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Overview of Vertical Agreements in Turkey (2015)

25 Mar 2015

First published by Getting The Deal Through.

1. What are the legal sources that set out the antitrust law applicable to vertical restraints?

The primary legislation that sets out the antitrust law applicable to vertical restraints is Law No. 4054 on Protection of Competition (Law No. 4054). Vertical restraints that violate competition laws are regulated under article 4 (which is closely modelled on article 101 of the Treaty on the Functioning of the European Union (TFEU)) of Law No. 4054.

Furthermore, there are a number of secondary legislation that, together with article 4 of Law No. 4054, form the backbone of the antitrust laws applicable to vertical restraints. Turkish secondary legislations are closely modelled localised versions of relevant EU legislation. These include:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2);
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements;
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and
- the Block Exemption Communiqué No. 2013/2 on Specialisation Agreements.

Similarly, the Turkish Competition Authority (the Authority) has issued guidelines that clarify the specifics of each piece of relevant secondary legislation.

English versions of the aforementioned legislations can be found on the website of the Authority at www.rekabet.gov.tr.

2. List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

As per article 2 of Communiqué No. 2002/2, vertical agreements are defined as agreements concluded between two or more undertakings operating at different levels of the production or distribution chain for purchase, sale or resale of particular goods or services.

Although Communiqué No. 2002/2 does not provide an exhaustive list of vertical restraints that raise competition law sensitivities, the most frequently encountered examples of vertical restraints are pricing-related restrictions, single branding, exclusive dealing, exclusive customer allocation, and selective distribution.

3. Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The main objective of the law on vertical restraints is the protection of competition, which can be considered economic. On the other hand, the preamble to Law No. 4054 emphasises that the protection of the competition also serves social interests such as consumer protection. In addition, the 'Method of Analysis' section of the Guidelines on Vertical Restraints (the Guidelines) indicates that the economic benefits must be considered not only in terms of the

benefit of the contract parties, but also for consumers at large.

4. Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The responsible authority for enforcing prohibitions on anti-competitive vertical restraints is the Turkish Competition Authority, which is an independent regulatory authority with administrative and financial autonomy. The decision-making body within the Authority is the Turkish Competition Board (the Board). The Authority is independent in fulfilling its duties. No organ, authority or person may influence the final decision of the Board. Legal actions against the final decisions of the Board are brought before the administrative judicial bodies.

5. What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Turkey is an ‘effects doctrine' jurisdiction. Vertical restraints will be subject to Turkish antitrust laws to the extent that they prevent, distort or restrict competition in the relevant markets in Turkey and thus affect the goods and services markets within the territory of the Republic of Turkey. In this regard, Turkey allows extraterritorial jurisdiction in competition law-related cases. For instance, in its Coal Import decision dated 25 July 2006 numbered 06-55/712-202, the Board stated that acts by undertakings operating outside of Turkey will be considered within the scope of Law No. 4054 to the extent that these actions affect the Turkish markets.

6. To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Law No. 4054 is applicable to undertakings and association of undertakings. It defines an undertaking as an economic unit, which can either be a natural or a legal person, that acts independently in the markets to produce, market and sell goods or services. Thus Law No. 4054 does not make any distinction between public and private entities in the application of antitrust law. In this regard, as long as public entities that are party to any agreements that include vertical restraints satisfy the criteria for being an undertaking for competition law purposes, they will be subject to the same scrutiny as private entities.

7. Do particular laws or regulations apply **to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.**

In addition to Law No. 4054 and Communiqué No. 2002/2 (see question 1), there are communiqués that specifically regulate research and development agreements, and technology transfer agreements, as well as the motor vehicle and insurance sectors.

8. Are there any general exceptions from antitrust law for certain types of agreement **containing vertical restraints? If so, please describe.**

There are no de minimis exceptions or any other general exceptions from the application of article 4 of Law No. 4054 for certain types of agreements under Turkish competition law.

9. Is there a definition of ‘agreement' - or its equivalent - in the antitrust law of your jurisdiction?

Primary legislation does not provide a definition of ‘agreement' for antitrust law purposes. That said, as per paragraph 6 of the Guidelines on the General Principles of Exemption (the Exemption Guidelines), any and all kinds of understanding, whether oral or written, are considered as an agreement. The precedents of the Board also confirm this viewpoint.

10. In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

As also stated in question 9 above, it is not necessary for there to be a formal written agreement in order to engage the antitrust law in relation to vertical restraints. Any kind of informal or unwritten understanding would suffice to attract antitrust scrutiny. In its Linde Gaz decision dated 29 August 2013 numbered 13-49/710-297, the Board emphasised that even though there may be no written agreement that regulates the conduct that is being investigated by the Board, the conduct itself will be considered sufficient to form a vertical agreement as a result of the de facto effects on the market.

11. In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Although there is no explicit definition of ‘related company' in Turkish antitrust law, companies within the same chain of control are considered as a single economic unit and thus a single undertaking. Therefore, agreements between a parent company and a related company and agreements between related companies of the same parent company would fall outside the scope of application of antitrust law and thus also outside vertical restraints rules.

12. In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In principle, article 4 of Law No. 4054 will not apply to an agreement between a ‘principal' and its ‘genuine agent' as long as the agreement relates to contracts negotiated or concluded by the genuine agent on behalf of its principal.

The decisive factor for whether there is a genuine principal-agent relation is the commercial or financial risk borne by the agent in relation to the activities for which it has been appointed. If an agent bears any commercial or financial risk for the contracts negotiated or concluded on behalf of its principal, this relationship would be subject to antitrust scrutiny and antitrust law on vertical restraints would apply to such relationship.

13. Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent-principal relationship for these purposes?

According to the Guidelines, if an agent does not bear any commercial or financial risk in the contract that it has concluded or negotiated on behalf of its principal, the relationship between the agent and the principal is outside the scope of article 4 of Law No. 4054. In such a case, the purchase or sales activity of the agent is considered an activity of the principal and thus antitrust rules do not apply to such relationship.

Risk, the decisive factor in triggering antitrust scrutiny, is assessed on a case-by-case basis, but the Guidelines provide a non-exhaustive list of the types of risk that would require the application of antitrust rules:

- the agent contributing to the costs associated with the purchase or sale of goods or services, including transportation costs;
  requiring the agent to directly or indirectly contribute to sales-building activities;
- the agent bearing risks such as financing the contract goods kept in stock, or the cost of lost goods, and the inability of the agent to return unsold goods to the client;
- requiring the agent to provide after-sales service, repair or guarantee services;
- requiring the agent to make investments that may be necessary to be able to operate in the market in question, and which may solely be used in this market;
- the agent being liable with regard to third parties for the losses caused by the product sold; and
- the agent bearing responsibility other than its inability to receive its commission resulting from the failure of customers to fulfil the conditions of the contract.

The Guidelines or the precedents of the Board do not deal specifically with what constitutes an agent-principal relationship in the online sector.

14. Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Vertical agreements containing provisions that relate to the assignment to the buyer or use by the buyer of IPRs, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers, would benefit from the protection of Communiqué No. 2002/2, as long as they comply with Communiqué No. 2002/2. That said, if assignment of IPRs is the primary object of the vertical agreement, the agreement would be outwith the scope of the block exemption safe harbour.

15. Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The analytical framework of the Authority is very similar to the framework of the European Commission (EC). Agreements and concerted practices are illegal and prohibited if they have as their object or effect (or likely effect) the prevention, distortion, or restriction of competition, either directly or indirectly, in a particular market for goods or services.

Restrictive agreements would fall outside the scope of article 4 of Law No. 4054 if they benefit from a block exemption or an individual exemption (or both).

Details on block exemption are dealt with in question 18 below.

There are four cumulative conditions for individual exemptions and all of them need to be met for an individual exemption to be granted. Accordingly, the agreement should:

1. contribute to new developments and improvement or technical or economic progress in the production or distribution of goods and in providing services; and
2. allow consumers to benefit from such progress and improvement;

and should not:

3. eliminate competition in a substantial part of the relevant market; and
4. impose a restraint on competition that is more than essential for the attainment of the objectives set out in (i) and (ii).

16. To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

The legality of individual restraint does not directly relate to the market shares of the suppliers. There is no presumption of legality or illegality for individual vertical restraints depending on the supplier's market share being above or below any particular thresholds. That said, in individual exemption analysis, the risk of the foreclosure of the market, market positions and the conduct of other suppliers are taken into account. In other words, the legality of individual restraints is examined in light of the relevant market structure.

Furthermore, the Board considers the market shares of suppliers when assessing whether their vertical agreements should benefit from the block exemption.

17. To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

According to article 2 of Communiqué No. 2002/2, for those vertical agreements involving exclusive supply obligation, the block exemption applies also on condition that the market share of the buyer in the relevant market in which it purchases the goods and services that are the subject of the vertical agreement does not exceed 40 per cent.

In the Eczac?ba?? Baxter decision, dated 20 August 2014, numbered 14-29/592-258, the Board examines the market share of the buyer as well as the market share of the supplier. Accordingly, the Board decided that an agreement containing exclusive supply obligations cannot benefit from the block exemption since the market shares of both parties exceed the thresholds.

18. Is there a block exemption or safe harbor that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbor **functions.**

Communiqué No. 2002/2 provides a safe harbour for certain agreements containing vertical restraints. Agreements that fulfil the requirements of Communiqué No. 2002/2 would be exempt from the application of article 4 of Law No. 4054.

First, the relevant agreement has to be a vertical agreement for the purposes of Communiqué No. 2002/2 (ie, the parties operate at different levels of the production or distribution chain). Agreements among competitors (ie, actual or potential market players of the same product market) cannot benefit from the block exemption.

As stated above (see questions 8, 15, 16 and 17), block exemption will be applicable to the vertical agreements of suppliers of whom the market share in the relevant market (ie, the market for the contracted goods or services) does not exceed 40 per cent. In agreements that concern a relation in which a supplier appoints just one buyer in Turkey, the buyer's market share would also be relevant and it should not exceed 40 per cent.

Even if the market share of the supplier (or as the case may be, both the supplier and the buyer) does not exceed 40 per cent, the vertical agreement must not contain the following elements:

- fixing of minimum resale prices;
- restrictions on customers to whom, or the territories into which, a buyer can sell the contract goods;
- members of a selective distribution system supplying each other or end-users; and
- component suppliers selling components as spare parts to the buyer's finished product.

Further, non-compete obligations imposed on buyers that exceed five years, and post-term non-compete obligations that exceed one year, or obligations imposed on the members of the selective distribution system not to sell the branded products of designated competing providers are outwith the scope of the safe harbour provided by Communiqué No. 2002/2.

It should be noted that a vertical agreement that does not qualify for a block exemption could still be individually exempted from the application of article 4 of Law No. 4054 if it fulfils the criteria for individual exemptions under article 5 of Law No. 4054 (akin to article 101(3) of the TFEU).

Furthermore, the Authority reserves the right to withdraw the exemption if there is a change of circumstances under which the exemption has been granted.

19. How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

In the Exemption Guidelines, restricting a buyer's ability to determine its resale price is considered among the object restrictions. According to the Exemption Guidelines, if there is an object violation there is no need to look into the effects of the conduct in question. In this regard, resale price maintenance is considered as one of the hard-core competition restrictions.

Communiqué No. 2002/2 also makes this point clear by explicitly stating that agreements that prevent buyers from determining their own sale prices would not benefit from the exemption granted by Communiqué No. 2002/2. That said, suppliers are at liberty to set maximum resale prices or recommend resale prices from which the buyers can deviate without any deterrent factor (provided these do not become fixed or minimum selling prices).

Indirect means of resale price maintenance (eg, fixing the maximum level of discounts or the profit margins of the buyers, providing extra discounts to the buyer on condition that it conforms to the recommended prices and threatening the buyer with delaying, suspending deliveries or terminating the agreement for non-conformity with the recommended prices) would also be outside the scope of block exemption safe harbour.

That being said, when the decisions of the Board are analysed, the Board is sending mixed signals in looking for the effects of object violations (eg, resale price maintenance). In this regard, the decisions of the Board are not consistent and there are also decisions in which the effects of object violations were not looked into.

In the Dogati decision, dated 22 October 2014 and numbered 14-42/764-340, which was related to resale price maintenance in a franchise agreement, the Board discussed the effects of such restraints in detail. For instance, the Board analysed the structure of the fast food market and underlined that there is a vast number of competitors. However, the Board stated that the actual competitors of the franchisees are not the other franchisees of the same franchisor. The actual competitors are considered as the other undertakings operating in the fast-food sector. The Board also emphasised the positive effects of the restraints, on the consumers and the prestige of the trademark. Accordingly, the Board allowed such resale price maintenance due to the aforementioned reasonable justifications.

On the other hand, in its Samsung decision dated 23 June 2011 and numbered 11-39/838-262, the Board did not go into the details of the effects of the resale price maintenance, and without engaging in any effects analysis, concluded an outright infringement based on the fact that the supplier had intervened in the pricing behaviour of its distributors.

20. Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a ‘loss leader'?

There is no precedent or guideline on this issue.

21. Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

The Guidelines prohibit both direct and indirect means of resale price maintenance. Furthermore, the Guidelines provide various examples that are most frequently used by undertakings in order to monitor and control the resale prices of their distributors.

Moreover, the Guidelines state that direct or indirect means of resale price maintenance would be more effective when coupled with monitoring schemes. For example, an obligation that may be imposed on all buyers about reporting buyers that apply different resale prices would considerably facilitate the control, by the supplier, of prices applied in the market.

22. Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Although the Guidelines do not address the efficiencies of the resale price maintenance, the Board, in its decisions, discusses the efficiencies that can arguably arise out of such restrictions. However, the Board does not specifically address the efficiencies. It rather mentions that these efficiencies may be raised and be considered by the Board to the extent that the market conditions allow.

23. Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

Considering that there is no guidance or decision of the Board concluding that price relativity clauses would outright violate article 4 of Law No. 4054, such clauses should benefit from the block exemption safe harbour provided that the other criteria for the application of Communiqué No. 2002/2 are met. That said, the effects of price relativity clauses need to be assessed on a case-by-case basis before conclusively deciding on whether such clauses violate antitrust law.

24. Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favored customer, or that it will not supply the contract products on more favorable terms to other buyers, is assessed.

Considering that there is no guidance or decision of the Board concluding that most-favoured-customer clauses at a wholesale level would outright violate article 4 of Law No. 4054, such clauses should benefit from the block exemption safe harbour, provided that the other criteria for the application of Communiqué No. 2002/2 are met.

That said, as indicated in the Arcelik/Sony decision of the Board, dated 8 December 2010 and numbered 10-76/1572-605, depending on the specific circumstances surrounding the case at hand most-favoured-nation (MFN) clauses might have anti-competitive effects. The Board indicated that such clauses may give rise to competitive concerns in markets where the level of competition is low and where the parties to such agreements have significant market power. That said, after considering the limited scope of the MFN clause in the case at hand, and the characteristics of the relevant market and the features of the products, the Board concluded that the MFN clause did not violate antitrust law.

Thus effects of MFNs need to be assessed on a case-by-case basis.

25. Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

There is no decision of the Authority that specifically deals with vertical agreements containing MFN clauses for the online environment.

26. Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

Advertisements are considered as one of the most important tools of demand creation, and thus sales, for undertakings. Considering the aforementioned approach of the Authority, although there is no guidance or precedent, intervening with the buyer's advertisement policy and determining the minimum advertised price could be considered an indirect method of resale price maintenance. Therefore, such restriction could be deemed a violation of antitrust law.

27. Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favored supplier, or that it will not purchase the contract products on more favorable terms from other suppliers, is assessed.

The Authority does not make any distinction between the most-favoured-customer clauses applied to suppliers and those applied to the buyers. Therefore, the explanations under questions 23 and 24 are also applicable here.

28. How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Under the Exemption Guidelines, restrictions on the regions in which the buyer may sell the contracted goods are considered among the object restrictions. According to the Exemption Guidelines, if there is an object violation there is no need to look into the effects of the conduct in question. In this regard, territorial restrictions are considered hard-core competition restrictions.

Communiqué No. 2002/2 provides an exception to the aforementioned general rule. Accordingly, if the restrictions concern only active sales (ie, restrictions on passive sales would fall outside the scope of the block exemption) into exclusive territories allocated to another buyer (or to the supplier itself), provided that the other requirements of Communiqué No. 2002/2 are satisfied, such territorial restrictions would still fall under the protection of the block exemption. In this regard, sales as a result of active demand creation activities are considered active sales whereas meeting unsolicited orders of the customers are considered passive sales.

For agreements that satisfy the requirements of the foregoing given exception but do not qualify for block exemption (due to failure to satisfy the other requirements under Communiqué No. 2002/2) theoretically individual exemption would still be applicable if the relevant conditions for individual exemption were met.

29. Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions are also considered object restrictions. Therefore, the main rule and its exception mentioned under question 28 above are also applicable to restrictions on the customers to whom a buyer may resell contract products.

Apart from the aforementioned exception, when customer restrictions are concerned, Communiqué No. 2002/2 provides for three more exceptions to the general rule:

- restrictions on wholesalers preventing them from selling directly to end-users;
- restrictions on members of selective distribution systems preventing them from selling to unauthorised distributors; and
- restrictions on buyers preventing them from selling components - that are supplied for the purposes of incorporation - to customers

who intending to use them to manufacture the same type of products as those produced by the supplier.
Vertical agreements containing restrictions on the above given issues would also benefit from the protection of the block exemption.

30. How is restricting the uses to which a buyer puts the contract products assessed?

There has not been any decision given by the Authority on the restriction of such uses. Most probably, such prevention would be considered outside the scope of the block exemption since this kind of restriction is not mentioned in the exceptional circumstances mentioned under questions 28 to 29 above. Thus, if it does not fulfil the criteria for an individual exemption, it would be a restriction of competition under article 4 of Law No. 4054.

31. How is restricting the buyer's ability to generate or effect sales via the internet assessed?

According to the Guidelines, sales made through the internet are generally passive sales; therefore, restricting these sales are prohibited. However, sending e-mails to the customers in the exclusive territory or to groups of customers of another buyer is considered a method of active sales as long as such a request is not solicited by the customers in question.

In the Yatsan decision, dated 23 September 2010 and numbered 10-60/1251-469, although the supplier argued that the aim of its restriction regarding internet sales was to protect its brand image, the Board indicated that internet

sales are mostly considered as passive sales, and that outright restrictions regarding internet sales of the buyer cannot benefit from the block exemption under Communiqué No. 2002/2.

32. Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

Neither the Guidelines nor any decision has dealt specifically with the differential treatment of different types of internet sales channel.

33. Briefly explain how agreements establishing ‘selective' distribution systems are assessed. Must the criteria for selection be published?

Establishing selective distribution systems is allowed by the Turkish competition law regime subject to fulfilment of certain conditions. Accordingly, Communiqué No. 2002/2 sets out the relevant criteria for selective distribution system to benefit from the block exemption safe harbour. Under Communiqué No. 2002/2 a selective distribution system will benefit from the block exemption if there is no:

- resale price fixing;
- restriction on active or passive sales to end-users; and
- restriction on members of the system to prevent them from supplying the contracted goods from each other.

According to Communiqué No. 2002/2, the criteria must be designated, but the suppliers are not required to publish them.

34. Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Under the Guidelines, to establish a selective distribution system, the contract products should necessitate such system in order to preserve their quality or to ensure their proper use.

35. In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

Although a complete restriction on internet sales is prohibited since they are considered as passive sales, the Authority may allow such restrictions if there are objective and reasonable justifications. The Authority follows the conduct of the EC on internet sales prohibitions (mentioned in the Yatsan decision). The Authority states that some quality standards with regard to internet sales by resellers can be justified. The Board does not allow internet sales restrictions in the Yatsan decision; since these restrictions were not considered reasonable, the Board refers to EC decisions and indicates that suppliers may also require approved distributors to maintain a bricks-and-mortar store in order to be able to conduct online sales.

36. Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorized buyers or sales by authorized buyers in an unauthorized manner?

This issue has not been dealt with in any decision of the Authority.

37. Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes. The Guidelines mention cumulative restrictive effects of multiple selective distribution systems. It is stated that the cumulative restrictive effects may prevent accessibility to the market. Accordingly, the Board takes into account

the market shares of the competitors when analysing cumulative restrictive effects.

38. Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The Guidelines permit the combination of selective distribution systems with other restrictions such as non-compete or exclusive restrictions provided that these additional restrictions are not hard-core restrictions, the relevant market share thresholds (ie, 40 per cent) are not exceeded, and (iii) resale to the authorised distributors and end-users are not restricted. The aforementioned agreements benefit from the block exemption under Communiqué No. 2002/2.

39. How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Primary or secondary legislation does not explicitly deal with ‘exclusive purchasing' arrangements. That said, if such an arrangement is combined with other restrictions it may raise competition concerns regarding market partitioning. Moreover, if market shares of both the supplier and the buyer are below 40 per cent, the restriction would fall under the block exemption safe harbour.

40. How is restricting the buyer's ability to sell non-competing products that the supplier deems ‘inappropriate' assessed?

The Board has not dealt with this issue yet, but it is likely that such restriction be considered as a hard-core restriction and be outside the scope of the block exemption. Therefore, the justifications and related efficiencies of such restriction must clearly be argued to the Board in order to qualify for an individual exemption.

41. Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Non-compete obligations in vertical agreements would fall under the restriction of article 4 of Law No. 4054 unless they satisfy the requirements of Communiqué No. 2002/2 or they are individually exempted.

Under Communiqué No. 2002/2, non-compete obligations that do not exceed five years in duration and post-term non-compete obligations that do not exceed one year following termination of the contract may benefit from safe harbour protection (if the contract satisfies the other conditions of the block exemption). Non-compete obligations that are tacitly renewable beyond a period of five years would also fall outside the scope of the block exemption. For non-compete clauses outside the scope of the block exemption, it is still possible to be individually exempted from the application of article 4 of Law No. 4054. The individual exemption analysis for such non-compete clauses would depend on the market positions of the parties (together with the market position of competitors), the extent and duration of the clause, the level of trade, barriers to entry and the level of countervailing buyer power.

42. How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Any obligation imposed on the buyer to purchase more than 80 per cent (based on the purchases of the buyer in the previous calendar year) of its purchases of the contracted goods or services from the supplier or from any other source to be designated by the supplier is considered a non-compete obligation. Thus, such obligation would be subject to the same assessment as that provided in question 41 above.

43. Explain how restricting the supplier's ability to supply to other buyers is assessed.

Although Communiqué No. 2002/2 does not explicitly deal with the restrictions imposed on suppliers, it allows for an exclusive supply relation (a supplier agreeing to supply only one buyer in Turkey) as long as the market share of both

the supplier and the buyer is below 40 per cent. Considering that the potential anti-competitive effects of such restrictions would be similar to those of non-compete obligations for a term shorter than five years, exclusive supply relations would be within the scope of Communiqué No. 2002/2.

44. Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Although the Guidelines do not give wide coverage to the restrictions imposed on suppliers, it is stated that a restriction on a component supplier from selling components as spare parts to end-users or to repairers that are not entrusted by the buyer with the repair or servicing of the buyer's products is considered a hard-core restriction of competition.

45. Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

46. Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Currently, the undertakings are not required to notify vertical restraints, and therefore there is no penalty imposed by the Board in the event that the undertakings do not notify their agreements containing vertical restraints.

Undertakings are at liberty to conduct their own self-assessment regarding their agreements containing vertical restraints. If the self-assessment reveals that the vertical restraints fulfil the requirements of exemption (block or individual), there is no need to notify the Board.

If the self-assessment of the undertakings does not reveal concrete results, the Guideline for Voluntary Notification provides the necessary guidance regarding the notifications of vertical restraints to the Board for exemption.

The individual exemption notification takes place using the notification form attached to the Guideline for Voluntary Notification. There is no statutory review period but in practice it takes approximately three to six months for the Board to decide on individual exemptions. After its review the Board would:

- conclude that the agreement falls within the scope of the block exemption safe harbour;
- grant an individual exemption;
- grant a conditional exemption (ie, an exemption conditioned on fulfilment of certain conditions); or
- grant a negative clearance.

Reasoned decisions of the Board are published on the official website of the Authority.

47. If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Apart from the procedure explained under question 46 above, there is no other procedure to obtain guidance from the Board or a declaratory judgment from a court.

48. Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

The Board can launch an investigation into alleged unlawful vertical restraints ex officio or as a result of a complaint. The Board is at liberty to reject the complaint if it does not deem it serious. If the Board finds the complaint serious,

however, it should conduct a preliminary investigation. The preliminary investigation is conducted by a team of case handlers appointed by the Board. After submission of the case team's preliminary report to the Board, it should decide within 10 days whether to launch a formal investigation.

If the case proceeds to an investigation, the process must be completed within six months, which can be extended, once only, for another period of up to six months.

The investigation process involves a written phase (consisting of three written defences) and an oral phase (consisting of an oral hearing). After the completion of the written phase the Board may decide to have an oral hearing ex officio or upon request by the undertakings concerned. After the oral hearing the Board must render its final decision within 15 calendar days.

49. How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Decisions of the Board regarding vertical agreements constitute a significant portion of its jurisprudence. Between January 2014 and June 2014 (ie, the most recent statistics at the date of publication), The Board have decided on 28 files concerning such restraints, constituting 12 per cent of its 229 total decisions.

The Board's decisions tend to focus on agreements containing territorial restrictions and resale price restrictions.

50. What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

If the Board concludes that a contract contains prohibited vertical restraints, depending on the severability of the relevant clauses either the agreement itself or only the relevant clauses containing the vertical restraints (to the extent that they are severable from the rest of the agreement) are deemed null and void, and administrative monetary fines may be imposed on the undertakings concerned.

51. May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The Board is directly authorised to impose penalties without requiring an approval from another entity.

If there is a violation of article 4 of Law No. 4054, the Board is entitled to impose administrative monetary fines on the undertakings concerned up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.

For vertical restraints, however, the Board does not always impose administrative monetary fines but closes the investigation at the preliminary investigation phase by issuing decisions conditioned on structural or behavioural remedies. In these decisions, however, if the undertaking concerned does not comply with the relevant remedies there should be a full-blown investigation about the conduct in question, which might lead to an administrative monetary fine.

52. What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Dawn raids and formal requests for information are the available investigatory tools to the Board to gather information in enforcing antitrust rules.

In carrying out its duties, the Board may request any information it deems necessary from all public institutions and organisations, undertakings and association of undertakings. Unless such requests are not complied with, administrative monetary fines can be imposed on relevant undertakings.

In addition, the case handlers appointed by the Board may perform dawn raids, in which they examine the books and records of the relevant undertakings together with any and all paperwork and documents, and request written or oral statements.

53. To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Under Law No. 4054, anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements in violation of Law No. 4054, or abuses its dominant position in a particular market for goods or services, is obliged to compensate injured third parties for any damages. Injured parties (including the parties to the agreement or third parties, or both) are entitled to litigate compensation claims arising from violations of Law No. 4054 in the civil courts and request treble damages. The duration of any civil lawsuit would depend on the complexity of the case.

54. Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

Updates and trends

Under the Turkish competition law regime, there is no de minimis safe harbour for the application of Article 4 of Law No. 4054. An amendment proposal, pending before Parliament, introduces a mechanism that provides a safe harbour for such agreements, concerted practices and decisions of associations of undertakings that would technically fall under the restrictions of Article 4, but are considered to be outside the scope of such restrictions due to either their limited or insignificant effects in the market, or the relatively weak economic and financial positions of its parties.

The amendment indicates that the substantial and procedural issues surrounding the application of the de minimis safe harbour will be regulated by the secondary legislation that will be issued by the Turkish Competition Board. Whether the Board will follow in the footsteps of its EU counterpart and adopt an identical de minimis communiqué remains to be seen.

Related Practices

- Antitrust and Competition
- Commercial Contracts
- Distribution, Franchising and Agency Agreements