

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority issues an opinion letter regarding its preliminary investigation on a manufacturer of ceramic and granite product for restricting active and passive sales of its dealers outside their territory and for forcing consumers to purchase its products within their provinces (*Qua Granit*)

ANTICOMPETITIVE PRACTICES, BLOCK EXEMPTION (REGULATION), DISTRIBUTION AGREEMENT, EXCLUSIVE DISTRIBUTION, INVESTIGATIONS / INQUIRIES, VERTICAL RESTRICTIONS, SERVICES, TURKEY, EXEMPTION (INDIVIDUAL), EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT, CHEMICAL INDUSTRY

Turkish Competition Authority, *Qua Granit*, 19-46/772-333, 26 December 2019 (Turkish)

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The Turkish Competition Board (“**Board**”) published its reasoned decision regarding its preliminary investigation pertaining to the allegations that Hayal Seramik Yapı ve Ürünleri San. Tur. ve Tic. A.Ş. (“**Qua Granit**”) violated Article 4 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by way of restricting the active and passive sales of its dealers outside their territory and thus forcing consumers to purchase Qua Granit products within their provinces. As a result of its assessment, the Board unanimously decided to not initiate a full-fledged investigation, but to send an opinion letter to Qua Granit asking it to abstain from the relevant restrictive practices based on Article 9 of Law No. 4054.

This case summary includes an analysis of the Turkish Competition Board’s (“**Board**”) Hayal Seramik (Qua Granit) decision [7] in which the Board evaluated the allegations against Hayal Seramik Yapı ve Ürünleri San. Tur. ve Tic. A.Ş. (“**Qua Granit**”), which manufactures ceramic and granite products, that Qua Granit violated Article 4 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by imposing restriction of active and passive sales to its dealers outside their designated territories and thus forcing them into selling within their provinces. The pre-investigation was initiated upon a complaint which claimed that Qua Granit exerted pressure on its dealers and led them to refrain from making sales to consumers in the territories allocated to other dealers, even in cases where the consumers could bear the costs given that they might purchase Qua Granit products cheaper in other provinces.

Background

The Board initially evaluated the ceramic sector by also taking into consideration its precedent on this front and found that the ceramic products were separated into sub-segments such as ceramic coating equipment, ceramic health equipment (kitchen and bathroom furniture such as sinks, flush tanks and toilets), tableware and knick-knack and technical ceramic. In its assessment of the relevant product market, where it analysed certain parameters between different segments based on the purpose of use, toughness, water absorption capacity, thickness etc., the Board defined the relevant product market as the market for the “ceramic coating equipment”, considering the Qua Granit’s activities in Turkey. As for the relevant geographic market, noting that the relevant products were manufactured, marketed and traded nationwide, the Board defined the relevant geographic market as “Turkey”.

Before delving into its evaluation as to whether Qua Granit violated Article 4 of Law No. 4054 through restrictive practices pertaining to its dealers’ active and passive sales outside their designated territories, the Board first provided an overview of the legal framework that applies to the restrictions on the active and passive sales. In this respect, the Board stated that pursuant to Block Exemption Communiqué No. 2002/2 on Vertical Agreements (“**Communiqué No. 2002/2**”), vertical agreements are defined as agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services. In this respect, the Board also highlighted that a vertical agreement may benefit from a block exemption if the supplier’s market share is below the 40 per cent threshold, provided that such vertical agreements comply with certain conditions set out in Communiqué No. 2002/2. Moreover, the Board emphasized that pursuant to Article 4 of Communiqué No. 2002/2, in case where there is an exclusive territory or customer group, the prevention of the buyers’ active sales would not be considered as a restriction of competition while, on the contrary, the passive sales would not be exempted in the same manner active sales are.

In its evaluation of Qua Granit’s restrictive practices of its dealers’ active and passive sales, the Board initially determined that Qua Granit distributed and sold its Qua Granit branded products through its distribution channels, namely (i) the dealer channel, (ii) project team channel and (iii) the retail channel. Furthermore, the Board set forth that Qua Granit entered into dealership agreements with its dealers in order them to distribute Qua Granit branded products. In its evaluation of the commercial relationships between Qua Granit and its respective dealers, the Board considered that such relationships were of vertical nature in accordance with the Communiqué No. 2002/2.

Moreover, the Board also evaluated the dealership agreements between Qua Granit and its dealers which included provisions such as (i) territory allocation and exclusivity, (ii) the restriction of dealers’ sales outside their designated territory, (iii) a penalty clause against the breach of the restriction on the dealers’ sales that were not in compliance with the relevant provision above and (iv) the permission requirement for marketing activities of the dealers for Qua Granit products. In this respect, the Board concluded that the relevant provisions of the dealership agreements could be considered not only to restrict the dealers’ active sales, but also their passive sales as well.

The Board then proceeded with its substantive assessment of (i) the restrictions imposed on the dealers’ active and passive sales and (ii) the market position of Qua Granit. Accordingly, the Board determined that Qua Granit’s market share in the market for ceramic coating equipment in Turkey was below the 40 per cent threshold between 2017 and 2019. However, the Board concluded that as the dealership agreements contained territory allocations along with the restrictions of the dealers’ active and passive sales, Qua Granit’s practices under the dealership agreements fell within the scope of Article 4 of Law No. 4054, and further decided a block exemption under Communiqué No. 2002/2 cannot be granted to these agreements due to the restriction of passive sales. As for the individual exemption, the Board concluded that an individual exemption cannot be granted to Qua Granit either, as

the conditions set forth under Article 5 of Law No. 4054 would not be met, since passive sales restrictions in this case would not fall under a certain exception that was previously accepted in the Board's precedents with regards to exempting such restrictions.

Subsequently, the Board thoroughly analysed (i) the structure of the relevant product market, (ii) market shares of the players, (iii) market position of Qua Granit against its competitors, (iv) whether the dealers operate under exclusivity clauses, (v) the effect of passive sales restrictions on the dealers' sales and (vi) costs for the dealers' sales to be made outside their territories. Accordingly, the Board found that Qua Granit's restrictions on passive sales would have very limited impact on competition.

Moreover, during the preliminary investigation process, Qua Granit informed the case handlers on the proposed amendments to the dealership agreements in order to eliminate any potential anti-competitive effect. The Board observed that relevant amendments would be sufficient to eliminate restrictions on passive sales.

In light of the foregoing, considering (i) the competitive structure of the relevant product market, (ii) Qua Granit's low market power, (iii) its competitors' market positions, (iv) the multi-branded structure of dealers, (v) the limited impact of the restrictions on passive sales and (vi) Qua Granit's efforts to eliminate vertical concerns, the Board decided that there is no need to launch a full-fledged investigation against Qua Granit. Instead, pursuant to Article 9(3) of Law No. 4054, it decided to issue an opinion letter to Qua Granit ordering it to abstain from its restrictive practices with regard to the passive sales of its dealers and to remove the relevant clauses from the dealership agreements.

Comments

The Board's Hayal Seramik (Qua Granit) decision is of significant importance, as the Board adopted a less stringent approach to the investigated undertaking, which was considered to have low market power in the relevant product market, and therefore it was decided that the anti-competitive restrictions would have very limited effect on competition. Furthermore, the decision is one of the examples that the Board decided to issue an opinion letter rather than initiating a full-fledged investigation, even though there was concrete evidence demonstrating the existence of anti-competitive restrictive practices. Finally, the decision includes a comprehensive analysis for the evaluation of active and passive sales restrictions by taking into consideration the Board's precedent and the legislative framework.

[1] The Board's Hayal Seramik (Qua Granit) decision, dated 26.12.2019 and numbered 19-46/772-333.