

Vertical Agreements 2021

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Contributing editor**Patrick J Harrison**

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

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



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LEGAL FRAMEWORK

Antitrust law

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

The main legislation regulating the vertical restraints is Law No. 4054 on the Protection of Competition in conjunction with the vertical block exemption communique (Communique No. 2002/2) and the Guidelines on Vertical Agreements (the Guidelines).

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 explicitly defined in Law No. 4054. Communique No. 2002/2 and the Guidelines define a non-exhaustive list of vertical restraints that may raise antitrust concerns, namely:

- resale price maintenance;
- region and customer restrictions;
- selective distribution systems;
- non-compete obligations;
- exclusive supply obligation; and
- single branding conditions.

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?

The objective of the relevant legislation solely concerns the protection of the competition.

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 competition authority for enforcing competition law is the Turkish Competition Authority (the Authority), a legal entity with administrative and financial autonomy.

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. Turkish competition law applies to anticompetitive conduct of undertakings that operate in Turkey or have impact on the relevant markets in Turkey.

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 'undertaking' comprises of both private and public entities that have economic activity. Therefore, a public entity that has commercial activities will be considered as an undertaking. Vertical agreements involving public entities can be subject to Law No. 4054, if the relevant agreement is not related to their public duties. The decisive factor is whether the relevant agreement concerns a public duty or a commercial activity (SGK, 13.07.2017, 17-22/362-158; Istanbul Metropolitan Municipality, 27.09.2017, 17-30/489-222; Izmir Metropolitan Municipality, 11.02.2010, 10-16/183-70).

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 sector-specific block exemption communique and guidelines regarding the vertical restraints in the motor-vehicle sector.

General exceptions

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

Amendments to Law No. 4054 that entered into force on 24 June 2020, introduced the de minimis principle. The Competition Board (the Board) will be able to decide not to launch full-fledged investigation if the market share and turnover thresholds that will be determined by the Board are not exceeded. This principle will not be applicable to hard-core restrictions such as price fixing, territory or customer sharing and restriction of supply. The Authority published the draft de minimis Communique on 23 October 2020 and launched a public consultation process (which is still ongoing).

TYPES OF AGREEMENT

Agreements

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

Law No. 4054 does not provide a definition of 'agreement'. 'Agreement' refers to all kinds of compromise or accord to which the parties feel bound (ie, the concurrence of wills). For an agreement to occur, it is necessary and sufficient to demonstrate that the undertakings' intentions towards a common purpose and that commitment to this purpose is conscious (*Ready-mixed Concrete*, 19.03.2020, 20-15/215-107).

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?

The Competition Board (the Board) does not require an agreement to be in written form, to stipulate sanctions in the case of non-fulfilment of obligations, conditions to be in effect or any other form (*LPG*, 09.01.2020, 20-03/28-12; *Autogas*, 29.03.2018, 18-09/180-85). Therefore, a vertical agreement that is written, oral or in any other form can be subject to Law No. 4054 (*Linde Gaz*, 29.08.2013, 13-49/710-297).

Parent and company-related 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)?

The Board considers companies within the same group as part of a single economic entity. To that end, the Board decided in *TTKKMB* (27.05.1999, 99-26/233-141), *TTKKMB-Bandırma* (17.07.2001, 01-33/331-94) and *Elektrik Dağıtım* (03.03.2011, 11-12/240-77) cases that the agreements between parent company and a company it controls are not subject to article 4 of Law No. 4054.

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?

In principle, agency agreements do not fall within the scope of article 4 of Law No. 4054. To that end, an agreement will be considered as an agency agreement if the agent does not bear any, or bears only insignificant, financial or commercial risks in relation to the contracts concluded or negotiated on behalf of the principal.

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 on Vertical Agreements set forth certain criteria to determine whether the agent bears economic or commercial risks. To the extent the agreement includes one or more situations listed below, the relationship would fall within the scope of article 4 of Law No. 4054, namely:

- a 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 the 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.

Intellectual property rights

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

If a vertical agreement concerns 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 the 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 these intellectual rights does not constitute the main purpose of the agreement.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

The first step would be to determine whether the agreement would benefit from the block exemption. If that is not the case, the next step would be to conduct a self-assessment to assess whether the agreement satisfies the cumulative conditions for individual exemption. Although it is sufficient for either the effect or the object to exist for there to be an infringement, the Competition Board typically conducts effects analysis to evaluate whether the vertical agreement results in any effects in the market and whether positive effects outweigh restrictive effects. The cumulative conditions for individual exemption set out under article 5 of Law No. 4054 state:

- the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- the agreement must allow consumers a fair share of the resulting benefit;
- the agreement should not eliminate competition in a significant part of the relevant market; and
- the agreement should not restrict competition more than what is compulsory for achieving the goals set out in the above first two points.

Market shares

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?

Vertical agreements may benefit from the block exemption if the supplier's market share is below 40 per cent and do not include hardcore restrictions. The essential factors taken into account in analysing the vertical restraints include:

- market positions of the supplier;
- buyer and their competitors;
- entry barriers;
- market maturity;
- exclusionary effects; and
- the nature of the products and services concerned.

The supplier's market position is arguably the most important of these factors. The supplier's market share will be deemed as an indicator of its position in conjunction with the competitive landscape 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?

In exclusive supply agreements, if the buyer's market share exceeds 40 per cent in the market in which it purchases goods and services, the agreement cannot benefit from a block exemption.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

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.

Communique No. 2002/2 provides the block exemption regime for vertical agreements. Where the supplier's (in exclusive supply agreements, buyer's) market share is less than 40 per cent, the agreement may benefit from a block exemption provided that other conditions are met. If the market-share threshold is exceeded, the agreement automatically falls outside the scope of a block exemption and direct or indirect vertical restraints cannot be imposed, unless the agreement qualifies for an individual exemption.

TYPES OF RESTRAINT

Assessment of restrictions

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

Restricting a reseller's discretion and ability to determine its own prices is among the restrictions by an object. A supplier can determine the maximum resale price or recommend resale prices unless these result in fixed or minimum prices in practice. To prevent a maximum or recommended price resulting in fixed or minimum prices, the supplier should explicitly state that these prices are maximum or recommended. For more than 10 years, the Competition Board (the Board)

typically conducted 'rule of reason' analysis concerning resale price maintenance (*Duru Bulgur*, 8.03.2018, 18-07/112-59; *Aygaz*, 16.11.2016, 16-39/659-294; *Dogati*, 22.10.2014, 14-42/764-340; and *UFO*, 27.10.2011, 11-54/1380-490), with only a few exceptions (*Consumer Electronics*, 7.11.2016, 16-37/628-279; and *Anadolu Elektronik*, 23.06.2011, 11-39/838-262). The Board's approach started to shift during the past two years when it considered resale price maintenance as a by-object restriction in several cases (*Maysan Mando*, 20.06.2019, 19-22/353-159; *Henkel*, 19.09.2018, 18-33/556-274; and *Sony*, 22.11.2018, 18-44/703-345).

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 these restrictions has not been considered in any legislation or decisional practice in Turkey to date.

Relevant decisions

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

The Guidelines on Vertical Agreements (the Guidelines) note that direct or indirect means of price-fixing can be made more effective when combined with measures such as a price-monitoring system or the enforcement of a most-favoured-nation clause. While the Board highlights potential links between resale price maintenance and other forms of restraint, it assesses these restrictions separately.

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

Resale price maintenances resulting in minimum or fixed prices are prohibited as a by-object restriction. For these, efficiency arguments are not accepted. In a limited number of precedents, the Board suggested that efficiency arguments (eg, eliminating the free-riding problem and increasing distribution) might be considered and acknowledged that efficiencies may outweigh any anticompetitive impact (eg, *Reckitt*, 13.06.2013, 13-36/468-204; and *Frito Lay*, 12.06.2018, 18-19/329-163).

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.

The main principle applicable here is whether the supplier is benchmarking fixed or minimum price results (eg, through the supplier's monitoring and punishment mechanisms). If so, this conduct may be considered a restriction of competition.

Suppliers

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.

The Guidelines recognise the pro-competitive nature of most-favoured-nation clauses and adopt a rule-of-reason approach. In terms of the analysis, the following should be taken into account, namely:

- the relevant undertakings' and their competitors' position in the relevant market;
- the object of the most-favoured-nation clause; and
- the specific characteristics of the market.

In *Booking.com* (5.01.2017, 17-01/12-4), the Board concluded that Booking.com's broad most-favoured-nation clauses were violating article 4 of Law No. 4054 and could not benefit from individual exemption. However, in *Travel Agents* (25.10.2018, 18-40/645-315), the Board indicated that agreements between travel agents and hotels containing broad most-favoured-nation clauses benefitted from a block exemption.

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.

Yemek Sepeti (9.06.2016, 16-20/347-156) is the first case where most-favoured-nation clauses were considered as an infringement. The Board concluded that Yemek Sepeti held a dominant position in the online meal order delivery platform services market and prevented restaurants from offering better or different conditions to rival platforms through most-favoured-nation practices. An agreement containing most-favoured-nation clauses may benefit from a block exemption provided that market share of the party benefitting from the clause does not exceed 40 per cent and that other conditions for a block exemption are met. If the market-share threshold is exceeded, other factors to take into account include:

- the market position of the party benefitting from the most-favoured-nation clause and its competitors;
- the purpose of including the most-favoured-nation clause in the agreement; and
- the specific aspects of the market and the provided most-favoured-nation clause.

The Guidelines also provide further concrete examples, such as retroactive most-favoured-nation clauses allowing the beneficiary buyer to get more favourable offers in all cases or that increase the supplier's costs for making discounts to the buyer not party to the clause. Besides, where parties to a most-favoured-nation clause have market power, those clauses are more likely to harm competition. These clauses, in concentrated markets, are potentially more problematic than those in non-concentrated markets from a competition law perspective. Further, where most-favoured-nation clauses have become widespread practice, thus where a significant portion of the market has been subjected to these clauses, the Board may take a more sceptical approach in assessing these clauses.

The Board also acknowledges that most-favoured-nation clauses do not always have anticompetitive effects. For example, where neither party to the agreement, including most-favoured-nation clauses, has market power, it is unlikely that implementation of these clauses would raise competition concerns. When a small-scale buyer with no significant market power applies a most-favoured-nation clause, it may have a positive effect on competition given that the clause allows buyers to benefit from favourable prices and sales conditions. In markets where the concentration level of the upstream market is low, competitive harm may be unlikely given that current and potential competitors may choose from various alternatives. Where the market is not transparent, any negative effects of most-favoured-nation clauses will be relatively low given that effective implementation of these clauses in the market is unlikely.

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.

In principle, resale price maintenance concerning minimum prices are restrictions by object, and therefore, prohibited. However, in certain decisions, the Board found no infringement when the buyer was able to apply discounts in practice and there was no evidence of supplier monitoring or punishing that behaviour (eg, *Çağdaş-Zuhal*, 24.10.2013, 13-59/825-350).

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 Guidelines recognise the pro-competitive nature of most-favoured-nation clauses and adopt a rule-of-reason approach to analysing the anti-competitive effects of these clauses, particularly taking into account:

- the relevant undertakings' and their competitors' positions in the relevant market;
- the object of the most-favoured-nation clause; and
- the specific characteristics of the market.

Restrictions on territory

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?

Article 4(a)(1) of Communiqué No. 2002/2 allows a supplier to prevent a buyer from active sales of contract products or services into an exclusive territory or to customers allocated to a supplier or another buyer, provided that the restriction does not cover resale the buyer's customers. Other exceptions are as follows:

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

Provisions extending beyond what is permissible under an appropriately defined exclusive distribution system, like the restriction of passive sales, cannot benefit from a block exemption (eg, *Mey İçki*, 12.06.2014, 14-21/410-178; and *Novartis*, 4.07.2012, 12-36/1045-332). Similarly, restrictions of sales not resulting from an active effort, like internet sales, and advertisements or promotions conducted through media with general intent, are considered passive sales methods and these restrictions cannot benefit from block exemption.

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?

Restrictions on sales through distributors', dealers' or buyers' websites imposed by a supplier is considered as a restriction on passive sales and thus prohibited. Additionally, 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

passive sales. A dealer offering several languages on their website does not change the fact that these are passive sales. Accordingly, restrictions, particularly on internet sales, will not benefit from the block exemption.

Restrictions on customers

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?

If the customer restriction only applies to active sales to customers of a class allocated exclusively to another buyer (or to the supplier itself), the arrangement may fall within the block exemption. Restrictions on a wholesaler selling directly to end users and restrictions on distributors within a selective distribution system to sell to unauthorised distributors, could also benefit from a block exemption.

Restrictions on use

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

Generally, a restriction on a buyer's freedom to use the contract products as it sees fit amounts to a restriction of competition. However, objectively justifiable restrictions on the uses to which a buyer (or a subsequent buyer) puts the contract goods are permissible. For these restrictions to be objectively justifiable, the supplier would likely have to impose the same restrictions on all buyers.

Restrictions on online sales

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

Internet sales are considered passive sales. The following restrictions do not benefit from a block exemption:

- a restriction on a (exclusive) distributor's website to consumers located in another (exclusive) distributor's region or diverting these consumers' access to a supplier's or the other (exclusive) distributor's websites;
- a (exclusive) distributor's termination of a transaction after realising that the customer is not located in its (exclusive) region based on the customer's delivery and billing-address information;
- a restriction on the share of the total amount of sales through the internet; and
- a 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.

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'?

As per the Guidelines, suppliers may impose additional requirements on their distributors in terms of internet sales. However, these 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 quality, brand image and potential efficiencies. In that context, a supplier may require the distributor to resell only through 'sales platforms or market places' that fulfil certain conditions. However, this requirement should also aim to not restrict the distributor's internet sales and price competition. The 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').

Accordingly, in *Baymak* (26.03.2020, 20-16/232-113) the Board deemed an absolute restriction on internet sales covering both individual websites of the distributors and third-party platforms as a violation of article 4 of Law No. 4054.

Selective distribution systems

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, provided that the market share of the supplier does not exceed 40 per cent in the relevant market and that the agreement includes no hard-core restrictions, for example:

- the products must necessitate a selective distribution to preserve their quality and ensure their proper use;
- the criteria by which buyers are selected must be objective, laid down uniformly for all potential buyers and not applied in a discriminatory manner (although there is no necessity that the selection criteria be published); and
- the restrictions imposed must not go beyond that that is necessary to protect the quality and image of the products in question.

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?

Products require a selective distribution system to be established to maintain their quality or to ensure their proper use. In *Sevil Parfümeri* (9.09.2009, 09-41/987-249), the Board stated that products such as jewellery, perfume and cosmetics require specially trained employees and strategic locations for points of sale. Also, the Guidelines provide that selective distribution for 'brand products such as jewellery and perfumery' are most likely admissible (paragraph 33 of the Guidelines). A similar assessment was made by the Board in *Antis* (24.10.2013, 13-59/831-353).

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?

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. Buyers who are retailers are allowed to sell the contract products or services to end-consumers on the internet. However, 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 *Jotun* (15.02.2018, 18-05/74-40), the Board noted that internet sales are primarily categorised as passive sales, as per paragraph 24 of the Guidelines, and therefore, restriction of these sales would be deemed as the restriction of passive sales. The 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 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, in line with the Guidelines, the supplier may require its distributor to possess at least one physical store.

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* (25.03.2004, 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 resolved that the agreement benefitted from the block exemption. Pursuant to the Board's *Arçelik* (18.10.2011, 11-53/1353-479) and *Consumer Electronics* (7.11.2016, 16-37/628-279) decisions, the prevention of the sale of contract products to unauthorised distributors is considered in the scope of the block exemption, if the supplier's market share does not exceed 40 per cent in the relevant market.

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

The Guidelines note that in relation to individual networks of selective distribution, cumulative effects will likely not be a significant factor in the competitive assessment where the share of the market covered by selective distribution is less than 50 per cent, or where the market covered by selective distribution is greater than 50 per cent, but the five largest suppliers have an aggregate market share of less than 50 per cent.

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, it is envisaged that active or passive sales by the buyers to end users outside the region may not be prevented in a selective distribution system, even if the supplier forms exclusive regions by means of supplying goods to a limited number of buyers in a certain region. Nevertheless, it should be noted that as per to Communiqué No. 2002/2, in a selective distribution system, suppliers are not allowed to restrict active or passive sales of its buyers operating at the retail level to end users. However, within a selective distribution system, a supplier may prohibit the members of the system from operating in unauthorised territories or locations. That being said, a supplier is not allowed to prevent purchases and sales between the system members themselves (cross supplies).

Other restrictions

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

As per Communiqué No. 2002/2, any clause that imposes purchasers to supply more than 80 per cent of their annual demands (on the basis of their overall purchases in the previous calendar year) from the supplier or from another undertaking to be designated by the supplier is deemed as a non-compete obligation. Non-compete obligations benefit from the block exemption provided in Communiqué No. 2002/2 as long as market share of the supplier does not exceed 40 per cent in the relevant market and the duration of the non-compete clause does not exceed five years.

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, also do not benefit from the block exemption (eg, *Takeda*, 3.04.2014, 14-13/242-107; *Sanofi Aventis*, 22.11.2012, 12-59/1570-571; and *JTI Tobacco*, 13.02.2019, 19-07/81-33).

41 | 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 legislation or case law 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, any clause that imposes purchasers to supply more than 80 per cent of their annual demands (on the basis of their overall purchases in the previous calendar year) from the supplier or from another undertaking to be designated by the supplier is deemed as a non-compete obligation. Non-compete obligations benefit from the block exemption provided in Communiqué No. 2002/2 as long as market share of the supplier does not exceed 40 per cent in the relevant market and the duration of the non-compete clause does not exceed five years. 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, also do not benefit from the block exemption.

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 seller, but also if the buyer is obliged to buy 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 2 of Communiqué No. 2002/2 indicates that exclusive supply agreements may benefit from block exemption provided that both market shares of supplier and buyer do not exceed 40 per cent in the relevant market in which the buyer purchases the products or services (eg, *Bayer*, 29.03.2018, 18-09/160-80; and *Novo Nordisk*, 7.09.2017, 17-28/461-200).

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

Although the Guidelines 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 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?

The Guidelines stipulate that vertical agreements comprising tying conditions might have an anticompetitive impact, thereby creating barriers to entry in the market in which the tied product is sold. This is first assessed in the Board's decision in *Petrol Ofisi* (11.01.2018, 18-02/20-10). The complainants' allegation was that three major distributors restricted competition by not allowing their dealers to purchase autogas (liquefied petroleum gas (LPG) for vehicles) from distributors other than themselves. The Board stated that the investigated distributors imposed the condition of purchasing autogas from the suppliers determined by the distributors to be able to purchase liquid fuels (ie, petrol and diesel) from them in the dealership agreements. Yet, the Board found that the tying practice between autogas and liquid fuel products has become a business practice within the sector and concluded that a vertical restraint through tying does not infringe article 4 of Law No. 4054 within the sector-specific conditions scrutinised in the reasoned decision.

NOTIFICATION

Notifying agreements

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

Turkey is one of the jurisdictions that adopted a self-assessment mechanism, and therefore, the parties are not obliged to make individual exemption applications. For the sake of completeness, the cumulative conditions for being granted an individual exemption are closely modelled on, and akin to, the conditions set forth under article 101(3) of the Treaty on the Functioning of the European Union.

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?

Not applicable.

ENFORCEMENT

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?

Yes. Private parties having a legitimate interest (those actually or potentially suffering damage as a result of the alleged conduct) can file complaints with the Turkish Competition Authority (the Authority). The Competition Board (the Board) will assess the complaint and decide whether it will launch a preliminary investigation on this front. There is no formal timeline regarding the process following the complaint.

Regulatory 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?

Vertical restraints are frequently scrutinised by the Board. Vertical restraints comprising resale price restrictions, selective distributions systems, conditions on exclusive territory or customer allocation, and passive sales could be considered as the main enforcement priorities.

- 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 the conditions for one of the block exemptions or the individual exemption, the 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?

The Board is the sole responsible authority for decisions, including imposing administrative fines on the violating undertakings. A company infringing 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 an association of undertakings (or both) that had a determining effect on the creation of the violation could also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. The Board is also entitled to impose behavioural or structural remedies, or both, and to inform the undertakings concerned of its opinions in writing, ordering the termination of the infringement. Board's decisions can be brought to judicial review by filing an appeal before the administrative courts.

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 provision 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, administrative monetary fines will be imposed. The Board is also able to conduct on-site inspections (eg, dawn raids). The relevant company, employees and outside counsel are obliged to cooperate with the Board during the dawn raid. Obstructing an on-site inspection will trigger a turnover-based administrative 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 anti-competitive conduct merit damages. These aspects are supplemented with private lawsuits. Law No. 4054 permits any party injured in its business or property, because of a competition law violation, to sue the violators for up to three times its actual damages or the profits gained, or likely to be gained, by the violators, plus litigation costs and attorney fees.

OTHER ISSUES

Other issues

- 55 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

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

The Turkish Competition Authority (the Authority) maintains its attention towards resale-price-maintenance cases (*Yataş*, 6.02.2020, 20-08/83-50; *Kubota*, 9.01.2020, 20-03/21-11; and *Red Bull*, 19.12.2019, 19-45/767-329). In *Yataş*, the Competition Board (the Board) assessed the allegations whether two undertakings violated Law No. 4054 by determining resale prices, fixing discount rates and limiting the payment methods of their distributors. The Board ultimately decided not to initiate a fully-fledged investigation but recommended both parties to alter and renew their dealer agreements to exclude the prohibition of passive sales via the internet. Further, in *Kubota*, the Board assessed the allegations whether Kubota violated article 4 of Law No. 4054 by determining the resale prices, discriminating between dealers and prohibiting trading between dealers. Yet, the Board first observed that there were no provisions with respect to resale price maintenance and determined that dealers' prices were significantly different from the recommended sales price. The Board concluded that there was no evidence regarding the alleged discriminatory practices against its dealers and decided not to initiate a fully-fledged investigation.

Anticipated developments

- 57 Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

Amendments to Law No. 4054, which entered into force on 24 June 2020, introduced the de minimis principle as well as settlement and commitment procedures. The Authority recently published draft communiqués regarding the de minimis principle and the commitment procedure (the public consultation process is still ongoing for both). These are expected to be promulgated in 2021 and shed further light on the specifics of these principles and tools.



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Coronavirus

- 58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No specific legislation, relief programme or initiative has been implemented to address covid-19 circumstances. Further, the Turkish Competition Authority (the Authority) has announced no limitations to their operational capacity and they have not requested applicants' cooperation regarding the special circumstances related to the ongoing pandemic. While events could change rapidly, so far, it appears to be business-as-usual at the Authority.

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