4. What other factors are considered when assessing dominance?

Turkey

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The Turkish Competition Board will assess the market power of an undertaking considering the competitive landscape of the relevant market and by taking into account the 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. Barriers to entry and expansion, countervailing buyer power, potential switching, supply and demand structure, competitors' market positions and other specific market dynamics will also be considered within the scope of the board's assessment. For example, in *Trakya Cam* (Decision 21-40/590-287 of 28 July 2021), the board evaluated excessive pricing allegations in the flat glass market. *Trakya Cam* was deemed to have a dominant position as a result of its constant high market share, its portfolio and production power due to its eight production bands and entry barriers encountered in the market.

## 2. 5. How are the product and geographic markets defined in your jurisdiction?

Turkey

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The Guidelines on Relevant Market Definition 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 on Relevant Market Definition consider demand-side substitution as the primary factor in defining the market, and supply-side substitution and potential competition as secondary factors. The relevant market is determined depending on the specific facts of each case.

## 2. 6. Does the dominance legislation make any distinction between dominant purchasers and suppliers?

## Turkey

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Article 6 of Law 4054 also applies to dominant purchasers. The Turkish Competition Board found that TEB had 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*, Decision 16-42/699-313 of 6 December 2016).

### 2. 7. Is collective dominance recognised in your jurisdiction? If so, how is it defined?

#### Turkey

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Collective dominance is also recognised by Law 4054. In order for collective dominance to exist, two or more undertakings should behave in a way that constitutes collectiveness from an economic standpoint (eg, see the Turkish Competition Board's decisions in *Biryay* (Decision 00-26/292-162 of 17 July 2000); *Turkcell/Telsim* (Decision 03-40/432-186 of 9 June 2003); *Chemical Solvents* (Decision 21-10/140-58 of 25 February 2021); and *Sinema TV* (Decision 16-17/299-134 of 18 May 2016). The market structure and forms of interaction, cooperation agreements or shareholding interests may lead to economic links and collective dominance. In order to find an abuse of collective dominance, the Turkish Competition Board must demonstrate that the undertakings are following a common policy in the market, at least for the purposes of the abusive conduct.

### 2. 8. What is the statute of limitations to prosecute abuse of dominance cases in your jurisdiction?

#### Turkey

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As per Article 20(3) of the Law on Misdemeanours (5326), the statute of limitations is eight years. Article 20(4) of the Law on Misdemeanours provides that the eight-year limitation period begins to run from the date on which the unlawful act was committed or its consequences arose. If the infringement is ongoing, this eight-year period starts from the date on which the infringement ceases.

## 3. Abuse of dominance

### 3. 1. How is 'abuse of dominance' defined in your jurisdiction?

#### Turkey

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Article 6 of Law 4054 sets out a non-exhaustive list of specific forms of abuse, which is similar to Article 102 of the Treaty on the Functioning of the European Union. This non-exhaustive list is as follows:

- directly or indirectly preventing entry into the market or hindering competitor activity in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to

- equivalent transactions with similar trading parties;
- 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;
  - the acceptance by intermediary purchasers of the display of other goods and services; or
  - the maintenance of a minimum resale price;
- distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and
- limiting production, markets or technical development to the prejudice of consumers.

### 3. 2. What specific types of conduct constitute an abuse of dominance in your jurisdiction?

#### Turkey

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The main types of abuse of dominance in Turkey are exclusionary and exploitative abuses. That said, the Turkish Competition Board rarely analyses instances of abuse of dominance involving the imposition of unfair and exploitative contract terms; the debate on whether to intervene usually focuses on excessive pricing. Exclusionary practices can be further divided into:

- exclusionary pricing;
- exclusive dealing;
- leveraging;
- refusal to deal; and
- discrimination.

Regarding exploitative abuses, excessive prices and/or exploitative terms of supply may be deemed in violation of Article 6 of Law 4054.

### 3. 3. On what grounds may the enforcement authorities commence an abuse of dominance investigation?

#### Turkey

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The Turkish Competition Board can commence an investigation *ex officio* or in response to a complaint that it receives. Assessments of abuse of dominance must be conducted within the rationale set out in Law 4054. In that sense, Article 2 of Law 4054 offers an effect-based approach to identify anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to abuse is the effect produced on the market, regardless of the type of conduct at issue.

### 3. 4. What powers do the enforcement authorities have in conducting their investigation?



## Turkey

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The Turkish Competition Authority has a wide range of investigative powers under Law 4054. As provided in Article 14 of Law 4054, the Turkish Competition Board can request relevant information for its ongoing investigations from third parties, public institutions and organisations, trade associations and the relevant undertakings. Failure to comply with a request to produce information or failure to produce such information in a timely manner may lead to the imposition of a fine of 0.1% 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). If incorrect or misleading information is provided in response to a request for information, the same penalty may be imposed. The administrative monetary fine may not be lower than TL 105,688 (valid until 31 December 2023).

In addition to its power to request information, the Turkish Competition Authority has the power to:

- conduct on-site inspections and examine the records, paperwork and all sorts of documents of undertakings and trade associations and, if need be, take copies of the same;
- request undertakings and trade associations to provide written or oral explanations on specific topics; and
- conduct on-site inspections with regard to any asset of an undertaking.

Additionally, as stipulated under the Amendment Law and the Guidelines on Examination of Digital Data During On-site Inspections (adopted through Decision 20-45/617 of 8 October 2022), the Turkish Competition Authority can inspect and make copies of all information and documents held in the electronic media and information systems of the relevant undertakings. The guidelines also allow the authority to examine mobile devices (eg, mobile phones and tablets), unless it is determined that such devices are used solely for the personal use of a given employee. Regardless, the authority has the power to conduct a quick review of any portable electronic device to ascertain its intended purpose. The authority may also investigate computer records, telephone records, emails and other correspondence (eg, WhatsApp), including deleted items.

Preventing and/or hindering on-site inspections will result in the imposition of administrative fines.

The Turkish Competition Board has imposed an administrative monetary fine for obstructing on-site inspections in various decisions even where the relevant correspondence/messages were restored or where no evidence of a violation was found (eg, see the board's decisions in *Eti* (Decision 20-24/278-123 of 29 April 2021); *Medicana* (Decision 21-31/400-202 of 17 June 2021); *Çiçek Sepeti* (Decision 21-27/354-173 of 27 May 2021); *Procter & Gamble* (Decision 21-34/452-227 of 8 July 2021); *Hepsiburada* (Decision 21-48/678-338 of 7 October 2021); *Unmas* (Decision 21-26/327-152 of 25 January 2022); *Hepsiburada* (Decision 22-03/35-16 of 13 January 2022); and *Softtech* (Decision 22-42/614-258 of 15 September 2022).

### 3. 5. Is there an opportunity for third parties to participate in the investigation?

## Turkey

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By way of complaints, third parties may trigger investigations of the Turkish Competition Board and become a party to the proceedings. In addition, the board may request the views of third parties within the course of an ongoing investigation or require specific documents.

### 3. 6. What are the general rights and obligations of the enforcement authorities during the investigation?

Turkey

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The Turkish Competition Board is authorised to take all necessary measures to:

- terminate restrictive agreements;
- remove all *de facto* and legal consequences of any action that has been taken unlawfully; and
- restore the level of competition and status to that which existed before the infringement.

A restrictive agreement will be deemed legally invalid and unenforceable, with all the legal consequences.

The board is authorised to take interim measures until the final resolution of the matter if there is a possibility of serious and irreparable damages. The board can order structural remedies for anti-competitive conduct, provided that behavioural remedies were initially applied and have failed.

### 3. 7. What are the general rights and obligations of the target company during the investigation? What are the general rights and obligations of individuals targeted during the investigation?

Turkey

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Investigated undertakings are entitled to protect confidential/commercially sensitive information. The main statutes on the protection of commercially sensitive information are Article 25(4) of Law 4054 and Communiqué 2010/3 on the Regulation of the Right to Access to File and Protection of Commercial Secrets. Communiqué 2010/3 places the burden of identifying commercial secrets and justifying such classification on the investigated undertakings. Therefore, undertakings must request confidentiality from the Turkish Competition Authority and justify the reasons for the confidentiality of the information or document in writing. Under Article 15(2) of Communiqué 2010/3, the authority may not consider confidentiality requests if they relate to information and documents that are indispensable as evidence of competition infringement. In such cases, the authority can disclose information and documents that could be considered as trade secrets by taking into account the balance between the public interest and private interest, and in accordance with the principle of proportionality.

Additionally, investigated undertakings have the right to access the case file on two legal grounds: Law 4982 on the Right to Information and Communiqué 2010/3. Article 5(1) of Communiqué 2010/3 provides that the right to access the case file will be granted upon written request of the parties within due time during the investigation. This gives the applicant access to information and documents in the case file that do not qualify as internal documents of the authority or trade secrets of other undertakings.

The Turkish Competition Board's decisions are subject to appeal before the administrative courts. Investigated undertakings can also voluntarily offer commitments during a preliminary investigation or a fully-fledged investigation to address the Turkish Competition Authority's competitive concerns. However, this mechanism is not applicable to hardcore violations. There is no time limitation for the utilisation of the commitment mechanism and no need to admit to a violation. Nevertheless, the board may relaunch an investigation if:

- there is a substantial alteration in any of the factors on which the decision was based;
- the relevant undertakings or associations of undertakings act in violation of the commitments given; or
- the decision was based on missing, false or misleading information presented by the investigated undertakings.

Furthermore, the board, *ex officio* or on the request of the investigated undertaking, can initiate a settlement procedure. Investigated undertakings that admit to the infringement can apply for the settlement procedure until official notification of the investigation report. If a settlement is reached, a reduction of up to 25% of the administrative monetary fine may be applied. The investigated undertaking may not bring a dispute on the settled matters and the administrative monetary fine once an investigation is finalised with a settlement.

### 3. 8. What factors will the enforcement authorities consider in assessing whether an abuse of dominance has taken place?

Turkey  
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The Turkish Competition Board will first assess whether the investigated undertaking holds a dominant position in Turkey in terms of the relevant product markets that are subject to the investigation. Consequently, the board will analyse whether the relevant actions/arrangements of the dominant undertakings amount to the abuse of dominance. To this end, as explained in question 3.3, Article 2 of Law 4054 adopts an effect-based approach to identify anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to abuse is the effect on the market, regardless of the type of conduct. All in all, the analysis by the board will depend on the type/nature of the alleged violation.

### 3. 9. In case of a finding of abuse of dominance, can the company seek to negotiate a settlement or similar resolution? If so, what is the process for doing so?

Turkey  
ELIG Gürkaynak Attorneys-at-Law

As per Article 43 of Law 4054, the settlement process can be commenced only after the initiation of the investigation and must be concluded before the official serving of the investigation report. Once the parties have officially confirmed their intentions for settlement by submitting a written application to the Turkish Competition Authority, the Turkish Competition Board will set a definitive timeframe for the undertakings to submit a settlement letter. Since the timeframe is definitive, the board will not consider submissions that are made after the period has concluded. Following the submissions of the undertakings, if the board decides to settle, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine, which may be reduced by up to 25% as a result of the settlement procedure. As per Article 17(6) of the Law on Misdemeanours, the utilisation of the settlement mechanism will not prevent the application of the reduction. However, the board's decision on the administrative fine and the matters within the scope of the final settlement text have a final nature and thus cannot be appealed before the administrative courts. As regards the applicability of the settlement mechanism, Law 4054 imposes no restriction in terms of the nature of the violation.

To explain in detail, according to the Regulation on the Settlement Procedures to be Applied During Investigations Regarding Anti-competitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance ('Settlement Regulation'), if the Turkish Competition Authority *ex officio* invites the parties under investigation to settlement negotiations, the parties should declare whether they wish to accept this invitation within 15 days. Article 4(4) of the regulation provides that the Turkish Competition Board has the discretion to grant a settlement reduction of between 10% and 25%, indicating that the actual reduction in fine due to settlement will not be less than 10%. Article 6(5) of the regulation stipulates that the Turkish Competition Authority will inform the settling party of:

- the content of the allegations;
- the nature and scope of the alleged violation;
- the main evidence on which the allegations are based;
- the potential reduction rate to be applied in case of settlement; and
- the range of potential administrative fines which might be imposed on the settling party.

Following the settlement negotiations, the board will adopt an interim decision, which includes the following, among other things:

- the nature and scope of the alleged violation;
- the maximum rate of the administrative fines in accordance with the Regulation on Fines; and
- the reduction rate to be applied at the end of the settlement procedure.

If the settling party agrees on the matters set forth therein, it will submit a settlement letter which includes an express declaration of admission as to the existence and scope of the violation. Article 9(1) of the Settlement Regulation provides that the board will adopt its final decision to end the investigation within 15 days of submission of the settlement letter. The board's final decision will include the finding of a violation and the administrative fine to be imposed on the settling undertaking.

## 4. Defences

### 4. 1. What defences are available to companies in response to enforcement?

## Turkey

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Paragraph 30 of the Guidelines on Exclusionary Abuses provides that the Turkish Competition Board will take into consideration any claims put forward by a dominant undertaking that its conduct is justified through 'objective necessity', 'efficiency' or both. Efficiency gains may be invoked, provided that the pro-competitive effects would outweigh the anti-competitive effects and this is properly presented in a rational manner. With regard to whether these defences are available when exclusionary intent is shown, objective justifications such as 'objective necessity', 'efficiency' or both can be utilised as a defence on that front. Paragraph 24 of the Guidelines on Exclusionary Abuses provides that in the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be considered. In this regard, in order to determine whether an undertaking has carried out abusive conduct, the actual (or potential) effect of the alleged conduct on the relevant market should be demonstrated.

### 4. 2. Can companies avail of leniency in abuse of dominance cases?

## Turkey

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No. In abuse of dominance cases, the investigated undertakings can either avail of the commitment mechanism or apply for the settlement mechanism before the Turkish Competition Authority.

## 5. Remedies and sanctions

### 5. 1. What remedies and sanctions may be imposed for abuse of dominance? Can sanctions be imposed on individuals?

## Turkey

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Sanctions imposed on undertakings by the Turkish Competition Authority are administrative in nature. There are no criminal sanctions. In case of a proven abuse of dominance, the incumbent undertakings concerned will be subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and/or executives of the undertakings that had a determinative effect on the violation may also be fined up to 5% of the administrative monetary fine imposed on the undertaking.

### 5. 2. How are the remedies and sanctions in abuse of dominance cases determined?

## Turkey

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In determining the magnitude of the monetary fine, the Turkish Competition Board considers factors such as:



- the level of fault and the extent of the possible damage in the relevant market;
- the market power of the undertakings within the relevant market;
- the duration and recurrence of the infringement;
- cooperation or the driving role of the undertakings in the infringement;
- the financial power of the undertakings; and
- compliance with commitments.

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

### 5. 3. Can the enforcement authorities impose remedies and sanctions directly or is court action required?

#### Turkey

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As the remedies and sanctions are administrative in nature, the Turkish Competition Board does not require a court decision to impose remedies and sanctions on the relevant undertakings.

## 6. Appeal

### 6. 1. Can the defendant company appeal the enforcement authorities' decision? If so, in what forum and what is the process for appeal?

#### Turkey

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As per the Administrative Procedure Law (2577), the relevant undertakings can appeal the Turkish Competition Board's decisions before the administrative courts within 60 calendar days of formal service of the relevant reasoned decision of the board. During the appeal, both procedural and substantive aspects of the decisions can be re-evaluated. In accordance with the principles set forth in the administrative branch of the Turkish legislation, the board's decisions, as administrative acts, must comply with the law in terms of all of the following elements:

- jurisdiction;
- form;
- reason;
- subject matter; and
- purpose.

According to Article 27 of Law 2577, filing an administrative action does not automatically stay execution of the board's decision. However, on the request of the plaintiff, the court may stay execution if the decision is likely to cause irreparable damage or contravene the law. Decisions of the administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the Council of State.

## 6. 2. Can third parties appeal the enforcement authorities' decision, and if so, in what circumstances?

Turkey

ELIG Gürkaynak Attorneys-at-Law

Third parties can challenge a Turkish Competition Board decision before the competent judicial tribunal, subject to proving their legitimate interest.

## 7.Private enforcement

### 7. 1. Are private enforcement actions against abuse of dominance available in your jurisdiction? If so, where can they be brought?

Turkey

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Aside from the general provisions stipulated under the Code of Obligations, Law 4054 also includes specific provisions on compensation for damages arising from Law 4054. Specific provisions in Law 4054 cover breaches that require compensation, determination of compensation amounts and standard of proof. The Turkish Competition Board does not decide whether the victims of anti-competitive conduct deserve to be awarded damages. These aspects are supplemented by private lawsuits. However, compensation of damages is not the sole aim of private enforcement; the provisions also establish a compensation risk in order to deter entities from breaching Law 4054. Anyone that suffers damage to its business or property as a result of an action that is prohibited under the competition laws can sue the infringer for up to three times the personal damages, plus litigation costs and legal fees, under Articles 57 and following of Law 4054. This makes Turkey one of the few jurisdictions that allow claims for treble damages. The competent courts for such private actions are the general courts.

### 7. 2. Are class actions or other forms of collective action available in your jurisdiction?

Turkey

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Turkish procedural law does not allow for class actions or procedures for antitrust infringements. While Article 73 of Law 6502 on the Protection of Consumers allows for class actions by consumer organisations, these are limited to violations of Law 6502 on the Protection of Consumers and do not extend to antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to bring class actions against acts of unfair competition, but this has no reasonable relevance to private suits under Articles 57 and following of Law 4054. Turkish procedural law allows for group actions under Article 113 of the Turkish Procedure Law (6100). Associations and other legal entities may initiate a group action:

- “to protect the interest of their members”;
- “to determine their members’ rights”; and
- “to remove the illegal situation or prevent any future breach”.

However, group actions do not cover actions for damages. A group action can be brought before the court as a single lawsuit only. The verdict will apply to all individuals within the group.

### 7. 3. What process do private enforcement actions follow?

Turkey

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Although in practice, most enforcement activity is conducted by the Turkish Competition Authority, there is an increasing trend in private enforcement whereby the claimants await a decision of the authority on which to base their claims and to support their positions through a formal decree. The case must be brought before the competent general civil court. As a general rule, plaintiffs or defendants can appeal decisions of the general civil courts before the civil chambers of regional courts within two weeks of the reasoned general civil court's decision. The parties to the lawsuit can also appeal the decision of the civil chambers of regional courts before the Court of Cassation within two weeks of the reasoned appealable decision.

### 7. 4. What types of relief may be sought and what types of relief are most commonly awarded? How is the relief awarded determined?

Turkey

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Articles 57 and following of Law 4054 entitle anyone that suffers damage to its business or property due to a breach of the antitrust laws to sue the infringer for up to three times the damages plus litigation costs and attorneys' fees. In practice, the courts usually wait for the Turkish Competition Board to render its opinion on the matter and thus treat the issue as a prejudicial question. As the courts usually wait for the board to render its decision, a court decision can be obtained within a shorter timeframe in follow-on actions. Claims for damages arising from competition law are ultimately subject to the general tort rules – that is, the Code of Obligations. Accordingly, in order for a private tort claim to be accepted by the court, the following conditions must be cumulatively met:

- the existence of an illegal act;
- fault;
- damage; and
- causal link.

### 7. 5. Can the decision in a private enforcement action be appealed? If so, to which reviewing authority?

Turkey

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Private enforcement actions that are sought in general courts are subject to the two-phase appeal regime in Turkey, consisting of the regional appellate courts and the Court of Cassation.

## 8. Trends and predictions

8. 1. How would you describe the current dominance enforcement landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

### Turkey

ELIG Gürkaynak Attorneys-at-Law

Considering the Turkish Competition Board's recent precedent and the Turkish Competition Authority's activities in the last couple of years, it is clear that the technology-related sectors and particularly digital platforms are on the authority's radar. The authority announced plans for its Strategy Development Unit to focus on digital markets on May 2020 and published its Final Report on the E-Marketplace Sector Inquiry on 14 April 2022. In this respect, the authority has a particular focus on digital markets (including abuse of dominance cases) – which is also evident from its various recent and ongoing investigations in the digital markets, coupled with its sector inquiries, as well as legislative/regulatory efforts. Similar to the approach of various antitrust authorities, such as the European Commission and the German Federal Cartel Office, the Turkish Competition Authority closely monitors the competitive landscape of digital markets and potential competition law concerns (particularly stemming from the actions of the dominant firms).

Given these trends, it is unsurprising that the draft amendment to Law 4054 which was prepared by the Turkish Competition Authority in 2022 includes various proposed amendments to regulate digital markets. In particular, it would introduce:

- several new definitions concerning digital markets (eg, relating to core platform services and undertakings with significant market power); and
- new obligations for undertakings with significant market power.

The draft amendment is a result of the authority's efforts to determine competition issues in digital markets and the regulatory preparations being made to effectively combat such issues, which have been ongoing since early 2021.

## 9. Tips and traps

9. 1. What would be your recommendations to companies to avoid an abuse of dominance charge and what potential pitfalls would you highlight?

### Turkey

ELIG Gürkaynak Attorneys-at-Law

The prudent approach for undertakings is to adopt a holistic approach in designing their corporate governance policies and compliance programmes, focusing not only on competition law, but also on other regulated areas, in order to foster a general culture of compliance. With respect to the prevention of potential abuse of dominance violations through viable compliance programmes, a focus on senior management is particularly important, taking into account the influence of such managers in steering the company's direction as a whole. Undertakings should also ensure that their employees do not attempt to bypass the rules of competition and use the competition compliance programme as an instrument to avoid getting caught by the competition authorities. Undertakings should carefully assess their market positions in the relevant product markets, and in doing so should take account of the evolving decisional practice of the Turkish Competition Board concerning those markets. Although market share is not the sole indicator of a dominant position, particularly in the absence of specific decisions of the board on the product markets in question, undertakings with significantly high market shares must carefully assess their commercial arrangements and decisions to minimise the risk of abuse of dominance allegations. Relatively standard and/or typical commercial decisions/arrangements for non-dominant undertakings might result in potential competition law allegations for dominant undertakings. Dominant undertakings have a 'special responsibility' not to allow their conduct to restrict competition, and the board continuously monitors the conduct of the dominant firms. Given that the relevant legislation sets out a non-exhaustive list of specific forms of abuse, specific commercial decisions/arrangements (particularly with relatively atypical elements) should be carefully assessed from a competition law standpoint.

An undertaking facing an abuse of dominance investigation should immediately consult attorneys with extensive experience in Turkish Competition Authority investigations in order to safeguard their right to defence and commence a self-compliance procedure regarding Law 4054. Furthermore, the commitment and settlement mechanisms also require the investigated undertakings to act in a timely manner, due to the statutory deadlines. In terms of the commitment mechanism, it is clear that the objectives of quick proceedings and procedural economy have been effectively achieved, considering the Turkish Competition Board's recent decisions on commitments, in which the board decided that no fully fledged investigation was required.

Finally, although the fate of the proposed draft amendments to Law 4054 remains unclear at this stage (see question 8.1), it would nonetheless be beneficial for undertakings operating in digital markets to closely follow developments in this regard and ensure that their internal policies and business models are fully compliant with the proposed amendments, in order to minimise the competitive concerns that may arise in the functioning of their daily business.





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