THE DOMINANCE AND MONOPOLIES REVIEW

Fifth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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This article was first published in The Dominance and Monopolies Review, - Edition 5
(published in July 2017 – editors Maurits Dolmans and Henry Mostyn)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-67-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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ANJIE LAW FIRM

BAKER MCKENZIE LLP

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PREFACE

Previous editions of the *Dominance and Monopolies Review* spoke of the law of abuse of dominance undergoing evolutionary – rather than revolutionary – change. Although we do not yet see competition lawyers mounting the barricades, abuse of dominance law appears to be entering a phase of more rapid development. Increasing international protectionism in industrial policy, overlapping parallel investigations, novel theories of harm deployed in rapidly changing markets, and around 100 jurisdictions applying competition law (often in starkly different ways) mean that it is harder than ever before for businesses to understand how to regulate their conduct.

This Fifth Edition of *The Dominance and Monopolies Review* is, therefore, more welcome than ever. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, as well as providing a review of the regime's enforcement activity in the past year and a prediction for future developments. From the thoughtful contributions of the specialist chapter authors, this editorial – as in previous years – attempts to identify a common theme to global competition enforcement. This year's theme is 'fairness'.

Competition regulators have recently emphasised that they see the role of competition enforcement as ensuring that everyone has a 'fair chance', creating 'fair conditions' in the markets, 'keeping markets fair' and sending 'a message of fairness'. It is fair enough in political discourse to explain competition policy in simple terms, but using them as criteria for a finding of infringement creates serious risks of antitrust populism, endangering the rule of law. It is not always clear what is meant by 'fair'. Fairness can mean different things to different people in different countries at different times – for example, equality (everybody should receive the same), equity (rewards are somehow allocated in proportion to deservedness) or need (those with the greatest need are protected).

And some concepts of fairness can be diametrically opposed to the goals of competition law. Equality of outcomes (i.e., the notion that everyone should receive an equal share) contradicts the purpose of competition. Equality of resources, cooperation, and sharing of information may facilitate the ultimate evil of antitrust – collusion. Equality of treatment (in the EU at least) is inconsistent with the principle that only dominant companies are subject to special responsibilities. And fairness in the sense of sharing assets conflicts with the rule that only essential facilities and state monopolies have a duty to assist rivals. Indeed, requiring such asset-sharing depresses innovation and investment in resources. The invocation of 'fairness' appears to be a tool to justify political intervention in the decision-making process, and creates the risk of arbitrary decision-making.

This is not to say that fairness has no role in competition law. But in our view, fairness is best achieved by relying on the following more precise and better-defined concepts: consumer welfare and allocative efficiency as the goal of competition law; competition on the merits

as the criterion for assessing a firm's unilateral conduct; proportionality and 'useful effect' as benchmarks for remedies; and due process and the rule of law as the hallmark of a proper procedure for applying the law.

The developments from the last year described below illustrate how 'fairness' can be applied in different ways in the antitrust context. While ostensibly these cases may refer to fair pricing, fair conduct, or fair processes, at core they are about one of the four concepts outlined above.

The first development is the return of unfair or excessive pricing cases – at least on the eastern side of the Atlantic. In the UK, the Competition and Markets Authority (CMA) imposed a record £85.2 million fine on Pfizer (as well as a £5.2 million fine on Flynn Pharma) for increasing the price of an anti-epilepsy drug by 2,600 per cent overnight. The EU Commission has recently opened a probe into Aspen Pharma's pricing of cancer drugs, with its press release referring to 'unjustified price increases of up to several hundred per cent'. (The Italian authority has already adopted an infringement decision against Aspen concerning the same conduct.) And Gazprom's recently proposed commitments to the EU Commission include price review mechanisms based on competitive price benchmarks. In *Facebook*, the German antitrust authority is reviewing Facebook's imposition of allegedly unfair privacy terms.

The renewed focus on excessive pricing is not only limited to Europe. In China, an authority has imposed fines on five gas suppliers that were determined to be charging customers unfairly high prices. In Israel, declarations of excessive pricing have led to class actions against Tamar (in the natural gas market) and Tnuva (in the dairy product market).

By contrast, Patricia Brink of the US Department of Justice recently discussed whether excessive prices are a matter for competition enforcement. She stated, 'in the United States, both historically and at present, the answer is an unequivocal no'. Ms Brink pointed to the statement by Justice Scalia in *Trinko* that the opportunity to charge monopoly prices is what attracts business acumen, induces risk taking, promotes innovation and encourages economic growth.

The conflicting positions, however, are not necessarily irreconcilable. In the CMA's *Pfizer/Flynn* decision, the drug at issue, phenytoin sodium, was first synthesised in 1908 and has not changed since then. Flynn acquired the distribution rights in 2012, at the time phenytoin sodium was debranded (and, therefore, no longer subject to price regulation). Around 48,000 patients in the UK still take the capsules, and these patients cannot be changed to a new manufacturer's product without risking therapeutic failure and toxic side effects. The CMA considered that the 2,600 per cent price increase at the time of debranding was excessive compared to the costs incurred and a reasonable rate of return. In these circumstances, it is quite difficult to see on its face how the decision risks restricting innovation or investment in the way that worried Justice Scalia in *Trinko*. The CMA's reasoning is that the fact epilepsy patients are locked in to one manufacturer's drug permitted the excessive price hike; the price had nothing to do with risk taking, investment, or innovation because there had not been any in very many years.

This is presumably what Advocate General Wahl had in mind when, in his recent opinion in the Latvian collecting society case, he advised that an excessive price cannot exist in a free and competitive market. Concerns only arise if there are legal barriers to entry or expansion and there is a legal monopoly (which, in effect, existed in the CMA case because official guidance prohibited switching patients to a different manufacturer's drug).

Indeed, the excessive-pricing cases are rare examples of enforcement against exploitative abuses – where a firm uses its market power or privileged position to extract rents from consumers directly, thereby reducing consumer welfare. As Advocate General Wahl recently advised, the prices are abusive because 'being excessively high, they exploit customers'. That requires there to be an excess (a 'significant difference') between the price actually charged and the competitive price, and for there to be no valid justification for the difference. In our view, referring to a more amorphous 'unfairness' standard makes this already difficult task only more tricky.

The second development concerning fairness is the continued focus on the licensing of standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. In 2015, China's NDRC fined Qualcomm $975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission (KFTC) followed suit, fining Qualcomm $854 million. In essence, Qualcomm engaged in a variety of interrelated behaviours that together excluded rivals from the market and allowed Qualcomm to impose unfair terms and conditions: a refusal to license SEPs to rival modem chipset makers, thus requiring device makers who buy and use these chipsets to take a licence directly from Qualcomm. Qualcomm then imposed unfair terms on device makers, including a royalty-free cross-licence that provided it with a unique advantage over rival chipset makers (Qualcomm was the only chipset maker that could offer its customers the full package of SEPs and non-SEPs, including patents from all other device makers). If device makers objected to the demand to cross-license their patents for free, Qualcomm refused to supply chipsets. 'No license, no chips', as the US Federal Trade Commission put it in a parallel claim against Qualcomm.

The Taiwan Fair Trade Commission is investigating similar conduct. Likewise, in January 2017, in conjunction with Apple initiating litigation against Qualcomm, the US FTC sued Qualcomm for its SEP licensing practices. Finally, the European Commission is poised to adopt decisions against Qualcomm for selective predatory pricing and loyalty rebates. This series of investigations and cases on three continents is worth watching closely.

In a related development, a UK court has ruled, for the first time, on what constitutes a FRAND rate. Mr Justice Birss held that that there is only one FRAND rate, and this should be determined (as a first step) by looking at a wide range of comparable licences.[1] In terms of the interaction with competition law, the judge found that there is no correlation with what is a contractual FRAND offer and what is anticompetitive. For a price to be excessive under Article 102 TFEU, it has to be 'substantially more than FRAND' (i.e., the price can be 'unfair' and in breach of the contractual FRAND promise, but still not 'unfair' according to competition law). Conversely, the judge found that a price can be discriminatory and in breach of the contractual FRAND promise only if it also violates competition law – a discrepancy that remains puzzling and may be explored on appeal.

The underlying purpose of the FRAND undertaking is to secure a fair and reasonable reward for innovation while avoiding a hold-up and holdout. Competition law can intervene to prohibit the conduct of SEP owners if they use their market power gleaned through the standard to restrict competition (e.g., through premature litigation). The touchstone for

1 The judge held that the FRAND terms are the terms that a truly willing licensor and truly willing licensee would agree upon in the relevant negotiation in the relevant circumstances absent irrelevant factors, such as hold-up and holdout.

the assessment is whether the conduct deviates from competition on the merits and harms the competitive process. The difference in what is 'fair' in the contractual FRAND promise and in competition law contexts (identified by Mr Justice Birss) confirms the inherent ambiguity underlying 'fairness' as a concept. The concepts developed in SEP cases could also appropriately be applied in other cases where IP owners violate legitimate expectations and use hold-up techniques to extract unreasonable royalties.

The third development concerns the debate, discussed in previous editorials, of the circumstances in which a full effects analysis is necessary to prove an abuse of dominance. Advocate General Wahl's Opinion in *Intel*, discussed in the EU chapter of this book, affirms the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities. Outside the narrow exceptions of 'by nature abuses', a 'fully-fledged effects analysis must be performed'. This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects'. (In *Unwired Planet,* Mr Justice Birss similarly recently held that outside 'by nature' abuses, 'a close analysis of the actual effects would be required'.)

The move to a more rigorous effects analysis is mirrored in other jurisdictions. In Australia, proposed new legislation will introduce an effects standard for assessing unilateral conduct. The Competition Commission of India in *XYZ v. REC Power Distribution Company Ltd* confirmed that establishing a denial of access abuse in India requires proving 'anti-competitive effect/distortion in the market in which denial has taken place'. This reinforces older statements from the Indian Competition Appellate Tribunal in *Schott Glass* that, unless the conduct at issue harms competition and, ultimately, consumers, there can be no abuse. And in the KFTC's *Qualcomm* decision, the exclusionary effects caused by Qualcomm's conduct were an important part of the case, with the KFTC insisting on such proof as a precondition to finding an infringement.

In these instances, the courts' and authorities' enforcement is not guided solely by seeking to achieve a 'fair' outcome. Rather, the cases examine the factual, legal and economic circumstances to assess whether there is a deviation from competition on the merits and harm to the competitive process. Those are the circumstances in which an abuse of dominance can properly be established.

The fourth development on 'fairness' relates to the continued international focus on due process. Here, the picture is mixed. In relation to competition law in Korea, for example, Gregory Sidak wrote a colourful open letter to President Trump criticising the KFTC's decision in the *Qualcomm* case as being based on an 'autocratic brand of due process.' But a review of the KFTC's process in that case shows that it complied with and perhaps even surpassed many international norms on due process: for example, Qualcomm received access to the authority's file, had the opportunity to rebut the KFTC's preliminary concerns, appeared at multiple hearings and could cross-examine witnesses. The investigative team was completely separate from the decision-makers (the Commissioners), and the latter all read the entire file and attended all hearings. Qualcomm can also appeal the decision to an active and discerning judiciary – which has several times in the past overturned KFTC decisions. This is a contrast with the European Commission, where the case team is directly involved in both investigation and decision-making, and the Commissioner for Competition (let alone the College of Commissioners that decides the cases) does not read the file and does not attend the hearing. As explained in previous prefaces, this situation creates a serious risk of confirmation bias and, thus, undermining due process.

In contrast to Korea, there are troubling developments in India, where the government has passed legislation to dissolve the specialist Competition Appellate Tribunal (COMPAT), and replace it with a more general tribunal focused on company law. Worryingly, the legislation follows a number of high-profile instances of the COMPAT overturning decisions made by the Competition Commission of India (CCI) on due process grounds (e.g., *Hiranandani* and *GSK*). Even more worryingly, the legislation permits the government to remove tribunal members at any time by paying them three month's salary. These developments undermine one of the most basic principles of 'due process' in competition enforcement – that a full appeal on facts and law to an independent judiciary must always be available.

In conclusion, in our view it is unhelpful to discuss 'fairness' as the yardstick of competition law enforcement. Fairness is too subjective and vague a criterion for authorities to decide cases, or for firms to determine their commercial conduct. Experiments conducted by Kahnemann, Knetsch and Taylor show that humans have irrational conceptions of what constitutes a fair price.[2] For example, consumers perceive changes in price as unfair even if they are rational, reasonable and good for consumers in the long run. And consumers were almost unanimous in concluding that any increase in price because of a decrease in competition – for example, because of a store temporarily closing – was unfair. Importing these irrational biases into competition policy creates serious risks or arbitrary and inefficient results.

Instead, we should stick to the more objective and precise concepts of consumer welfare, competition on the merits, proportionality and due process. These concepts, which capture the same goals as 'fairness', are less ambiguous, relatively well defined in case law and less susceptible to lead to outcome-focused – instead of fact-driven – results.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fifth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions – or even revolutions – 2017 holds for the next edition of this book.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2017

2 Kahnemann, Knetsch, and Taylor, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *American Economic Review*, Vol. 76, No. 4 (September 1986), pp. 728–741.

Chapter 23

TURKEY

Gönenç Gürkaynak[1]

I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings individually or through joint venture 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'.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited, but only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions as well as the other provisions of Law No. 4054 apply to all companies and individuals, to the extent that they act as an 'undertaking' within the meaning of Law No. 4054. An 'undertaking' is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike, if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.[2]

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority (the Competition Authority) is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions)

1 Gönenç Gürkaynak is the managing partner at ELIG, Attorneys-at-Law.

2 See, for example, *General Directorate of State Airports Authority*,15-36/559-182, 9 September 2015; *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004; *Türk Telekom*, 14-35/697-309, 24 September 2014.

are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather 'a restriction of effective competition' element is required to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, recently the Turkish Competition Board (the Competition Board) rejected the acquisition of sole control over Beta Turizm and Pendik Turizm by Setur as it concluded that the transaction would result in the creation of a dominant position and thus, would impede effective competition.[3]

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.[4]

II YEAR IN REVIEW

According to the Competition Authority's 2016 statistics, the Competition Board decided on 41 pre-investigations or investigations out of a total of 83, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which 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 of thereof. Further, 29 finalised investigations have been carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits 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. The Competition Board also decided on the remaining 13 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to assert that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.[5]

Over the past five years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. As a reflection of this trend, the Competition Board has also shown an increased interest in the unilateral pricing behaviour of undertakings, as exemplified by recent high-profile predatory pricing investigations involving Turkish Airlines,[6] where there was ultimately no finding of an abuse of a dominant position, and the shipping company UN Ro-Ro,[7] where UN Ro-Ro was fined 4 per cent of its 2011 turnover, which amounted to 841,199.70 lira. In *Turkcell*,[8]

3 15-29/421-118, 9 July 2015

4 See, for example, *Biryay*, 00-26/292-162, 17 July 2000.

5 In 2015, the Competition Board decided on a total of 89 pre-investigations or investigations. Among these pre-investigations or investigations, 41 were concerning violations of Article 4 of Law No. 4054, 29 were concerning violations of Article 6 of Law No. 4054 and 19 cases were evaluated from the aspect of both Article 4 and Article 6.

6 *Turkish Airlines*, 11-65/1692-599, 30 December 2011.

7 *UN Ro-Ro*, 12-47/1412-474, 1 October 2012.

8 *Turkcell*, 13-71/988-414, 9 December 2013.

the Competition Board analysed the market foreclosure allegations against Turkcell, Turkey's dominant GSM operator. It concluded that Turkcell had violated the law by preventing its competitors' activities through exclusive practices for vehicle-tracking services, imposing a monetary fine of 39 million lira. Tüpraş[9] was fined more than 412 million lira for the abuse of its dominant position through excessive pricing; the Competition Authority had launched the investigation in 2012. Similarly Mey İçki[10] was fined more than 155 million lira for abusing its dominance position by way of aggravating its competitors activities. In *Türk Telekom*,[11] the undertaking was fined approximately 33 million lira for abusing its dominance through delaying, aggravating and obstructing facility-sharing request applications made by third parties.

The following table shows the Competition Board's most recent landmark decisions regarding abuse of dominance:

Investigated party	Date and number of the Competition Board decision	Summary of the case	Administrative monetary fine
Yemek Sepeti	No. 16-20/347-156, 9 June 2016	A noteworthy case regarding the abuse of dominant position was concerned with MFC (most favoured customer) practices of Yemek Sepeti, an online food ordering platform. Accordingly, the Competition Board reviewed Yemek Sepeti's MFC clauses that were being applied to the restaurants in its system. The Competition Board decided that Yemek Sepeti was in a dominant position since it was the first entrant of the market and it was protecting its market power with high entry barriers. The Competition Board took into consideration different antitrust authorities' approaches in other jurisdictions (e.g., the USA, EU, UK and Germany) and stated that MFC clauses could be interpreted as an anticompetitive behaviour. The two-sided market structure and network effects were also taken into account by the Competition Board when assessing effects of MFC practices. The Competition Board decided that all Yemek Sepeti's MFC practices, which are preventing competitor platforms from offering better/different sale conditions, were abusive and imposed administrative fine of approximately 428,000 lira to the undertaking. The Board also ordered that Yemek Sepeti should change its existing agreements in accordance with the decision.	Approximately 428,000 lira
Türk Telekom	No. 16-20/326-146, 9 June 2016	The incumbent operator of Turkey (i.e. Türk Telekom) was subject to the Board's investigation owing to allegations of its practices concerning facility-sharing requests made by competitor. Widespread infrastructure of Türk Telekom and regulatory conditions were the main criteria behind the Competition Board's reasoning on establishing that Türk Telekom is in the dominant position in the relevant market. The characteristic of the market makes accessing to infrastructure indispensable for the alternative operators since the regulations envisage an application for facility sharing for the undertakings. In this regard, the Competition Board considered eight of the alleged practices as refusal to supply conduct that generally resulted to delayed or overpriced facility-sharing activities. Against this background, the Competition Board decided that Türk Telekom abused its dominant position (Article 6 of Law No. 4054) through refusal to supply and imposed approximately 34 million lira fine on the undertaking at 0.45 per cent of its 2015 turnover. This decision re-emphasised the Board's stance on the abusive refusal to supply conduct.	Approximately 34 million lira

9 *Tüpraş*, 14-03/60-24, 17 January 2014.

10 *Mey İçki* 17-07/84-34, 16 February 2017.

11 *Türk Telekom*, 16-20/326-146, 9 June 2016.

Investigated party	Date and number of the Competition Board decision	Summary of the case	Administrative monetary fine
Tüpraş	No. 16-10/159-70, 16 March 2016	Upon the complaint of a distributors' association, the Board launched a preliminary investigation against TÜPRAŞ, scrutinising its rebate system. The Board defined the relevant product market as the 'fuel wholesale market' and, without conducting an analysis on dominance, it concluded that TÜPRAŞ is in a dominant position within the relevant market based on the previous Board decisions. The Board's foregoing TÜPRAŞ decision sets out significant parameters and considerations for the application of turnover premium rebate systems by undertakings in a dominant position. Indeed, pursuant to the Board's assessment, the turnover premium systems that are not personalised but standard targeted, transparent, granted to all customers under equal terms and objective amounts and where economies of scale are taken into consideration along with the balance of non-discrimination among the undertakings active in the relevant market, are considered to be in line with Law No. 4054. Consequently, the Board concluded that Solgar did not violate Law No. 4054, and, thus, it did not impose any administrative monetary fine on TÜPRAŞ.	N/A

Ongoing high-profile investigations of the Competition Authority, at the time of writing, are provided in the table below:

Investigated party	Alleged abuse of dominance activity	Date of initiation
Mercedes-Benz Türk AŞ	Restricting competition through agreements and rebate system	24 March 2017
Google Inc, Google International LLC and Google Reklamcılık ve Pazarlama Ltd Şti	Restricting competition through practices related to offering mobile operating systems and mobile applications and services	6 March 2017
The economic entity consisting of Türk Telekomünikasyon AŞ and TTNET AŞ	Restricting competition through packages including fixed broadband internet and pay TV services	13 February 2017
Zeyport Zeytinburnu Liman İşletmeleri Sanayi ve Ticaret AŞ and S.S. Gemi Tali Acenteleri Deniz Motorlu Taşıyıcıları Cooperative	Restricting competition through its port service practices	18 April 2017
Enerjisa Enerji AŞ, Toroslar Elektrik Dağıtım AŞ, Enerjisa Toroslar Elektrik Perakende Satış AŞ, Başkent Elektrik Dağıtım AŞ, Enerjisa Başkent Elektrik Perakende Satış AŞ, İstanbul Anadolu Yakası Elektrik Dağıtım AŞ and Enerjisa İstanbul Anadolu Yakası Elektrik Perakende Satış AŞ	Restricting competition through aggravating independent suppliers' activities and preventing the consumers from choosing their own supplier	27 January 2017
Turkish Pharmaceuticals Association and Seven Pharmaceuticals Association	Restricting competition through distributing prescriptions exclusively and within the specified sequence-limit among the pharmacies	21 April 2016

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, which states that 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers'. Enforcement trends show that the Competition Board is inclined to broaden

the scope of application of the Article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.[12]

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. For establishing a dominant position, first, the relevant market has to be defined and secondly, the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of market definition. Thus, the undertakings concerned have to be in a dominant position in relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary step for evaluating its position in the market. In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered as dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm. Thus, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or of other quantitative elements; other market conditions as well as the overall structure of the relevant market should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[13]

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, the indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm. Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) has been reviewed under Article 4 (restrictive agreement

12 See, for example, *Anadolu Cam*, 04-76/1086-271, 1 December 2004; and *Warner Bros*, 07-19/192-63, 8 March 2007.

13 See, for example, *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

rules). The *3M Turkey*, *Turkcell* and *Solgar* decisions are the latest examples of this same trend. In *3M Turkey*,[14] the Competition Board analysed whether 3M Turkey, which was not found to be in a dominant position in the work safety products market, discriminated against some of its dealers under Article 4 and not under Article 6. 3M Turkey was cleared without a fine. In *Turkcell*,[15] the Competition Board assessed whether Turkcell's exclusive contracts foreclosed the market, based on both Article 6 and Article 4, eventually finding that Turkcell did not violate either Article 6 or Article 4. Likewise, in *Solgar*,[16] the Competition Board decided on a fully fledged investigation against Solgar, which looked into whether Solgar had violated Article 4 or Article 6 of Law No. 4054 by refusing to supply. The Competition Board concluded that Solgar did not violate Law No. 4054 and, thus, it did not impose any administrative monetary fine on Solgar. In *Efes*,[17] the Competition Board assessed the allegations asserted towards Efes under Articles 4 and 6 of Law No. 4054 and decided that preventing the competitor undertaking from placing refrigerated cabinets at certain sales points does not obstruct the sales of the relevant competotors' products at the sales points in question and, therefore, does not give rise to *de facto* exclusivity. In light of the foregoing, the Competition Board ultimately did not initiate a full-fledged investigation.

IV ABUSE

i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes 'abuse' *per se*, it provides five examples of prohibited abusive behaviour, which comes as a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. Accordingly, these examples include the following:

a directly or indirectly preventing entry into the market or hindering competitor activity in the market;

b directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

c making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;

d distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and

e limiting production, markets or technical development to the prejudice of consumers.

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred

14 *3M*, 14-22/461-203, 25 June 2014.

15 *Turkcell*, 14-28/585-253, 13 August 2014.

16 *Solgar*, 16-05/116-51, 18 February 2016.

17 *Efes*, 16-36/613-274, 3 November 2016.

abuse from the same set of circumstantial evidence that was employed in demonstrating the existence of dominance. Furthermore, abusive conduct on a market that is different from the market subject to dominant position is also prohibited under Article 6.[18] On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as strategic capacity construction, predatory product design or product innovation, failure to pre-disclose new technology, predatory advertising or excessive product differentiation.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.[19] That said, complaints on this basis are frequently dismissed by the Competition Authority due to its welcome reluctance to micro-manage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.[20]

Furthermore, in line with the EU jurisprudence, price squeezes may amount to a form of abuse in Turkey and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.[21]

Exclusive dealing

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.[22]

On a separate note, the Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. The Competition Board, in *Turkcell*,[23] condemned the defendant for abusing its dominance by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo and

18 See, for example, *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom*, 02-60/755-305, 2 October 2002; and *Turkcell*, 01-35/347-95, 20 July 2001.

19 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Coca-Cola*, 04-07/75-18, 23 January 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Trakya Cam*, 11-57/1477-533, 17 November 2011; *Turkey Maritime Lines,* 06-74/959-278, 12 October 2006; and *Feniks*, 07-67/815-310, 23 August 2007.

20 *UN Ro-Ro*, 12-47/1412-474, 1 October 2012.

21 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Doğan Dağıtım*, 07–78/962–364, 9 October 2007; *Türk Telekom*, 04-66/956-232, 19 October 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

22 See, for example, *Mey İçki*, 14-21/410-178, 12 June 2014.

23 *Turkcell*, 09-60/1490-37, 23 December 2009.

refusing to offer rebates to buyers that work with its competitors. The Competition Board has condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.[24]

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board assessed many tying, bundling and leveraging allegations against dominant undertakings and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to have them avoid tying and leveraging.[25]

Refusal to deal

Refusals to deal and access to essential facilities are the forms of abuses that are brought before the Competition Authority frequently. Therefore, there are various decisions by the Competition Board concerning this matter.[26]

iii Discrimination

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.[27]

iv Exploitative abuses

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Board has condemned excessive or exploitative pricing by dominant firms.[28] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micromanage pricing behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date

24 *Doğan Holding*, 11-18/341-103, 30 March 2011.

25 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009, *Türk Telekomünikasyon AŞ* 16-20/326-146, 9 June 2016.

26 See, for example, *POAS*, 01-56/554-130, 20 November 2001; *Eti Holding*, 00-50/533-295, 21 December 2000; *AK-Kim*, 03-76/925-389, 12 April 2003; and *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; Congresium Ato 16-35/604-269, 27 October 2016.

27 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002; and *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; and *MEDAŞ* 16-07/134-60, 2 March 2016.

28 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002; *Belko*, 01-17/150-39, 6 April 2001; and *Soda* 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full-fledged investigation).

of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of the undertaking. After the amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments, etc., in determining the magnitude of the monetary fine.

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

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,[29] where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the relevant undertaking's annual turnover for the relevant year).

In addition to monetary sanctions, the Competition Board is authorised to take all necessary measures to terminate infringements, 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.

ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damages.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to follow a certain method of conduct such as granting access, supplying goods or services or concluding a contract). Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead to an investigation, which may or may not result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious.

29 *Tüpraş*, 14-03/60-24, 17 January 2014.

At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition 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 Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition 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. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition 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 Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2017 is 18,377 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.[30]

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

30 *Türk Telekom*, 16-15/255-110, 3 May 2016.

specific topics; and conduct on-site investigations with regard to any asset of an undertaking. Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records are fully examined by the experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2017 is 18,377 lira. It may also lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted to judicial review before the Administrative Courts by filing a lawsuit within 60 days of the receipt by the concerned parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stay the execution of the Competition Board's decision (Article 27, Administrative Procedural Law).

After the recent legislative changes, administrative litigation cases (private litigation cases as well) are now subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will (1) go through the case file both on procedural and substantive grounds and (2) investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, the decision of the regional court will not be considered as a final decision and the Council of State may decide to uphold or reverse the regional court's decision. If the decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision which takes into account the Council of State's decision. As the regional courts are newly established, it has not been experienced yet 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) within the new system should also be tested before providing an estimate time period.

Third parties can also challenge the Competition Board's decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their 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 legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

VIII FUTURE DEVELOPMENTS

In 2013, the Competition Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation; in particular, to provide efficiency in time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete as a result of the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. It is further indicated that the Authority may take steps toward the amendment of certain articles if a new competition law is not passed by the parliament.

The Competition Authority also showed increasing willingness at the beginning of 2015 to develop its relations with other governmental agencies in Turkey, signing a cooperation protocol with the Energy Market Regulatory Authority and enlarging the scope of its cooperation protocol with the Information and Communication Technologies Authority.

The recent enforcement trend of the Competition Authority showed that the Authority is becoming more and more interested in the refusals to supply/contract of dominant undertakings. There have been several pre-investigations and investigations launched by the Competition Authority in relation to this aspect of the competition law principles in Turkey over the past year. These instances include the Competition Board's *Ankara Uluslararası Kongre ve Fuar İşletmeciliği*[31] and *Türk Telekomünikasyon*[32] decisions. Other high-profile cases involving abuse of dominance allegations in the past year are *Yemeksepeti*[33] and *Türk Eczacıları Birliği*.[34] In *Yemeksepeti* (an online meal order platform), the Board concluded that the use of most favoured customer clauses violated Article 6 of the Law No. 4054 since these

31 *Ankara Uluslararası Kongre ve Fuar İşletmeciliği,* 16-35/604-269, 27 October 2016.

32 *Türk Telekomünikasyon* 16-20/326-146, 9 June 2016.

33 *Yemeksepeti* 16-20/347-156, 9 June 2016.

34 *Türk Eczacıları Birliği* 16-42/699-313, 9 December 2016.

clauses gave rise to exclusionary effects in the relevant market. In *Türk Eczacıları Birliği*, the Board decided that the agreements executed with the pharmaceutical suppliers that contain exclusivity clauses violated Article 6 of Law No. 4054.

Appendix 1

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Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 70 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law, counselling on issues with more than 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court and over 50 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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