Competition Compliance 2019

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LEXOLOGY®
Getting The Deal Through

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Published by
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Tel: +44 20 3780 4147
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First published 2017
Third edition
ISBN 978-1-83862-121-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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King & Wood Mallesons

Lexology Getting The Deal Through is delighted to publish the third edition of *Competition Compliance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Susan Ning, Kate Peng and Zhifeng Chai of King & Wood Mallesons, for their continued assistance with this volume.

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Getting The Deal Through

London
May 2019

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Turkey

M Fevzi Toksoy, Bahadır Balkı and Ertuğrul Can Canbolat
ACTECON

GENERAL

General attitudes

1 What is the general attitude of business and the authorities to competition compliance?

The Turkish Competition Authority (TCA) welcomes and encourages the competition compliance efforts of undertakings. A competition compliance programme (CCP) is regarded by the TCA as an indicator of good faith and stands out as an effective tool in complying with competition law. The TCA's practice shows that while CCPs are encouraged (and in some cases may be regarded as the undertaking's endeavour to act in compliance with competition law or accepted as a behavioural remedy in merger cases), the mere existence of a CCP cannot be regarded as a sole indicator of an undertaking's compliance with competition law.

In its *Unilever* decision No. 12-42/1258-410 in 2012, the TCA showed a positive approach to Unilever's competition compliance efforts. During dawn raids as part of the investigation into alleged exclusivity practices in the ice-cream market, the TCA found a document with reference to Unilever's CCP and regular competition law training. The existence and content of the aforesaid document illustrated Unilever's endeavour to act in compliance with competition law, and to some extent served as grounds for the TCA's decision not to initiate a fully fledged investigation into the company. A similar approach was taken by the TCA in the *Efes* decision No. 12-38/1084-343 in 2012.

At the same time, in the *Frito Lay* decision No. 13-49/711-300 in 2013, the TCA stated that CCPs constitute one of the significant policies of the TCA; however, the mere existence of CCPs cannot be regarded as a sole indicator of an undertaking's compliance with competition rules. Moreover, in the *Industrial Gas* decision No. 13-49/710-297 in 2013, while admitting that the undertaking having a CCP in place was positive, the TCA nevertheless stated that it could not be deemed a mitigating factor in determining the fine.

In the *Banking* decision No. 17-39/636-276 in 2017, the TCA expressly set forth that the fact of undertakings having CCPs does not change their position when they violate competition law, and that being part of a violation despite having a CCP merely shows that the CCP was not taken into consideration by these undertakings. The TCA further stated that the aim of CCPs is to prevent violations, and that there is no provision in the relevant legislation that would require taking the presence of CCPs into consideration while determining the amount of administrative fines. On the other hand, the TCA, in the same decision, attached importance to the following: the 'zero-tolerance policy' adopted by one of the investigated banks as regards the violation of competition rules; and, within this context, the leniency application submitted to the TCA about competition law violations and the full active cooperation with the TCA during the investigation procedure as a part of the compliance policy of the bank concerned. Indeed, those policies have enabled the bank concerned to detect potential violations and to notify them to the TCA within the scope of the Turkish leniency programme. Owing to the zero-tolerance policy and the full cooperation within the leniency application, this bank has enjoyed full immunity from the fine imposed, although this violation is not regarded as a hardcore cartel.

While from a business perspective competition compliance is a frequent practice to raise awareness, multinationals and companies managed under corporate governance mostly apply their policies and pursue their sustainability with tools such as training, workshops and e-learning.

Government compliance programmes

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

The following documents have been announced by the TCA on its website with regard to the standards for compliance programmes:

- the Competition Law Compliance Programme as part of the TCA's Competition Letter 2011 (in English); and
- the Competition Law Compliance Programme (in Turkish).

These documents provide undertakings with clarification to a certain extent in terms of the issues and concepts of competition compliance, such as the purpose and scope of CCPs, checklists for compliance with competition legislation, the content of CCPs, corporate guides, training, regular assessment and monitoring of CCPs, as well as supportive practices. The document should be helpful for all undertakings in the process of developing their own CCPs. Those documents are largely inspired by EU competition law and provide advice to local businesses with structured requirements in order that their CCP be sound and workable. The existence of guidelines, employee responsibility, a confidential hotline, sanctioning or rewarding mechanisms, and regular reporting are among the 'must-have' features listed in the document.

The documents are available at www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fGenel+%c4%b0%c3%a7erik%2fuyumprogram%c4%b1.pdf (in Turkish (2013)) and www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FGeneral+Content%2FCompetition+Compliance+Program.pdf (in English (2011)).

Applicability of compliance programmes

3 Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

A one-size-fits-all approach is not favoured at all in ensuring effective compliance guidance. Indeed, the issues that may be deemed sensitive from a competition law perspective vary on the basis of factors such as the characteristics and structure of relevant markets, the number of undertakings being active in those markets, the market shares of undertakings, legal or technical entry barriers, the regulations on

relevant markets, the approaches adopted in the TCA's former cases with regard to practices in those markets, and undertakings' own needs. In other words, since the behaviour of a company raising competition concerns differs, each compliance guidance requires a unique design by taking the aforementioned elements into consideration and thus be custom-made for each undertaking.

The content of each CCP shall also entail certain basic elements or issues that are generally applicable and can be exemplified as follows:

- the importance and sensitivity of competition law compliance;
- basic principles and procedures under Law No. 4054 on Protection of Competition (Competition Law) and the TCA's powers;
- ongoing assessment of awareness levels through regular competition law training, internal monitoring and reporting procedures;
- a checklist; and
- incentive and disciplinary practices.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Regulation on Fines) provides a non-exhaustive list of the aggravating and mitigating factors in the assessment of the fine amount. The implementation of a CCP is not listed among those factors. Moreover, as referred to above in the *Industrial Gas* and *Banking* decisions, the TCA stated that the mere presence of a CCP does not constitute a mitigating factor in the determination of the amount of the administrative fines. Therefore, having a CCP will not de jure affect the sanctions imposed by the TCA. However, a CCP may de facto have a positive influence over the TCA in the course of its evaluations regarding the infringement allegation (see question 1).

IMPLEMENTING A COMPETITION COMPLIANCE PROGRAMME

Commitment to competition compliance

5 How does a company demonstrate its commitment to competition compliance?

A company may demonstrate its commitment to competition compliance by meaningful and effective implementation of a CCP that at least contains the following actions:

- establishment of regular dawn raid simulations and training sessions for current and future employees;
- drawing up a general checklist for all employees or departments according to their position and workflow;
- review and assessment of past and current practices in light of competition rules;
- appointment of an in-house compliance officer or an external consultant responsible for the implementation of the CCP and allocation of the tasks determined;
- receiving written commitments from employees as regards the fulfilment of their responsibilities in line with competition law;
- adoption and implementation of disciplinary actions for employees' breach of competition law or the CCP; and
- execution of an incentive system (such as a helpline or hotline) that encourages employees to inform the relevant person in charge and rewards employees who contribute to the detection in advance and prevent a potential violation.

Furthermore, to increase their compliance levels, companies may prefer to design a technological infrastructure enabling them to detect beforehand communications that raise competition law concerns. Such infrastructure may require a list of keywords that has to be designed and updated in line with the structure of the relevant market.

In particular, the devotion of the management team to competition compliance is of significance to show their complete support for the CCP and compliance culture to team members.

Risk identification

6 What are the key features of a compliance programme regarding risk identification?

The CCP helps in identifying risks (legal, financial and reputational) by way of outlining simple and clear 'do's and don'ts' lists for employees and management. Risk identification entails at least the following essential features:

- conducting market research paying special attention to the TCA's recent decisions;
- familiarisation with the structure of the markets in which the company operates and with competition law concerns in those markets; and
- keeping track of past and current competition law investigations in Turkey and abroad.

Risk-assessment

7 What are the key features of a compliance programme regarding risk-assessment?

Risk assessment would typically start with a kick-off meeting with companies' management as regards the identification of risks that may be associated with companies' practices. Also of significance are:

- the enhancement of communications with employees on the risks related to anticompetitive practices;
- a review of companies' agreements or practices (for example, exclusivities, pricing policies, non-compete obligations, duration and potential impact on the market);
- an assessment of companies' activities, along with their affiliates' practices and current and future business channels from the perspective of both the product and territorial scope;
- categorisation of the identified risks in accordance with the priority level (low, medium or high); and
- preparation and presentation of a report with a focus on main findings and risk mitigation strategies.

An appointed compliance officer or established compliance department should monitor and oversee the process concerned.

A company's method of handling findings that are deemed sensitive from a competition law perspective is one of the key features, since it indicates companies' devotion to their risk-assessment efforts. Indeed, the CCP documents published by the TCA encourage businesses to end infringing practices and notify the competent authorities.

Risk-mitigation

8 What are the key features of a compliance programme regarding risk-mitigation?

Risk mitigation typically involves monitoring, reporting and training:

- dawn raid simulations, which entail both a review of communications and a brief educational session for employees about how an 'on-the-spot inspection' by the TCA's experts could easily be dealt with;
- general competition training, which also includes sector-specific samples on how competition rules may be faced in daily practice;
- CCP report, which consists of a SWOT analysis; and

- a helpline or hotline through which employees may request advice from a competition law perspective and inform the person in charge about a potential violation.

In this regard, employees' written commitments to carry out their activities in compliance with the CCP may also be useful in increasing their awareness.

Furthermore, regular assessment of the compliance level by competition law experts and updating of the CCP (for example, on the basis of amendments to the applicable laws and continuing developments in the approach adopted by the TCA) are essential. In addition, competition law consultants should participate in the company's executive meetings or meetings of the association of which the company concerned is a member.

Finally, if the management becomes aware of a potential infringement of competition rules, it should immediately end the violating practice, comprehensively assess the case and inform the TCA if necessary (a leniency application or full active cooperation with the TCA may be considered to eliminate or minimise the risk of facing a fine; see question 15).

Compliance programme review

9 | What are the key features of a compliance programme regarding review?

A review encompasses features such as:

- regular assessment of the CCP and competition law awareness level of employees;
- updating of CCP rules and procedures; and
- monitoring of employees' activities with or without a prior notice.

Regular dawn raid simulations (particularly if conducted without notice) by competition law experts are essential in ensuring employees' compliance with competition rules and in assessing compliance levels.

DEALINGS WITH COMPETITORS

Arrangements to avoid

10 | What types of arrangements should the company avoid entering into with its competitors?

Arrangements between competitors are more likely to attract the TCA's attention irrespective of their object or effect. Indeed, the Competition Law prohibits agreements that restrict competition either by object or by effect. Agreements are defined very broadly regardless of the form or whether the parties explicitly or tacitly agree. The most popular examples for anticompetitive agreements are cartels involving setting prices, restricting output, allocating markets or customers and bid rigging.

Additionally, the direct or indirect exchange of competition-sensitive information (such as sales conditions, pricing policies, customers, production levels and capacity) is also considered within the scope of the aforementioned prohibition, since it reduces or removes uncertainty regarding the current or future behaviour of competitors.

Suggested precautions

11 | What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following precautions may be taken:

- informing the internal compliance officer in charge or external competition law experts;
- reviewing and assessing the concerned arrangement from a competition law perspective;
- avoiding exchanges of sensitive information and attending any meeting with competitors (especially without a pre-examination of the agenda) during this process;
- preparing meeting notes and clearly identifying the issues that have been discussed with competitors;
- assessing the level of the risk associated with the concerned arrangement; and
- applying to the TCA for negative clearance or an exemption.

CARTELS

Cartel behaviour

12 | What form must behaviour take to constitute a cartel?

Cartels are normally defined as agreements restricting competition or concerted practices between competitors for fixing prices; allocating customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas; and bid rigging (as listed under the Regulation on Fines and the Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation)). Additionally, the exchange of competition-sensitive information among rivals such as prices, output or sale amounts are generally considered as cartels since they are generally aimed at fixing prices and quantities (according to the Guidelines on Horizontal Cooperation Agreements). On the other hand, there are precedents whereby the exchange of such information was not considered as a cartel and was categorised under other infringements.

In practice, cartels are very unlikely to be formed in writing. Any act or concerted action between competitors preventing or restricting competition, including any (even unsuccessful) attempt to run a cartel, if there is sufficient evidence of a solid intention to commit it, shall be regarded as a cartel. The issue of whether the anticompetitive agreement has (fully or partially) been implemented may only be relevant in determining the gravity of sanctions to be imposed on the parties, not to the fact that article 4 of the Competition Law (equivalent to article 101(1) TFEU) has been violated.

Avoiding sanctions

13 | Under what circumstances can cartels be exempted from sanctions?

Cartels may be exempted from sanctions following the leniency application if certain conditions under the Leniency Regulation are satisfied. In such cases, the lenient party may benefit either from full immunity or from a reduction in fines.

A leniency application is possible until the serving of the TCA's investigation report. The first undertaking that submits its leniency application along with the evidence disclosing a cartel until the serving of the investigation report by the TCA may benefit from full immunity, unless the applicant coerced other undertakings to participate in the cartel. All subsequent applicants for leniency may only benefit from a reduction in fines. In this context, active cooperation with the TCA should last until its final decision and thus is indispensable.

Accordingly, the leniency applicant shall:

- immediately end its involvement in the cartel (except when the assigned unit on the ground requests otherwise, if detecting the cartel would be complicated);
- submit information and evidence in respect of the cartel, including:
  - all types of books, documents, information and other resources that may be used to substantiate the meetings concerning the cartel, including invoices, notes, organisers, meeting minutes, internal–external letters, travel records, reports, working

texts, tables, electronic records, computer printouts, credit card statements and detailed phone records; and
- products affected by the cartel, duration of the cartel, names of the undertakings participating in the cartel, dates, locations and the participants of cartel meetings;

- keep its application confidential;
- actively cooperate with the TCA throughout the entire procedure and in line with the TCA's instructions (see question 15 for active cooperation with regard to infringements other than a cartel); and
- not conceal or destroy information or evidence related to the alleged cartel.

Exchanging information

14 | Can the company exchange information with its competitors?

As mentioned in question 12, exchanges of competition-sensitive information among rivals may be anticompetitive under certain circumstances (they may also be considered as cartels in case of an object to fix prices or quantities). Commercial information such as prices, quantities, customers, costs, turnovers, sales, purchases, capacities, product characteristics, marketing plans, risks, investments, technologies and R&D programmes are deemed competition-sensitive. Exchanges of aggregated data (when it is sufficiently difficult to identify individual data of a particular undertaking) or historical data (as opposed to current or future data) are much less likely to lead to a competition concern.

An undertaking may exchange information with its competitors if the exchange of information leads to efficiency gains, which are passed on to consumers, and outweigh the restrictive effects on competition. The framework for information exchange among competitors is also shaped by the many precedents of the TCA in different industries and forms. These detailed precedents are the outcome of negative clearance or exemption applications to the TCA (which have mostly been submitted by industry associations).

LENIENCY

Cartel leniency programmes

15 | Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

A leniency programme is available to both companies and individuals. Until the *Banking* decision, the leniency programme was in place exclusively to reveal the existence of cartels. Therefore, if the TCA discovered that the practices indicated in the leniency application in fact relate to other types of infringement, the leniency applicant only benefited from the possibility of obtaining a reduced fine in the event it actively cooperated with the authority (for example, in the *Hyundai Dealers* decision No. 13-70/952-403 of 2013, the TCA held that the leniency applicant may not benefit from full immunity as the infringement concerned was not a cartel but an information exchange and deemed the leniency application as a form of active cooperation, thereby reducing the fine). In the *Banking* decision, the TCA granted full immunity to the leniency applicant on the basis of its active cooperation, despite the fact that the practices concerned did not amount to a cartel. It is important to note that the TCA relied directly on the provisions of the Competition Law concerning active cooperation rather than those of the Leniency Regulation, as the former does not distinguish between different types of violation, whereas the latter stipulates that full immunity may only be granted in case of a cartel finding.

Although the Leniency Regulation and Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels (Guidelines on Active Cooperation) refer to cartels, article 16 of the Competition Law stipulates as follows:

> *To those undertakings or associations of undertakings or their managers and employees making an active cooperation with the Authority for the purposes of revealing violations of the Act, penalties mentioned in paragraphs three and four may not be imposed or reductions may be made in penalties to be imposed pursuant to such paragraphs, taking into consideration the quality, efficiency and timing of cooperation and by means of demonstrating its grounds explicitly.*

The name of the applicant must be kept confidential until the end of the investigation, unless requested otherwise by the assigned unit (see question 13).

16 | Can the company apply for leniency for itself and its individual officers and employees?

As also stated under the Guidelines on Active Cooperation, in case of an application by undertakings, all managers and employees of the applicant undertaking who admit to the existence of the infringement and enter into active cooperation may benefit from the Regulation as a rule. Therefore, it is not necessary for the undertakings to submit a list of the managers and employees who can benefit from immunity or reduction. Accordingly, there are no barriers for previous managers and employees benefiting from the applications filed by undertakings.

17 | Can the company reserve a place in line before a formal leniency application is ready?

A marker system is available in Turkey. In general, following a face-to-face meeting, the undertaking or its representative signs an affidavit with the case-handlers indicating the date and time of the marker. Placing a marker would not result in any additional obligations or duties on the undertaking concerned. However, as a rule of thumb, the undertaking is expected to proceed and submit the available evidence in relation to the suspected practices or cartel.

Whistle-blowing

18 | If the company blows the whistle on other cartels, can it get any benefit?

As per article 7(2) of the Regulation on Fines, an undertaking may apply for leniency plus during an ongoing investigation. If an undertaking discloses a new infringement through the leniency programme (in accordance with the Leniency Regulation) during an ongoing investigation, it benefits twice by obtaining full immunity for the new infringement (provided the conditions in the Leniency Regulation are satisfied) and a fine reduction of a quarter for the ongoing investigation.

DEALING WITH COMMERCIAL PARTNERS (SUPPLIERS AND CUSTOMERS)

Vertical agreements

19 | What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The vertical relations between undertakings operating at different levels of the market are subject to the main rule that prohibits any agreement, decision or practice preventing, distorting or restricting competition in the relevant markets. In this regard, certain practices are deemed hardcore restrictions, whereas other restrictive practices may be evaluated under individual or block exemption rules. As for individual or block exemption, a thorough analysis of various factors such as market

structure, efficiency gains, economic rationale, level of competition and duration of agreements should be performed, particularly if the company's market share accounts for a high percentage of the total market or the economic entity has vertically integrated operations.

Accordingly, vertical restrictions cover, but are not limited to, the following practices:

- fixing the minimum resale prices of customers;
- intervening in sales conditions;
- prohibiting active or passive sales;
- preventing online sales;
- imposing non-competition obligations; and
- setting most-favoured nation (MFN) clauses.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Not all vertical arrangements are illegal per se. The TCA makes a distinction between arrangements that restrict competition by object and by effect. For example, resale price maintenance (RPM) and passive sales could be regarded under the category of restrictions by object. If the TCA establishes the existence of the object to restrict competition, the TCA is not obliged to analyse the effect of such arrangements as for the violation finding; however, the effect may have a role in determining the gravity of the infringements and sanctions (the Guidelines on General Principles of Exemption).

The practice shows that although the TCA may follow a different (per se) approach on case-by-case basis, it generally tends to subject RPM practices to a rule-of-reason analysis and assesses the effects of such practices by considering the market structure, competition level and effect on consumers (*Çilek* decision No. 14-29/597-263 dated 20 August 2014; *Dogati* decision No. 14-42/764-340 dated 22 November 2014; *Yataş* decision No. 17-30/487-211 dated 27 September 2017; *Duru* decision No. 18-07/112-59 dated 8 March 2018).

Arrangements that may be restrictive by effect should be assessed from the point of view of actual and potential effects on competition parameters in the market. Therefore, in addition to actual anticompetitive effects, restrictive effects expected to occur with a reasonable probability will be evaluated by the TCA and may be considered sufficient to find those arrangements anticompetitive.

If the TCA uncovers anticompetitive conditions in vertical arrangements, arrangements not including any restriction that is deemed per se illegal may be evaluated within the scope of the block exemption and individual exemption rules. In this regard, one of the main points is the market share of the company setting a restriction in its vertical arrangements (according to the Guidelines on Vertical Agreements, the market share threshold is 40 per cent). Even if a company may not benefit from the block exemption rules, it may still be allowed if the conditions listed in article 5 of the Competition Law (equivalent to article 101(3) TFEU) are satisfied (see question 21).

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangements may be exempted from sanctions if they fall within the scope of one of the relevant block exemption communiqués, namely, on vertical agreements, on research and development agreements, on vertical agreements and concerted practices in the motor vehicles sector, on the insurance sector and on technology transfer agreements. Alternatively, an individual assessment of the exemption under article 5 of the Competition Law shall be conducted. In terms of the individual exemption, the below criteria shall be satisfied:

- ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
- benefitting the consumer from the above-mentioned;
- not eliminating competition in a significant part of the relevant market; and
- not limiting competition more than what is compulsory for achieving the goals set out in first and second points.

In cases of uncertainty on which of the exemptions could be granted, it is highly recommended to approach the TCA to avoid any risk of being fined.

In its decision No. 17-01/12-4 taken in 2017, the TCA fined Booking.com approximately 2.5 million lira for violating the Competition Law via its 'best price guarantee'/MFN practices. It was found that agreements (particularly the MFN clauses) concluded between Booking.com and accommodation facilities were outside the scope of the Block Exemption Communiqué on Vertical Agreements, owing to the market share threshold. An individual exemption could not be granted either, since the practices did not meet the exemption conditions set out by article 5 of the Competition Law.

HOW TO BEHAVE AS A MARKET DOMINANT PLAYER

Determining dominant market position

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The following factors are applied by the TCA to determine if a company holds a dominant position:

- the market position of the undertaking concerned and its competitors. The established practice of the TCA is to consider undertakings with less than 40 per cent of the market share as less likely to be dominant;
- barriers to entry and expansion in the relevant market;
- legal and administrative barriers;
- economic barriers;
- barriers stemming from the characteristics of the undertaking in question; for example, possession of key inputs and access to special information;
- conduct in the market; for example, large-scale investments, which existing or potential competitors would have to match; and
- buyer power.

Abuse of dominance

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The following behaviour may constitute abuse of market dominance:

- excessive or predatory pricing and complicating competitors' activities via pricing policy;
- price or margin squeezing;
- tying;
- rebates;
- exclusivity or single branding arrangements;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby discriminating;
- limiting production, markets or technical development to the prejudice of consumers;
- restricting or cutting off the supply of goods to customers or competitors without reasonable grounds;

- preventing other undertakings from entering into the market and complicating their activities in the market by using financial or technological or IP superiority in a market; and
- MFN practices.

This list is not exhaustive. The basis of the TCA's evaluation in this respect is whether the behaviour of the dominant undertaking leads to actual or potential anticompetitive foreclosure.

The TCA's decision No. 16-20/347-156 taken in 2016 in relation to the popular Turkish online food-ordering platform Yemeksepeti stated that the undertaking abused its dominant position via the MFN clauses, which prevented competitors from providing better or different conditions (prices, discounts, promotions, menus, payment options and delivery regions), as well as by preventing advertisements of competing platforms, by offering promotions to restaurants in return for refusing to work with competing platforms. The undertaking was fined 427,977 lira and was ordered to remove MFN clauses from the agreements.

The TCA's decision No. 17-07/84-34 taken in 2017 in relation to the traditional alcoholic drink (rakı) producer Mey İçki is another recent example of abuse of dominance. Providing financial benefits in relation to the shelf positioning and product layout of the rakı category within the traditional channel sales points and loyalty rebates, in addition to other practices, were deemed as exclusionary. The company was fined 155,782,969 lira, corresponding to 4.2 per cent of Mey İçki's turnover (the fourth largest fine imposed on a company in Turkey). The decision lists in detail a number of actions that the dominant company needs to undertake or refrain from.

The TCA delivered another abuse of dominance decision No. 17-08/99-42 in 2017 in relation to the branded sunglasses wholesaler Luxottica. Luxottica was fined 1,672,647 lira for abuse of dominance through practices foreclosing the market to its competitors.

The TCA published its decision No. 18-06/101-52 dated 20 February 2018 in relation to the electricity sector and imposed a total fine of 38 million lira on the following undertakings for abuse of dominance: Akdeniz Elektrik Dağıtım AŞ, the electricity distribution company in the Mediterranean region; and Akdeniz Elektrik Perakende Satış AŞ, the incumbent retail electricity sales company, which is under the same control structure as the distribution company.

In its decision No. 18-36/584-285 dated 1 October 2018, the TCA fined Sahibinden.com (an online platform service provider) 10,680,425.98 lira for abuse of dominance via excessive pricing in the markets for online platform services for real estate sales and rentals and online platform services for vehicle sales.

24 | Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Abusing market dominance may be exempted from sanctions if there are sufficient grounds to justify such behaviour. The reasons put forward must include an explanation of the objective necessity of the concerned conduct and the efficiency gains they entail.

Under the 'objective necessity' category, the abusive conduct should protect a legitimate benefit and such conduct should be indispensable for achieving that benefit. Additionally, such conduct must be caused by external factors; namely, health and safety requirements set by public authorities. The restriction must not exceed what is necessary for the protection of that benefit.

As for the 'efficiency' category, the dominant company must prove that the abusive conduct meets the following four conditions:

- certain efficiencies are or will be made possible as a result of the conduct;
- the conduct is indispensable for the realisation of those efficiencies;
- the efficiencies outweigh any possible negative effects on competition or consumer welfare; and
- the conduct should not eliminate effective competition (Guidelines on the Assessment of Exclusionary Abusive Conduct Dominant Undertakings).

COMPETITION COMPLIANCE IN MERGERS AND ACQUISITIONS

Competition authority approval

25 | Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Concentrations between undertakings that lead to a lasting change of control must be notified to the Competition Board if they exceed certain turnover thresholds. Control, which could be acquired on a de jure or de facto basis, is defined as the possibility of exercising decisive influence on an undertaking through rights, agreements or any other means. The control could be taken solely or jointly.

If one of the following turnover thresholds is exceeded in a transaction involving a permanent change of control, the transaction must be notified to the TCA:

- either the total Turkish turnover of the transaction parties exceeds 100 million lira and the Turkish turnover of at least two of the parties separately exceed 30 million lira; or
- the Turkish turnover of the assets or businesses being acquired in acquisition transactions and of at least one of the parties in merger transactions exceeds 30 million lira, and the worldwide turnover of the other party exceeds 500 million lira.

The average buying exchange rate of the Central Bank of Turkey for the financial year in which the turnover is generated is taken into consideration in the calculation of the turnover.

For the purpose of calculating turnovers, transactions executed between the same persons, parties or undertakings or by the same undertaking in the same relevant product market (ie, creeping acquisitions) are considered to constitute a single transaction if they are realised within three years.

Article 8 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Authorisation of the Competition Board establishes that the calculation of turnovers must be based on net sales, whereas article 9 prescribes specific rules regarding the calculation of financial institutions' turnovers including, among others, banks and insurance, factoring and financial leasing companies.

The parties to the concentration or their representatives can file the notification jointly or separately. If separately, the notifying party must inform the other party (see question 26).

26 | How long does it normally take to obtain approval?

The procedure before the TCA may have two phases.

Phase I consists of a preliminary review that lasts one to two months. The Competition Board of the TCA decides either to approve or to further investigate the concerned transaction at the end of Phase I. Following the notification, the board conducts a preliminary examination within 15 days, upon which it decides either to clear the transaction or to further examine its possible effects by initiating a Phase II investigation. Within the 15-day period, the TCA may decide to request information from the transaction parties or third parties. The 15-day period restarts following the receipt of the requested information.

If the board does not notify its decision or does not take any action as to the notified transaction within 30 days of the notification date, it is considered to have implicitly approved the transaction.

In practice, clearance of Phase I transactions generally takes one month.

A Phase II investigation is initiated if the notified transaction is considered to carry the risk of creating a dominant position or strengthening an existing one, and significantly impeding effective competition. The Phase II notice is sent to the parties within 15 days following such a decision. The parties submit their first written defence within 30 days of receiving the Phase II notice. The TCA must issue the Phase II report within six months (extendable for another six months) after the initiation of the Phase II investigation. In practice, the TCA generally issues the Phase II report within the first six months. Parties have 30 days (extendable for another 30 days) for submitting the second written defence and the TCA issues its additional opinion within 15 days of receiving the second written defence. The parties may respond to the additional opinion within 30 days, and this closes the investigation stage. Unless an oral hearing is held, the board renders its decision within 30 days (extendable for another 30 days) of the conclusion of the investigation stage. The board generally decides whether a Phase II transaction shall be cleared or not within a year of the transaction being notified. In this regard, the best timing for filing a notification depends on the specific circumstances and conditions of the transaction.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The TCA's clearance shall also cover ancillary restrictions that are proportionate, directly related and necessary for the concentration, and restrictive only for the parties (non-compete, confidentiality and non-solicitation clauses). If, following the clearance, the restraints are found not to be directly related and necessary, the concerned company may face an investigation.

Failure to file

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

The amount of the administrative fine for failure to file or delay in filing varies depending on whether the transaction is found to create or strengthen a dominant position and significantly impede competition, and therefore violate article 7 of the Competition Law. In cases of failure to notify or delay in filing:

- if the transaction creates or strengthens a dominant position, and significantly impedes competition – a fine up to 10 per cent of the turnover generated by the end of the preceding fiscal year; or
- if the transaction does not create or strengthen a dominant position and does not significantly impede competition – a fine of 0.1 per cent of the turnover generated by the end of the preceding fiscal year.

Additionally, executives and employees of the undertakings concerned who played a decisive role in the violation of the standstill obligation may also be faced with a fine of up to 5 per cent of the fine imposed on the undertakings.

If a transaction subject to TCA's authorisation is not notified and violates article 7 of the Competition Law, the Competition Board of the TCA will order the concerned transaction to be terminated and the previous situation to be restored. In this regard, the Competition Board is also empowered to take the following actions:

- ordering the return of all the seized assets within a certain timescale or, if this is not possible, the assignment and transfer to third parties of the seized assets;
- prohibiting the acquiring persons from taking part in the management of the acquired undertakings until the assignment of the seized assets; and
- taking any other measure deemed necessary.

The fine is imposed on both parties in mergers and on the acquirer in acquisitions. In transactions in which a joint venture is established, all parties are deemed as acquirers and fines imposed accordingly.

Examples of the TCA's decisions as regards the closing of the transaction before the submission of a notification or failure to do so are as follows:

- *Total/Cepsa* decision No. 06-92/1186-355 in 2006;
- *CVR Inc/Inco Ltd* decision No. 07-11/71-23 in 2007;
- *Tekno İnşaat* decision No. 12-08/224-55 in 2012;
- *DSG European Investment Ltd* decision No. 13-50/717-304 in 2013; and
- *Labelon Group/A-Tex Holding* decision No. 16-42/693-311 in 2016.

INVESTIGATION AND SETTLEMENT

Legal representation

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Although not referred to in any competition legislation, an employee may seek external legal support if he or she faces action from his or her employer with the allegation that his or her own initiatives caused the subjected breach of competition law. An individual may also seek individual legal advice in cases where his or her employer forced the employee to breach competition rules and put him or her under a responsibility towards competition law. In such cases, an individual may apply for leniency or whistle-blowing under the guidance of the individual legal support.

Dawn raids

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The TCA frequently carries out dawn raids irrespective of the nature of the alleged infringement. Unannounced onsite inspections are used both at the pre-investigation and investigation stages.

The TCA may search the premises of the undertaking subject to investigation. TCA officials do not need authorisation from a court, but they must obtain authorisation from the TCA's president defining the scope of the investigation. Those decisions indicate that an administrative fine will be imposed if incorrect information is provided. Authorisation from the court is required only if the undertaking concerned refuses to allow the dawn raid.

The TCA's officials may, under article 15 of the Competition Law, enter the undertakings' premises and means of transport; access electronic devices such as computers, business phones and laptops; examine and take copy of the books and other business records; and ask any representative or employee for explanations about facts or documents. The TCA's officials are entitled to fully examine the computers, including all deleted items.

31 | What are the company's rights and obligations during a dawn raid?

The undertaking is obliged to allow the TCA's officials to access the premises and conduct the investigation if a formal decision is taken by the TCA. There is no such obligation in the absence of a formal decision and the undertaking concerned may refuse the inspection without specifying any particular reason. If the undertaking voluntarily decides to allow the investigation, it will not be able to change its decision later on. In the presence of a formal decision, undertakings must allow the inspectors to conduct the dawn raid. If this is hindered, the undertaking will be subject to an administrative fine amounting to 0.5 per cent of its turnover of the preceding year.

One of the most significant decisions of the TCA regarding the obstruction of a dawn raid is the *TTNET* decision No. 13-46/601-M taken in 2013, where it was found that an employee deleted certain documents during the dawn raid, which led the TCA to impose a fine of 15,512,258 lira, corresponding to 0.5 per cent of the TTNET's turnover.

Settlement mechanisms

32 | Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Turkish law does not provide for a settlement procedure. The TCA may, at the stage of preliminary investigation, adopt a decision or warning stating that it would initiate a full investigation if the undertakings concerned do not modify or put an end to their agreements or conduct, and the parties should come up with effective commitments to be accepted by the TCA.

Settlements in the form of remedies are available within the scope of merger control. The TCA allows the undertakings concerned to propose remedies related to the transaction with a view to eliminating the competition concerns that may arise. At the same time, the TCA is entitled to impose requirements and obligations to ensure the fulfilment of such remedies.

33 | What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

As the TCA considers CCPs part of the remedies package in merger cases and more generally as a positive factor, the TCA may be expected to take into consideration existing CCPs in the context of the settlement procedure if the draft law mentioned in question 42 is passed.

Corporate monitorships

34 | Are corporate monitorships used in your jurisdiction?

No, corporate monitorships are not used in Turkey.

Statements of facts

35 | Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

This remains to be seen once the settlement mechanism is introduced in Turkey. Currently, the civil courts suspend proceedings in actions for private damages until the TCA renders a decision confirming the competition law infringement. If the TCA finds an infringement, the civil courts must take this as given and they may not further assess whether the conduct of the defendant is unlawful or not. Private damages claims are tort claims, and the infringement decision of the TCA only proves the unlawfulness of the relevant conduct. The claimant must further prove the negligence of the infringer, its damages and the causal link between the unlawful conduct and its damages. There is no class action envisaged in Turkish law for the purposes of private enforcement in relation to competition law violations (as opposed to cases on consumer protection).

Invoking legal privilege

36 | Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The undertaking (both the company and individual) may claim attorney–client privilege over any aspect of internal antitrust investigations that relates to the right of defence under certain conditions. Legal privilege in Turkey covers documents prepared by or correspondence with an independent external attorney that is directly related to the client's right of defence (for example, a legal opinion on whether the agreement infringes competition law). If this is not the case, or if the purpose of the documents is to conceal or facilitate the violation (for example, discussions on how to apply the anticompetitive practices), the privilege cannot be invoked, and the documents concerned cannot be protected. The attorney–client privilege was confirmed by the TCA in its *Dow* decision No. 15-42/690-259 in 2015 stating that communications with an independent (with no employment relations with the client) attorney fall within the scope of attorney–client privilege and shall be protected from disclosure. As no statutory or regulatory rule provides for legal privilege, the TCA enjoys discretion in this respect.

In the *Luxottica* decision No. 17-08/88-38 in 2017, the TCA held that the undertakings' responses to the information requests must be evaluated in the context of the privilege against self-incrimination. The TCA stated that the undertakings have a right to answer questions that are directly related to the essence of the investigations in parallel with their defences, and that it may not be claimed that these responses are misleading owing to the privilege against self-incrimination.

In the *AYESAŞ* case, TCA officials had seized a document that was prepared by AYESAŞ's lawyers during a competition compliance programme as evidence in the investigation as it was not prepared for the purpose of exercising the right of defence within the scope of the ongoing investigation (TCA decision No. 16-42/686-314 dated 6 December 2016). While the Administrative Court (Judgment No. E:2017/412 and K: 2017/3045 dated 1 March 2018) had annulled the TCA's decision by holding that this document was covered by attorney–client privilege and that it could not be used as an evidence against AYESAŞ, the Regional Court (Judgment No. E: 2018/658 and K: 2018/1236 dated 7 January 2019) held that the document in question did not fall within the scope of the right of defence as there was no ongoing competition investigation when that document was drafted. Consequently, the concerned document was not directly linked to AYESAŞ's exercise of its right of defence and could thus not benefit from attorney–client privilege.

Confidentiality protection

37 | What confidentiality protection is afforded to the company and/or individual involved in competition investigations?

The undertakings involved in competition investigations are entitled to confidentiality protection. To that end, the concerned undertaking must make a written request to the TCA indicating the information and documents for which confidentiality is requested and the reasons justifying such a request. In addition, a non-confidential version of those information and documents must be provided together with the request. The TCA has discretion in deciding whether there are legitimate reasons to grant confidentiality. The TCA may, under Communiqué No. 2010/3 on Access to the File, request detailed explanations justifying the request.

In any event, the Competition Law prohibits the TCA's officials from disclosing and using (in their own or others' interests), even after their duties have ceased, the confidential information and trade secrets obtained in the performance of their functions.

Additionally, anyone submitting to the TCA information on alleged violations may request anonymity in accordance with Communiqué 2012/2. If this request is accepted, any information that may lead to the identification of the person concerned will not be mentioned in any correspondence, including within the TCA.

Confidentiality may also be regarded as a duty under the Leniency Regulation, according to which a leniency applicant, in order to be eligible for leniency, must, among other requirements, keep the application confidential until the end of the investigation, unless requested to do otherwise by the TCA.

Refusal to cooperate

38 | What are the penalties for refusing to cooperate with the authorities in an investigation?

Refusal to cooperate with the TCA may take the form of obstructing, making it difficult to perform the on-the-spot inspection or failing to respond duly to information requests. In the case of obstructing the on-the-spot inspection, the TCA may impose an administrative fine of 0.5 per cent of the concerned undertaking's annual gross revenues of the preceding financial year, whereas in the case of failing to respond duly to information requests or providing false information, the TCA may impose an administrative fine of 0.1 per cent of the undertaking's annual gross revenues of the preceding financial year.

For instance, in its *Poultry* decision No. 19-12/155-70 dated 3 March 2019, the TCA resolved to impose a fine corresponding to 0.1 per cent of the following companies' turnover of the previous year:

- Bakpiliç for failure to provide the requested information and documentation as part of the investigation; and
- Tad Piliç for providing false or misleading information.

It is important to emphasize that these companies did not violate the Competition Law in essence. Additionally, in its *Mosaş* decision No. 18-20/356-176 in June 2018, the TCA imposed administrative fines of 0.5 per cent because of hindrance of the on-the-spot inspection.

Infringement notification

39 | Is there a duty to notify the regulator of competition infringements?

No statutory or regulatory rule provides for such a duty. Each natural person, institution or undertaking is entitled to apply to the TCA.

Limitation period

40 | What are the limitation periods for competition infringements?

Eight years.

MISCELLANEOUS

Other practices

41 | Are there any other regulated anti-competitive practices not mentioned above? Provide details.

Not applicable.

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Future reform

42 | Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

The Ministry of Customs and Trade issued in 2013 a draft law amending certain provisions of the Competition Law, which was introduced in parliament in early 2014. Although this draft law was not enacted and became obsolete following the general elections of 2015, its provisions can be indicative of what could be expected from a potential reform.

The draft concerned provides for settlement and commitment procedures. Accordingly, in the case of a settlement, undertakings will accept the violation and waive their right to appeal against the settled issues, and then benefit from a fine reduction, whereas in the case of undertakings' commitments, the TCA may accept such commitments and thus it may either not initiate a full investigation or terminate the investigation without any violation determination.

Additionally, the draft concerned replaces the current dominance test with the 'significant impediment of effective competition' test for the purpose of merger assessment.

Innovation and all the developments linked to artificial intelligence and the use of algorithms facilitate collusion between undertakings. In this respect, the TCA emphasizes, in its second Strategic Plan 2019-2023 (published on 13 March 2019), the necessity to adapt to technological developments and digitalisation and to revise the scope of its investigative powers, particularly regarding digital forensics and technical infrastructure.

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ISBN 978-1-83862-121-6