Merger Control

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Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 ("*Law No. 4054*") dated December 13, 1994, and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("*the Merger Communiqué*") published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017 Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("*Communiqué No. 2017/2*").

According to the annual statistics of the Mergers and Acquisitions Status Report for 2017, the Competition Board reviewed 184 transactions in total, including: 150 mergers and acquisitions that were approved unconditionally; two decisions that were approved conditionally; five privatisations, 30 out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control); and one transaction that did not receive clearance.

New developments in jurisdictional assessment or procedure

On February 24, 2017, Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("*Communiqué No. 2017/2*"). The new amendments effected by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4, are as follows:

1. Prior to the amendment brought by Communiqué No. 2017/2, the Article 8(5) of Communiqué No. 2010/4 had stated that "two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué". Article 2 of Communiqué No. 2017/2 amended Article 8(5) of Communiqué No. 2010/4 as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market, within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué".
2. Article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included to Article 10 of Communiqué No. 2010/4, which reads as follows: "*If the control is acquired from various sellers by way of series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realisation of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Turkish Competition Board without delay; and*

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(b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition."

This newly introduced provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, even before the promulgation of Communiqué No. 2017/2, the case law of the Turkish Competition Board was shedding light on this matter. In the *Camargo* decision (Camargo Corrêa S.A. decision 12-24/665-187, May 3, 2012), the Board recognised that the parties can close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that: (i) the transaction is notified to the Turkish Competition Board without any delay; and (ii) the acquirer does not exercise control over the target pending the Turkish Competition Board's approval decision. That said, since this approach had not been solidified through subsequent decisions on that front and the Camargo decision appears to be rather unique, a legislation-based security on these types of concentrations would be most welcome.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Traditionally, the Competition Authority pays special attention to transactions that take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors that are important to the country's economy (such as automotive, telecommunications, energy, etc.) attract the Competition Authority's special scrutiny as well. The Competition Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition law concerns are looked into very carefully. In some sectors, the Competition Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2017 show that the transactions in the sector for food, agriculture, forestry, fishery and stockbreeding took the lead with 26 notifications, followed by the energy industry with 22 notifications..

The Competition Board adopted many **significant decisions** in the past year, examples of which are summarised below:

- In May 2017, the Board granted unconditional approval to the transaction concerning the acquisition by Maersk Line A/S ("*Maersk*") of all shares and sole control of Hamburg Südamerikanische Dampfschifffahrts – Gesellschaft KG ("*HSDG*"). Maersk (the buyer) is the largest container shipping company, while HSDG is among the top ten worldwide. Maersk and HSDG offer their services on trade routes through cooperation agreements with other shipping companies based on vessel-sharing agreements, where members decide jointly on capacity setting, scheduling and ports of call, which are all important parameters of competition. In its decision, the Board clearly indicated that in its assessment of the proposed transaction it took into consideration the commitments

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that the parties submitted to the European Commission, specifically with respect to the trade routes from/to Mediterranean Sea. The European Commission had cleared the proposed acquisition (Case M.8330 – Maersk/Hamburg (2017)) conditionally upon the withdrawal of HSDG from five consortia on trade routes. Among these routes, the ones connecting (i) the Mediterranean and West Coast South America and (ii) the Mediterranean and East Coast South America are related to the Turkish markets. The Commission stated in its press release dated April 10, 2017 that this will entirely remove the problematic links between Maersk and HSDG's consortia that would have been created by the transaction. In view of the proposed remedies, the Commission concluded that the proposed transaction, as modified, would no longer raise competition concerns. The Commission's decision is conditional upon full compliance with the commitments.

- In November 2017, the Board granted an unconditional approval to the transaction concerning the reinstatement of certain minority protection rights granted to Anheuser-Busch InBev ('ABI') over Anadolu Efes and formation of a joint venture between those two undertakings (November 23, 2017, 17-38/611-267) by concluding that the relevant transaction will not result in creation of a dominant position or strengthening an existing dominant position, and will not significantly impede competition. The transaction is of importance as it was a cross-border deal between ABI, one of the biggest players in the production of beer worldwide, and Anadolu Efes, the largest beer producer in Turkey and a significant player in Eastern Europe, where ABI acquired joint control over Anadolu Efes due to reinstatement of certain strategic veto rights.
- In November 2017, the Board concluded its Phase II review of the acquisition of Ulusoy Deniz Taşımacılığı A.Ş, Ulusoy Gemi İşletmeleri A.Ş., Ulusoy Ro-Ro İşletmeleri A.Ş., Ulusoy Ro-Ro Yatırımları A.Ş., Ulusoy Gemi Acenteliği A.Ş., Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri A.Ş. and Ulusoy Çeşme Liman İşletmesi A.Ş. ('Ulusoy Ro-Ro') by U.N. Ro-Ro İşletmeleri A.Ş. ('U.N. Ro-Ro'). The Board concluded that: the transaction will strengthen U.N. Ro-Ro's dominant position in the market for Ro-Ro transport between Turkey and Europe; U.N. Ro-Ro will be in a dominant position in the market for port management concerning Ro-Ro ships upon the consummation of the transaction; the transaction will significantly impede competition in these markets; and the behavioural remedies submitted by the parties are not sufficient to eliminate the competition law concerns arising from the transaction. In this respect, the Board did not grant approval to the transaction.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Turkish merger control regime currently utilises a 'dominance test' in the evaluation of concentrations. Pursuant to Article 13/II of the Merger Communiqué, mergers and acquisitions which do not create or strengthen a sole or joint dominant position, and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Competition Board. Article 3 of the Law No. 4054 defines a dominant position as: "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% may be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a

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presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of the Law No. 4054.

On the other hand, there were a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Competition Board evaluated the coordinated effects of the mergers under a joint dominance test, and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Competition Board took note of factors such as 'structural links between the undertakings in the market', and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market', and the 'structure of demand'. It concluded that certain factory sales would result in the creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court has overturned the Competition Board's decision and decided that the 'dominance test' does not cover 'joint dominance'. This has been a very controversial topic ever since, because the Competition Board has not prohibited any transaction on the grounds of joint dominance after the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard dominance test is applied. Additionally, regardless of whether the joint venture is full-function, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

On the other hand, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, November 17, 2011), the Competition Board used the OLS and 2SLS estimation models in order to define price increases that are expected from the transaction. It also employed the Breusch/Pagan, Breusch-Pagan/Godfrey/Cook-Weisberg, White/Koenker NR2 tests and the Arellano-Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses which are used more often are the HHI and CRN indices to analyse concentration levels.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Article 10 of the Law No. 4054, once the formal notification has been made, the Turkish Competition Board, upon its preliminary review (Phase I) of the notification, will decide either to approve, or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, the Law No. 4054 makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

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The Competition Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with; however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

In 2017, four transactions were taken into Phase II review, concerning the sectors for ro-ro transportation services, agriculture, port services and optics. The decision concerning the acquisition by UN Ro-Ro İşletmeleri A.Ş. (i.e. the transaction in the ro-ro transportation services) was not granted clearance (17-36/595-259, November 9, 2017). The remaining three Phase II Reviews are ongoing. On the other hand, the Competition Board granted clearance to two transactions after the parties submitted commitments.

In *Bekaert/Pirelli* (17-06/56-22, February 9, 2017), the Board initiated a Phase II review, considering that the transaction might raise competitive concerns in the affected markets by causing significant concentration levels and increasing market power. During an in-depth Phase II review, the Board evaluated the behavioural commitments submitted by the parties which mainly included long-term supply agreements with local consumers, pricing commitments and provision of prices at a competitive level. As a result of its assessment, by also receiving the relevant local consumers' positive views on the commitments, the Board concluded that the commitments submitted by the parties are sufficient, sustainable and clear in terms of eliminating competitive concerns that might arise as a result of the transaction, and granted a conditional approval based on purely behavioural remedies to a sophisticated transaction which, under normal circumstances, could have been expected to prompt structural remedies.

Furthermore, the Turkish Competition Board has, until the *Bekaert/Pirelli* case, consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings' arrangements, based on the argument that a closing is sufficient for the Board to impose a suspension violation fine, and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. The Board's approach to carve-out or hold-separate arrangements has been challenged with a genuine arrangement which includes splitting the transaction into two separate transactions in the *Bekaert/Pirelli* case. During the Phase II review, the parties proposed to split the transaction in spite of the Board's negative approach on carve-out or hold-separate arrangements. The Board, similar to its previous decisions, first argued that a closing outside of Turkey is sufficient for the suspension violation fine to be imposed. However, separate SPAs have been prepared and all the necessary measures have been taken in an attempt to prevent these two transactions being considered as one transaction. The Board clearly stated in its decision that it did not see any problem with respect to the parties splitting the transaction into two separate transactions concerning (i) the assets located in Brazil, Italy, Romania and China, and (ii) those located in Turkey and, accordingly, the parties' closing of the transaction in terms of the assets in the relevant four countries outside Turkey – which led the Board to solely assess the Turkish part of the transaction.

The *Maersk/HSDG* and *Ulusoy/UN Roro* cases are also examples from the past year that are subject to remedies, details of which are provided above under 'Significant decisions'.

As evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a

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concentration. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

The Competition Authority does not have a clear preference for any particular types of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in Turkish merger control regime in the past few years. In line with the amendment of the Merger Communiqué, the Competition Board also revised its Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned") and took out the relevant section on affected markets, so that the concept of affected markets is now only relevant to the preparation of the notification form and the analysis of the transaction. Furthermore, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: i) the Horizontal Merger Guideline; and ii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). The Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Competition Board to market shares and concentration levels is similar to the approach taken by the European Commission and spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis remains still subject to Article 7 of the Law No. 4054.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor to anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that might arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it

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indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: i) the allegedly failing firm will soon exit the market if not acquired by another firm; ii) there is no less restrictive alternative to the transaction under review; and iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present) are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Merger Guideline include the effects arising from vertical mergers, and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position were accepted on January 29, 2014.
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of the Act No 4054 on the Protection of Competition, came into force on December 10, 2016.
- Block Exemption Communiqué on Research and Development Agreements (Communiqué No. 2016/5) came into force on March 16, 2016.
- Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board, came into force on February 24, 2017. Block Exemption Communiqué on the Vertical Agreements in the Motor Vehicle Sector in Turkey (Communiqué No: 2017/3), came into force on February 24, 2017.
- Guidelines on the Explanation on the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector in Turkey, were accepted on March 7, 2017.
- Communiqué No. 2017/4 on the Payments of Joint Stock Companies and Limited Liability Companies as per Law No. 4054, came into force on March 31, 2017.

Reform proposals

The Draft Proposal for the Amendment of the Competition Law (Draft Law) and the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation) were officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law and the Draft Regulation to the Presidency of the Turkish Parliament on January 23, 2014 and January 17, 2014, respectively. In 2015, the Draft Law became obsolete again due to the general elections in June and November 2015. It is yet to be seen whether the new Turkish Parliament or the Government will renew the Draft Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft

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Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if the parliament of Turkey does not pass the Draft Law.

The Draft Law aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation. The Draft Law proposes several significant changes in terms of merger control. First, the substantive test for concentrations will be changed. The EU's SIEC Test (significant impediment of effective competition) will replace the current dominance test. Secondly, the Draft Law adopts the term "concentration" as an umbrella term for mergers and acquisitions. Thirdly, the Draft Law eliminates the exemption of acquisition by inheritance. Fourthly, the Draft Law abandons the Phase II procedure, which was similar to the investigation procedure, and instead provides a four-month extension for cases requiring in-depth assessments. During in-depth assessments, the parties can deliver written opinions to the Competition Board, which will be akin to written defences. Finally, the Draft Law extends the review period for concentrations from the current 30-day period to 30 working days, which equates to approximately 40 days in total. As a result, obtaining a Phase I decision is expected to be extended.

The Draft Law proposes to abandon the fixed rates for certain procedural violations, including failure to notify a concentration and hindering on-site inspections, and set upper limits for the monetary fines for these violations. This new arrangement gives the Competition Board discretionary space to set monetary fines by conducting case-by-case assessments. Additionally, the Draft Regulation is set to replace the Regulation on Fines. The content of the Draft Regulation also seems to be heavily inspired by the European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02). Thus, the introduction of the Draft Regulation clearly demonstrates the motive of the Competition Authority to bring the secondary legislation in line with the EU competition law principles during the harmonisation process.

Another significant anticipated development is the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition, which will replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the authority's intention to bring the secondary legislation into line with EU competition law during the harmonisation process. The draft regulation was sent to the Turkish Parliament on January 17, 2014, but as yet no enactment date has been announced.

Additionally, on July 20, 2017, the Authority's Information Note regarding the Proposed Guidelines on Vertical Agreements ('Proposed Guidelines') was exposed to public opinion through the official website of the Authority. The Proposed Guidelines incorporate certain significant amendments as regards the Authority's current Guidelines on Vertical Agreements No. 15-36/537-RM(2) ('Guidelines') as well as several assessments relating to the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ('Communiqué No. 2002/2'). The Proposed Guidelines address the need to regulate and/or update the legislation which relate to (i) agency agreements, (ii) the most favoured nation/customer ('MFN') clauses, and (iii) internet sales, in light of the changing market conditions.

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With regard to agency agreements, the Authority has pursued a more rigid approach in terms of the restrictive nature of agency agreements. The Proposed Guidelines indicate that non-compete restrictions should not be evaluated under the scope of a rule-of-reason approach and set forth that if non-compete obligations lead to foreclosure effects in the market where the products/services subject to the agreement are being sold, such obligations will be considered within the scope of Article 4 of Law No. 4054.

Additionally, the Proposed Guidelines provide detailed explanations on MFN clauses with a view to clarify such a greenfield topic in competition law, and thereby update the legislation in light of the market dynamics. Specifically, the Proposed Guidelines recognise the pro-competitive nature of MFN clauses and prescribe a rule-of-reason analysis, while setting out that the anti-competitive effects of MFN clauses could be determined based on an effect analysis that covers aspects such as the relevant undertakings' positions in the market, the object for incorporating the MFN clause, and the characteristic features of the relevant market.

Lastly, the Proposed Guidelines also project some fresh amendments on internet sales and explicitly define them as a passive sales method for the first time. The Proposed Guidelines emphasise every retailer's and distributor's right to perform sales over the internet, and thereby set out the restrictions which leave vertical agreements outside the scope of the block exemption.

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