



Draw Your Lines Carefully or Commit Instantly: The Turkish Competition Authority Accepts Baymak’s Commitments and Ends the Preliminary Investigation Initiated in Relation to Territorial Restriction of Active Sales of Authorized Service Providers in the Non-exclusive Regions

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Background

The Turkish Competition Board (“**Board**”) initiated a preliminary investigation¹ against Baymak Makine San. ve Tic. A.Ş. (“**Baymak**”) upon a complaint, in order to detect whether Baymak violated Article 4 and Article 6 of Law No.4054 on the Protection of Competition (“**Law No. 4054**”) by restricting its authorized service providers’ activities in Turkey. The preliminary investigation focused on (i) the assessment of the territorial active sales restrictions imposed by Baymak on its authorized service providers, which essentially appeared to not have territorial exclusivities, and also, (ii) the non-compete terms imposed by Baymak on its authorized service providers.

Before a possible full-fledged investigation, Baymak made a commitment application before the Turkish Competition Authority (“**Authority**”) on January 17, 2022, and it noted that it would stop imposing active sales restrictions and allow all its authorized service providers to offer their services freely to any region within Turkey. Subsequent to formal commitment related discussions with the Authority (i) Baymak’s relevant commitments were accepted by the Board and, moreover, (ii) the Board rendered that the non-compete conditions imposed by Baymak indeed benefited from Block Exemption Communiqué (“**Communiqué No:2002/2**”)². Below we provide an overview of the Board’s assessment in relation to active sales restriction practices in absence of exclusivity conditions.

Overview of Baymak’s Practices

Baymak’s Authorized Service Provider Agreements contained self-contradicting terms on territorial restrictions. Clause 6.2 of Authorized Service Provider Agreements imposed a territorial active sales restriction to authorized service providers by stating that “*Baymak has the right to limit and change the geographic region of the active sales made by the authorized service providers*” yet (ii) the terms in the agreement did not clearly set out territorial exclusivity. In fact, the same clause in the agreement included a term that read as follows: “*Baymak reserves the right to work with different authorized service providers within the same activity region or to establish or encourage the establishment of authorized service providers in the region*”.

Moreover, Baymak’s practices in the field were also self-contradicting. Indeed, during the preliminary investigation, it was found that, after suspecting that its authorized service providers made active sales outside of their “designated” regions, Baymak sent a warning letter to the relevant authorized service providers through the notary public in order to ensure that they only provide services in their

¹ The Board’s decision dated 07.10.2021 and numbered 21-48/685-M.

² The Board’s decision dated 24.03.2022 and numbered 22-14/221-95.

“designated” regions, however, Baymak allowed more than one authorized service providers to make sales in the same region. Accordingly, Baymak had warned the authorized service providers which made active sales outside of their regions when in fact no territorial exclusivity was foreseen for these authorized service providers.

Explanation of the Relevant Legislation

Under Communiqué No:2002/2, inter alia, a purchaser can restrict the active sales so long as it determines an exclusive territory or an exclusive customer group and benefit from the group exemption mechanism. The Guidelines on Vertical Agreements (“*Vertical Guidelines*”) lays out the conditions for territorial or customer group exclusivity. According to the Vertical Guidelines, “*In order to consider a region or customer group as exclusive, that region or customer group must receive active sales only from a single buyer or only from the supplier itself. In other words, if the number of undertakings selling to a specific region or customer group is two or more, that region or customer group is no longer exclusive.*” Accordingly, buyers must be allowed to make active sales to regions or customers in absence of territorial or customer exclusivities.

However, Baymak, which appeared to impose territorial active sales restrictions on its authorized service providers (i.e. buyers), essentially did not allocate an exclusive region to the relevant service providers and restricted active sales without a just cause. Considering the potential competition restriction concerns, Baymak is understood to have applied for the commitment mechanism.

Information on Baymak’s Commitments

As per the Communiqué on the Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position (“*Communiqué No: 2021/2*”), investigated parties can apply for the commitment mechanism, provided that, inter alia the timing requirements, the investigated actions do not fall under the naked and hard-core violations listed exhaustively within the relevant Communiqué³. Baymak’s actions which concerned the restriction of activities of its authorized service providers do not fall under the naked and hard-core violations listed and therefore can benefit from the exemption mechanism.

In the decision, the Board made a similar analysis and accepted Baymak’s commitment application. In consideration of the commitment application, the Authority noted the following during the formal commitment related discussions⁴:

- Baymak’s practices and the relevant territorial restriction clauses in Authorized Service Provider Agreements fell contrary to the exclusivity and active sales restriction requirements which were exempted under the group exemption mechanism stipulated under Communiqué No:2002/2,
- In this regard, the practices and the terms in the Authorized Service Provider Agreements potentially created competition concerns.

³ Article 4.1(a) of the Communiqué No: 2021/2 lists agreements and concerted practices as well as decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services, made for the following purposes: (i) price fixing sharing customers, suppliers, territories or trade channels, restriction of supply or imposing quotas, bid rigging, sharing competitively sensitive information such as price, production or sales volumes planned for future between competitors and (ii) in the relationship between undertakings operating at different levels of the production or distribution chain, determining the fixed or minimum price for the buyer as naked and hard-core violations.

⁴ Two commitment discussions were held between Baymak officials and the Authority officials on February 9, 2022, and March 4, 2022.

Accordingly, taking into consideration the discussions with the Authority, Baymak proposed the following commitments to the Authority⁵:

- Baymak will remove the relevant clause 6.2 in Authorized Service Provider Agreements entirely,
- Baymak will announce it's the removal of this clause to all authorized service providers with an e-mail text which will inform the services that (i) the application of territorial restriction has ended and (ii) the authorized service providers can provide services across all regions in Turkey.
- Post removal of the relevant clause from the agreements, Baymak will sign a new agreement with its authorized service providers within 60 days from the notification of the short decision of the Board and will also send out an informative mail during this period.

After evaluation of the commitments proposed by Baymak, the Board considered that these commitments remedied competition law concerns and rendered them binding. Accordingly, the Board concluded that Baymak should document to the Authority that it fulfilled the binding commitments within 60 days after the notification of the short decision and it ended the preliminary investigation within the scope of the commitments proposed.

Final Remarks

For now, Baymak seems to have freed itself from a full-fledged investigation and possible infringement related consequences – (i.e. a possible administrative fine) by applying to the commitment mechanism. However, commitment mechanisms may not be a safe harbour at all times. Indeed, under Article 43 of Law No.4054, the Board still relaunch an investigation in case (i) there is a substantial alteration in any of the factors which gave rise to the decision, (ii) the relevant undertakings or associations of undertakings act on contrary to the commitments made, and (iii) the decision is made based on missing, false or misleading information presented by the parties.

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⁵ Baymak submitted its commitment texts on March 10, 2022, and March 14, 2022.