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The Turkish Competition Authority publishes revised Guidelines on vertical agreements

ANTICOMPETITIVE PRACTICES, AGREEMENT, BLOCK EXEMPTION (REGULATION), VERTICAL RESTRICTIONS, ALL BUSINESS SECTORS, TURKEY, REFORM, INTERNET, MFC CLAUSE

Turkish Competition Authority, Updated version of the Guidelines, 30 March 2018

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

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The Turkish Competition Authority ("Authority") completed its work in progress on revising the Guidelines on Vertical Agreements ("Guidelines") that was issued based on the Block Exemption Communiqué on Vertical Agreements ("Communiqué No. 2002/2"). It took approximately 2 years for the Authority to finalize its work. The Authority has published the updated version of the Guidelines on its official on March 30, 2018 (Friday). Below is the summary of amendments made in the Guidelines:

I. Internet Sales

The Authority's announcement on revision of the Guidelines indicates that internet platform's emergence as a new distribution channel provides consumers with the ability to (i) access to a large set of information without difficulty, (ii) compare prices, (iii) access more products and more sellers. On the other hand, it enables suppliers to market their products to wider geographical markets with lower costs. For that reason and due to the rapid increase in internet sales' yearly average developing rate in Turkey, a regulation on internet sales has become a necessity. The Authority's announcement further states that the amendments seek a balance between (i) re-evaluation of competition law rules with respect to sales through internet, thereby ensuring preservation of internet's contribution to consumers and resellers and (ii) protection of suppliers' commercial interests. On that note, the Authority has added a couple of articles to sections regarding sales through internet. Please find the brief notes on the amendments below:

1. A restriction on sales through distributors'/dealers'/buyers' websites imposed by a supplier is restriction on passive sales. Within this context, purchases made through consumers' (i) visits to dealers' websites, (ii) contacts with dealers or (iii) requests to be auto-informed by dealers are considered to be passive sales. Offering various language selections by dealers on their website does not change the fact that they are passive sales. Accordingly, the restrictions below in particular on internet sales will not benefit from the exemption under the Communiqué No. 2002/2.

i. Restriction on a (exclusive) distributor's website to consumers located in another (exclusive) distributor's region or diverting such consumers' access to supplier's or the other (exclusive) distributor's websites: Restriction on sales requested through internet from a particular region or customer group will be considered as a hard-core restriction.

ii. (Exclusive) Distributor's termination of transaction after realizing the customer is not located in its (exclusive) region regarding the customer's delivery, mail, credit card, etc. address information: Restriction on sales requested through internet from a particular region or customer group will be considered as a hard-core restriction.

iii. Restriction on share of sales through internet in total amount of sales: On that note, setting a maximum sales limit for internet sales will be considered as a hard-core restriction. A condition setting forth that a distributor should sell a particular portion of its total sales through physical stores as to preserve those stores' efficiency without restricting internet sales or conditions as to ensure compatibleness of internet sales and general distribution system are excluded from the scope of this restriction.

iv. Condition providing that a distributor should pay more to its supplier for products that it resells through internet than products supplied in physical stores: Applying different bulk purchase prices directly or indirectly (e.g. rebate systems) will be considered within this scope. Supplier's power to affect the distributor's preference of its distribution channel by increasing the price difference between internet and physical store sales may obstruct distributors to operate through internet sales. Nevertheless, suppliers are entitled to pay fixed amounts to their distributors regardless of their sales income and amount, as to support their reselling efforts (through internet or physical stores).

2. To that end, restrictions above are considered to be restriction of passive sales. However, internet sales made to a particular exclusive region or a particular exclusive customer group of another distributor through promotion or similar methods will be deemed active sale and one can argue that such sales will be within the scope of the exemption. Advertisements directed to a specific group of customers and/or a specific geographical region and (unrequested) e-mails will be considered as active sales. For instance, advertisements directed to a particular geographical region that are published through third party platforms or market places are active sales for that region's residents. Accordingly, one can consider making payments to search engines or internet advertisement providers to publish ads for customers located in a specific region as an active sale.

3. On the other hand, a supplier may impose certain conditions on the use of internet distribution channel as it can also do for physical stores or catalogues that publish ads and promotions. For example, suppliers may require quality standards for the website or may require provision of certain services to the customers purchase through internet:

i. Especially within a selective distribution system, the supplier may require its distributor to possess at least one physical store; however, such requirement should not aim excluding the suppliers that only sell through internet (pure player) from the market or restrict their sales. Suppliers may also impose additional requirements to their distributors, but more importantly such requirements should not aim to directly or indirectly restrict distributor's internet sales. Justifications for the imposed requirements should be objective, reasonable and admissible with respect to the aspects that enhances the distribution's qualifications and quality, brand image and/or potential efficiencies. Likewise, supplier may require the distributor to resell only through "sales platforms/market places" that fulfil certain standards and conditions. However, this requirement should also not aim restricting the distributor's internet sales and price competition. One may consider general restrictions on sales through platforms without any objective and uniformed justification regarding the product's propriety and qualities as an infringement.

ii. Even though requirements imposed on physical sales and internet sales should not be identical due to their difference on sales conditions, both requirements should (i) serve to the same purpose, (ii) ensure comparable consequences and (iii) be able to verify the intrinsic differences of the two distribution channels ("equivalence principle"). In other words, the conditions should not restrict internet sales directly or indirectly. Therefore, one can consider requirements as hard-core restriction if they (i) violate the equivalence principle and (ii) discourage distributors to use internet as a distribution channel.

4. A website launched for reselling through internet by a distributor within a selective distribution system, will not be considered as a new physical sales point.

II. Most Favored Customer Clause ("MFN")

The Authority's announcement indicates that MFN clause is one of the frequently examined issues recently by the competition authorities throughout the world and the competition law practitioners and thereby a necessity of establishing a new regulation on this matter has arisen.

1. In principle, an agreement containing MFN clauses may benefit from block exemption on the conditions that the market share of the party that is beneficiary of the clause does not exceed 40% and that the other conditions stipulated in the Communiqué No. 2002/2 are met. The evaluation of MFN clauses in the traditional markets differs from those in the online platforms. For example, while the party that is the beneficiary of the clause is the buyer in the traditional markets, it may be either supplier, buyer or intermediary in the online platform markets depending on the relevant product market. Therefore, Communiqué No. 2002/2 does not provide any indication as to which party's market share should be taken into account. Accordingly, the Communiqué provides that one should consider the market share of the beneficiary party of the agreement. In case the market share thresholds are exceeded, it is necessary to consider the explanations on individual assessments in the Guidelines:

i. For instance, retroactive MFN clauses which allow the beneficiary buyer to get more favorable offers in all cases or which increase the supplier's costs for making discounts to buyers that are not party to the clause (payment of the difference between the (i) low prices offered to buyers that are not party to MFN clause and the (i) price offered to the buyer party to MFN clause, to the relevant buyer), are likely to harm competition much more than other clauses do. Besides, in the instances where parties to MFN clause have market power compared to their competitors in the market, one may evaluate that such clauses are likely to harm competition more. In such situations, these clauses may lead to exclusion of competitors that are not party to the relevant agreement and foreclosure of market to the competitors. Moreover, the use of these clauses in the concentrated markets is more risky than the use of these clauses in non-concentrated markets from a competition law perspective. This is because, the likelihood of rival buyers that are not party to the clause, to find an alternative supplier is relatively lower in the concentrated markets. In addition to this, in the cases where the use of MFN clauses have become widespread and thus a significant portion of the market has been subjected to these clauses, it is necessary to adopt a more skeptical approach in the evaluation of these clauses. This is because, it is more likely that the restrictive effects arising from the clauses cumulatively increase, where these clauses have become widespread in the market, and thus the likelihood of restriction of competition is higher.

ii. On the other hand, MFN clauses may not result in a competition concern under certain circumstances. For example, in the instances where both parties to an agreement containing MFN clauses do not have a market power, it is unlikely that implementation of these clauses would create competition concerns. In case small-scale buyers with no market power use MFN clauses, it would have a positive effect on the competition in the market given that these clauses allow relevant buyers to benefit from favorable price and conditions in the market. In the

instances where concentration level of the upstream market is low (i.e. upstream market is sufficiently competitive), competitive harm may not exist given that in such a situation current and potential competitors may choose the alternatives. In case of a non-transparent market, the negative effects of MFN clauses would be relatively low given that in such situations it is unlikely to effectively monitor the implementation of these clauses in the market.

2. As for the direct or indirect methods of determining the resale price, an MFN clause incorporated in agreements concluded between undertakings which may decrease suppliers' incentives to supply goods under more favorable price and conditions to buyers other than beneficiary buyers may reinforce the influence of direct or indirect methods of determining the resale price. However, supporting practices which reinforce the efficiency of MFN clauses and resale price should not be evaluated as practices which result in determination of the resale price.