Turkey

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Country Focus: The Legal Landscape
Merger Control
Cartel Regulation
Dominance
Pharmaceutical Antitrust

2017

GETTING THE DEAL THROUGH

GCR 100
GLOBAL COMPETITION REVIEW
2017

TURKEY

Turkey's compact antitrust bar boasts highly trained attorneys who deal with a competition authority that is flexing its muscle in cartel and merger enforcement.

ELITE

ELIG ATTORNEYS AT LAW remains the go-to option for competition advice in Turkey. Gönenç Gürkaynak leads an impressive team of 36 competition law specialists. He is joined by three partners: Korhan Yıldırım, Hakan Özgökçen and Öznur İnanılır, who was promoted in January 2016. In April 2016, the team also saw the addition of Ekrem Kalkan from the Turkish Competition Authority, where he served for 18 years and held various senior positions, including chief economist. Elig is the only Turkish firm with a full-time, in-house competition economist.

Unsurprisingly, Elig was involved in some major global mergers – including advising Dow and DuPont in a Turkish merger notification. The team also acted on behalf of Anheuser-Busch InBev during its merger with SABMiller, for which the Turkish Competition Authority launched a Phase II review. The Turkish enforcer unconditionally cleared the deal in June 2016.

On the behavioural front, Elig successfully helped flash memory company SanDisk avoid an investigation after the company retained the firm during a preliminary investigation by the Turkish Competition Authority. Elig also successfully represented Solgar Vitamin ve Sağlık Ürünleri, a nutritional supplement company, in an investigation before the Turkish antitrust authority; the company received no fines.

Firm	Head(s) of competition	Size	Who's Who Legal nominees	Clients
Elite				
ELIG Attorneys at Law	Gönenç Gürkaynak	36 attorneys	Gönenç Gürkaynak	AB InBev, Gilead Sciences, Mercedes-Benz, Pfizer, GE, ExxonMobil, 3M, Turkish Airlines, Booking.com, Warner Bros, Philips, Alcon, Votorantim Cimentos, Finansbank

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The Legal Landscape

Gönenç Gürkaynak, Nazlı Nil Yukaruç and Ceren Yıldız

ELIG, Attorneys-at-Law

Country overview

1 Give an overview of the country's economy, its structure and main characteristics, and prevailing government economic policy, particularly as regards foreign investment.

A natural gateway connecting Europe and Asia, Turkey is geographically proximate to Europe, the Middle East, North Africa, Russia and the Turkic states. The workforce is also accessible to foreign investors because of the relative weakness of the Turkish lira against the euro and US dollar.

There were two elections during 2015 and 2016, followed by a failed coup and a post-coup purge of state officials, along with a constitutional referendum in 2017. Despite the turbulence and the state of emergency declared following the coup attempt, Turkey is still stable, especially in comparison with its neighbours.

The main driving force behind the Turkish economy is urban construction and infrastructure projects. Looking at the overall size of the economy, it can be said that Turkish industry has much room for improvement to add value to the economy.

Turkey has a liberal foreign investment policy and aims at equal treatment of foreign and local investors.

Legal overview

2 Describe the legal framework and legal culture in your jurisdiction as regards business and commerce.

Turkey has adopted the national law system, consisting of public and private law. The Turkish legal system has adopted the principles of supremacy of law and separation of powers.

The Turkish legal system has been modelled on various European law systems such as French, German, Swiss, Italian and Austrian law. There have also been significant legal developments to facilitate foreign investments.

Commercial practices are supervised by government authorities, which may impose monetary and administrative penalties on companies. Each year a significant number of companies face sanctions for commercial malpractice. To this end, it would be fair to conclude that the Turkish commercial space is well governed and supervised by the government in line with related legislation, with a culture of litigation.

3 What are the main sources of civil and administrative law applicable to companies?

The main sources of civil law are the Turkish Commercial Code, Turkish Code of Obligations, Turkish Civil Code, Intellectual Property Rights Law, Industrial Property Law and International Private and Civil Procedure Law, while the Turkish Constitution, Turkish Criminal Law, Tax Law, Labour Law, Enforcement and Bankruptcy Law and Administrative Jurisdiction Procedures Law are the main sources of administrative law.

Dispute resolution

4 How does the court system operate with regards to large commercial disputes?

The procedural rules do not make any distinctions based on the size of commercial disputes. One difference in that regard would be in the examination of commercial records, considering that large commercial disputes usually involve large companies or long-lasting commercial relationships, rendering the examination of records more complex.

5 What legal recourse do consumers typically have against businesses?

Consumers can resort to the Arbitration Committee for Consumer Problems for certain claims, and this is a swift remedy for consumers, as the process takes about six months, which is quite fast given that court proceedings usually take about two years. Class actions are always a concern for businesses as they may provoke media coverage and ultimately place a significant financial burden on the business. There is no plaintiffs' bar in Turkey, but one can petition the bar association to be assigned an attorney.

6 How significant is arbitration as a method of dispute resolution?

Use of arbitration has increased significantly in international business transactions owing to globalisation and transnational disputes, especially with the establishment of the Istanbul Arbitration Centre. Courts are, however, still seen as the first option.

7 What other methods of dispute resolution are commonly used?

Mediation, which is a fairly new concept in the Turkish legal system, is another dispute mechanism used in Turkey.

8 How easy is it to have foreign court judgments and foreign arbitral awards recognised and enforced in your jurisdiction?

The Law on International Private and Civil Procedure stipulates the recognition and enforcement of foreign arbitral awards in Turkey. For an arbitral award obtained in a foreign country to gain effect in Turkey, the award must be recognised and approved by Turkish courts. The recognition lawsuit or the enforcement lawsuit may take approximately two years.

Foreign investment and trade

9 Outline any relevant treaty organisations, economic or monetary unions, or free trade agreements.

Turkey is a party to many treaties, including accession treaties for membership of the Organisation for Security and Co-operation in Europe (OSCE), NATO and the United Nations (www.mfa.gov.tr/sub.en.mfa?7cafe2ef-78bd-4d88-b326-3916451364f3).

Turkey maintains close cooperation with the monitoring bodies of the Council of Europe and is party to almost half of the Council of Europe's Conventions and Protocols.

Turkey entered into the Ankara Agreement with the European Economic Community in 1963, which was then extended by the Customs Union Decision in 1996. Turkey signed the Free Trade Agreement with the European Coal and Steel Community in 1999.

Turkey also has free trade agreements with several countries.

10 Are foreign exchange or currency controls in place?

The main regulation relating to exchange controls is the Council of Ministers' Decision on the Protection of the Value of Turkish Currency. Pursuant to the decision, considerations regarding net profits, dividends, proceeds, liquidation and indemnification, royalty, any of which arises from the activities and operations of foreign investors in Turkey, can be transferred abroad through banks without any restrictions.

The following rules are significant in this regard:

- Foreign currency can be imported and exported without any restrictions.
- Residents in Turkey may freely possess and purchase foreign currency, hold foreign currency with banks and dispose of foreign currency in and out of Turkey through banks.
- Residents in Turkey can accept payment in foreign currency from non-residents, for transactions to be conducted in Turkey in favour of such non-residents.
- Non-residents can purchase foreign currency.
- Residents in Turkey and non-residents may freely transfer foreign currency abroad through banks.
- The transfer of an amount exceeding €10,000 should be carried out in compliance with the rules set out by the relevant ministry.

11 Are there restrictions on foreign investment?

As a rule, there are no restrictions on foreign investment, and Turkey considers foreign and local investors equal.

As an exception to this rule, the rights of foreign natural persons and foreign legal persons with respect to acquisition of real property in Turkey could be restricted by a decision of the Council of Ministers.

Foreign natural or legal persons acquiring real property without any buildings should submit the project they will develop on the acquired real property to the approval of the relevant ministry. The relevant ministry will send the project to the land registry to be entered as a note in the land registry.

Foreign natural persons, foreign legal persons duly established under foreign laws and international organisations may hold real property subject to legal restrictions. Companies with foreign capital where foreign investors hold 50 per cent or more of the shares or may appoint or dismiss the majority of the persons who have the right to govern may acquire and use real property and restricted real rights in Turkey to carry out the activities contained in their articles of association.

12 Are there grants, incentives or tax reliefs for foreign investors or businesses?

Upon receipt of the necessary certification, incentives could include:

- customs duty exemption;
- exception for and refund of the value added tax (VAT);
- interest support on financing;
- contribution to the social security employer premium;
- support related to income withholding tax;
- reduction in corporate tax; and
- allocation of land.

13 What are the main taxes that apply to cross-border or foreign-owned business and investors?

There are two main income taxes: individual income and corporate income.

Natural persons' income is subject to an individual income tax rate that varies from 15 to 35 per cent.

Companies, cooperatives, public economic enterprises, economic enterprises owned by associations, foundations and joint ventures are subject to corporate income tax, which is levied on business profits as 20 per cent.

The generally applied tax on expenditures is VAT, which is generally applied at 1, 8 and 18 per cent.

Banking and insurance company transactions remain exempt from VAT, but are subject to a banking and insurance transaction tax, whose rate varies from 1 to 5 per cent.

No tax is levied on sales from foreign exchange transactions.

Stamp duty applies to a wide range of documents. It is levied as a percentage of the value of the document at rates ranging from 0.189 to 0.948 per cent or is set as a fixed amount for some documents.

Regulation

14 Which industry sectors are regulated or controlled by the government?

The main regulated sectors are banking or payment systems, tourism, agriculture, nourishment, medical or health, energy, transportation and retail.

15 Who are the key industry regulators, and what are their powers?

- The Ministry of Economy determines the main policies and targets concerning foreign trade in goods and services.
- The Ministry of Energy and Natural Resources regulates usage and consumption of natural resources.
- The Ministry of Food, Agriculture and Livestock regulates agricultural and husbandry practices.
- The Ministry of Customs and Trade generates, enforces and supervises the policies and practices promoting competition, entrepreneurship and economic growth in the realms of customs and trade.
- The Ministry of Finance carries out implementation, monitoring and auditing of fiscal policy.
- The Ministry of Health plans, coordinates and cooperates with all relevant internal and external stakeholders to provide human-oriented sustainable healthcare services.
- The Ministry of Science, Industry and Technology develops and implements policies, strategies, plans and programmes on science, industry and technology.
- The Ministry of Transport, Maritime Affairs and Communications provides and monitors transport, information and communications services for all users.

16 What are the other main enforcement authorities relevant to businesses?

These include the Revenue Administration, Competition Authority, Banking Regulation and Supervision Agency, High Council of Radio and Television, Capital Markets Board, Information and Communication Technologies Authority, Energy Market Regulatory Authority, Tobacco and Alcohol Market Regulatory Authority, and the Public Procurement Authority.

17 On which areas have regulators particularly focused their recent enforcement activities?

The regulators have focused on the enactment and implementation of the secondary legislation on Law on Protection of Personal Data (the DP Law) and implementation of the new Industrial Property Law which came into effect on 10 January 2017.

Compliance

18 What are the principal bribery, corruption and money laundering concerns for businesses?

The Turkish Criminal Code prohibits the direct and indirect bribery and bribery of foreign officials, in addition to private commercial bribery for publicly traded joint-stock companies. It also contains provisions on laundering of proceeds of crime and leniency for real persons for certain corruption crimes including bribery and laundering of proceeds of crime. Corporations can be held liable through administrative fines and other measures.

19 What are the main data protection and privacy risks for businesses?

The DP Law sets forth the conditions for the processing of personal data, which are, principally, obtaining the data subject's explicit consent and being authorised by law. It states that where the interests of Turkey or the data subject will be seriously undermined, personal data may be transferred abroad with authorisation from the board. There is no guidance regarding how personal data will be transferred between group companies or the process that foreign companies will need to follow to prove that they provide an adequate level of protection of personal data. Also, the Personal Data Protection Board, in its official website, published the 'Draft Regulation on the Data Controllers' Registry' (Draft Regulation) for public opinion for a certain period. The Draft Law requires non-resident data controllers to register to the Data

Controllers' Registry via a local representative, which was not regulated as an obligation under the DP Law, without defining any conditions or criteria which give rise to the obligation. In fact, the DP Law implies that assignment of a representative is optional. The Personal Data Protection Board, after gathering public opinion, continues working on the Draft Regulation. The Draft Regulation is not in force yet and it may be subject to changes. Implementation of the DP Law will be clearer once there are established Personal Data Protection Board decisions and/or guides on the matter and the relevant secondary legislation has been enacted.

20 What are the main anti-fraud and financial statements duties?

Companies shall prepare an income statement and financial statements that explain the relation of assets and liabilities in the beginning of the commercial activities and at the end of every operating period. The balance sheet and the income statement shall constitute the year-end financial statements.

Year-end financial statements shall be prepared in compliance with the Turkish accounting standards, be clear, and be prepared within such time as required by a regular course of enterprise operations.

Year-end financial statements shall be prepared in the Turkish language and in Turkish lira.

The board of directors of a joint stock company (that is controlled by another company) should prepare a dependency report, which explains the transactions conducted with its controlling company and other group companies, for each ordinary meeting of the general assembly. Within this report the controlled company should explain any loss it has incurred owing to transactions with, or under the instructions of, the controlling company.

21 What are the main competition rules companies must comply with?

The Turkish competition law regime deals with the following main concepts: (i) restrictive agreements, concerted practices and decisions, (ii) abuses of dominance, and (iii) merger control.

The regime prohibits:

- agreements between undertakings, decisions by trade associations and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition;
- abuses by one or more undertakings, individually or through joint agreements or practices, of dominance in a market for goods or services within the whole or part of the country; or
- concentrations that create or strengthen a dominant position, thereby significantly lessen competition in a relevant market in Turkey. The competition regime authorises the Competition Board to regulate which mergers and acquisitions should be notified to gain validity.

22 Outline the corporate governance regime.

The corporate governance regime is set forth in the Turkish Commercial Code (TCC) and its secondary legislation. Companies may tailor their own governance rules as permitted by non-mandatory provisions of the TCC.

Companies whose shares are traded on the stock exchange must comply with the corporate governance principles that relate to shareholder relations, public disclosure and transparency, stakeholders and boards of directors.

23 Can business entities incur criminal liability? What are the sanctions for businesses, related companies and their directors and officers for wrongdoing and compliance breaches?

According to the Criminal Code, entities cannot be held criminally liable. However, the following measures can be imposed on entities if the entity obtains an unjust benefit within the scope of the crimes explicitly mentioned in the Criminal Code: (i) invalidation of the licence granted by a public authority; (ii) seizure of the goods used in the commission of, or resulting from, a crime by the representatives of a legal entity; and (iii) seizure of pecuniary benefits arising from or provided for the commission of a crime. Administrative fines can be imposed on companies whose bodies or representatives commit the crimes listed in the Law on Misdemeanours (such as bribery, fraud, bid-rigging or money laundering).

In addition to the criminal sanctions that may be imposed upon the perpetrators (such as directors, managers, employees) of the crime committed, founders, members of the board of directors, managers and liquidators of the company can be held civilly liable to the company, its shareholders and its creditors.

Business operations

24 What types of business entity are most commonly used by foreign investors and why? What are the main requirements for their establishment and operation?

Among the different types of entities that can be formed, the limited liability company (LLC) and the joint-stock company (JSC) are the most common. A branch office of a foreign company can also be formed in Turkey.

JSCs are used by those who want to start large businesses. At least one shareholder and a minimum share capital of 50,000 lira are required for incorporation. The board of directors and general assembly are mandatory company bodies. Founders can be real persons or legal entities. A JSC is managed by its board. The board is composed of at least one director who could be a real person or a legal entity.

LLCs are used by those who want to start small and medium-sized businesses. At least one shareholder and a minimum share capital of 10,000 lira are required for incorporation. The board of directors and general assembly are mandatory company bodies. Founders can be real persons or legal entities. The company is managed by a board composed of at least one director who could be a real person or a legal entity, and at least one of the shareholders should be appointed as a director with unlimited authority to represent the company.

Branches of foreign companies may also engage in any commercial activities in Turkey within the scope of the activities and purpose of its headquarters. No specific minimum capital amount applies for branches. At least one of the branch representatives who resides in Turkey should be vested with full authority to represent the branch.

25 Describe the M&A market and the merger control regime. How easy is it to complete deals in your jurisdiction?

2016 was a challenging year for the M&A market in Turkey owing to the domestic and global political climate and weakened growth of the economy (https://www2.deloitte.com/content/dam/Deloitte/tr/Documents/mergers-acqisitions/annual-turkish-m&a-review-january-2017.pdf). The M&A market witnessed a total deal volume of US$ 7.7 billion through 248 deals resulting in the lowest deal volume since 2009.

The deal volume of foreign investors was low compared with previous years and the overall M&A volume dropped by 53 per cent.

Investors tended to focus on the internet and mobile services, technology, energy, manufacturing, financial services, food and beverage and healthcare sectors.

Communiqué No. 2010/4 lists the types of mergers and acquisitions that are subject to the Competition Board's review and approval. Concentrations that result in a permanent change of control are subject to the Competition Board's approval, provided that they exceed the applicable thresholds. Foreign-to-foreign transactions would also trigger a notification requirement if they exceed the turnover thresholds.

In practice, it is recommended that the filing be done at least 45 calendar days before the projected closing, except for high-risk concentrations or extremely complicated transaction structures that may require extensive discussions with the Competition Authority.

If following the notification, the transaction is found to be problematic under the applicable dominance test, it becomes a fully fledged Phase 2 investigation. Phase 2 takes about six months and if deemed necessary, may be extended only once, for an additional period of up to six months.

26 Outline the corporate insolvency regime. Is bankruptcy protection available for corporates?

Creditors who could not collect monetary receivables may prefer to commence bankruptcy proceedings. Bankruptcy lawsuits generally take more than one year.

The creditors may demand bankruptcy of a company by general bankruptcy, bankruptcy pertaining to commercial papers and bills, and direct bankruptcy.

A company can be terminated upon the decision of the Commercial Court of First Instance and go into liquidation.

If the company's financial situation seems recoverable, bankruptcy may be postponed by the court at the request of managers, the board of directors or creditors. A recovery project should be presented to the court. However, as things stand, postponement of bankruptcy is no longer allowed, owing to measures taken during the state of emergency.

Employment

27 How easy is it to enter into and terminate employment contracts?

Every individual eligible to work can enter into an employment contract. However, termination of employment should only be considered as a last resort.

Fixed-term employment agreements terminate automatically upon expiry. Furthermore, parties of definite-term employment agreement can terminate the agreement with a valid reason if the other party breaches the agreement (if the fixed-term employment agreement is terminated by the employer without any valid or rightful reason before its term expires, the employee is entitled to compensation for the damage caused).

An employer who employs at least 30 employees must present a valid reason (as listed under the Labour Law) for dismissal of an employee who has worked for at least six months at a workplace under an indefinite-term agreement. Indefinite-term employment agreement can be terminated by prior written notice. The employer may also terminate employment agreement immediately, by paying compensation in lieu of notice.

An employer is also required to request the employee's written defence before terminating employment agreement based on valid reasons.

Employers can immediately terminate an employment agreement based on one of the rightful reasons set forth under the Labour Law.

Employers' right to terminate an employment agreement based on rightful reasons must be exercised within six business days after the employer becomes aware of the rightful reason or within one year of the rightful reason occurring. Notice periods are not applicable to terminations based on rightful reasons.

Employers and employees can also terminate employment by agreement. The validity of a mutual termination agreement relies on whether the relevant employee obtains a benefit. The employee's benefit could be identified by financial inducement to accept the mutual separation agreement.

28 What are the key rights of local employees?

Employees rights include:

- remuneration;
- severance payment;
- payment in lieu of notice;
- overtime payment;
- annual leave;
- weekend leave; and
- leave in general and public holidays.

29 What are the main restrictions on engaging foreign employees?

Foreigners intending to work in Turkey must obtain work permits. Employers who employ foreign employers must notify the Ministry of Labour and Social Security of the employment relation.

There are three types of work permits:

- definite duration;
- permanent; and
- independent.

The employers or the foreign employees who have an independent or permanent work permit and who do not fulfil their obligation to notify the ministry may be subject to a monetary fine.

30 What are the other key employment law factors that foreign counsel, investors and businesses should be aware of?

Turkey is governed as a social state, which entails the protection of employees and thus interpretation of circumstances in favour of the employee. This means employers should duly document and support each action taken against the employee.

Intellectual property

31 Describe the intellectual property environment. How effective is enforcement and what are the key current issues?

Principles as to intellectual property (IP) are mainly set forth under the IP Rights Law, which mainly grants the following remedies for infringement of IP rights: (i) determination of the offence, (ii) prohibition of infringement and (iii) compensation claims. Many regional and international treaties on IP have also been adhered to by Turkey.

There is also a new legislation on Industrial Property that regulates many reforms and regulates trademarks, geographical indications, designs and patents in detail and in compliance with European Union regulations. Establishing a responsive system in order to substantially increase the number of applications for industrial property rights, harmonising the Turkish legislation with EU Law and abolishing the inconsistencies in the law are key objectives that led to the establishment of the Industrial Property Law.

The current key issues mainly revolve around the protection of recognisable brands and software, computer based intellectual properties as well as intellectual property right protection in scientific inventions.

Legal reform and policy

32 What are the key issues in legal reform, government policy and the economy?

As a part of the European Union accession process, the government is focusing on adaptation of national legislation to bring it in line with European Union regulations.

33 Are there any significant legal developments ongoing or pending? What are their effects on the business environment?

As a result of voting in the constitutional referendum held on 16 April 2017, a change to the political regime from a parliamentary system to an executive presidency will be put in effect during 2019.

Owing to a recent coup attempt, the government declared a state of emergency in July 2016 which introduced various measures and changes in the structuring of certain authorities. The term of the state of emergency has been extended. However, the current situation has not had an impact on the conduct of official authorities, and business is stable and continuing as usual at this stage.

Resources and references

34 Please cite helpful references, for example sources of law, websites of major regulators and government agencies.

None.

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ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

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Our legal team consists of 80 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

As an independent Turkish law firm, ELIG collaborates with many international law firms on various projects.

Merger Control

Gönenç Gürkaynak
ELIG, Attorneys-at-Law

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054 dated 13 December 1994 (the Competition Law) and a communiqué published by the Turkish Competition Authority (TCA). In particular, article 7 of the Competition Law governs mergers and acquisitions.

Article 7 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified in order to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) published on 7 October 2010, replaces Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 1997/1) as of 1 January 2011, as a primary instrument in assessing merger cases in Turkey. Communiqué No. 2010/4 sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, bringing together some significant changes to the Turkish merger control regime.

The national competition authority for enforcing the Competition Law in Turkey is the TCA, a legal entity with administrative and financial autonomy. The TCA consists of the Competition Board, Presidency and Main Service Units. As the competent body of the TCA, the Competition Board is responsible for, inter alia, reviewing and resolving on merger and acquisition notifications. The Competition Board consists of seven members and is seated in Ankara.

The Main Service Units consist of five supervision and enforcement departments, department of decisions, economic analyses and research department, information management department, external relations, training and competition advocacy department, strategy development, regulation and budget department, and cartel on-the-spot inspections support division. There is a 'sectoral' job definition of each supervision and enforcement department.

2 What kinds of mergers are caught?

It is a typical dominance test. As a matter of article 7 of Law No. 4054 and article 13 of Communiqué No. 2010/4, mergers and acquisitions that do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey shall be cleared by the Competition Board. Accordingly, Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings;
- acquisition of or direct or indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through the purchase of assets or a part or all of its shares, an agreement, or other instruments.

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Competition Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with such securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or for privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, The TCA has recently introduced the Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced to Communiqué No. 2010/4 is that article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4 propounding that 'The thresholds [...] are re-determined by the Board biannually'. Through the mentioned amendment, the Board is no longer rested with the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the relevant turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4. In addition, article 2 of Communiqué No. 2017/2 modified article 8(5) of Communiqué No. 2010/4. Together with this amendment, the Board would now be in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three year period. Lastly, article 3 of Communique No. 2017/2 introduced a new paragraph to be included to article 10 of Communique No. 2010/4. This newly introduced provision by article 3 of Communique No. 2017/2 is similar to article 7(2) of European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, the case law of the Turkish Competition Board was shedding light on this matter.

3 What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are subject to notification to, and approval of, the Competition Board. The provision of article 5(3) stipulates that joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable. Article 13/III of Communiqué No. 2010/4 provides that the Competition Board would carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Communiqué No. 2010/4 provides a definition of 'control', which does not fall far from the definition of this term in article 3 of Council

Regulation No. 139/2004. According to article 5(2) of Communiqué No. 2010/4:

> *Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*

Pursuant to the presumption regulated under article 5(2) of Communiqué No. 2010/4, control shall be deemed acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under such agreements, have de facto power to exercise these rights.

In short, much like the EU regime, under the Turkish Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the Competition Board. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions; and it can be exercised de jure or de facto. Thus, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Communiqué No. 2012/3 on the Amendment of Communique No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (Communiqué No. 2012/3), amends the turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification for the purposes of the Turkish merger control regime. After the enactment of the amendments, the new thresholds are as follows:

- the aggregate Turkish turnovers of the transacting parties exceeding 100 million liras and the Turkish turnovers of at least two of the transacting parties each exceeding 30 million liras; or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million liras; or
- the Turkish turnover of any of the merging parties exceeding 30 million liras and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million liras.

Where the transaction does not meet the thresholds set out above, the transaction would not be deemed notifiable. Furthermore, Communique No. 2010/4 no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

As mentioned through the sections above, the article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4 propounding that 'The thresholds [...] are re-determined by the Board biannually'. Through the mentioned amendment, the Board is no longer rested with the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the relevant turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded, there is no exception for filing a notification cited in the Competition Law or its secondary legislation. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign-to-foreign mergers are caught under the Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey. Merely sales into Turkey may trigger the notification requirement to the extent the thresholds are met. Article 2 of the Competition Law provides the 'effects criteria', pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned do not have local subsidiaries, branches, sales outlets, etc in Turkey, the transaction could still be subject to the provisions of the Turkish competition legislation if the goods or services of such undertakings are sold in Turkey and thus have effects on the relevant Turkish market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for financial institutions. Such special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The competition legislation provides no special regulation applicable to foreign investments.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines for filing

The Competition Law provides no specific deadline for filing but based on ELIG, Attorneys-at-Law's experience in over 300 merger control filings so far; in light of the 30-calendar-day review period it is advisable to file the transaction at least 40 to 45 calendar days before closing. Owing to this 30-day review period Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings, therefore the time frame required for preparation of a notification form will be longer than under the old regime. It is important that the transaction is not closed before the approval of the Competition Board.

Penalties for not filing

In the event that the parties to a merger or acquisition that requires the approval of the Competition Board realise the transaction without obtaining the approval of the Board, a monetary 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) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction. The minimum fine for 2017 is 18,377 liras.

Invalidity of the transaction

Another very important sanction, which is legal rather than economic, is set out under article 7 of the Turkish Competition Law and article 10 of Communiqué No. 2010/4: a notifiable merger or acquisition that is not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

Termination of infringement and interim measures

Pursuant to article 9(1) of the Competition Law, should the Competition Board find any infringement of article 7, it shall order the parties concerned, by a resolution, to take the necessary actions in order to restore the level of competition and status as before the completion of the transaction infringing the Competition Law. Similarly, the Competition Law authorises the Competition Board to take interim measures until

the final resolution on the matter, in case there is a possibility for serious and irreparable damages to occur.

Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Competition Board decides that the transaction falls within the prohibition of article 7 (in other words, it creates or strengthens a dominant position and causes a significant decrease in competition), the undertakings shall be subject to fines of up to 10 per cent of their 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). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party. In determining the monetary fines on the parties, the Competition Board shall take into consideration repetition of the infringement, its duration, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of the damage that takes place or is likely to take place.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all de facto legal consequences of every action that has been unlawfully taken, return all shares and assets if possible to the entities that owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties; and meanwhile forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures.

Failure to notify correctly

If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. In addition, the TCA will impose a turnover-based monetary 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) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

10 Who is responsible for filing and are filing fees required?

In principle, under the merger control regime, a filing can be made by either one of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

There is no filing fee required under Turkish merger control proceedings.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Competition Board, upon its preliminary review (Phase I) of the notification will decide either to approve, or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with Phase II should be formed within 15 days, the Competition Board generally uses more than 15 days to form their opinion concerning the substance of a notification, and it is more sensitive about the 30-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will restart the 30-day period.

If a notification leads to an investigation (Phase II), it changes into a fully-fledged investigation. Under Turkish law, the investigation takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months, by the Competition Board.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

If a merger or acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Competition Board reaches the conclusion that the transaction creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned as well as their employees and directors will be subject to the monetary fines and sanctions stated in question 9. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

As also provided under question 9, the wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Competition Board. The monetary fine is 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) in Turkey. The liability for fines is on firms that are the acquirers in the case of an acquisition; and on both merging parties in the case of a merger. The minimum fine is 18,377 liras for 2017.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of the transaction does not prevent imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7) in and of itself. In case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Turkish Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey.

As an example, in the *Simsmetal/Fairless* decision (dated 16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Turkey, the Competition Board imposed an administrative monetary fine on Simsmetal East LLC (ie, the acquirer) subsequent to first paragraph of article 16 of Law No. 4054, totalling 0.1 per cent of Simsmetal East LLC's gross revenue generated in the fiscal year 2009, because of closing the transaction before obtaining the approval of the Competition Board. Similarly, the Competition Board's Longsheng (dated 2 June 2011, No. 11-33/723-226), *Flir Systems Holding/Raymarine PLC* (17 June 2010, No. 10-44/762-246) and *CVRD Canada Inc* (8 July 2010, No. 10-49/949-332) decisions are examples whereby the Board imposed a turnover-based monetary fine based on the violation of the suspension requirement in a foreign-to-foreign transaction.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of Communique No. 2010/4, a transaction is deemed to be 'realised' (ie, closed) on the date when the change in control occurs. It remains to be seen whether this provision will be interpreted by the TCA in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has been rejected by the Competition Board so far (eg, the Competition Board's *Total SA* decision dated 20 December 2006 No. 06-92/1186-355, and *CVR Inc-Inco Limited* decision dated 1 February 2007 No. 07-11/71-23), the Board arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

15 Are there any special merger control rules applicable to public takeover bids?

The notification process differs for privatisation tenders. With regard to privatisation tenders, Communiqué No. 1998/4 of the Competition Board was replaced with a new communiqué titled Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be filed with the TCA in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2). According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and

receive the opinion of the Competition Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 30 million liras. Further to that, the Communiqué promulgates that in order for the acquisitions to become legally valid through privatisation, which requires pre-notification to the TCA, it is also mandatory to get approval from the Competition Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

16 What is the level of detail required in the preparation of a filing?

Communiqué No. 2010/4 has introduced a new and much more complex notification form, which is similar to the Form CO of the European Commission. One hard copy and one electronic copy of the merger notification form shall be submitted to the Competition Board. The notification form itself is revised from Communiqué 1997/1; in parallel with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified anyway, there has been an increase in the information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required. Bearing in mind that each subsequent request by the Competition Board for incorrect or incomplete information will prolong the waiting period, detailed and justified answers and information to be provided in the notification form is to the advantage of the parties.

17 What is the statutory timetable for clearance? Can it be speeded up?

The Competition Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information.

If a notification leads to a Phase II review, it turns into a fully-fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Competition Board may extend this period once by up to six months.

In practice, only exceptional cases require a Phase II review, and based on ELIG, Attorneys-at-Law's experience in over 300 merger control filings so far, most notifications obtain a decision within 40 to 45 days from the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

18 What are the typical steps and different phases of the investigation?

Pursuant to article 10 of the Competition Law, if the Competition Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days (from the filing) and the transaction will be suspended and additional precautionary actions deemed appropriate by the Competition Board may be taken until the final decision is rendered. Article 13(4) of Communiqué No. 2010/4 states that if the investigation is decided to be further investigated, provisions of articles 40 to 59 of the Competition Law shall be applied to the extent they are compatible with the relevant situation. Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

Substantive assessment

19 What is the substantive test for clearance?

The substantive test is a typical dominance test. According to article 7 of the Competition Law and article 13 of Communiqué No. 2010/4, mergers and acquisitions that do not create or strengthen a dominant position and do not significantly lessen competition in a relevant product market within the whole or part of Turkey shall be cleared by the Competition Board.

Article 3 of the Competition Law defines dominant position as:

> *any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply.*

Market shares of about 40 per cent and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant product market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly lessens the competition in the whole territory of Turkey or in a part of it, pursuant to article 7 of the Competition Law.

20 Is there a special substantive test for joint ventures?

The Competition Board evaluates joint-venture notifications according to two criteria: existence of joint control in the joint venture; and the joint venture being an independent economic entity (ie, having adequate capital, labour and an indefinite duration). In recent years, the Competition Board has consistently applied the test of 'full-functioning' while determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the two criteria mentioned above, the standard dominance test is applied. Additionally under the merger control regime, a specific section in the notification form aims to collect information to assess whether the joint venture will lead to coordination. Article 13/III of Communiqué No. 2010/4 provides that the Competition Board will carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form allows for such a review as well.

21 What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criteria in the TCA's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on those grounds (eg, the Competition Board's *Ladik* decision dated 20 December 2005 No. 05-86/1188-340). These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Competition Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Competition Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market' and the 'structure of demand'. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly lessened. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Competition Board, which was based on collective dominance. No transaction has been blocked on the grounds

of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

22 To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the TCA has financial and administrative autonomy and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Competition Board.

23 To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the combined market share of the parties exceeds 20 per cent for horizontal overlaps and the market share of both parties exceeds 25 per cent for vertical overlaps. In cases where the market share remains below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies. The Competition Board may take into account efficiencies in reviewing a concentration to the extent they operate as a beneficial factor in terms of better-quality production or cost savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Competition Board during the investigation stage are very broad.

Article 9 of the Competition Law provides that if the Competition Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion concerning how to terminate such infringement.

Mergers and acquisitions prohibited by the Competition Board are not legally valid and the transaction documents are not binding and enforceable even if the 'closing' is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4, authorisation granted by the Competition Board concerning the merger and acquisition shall also cover the limitations that are directly related and necessary to the implementation of the transaction. The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework. Furthermore, article 13(4) and article 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Competition Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Competition Board may at any time re-examine a clearance decision and decide on prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. In this case, the transaction shall be re-examined by the Competition Board, which may decide on prohibition and application of the sanctions mentioned in question 9.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Board may grant conditional approvals to mergers and acquisitions, and such transactions may be implemented provided that measures deemed appropriate by the Competition Board are taken, and the parties comply with certain obligations. In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Competition Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation. The parties can complete the merger before the remedies have been complied with. However, the merger gains legal validity after the remedies have been complied with.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

Strategic thinking at the time of filing is somewhat discouraged through language confirming expressly that the review periods would start only after the filing is made. This is already the current situation in practice, but now it is explicitly stated. The Competition Board is now expressly given the right in Communiqué No. 2010/4 to secure certain conditions and obligations to ensure the proper performance of commitments.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Competition Board has accepted the remedies or commitments (such as divestments) proposed to, or imposed by, the European Commission as long as these remedies or commitments ease competition law concerns in Turkey (see, for example, *Cookson/Foseco* decision No. 08-25/254-83 of 20 March 2008).

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in EU competition law. Therefore, a restriction such as a non-competition obligation should be directly related and necessary to the concentration, should be restrictive only for the parties and proportionate. As a result, for instance, it may be said that a restriction will be viewed as ancillary as long as its nature, geographic scope, subject matter and duration is limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction. The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. In the event the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of Communiqué No. 2010/4, the Competition Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the TCA is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Competition Board during the investigation, provided that they prove their legitimate interest.

Update and trends

One of the most significant precedents of the past year is concerned with the acquisition by Anheuser-Busch InBev (ABI) of sole control over SABMiller plc (SABMiller) (6 June 2016, 16-19/311-140). The Competition Board initiated a Phase II review of the transaction in the first quarter of 2016. The Board stated that the transaction would potentially lead to competitive concerns in the beer market, as ABI was also indirectly acquiring a minority interest in Anadolu Efes (which is a leading player in the beer market in Turkey). The Competition Board also assessed any potential competitive concerns that may arise due to a potential switch of ABI brands currently distributed by Türk Tuborg to Anadolu Efes as a result of the acquisition of a non-controlling minority shareholding by ABI in Anadolu Efes. The Board stated in its decision that there was no causal link between the transaction at hand and the termination of the distribution agreements between Türk Tuborg and ABI. The parties presented an economic analysis report to the Board, stating that the relevant market should be defined as 'the market for beer', rather than sub-segmenting the market based on quality and price. After an in-depth Phase II review, taking the economic analysis into consideration, the Competition Board defined the relevant product market as the 'market for beers', and therefore granted unconditional approval to the transaction. The decision is significant for the application of Turkish Competition Law, as the relevant transaction was granted unconditional approval even though the parties had proposed remedies considering the economic analysis for the definition of the relevant market.

Another prominent case during the past year is concerned with the acquisition of 100 per cent of the shares of Grup Maritim TCB, SL (Grup Maritim) by APM Terminals BV (APMT) (11 May 2016, 16-16/267-118). Grup Maritim has only one subsidiary in Turkey, namely TCE EGE. In this regard, the Competition Board evaluated the transaction considering TCE EGE as the target. There had been several complaints in relation to the transaction. The complainants' concerns were mainly focused on the possibility that APMT could acquire a dominant position in the market for container terminal services, as TCE EGE is the only competitor of APMT. The Competition Board examined the relevant concerns and decided at the end of its Phase II review that the transaction did not lead to any significant competitive concerns. The Board concluded that the number of players in the relevant market and the total capacities of the ports would increase, given that Çandarlı Port would start operating straight after the planned closing of the transaction. Therefore, the Competition Board granted unconditional approval to the transaction.

Lastly, one of the most notable precedents of last year is related to the acquisition by Essilor Optica International Holding SL of 65 per cent of the shares of Merve Gözlük Camı San ve Tic AŞ (23 September 2016, 6-31/520-234). The transaction, which was taken into a Phase II review in 2015, was concluded in 2016. However, the Competition Board indicated that the possible competitive concerns could not be eliminated through the remedies proposed by the parties. The parties decided to cancel the acquisition transaction and to withdraw their filing. The Board then decided that rendering a decision on the outcome of the transaction was not necessary, due to lack of merits.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the TCA publishes the notified transactions on its official website (www.rekabet.gov.tr), including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once notified to the TCA, the existence of a transaction is no longer a confidential matter.

If the Competition Board decides to have a hearing during the investigation, hearings at the TCA are, in principle, open to the public. The Competition Board may, on the grounds of protection of public morality or trade secrets, decide that the hearing shall be held in camera.

The main legislation that regulates the protection of commercial information is article 25(4) of the Competition Law and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué 2010/3), which was enacted in April 2010. Communiqué 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets to the undertakings. Therefore, undertakings must request confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Competition Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Lastly, the final decisions of the Competition Board are published on the website of the TCA after confidential business information is taken out.

Under article 15(2) of Communiqué 2010/3, the TCA may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the TCA can disclose such information and documents that could be considered as trade secrets, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Article 43 of Decision No. 1/95 of the EC Turkey Association Council (Decision No. 1/95) authorises the TCA to notify and request the European Commission (Competition Directorate-General) to apply relevant measures if the Competition Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commission has the authority to request the Competition Board to apply relevant measures to restore competition in relevant markets.

The Commission has been reluctant to share any evidence or arguments with the TCA, in the few cases where the TCA has explicitly asked for them.

Apart from that, the TCA has international cooperation with several antitrust authorities in other jurisdictions. Additionally, the TCA develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of Pakistani Competition Authority, top managers of the National Agency of the Kyrgyz Republic for Anti-Monopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation and Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements.

Judicial review

32 What are the opportunities for appeal or judicial review?

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Competition Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Competition Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be taken in accordance with the Administrative Procedural Law. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Competition Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to be against the law.

A significant development in competition law enforcement was the change in the competent body for appeals against the Competition Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will

go through the case file both on procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

33 What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Competition Board is 60 days starting from the receipt of the reasoned decision.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the annual Mergers and Acquisitions Status Report for 2015, the Competition Board reviewed 159 transactions in total, including 141 merger and acquisitions, eight privatisations, six out of the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control), three information notes and one complaint.

With regard to 2016, pursuant to the Merger and Acquisition Status Report of the TCA, the Board reviewed a total of 209 transactions in 2016; these transactions included 191 merger and acquisition transactions and nine privatisations. Among these transactions two concentrations (ie, ABI-SABMiller, 1 June 2016, 16-19/311-140; Group Maritim-APM Terminals, 11 May 2016, 16-16/267-118) were taken into Phase II review in 2016. Moreover, one concentration (Merve Gözlük Camı-Essilor, 23 September 2016, 16-31/520-234) notified and taken into Phase II review in 2015 was withdrawn in 2016. In 2016, 107 transactions notified to the Board were foreign-to-foreign transactions, which constitutes over half of the concentrations notified within 2016.

Generally, the TCA pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high.

The TCA handles transactions and possible concentrations in the Turkish cement and aviation sectors with special scrutiny. In addition to bringing more than 10 investigations in the Turkish cement sector, the TCA also gave a number of rejection decisions in relation to contemplated sales of cement factories in the Turkish cement market. It would also be accurate to report that the TCA has a special sensitivity in markets for construction materials. In addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated and the offenders were fined by the TCA.

To the extent these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the TCA will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

Additionally, the TCA has published three market inquiries during 2016 and the first five months of 2017; one for the motion picture services market, one for the cement market and one for the TV broadcasting market.

35 Are there current proposals to change the legislation?

As mentioned in questions 2 and 5, on 24 February 2017 the Communiqué No. 2010/4 was amended by the Communique No. 2017/2 on the Amendment of Communique No. 2010/4.

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Cartel Regulation

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 125 case handlers. A research department, a leniency unit, a decisions unit, an information-management unit, an external-relations unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

After a long wait on the sidelines, the Prime Ministry finally sent the Draft Law on Protection of Competition to the Presidency of the Turkish Parliament on 23 January 2014. The Draft Law is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure. In 2015, the Draft Law became obsolete again due to the general elections in June and November 2015. It is yet to be seen whether the new Turkish Parliament or the Government will renew the Draft Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if Parliament does not pass the Draft Law.

The Turkish Competition Authority announced for public consultation the Draft Regulation on Administrative Monetary Fines. The Draft Regulation is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines). Consultations on the Draft Regulation are still ongoing. The most significant changes the Draft Regulation will bring are as follows:

- the base fine to be determined based on 'the turnover generated in the relevant market, which is directly or indirectly related to the respective competition law infringement';
- the impact and the duration of the infringement will also be taken into account in calculating the base fine;
- the Competition Board will take into account factors such as the concerned undertaking's market power, the infringement's nature and the actual or potential damages of the infringement, as well as the geographical scope of the violation;
- the three aggravating factors are (i) being the leader or the initiator of the infringement, (ii) coercion, and (iii) non-compliance to commitments previously made to the Competition Board and recidivism; which increase the base fine by half or one-fold;
- the Competition Board is obliged to reduce the fine when mitigation factors exist, without any discretion;
- the Competition Board has the discretion to increase the fines in certain cases, with the intent to ensure deterrence; and
- where the administrative fine would compromise the ability of maintaining the respective undertaking's economic activities, the Board can reduce the fine upon request.

Finally, the following key legislative texts have been announced and enacted between 2013 and the beginning of 2016:

- Block Exemption Communiqué No. 2016/5 on R&D Agreements;
- Communique on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of the Act No. 4054 on the Protection of Competition;
- Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices, enacted on 7 April 2014;
- Guidelines on Exclusionary Abusive Conducts by Companies in Dominant Positions, enacted on 29 January 2014;
- Block Exemption Communiqué on Specialization Agreements (Communiqué No. 2013/3), entered into force on 26 July 2013;
- Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, enacted on 26 March 2013;
- Guidelines on Active Cooperation for the Exposure of Cartels, enacted on 17 April 2013;
- Guidelines on the Protection of Horizontal Agreements in line with articles 4 and 5 of the Competition Law Act No. 4054, enacted on 30 April 2013;
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control, enacted on 16 July 2013; and
- Guidelines on General Principles of Exemption, enacted on 28 November 2013.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union

(TFEU) (ex article 81(1) of the EC Treaty). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not bring a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal to deal agreements. A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- the Block Exemption Communiqué No. 2013/2 on Specialisation Agreements; and
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2016/3 on R&D Agreements, sets out revised rules for research and development agreements in Turkey, overhauling the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements in order to retain the harmony between EU and Turkish competition law instruments.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

The Turkish antitrust regime also condemns concerted practices and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The special challenges posed by the proof standard concerning concerted practices are addressed in question 13.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Due to the 'presumption of concerted practice' (see question 13), oligopoly markets for the supply of homogenous products (eg, cement, bread yeast, ready-mixed concrete) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 29 investigations in the cement and ready-mixed concrete markets in 17 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Turkish competition law does not provide any specific exceptions to government-sanctioned activities or regulated conduct. There are, however, examples where the Competition Board took the state action defence into account (see, eg, *Paper Recycling*, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*, 2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law applies to 'undertakings' and 'associations of undertakings'. 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. The Competition Law therefore applies to individuals and corporations alike if they act as an undertaking.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Turkey is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (see, for example, *Sisecam/Yioula*, 28 February 2007; 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004; 04-43/538-133; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156). It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a colourable argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent they produce an effect on a Turkish market, regardless of where the conduct takes place.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced onsite inspections) (see question 9) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the 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 Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). 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-day period 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 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 Board to serve a reasoned decision on the counterpart.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. 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 is 17,700 Turkish lira (Communique on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of the Act No. 4054 on the Protection of Competition (Communiqué No. 2016/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations and dawn raids. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

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). It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision, for each day of the violation (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 Competition Law provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Competition Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed time. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the 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 (that is, that which is written on the deed of authorisation).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (DG Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Competition Authority also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

11 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

It is fair to say that the interplay between jurisdictions does not in practice materially affect the Board's handling of cartel investigations, including cross-border cases. Principle of comity does not take part as

an explicit provision in Turkish Competition law. A cartel's conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Board can initiate an inspection about an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Private suits against cartel members are tried before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Turkey is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially of the 'object or effect of which...' branch, the Board has established an extremely low standard of proof concerning cartel activity. The standard of proof is even lower as far as concerted practices are concerned; in practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an article 4 enforcement in cases where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that 'conscious parallelism' is rebuttable evidence of forbidden behaviour and constitutes sufficient ground to impose fines on the undertakings concerned. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

Unlike the EC, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, the Competition Law does not give weight to the doctrine known as 'conscious parallelism and plus factors'. In practice, the Competition Board does not go to the trouble of seeking 'plus factors' along with conscious parallelism if naked parallel behaviour is established.

Recent indications in practice also suggest that the Competition Authority officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

14 Appeal process

What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff the court, by providing its justifications, may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes about 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the High State Court.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will (i) go through the case file both on procedural and substantive grounds and (ii) 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 High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law. In this case, the decision of the regional court will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision which takes into account the High State Court's decision. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In the case of a proven cartel activity, the undertakings concerned will 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 of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings or the compliance with their commitments etc, in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally

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

The years 2015 and 2016 have witnessed various fining decisions on cartels. The Board imposed administrative monetary fines in no less than 10 cases (*Six Cement Companies in the Aegean Region,* 14 January 2016, 16-02/44-14; Yeast Producers, 30 March 2015, 14-42/738-346; *Kahramanmaraş Driving Schools*, 20 August 2014, 14-29/610-264; *Tokat Kırıkkale Private Teaching Institutions*, 11 August 2014, 14-27/556-239; *Aegean Region Driving Schools*, 11 August 2014, 14-27/555-238; *Kırıkkale Driving Schools*, 8 May 2014, *Aksaray Bakeries*, 16 April 2014, 14-15/287-120; 14-17/330-142; *Didim Bakeries*, 22 January 2014, 14-04/80-33; *Aksaray Driving Schools*, 12 February 2014, 14-06/127-56; *Hyundai Dealers*, 15 December 2013, 13-70/952-403; *Çorum Construction Inspection Firms*, 2 December 2013, 13-67/929-391; *Erzincan Ready-Mixed Concrete Investigation*, 17 September 2013, 13-54/755-315, and *Cement and Ready-Mixed Concrete*, 17 September 2013, 13-54/756-316). Having said that, a great majority of the investigations into cartel allegations did not result in monetary fines against defendants in 2016.

The highest administrative monetary fine ever imposed by the Board in a cartel case is 213,384,545.76 Turkish lira, which was imposed on the economic entity comprising Türkiye Garanti Bankası AŞ ve Garanti Ödeme Sistemleri AŞ and Garanti Konut Finansmanı Danışmanlık AŞ (*Banking Industry*, 8 March 2013, 13-13/198-100). This amount represented 1.5 per cent of Garanti's annual gross revenue for the year 2011. The case also represents the highest ever combined administrative monetary fine, which amounts to 1,116,957,468.76 Turkish lira.

Civil actions are still rare but increasing in practice.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc, in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines was recently enacted by the Turkish Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

The Regulation on Fines is binding on the Competition Authority.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract or by the relevant ministry that the contracting authority is subordinate to or is associated with. It is even a duty, not an option, for administrative authorities to apply for blacklisting in the case of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging – it is not available in cases of other forms of cartel infringement.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish obligation law regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, the debtor shall pay on the amount of their shares. However, in the event that the debtor make a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust-based private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations.

Indirect purchaser claims have not yet been tested before the courts.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 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'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (Regulation on Leniency) was enacted on 15 February 2009. The Regulation on Leniency sets out the main principles of immunity and leniency mechanisms. In parallel to the Regulation on Leniency, the Board published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels on April 2013.

The leniency programme is only applicable for cartel cases. It does not apply to other forms of antitrust infringement. Section 3 of the Regulation on Leniency provides for a definition of cartel that encompasses price fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging.

A cartel member may apply for leniency until the investigation report is officially served on it. Depending on the timing of the application, the applicant may benefit from full immunity or fine reduction.

The first one to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. Employees or managers of the first applicant can also benefit from the full immunity granted to the applicant firm. However, there are several conditions an applicant must meet to receive full immunity from all charges. One of them is not to be the coercer of the reported cartel. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), the applicant firm and its employees may only receive a reduction of between 33 per cent and 100 per cent. The other conditions are as follows:

- the applicant shall submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings;
- the applicant shall not conceal or destroy information or evidence related to the alleged cartel;
- the applicant shall end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated;
- the applicant shall keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for 'second-in' and subsequent leniency applicants. Also, the Competition Authority may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of Regulation on Fines.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Competition Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

There is no amnesty plus or immunity plus option.

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As stated in question 22, a cartel member may apply for leniency until the investigation report is officially served. Although the Regulation on Leniency does not provide detailed principles on the 'marker system', the Competition Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties. A document (showing the date and time of the application and request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

26 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant must submit: information on the products affected by the cartel; information on the duration of the cartel; names of the cartelists; dates, locations, and participants of the cartel meetings; and other information or documents about the cartel activity. The required information may be submitted verbally. A marker is also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered. The applicant must also convey any new documents to the Authority as soon as they are discovered; cooperate with the Authority on additional information requests; and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In *3M* (27 September 2012; 12-46/1409-461), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

Recently, however, the Board eased the tensions a little and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the reasoned decision of the fresh yeast producers investigation was released (14-42/738-346). The decision is the first of its kind to be entered by the Board where it granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was afforded to a submission made after the initiation of the preliminary investigation and dawn raids. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids. The Board justified its unprecedented application by claiming that substantive evidence and added value was brought in through the leniency application. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or the employees or managers of the undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well. While the Competition Board can also evaluate the information or documents ex officio, the general rule is that information

or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request in writing confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Competition Board has decided on the case.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. When enacted, the new Draft Law is expected to introduce a form of settlement procedure.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

The current employees of a cartelist entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency a manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Since active cooperation is required from all applicant cartel members in order to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews. That said, the Turkish Competition Authority has recently published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels in April 2013.

Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The right of access to the file has two legal bases in the Turkish competition law regime: (i) Law No. 4982 and (ii) Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communique No. 2010/3). Article 5/1 of Communiqué No. 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties within due period during the investigations. The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement. This right can only be used once so long as no new evidence has been obtained within the scope of the investigation.

On the other hand, Law No. 4982 does not have such a restriction in terms of timing or scope. Access to the case file enables the applicant to get access to information and documents in the case file that do not qualify as (i) internal documents of the Competition Authority, or (ii) trade secrets of other firms or trade associations. Law No. 4982 provides for similar limitations.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both the investigated corporation and its employees. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

So long as there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

There is a reduction mechanism for the administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No. The Turkish Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules (see question 8).

Overlapping liability for damages in other jurisdictions is not taken into account.

Update and trends

The most recent changes with respect to the Turkish cartel regime were the publication of the Block Exemption Communiqué on R&D Agreements of 16 March 2016, overhauling the Block Exemption Communiqué on Specialisation Agreements of 26 July 2013. Furthermore, in 2015, the Draft Law became yet again obsolete due to the general elections in June and November 2015.

The year in review did not witness ground-breaking cartel cases or record fines for cartel activity. In fact, there is an easily detectable decline in the number of cartel cases. Most of the fully fledged investigations did not result in monetary fines against the defendants.

Recently, the Board concluded that six cement companies operating in the Aegean region of Turkey violated article 4 of the Competition Law by sharing sales territories and increasing resale prices in collusion in the Aegean region (14 January 2016, 16-02/44-14). The Board fined the cement producers a total of approximately 71 million Turkish lira. The fines ranged between 3 per cent and 4.5 per cent of each company's 2014 annual turnover. These fines were relatively high for a Turkish jurisdiction in terms of turnover percentage.

In another case, the Board rendered a decision on the investigation conducted in order to determine whether nine international companies active in railway freight forwarding services market have restricted competition by sharing customers (16 December 2015, 15-44/740-267). The Board concluded that the agreements have not produced effects on the Turkish markets so declined jurisdiction. This decision shows the scope and limits of the Turkish Competition Authority's jurisdiction.

In *Diye*, the Board had ordered the involved parties to cease and desist observing the infringing activities but spared them from the fine by delivering its opinion pursuant to article 9/3 of Competition Law that is commonly called a 9/3 order (12.12.2014, 14-51/900-410). In the decision, references were made to the lack of evidence to show any oral or written agreement or mutual consensus between the buyers, and to the share of advertisers' advertisement expenses in the overall advertisement expenses. The Board's decision weighed whether (i) the cumulative effect that may occur as a result of an increase in the number of undertakings that participate in the system due to the nature of the information obtained by the advertisers within the scope of the service provided through the system under investigation, and (ii) certain competitive concerns could be raised in the relevant market in the medium and long term. As a result, the Board ordered an immediate halt of the activities in question. On appeal, the Ankara Administrative Court decided that (i) there is no violation of the Competition Law and (ii) the Board failed to substantiate its case (E.2015/101; K.2015/1371).

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Aside from the newly introduced leniency programme, article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established through a very diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas*, 13-49/710-297). In *Industrial Gas*, the investigated party argued that it has immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take into account this as a mitigating factor. To that end, there is room to argue that the Board does not take into account compliance initiatives undertaken after the investigation has commenced as a mitigating factor.

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Dominance

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

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

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

2 Definition of dominance

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

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

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

3 Purpose of the legislation

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

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

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

4 Sector-specific dominance rules

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

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

5 Exemptions from the dominance rules

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

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

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

6 Transition from non-dominant to dominant

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

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

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

7 Collective dominance

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

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

8 Dominant purchasers

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

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

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

9 Market definition and share-based dominance thresholds

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

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

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

Abuse of dominance

10 Definition of abuse of dominance

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

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

11 Exploitative and exclusionary practices

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

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

12 Link between dominance and abuse

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

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

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

13 Defences

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

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

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

Specific forms of abuse

14 Rebate schemes

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

15 Tying and bundling

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

16 Exclusive dealing

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

17 Predatory pricing

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

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

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

18 Price or margin squeezes

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

19 Refusals to deal and denied access to essential facilities

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

20 Predatory product design or a failure to disclose new technology

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

21 Price discrimination

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

22 Exploitative prices or terms of supply

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

23 Abuse of administrative or government process

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

24 Mergers and acquisitions as exclusionary practices

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

25 Other abuses

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

Enforcement proceedings

26 Enforcement authorities

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

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

Update and trends

No significant change is expected to the legislation or other measures that will have an impact on the area of abuse of dominance in the near future. However, it is fair to say that competition law enforcement is expected to focus more on platform business models in multi-sided markets. For instance, the Competition Board analysed the exclusionary effects of the most favoured customer clauses in a platform business model, and condemned these clauses for the first time (*Yemeksepeti,* 9 June 2016, 16-20/347-156 – abuse of a dominant position by enforcing the most favoured nation clauses on a multisided market).

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

The Competition Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information or failure to produce on a timely manner may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed. Theis administrative monetary fine may not be lower than 18,377 lira for 2017.

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

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

27 Sanctions and remedies

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

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

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

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

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

28 Enforcement process

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

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

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

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

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

30 Contractual consequences

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

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

31 Private enforcement

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

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

32 Damages

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

A dominance matter is primarily adjudicated by the Competition Board. The Competition Board does not decide whether the victims of the abusive practices merit damages. These aspects are supplemented with private lawsuits. Articles 57 et seq of Law No. 4054 entitle any person who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple-damages principle exists in the law. In private suits, the incumbent firms are adjudicated before regular civil courts. Because the triple-damages principle allows litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the article 6 enforcement arena. Most of the civil courts wait for the decision of the Competition Board in order to build their own decision on the Competition Board's decision. The decision of the Competition Board is not binding on the court. However, the existence of a Competition Board decision becomes relevant in a number of aspects of civil litigation. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

33 Appeals

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

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

Unilateral conduct

34 Unilateral conduct by non-dominant firms

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

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

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

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Pharmaceutical Antitrust

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Pharmaceutical regulatory law

1 Which legislation sets out the regulatory framework for the marketing, authorisation and pricing of pharmaceutical products, including generic drugs? Which bodies are entrusted with enforcing these rules?

The primary legislation for the marketing, authorisation and pricing of pharmaceutical products is Law No. 1262 on Pharmacies and Pharmaceuticals, which dates from 1928. Law No. 3359 on Basic Health Services is also relevant to this matter. These statutes provide a basic regulatory framework and leave the details for regulation up to the secondary legislation.

Marketing/licensing

The main secondary legislation on the licensing of pharmaceuticals is the Licensing Regulation of Pharmaceutical Products (Official Gazette of 19 January 2005, No. 25705). This regulation is akin to and closely modelled after the Directive 2001/83/EC of 6 November 2001 on the Community Code relating to Pharmaceutical Products for Human Use.

Conditions of licensing of the variations in licensed or to-be-licensed pharmaceuticals are laid down in the Regulation on Variation in the Licence Application Pending Products (Official Gazette of 23 May 2005, No. 25823). This regulation, in turn, is closely modelled on the Commission Regulation (EC) No. 1084/2003 of 3 June 2003.

The Turkish licensing regulations seek two separate licences for the licensing and marketing of pharmaceuticals. The licences are provided by the Ministry of Health. It is possible to file for a licence electronically.

Pricing

The pricing of pharmaceuticals is regulated by the Communiqué on the Pricing of Pharmaceutical Products (Official Gazette of 22 September 2007, No. 26651) and the Decree on Pricing of Pharmaceutical Products (Official Gazette of 30 June 2007, No. 26568). The Ministry of Health uses its powers under the legislation to issue and circulate pricing communiqués from time to time. These communiqués lay down the ever-changing details of the pricing regime.

Turkey applies a reference pricing system in which the lowest ex-factory prices in certain reference countries serve as a benchmark for the ex-factory price of the original and generic pharmaceuticals. Profit margins in the different levels or layers of the distribution chain are strictly controlled. The reference countries have currently been selected as France, Greece, Italy, Portugal and Spain. The base price of original products with no generics in the Turkish market cannot exceed the lowest reference country price, whereas the base price of original products with generics cannot exceed 60 per cent of the lowest reference country price. The ex-factory price of generics cannot exceed 60 per cent of the lowest reference country price.

Once the ex-factory base price (ie, price to the wholesaler) has been set, profit margins are added at each level of the distribution chain. Profit margins of wholesalers range between 2 and 9 per cent, depending on the value of the product. Pharmacies' margins range between 12 and 25 per cent.

Promotion/sale

Rules of the promotion and marketing of pharmaceuticals are laid down in the Regulation on Promotion Activities for Human Medical Products (Official Gazette of 23 October 2003, No. 25268). This Regulation follows the generally applicable business ethics rules concerning the promotion and advertisement of pharmaceuticals. It is akin to and closely modelled after Directive No. 2001/83/EC of 6 November 2001 on the Community Code relating to Pharmaceutical Products for Human Use.

The regulatory rules for the licensing, pricing and marketing of pharmaceutical products are enforced by the Ministry of Health. The Pharmaceuticals and Medical Devices Authority, a sub-entity of the Ministry, is specifically tasked with enforcing these rules. Antitrust rules for the industry are enforced by the Turkish Competition Authority, as explained below.

2 Is there specific legislation on the distribution of pharmaceutical products?

There are certain restrictions on the distribution of the pharmaceutical products. The Guideline on the Good Distribution Practice of Pharmaceutical Products (Notice of 22 October 1999, No. 48196) includes complementary principles on the Regulation on Pharmaceutical Wholesalers and Products in the Pharmaceutical Wholesalers (Official Gazette of 20 October 1999, No. 23852). According to these principles, processes and procedures for distribution activities should be in writing. All precautions should be taken to control the distribution chain.

Additionally, the Regulation on Pharmaceutical Wholesalers and Products in the Pharmaceutical Wholesalers prohibits retail sales by pharmaceutical wholesalers (article 10) and distribution of certain pharmaceutical products (article 11).

The Drug Tracking System is a unique system based on a data matrix, which enables the Ministry of Health to follow any box of medicine at any pharmacy in the country. According to the Regulation Regarding the Packaging and Labelling of Medicinal Products for Human Use (Official Gazette of 12 August 2005, No. 25904), all the responsible parties with a role in the production and the distribution level of the pharmaceutical products, namely licence and permit holders, warehouses and pharmacies, should adopt certain distribution practices. These practices are as follows:

- licence or permit holders must inform the Drug Tracking System concerning the products' data matrix that they:
  - produce or store to sell;
  - sell;
  - accept for return; and
  - decide to destroy on any grounds;
- warehouses must inform the Drug Tracking System concerning the products that they:
  - buy from the suppliers;
  - trade with the other warehouses whether buying or selling;
  - accept for return and decide to destruct on any grounds;
  - lose in the transportation process; and
  - sell to pharmacies; and
- pharmacies must inform the Drug Tracking System concerning the products that they:
  - buy;
  - return to the seller;
  - decide to destroy;
  - trade; and
  - sell on any grounds.

3 Which aspects of this legislation are most directly relevant to the application of competition law to the pharmaceutical sector?

Aside from the price and profit-margin ceilings, the regulatory framework for pharmaceutical products is not specific or directly relevant to the application of Turkish competition laws to the pharmaceutical industry. The industry is subject to the general competition law rules, barring any judicial precedents that take account of the sector-specific aspects of the industry.

Competition legislation and regulation

4 Which legislation sets out competition law?

The relevant legislation setting out competition law is Law No. 4054 on the Protection of Competition, enacted on 13 December 1994 (the Competition Law).

The national competition authority for enforcing the Competition Law in Turkey is the Turkish Competition Authority (the Authority), a body with administrative and financial autonomy.

To supplement the antitrust enforcement, the Authority has issued communiqués, regulations and guidelines as secondary legislation. The following is a list of all general communiqués currently in force (excluding communiqués related to amendments to communiqués and communiqués related to administrative fines):

- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- Communiqué No. 2017/1 on the Increase of Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of the Law No 4054;
- Block Exemption Communiqué No. 2016/5 on Research and Development Agreements (Communiqué No. 2016/5);
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
- Communiqué No. 2013/2 on the procedures and principles to be pursued in pre-notifications and authorisation applications to be filed with the Authority in order for acquisitions via privatisation to become legally valid;
- Communiqué No. 2012/2 on the Application Procedure for Competition Law Infringements;
- Communiqué No. 2010/4 on Mergers and Acquisitions that Require the Approval of the Competition Board;
- Communiqué No. 2010/2 on Hearings held in relation to the Competition Board;
- Communiqué No. 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2008/3 in Relation to the Insurance Sector; and
- Communiqué No. 1997/5 on the Formation of the Organisation of the Authority.

The following is a list of all the guidelines currently in effect:

- the guidelines on remedies that are acceptable by the Authority in merger and acquisition transactions;
- the guidelines on undertakings concerned, turnover and ancillary restraints in mergers and acquisitions;
- the guidelines on the definition of relevant market;
- the guidelines on certain toll manufacturing agreements between non-competitors;
- the guidelines on the voluntary notification of agreements, concerted practices and decisions of associations of undertakings;
- the guidelines on the explanation of the Block Exemption Communiqué on vertical agreements;
- the guidelines on certain subcontracting agreements between non-competitors;
- the guidelines on the explanation of the Block Exemption Communiqué on vertical agreements and concerted practices in the motor vehicle sector;
- the guidelines explaining of the application of articles 4 and 5 of the Law on Protection of Competition on Technology Transfer Agreements;
- the guidelines explaining the Regulation on Active Cooperation for Discovery of Cartels;
- the guidelines on horizontal cooperation agreements;
- the guidelines on the assessment of horizontal merger and acquisitions;
- the guidelines on the assessment of non-horizontal mergers and acquisitions;
- the guidelines on mergers and acquisitions transactions and the concept of control;
- the guidelines on the general principles of the exemption;
- the guidelines on the assessment of exclusionary conduct by dominant undertakings;
- the guidelines on evaluation of competition; and
- the guidelines on vertical agreements.

There is a potential draft law proposal on the matter. The Draft Proposal for the Amendment of the Competition Law (Draft Law) was submitted to the Grand National Assembly of Turkish Republic on 23 January 2014. In 2015, the Draft Law became obsolete due to the general elections in June 2015. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law.

5 Which authorities investigate and decide on pharmaceutical mergers and the anticompetitive nature of conduct or agreements in the pharmaceutical sector?

The national authority that enforces the Competition Law in Turkey is the Authority, a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board (the Board), and the Presidency and Service Departments. As the competent body of the Authority, the Board is responsible for, inter alia, reviewing or resolving mergers and investigating or deciding on anticompetitive conduct and agreements. The Board consists of seven members and is seated in Ankara. The service departments consist of five technical enforcement units and eight technical support units. There is a 'sectoral' job definition for each technical unit and all competition law-related issues of the pharmaceutical sector are reviewed by the Third Supervision and Enforcement Department. There is no other specific authority that investigates or decides on pharmaceutical mergers and anticompetitive effects of conduct or agreements in the pharmaceutical sector.

6 What remedies can competition authorities impose for anticompetitive conduct or agreements by pharmaceutical companies?

In the case of a proven anticompetitive conduct or agreement, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in case there is a possibility of serious and irreparable damages.

Furthermore, undertakings and associations of undertakings condemned by the Board for violating article 4 through an anticompetitive conduct or agreement may be given administrative fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not calculable, in the financial year nearest the date of the fining decision). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking.

The Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) is applicable for calculation of monetary fines in the case of antitrust violations. According to the Regulation on Fines, fines are calculated by first determining the base fine, which in the case of non-cartel behaviour ranges between 0.5 per cent and 3 per cent, and 2 per cent and 4 per cent for cartel behaviour of the company's turnover in the financial year preceding the date of the decision to impose a fine. If this is not calculable, the turnover for the financial year nearest to the date of the decision is to be considered in calculation. The Competition Law makes reference to article 17 of the Law on Minor Offences to

require the Board to take into consideration factors, such as the level of fault and the amount of possible damage in the relevant market; the market power of the undertakings within the relevant market; the duration and recurrence of the infringement; the cooperation or driving role of the undertakings in the infringement; the financial power of the undertakings; and compliance with the commitments, etc, in determining the magnitude of the monetary fine.

7 Can private parties obtain competition-related remedies if they suffer harm from anticompetitive conduct or agreements by pharmaceutical companies? What form would such remedies typically take and how can they be obtained?

Private parties can seek to obtain competition-related remedies. Even though an antitrust matter is primarily adjudicated by the Board, enforcement is also supplemented by private lawsuits. In private suits, antitrust violators are adjudicated before regular courts. Turkey is one of the exceptional jurisdictions where a treble damages clause exists in the law. Private antitrust litigations increasingly make their presence felt in the antitrust enforcement arena due to a treble damages clause allowing litigants to obtain three times their loss as compensation. Most courts wait for the decision of the Board and build their own decision on that decision (eg, *Ford/Sahsuvaroglu*, 99-58/624-398, 21 December 1999; *Peugeot/Maestro*, 06-66/885-255, 19 September 2006). The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply and cartel allegations. However, this is a growing area as private antitrust lawsuits become more common.

8 May the antitrust authority conduct sector-wide inquiries? If so, have such inquiries ever been conducted into the pharmaceutical sector and, if so, what was the main outcome?

Yes. The Authority may conduct sector-wide inquiries as part of its competition advocacy role. The Authority has completed the full sector inquiry for the pharmaceutical sector and published the Pharmaceutical Sector Report (the Report) on 27 March 2013.

The report is akin to the Pharmaceutical Sector Inquiry Report of the EC. It mainly focuses on sector-specific regulations, such as licensing, pricing, refunding conditions of pharmaceuticals and the status and the effects of patents in the market. It underlines that the applicable regulations are closely modelled with EC regulations; however, unlike the practice in Europe there are still remarkable delays in the completion of licencing applications that cause barriers for market entries. Therefore, it suggests amending the relevant legislation and shortening the application terms for an efficient competition environment despite positive progress in the release of the products on the market. The Report also indicates that the patent protection is a major necessity for the sector. It further underlines that the Board will be more active for commercialisation agreements and will evaluate the risk of coordination more cautiously.

9 To what extent do non-government groups play a role in the application of competition rules to the pharmaceutical sector?

There is an interplay between non-governmental organisations (eg, the Association of Research-Based Pharmaceutical Companies, the Pharmaceutical Manufacturers Association of Turkey) and the Authority. Non-governmental organisations, such as trade associations, can and do bring their antitrust complaints before the Authority. Private antitrust litigation by non-governmental organisations is not a very common feature of Turkish antitrust enforcement as yet, though the number of relevant cases is increasing.

Review of mergers

10 Are the sector-specific features of the pharmaceutical industry taken into account when mergers between two pharmaceutical companies are being reviewed?

Sector-specific features of the pharmaceutical industry such as product innovation, research and development (R&D), pricing, and distribution or licensing requirements play an important role in the Authority's review of mergers. In practice, the market definition and substantive tests rely heavily on such sector-specific features (eg, *Allergan Plc*, 20 November 2015, 15-41/679-241; *Pfizer*, 7 April 2011, 11-22/386-120; *Zentiva/PPF*, 9 July 2008, 08-44/608-233).

11 How are product and geographic markets typically defined in the pharmaceutical sector?

The Board's Guideline on the Definition of the Relevant Market provides that demand substitution, supply substitution and potential competition should be considered when defining the relevant market. Typically, demand-side substitutability is the main reference point in market definition tests.

In cases that concern the pharmaceutical industry, the Board typically uses Intercontinental Medical Statistics' data and anatomical therapeutic chemical (ATC) product classification. The ATC classification is hierarchical and has 16 categories (A, B, C, D, etc), each with up to four levels. The first level (ATC1) is the most general and the fourth level (ATC4) is the most detailed. The Board usually relies on the third level of the ATC classification (ATC3), which allows medicines to be grouped in terms of their therapeutic indications (ie, their intended use), as a starting point for inquiring about product market definition in competition cases (eg, *Reckitt Benckiser*, 7 July 2015, 15-28/344-114; *Valeant*, 11 July 2013, 13-44/552-246; *Actavis/Roche*, 15 November 2007, 07-86/1082-418; *UCB/Schwarz Pharma*, 14 December 2006, 06-90/113-335; *Solvay/BTG*, 6 December 2006, 06-87/1134-332; *Actavis/Alpharma*, 15 December 2005, 05-84/1151-331). There have been cases, albeit rarely, where the Board has also taken into account ATC4 classifications or has opted for a narrower market definition than the ATC3 classification (*Roche*, 16 November 2016, 16-39/642-288; *Novartis/Ebewe Spezial-Pharma*, 17 June 2010, 10-44/783-260; *GlaxoSmithKline*, 3 June 2004, 04-40/453-114; *Pfizer/Sanovel*, 18 March 2004, 04-20/206-42).

The Board consistently defines the relevant geographical market as Turkey, without further segmentation on the basis of different regions of the country.

12 Is it possible to invoke before the authorities the strengthening of the local or regional research and development activities or efficiency-based arguments to address antitrust concerns?

Yes. Similar to article 101(3) of the Treaty of the Functioning of the European Union (TFEU), article 5 of the Competition Law provides that the prohibition contained in article 4 may be declared inapplicable in the case of agreements between undertakings that contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and that do not impose restrictions that are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned. This individual exemption test is done on a case-by-case basis and the Board does give weight and effect to industrial-policy type arguments, to the extent they are relevant to the conditions of individual exemption, as confirmed by the recently enacted guidelines.

13 Under which circumstances will a horizontal merger of companies currently active in the same product and geographical market be considered problematic?

Concentrations that do not create or strengthen a dominant position and do not significantly impede effective competition in a relevant product market within all or part of Turkey are to be cleared by the Board. Article 3 of the Competition Law defines dominant position as:

> *any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply.*

Market shares of about 40 per cent and higher can be considered, along with other factors such as vertical/horizontal foreclosure or barriers to entry, as an indicator of a dominant position in a relevant product market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes the competition in the whole territory of Turkey or in a substantial part of it, pursuant to article 7 of the Competition Law. Unilateral effects have been the predominant criteria in the Authority's assessment of mergers and acquisitions in Turkey. That said, there have been a couple of exceptional cases where

the Board discussed the coordinated effects under a 'joint dominance test' (*Henkel*, 20 January 2009, 09-03/47-16; *Petrol Sanayi Derneği*, 20 September 2007, 07-76/907-345; *Gaziantep Çimento*, 20 December 2005, 05-86/1190-342; *TEB*, 18 September 2000, 00-35/393-220).

Therefore, the existence of an overlap and the resulting market shares are not in and of themselves sufficient to raise a competition law concern. The structure of the market, potential competition (such as pipeline products or new R&D investments), market positioning of competitors, barriers to entry, growth projections, etc, are all important parameters of the dominance and 'significant lessening of competition' tests.

14 When is an overlap with respect to products that are being developed likely to be problematic? How is potential competition assessed?

There is no specific provision or case law on this matter. That said, potential competition such as pipeline products or new R&D investment is a parameter to be factored in when reviewing a merger.

Potential competition is formed by firms operating in the relevant market with a potential to increase its capacity in short term, and with a potential to enter into the relevant market, even though it is not currently active. The analysis of potential competition in the Competition Board's past decisions usually focuses on the discussion of barriers to entry (see, eg, *Johnson and Johnson*, 28 July 2015, 15-32/461-143; *Henkel*, 20 January 2009, 09-03/47-16, *Condat SA Henkel*, 4 July 2007, 07-56/659-229). While evaluating the competitive effects of a merger filing, the Board considers whether an entry to the relevant market is possible and a potential entry to the relevant market would avoid the anticompetitive effect of the merger transaction, as also indicated in Guidelines for Horizontal Mergers.

15 Which remedies will typically be required to resolve any issues that have been identified?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The Board is explicitly given the right to secure certain conditions and obligations to ensure the proper performance of commitments. Pursuant to the relevant guideline, it is at the parties' own discretion whether to submit a remedy. The Board will neither impose any remedies nor ex parte change the submitted remedy. In the event the Board considers the submitted remedies insufficient, it may enable the parties to make further changes to the remedies. If the remedy is still insufficient to resolve competition problems, the Board may not grant clearance.

The form and content of the divestment remedies vary significantly in practice. Examples of pro-competitive remedies acceptable to the Board include divestitures, ownership unbundling, legal separation, licensing requirements, access to essential facilities and obligations to apply non-discriminatory terms (eg, *Novartis*, 8 July 2010, 10-49/929-327; *Novartis*, 26 May 2005, 05-36/450-103; *Syngenta*, 29 July 2004, 04-49/673-171; *DSM NV/Roche*, 11 September 2003, 03-60/730-342; *Glaxo Wellcome/SmithKline Beecham*, 3 August 2000, 00-29/308-175). As a general rule, structural remedies take precedence over behavioural remedies. To that end, behavioural remedies can be considered in isolation only if structural remedies are impossible to implement and behavioural remedies are beyond doubt as effective as structural remedies. In order for behavioural remedies to be accepted alone, such remedies must produce results as efficient as divestiture, such as:

> *it must be sufficiently clear that lowering of entry barriers by the access rights given through the proposed remedy will lead to the entry of new competitors in the market and significant lessening of competition will be eliminated* (paragraph 77 of the Guidelines on Acceptable Remedies).

16 Would the acquisition of one or more patents or licences be subject to merger reporting requirements? If so, when would that be the case?

The acquisition of one or more patents or licences would amount to a concentration within the meaning of Turkish merger control rules, if and to the extent the patent or licence in question amounts to an operable asset. The acquisition would be subject to the reporting and approval requirements, subject to the applicable turnover thresholds being met.

Anticompetitive agreements

17 What is the general framework for assessing whether an agreement or practice can be considered anticompetitive?

Article 4 of the Turkish Competition Law is akin to and closely modelled on article 101(1) of the TFEU. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board.

Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal.

The Turkish antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'.

18 To what extent are technology licensing agreements considered anticompetitive?

The answer to this question depends heavily on whether the technology licensing agreement in question benefits from Communiqué No. 2008/2. Communiqué No. 2008/2 is akin to and closely modelled on the Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of article 101(3) of the Treaty to categories of technology transfer agreements. Accordingly, factors such as the market shares of the parties (30 per cent for competitors and 40 per cent for non-competitors), contents of the agreement, competition between the parties, etc, would be essential in assessing whether the agreement is anticompetitive. Hard-core restrictions in technology licensing agreements such as price fixing or maintenance, restriction of output, market or territory sharing are considered anticompetitive. Communiqué No. 2008/2 exempts a broader range of restrictive provisions, if the agreement is between non-competitors.

19 To what extent are co-promotion and co-marketing agreements considered anticompetitive?

The answer to this question depends heavily on whether the parties to the co-promotion or co-marketing agreement compete with each other at the manufacturing level. If the answer is negative, the agreement might benefit from the block exemption available under Communiqué No. 2002/2. If the answer is affirmative, any restrictive provisions must fulfil the conditions of individual exemption.

In any event, there have been cases where the Board reviewed and analysed co-promotion and co-marketing agreements. These agreements are considered anticompetitive when and to the extent they:

- serve as a tool to fix prices or other sales terms (eg, *Biovesta/Abdi İbrahim*, 27 November 2012, 12-60/1597-581);
- enable the parties to share customers, markets or territories;
- enable the parties to control the output or demand; or
- restrict competition by hindering competitors, forcing competitors out of the market or preventing potential new entries (eg, *Eczacıbaşı/Gül*, 12 September 2014, 14-32/647-284; *Abdi İbrahim*, 9 May 2013, 13-27/368-170; *Merck Sharp*, 18 July 2012, 12-38/1086-345; *Abbot/Eczacıbası*, 15 March 2007, 07-23/227-75; *Sandoz/Eli Lilly*, 2 August 2007, 07-63/776-282).

The guidelines on horizontal cooperation agreements lay down the basics of the competition law analysis of similar co-promotion and co-marketing agreements, including the above-listed principles.

Update and trends

The past year did not see any ground-breaking cartel cases or record fines for cartel activity in the pharmaceutical sector. In fact, there has been an easily detectable decline in the number of cartel cases. Most of the full-fledged investigations did not result in monetary fines against the defendants. The majority of cases comprised individual exemption applications of pharmaceutical distributors that are opting for exclusivity schemes for certain distribution channels such as public tenders.

Most notably, there have been changes in the Competition Board's seating as 2016 saw three members of the Board being replaced.

As mentioned above, there is a potential draft law proposal pending. The Draft Proposal for the Amendment of the Competition Law (Draft Law) was submitted to the Grand National Assembly of Turkish Republic on 23 January 2014. In 2015, the Draft Law became obsolete due to the general elections in June 2015. As reported in their 2015 Annual Report, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law.

In terms of recent landmark case law, the Board recently concluded that six cement companies operating in the Aegean region of Turkey violated Article 4 of the Competition Law by sharing sales territories and increasing resale prices in collusion in the Aegean region (14 January 2016, 16-02/44-14). The decision is pertinent in that the Board classified the case as 'cartel' and defined cartels in a manner that encapsulates both agreements and concerted practices. The Board fined the cement producers by a total of approximately 71 million Turkish lira. The fines ranged between 3 per cent and 4.5 per cent of each company's 2014 annual turnover. These fines were relatively high in the Turkish jurisdiction in terms of turnover percentage.

20 What other forms of agreement with a competitor are likely to be an issue? Can these issues be resolved by appropriate confidentiality provisions?

A number of horizontal restrictive agreement types with actual or potential competitors, such as price fixing, market allocation, output restriction, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. On the other hand, agreements such as licensing, R&D, co-marketing and co-manufacturing can be exempted from the article 4 prohibition under an effects-based test, since they may bring about economic or technological efficiencies. Putting in place appropriate confidentiality conditions and Chinese wall separation mechanisms may assist in preventing coordinated behaviour, reducing the exposure risks of collusion or claims of facilitating collusion between the parties. In any event, this issue warrants a case-by-case analysis.

21 Which aspects of vertical agreements are most likely to raise antitrust concerns?

Provisions that may serve as a direct or indirect tool to orchestrate resale price maintenance, exclusivity clauses, customer or territory allocations or restrictions, non-compete obligations, provisions that facilitate information exchanges and most-favoured customer clauses are typical examples of vertical arrangements that are most likely to raise competition law concerns. The analysis should be handled in view of Communiqué No. 2002/2. Under Communiqué No. 2002/2, agreements between two or more undertakings operating at different levels of the production or distribution chain are exempted from the article 4 prohibition, provided that they meet the conditions mentioned in the Communiqué. The Communiqué brings about a 40 per cent market share threshold so vertical agreements of undertakings with market shares that exceed 40 per cent cannot benefit from the block exemption. Such undertakings may apply to the Authority for an individual exemption or carry out a self-assessment to see if the vertical agreement in question meets the conditions of individual exemption.

Resale price maintenance

Communiqué No. 2002/2 does not exempt agreements that directly or indirectly restrict the buyer's ability and freedom to determine its own resale prices (eg, *Reckitt Benckiser*, 13 June 2013, 13-36/468-204; *Anadolu Elektrik*, 23 June 2011, 11-39/838-262; *Bakara İlaç*, 31 March 2010, 10-27/394-147; *Benckiser*, 3 July 2008, 08-43/591-223; *Frito-Lay*, 11 January 2007, 07-01/12-7). However, indications in practice suggest that the Board is increasingly unlikely to adopt a dismissive approach towards resale price maintenance behaviour (*Dogati*, 22 October 2014, 14-42/764-340).

Exclusivity, restrictions on customers and territories

Provisions that extend beyond what is permissible under an appropriately defined exclusive distribution system, such as restriction of passive sales, cannot benefit from the block exemption and may exclude the vertical agreement from the application of Communiqué No. 2002/2 (eg, *Trakya Cam*, 2 December 2015, 15-42/704-258; *Mey İçki*, 12 June 2014, 14-21/410-178; *Novartis*, 4 July 2012, 12-36/1045-332; *Turkcell*, 6 June 2011, 11-34/742-230; *Unilever*, 15 May 2008, 08-33/421-147; *Pfizer/Dilek Ecza*, 2 August 2007, 07-63/774-281; *Karbogaz*, 23 August 2002, 02-49/634-257).

Non-compete obligations

Non-compete obligations for more than five years and non-compete provisions that are designed to remain in effect post-termination cannot benefit from the block exemption (eg, *Sanofi Aventis*, 2 November 2012, 12-59/1570-571; *Boehringer*, 27 October 2011, 11-54/1389-497; *Yatsan Sünger*, 23 September 2010, 10-60/1251-469; *Boydak*, 2 November 2011, 11-55/1434-509; *BP*, 23 September 2010, 10-60/1261-473; *Industrial Ice-cream*, 15 May 2008, 08-33/421-147; *Takeda*, 3 April 2014, 14-13/242-107).

Other

Other forms of special clauses such as provisions that facilitate information exchanges and most-favoured customer clauses might also raise competition law concerns. Such clauses warrant close consideration and case-by-case analyses.

22 To what extent can the settlement of a patent dispute expose the parties concerned to liability for an antitrust violation?

There is no specific statutory provision or case law on this matter.

23 Are anticompetitive exchanges of information more likely to occur in the pharmaceutical sector given the increased transparency imposed by measures such as disclosure of relationships with HCPs, clinical trials, etc?

The pharmaceutical market is indeed considerably more transparent than other markets. Transparent markets are generally considered to be more suitable for anticompetitive exchanges. However, this does not readily apply to the pharmaceutical sector since the industry is highly regulated. Types of strategic information that are highly sought after in other markets simply do not carry the same weight in the pharmaceutical sector because of the regulatory interests. As detailed above, pricing is closely monitored by the authorities and regulated by the law-maker.

Disclosure of relationships regarding clinical trials, etc, would not lessen the competition in the market to the extent that these disclosures do not contain information that would be directly relevant to the competition.

Anticompetitive unilateral conduct

24 In what circumstances is conduct considered to be anticompetitive if carried out by a firm with monopoly or market power?

The main legislation applying specifically to the behaviour of dominant firms is article 6 of the Competition Law. It provides that 'any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited'.

Article 6 brings a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the TFEU. Accordingly, such abuse may, in particular, consist of:

- directly or indirectly preventing entries 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 or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;
- distorting competition in other markets by taking advantage of financial, technological and commercial superiority in the dominated market; and
- limiting production, markets or technical development to the prejudice of consumers.

25 When is a party likely to be considered dominant or jointly dominant?

Article 3 of the Competition Law defines dominance as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers'. Enforcement trends show that the Board is increasingly inclined to somewhat broaden the scope of application of the article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases of dependence or interdependence (eg, *Anadolu Cam*, 1 December 2004, 04-76/1086-271; *Warner Bros*, 24 March 2005, 05-18/224-66).

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

The wording of article 6 also prohibits abuse of collective dominance. Precedents on collective dominance are neither abundant nor mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance would be alleged. That said, the Board has considered it necessary to establish 'an economic link' for a finding of abuse of collective dominance (see, for example, *Turkcell/Telsim*, 9 June 2003, 03-40/432-186; *Biryay*, 17 July 2000, 00-26/292-162).

26 Can a patent holder be dominant simply on account of the patent that it holds?

Holding a patent would not in and of itself place the undertaking in a dominant position. The dominant position test should be handled in view of the factors mentioned in question 25.

The precedents of the Board do not yet include a finding of dominant position or infringement on the basis of a patent or abuse of intellectual property rights.

27 To what extent can an application for the grant or enforcement of a patent expose the patent owner to liability for an antitrust violation?

There is no specific case law on this matter. Theoretically speaking, an application for a patent may result in the applicant's antitrust liability if and to the extent that:
- the applicant is in a dominant position in the relevant market;
- the application amounts to an abuse; and
- the application is incapable of justification under objective and legitimate reasons.

There is no specific precedent or case law on this matter. Theoretically speaking, the answer to question 27 would apply here as well. Misusing the legal proceedings that result from the enforcement of patent rights to prevent the entry of generics (sham litigation) might theoretically result in the dominant patent owner's antitrust liability.

28 Can certain life-cycle management strategies also expose the patent owner to antitrust liability?

There is no specific precedent or case law on this matter. Even if they result in the prevention of new market entries, life-cycle management strategies would not raise competition law concerns, if and to the extent they are used for legitimate business purposes such as taking full benefit of the patent system and are capable of justification under objective criteria.

29 May a patent holder market or license its drug as an authorised generic, or allow a third party to do so, before the expiry of the patent protection on the drug concerned, to gain a head start on the competition?

The concept of 'authorised generics' is not defined in Turkish pharmaceutical laws. That is because the licensing regulations in Turkey allow only one licence for a formula. However, there appears to be no legal roadblock against the patent owner gaining a head start on the competition by marketing a generic through establishing a new company and an abridged licence application process.

30 To what extent can the specific features of the pharmaceutical sector provide an objective justification for conduct that would otherwise infringe antitrust rules?

Sector-specific features of the pharma industry may provide good objective justifications for conduct that can otherwise be viewed as anticompetitive. For instance, price control regulations and statutory market monitoring mechanisms justify suppliers' attempts to track the products, which might otherwise raise competition law concerns in some other industries (eg, *3M*, 13 March 2007, 07-22/207-66). Similarly, the obligation on manufacturers and wholesalers to keep adequate supply of medicines at all times may justify sales and export restrictions (*Pfizer/Dilek Ecza*, 2 August 2007, 07-63/774-281). Similarly, designating distributors to attend public tenders on an exclusive capacity has also been found to serve the public good by keeping hospital inventories stocked (eg, *Roche*, 16 November 2016, 16-39/642-288; *Roche*, 13 October 2016, 16-33/569-247; *Daiichi*, 8 September 2016, 16-30/504-225).

31 Has national enforcement activity in relation to life cycle management and settlement agreements with generics increased following the EU Sector Inquiry?

Not applicable.

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