

Vertical Agreements

Contributing editor
Patrick J Harrison



2018

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Vertical Agreements 2018

Contributing editor
Patrick J Harrison
Sidley Austin LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2007
Twelfth edition
ISBN 978-1-78915-080-3

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between December 2017 and February 2018. Be advised that this is a developing area.

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



CONTENTS

Argentina	5	Mozambique	132
Julián Peña Allende & Brea		Fabricia de Almeida Henriques Henriques, Rocha & Associados Pedro de Gouveia e Melo Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Australia	11	Netherlands	138
Charles Coorey and Liana Witt Gilbert + Tobin		Sarah Beeston and Anouk Rutten Van Doorne	
Austria	20	Philippines	146
Guenter Bauer and Robert Wagner Wolf Theiss		Franco Aristotle G Larcina and Arlene M Maneja SyCip Salazar Hernandez & Gatmaitan	
Brazil	27	Russia	153
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		Alexander Egorushkin and Igor Panshensky Antitrust Advisory	
Canada	35	Serbia	161
Kevin Ackhurst, Matthew Zedde and Erin Brown Norton Rose Fulbright Canada LLP		Guenter Bauer, Maja Stankovic and Marina Bulatovic Wolf Theiss	
China	43	South Africa	168
Lei Li Sidley Austin LLP		Heather Irvine Falcon & Hume Inc	
European Union	52	Spain	173
Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP		Pedro Callol, Manuel Cañadas and Laura Moya Callol, Coca & Asociados SLP	
France	65	Sweden	180
Marco Plankensteiner Kramer Levin		Mats Johnsson Hamilton Advokatbyrå	
Germany	73	Switzerland	186
Markus M Wirtz and Silke Möller Glade Michel Wirtz		Franz Hoffet, Marcel Dietrich and Martin Thomann Homburger	
India	84	Thailand	196
Rahul Rai, Rahul Satyan and Aakarsh Narula AZB & Partners		Chotika Lurpongkukana Blumenthal Richter & Sumet	
Indonesia	92	Turkey	202
HMBC Rikrik Rizkiyana, Anastasia Pritahayu R Daniyati and Wisnu Wardhana Assegaf Hamzah & Partners		Gönenç Gürkaynak and Hakan Özgökçen ELIG, Attorneys-at-Law	
Ireland	99	Ukraine	209
Ronan Dunne Philip Lee		Igor Svehkar and Oleksandr Voznyuk Asters	
Japan	106	United Kingdom	217
Nobuaki Mukai Momo-o, Matsuo & Namba		Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP	
Macedonia	115	United States	229
Vesna Gavriloska CAKMAKOVA Advocates		Joel Mitnick, Peter Huston and Karen Kazmerzak Sidley Austin LLP	
Malaysia	124		
Sharon Tan and Nadarashnaraj Sargunaraj Zaid Ibrahim & Co			

Preface

Vertical Agreements 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Vertical Agreements*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Canada, India, the Netherlands, the Philippines, Russia, South Africa, Spain and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Turkey

Gönenç Gürkaynak and Hakan Özgökçen

ELIG, Attorneys-at-Law

Antitrust law

1 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 (the Board) issued the Guidelines on Vertical Agreements (Guidelines) by its decision dated 30 June 2003 and last updated these Guidelines by its decision dated 9 September 2015.

Types of vertical restraint

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?

The concept of vertical restraint is not defined in Law No. 4054. Article 2 of Communiqué No. 2002/2 defines the concept of vertical agreements as agreements that are 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 define certain vertical arrangement types in terms of antitrust concerns, the list is not exhaustive:

- resale price maintenance (RPM): setting the 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 which 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

3 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 separate objective to vertical restraints, but in general, Turkish competition law pursues economic efficiency along with protection of consumers.

Responsible authorities

4 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 Authority). The Authority has administrative and financial autonomy and consists of the Board, presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 145 case handlers. A research department, a leniency unit, a decisions unit, an information-management unit, an external relations unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Authority, the Board is responsible for, inter alia, investigating and condemning anticompetitive behaviours. The Board consists of seven independent members.

Jurisdiction

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. In light of article 2 of Law No. 4054, the Turkish competition regime covers the behaviours 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 in terms of vertical restraints.

Agreements concluded by public entities

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

The scope of an undertaking comprises both private and public entities that take part in economic activity. Therefore, a public entity taking part in economic activity in the private sector will be deemed as an undertaking under the Turkish competition regime. In *Türk Telekom* (Council of State 10th Chamber Case No: 2001/2113; Decision No: 2004/5849), the Council of State decided that Türk Telekom, which was a completely public entity at that time, was an economic undertaking and thus was subject to Law No. 4054. The Board did not deem a municipality as an undertaking, owing to its characteristic as a public authority (12 June 2018; 08-39/511-187).

Sector-specific rules

- 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.**

There are certain Communiqués regarding specific sectors:

- Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector;
- Block Exemption Communiqué on Specialization Agreements;
- Block Exemption Communiqué on Technology Transfer Agreements;
- Block Exemption Communiqué on Research and Development Agreements; and
- Block Exemption Communiqué in Relation to the Insurance Sector.

General exceptions

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

There are no general exceptions (such as *de minimis*) for certain types of agreements under Turkish competition law.

Agreements

- 9 Is there a definition of ‘agreement’ – or its equivalent – in the antitrust law of your jurisdiction?**

Law No. 4054 avoids providing a complete definition of ‘agreement’, since an agreement may occur in various ways. For instance, the Board decided that nonbinding gentlemen’s agreements are deemed ‘agreements’ where the parties comply with rules that restrict competition (8 March 2013; 13-13/198-100). Furthermore, it was decided by the Board that even agreements made by unauthorised persons are deemed ‘agreements’ in terms of Turkish competition law (26 November 1998; 93-750-159).

It should be noted that paragraph 6 of the Guidelines on the General Principles of Exemption explicitly states that there would not be any difference between oral or written forms of agreement regarding competition law.

- 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 stated in question 9, Turkish competition regime does not seek to define agreement under any requirements as to form. Hence, a vertical agreement that is written, oral or of any type would be subject to Law No. 4054 (eg, *Linde Gaz* decision dated 29 August 2013; 13-49/710-297).

Parent and related-company agreements

- 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)?**

In many cases, the Board decided that companies within the same group are regarded as a single economic entity, such as *Glencore AG* (25 July 2006; 06-55/712-202). Moreover, the Board also decided in *TTKKMB* (27 May 1999; 99-26/233-141) and *Türk Telekom* (17 July 2001; 01-33/331-94) that agreements between the parent company and its controlled company are not subject to article 4. Given that a related company generally refers to an entity that is independent in a manner of law, but not economically, vertical agreements between a parent company and its controlled related company do not fall in the scope of article 4.

Agent–principal agreements

- 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?**

Under the Guidelines, 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 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, the agreement will be subject to article 4.

- 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?**

The Guidelines set forth certain criteria in order 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 which 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 due to customers’ failure to fulfil the terms of the contract.

Intellectual property rights

- 14 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 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 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 rights does not constitute the main purpose of the agreement.

Analytical framework for assessment

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

In order to analyse whether a vertical agreement falls within article 4 of Law No. 4054:

- first, it should be determined whether an agreement contains conditions infringing article 4 by its object;
- second, if the object of the agreement does not restrict competition, the effect of the agreement should be analysed; and
- lastly, where the Board fails to indicate 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, whereas the TFEU seeks an agreement being restrictive by its object or effect, Law No. 4054 seeks a potential effect of the agreement in addition to object and effect criteria.

Moreover, the Guidelines specify three steps in terms of analysis as to what extent 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;
- if the market share is below the 40 per cent threshold, the agreement shall benefit from the block exception, provided it does not include any of the *per se* restrictions and meets the rest of the conditions listed in the Communiqué; and

- if the market share is above the 40 per cent threshold, it is necessary to assess whether the agreement meets the criteria listed in 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:

- ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
- benefit the consumer from the above-mentioned;
- not eliminate competition in a significant part of the relevant market; and
- not limit competition more than is necessary for achieving the goals set out in (a) and (b).

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?

As stated in question 15, in the Turkish competition law regime, assessing the legality of individual restraints is related to the market share of supplier, since the undertaking's market share must be below 40 per cent in order for it to benefit from the block exemptions provided that the vertical agreement complies with certain conditions in Communiqué 2002/2. However, if an agreement is not eligible for a block exemption, such as where the supplier's market share exceeds 40 per cent in the market to which it supplies goods and services, it would still be exempted from article 4, provided that the conditions of the individual exemption under article 5 of Law No. 4054 are satisfied.

Furthermore, 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 Board under article 6 of Communiqué 2002/2 where the vertical agreement network comprises more than 50 per cent of the market.

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?

The answers to questions 8 and 16 are also applicable here. Where there exists an exclusive supply obligation and the market share of the buyer 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

18 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.

Under the Turkish competition law regime, vertical agreements may be exempted under certain conditions of Communiqué No. 2002/2. Agreements having market shares below 40 per cent in the relevant product markets may benefit from the block exemption. 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 an individual exemption is granted by the Board.

Apart from Communiqué No. 2002/2, the Turkish competition regime allows individual exemptions for anticompetitive vertical agreements provided the anticompetitive conditions in the agreement satisfy article 5 of Law No. 4054.

Additionally, there are specific sector-based exemption communiqués (see question 7) applying to certain undertakings.

Types of restraint

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

The Board's established practice adopts a very sensitive approach in connection with all resale price maintenance arrangements. Indeed, Communiqué No. 2002/2 does not exempt agreements that directly or indirectly restrict the buyer's ability and freedom to determine its own resale prices.

Despite certain decisions where the Board somehow signalled 'rule of reason' analysis by considering the market structure, competition level and effect on consumers (eg, *Çilek*, 20 August 2014, 14-29/597-263; *Dogati*, 22 October 2014, 14-42/764-340), the Board's established precedent clearly points towards viewing resale price maintenance as a per se violation (eg, *Anadolu Elektronik*, 23 June 2011, 11-39/838-262; *Akmaya*, 20 May 2009, 09-23/491-117; *Kuralkan*, 27 May 2008, 08-35/462-162).

Nevertheless, the supplier is not prohibited from setting a maximum resale price or recommend resale prices for the goods and services it supplies, provided that such conditions do not, directly or indirectly, lead to any fixed or minimum selling prices and the supplier's market share in the relevant product market in Turkey remains below 40 per cent.

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'?

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

21 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 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 resale price maintenance, the Board considered these restrictions separately.

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

Although certain efficiencies regarding vertical agreements have been addressed in the Guidelines, efficiencies regarding resale price maintenance have not been addressed, as such restrictions are forbidden per se.

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.

Such a specific form of resale price maintenance is not dealt with in the Communiqué or Guidelines. However, the Board is highly sensitive to the application of resale price maintenance. Since such restraints are deemed hard-core restrictions, any obligation that may directly or indirectly induce price fixing on the buyer will be deemed as anticompetitive and cannot benefit from block exemption. It is also difficult for hard-core restrictions to benefit from individual exemptions, as the negative effects of such restraints will, generally, overcome positive effects of the restraints.

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-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

There is no statutory provision explicitly allowing or disallowing MFNs in Turkey. MFNs, especially when used by a strong market player, might raise competition law concerns if and to the extent that they

'artificially increase market transparency', 'raise barriers to entry' or 'raise the rivals' costs'.

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.

Within the *Yemek Sepeti* (9 June 2016, 16-20/347-156) decision, MFN clauses have been evaluated in Turkey, which have set forth the approach of the Board. *Yemek Sepeti* is the first ruling in the Board's decisional practice where MFN clauses have been held to violate the provisions of the Competition Law. The Board concluded that Yemek Sepeti holds a dominant position in the online meal order-delivery platform services market and decided that preventing restaurants from offering better/different conditions to rival platforms through MFN practices creates exclusionary effects in the relevant market and thus constitutes an abuse of a dominant position.

Furthermore, within the scope of the draft amendments to the Guidelines (Draft Guidelines), which were announced by the Authority on 20 July 2017 on its website to seek public opinion, there are explanations regarding MFN practices that are being considered for incorporation into the Guidelines. See Anticipated developments in Update and trends.

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.

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

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-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

The answers to questions 23, 24, and 25 apply equally to this question.

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?

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 are considered a violation of article 4 of Law No. 4054 by their object. Nevertheless, Communiqué No. 2002/2 sets forth an exception regarding territorial restrictions allowing such restrictions to be exempted. Article 4(a)(1) of Communiqué No. 2002/2 explicitly allows the supplier to require the buyer not to make active sales for contract products or services into the exclusive territory or to customers allocated to the supplier or another buyer provided that the restriction in question does not cover resale by the buyer's customer.

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, 14-21/410-178; *Novartis*, 4 July 2012, 12-36/1045-332).

Restrictions regarding direct marketing methods, establishing a point of sale or distribution warehouse, and advertisements or promotions directly targeting customers in a region are considered active sale methods, restriction of which could be exempted under the block exemption.

On the other hand, restrictions in respect of sales that are not the result of an active effort, such as internet sales, and advertisements or promotions of a general nature in the media are considered passive sales methods and such restrictions cannot benefit from block exemptions.

29 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?

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

30 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?

Restrictions aimed at the resale of goods or services for certain customers are deemed hard-core restrictions by their object. Hence, the conditions provided in question 28 regarding active and passive sales are implied equivalently.

Nevertheless, article 4(a)(1) of Communiqué No. 2002/2 sets forth three exceptions. First, the buyer in a wholesaler's position could be restricted from selling the products or services directly to end-consumers in order to maintain the efficiency arising from distribution network. Secondly, in a selective distribution system, system members could be prevented from selling the contract products or services to unauthorised distributors. Lastly, where the supplier is the producer, restricting the buyer from selling such combining products to competitors of the supplier is permitted.

31 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 considers the restrictions regarding producing, purchasing and 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.

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

As explained in question 28, internet sales are considered as passive sales based on Communiqué No. 2002/2. In this regard, any restriction aimed at internet sales will be outside the scope of block exemption.

33 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'?

Neither any legislation nor the Guidelines have dealt in any way with the differential treatment of different types of internet sales channels. Refer to the *Yemek Sepeti* decision in question 25.

34 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 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 (i) no resale price maintenance, (ii) no restriction on active or passive sales to end-consumers; or (iii) no restriction on system members that prevents them from supplying the contracted goods to each other.

35 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?

The products must require a selective distribution system to be established in order to preserve their quality or to ensure their proper use. In *Sevil Parfümeri* (9 September 2009; 09-41/987-249) the Board stated that products such as jewellery and perfume depend on certain training for employees and strategic locations for point of sale. Thus, such products may be the subject of a selective distribution system.

36 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?

As explained in question 34, members of a selective distribution system at the retailer level cannot be restrained from making active or passive sales of the products or services to end-consumers provided that

Update and trends

Anticipated developments

The Authority has prepared the Draft Guidelines within the scope of the ongoing re-evaluation studies of Communiqué 2002/2 and the Guidelines. The amendment mainly focuses on (i) MFN clauses, (ii) agencies and (iii) internet sales and is anticipated to be adopted at the end of January 2018.

- MFN clauses: the Draft Guidelines propose two amendments in terms of MFN clauses: (i) inclusion of a new sentence at the end of paragraph 19 of the Guidelines (which concerns resale price maintenance), indicating that MFN clauses may be considered as an example to further reinforce the influence of direct or indirect methods of determining the resale price, and (ii) inclusion of an entire separate section consisting of three paragraphs relating to MFN clauses and the relevant assessments.
- Agency agreements: the Guidelines prior to the proposed amendments indicate that the non-compete clauses in agency agreements are only considered within the scope of article 4 (concerning anticompetitive agreements) of Law No. 4054 and are subject to the individual exemption regime if the relevant clauses result in market foreclosure. The proposed amendment in the draft Vertical Guidelines in terms of agency agreements would allow non-compete clauses subject to article 4 of Law No. 4054 and subject to the individual exemption regime at all times, eliminating the condition that they result in foreclosure.
- Internet sales: the Draft Guidelines propose to include additional explanations in line with EU legislation. The additional explanations include the principles to be considered when evaluating internet sales (ie, internet sales are generally considered to be passive sales and should not be restricted) and certain restrictions and requirements implemented by suppliers regarding internet sales that may benefit from block exemption (ie, requiring quality standards for the use of the internet site to resell the supplier's goods, requiring certain services to be provided to the customers, and requiring the web site to have a physical sales point).

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 internet. However, from the wording of Communiqué No. 2002/2, buyers at the wholesaler level are not allowed to make either active or passive sales of the contract products or services to end-consumers. Indeed, in *Antis Kozmetik* (24 October 2013; 13-59/831-353), the Board argued that internet sale restrictions on the distributor of the selective distribution system is a vertical restraint that may not benefit from the block exemption, since passive sales in a selective distribution system cannot be restricted.

37 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; 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 Board decided to grant an exemption on the agreement under Communiqué No. 2002/2.

38 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, despite a vertical agreement restricting competition in the market but benefiting from the block exemption, such a block exemption may be revoked by the Board where the vertical agreement network comprises more than 50 per cent of the market.

39 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, selective distribution agreements will likely induce 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-competing obligations. In such circumstances, the criteria stated in a single branding obligation under the Guidelines will apply to the analysis as to whether the vertical agreement has an anticompetitive impact on the market.

40 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 Communiqué No. 2002/2 indicates that selective member buyers cannot be restricted from purchasing and selling between each other. In *EÜAŞ* (3 August 2011; 11-44/960-313), the Board decided that an exclusive purchase agreement with a four-year term could receive a block exemption.

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

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

42 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 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, 14-13/242-107; *Sanofi Aventis*, 22 November 2012, 12-59/1570-571).

However, 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.

43 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 buyer, but also if the buyer buys at least 80 per cent of the products or services from the supplier.

44 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. Furthermore, the Guidelines 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 Board will consider the buyer's market share in which it sells (downstream market) the products or services.

45 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, 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 hard-core restriction of competition.

46 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?

Although not assessed in any decision of the Board, the Guidelines state that vertical agreements comprising tying conditions might have an anticompetitive impact, thereby creating barriers in the market in which the tied product is sold.

Notifying agreements**47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.**

Parties are not obliged to notify the vertical agreements to the 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 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, association of undertakings and persons in the managing bodies of undertakings for not notifying agreements, concerted practices and decisions of association of undertakings.

Paragraph 45 of the Guidelines states that parties to the vertical agreement may apply for individual exemption regarding the agreements that do not fall in block exemption under the Guidelines on Voluntary Notification.

Authority guidance**48 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?**

Other than the procedure for notification stated in question 47, there is no other procedure with respect to notification for clearance or exemption. It is not possible under Turkish competition law to seek the Authority's guidance.

Complaints procedure for private parties**49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?**

The Board is entitled to launch an investigation into alleged anticompetitive conduct ex officio or in response to a complaint. The Board will conduct a pre-investigation if it finds the notice or complaint to be serious. The preliminary report of the Authority's experts will be submitted to the Board within 30 calendar days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 calendar days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 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 Board.

Enforcement**50 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 allocated, and passive sales could be considered the priorities of the Turkish competition regime.

51 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 one of the block exemptions and 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.

52 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?

As stated in question 49, the Board is the sole responsible authority for decisions including imposing penalties on the violating undertakings. In the case of a proven anticompetitive conduct or agreement, the undertakings concerned shall be separately subject to administrative monetary fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision. Employees or managers of the undertakings or association of

ELIG*Attorneys at Law***Gönenç Gürkaynak
Hakan Özgökçen****gonenc.gurkaynak@elig.com
hakan.ozgokcen@elig.com**Çitlenbik Sokak No:12
Yıldız Mahallesi
Beşiktaş, 34349 Istanbul
TurkeyTel: +90 212 327 17 24
Fax: +90 212 327 17 25
www.elig.com

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.

Investigative powers of the authority

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

The 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 Board is also authorised to conduct on-site inspections (dawn raids). Refusal to grant the staff of the Authority access to business premises may lead to the imposition of a turnover-based fine.

Private enforcement

54 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 Board does not decide whether the victims of the anticompetitive conducts merit damages. These aspects are supplemented with private lawsuits. Articles 57 et seq of Law No. 4054 entitle any person who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages, plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple damages principle exists in law. In private suits, the incumbent firms are adjudicated before regular civil courts. Most civil courts wait for the decision of the Board in order to build their own decision on the Board's decision.

Other issues

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

No.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com