IN-DEPTH

Dominance And Monopolies

TÜRKIYE

LEXOLOGY

Dominance and Monopolies

EDITION 12

Contributing Editors

Maurits Dolmans , Henry Mostyn and Patrick Todd

Cleary Gottlieb Steen & Hamilton LLP

In-Depth: Dominance and Monopolies (formerly The Dominance and Monopolies Review) provides an accessible and easily understandable summary of global abuse of dominance rules. Each jurisdiction-specific chapter – authored by specialist local experts – highlights the most consequential legal and regulatory provisions; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments.

Generated: August 27, 2024

Türkiye

Bahadır Balkı, Ertuğrul Can Canbolat, Can Yıldız and Sera Erzene Yıldız
ACTECON

Summary

Introduction

Simply put, abuse of dominance is one of the main forms of violation of the competition rules in Türkiye, akin to many other jurisdictions. Article 6 of Law No. 4054 on the Protection of Competition (Competition Law), which states that 'the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited', forms the basis of the statutory framework in Türkiye regulating the conduct of dominant firms.

As can be inferred from the wording of the Article, this provision, forbidding the abusive exploitation of a dominant market position, only targets dominant firms. Much like Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited or penalised in any way but the abuse of such dominance is.

Article 6 and other aspects of the Competition Law apply to all companies and individuals, provided they act as undertakings as defined by the Competition Law. An undertaking is considered a real and legal person who produces, markets and sells goods or services in a market, or a unit that can make independent decisions and constitute an economic whole. Consequently, the Competition Law covers both individuals and corporations if they function as undertakings, including state-owned and state-affiliated entities.

The Competition Law does not identify any industry-specific abuses or defences, meaning that certain regulatory authorities are responsible for regulating certain activities of dominant firms in their sectors, such as in energy and telecommunications. These sector-specific rules are designed to support the free market's effective functioning through structural remedies but do not include dominance-control mechanisms. That being said, the Turkish Competition Authority (the Authority or TCA) is the only body authorised to investigate and penalise abuses of dominance, and also has the jurisdiction to investigate and fine undertakings active in sectors regulated by other regulatory authorities.

In the realm of developments in digital markets, the Authority has shown a particular interest in digital platforms recently, and is known to be crafting regulations for digital markets, drawing on the Digital Markets Act (DMA) as a foundation. This is expected to be in the form of an amendment to the Competition Law and is predicted to bring the most substantial change to digital market laws, and is likely to integrate elements of the EU DMA with an increased antitrust focus on digital markets and introducing concepts such as 'gatekeepers' to Turkish competition law.

Year in review

In 2023, based on the TCA's yearly decision statistics report, the Competition Board (the decision-making body of the TCA) rendered 18 decisions within the sole scope of Article 6 (abuse of dominance). In addition, there were six decisions rendered within the scope of both Articles 6 and 4 (anticompetitive agreements) out of 145 decisions rendered in total.

One of the prominent dominance investigations of 2023 involved allegations against Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret AS (Sahibinden) for abusing its dominant position.[1] Initiated in September 2021, the case concluded that Sahibinden held a dominant position in the online platform services markets for real estate sales/rentals and vehicle sales activities for corporate members. The TCA determined that Sahibinden hindered corporate members from using multiple platforms by blocking data transfers to other platforms. Additionally, through non-competition clauses in its contracts, Sahibinden enforced de facto and contractual exclusivity, thereby complicating its competitors' activities. Consequently, the TCA imposed an administrative fine of 40.15 million Turkish lira on Sahibinden along with multiple remedies to be fulfilled by Sahibinden to ensure data portability.

A more recent decision concluding another investigation, which was also initiated back in September 2021, concerned the allegations that DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (Trendyol) engaged in self-favouritism and discrimination between sellers on its platform.[2] The TCA found that: (1) Trendyol held a dominant position in the multicategory e-marketplace market; and (2) Trendyol engaged in self-favouritism by providing unfair advantage to its own retail activity by interfering with the algorithm and using the data of third-party sellers selling on the marketplace, which are actions with the nature of making the activities of its competitors more difficult and violating Article 6 of the Competition Law. Therefore, the TCA: (1) fined Trendyol 61.3 million lira; and (2) imposed multiple technical and structural obligations on Trendyol to terminate the violation as well as to re-establish competition.

The following table provides the significant TCA decisions of the on abuse of dominance.
Significant TCA decisions on abuse of dominance

Investigated Party	Type of the Case	Conclusion
The economic unit of Facebook, consisting of Meta Platforms, Inc., Meta Platforms Ireland Limited and WhatsApp LLC (22 - 48/706 - 299 of 20 October 2023)	Tying and bundling	The TCA found that: (1) Facebook is in a dominant position in social networking services for personal use, consumer communication services and online video advertising markets; and (2) by combining the data collected from Facebook, Instagram and WhatsApp services, Facebook distorted competition and violated Article 6 of the Competition Law by making the activities of its competitors operating in the social networking services for personal use and

		online display advertising markets difficult and creating an entry barrier to the market. The undertaking was imposed a hefty fine of 346.7 million lira along with multiple obligations.
Obilet Bilişim Sistemleri AŞ (23 - 27/521 - 177 of 15 June 2023)	Tying and exclusivity	The TCA found that: (1) Obilet Bilişim Sistemleri AŞ may have a dominant position in the 'ticketing software service market for bus transport', 'distribution of bus timetable data to platforms (B2B) service market' and 'sale of bus tickets via platforms (B2C) service market'; (2) that the ticketing software service for bus transport is de facto linked to the sale of bus tickets via platforms; and (3) the commitments offered by Obilet in terms of the behaviours that are considered to violate Articles 4 and 6 are capable of eliminating the competitive concerns identified within the scope of the file. Therefore, the TCA terminated the investigation initiated against Obilet without any fines.
D Elektronik Şans Oyunları ve Yayıncılık AŞ	Exclusivity	Nesine, which dominates the 'fixed odds betting by virtual dealers' market, was found to have abused its position by signing exclusive agreements for advertising, promotion and sponsorship with sports clubs, as well as

		stadium advertisements, and exclusive agreements with Maçkolik İnternet Hizmetleri Ticaret AŞ for ad services. As a result, the TCA fined Nesine 77.71 lira and imposed several behavioural remedies in line with Article 9.

Some of the most prominent abuse of dominance investigations are provided in the following table.[3]

Significant investigations into abuse of dominance

Investigated Party	Conduct	Date of Initiation
Apple Inc. and Apple Teknoloji ve Satış Limited Şirketi	Abuse of dominance by exclusionary practices	21 May 2024
Frito Lay Gıda San. ve Tic. AŞ	Obstructing the activities of competitors	21 March 2024
Novozymes Enzim Dış Tic. Ltd. Şti., Novozymes Berlin GmbH, Novozymes France S.A.S., Novozymes Switzerland AG and Novozymes North America	Hindering and obstructing the activities of competitors	28 March 2024
Yemek Sepeti Elektronik İletişim Perakende Gıda AŞ	Tying, obstructing the activities of member enterprises	7 March 2024
Tetra Laval Holding - Finance SA and Tetra Pak Paketleme Sanayi ve Ticaret Limited Şti.	Exclusionary practices on competitors	29 December 2022
Alphabet Inc., Google LLC, Google International LLC, Google Ireland Limited ve Google Reklamcılık ve Pazarlama Ltd. Şti.	Obstructing the activities of content providers by discriminatory practices	12 January 2023
Çiçeksepeti İnternet Hizmetleri AŞ	Self - favouritism and exclusionary practices	11 January 2024

Market definition and market power

As per Article 3 of the Competition Law, dominant position means that one or more undertakings within a particular market wield the power to independently determine economic parameters such as price, supply, production levels and distribution, irrespective of their competitors and customers.

The extent which the undertaking concerned can act independently of competitive pressure is examined on a case-by-case basis when assessing dominant position. The main factors taken into consideration in the assessment of dominant position are:

1. the positions of the undertaking examined and its competitors in the relevant market,
2. barriers to entry and expansion in the market, and
3. bargaining power of buyers.[4]

Article 6 of the Competition Law clearly prohibits collective dominance by including the abuse of dominant position by 'one or more undertakings'. In terms of collective dominance, it is important that more than one undertaking exhibits the common will to act in the same way as a dominant undertaking and that the market conditions are convenient for this.[5] Collective dominance is a highly uncommon occurrence in practice. Despite the Board's limited precedent on collective dominance, the implicit or explicit common policy of undertakings and economic linkage are often cited as the factors indicating collective dominance.[6]

The definition of the relevant market forms the foundation for determining whether the undertaking concerned holds a dominant position. Identifying the relevant market involves product and geographical area.

Demand substitution is evaluated when making the market definition. This involves identifying other products that consumers perceive as interchangeable with the relevant product. The analysis assumes a slight and temporary change in prices, evaluating how consumers might react to such changes. Supply substitution is also considered if it has equivalent effect to demand substitution. This entails suppliers being capable of shifting their production to other products in response to small and non-transitory price increases and being able to market these products without significant additional costs or risks in the short term. However, potential competition is typically not factored into market definition because it does not offer the same efficiency as demand substitution in yielding prompt outcomes.

The geographical market definition hinges on analysing the distribution of market shares among the parties and competitors, as well as examining price differentials. It evaluates whether undertakings in different regions can serve as alternative sources of supply based on customer demand.

Even though there is no specific market share threshold that proves an undertaking is dominant, the precedent of the Board foresees, in the absence of any indication to

the contrary, to accept that undertakings holding less than 40 per cent of the market share are less likely to be dominant,[7] and more detailed examinations are conducted for undertakings with a higher market share. However, it is accepted by the Board that an undertaking with a market share of less than 40 per cent may also be in a dominant position, considering the characteristics of the relevant market.[8]

Abuse

Overview

Article 6 of the Competition law prohibits 'the abuse, by one or more undertakings of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices'. This article also provides a non-exhaustive list of common abuses, which are:

1. preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market;
2. making direct or indirect discrimination between purchasers with equal status by offering different terms for the same and equal rights, obligations and acts;
3. purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price;
4. conduct that aims to distort competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market; and
5. restricting production, marketing or technical development to the prejudice of consumers.

To provide further guidance on the nature of potential abuses, the Guidelines define abuse as a dominant undertaking taking advantage of its market power to engage in activities that are likely, directly or indirectly, to reduce consumer welfare. As such, any type of conduct that falls within this framework may be deemed as abuse of dominance. Abuse may be exclusionary or exploitative in nature.

When assessing exclusionary conduct, both the specific actions and their actual or potential market effects are considered. These effects can manifest in the dominant market or related markets. The focus is on whether the dominant undertaking’s behaviour leads to anticompetitive foreclosure.

When examining the presence of anticompetitive foreclosure, the Board, in general, takes the following points into account, on a case-by-case basis:

1. the position of the dominant undertaking;

2. the conditions in the relevant market;
3. the position of the dominant undertaking's competitors;
4. the position of the customers or suppliers;
5. the scope and duration of the conduct examined;
6. possible evidence of actual foreclosure; and
7. direct or indirect evidence of exclusionary strategy.

Furthermore, Article 2 of the Competition Law, employs an effects-based approach to detect anticompetitive behaviours. This approach focuses on the market impact as the decisive factor in determining whether a practice constitutes an abuse, irrespective of its specific nature. On the other hand, the Guidelines underscore the importance of considering both the specific conditions and the actual or potential market effects in evaluating exclusionary conduct.

Exclusionary abuses

Exclusionary pricing

In its previous decisions,[9] the Board analysed predatory pricing based on four elements:

1. Economic superiority of the undertaking
2. Unusually low price
3. Intention to harm competitors
4. Short-term losses traded for long-term gains

The Board does not consider below-cost sales to be sufficient for the determination of predatory pricing and assesses whether the behaviour examined is likely to lead to anticompetitive market foreclosure. In this assessment, the position of the dominant undertaking, the conditions in the relevant market, the position of the dominant undertaking's competitors, the position of customers or suppliers, the scope and duration of the conduct under investigation, possible evidence of de facto market foreclosure and direct or indirect evidence of exclusionary strategy are taken into account.[10]

Exclusive dealing

Exclusive dealing is regulated under Article 4 of the Competition Law on agreements, concerted practices and decisions limiting competition. Even though it can also be evaluated within the context of abuse of dominant position, the Board’s precedent in that regard is limited. In the Aydem[11] decision, the Board stated that the competitive concerns under Article 6 would be more profound in terms of the contracts concluded by an undertaking in a dominant position and evaluated the exclusivity agreements within the scope of abuse of dominant position. In the Unilever[12] decision, the Board assessed that the rebates applied by Unilever in the traditional channel have the purpose and effect of

making the activities of its competitors more difficult, thus leading to de facto exclusivity, and concluded that Unilever abused its dominant position. In the Doğan[13] decision, although no direct anti-competitive effects were found, it was decided that the rebate systems implemented by Doğan constituted an infringement due to the risk of exclusionary effects.

In Unilever decision,[14] Unilever, which holds a dominant position in the industrial ice cream, impulse ice cream and take-home ice cream markets, faced allegations of creating de facto exclusivity by blocking the sale of competing products at its final sale points, resulting in a fine of around 480 million lira for violating Article 4 and Article 6 of the Competition Law. The company abused its dominance by implementing a rebate system, imposing a non-compete obligation (previously prohibited by the TCA), and incorporating exclusivity clauses in loan agreements concerning the use of Unilever freezers.

Leveraging

As per the Guidelines, when assessing whether the practice of an undertaking with dominant position in the tying market is in violation of the Competition Law, the Board considers two factors:

1. the tying product and the tied product should be distinct; and
2. it should be likely for the tying practice to lead to anticompetitive foreclosure.

The Board, in its Google Android[15] decision, envisaged a six-step test for the determination of tying violation:

1. the existence of two separate products;
2. offering two separate products in one;
3. the dominant position of the undertaking in the tying product market;
4. actual or potential foreclosure effect in the connected product market;
5. damage to the consumer due to the application; and
6. unjustified application.

In its Obilet[16] decision, the Board applied the same six-step test and concluded that Obilet Bilişim Sistemleri AŞ's not paying the web service fee that it had previously paid within the framework of the revenue sharing model within the scope of the service provided in the B2B service market, and tying the ticketing software service for bus transport to the actual sale of bus tickets through platforms, may constitute an abuse of dominant position.

There are also two cases of the TCA concerning Google. In the first case,[17] the Board found Google's activities of unfairly disadvantaging competitors in the shopping comparison services sector, which resulted in complicating the operations of competitors and distorting market competition in breach of Article 6 of the Competition Law. Consequently, the Board imposed a fine totalling 98 million lira. On 29 July 2019, Google announced its intention to eliminate shopping ads, known as the 'Shopping Unit,' from its search pages in Türkiye starting 10 August 2019. The company cited uncertainties

regarding the acceptance of its proposed remedy package to comply with the Board's ruling as the reason for this decision.

In the second case,[18] Google was fined 196.7 million lira for abusing its dominance in the general search services market. The TCA's decision was based on allegations that Google hindered other undertakings' activities by unfairly updating its general search services and manipulating AdWords. Additionally, Google was criticised for displaying paid advertisements at the top of search results without adequately disclosing their commercial nature. Alongside the monetary penalty, Google was instructed to implement corrective measures to cease its anticompetitive practices and promote fair competition within six months. Moreover, Google must provide compliance updates and annual reports for five consecutive years.

Refusal to deal

When assessing claims of refusal to supply, the Board looks for the presence of all of the following three conditions in order to find a violation:

1. the refusal concerns a product or service that is indispensable to be able to compete in a downstream market;
2. the refusal is likely to lead to the elimination of effective competition in the downstream market;
3. consumer harm is a likely result of the refusal.[19]

In addition to these conditions the Board also considers justifiable grounds claimed by the undertaking concerned.[20]

The role of economics and in particular the as-efficient competitor test in investigations or litigation involving exclusionary abuses

Paragraphs 27 and 28 of the Guideline provide that the as-efficient competitor test examines whether a dominant firm's pricing practices, such as potential below-cost pricing, could unfairly exclude competitors of equal efficiency. The Board evaluates economic data to assess if these practices harm effective competition. If the data shows that equally efficient competitors can still compete effectively, the Board generally refrains from intervention, assuming no adverse impact on competition and consumers. However, if the dominant firm's pricing could exclude equally efficient competitors, the Board considers this in its broader assessment of potential anticompetitive effects, using additional relevant evidence as needed.

As per the Board's precedent, the as-efficient competitor test does not have to be used in every case of dominant position. The abuse of dominant position may be examined on a case-by-case basis, using different methods in accordance with the requirements of the case. In the Unilever[21] decision, it was assessed that the presence of a large number of products with different prices at a large number of locations of different sizes makes it difficult to determine the demand open to competition and the effective price that the competitor should offer, and that even if these are determined, a sound conclusion cannot be reached by using the as-efficient competitor test.

Discrimination

Discrimination (price and non-price) may be evaluated within the scope of abuse of dominant position under Article 6. In order for a practice to be considered discriminatory, the transactions must be on an equal basis. The imposition of different prices for unequal transactions is accepted as the commercial policy of the undertaking, unless proven otherwise.[22] In the Siemens[23] decision, the Board noted that imposing different prices on customers alone would not constitute discrimination within the scope of Article 6, but it would be decisive if the imposition of different prices means deterring or penalising customers who purchase technical service from others. Accordingly, these discriminatory pricing practices must occur in a systematic manner and as part of a specific strategy.

Exploitative abuses

The Board's precedent is to intervene in excessive pricing only under limited circumstances. The Board applies the Economic Value Test (EVT) in line with the practices of the Court of Justice of the European Union in determining the excessive pricing. This test comprises two parts (i.e., price cost difference test and price comparison analysis).[24]

When applying the EVT test, the Board adopts a flexible approach and may apply the price comparison method as a priority in case-specific assessments,[25] or, in cases where it is not possible to calculate the costs precisely, it may perform an excessive price analysis only through price comparison analysis without performing a price cost analysis.-[26] However, even if the price cost analysis reveals that the undertaking has incurred a loss, the price comparison test may be taken into account and the undertaking may be found to have imposed an excessive price.[27]

A certain profit margin is not stipulated in terms of determination of excessive pricing. In the Port Akdeniz decision,[28] the profit margin in the range of 55 to 67 per cent was deemed sufficient for the determination of excessive pricing, while in the Biletix and MTS decisions,[29] it was concluded that the margins in the ranges of 11 to 18 per cent and 25 to 30 per cent, respectively, were not sufficient for the determination of excessive pricing. In the Tüpraş decision, the fact that the prices imposed by Tüpraş in the last three months of 2008 were on average 15 per cent higher than the Platts Italy CIF Med prices selected as the reference price, and the export prices of Tüpraş were on average approximately 30 per cent higher than the domestic retail sales prices, were deemed sufficient for the determination of excessive pricing.

Remedies and sanctions

Sanctions

In cases of abuse of dominant position, the principles for determining administrative fines are primarily governed by Article 16 of Law No. 4054 and Article 4 of the Regulation on Administrative Fines Regarding Anti-Competitive Agreements, Concerted Practices and

Abuse of Dominant Position (Regulation). Pursuant to Article 16, an administrative fine can be up to 10 per cent of the annual gross revenue of the undertaking or association of undertakings, or its members, generated by the end of the financial year preceding the decision. If this cannot be calculated, it will be based on the closest financial year to the decision date. Additionally, if administrative fines are imposed on undertakings or associations of undertakings, its managers or employees with decisive influence in the violation may also face fines up to 5 per cent of the penalty imposed on the undertaking or association.

Based on the Regulation, administrative fines are calculated separately for each independent behaviour detected in terms of market, nature, and chronological process. For those who abuse their dominant position, the base fine will be 0.5 per cent to 3 per cent of the annual gross revenue of the undertaking or association of undertaking. These base fines are subject to adjustments based on aggravating and mitigating factors.

When determining the administrative fine, the Board considers factors such as the recurrence and duration of the violation, market power of the entities involved, their role in the violation, compliance with commitments, cooperation with the investigation and the severity of damage caused or likely to be caused. From 1 January 2024 to 31 December 2024, the minimum amount of administrative fine for violations under Article 16 of Law No. 4054 is set at 167,473 lira, adjusted annually according to the revaluation rate.

It is noteworthy that the largest fine imposed so far for abuse of dominant position was in the Tüpraş case in TCA's decision numbered 14-03/60-24 and dated 17 January 2014, where the fine amounted to 412 million lira, equivalent to 1 per cent of the undertaking's annual turnover for the relevant year.

Behavioural and Structural Remedies

Article 9 of the Law No. 4054 outlines procedures for addressing violations and restoring competition. When the Board identifies an abuse of dominant position, it issues final decisions specifying actions undertakings must take to reestablish competition. These actions may include behavioural remedies or, if necessary and proportionate, structural remedies such as divesting certain businesses or assets. Behavioural remedies precede structural ones, which are only considered if behavioural remedies fail, with undertakings given at least six months to comply.

Also, according to Article 43 of Law No. 4054, relevant undertakings can propose commitments during preliminary inquiries or investigations aimed at resolving issues of abuse of dominant position. If the Board deems these commitments sufficient, they become binding, potentially avoiding or ending investigations. However, commitments are not accepted for serious violations such as price-fixing or market allocation. If the Board's decision finds significant changes in underlying factors, violations of commitments or false information, it may reopen investigations. Commitments must effectively address competition issues and be promptly implemented. Statements of intent to comply with the law do not count as commitments.

There is also a Communiqué No. 2021/2 on the Commitments to be Submitted in Preliminary Investigations and Investigations into AntiCompetitive Agreements, Concerted Practices and Abuse of Dominant Position. This communique sets out procedures for offering commitments to resolve competition issues, making these commitments binding

if accepted by the Board, and monitoring their implementation. Accordingly, requests for commitments during the investigation process shall be submitted to the Authority within the three months following the official delivery of the investigation notice. The Board may seek third-party comments on commitments. If the commitment text or any changes aren't submitted within the set period or are withdrawn, the commitment process ends. The Board can decide not to start or to stop an investigation by making commitments binding if it believes they resolve competition issues. The Board's decision does not include the determination of whether the agreement, decision or practice giving rise to the competition problem is or is not a violation.

For example, in an investigation against Storytel Turkey Yayıncılık Hizmetleri AS (Storytel),-[30] an audiobook platform, the TCA scrutinised the allegations that Storytel violated the Competition Law by preventing competitors from entering and growing in the online audiobook streaming services market through long-term exclusivity agreements with publishers and authors. During the investigation, Storytel submitted commitments to address the TCA's anticompetitive concerns. Pursuant to the commitments, Storytel agreed to amend its agreements so as not to grant Storytel an exclusive right to produce the audiobook format of a particular book. In addition, Storytel committed not be granted exclusivity/full licence over content distributed through content distribution agreements and narration agreements. The Board accepted the commitments and decided to conclude the investigation without imposing any fines.

Furthermore, in the Yemek Sepeti decision,[31] the Board found the narrow most favourite customer practice of Yemek Sepeti, the mandatory joker policy that obliges the user to receive discounts when certain conditions are met for individual restaurants, the mandatory minimum basket amount practice for individual restaurants and the valet practice that requires the user and the restaurant that purchase the platform service from Yemek Sepeti to also purchase the courier service from Yemek Sepeti to be of competitive concern. In line with the Guidelines, the Board stated that in cases where competitors cannot compete with the package offered by the dominant undertaking by offering a reasonable alternative package, anticompetitive effects may arise and these effects would be similar to predatory pricing. In this respect, it is important whether the total incremental revenue of the package offered by the dominant undertaking covers its incremental costs. As a result, it was assessed that Yemek Sepeti may distort the competition in the platform services market with its valet application and below-cost pricing in the platform and courier services market for online food service, and this may have an exclusionary effect on its competitors in the short and long term. In this context, the Board concluded that the commitments offered by Yemek Sepeti would eliminate the competition problems identified in the Investigation Report.

Procedure

Pursuant to Article 40 of the Competition Law, the Board determines whether to initiate a direct investigation or undertake a preliminary inquiry to ascertain the need for an investigation upon its own discretion or upon receiving applications. In the event it conducts a preliminary inquiry, the Board convenes to assess the information and decide whether to initiate an investigation within 10 days of receiving the preliminary inquiry report, which should be prepared by the case handlers within 30 days of initiating a

preliminary investigation. If an investigation is initiated, an investigation notice is served to the investigated parties, and the case handlers then prepare their comprehensive investigation report within six months (with a one-time possibility of an extension of an additional six months.

Throughout the investigation, in carrying out the duties assigned to it under the Competition Law, the TCA may request any information it deems necessary from all public institutions and organisations, undertakings and associations of undertakings. Moreover, the experts of the TCA may perform on-site inspections at undertakings and associations of undertakings in cases it deems necessary.

Furthermore, as per Article 9 of the Competition Law, the Board may take interim measures when serious and irreparable damage is likely to occur before the final decision is made, to preserve the situation as it was before the infringement, without exceeding the scope of the final decision.

In terms of defences to be submitted by the investigated undertakings in response, on 29 May 2024, certain provisions of the Competition Law were amended with Law No. 7511 on Amendments to the Turkish Commercial Code and Certain Laws published in the Official Gazette. Accordingly, the investigation procedure before the TCA undergone some major changes. Prior to the amendment, parties under investigation had the right to submit three written defences: the first written defence within 30 days of the investigation notice, the second written defence within 30 days of the investigation report (with an optional 30-day extension for valid reasons) and the third written defence within 30 days of receiving the additional written opinion from the Board (also with a potential 30-day extension for valid reasons). The Law Amendment has abolished the right to submit the first written defence in response to the investigation notice while right to submit the second written defence in response to the investigation report remains unchanged in terms of time periods.

On the other hand, the right to submit the third written defence in response to the additional written opinion has been conditioned upon the investigation committee's change in its opinions following the written defence submitted by the investigation parties in response to the investigation report. In this context, unlike the previous procedure, the investigation committee will only present an additional written opinion if there is a change in its opinions in the investigation report. If an additional written opinion is presented, the right to submit the third written defence will be limited to 30 days (the possibility of granting an additional 30 days to the investigation parties will no longer be available).

At the end of the procedure, within two months of the submission of the investigated parties' final written defence, an oral defence hearing is held upon the parties' request before the Board. After the oral defence hearing, the Board renders its final decision within 15 days. This short-form decision includes the outcome of the case, while the more detailed reasoned decision follows in approximately eight to 10 months.

Should the Board conclude the investigated parties have violated the Competition Law, it imposes administrative monetary fines on them. Furthermore, the Board is authorised to take the necessary measures to terminate the abuse of dominance. In this regard, certain behavioural or structural obligations may be imposed on the undertaking in order to ensure the violation is eliminated.

Pursuant to Article 55 of the Competition Law judicial review against decisions of the Board is open. Concerned parties have the right to challenge the Board's final decisions

within 60 days of receiving the Board's reasoned decision. Additionally, third parties can challenge Board decisions before the appropriate judicial body, provided they demonstrate a legitimate interest in doing so.

The Administrative Procedural Law foresees a three-tier review system including administrative courts, regional appellate courts and the Council of State, respectively. Regional courts will thoroughly examine case files on procedural and substantive grounds to reach their verdicts, which are generally final. However, in exceptional circumstances specified in Article 46 of the Administrative Procedure Law, decisions of regional courts may be subject to review by the Council of State. If the Council of State decides to intervene, it can either uphold or overturn the regional court's decision. If overturned, the case returns to the regional court for reconsideration in light of the Council of State's ruling.

Furthermore, it should be noted that the judicial review of the Board's decisions does not suspend the implementation of those decisions or the enforcement and collection of administrative fines automatically.

Private enforcement

Private antitrust actions under the Competition Law outline how injured parties can seek damages. In terms of abuse of dominance, any party, be it a competitor, customer or consumer who was injured as a result of the abusive conduct may seek damages in courts. Section 5 of the Competition Law grants these parties the right to claim treble damages in civil courts, which have exclusive jurisdiction in these matters. These courts apply general tort principles from the Code of Obligations and procedural rules from the Code of Civil Procedure. Both parties have the right to appeal civil court judgments.

Article 57 of the Competition Law allows private actions for any breaches of the Competition Law rules. Those who prevent or restrict competition by way of anticompetitive concerted practices, decisions or agreements as well as by abusing their dominance must compensate the injured parties.

Normally, the injured party can only claim damages equivalent to the losses incurred under the Code of Obligations. However, the Competition Law allows for an exception by permitting treble damages. This includes the right to claim damages based on the difference between the actual cost paid and what would have been paid in a competitive market scenario. Competitors affected by market restrictions may also seek compensation for all damage, including lost profits they would have otherwise gained.

Outlook and conclusions

The most prominent abuse of dominance trend appears to be the TCA's focus on digital markets. In addition to the recently observed cases in digital markets, regulatory efforts regarding digital markets have gained importance in terms of Turkish Competition Law. In this context, the Draft Law Proposal Amending the Competition Law is currently on the agenda, which is expected to draw from Digital Market Act (DMA),The amendment aims to provide benefits for end users, legal certainty for commercial users, protection of

the competitiveness of small and medium-sized undertakings, transparency in terms of rankings and advertisements, limitation of data access and data power, and protection of a fair and competitive market structure. In addition, it also aims to stipulate clear obligations for undertakings with significant market power, to determine the framework of basic platform services and to subject the identified undertakings to obligations such as not self-preferencing and interoperability.

In this respect, the draft proposal introduces detailed regulations on how undertakings with significant market power will be determined. This determination may be made by the Board either ex officio or upon application. A maximum period of six months will be allowed for undertakings with significant market power to comply with the obligations. Undertakings found to have a significant market share that engage in prohibited behaviours under the Competition Law will be subject to administrative fines up to 10 per cent of their annual gross revenues. If it is determined that at least two violations have been committed in the past five years in terms of the same core platform service, an administrative fine up to twice this amount will be imposed.

The draft law also introduces new authorities and obligations in terms of on-site inspections. Accordingly, it is foreseen that:

1. undertakings offering at least one core platform service in Türkiye shall fulfil the technical and administrative requirements to enable the exercise of on-site inspection authorities; and
2. In cases requiring special expertise or technical knowledge, the inspection shall be conducted with the assistance of experts to be appointed by the Board, if deemed necessary.

While there is no insight on when the amendment may enter into force, a communiqué detailing the principles and procedures of the newly introduced matters along with a transition period is foreseen in the draft, which will allow the relevant undertakings to adjust themselves to the obligations introduced therein.

Endnotes

1 Sahibinden, 23-39/754-26, 17 August 2023. Back to section

2 Trendyol, 23-33/633-213, 26 July 2023. Back to section

3 It should be noted that this list has been prepared in accordance with publicly available information. The decisions of the TCA only become public at the date of announcement by the TCA, not the actual date the decisions are issued. Back to section

4 Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings. Back to section

5 0laç ve Kimya Endüstrisi,00-1(b)/11-5, 12 January 2000. Back to section

6 Turkcell 9 June 2003, 03 - 40 / 432-186, Do an TV 18 May 2016,16-17/299-134. Back to section

7 Mediamarkt, 10-36/575-205, 12 May 2010. Pepsi Cola, 10-52/956-335, 5 August 2010. Egetek, 10-62/1286-487, 30 September 2010. Back to section

8 Elektrik Da 1t1m Özelle_tirmeleri, 10-78/1645-609, 16 December 2010. Back to section

9 Kale Kilit, 12-62/1633-598, 06 December 2012. Aycell, 03-56/655-301, 14 August 2003. Aski, 02-47/587-240, 8 August 2022. Back to section

10 Çiçek Sepeti,18-07/111-58, 08 March 2018. Back to section

11 Aydem, 18-36/583-284, 01 October 2018. Back to section

12 Unilever, 21-15/190-80, 18 March 2021. Back to section

13 Do an, 11-18/341-103, 30 March 2011. Back to section

14 Unilever, 18 March 2021, 21-15/190-80. Back to section

15 Google Android, 18-33/555-273, 19 September 2018. Back to section

16 Obilet, 23-27/521-177, 15 June 2023. Back to section

17 Google Shopping, 20-10/119-69, 13 February 2020. Back to section

18 Google Adwords, 20-49/675-295, 12 November 2020. Back to section

19 Digitürk, 12-24/710-198, 3 May 2012. Back to section

20 Petrofis, 23-50/977-354, 26 October 2023. Back to section

21 Unilever, 21-15/190-80, 18 March 2021. Back to section

22 Çimsa 14-32/653-288, 12 September 2014. Back to section

23 Siemens, 14-29/613-266, 20 August 2014. Back to section

24 Trakya Cam, 21-40/590-287, 26 August 2021. Back to section

25 MTS, 06-36/462-124, 26 May 2006. Back to section

26 Tüpra_, 14-03/60-24, 17 January 2014. Back to section

27 Congresium, 16-35/604-269, 27 October 2016. Belko, 01- 17/150-39, 06 April 2001. Back to section

28 Port Akdeniz, 20-48/666-291, 05 November 2020. Back to section

29 Biletix, 07-18/164-54, 01 March 2007. Back to section

30 Storytel, 23-55/1076-380, 11 November 2023. Back to section

31 Yemek Sepeti, 21-05/64-28, 28 January 2021. Back to section

Bahadır Balkı bahadir.balki@actecon.com
Ertuğrul Can Canbolat ertugrul.canbolat@actecon.com
Can Yıldız can.yildiz@actecon.com
Sera Erzene Yıldız sera.yildiz@actecon.com

ACTECON