LEXOLOGY
Getting The Deal Through

Vertical Agreements

in Turkey

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Contributors

Turkey

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com
ELIG Gurkaynak Attorneys-at-Law

Hakan Özgökçen
hakan.ozgokcen@elig.com
ELIG Gurkaynak Attorneys-at-Law

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LEGAL FRAMEWORK

Antitrust law

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

The main legislation applying to vertical restraints is article 4 of Law No. 4054 on the Protection of Competition (Law No. 4054). Article 4 of Law No. 4054 is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices having (or which may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof.

Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2) outlines the block exemption principles for vertical agreements.

In addition, the Competition Board issued the Guidelines on Vertical Agreements by its decision dated 30 June 2003 and has recently updated these Guidelines by its decision dated 29 March 2018. Amendments to the Guidelines on Vertical Agreements mainly focus on most-favoured nation (ie, customer) (MFN) clauses and online sales.

Types of vertical restraint

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?

The concept of vertical restraint is not defined in Law No. 4054. Article 2 of Communiqué No. 2002/2 defines vertical agreements as agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services.

Although both Communiqué No. 2002/2 and the Guidelines on Vertical Agreements define the following vertical agreement types that may raise antitrust concerns, the list is not exhaustive:

- resale price maintenance: setting fixed prices for the buyer’s resale prices;
- region and customer restrictions: restrictions placed upon buyers concerning the region in or customers to which the contracted goods or services may be sold;
- selective distribution systems: a distribution system whereby the provider undertakes, directly or indirectly, to sell the goods or services that are the subject of the agreement only to distributors selected by the provider, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorised distributors;
- non-compete obligations: any kind of direct or indirect obligation preventing the purchaser from producing, purchasing, selling or reselling goods or services that compete with the goods or services that are the subject of the agreement;
- exclusive supply obligation: a direct or indirect obligation on the provider to sell the goods or services that are the subject of the agreement to only one buyer inside Turkey for the purpose of use or reselling; and
- single branding conditions: the buyer is encouraged to procure all or most of its requirements for a particular product or group of products from a single supplier.

Legal objective

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

Law No. 4054 does not attribute a specific objective to vertical restraints, but in general, Turkish competition law pursues protection of competition, by removing entry barriers and encouraging innovation.

Responsible authorities

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

The national authority responsible for enforcing prohibitions on anticompetitive vertical restraints in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board, the office of the president and technical and administrative units. The Competition Authority enforces competition law through five sector-specific technical units and approximately 128 case handlers. An economic analysis and research unit; a strategy development, arrangement and budget unit; a decisions unit; an information management unit; and an external relations, education and competition advocacy unit assist these five technical units and the office of the president in performing their tasks. The Competition Board, on the other hand, is the decisive organ of the Competition Authority and is responsible for, inter alia, investigating and condemning anticompetitive behaviours. The Competition Board consists of seven independent members.

Jurisdiction

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. Pursuant to article 2 of Law No. 4054, Turkish competition law applies to anticompetitive conduct of undertakings that operate in Turkey or have impact on the relevant markets in Turkey. So far, Law No. 4054 has not been applied extraterritorially regarding vertical restraints.

Agreements concluded by public entities

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

The scope of 'undertaking' comprises both private and public entities that have economic activity. Therefore, a public entity that has economic activities in the private sector will be considered as an undertaking under Turkish competition law.

In a recent decision concerning vertical agreements, the Competition Board decided that an agreement concluded between the Social Security Authority (SGK) and the Turkish Pharmacists' Association did not fall under the scope of Law No. 4054 because the SGK's conduct under investigation was related to its public service (13 July 2017, Decision No. 17-22/362-158). On the other hand, the Council of State held that Law No. 4054 applies to decisions of public

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associations of undertakings if these decisions have no statutory basis (16 December 2014, Decision No. 2010/4769 E and 2014/4294 K). Law No. 4054, however, will not apply to these associations' conduct if they are related to implementation of the legal provisions regarding their duties as public associations or professional chambers. In light of the above, vertical restraints agreements of public entities can be subject to Law No. 4054, provided that the relevant agreement is not related to their duties as public entities set forth by the law.

Sector-specific rules

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.

There are certain communiqués regarding specific sectors:

- Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and
- Block Exemption Communiqué No. 2008/3 in Relation to the Insurance Sector.

General exceptions

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

Under Turkish competition law, there are no general exceptions (such as de minimis) for certain types of agreements containing vertical restraints.

TYPES OF AGREEMENT

Agreements

Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Law No. 4054 refrains from a strict definition of 'agreement', since an agreement may occur in various ways. For instance, the Competition Board decided that non-binding gentlemen's agreements were 'agreements' within the meaning of Law No. 4054 where parties agreed to anticompetitive terms (8 March 2013, Decision No. 13-13/198-100; 3 March 2011, Decision No. 11-12/226-76). The Competition Board also decided that even agreements entered into by unauthorised employees of undertakings are deemed 'agreements' under Turkish competition law (26 November 1998, Decision No. 93-750-159). Paragraph 6 of the Guidelines on Vertical Agreements on the General Principles of Exemption explicitly states that there is no difference between oral or written forms of agreement for the purposes of competition law.

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?

The Turkish competition regime does not require an anticompetitive agreement to be in a specific form. Hence, a

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vertical agreement that is written, oral or in any other form can be subject to Law No. 4054 (eg, the Linde Gaz decision dated 29 August 2013, Decision No. 13-49/710-297).

Parent and company-related agreements

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)?

In many cases, the Competition Board decided that companies within the same group are regarded as a single economic entity. The Competition Board decided in TTKKMB (27 May 1999, Decision No. 99-26/233-141), TTKKMB v Bandırma (17 July 2001, Decision No. 01-33/331-94) and Elektrik Dağıtım (3 March 2011, Decision No. 11-12/240-77) that agreements between the parent company and the company it controls are not subject to article 4. Given that a related company generally refers to an entity that is independent legally but not economically, vertical agreements between a parent company and the companies it controls do not fall within the scope of the prohibition under article 4.

Agent–principal agreements

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?

Under the Guidelines on Vertical Agreements, agent–principal agreements do not in principle fall within the scope of article 4 of Law No. 4054 because, generally, agents operate on behalf of the principal. Nevertheless, the Guidelines on Vertical Agreements set forth economic and commercial risk factors that will make such agreements subject to article 4. Where an agent bears the economic or commercial risk of the business, article 4 will apply to this agreement.

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?

The Guidelines on Vertical Agreements set forth certain criteria to determine whether the agent bears economic or commercial risks:

- contribution by the agency to the costs related to the purchase and sale of the goods or services, including transportation costs;
- forcing the agency to contribute, directly or indirectly, to activities aimed at increasing sales;
- the agency assuming risks, such as the funding of the contracted goods kept at storage or the cost of lost goods, and the agency being unable to return unsold goods to the client;
- placing an obligation on the agency for provision of after-sales service, maintenance or warranty services;
- forcing the agency to make investments that may be necessary for operation in the relevant market and that can be used exclusively in that market;
- holding the agency responsible to third parties for any damages caused by the products sold; and
- the agency assuming responsibility other than failing to get a commission owing to customers' failure to fulfil the terms of the contract.

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Intellectual property rights

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

According to article 2 of Communiqué No. 2002/2, if a vertical agreement concerns the sale and resale of goods and services and also includes provisions on the transfer of intellectual property rights to the buyer or the exercise of such rights by the buyer, the relevant vertical agreement might benefit from block exemption under Communiqué No. 2002/2 provided that the relevant intellectual property rights directly concern the use, sale or resale, by the buyer or the customers of the buyer, of the goods or services that constitute the substantial matter of the agreement, and that the transfer or use of such intellectual property rights does not constitute the main purpose of the agreement.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

The steps of the analysis on whether a vertical agreement falls within article 4 of Law No. 4054 are as follows:

- determining whether an agreement contains conditions infringing article 4 by its object;
- if the agreement does not restrict competition by object, analysing the effect of the agreement; and
- where the Competition Board fails to prove the anticompetitive effect of the agreement, it should demonstrate that the agreement has a likely effect on the relevant market.

One of the major distinctions between the TFEU and Law No. 4054 is that the TFEU applies to an agreement restricting competition by its object or effect, whereas Law No. 4054 also applies to an agreement of which the potential effect restricts competition.

Moreover, the Guidelines on Vertical Agreements specify two steps in analysing the extent to which an anticompetitive vertical agreement should be prohibited:

- first, depending on the type of vertical restriction, the undertakings involved need to define the relevant market so that the market share of the supplier or the buyer may be determined; and
- second, the market share of the supplier, or in exclusive supply agreements, the market share of the buyer, is evaluated in terms of the 40 per cent threshold. If the market share is below the 40 per cent threshold, the agreement may benefit from the block exemption, provided that it does not include any of the per se restrictions and meets the rest of the conditions listed in the Communiqué. If, however, the market share is above the 40 per cent threshold, the agreement can only benefit from an individual exemption should the agreement fulfil the conditions under article 5 of Law No. 4054.

In order for an agreement to benefit from individual exemption under article 5 of Law No. 4054, it should:

1. ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
2. benefit the consumer with the above-mentioned developments;

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3. not eliminate competition in a significant part of the relevant market; and
4. not limit competition more than is necessary for achieving the goals set out in (1) and (2).

Market shares

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?

A vertical agreement may benefit from a block exemption if the supplier's market share is below 40 per cent, provided that the vertical agreement complies with certain conditions in Communiqué No. 2002/2. However, if an agreement is not eligible for a block exemption, it may still be exempted from the prohibition of article 4, provided that the conditions of the individual exemption under article 5 of Law No. 4054 are satisfied.

Further, despite a vertical agreement restricting the competition in the market but benefiting from the block exemption, such a block exemption could be revoked by the Competition Board under article 6 of Communiqué No. 2002/2 where the vertical agreement network comprises more than 50 per cent of the market.

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?

Under Turkish competition law, there are no general exceptions (such as de minimis) for certain types of agreements containing vertical restraints. In exclusive supply agreements, if the buyer's market share exceeds 40 per cent in the market in which it purchases goods and services, such an agreement cannot benefit from the block exemption.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

Is there a block exemption or safe harbour 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 harbour functions.

Communiqué No. 2002/2 provides the block exemption regime for vertical agreements. Where the supplier's (or in exclusive supply agreements, the buyer's) market share is below 40 per cent, the agreement may benefit from the block exemption provided that the other conditions are also met. If the market share of the undertaking exceeds the 40 per cent threshold, the agreement automatically falls outside the scope of the block exemption. In other words, agreements between undertakings holding market shares above 40 per cent in the relevant markets are automatically disqualified from the block exemption, and the suppliers may not impose any kind of direct or indirect vertical restraints on buyers regarding the goods or services covered by the agreements, unless the agreement qualifies for an individual exemption under article 5 of Law No. 4054.

Additionally, there are specific sector-based exemption communiqués that apply to certain undertakings.

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TYPES OF RESTRAINT

Assessment of restrictions

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

According to article 4 of Communiqué No. 2002/2, restricting a reseller's discretion and ability to determine its own prices is among the restrictions by object. Article 4, however, also provides that a supplier can determine maximum resale price or recommend resale prices unless these result in fixed or minimum prices in practice.

Moreover, paragraph 17 of the Guidelines on Vertical Agreements provides that, to prevent a maximum or recommended price notified to the buyer from resulting in fixed or minimum prices, the supplier should explicitly state in its price lists, or on the products, that these prices are maximum or recommended.

The Competition Board's established practice adopts a very sensitive approach in connection with all resale price maintenance (RPM) arrangements. Despite certain decisions where the Competition Board signalled a 'rule of reason' analysis by considering the market structure, competition level and effect on consumers (eg, Çilek , 20 August 2014, Decision No. 14-29/597-263; Dogati , 22 October 2014, Decision No. 14-42/764-340), the Competition Board's established precedent points towards a per se infringement for RPM concerning minimum or fixed prices (eg, Sony , 22 November 2018, Decision No. 18-44/703-345, Henkel 19 August 2018, Decision No. 18-33/556-274, Anadolu Elektronik , 23 June 2011, Decision No. 11-39/838-262)

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'?

Implementation of such restrictions has not been considered in any legislation or decisional practice in Turkey.

Relevant decisions

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

Neither guidelines nor decisions have addressed the possible links between resale price maintenance (RPM) and other vertical restraints. While there have been cases where the agreement at issue contained other vertical restrictions (such as territorial sales restrictions and internet sales bans) in addition to RPM, the Competition Board considered these restrictions separately.

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

Pursuant to article 4 of Communiqué No. 2002/2, RPM resulting in setting minimum or fixed prices is prohibited as a by-object restriction. For these restrictions, therefore, efficiency arguments are not accepted. In a limited number of precedents, the Competition Board suggested that efficiency arguments (such as eliminating a free-riding problem and increasing productivity of distribution) might be considered in the case of resale price maintenance practices and acknowledged that efficiencies may outbalance any anticompetitive impact of this conduct (see, eg, Reckitt , 13 June 2013, Decision No. 13-36/468-204; Frito Lay , 12 June 2018, Decision No. 18-19/329-163).

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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.

The main principle applicable to this hypothetical is whether or not the supplier is benchmarking fixed or minimum price results (eg, through a supplier's monitoring and punishment mechanism). If so, this conduct may be considered as a restriction of competition under article 4 of Law No. 4054.

Suppliers

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

Under the current Turkish competition law, there is no statutory provision explicitly allowing or prohibiting most-favoured nation (MFN) arrangements in Turkey. On the other hand, the Guidelines on Vertical Agreements recognise potential pro-competitive effects of MFN clauses and adopt a rule of reason-based approach to these clauses. The Guidelines on Vertical Agreements provide that, in the analysis of these clauses, factors to be taken into account include:

- the relevant undertakings' and their competitors' position in the relevant market;
- the object of the MFN clause in the relevant agreement; and
- the specific characteristics of the market.

However, MFNs, especially when used by a strong player in the market, might raise competition law concerns if and to the extent they 'artificially increase market transparency', 'raise barriers to entry' or 'raise competitors' costs'.

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.

Yemek Sepeti (9 June 2016, Decision No. 16-20/347-156) is the first case where MFN clauses were considered as an infringement of Law No. 4054. The Competition Board concluded that Yemek Sepeti holds a dominant position in the online meal order delivery platform services market. The Competition Board has further decided that preventing restaurants from offering better or different conditions to rival platforms through MFN practices leads to exclusionary effects and thus an abuse of dominant position.

Pursuant to the recently added content on MFN clauses to the Guidelines on Vertical Agreements, an agreement containing MFN clauses may benefit from block exemption provided that the market share of the party that is the beneficiary of the clause does not exceed 40 per cent and that other conditions under Communiqué No. 2002/2 are met. If the market share thresholds are exceeded, other factors to be taken into account include the market position of the party benefiting from the MFN clause and its competitors; the purpose of including the MFN clause in the relevant agreement; and specific aspects of the market and the provided MFN clause.

The Guidelines on Vertical Agreements also provide more concrete examples; for instance, retroactive MFN clauses that allow the beneficiary buyer to get more favourable offers in all cases or that increase the supplier's costs for making discounts to buyers that are not party to the clause (payment of the difference between the low prices offered

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to buyers that are not party to the MFN clause and the price offered to the buyer party to the MFN clause, to the relevant buyer) are likely to harm competition much more than other clauses can. Besides, where parties to MFN clauses have market power, such clauses are more likely to harm competition. Under these circumstances, MFN clauses may lead to exclusion of competitors that are not party to the relevant agreement and market foreclosure. Moreover, these clauses in concentrated markets are potentially more problematic than those in non-concentrated markets from a competition law perspective. Further, where MFN clauses have become widespread practice and thus a significant portion of the market has been subjected to these clauses, the Competition Board may take a more sceptical approach in the assessment of these clauses.

On the other hand, the Competition Board acknowledges that MFN clauses do not always have anticompetitive effects. For example, where neither party to an agreement including MFN clauses has market power, it is unlikely that implementation of these clauses would raise competition concerns. Moreover, when a small-scale buyer without any significant market power applies an MFN clause, this may have a positive effect on competition given that this clause allows buyers to benefit from favourable prices and sales conditions. In markets where the concentration level of the upstream market is low (ie, the upstream market is sufficiently competitive), competitive harm may not be likely given that current and potential competitors may choose from sufficient alternatives. Where the market is not transparent, the negative effects of MFN clauses will be relatively low given that effective implementation of these clauses in the market is unlikely.

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.

In principle, resale price maintenance concerning minimum prices is a restriction by object and prohibited under Turkish competition law. That said, in a number of decisions, the Competition Board did not find an infringement when the buyer was able to apply discounts in practice and there was no evidence of the supplier monitoring or punishing such behaviour (see, eg, Frito Lay ; Çağdaş v Zuhal , 24 October 2013, Decision No. 13-59/825-350).

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

This is assessed in the same way as a supplier selling products on favourable terms to a buyer.

Restrictions on territory

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?

Pursuant to article 4 of Communiqué No. 2002/2, restrictions requiring the buyer not to sell the products or services in certain territories or to certain customers may be considered as a violation of article 4 of Law No. 4054 by object. There are, however, a number of exceptions to this rule. Indeed, article 4(a)(1) of Communiqué No. 2002/2 allows the supplier to prevent the buyer from active sales of contract products or services into the exclusive territory or to customers allocated to the supplier or another buyer, provided that this restriction does not cover resale by the buyer's

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customer. Other exceptions to this rule are as follows:

- preventing a buyer at wholesale level from selling the products to end-customers;
- in selective distribution systems, preventing authorised distributors from selling the products to unauthorised distributors; and
- when the relevant product is supplied in order to be combined with other products, preventing the buyer from selling these products to the suppliers' competitors that are producers.

Communiqué No. 2002/2 grants block exemption to the practices articulated above.

Provisions extending beyond what is permissible under an appropriately defined exclusive distribution system, such as restriction of passive sales, cannot benefit from the block exemption and may exclude the vertical agreement from the application of Communiqué No. 2002/2 (eg, Mey İçki , 12 June 2014, Decision No. 14-21/410-178; Novartis , 4 July 2012, Decision No. 12-36/1045-332). Similarly, restrictions in respect of sales that are not the result of an active effort, such as internet sales, and advertisements or promotions conducted through media with general intent (ie, that are not specifically targeted), are considered passive sales methods and such restrictions cannot benefit from block exemptions.

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

One of the focus areas of the recent amendments to the Guidelines on Vertical Agreements is restrictions on internet sales. A restriction on sales through distributors', dealers' or buyers' websites imposed by a supplier is considered as restriction on passive sales and thus prohibited under Turkish competition law. Within this context, purchases made through consumers' visits to dealers' websites, consumers' contact with dealers or consumer requests to be automatically informed (about deals) by dealers are considered to be passive sales. A dealer offering various language selections on their website does not change the fact that these are passive sales. Accordingly, restrictions in particular on internet sales will not benefit from the exemption under Communiqué No 2002/2. For instance, the restriction on a (exclusive) distributor's website to consumers located in another (exclusive) distributor's region or diverting such consumers' access to supplier's or the other (exclusive) distributor's websites will be considered as a hardcore restriction.

Restrictions on customers

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?

In its Teknosa decision (9 November 2017, Decision No. 17-36/578-252), the Competition Board investigated an allegation that Teknosa restricted İklimsa distributors from selling the products to the complainant. Teknosa operates in the air-conditioning sector through its brand İklimsa with 200 distributors and 245 authorised service stations. The complainant, who is active in the sales of domestic appliances and air conditioners, indicated that it purchases the relevant products from İklimsa distributors and sells them through its own store, website and a number of e-commerce websites. The Competition Board held that restricting buyers' sales to unauthorised distributors is permitted under Communiqué No. 2002/2 and decided not to initiate a full investigation.

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Restrictions on use

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

Article 2 of Communiqué No. 2002/2, setting forth the block exemption, merely addresses the restrictions regarding production, purchase, sale or resale of particular products or services. In this regard, restrictions with respect to the uses to which a buyer puts the contract products are not considered within Communiqué No. 2002/2. Hence, such restrictions could directly be the subject of individual exemptions under article 5 of Law No. 4054.

Restrictions on online sales

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

Internet sales are considered as passive sales based on Communiqué No. 2002/2. The Competition Board introduced further descriptions on restrictions on internet sales that should be considered as passive sales, and thereby that cannot benefit the group exemption provided under Communiqué No. 2002/2.

Accordingly, the restrictions below, particularly on internet sales, do not benefit from the exemption under Communiqué No. 2002/2:

- Restriction on a (exclusive) distributor's website to consumers located in another (exclusive) distributor's region or diverting such consumers' access to a supplier's or the other (exclusive) distributor's websites: restriction on sales requested through internet from a particular region or customer group will be considered as a hardcore restriction.
- (Exclusive) distributor's termination of a transaction after realising the customer is not located in its (exclusive) region regarding the customer's delivery and billing address information: restriction on sales requested through the internet from a particular region or customer group will be considered as a hardcore restriction.
- Restriction on the share of the total amount of sales through the internet: setting a maximum sales limit for internet sales will be considered as a hardcore restriction. A condition setting forth that a distributor should sell a particular portion of its total sales through physical stores to preserve the efficiency of those stores without restricting internet sales or conditions as to ensure the compatibility of internet sales and the general distribution system is excluded from the scope of this restriction.
- Condition providing that a distributor should pay more to its supplier for products that it resells through the internet than products supplied in physical stores: applying different bulk purchase prices directly or indirectly (eg, rebate systems) will be considered within this scope. A supplier's power to affect the distributor's preference of its distribution channel by increasing the price difference between online and physical store sales may obstruct distributors from operating through internet sales. Nevertheless, suppliers are entitled to pay fixed amounts to their distributors regardless of their sales income, to support their reselling efforts (through the internet or physical stores).

However, internet sales made to a particular exclusive region or a particular exclusive customer group of another distributor through promotion or similar methods will be deemed active sale and may benefit from an exemption. Advertisements directed to a specific group of customers or a specific geographical region, or both, and (unsolicited) emails will be considered as active sales. For instance, advertisements directed to a particular geographical region, which are published through third-party platforms or marketplaces are active sales for that region's residents. Moreover, suppliers may require quality standards for the website or may require the provision of certain services to the customers who purchase through the internet.

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In a selective distribution system, a supplier may require its distributor to possess at least one physical store; however, such requirement should not aim to exclude the distributors that only sell through the internet (pure online players) from the market or restrict their sales. Suppliers may also impose additional requirements on their distributors, but more importantly, such requirements should not aim to directly or indirectly restrict a distributor's internet sales. Justifications for these requirements should be objective, reasonable and admissible with respect to the aspects that enhance the distribution's qualifications and quality, brand image and potential efficiencies. Likewise, a supplier may require the distributor to resell only through 'sales platforms or market places' that fulfil certain standards and conditions. However, this requirement should also not aim to restrict the distributor's internet sales and price competition.

Requirements imposed on internet sales and physical sales should:

- serve the same purpose;
- ensure comparable consequences; and
- be able to verify the intrinsic differences of the two distribution channels (the equivalence principle).

In other words, the conditions should not restrict internet sales directly or indirectly. Therefore, one can consider requirements as hardcore restrictions if they violate the equivalence principle and discourage distributors from using the internet as a distribution channel.

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

In Marka Mağazacılık (4 November 2019, Decision No. 19-15/208-93) the Board evaluated a franchising agreement including a right to make sales on platforms that comply with certain conditions. The Board stated that the supplier may set standards for internet sales, such as the supplier's ability to make sales only through 'sales platforms/ marketplaces'. The Board further stated that such requirements aiming at the protection of brand image would be considered as reasonable but that those requirements should not seek to restrict or dissuade from online sales and to promote sales through brick and mortar stores.

Selective distribution systems

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

Establishing a selective distribution system is allowed under the Turkish competition regime on the basis of Communiqué No. 2002/2, provided that the market share of the supplier does not exceed 40 per cent in the relevant market to which it provides the goods or services. In addition, a selective distribution system may benefit from block exemption provided that there is no resale price maintenance; no restriction on active or passive sales to end-consumers; or no restriction on system members that prevents them from supplying the contracted goods to each other. According to Communiqué No. 2002/2, and the Competition Board's decisions, it is not required for parties to disclose the criteria for selection in order to receive an exemption.

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?

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Products must require a selective distribution system to be established in order to maintain their quality or to ensure their proper use. In Sevil Parfümeri (9 September 2009, Decision No. 09-41/987-249), the Competition Board stated that products such as jewellery, perfume and cosmetics require special training of employees and strategic locations for point of sale. Also, the Guidelines on Vertical Agreements provide that selective distribution for 'brand products such as jewellery and perfumery' are most likely admissible (paragraph 33 of the Guidelines on Vertical Agreements). Thus, such products may be the subject of a selective distribution system.

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?

Members of a selective distribution system at the retailer level cannot be restrained from making active or passive sales of products or services to end-consumers provided that the buyer does not operate in unauthorised territory. In this regard, buyers who are retailers are allowed to sell the contract products or services to end-consumers on the internet. However, from the wording of Communiqué No. 2002/2, buyers at the wholesale level are not allowed to make either active or passive sales of the contract products or services to end-consumers. In the Jotun decision, the Competition Board noted that internet sales are primarily categorised as passive sales, as per paragraph 24 of the Guidelines on Vertical Agreements, and therefore the restriction of online sales would be deemed as the restriction of passive sales. In this context, the Competition Board considered that the supplier can prohibit sales to unauthorised distributors within the framework of a selective distribution system; but it cannot restrict active or passive sales to end users on the retail level. The Competition Board evaluated that prohibiting online sales as a whole would be disproportionate with the purpose of restricting the sales to unauthorised distributors and, additionally, would not benefit from an individual exemption.

Also, with respect to the recently amended provision of the Guidelines on Vertical Agreements, the supplier may require its distributor to possess at least one physical store.

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 unauthorised buyers or sales by authorised buyers in an unauthorised manner?

In BBA Beymen (25 March 2004, Decision No. 04-22/234-50), Beymen entered into a franchise agreement with undertakings between the members of a selective distribution system, thereby restricting them from selling the contract products to unauthorised distributors. The Competition Board granted an exemption on the agreement under Communiqué No. 2002/2. More recently, pursuant to the Competition Board's Arçelik (18 October 2011, Decision No. 11-53/1353-479) and Consumer Electronics (7 November 2016, Decision No. 16-37/628-279) decisions, the prevention of the sale of contract products to unauthorised distributors is considered in the scope of the group exemption provided under Communiqué No. 2002/2, if the supplier's market share does not exceed 40 per cent in the relevant market. If the market share threshold is exceeded, the restriction may still benefit from an individual exemption.

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

Pursuant to article 6 of Communiqué No. 2002/2, a vertical agreement restricting competition in the market may benefit from block exemption; however, such a block exemption may be revoked where the vertical agreement network

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comprises more than 50 per cent of the market.

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?

Under the Guidelines on Vertical Agreements, selective distribution agreements will likely lead to competition concerns where they are combined with single branding obligations. Additionally, if the cumulative restrictive effects of multiple selective distribution systems operate in the same market, the selective distribution agreement may hinder competitors in the relevant market if it is combined with non-compete obligations. In such circumstances, the criteria stated in a single branding obligation under the Guidelines on Vertical Agreements will apply to the analysis of whether the vertical agreement has an anticompetitive impact on the market. Nevertheless, restricting passive sales to end-customers by way of applying territory restrictions is prohibited under Communiqué No. 2002/2.

Other restrictions

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

Although exclusive purchasing obligations are not specifically mentioned in Communiqué No. 2002/2, article 4(d) of the Communiqué indicates that selective member buyers cannot be restricted from purchasing and selling from each other. In Bayer (29 March 2018, Decision No. 18-09/160-80), the Competition Board examined Medifar's obligations under the agreement between Bayer and Medifar (ie, the obligation to notify Bayer if Medifar won the tender to supply medicines to hospitals, or the obligation to buy Bayer's products to comply with its contractual obligations against the hospitals regarding the supply of medicines) and concluded that Bayer became the exclusive supplier of the medical products. Although the agreement could not be granted a block exemption as Bayer's market share exceeds the threshold set by Communiqué No. 2002/2, the Competition Board granted an individual exemption to the agreement under article 5 of Law No. 4054.

In its recent Takeda decision (7 February 2019, Decision No. 19-06/57-21), the Competition Board observed that Takeda imposes an exclusivity clause in its agreements with Aksel and Gül indicating that both undertakings could only obtain the products from Takeda or the third parties identified by Takeda. Although the agreement could not be granted a block exemption, as Takeda's market share exceeds the threshold set by Communiqué No. 2002/2, the Competition Board granted individual exemptions to the relevant agreements under article 5 of Law No. 4054.

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

These restrictions have not been considered in the legislation or case law in Turkey.

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

Under Communiqué No. 2002/2, non-compete agreements require the buyer not to manufacture, and to purchase the contract products or services only from the supplier. Non-compete obligations could be considered as restrictive under

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the Turkish competition law regime. According to article 5 of Communiqué No. 2002/2, non-compete obligations of longer than five years or for an indefinite period, and non-compete provisions that are designed to remain in effect post-termination, may not benefit from the block exemption (eg, Takeda , 3 April 2014, Decision No. 14-13/242-107; Sanofi Aventis , 22 November 2012, Decision No. 12-59/1570-571; JTI Tobacco , 13 February 2019, Decision No. 19-07/81-33).

However, pursuant to Communiqué No. 2002/2, non-compete agreements may benefit from the block exemption provided that the market share of the supplier does not exceed 40 per cent in the relevant market, and the term of the agreement does not exceed five years.

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?

Pursuant to article 3 of Communiqué No. 2002/2, a non-compete obligation occurs not only where the buyer is obliged to purchase all the products or services from the seller, but also if the buyer is obliged to buy at least 80 per cent of the products or services from the supplier.

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

Under Turkish competition law, exclusive supply refers to an obligation on the supplier to sell the products or services to only one buyer in Turkey. Article 3(h) of Communiqué No. 2002/2 indicates that exclusive supply agreements may benefit from block exemption provided that the buyer's market share does not exceed 40 per cent in the relevant market in which the buyer purchases the products or services. Further, the Guidelines on Vertical Agreements state that the buyer's market share of the market in which it sells the products or services is also a substantial factor when determining whether an exclusive purchase obligation may benefit from block exemption. Thus, even if the buyer's market share in the relevant market is below 40 per cent, the Competition Board will consider the buyer's market share in which it sells (downstream market) the products or services. The Bayer decision also constitutes an important precedent regarding the Competition Board's approach towards exclusive supply. In the decision, the Competition Board found that the agreement between Bayer and Medifar also includes exclusivity provisions that require Bayer to supply its products only to Medifar within the territory of Turkey. Under this provision, Bayer had no right to bid on any tender (except group tenders and bulk purchase tenders) in Turkey on behalf of itself. Considering Bayer's market share exceeds the threshold set by Communiqué No. 2002/2, the Competition Board did not grant a block exemption but granted an individual exemption under article 5 of Law No. 4054.

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

Although the Guidelines on Vertical Agreements do not address the restrictions imposed on suppliers in detail, 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, could be considered a hardcore restriction of competition.

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?

The Guidelines on Vertical Agreements stipulate that vertical agreements comprising tying conditions might have an

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anticompetitive impact, thereby creating barriers to entry in the market in which the tied product is sold. This is first assessed in the Competition Board's decision in Petrol Ofisi (11 January 2018, Decision No. 18-02/20-10). The complainants' allegation was that Petrol Ofisi AŞ, Milan Petrol San Tic AŞ and TP Petrol Dağıtım AŞ restricted competition by not allowing their distributors to purchase auto gas liquefied petroleum gas (LPG) from suppliers other than themselves. The Competition Board stated that the undertakings under scrutiny laid down the condition of purchasing auto gas LPG from the suppliers entrusted by them, for buyers to be able to purchase liquid fuels (ie, gasoline and diesel) from them in their dealership agreements. Pursuant to article 4 of Law No. 4054, a tying practice should at least be against the essence of the agreement subject to evaluation or to commercial customs in order to be considered under the scope of article 4 of Law No. 4054. In the case at hand, the Competition Board found that the tying practice between auto gas LPG and liquid fuel products has become a trade custom within the sector and is in compliance with the essence of the concerning agreement owing to certain sector-related reasons explained in the decision. To that end, the Competition Board concluded that a vertical restraint through tying does not infringe article 4 of Law No. 4054 within the circumstances presented above.

NOTIFICATION

Notifying agreements

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

Parties are not obliged to notify agreements containing vertical restraints to the Competition Board. Pursuant to the Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings, an exemption will be granted by the Competition Board on its own initiative where the conditions in the agreement satisfy article 5 of Law No. 4054. In this regard, fines will not be imposed on undertakings, associations of undertakings or persons in the managing bodies of undertakings for not notifying agreements, concerted practices or decisions of association of undertakings.

Paragraph 45 of the Guidelines on Vertical Agreements states that parties to a vertical agreement may apply for individual exemption regarding the agreements that do not benefit from block exemption under the Guidelines on Voluntary Notification.

Authority guidance

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?

Parties are not obliged to notify agreements containing vertical restraints to the Competition Board. Pursuant to the Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings, an exemption will be granted by the Competition Board on its own initiative where the conditions in the agreement satisfy article 5 of Law No. 4054. Other than this, there is no other procedure with respect to notification for clearance or exemption.

ENFORCEMENT

Complaints procedure for private parties

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

The Competition Board is entitled to launch an investigation into alleged anticompetitive conduct ex officio or in response to a complaint. The Competition Board will conduct a preliminary investigation if it finds the notice or complaint to be serious. The preliminary report of the Competition Authority's experts will be submitted to the Competition Board within 30 calendar days of the preliminary investigation decision being taken by the Competition Board. The Competition Board will then decide, within 10 calendar days, whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send notice to the undertakings concerned within 15 calendar days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

Regulatory enforcement

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?

Provisions regarding vertical restrictions are frequently applied in Turkey. Vertical restraints comprising resale price restrictions, selective distributions systems, conditions on exclusive territory or customer allocation, and passive sales could be considered the priorities of the Turkish competition regime.

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

Pursuant to the Turkish competition law regime, where the vertical agreement containing a prohibited restraint fails to satisfy the conditions for one of the block exemptions or the individual exemption, such agreement will be void provided that the relevant clause of the agreement may not be severed from the agreement. If the relevant restraining clause may be severed from the agreement, the rest of the agreement will remain valid.

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 Competition Board is the sole responsible authority for decisions, including imposing penalties on the violating undertakings. A company infringing the competition law may face a fine of up to 10 per cent of its Turkish turnover generated in the financial year preceding the date of the decision. Employees or managers of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. The minimum amount of fine that may be imposed under Law No. 4054 is set at 26,028 Turkish lira for 2019.

Investigative powers of the authority

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

The Competition Board may request all information that it deems necessary from all public and private institutions and organisations, undertakings and trade associations. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

The Competition Board is also able to conduct on-site inspections (dawn raids). The relevant company, employees and outside counsel are obliged to cooperate with the Competition Board during the dawn raid. Obstructing an on-site inspection (eg, by refusing to grant the staff of the Competition Authority access to business premises) will trigger a turnover-based administrative fine.

Private enforcement

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?

The Competition Board does not decide whether the victims of anticompetitive conduct merit damages. These aspects are supplemented with private lawsuits. Articles 57 et seq of Law No. 4054 entitle any person who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to bring damages claims against the violators to recover up to three times their personal damages, plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a treble damages principle exists in law. In private suits, the incumbent firms are adjudicated before regular civil courts. Most civil courts wait for the decision of the Competition Board before building their own decision on the Competition Board's decision since civil courts do not usually analyse whether there is an anticompetitive agreement or concerted practice, and defer to the Competition Board to render its opinion on the matter, thus treating the issue as a prejudicial question.

OTHER ISSUES

Other issues

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

No.

UPDATE AND TRENDS

Recent developments

What were the most significant two or three decisions or developments in this area in the last 12 months?

In its Maysan Mando decision (20 June 2019, Decision No: 19-22/353-159), the Competition Board decided that

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Maysan Mando violated article 4 of the by determining the resale prices of dampers through the supply agreements with its dealers. The Competition Board evaluated such conduct under the Block Exemption Communiqué No.2017/3 on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3) and held that, further to article 6 of Communiqué No. 2017/3, preventing the distributors' freedom to set their own selling prices is considered as a restriction that aims to restrict competition in both direct or indirect manners and any agreement that contains such restrictions cannot benefit from the block exemption provided within the scope of Communiqué No. 2017/3.

The Competition Board highlighted that resale price maintenance conducts generally constitute a restriction by object and it is thus not possible to grant an individual exemption under article 5 of the Law No. 4054. Therefore, it is not expected that such practice can meet the conditions set forth under article 5(a) and (b), namely ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, and benefiting the consumer from such practice.

In BFIT (7 February 2019, Decision No. 19-06/64-27), the Competition Board launched a preliminary investigation against Bfıt Sağlık ve Spor Yatırım ve Tic AŞ (BFIT), pursuant to the allegations that BFIT's franchising agreements included non-compete and no-poaching clauses.

- The Competition Board found that no-poaching clauses may have an indirect effect on the labour market since they result in wage-fixing; therefore, they should be evaluated under article 4 of Law No. 4054. However, the Competition Board noted that if know-how and innovation are essential in the relevant sectors and the duration of the clauses is reasonable, these agreements may benefit from an exemption. Accordingly, the Competition Board concluded that the franchising agreements would be assessed within the scope of block exemption under Communiqué No. 2002/2 since BFIT's market share was below the 40 per cent threshold.
- The non-compete clause covered the franchisees and their employees during the agreement term (ie, five years) and also included a non-compete obligation for the period following the termination of the agreement (respectively, one year and two years for two separate types of agreements). The Competition Board stated that non-compete obligations regarding agreement term for five years complied with Communiqué No. 2002/2. However, the non-compete obligations with regard to the period following the termination of agreements do not meet the conditions in Communiqué No. 2002/2, since they are not limited to the facility or land where the purchaser operates during the agreement do not meet the conditions in terms of duration. Therefore, the Competition Board concluded that they cannot benefit from a block exemption. In the same vein, the Competition Board stated that non-poaching clauses cannot benefit from the block exemption either.
- The Competition Board further conducted an individual exemption analysis for the non-compete and non-poaching clauses. In this analysis, the Competition Board found that franchising agreements restricted competition more than necessary, and thus did not grant individual exemption since the non-compete obligation with regard to the period following the termination of the agreement did not meet the necessary conditions in terms of duration and geographic area, and the scope of the consent of BFIT was unclear.

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