Were you benefiting from the block exemption mechanism for vertical agreements? Make sure you double-check your market share this year…

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As we approach the end of the year, the Turkish Competition Authority ("***Authority***") introduced some important legislative changes regarding vertical agreements. The Authority decreased the market share threshold set for the block exemption mechanism applicable to vertical agreements, aligning its assessment with the EU rules. These amendments came into force without going through a public consultation period. A summary of the recent changes is provided below.

Background to the legislative change

Although, as a rule, vertical restraints are prohibited under Article 4 of the Law on the Protection of Competition No. 4054 ("***Law No. 4054***") certain vertical restraints may benefit from the block exemption mechanism, provided that they meet the conditions set out in the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No. 2002/2***"). Additionally, undertakings may also avail themselves of other block exemption mechanisms for specific sectors and agreements. Besides the block exemption mechanism, there is also an individual exemption mechanism that may be applicable subject to the conditions set out under Article 5 of Law No. 4054.

Under the block exemption mechanism applicable to vertical agreements in general, the first condition pertains to the market share of the parties to the vertical agreement. Previously, Communiqué No. 2002/2 on Vertical Agreements provided a protective cloak for agreements where the respective parties' market shares did not exceed 40%, so long as they also satisfied the other conditions. Now, this market share threshold assessment has been changed with the Communiqué numbered 2021/4 ("***the Amendment Communiqué No. 2021/4***"), which was published in the Official Gazette dated November 5, 2021[1] and entered into force on the same day.

[1] Official Gazette dated 05.11.2021 and numbered 31650, available at: https://www.resmigazete.gov.tr/eskiler/2021/11/20211105-12.htm (last accessed: 16.11.2021)

Market share thresholds, before and after the amendment

Before the Amendment Communiqué No. 2021/4 came into force, the supplier that is a party to the vertical agreement was required to have a market share of 40% or less within the relevant market concerning the goods and services subject to the vertical agreement, in order for the agreement to benefit from the protective cloak provide via the relevant block exemption mechanism under the Communiqué No. 2002/2. As for the vertical agreements containing exclusive supply clauses, the block exemption mechanism would be applicable only where the buyer`s market share did not exceed the 40% threshold in the relevant market concerning the goods and services subject to the vertical agreement.

That said, with the changes introduced by the Amendment Communiqué No. 2021/4, the thresholds set for the market shares of the respective suppliers and buyers concerning the application of the block exemption mechanism on vertical agreements were lowered to 30%, in compliance with the EU competition law rules.

Calculation of the market shares and changes to market shares in subsequent years

Overall, the method for calculating the market shares remained unchanged. Indeed, similar to the previously applicable provisions, Article 2 of the Amendment Communiqué No. 2021/4 provides that the market share is to be calculated by using the previous year`s data, and on the basis of all goods and services provided to the affiliated distributors for sale.

Furthermore, according to the Amendment Communiqué No. 2021/4, in the event that the undertaking`s market share subsequently exceeds 30%, the block exemption will remain valid (i) for a period of two years starting from the year when the threshold was first exceeded, provided that the relevant market share exceeds the 30% threshold yet remains below 35%, and (ii) for a period of one year starting from the year when the threshold was first exceeded, if the relevant market share exceeds 35%.

Transition period and expected increase in assessments

Under Article 3 of the Amendment Communiqué No. 2021/4, a six-month transition period is granted to undertakings for complying with the changes to the thresholds. Accordingly, in this period, the prohibition under Article 4 of Law No. 4054 will not be applicable to vertical restraints that benefit from block exemption. In other words, to the extent the relevant market shares do not exceed 40%, vertical agreements that currently benefit from the block exemption will continue to be exempt until the beginning of May 2022.

That said, the parties may subsequently need to modify their agreement to comply with the Amendment Communiqué No. 2021/4, conduct a self-assessment, or seek the Authority’s assessment via an application for individual exemption as per Article 5 of Law No. 4054.

The changes are expected to increase vertical agreement-related assessment applications by undertakings in the upcoming months and perhaps, may also increase the Authority’s own assessments on this front.

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