Vertical Agreements

Contributing editor
Patrick Harrison

2019

GETTING THE DEAL THROUGH

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Vertical Agreements 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Vertical Agreements*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Italy.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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 Harrison of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Turkey

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Antitrust law

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

The main legislation applying to vertical restraints is article 4 of Law No. 4054 on the Protection of Competition. Article 4 of Law No. 4054 is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices having (or which may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof.

Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2) outlines the block exemption principles for vertical agreements.

In addition, the Competition Board (the Board) issued the Guidelines on Vertical Agreements (the Guidelines) by its decision dated 30 June 2003 and has recently updated these Guidelines by its decision dated 29 March 2018. Amendments to the Guidelines mainly focus on most-favoured nation (ie, customer) (MFN) clauses and online sales.

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 defined in Law No. 4054. Article 2 of Communiqué No. 2002/2 defines vertical agreements as agreements that are concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services.

Although both Communiqué No. 2002/2 and the Guidelines define the following certain vertical agreement types that may raise antitrust concerns, the list is not exhaustive:

- resale price maintenance (RPM): setting fixed prices for the buyer's resale prices;
- region and customer restrictions: restrictions placed upon buyers concerning the region in or customers to which the contracted goods or services may be sold;
- selective distribution systems: a distribution system whereby the provider undertakes, directly or indirectly, to sell the goods or services that are the subject of the agreement only to distributors selected by the provider, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorised distributors;
- non-compete obligations: any kind of direct or indirect obligation preventing the purchaser from producing, purchasing, selling or reselling goods or services that compete with the goods or services that are the subject of the agreement;
- exclusive supply obligation: a direct or indirect obligation on the provider to sell the goods or services that are the subject of the agreement to only one buyer inside Turkey for the purpose of use or reselling; and
- single branding conditions: the buyer is encouraged to procure all or most of its requirements for a particular product or group of products from a single supplier.

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?

Law No. 4054 does not attribute a specific objective to vertical restraints, but in general, Turkish competition law pursues protection of competition, by removing entry barriers and encouraging innovation.

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 authority responsible for enforcing prohibitions on anticompetitive vertical restraints in Turkey is the Competition Authority (the Authority). The Authority has administrative and financial autonomy and consists of the Board, the office of the president and technical and administrative units. The Authority enforces competition law through five sector-specific technical units and approximately 128 case handlers. An economic analysis and research unit, a strategy development, arrangement and budget unit, a decisions unit, an information management unit, and an external relations, education and competition advocacy unit assist these five technical units and the office of the president in performing their tasks. The Board, on the other hand, is the decisive organ of the Authority and is responsible for, inter alia, investigating and condemning anticompetitive behaviours. The Board consists of seven independent members.

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. Pursuant to article 2 of Law No. 4054, Turkish competition law applies to anticompetitive conduct of undertakings that operate in Turkey or have impact on the relevant markets in Turkey. So far, Law No. 4054 has not been applied extraterritorially regarding vertical restraints.

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 both private and public entities that have economic activity. Therefore, a public entity that has economic activities in the private sector will be considered as an undertaking under Turkish competition law. In *Türk Telekom* (Council of State 10th Chamber Case No. 2001/2113, Decision No. 2004/5849), the Council of State decided that Türk Telekom, which was a wholly state-owned entity at that time, was an economic undertaking and thus was subject to Law No. 4054. The Board, however, did not consider municipalities' restrictions on bread distribution as an economic

activity and held that the relevant conduct was related to their role as a public authority (6 May 2010, Decision No. 10-34/546-194; 12 June 2008, Decision No. 08-39/511-187).

In a recent decision concerning vertical agreements, the Board decided that an agreement concluded between the Social Security Authority (SGK) and the Turkish Pharmacists' Association did not fall under the scope of Law No. 4054 because the SGK's conduct under investigation was related to its public service (decision of 13 July 2017, Decision No. 17-22/362-158). On the other hand, the Council of State held that Law No. 4054 applies to decisions of public associations of undertakings if these decisions have no statutory basis (decision of 16 December 2014, Decision No. 2010/4769 E and 2014/4294 K). Law No. 4054, however, will not apply to these associations' conduct if they are related to implementation of the legal provisions regarding their duties as public associations or professional chambers. In light of the above, vertical restraints agreements of public entities can be subject to Law No. 4054, provided that the relevant agreement is not related to their duties as public entities set forth by the law.

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 certain communiqués regarding specific sectors:

- Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and
- Block Exemption Communiqué No. 2008/3 in Relation to the Insurance Sector.

General exceptions

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

Under Turkish competition law, there are no general exceptions (such as de minimis) for certain types of agreements containing vertical restraints.

Agreements

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

Law No. 4054 refrains from a strict definition of 'agreement', since an agreement may occur in various ways. For instance, the Board decided that non-binding gentlemen's agreements were 'agreements' within the meaning of Law No. 4054 where parties agreed to anticompetitive terms (8 March 2013, Decision No. 13-13/198-100; 3 March 2011, Decision No. 11-12/226-76). The Board also decided that even agreements entered into by unauthorised employees of undertakings are deemed 'agreements' under Turkish competition law (26 November 1998, Decision No. 93-750-159). Paragraph 6 of the Guidelines on the General Principles of Exemption explicitly states that there is no difference between oral or written forms of agreement for the purposes of competition law.

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?

As stated in question 9, the Turkish competition regime does not require an anticompetitive agreement to be in a specific form. Hence, a vertical agreement that is written, oral or in any other form can be subject to Law No. 4054 (eg, *Linde Gaz* decision dated 29 August 2013, Decision No. 13-49/710-297).

Parent and related-company 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)?

In many cases, the Board decided that companies within the same group are regarded as a single economic entity. The Board decided in *TTKKMB* (27 May 1999, Decision No. 99-26/233-141), *TTKKMB v Bandırma* (17 July 2001, Decision No. 01-33/331-94) and *Elektrik Dağıtım* (3 March 2011, Decision No. 11-12/240-77) that agreements between the parent company and the company it controls are not subject to article 4. Given that a related company generally refers to an entity that is independent legally but not economically, vertical agreements between a parent company and the companies it controls do not fall within the scope of the prohibition under article 4.

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?

Under the Guidelines, agent–principal agreements do not in principle fall within the scope of article 4 of Law No. 4054, because, generally, agents operate on behalf of the principal. Nevertheless, the Guidelines set forth economic and commercial risk factors that will make such agreements subject to article 4. Where an agent bears the economic or commercial risk of the business, article 4 will apply to this agreement.

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 set forth certain criteria in order to determine whether the agent bears economic or commercial risks:

- 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 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)?

According to article 2 of Communiqué No. 2002/2, if a vertical agreement concerns the sale and resale of goods and services and also includes provisions on the transfer of intellectual property rights to the buyer or the exercise of such rights by the buyer, the relevant vertical agreement might benefit from block exemption under Communiqué No. 2002/2 provided that the relevant intellectual property 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 such intellectual property rights does not constitute the main purpose of the agreement.

Analytical framework for assessment

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

The steps of the analysis on whether a vertical agreement falls within article 4 of Law No. 4054 are as follows:

- determining whether an agreement contains conditions infringing article 4 by its object;
- if the agreement does not restrict competition by object, analysing the effect of the agreement; and
- where the Board fails to prove the anticompetitive effect of the agreement, it should demonstrate that the agreement has a likely effect on the relevant market.

One of the major distinctions between the TFEU and Law No. 4054 is that the TFEU applies to an agreement restricting competition by its object or effect, whereas Law No. 4054 also applies to an agreement of which the potential effect restricts competition.

Moreover, the Guidelines specify two steps in analysing the extent to which an anticompetitive vertical agreement should be prohibited:

- first, depending on the type of vertical restriction, the undertakings involved need to define the relevant market so that the market share of the supplier or the buyer may be determined; and
- second, the market share of the supplier, or in exclusive supply agreements, the market share of the buyer, is evaluated in terms of the 40 per cent threshold. If the market share is below the 40 per cent threshold, the agreement may benefit from the block exemption, provided that it does not include any of the per se restrictions and meets the rest of the conditions listed in the Communiqué. If, however, the market share is above the 40 per cent threshold, the agreement can only benefit from an exemption should the agreement fulfil the conditions under article 5 of Law No. 4054.

In order for an agreement to benefit from individual exemption under article 5 of Law No. 4054, it should:

(i) ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services;
(ii) benefit the consumer with the above-mentioned developments;
(iii) not eliminate competition in a significant part of the relevant market; and
(iv) not limit competition more than is necessary for achieving the goals set out in (i) and (ii).

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?

As stated in question 15, a vertical agreement may benefit from a block exemption if the supplier's market share is below 40 per cent, provided that the vertical agreement complies with certain conditions in Communiqué No. 2002/2. However, if an agreement is not eligible for a block exemption, it may still be exempted from the prohibition of article 4, provided that the conditions of the individual exemption under article 5 of Law No. 4054 are satisfied.

Further, despite a vertical agreement restricting the competition in the market but benefiting from the block exemption, such a block exemption could be revoked by the Board under article 6 of Communiqué No. 2002/2 where the vertical agreement network comprises more than 50 per cent 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?

See questions 8 and 16, which are also applicable here. In exclusive supply agreements, if the buyer's market share exceeds 40 per cent in the market in which it purchases goods and services, such an agreement cannot benefit from the block exemption.

Block exemption and safe harbour

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.

Communiqué No. 2002/2 provides the block exemption regime for vertical agreements. As explained above, where the supplier's (or in exclusive supply agreements, the buyer's) market share is below 40 per cent, the agreement may benefit from the block exemption provided that the other conditions are also met. If the market share of the undertaking exceeds the 40 per cent threshold, the agreement automatically falls outside the scope of the block exemption. In other words, agreements between undertakings holding market shares above 40 per cent in the relevant markets are automatically disqualified from the block exemption, and the suppliers may not impose any kind of direct or indirect vertical restraints on buyers regarding the goods or services covered by the agreements, unless an individual exemption is granted by the Board.

Apart from Communiqué No. 2002/2, the Turkish competition regime allows individual exemptions for anticompetitive vertical agreements provided the anticompetitive conditions in the agreement fulfil the conditions of the individual exemption specified in article 5 of Law No. 4054.

Additionally, there are specific sector-based exemption communiqués (see question 7) applying to certain undertakings.

Types of restraint

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

According to article 4 of Communiqué No. 2002/2, restricting a reseller's discretion and ability to determine its own prices is among the restrictions by object. Article 4, however, also provides that a supplier can determine maximum resale price or recommend resale prices unless these result in fixed or minimum prices in practice.

Moreover, paragraph 17 of the Guidelines provides that, in order to prevent a maximum or recommended price notified to the buyer from resulting in fixed or minimum prices, the supplier should explicitly state in its price lists, or on the products, that these prices are maximum or recommended.

The Board's established practice adopts a very sensitive approach in connection with all RPM arrangements. Despite certain decisions where the Board signalled a 'rule of reason' analysis by considering the market structure, competition level and effect on consumers (eg, *Çilek*, 20 August 2014, Decision No. 14-29/597-263; *Dogati*, 22 October 2014, Decision No. 14-42/764-340), the Board's established precedent points towards a per se infringement for RPM concerning minimum or fixed prices (eg, *Anadolu Elektronik*, 23 June 2011, Decision No. 11-39/838-262; *Akmaya*, 20 May 2009, Decision No. 09-23/491-117; *Kuralkan*, 27 May 2008, Decision No. 08-35/462-162). In a more recent decision, the Board decided not to initiate a full investigation into Duru Bulgur Gıda San ve Tic AŞ (8 March 2018, Decision No. 18-07/112-59) by taking into consideration:

- inter-brand competition in the market;
- competitive pressure in the retail market from discount stores and retail chains;
- Duru's low market share;
- low concentration level in the market;
- the fact that retailers often price its products below the recommended prices; and
- lack of evidence regarding any enforcement or monitoring mechanism to implement the recommended prices set by Duru.

Regardless of these findings, the Board also issued an opinion letter stating that Duru should indicate in its price lists that the relevant prices are 'maximum' or 'recommended sales prices' and terminate any conduct that may lead to determining resale prices and discount rates or fixing resale prices by any other means.

As seen in the *Duru* decision, suppliers are not prohibited from setting a maximum resale price or recommend resale prices, provided that such conditions do not, directly or indirectly, lead to any fixed or minimum selling prices and the supplier's market share in the relevant product market in Turkey remains below 40 per cent. Indeed, in

the *Jotun* decision (15 February 2018, Decision No. 18-05/74-40), the Board found that Jotun Boya Sanayi ve Ticaret AŞ's conduct was more a situation of setting a maximum price including a special discount for large-scale projects than a problematic resale price management.

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 such restrictions has not been considered in any legislation or decisional practice in Turkey.

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

Neither guidelines nor decisions have addressed the possible links between RPM and other vertical restraints. While there have been cases where the agreement at issue contained other vertical restrictions (such as territorial sales restrictions and internet sales bans) in addition to RPM, the Board considered these restrictions separately.

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

Pursuant to article 4 of Communiqué No. 2002/2, RPM resulting in setting minimum or fixed prices is prohibited as a by-object restriction. For these restrictions, therefore, efficiency arguments are not accepted. As regards RPM concerning recommended and maximum prices, the Board considered efficiency arguments (such as eliminating a free-riding problem and increasing productivity of distribution) in a number of decisions and acknowledged that efficiencies may outbalance any anticompetitive impact of this conduct (see, eg, *Reckitt*, decision of 13 June 2013, Decision No. 13-36/468-204; *Frito Lay*, decision of 12 June 2018, Decision No. 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 to this hypothetical is whether or not the supplier is benchmarking fixed or minimum price results (eg, through a supplier's monitoring and punishment mechanism). If so, this conduct may be considered as a restriction of competition under article 4 of Law No. 4054.

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.

Under the current Turkish competition law, there is no statutory provision explicitly allowing or prohibiting MFN arrangements in Turkey. On the other hand, the Guidelines recognise potential pro-competitive effects of MFN clauses and adopt a rule of reason-based approach to these clauses. The Guidelines provide that, in the analysis of these clauses, factors to be taken into account include:

- the relevant undertakings' and their competitors' position in the relevant market;
- the object of the MFN clause in the relevant agreement; and
- the specific characteristics of the market.

However, MFNs, especially when used by a strong player in the market, might raise competition law concerns if and to the extent they 'artificially increase market transparency', 'raise barriers to entry' or 'raise competitors' costs'.

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 June 2016, Decision No. 16-20/347-156) is the first case where MFN clauses were considered as an infringement of Law No. 4054. The Board concluded that Yemek Sepeti holds a dominant position in the online meal order delivery platform services market. The Board has further decided that preventing restaurants from offering better or different conditions to rival platforms through MFN practices leads to exclusionary effects and thus an abuse of dominant position.

Pursuant to the recently added content on MFN clauses to the Guidelines, an agreement containing MFN clauses may benefit from block exemption provided that the market share of the party that is the beneficiary of the clause does not exceed 40 per cent and that other conditions under Communiqué No. 2002/2 are met. If the market share thresholds are exceeded, other factors to be taken into account include the market position of the party benefiting from the MFN clause and its competitors; the purpose of including the MFN clause in the relevant agreement; and specific aspects of the market and the provided MFN clause.

The Guidelines also provide more concrete examples; for instance, retroactive MFN clauses that allow the beneficiary buyer to get more favourable offers in all cases or that increase the supplier's costs for making discounts to buyers that are not party to the clause (payment of the difference between the low prices offered to buyers that are not party to the MFN clause and the price offered to the buyer party to the MFN clause, to the relevant buyer), are likely to harm competition much more than other clauses can. Besides, where parties to MFN clause have market power, such clauses are more likely to harm competition. Under these circumstances, these clauses may lead to exclusion of competitors that are not party to the relevant agreement and foreclosure of the market to the competitors. Moreover, these clauses in concentrated markets are potentially more problematic than those in non-concentrated markets from a competition-law perspective. Further, where MFN clauses have become widespread practice and thus a significant portion of the market has been subjected to these clauses, the Board may take a more sceptical approach in the assessment of these clauses.

On the other hand, the Board acknowledges that MFN clauses do not always have anticompetitive effects. For example, where neither party to an agreement including MFN clauses has market power, it is unlikely that implementation of these clauses would raise competition concerns. Moreover, when a small-scale buyer without any significant market power applies an MFN clause, this may have a positive effect on competition given that this clause allows buyers to benefit from favourable prices and sales conditions. In markets where the concentration level of the upstream market is low (ie, the upstream market is sufficiently competitive), competitive harm may not be likely given that current and potential competitors may choose from sufficient alternatives. Where the market is not transparent, the negative effects of MFN clauses will be relatively low given that effective implementation of these clauses in the market is unlikely.

In the *Yataş* decision (27 November 2017, Decision No. 17-30/487-211), the Board held that MFN clauses can restrict competition by leading to coordination, cartels, entry barriers and exclusionary effects, but can also have positive outcomes, such as creating efficiencies, eliminating free-riding problems, protecting trademarks and reducing costs.

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.

As explained above, in principle, RPM concerning minimum prices are restrictions by object and prohibited under Turkish competition law. That said, in a number of decisions, the Board did not find an infringement when the buyer was able to apply discounts in practice and there was no evidence of the supplier monitoring or punishing such behaviour (see, eg, *Frito Lay*; *Çağdaş v Zuhal*, decision of 24 October 2013, Decision No. 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.

See questions 23, 24, and 25, which apply equally to this question.

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?

Pursuant to article 4 of Communiqué No. 2002/2, restrictions requiring the buyer not to sell the products or services in certain territories or to certain customers may be considered as a violation of article 4 of Law No. 4054 by object. There are, however, a number of exceptions to this rule. Indeed, article 4(a)(1) of Communiqué No. 2002/2 allows the supplier to prevent the buyer from active sales of contract products or services into the exclusive territory or to customers allocated to the supplier or another buyer, provided that this restriction does not cover resale by the buyer's customer. Other exceptions to this rule are as follows:

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

Communiqué No. 2002/2 grants block exemption to the practices articulated above.

Provisions extending beyond what is permissible under an appropriately defined exclusive distribution system, such as restriction of passive sales, cannot benefit from the block exemption and may exclude the vertical agreement from the application of Communiqué No. 2002/2 (eg, *Mey İçki*, 12 June 2014, Decision No. 14-21/410-178; *Novartis*, 4 July 2012, Decision No. 12-36/1045-332). Similarly, restrictions in respect of sales that are not the result of an active effort, such as internet sales, and advertisements or promotions conducted through media with general intent (ie, that are not specifically targeted), are considered passive sales methods and such restrictions cannot benefit from block exemptions.

Additionally, the *Tuborg* decision (9 November 2017, Decision No. 17-36/583-256) provides an insight into the Board's approach towards restrictions in exclusive distribution agreements. In this decision, the Board evaluated whether the individual exemption granted to the exclusive distribution agreements of Tuborg on 18 March 2010 should be revoked. The Board analysed the current market structure and found that market dynamics differ from those in 2010, effectively altering the competitive landscape. To that end, the Board concluded that, even though Tuborg's market share at the end of 2016 was below 40 per cent, the relevant agreements no longer satisfy the condition of 'not eliminating competition in a significant part of the relevant market' set forth under article 5 of Law No. 4054 and thus, the individual exemption granted to Tuborg in 2010 should be revoked.

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?

One of the focus areas of the recent amendments to the Guidelines is restrictions on internet sales. A restriction on sales through distributors', dealers' or buyers' websites imposed by a supplier is considered as restriction on passive sales and thus prohibited under Turkish competition law. Within this context, 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 to be passive sales. Dealers offering various language selections on their website does not change the fact that these are passive sales. Accordingly, restrictions in particular on internet sales will not benefit from the exemption under Communiqué No 2002/2. For instance, the 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 will be considered as a hardcore restriction.

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?

See question 28 for the rule and exceptions regarding restrictions on customers to whom a buyer may resell.

In its *Teknosa* decision (9 November 2017, Decision No. 17-36/578-252), the Board investigated an allegation that Teknosa restricted İklimsa distributors from selling the products to the complainant. Teknosa operates in the air-conditioning sector through its brand İklimsa with 200 distributors and 245 authorised service stations. The complainant, who is active in the sales of domestic appliances and air conditioners, indicated that it purchases the relevant products from İklimsa distributors and sells them through its own store, website and a number of e-commerce websites. The Board held that restricting buyers' sales to unauthorised distributors is permitted under Communiqué No. 2002/2 and decided not to initiate a full investigation.

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

Article 2 of Communiqué No. 2002/2, setting forth the block exemption, merely addresses the restrictions regarding production, purchase, sale or resale of particular products or services. In this regard, restrictions with respect to the uses to which a buyer puts the contract products are not considered within Communiqué No. 2002/2. Hence, such restrictions could directly be the subject of individual exemptions under article 5 of Law No. 4054.

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

As explained in question 29, internet sales are considered as passive sales based on Communiqué No. 2002/2. The Board introduced further descriptions on restrictions on internet sales that should be considered as passive sales, and thereby that cannot benefit the group exemption provided under Communiqué No. 2002/2.

See question 29 regarding sales considered to be passive sales. Accordingly, the restrictions below, particularly on internet sales, do not benefit from the exemption under Communiqué No. 2002/2:

- Restriction on a (exclusive) distributor's website to consumers located in another (exclusive) distributor's region or diverting such consumers' access to a 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 hardcore restriction.
- (Exclusive) Distributor's termination of transaction after realising the customer is not located in its (exclusive) region regarding the customer's delivery and billing address information: restriction on sales requested through the internet from a particular region or customer group will be considered as a hardcore restriction.
- Restriction on share of total amount of sales through the internet: setting a maximum sales limit for internet sales will be considered as a hardcore restriction. A condition setting forth that a distributor should sell a particular portion of its total sales through physical stores to preserve the efficiency of those stores without restricting internet sales or conditions as to ensure the compatibility of internet sales and the general distribution system is excluded from the scope of this restriction.
- 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: applying different bulk purchase prices directly or indirectly (eg, rebate systems) will be considered within this scope. A 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 from operating through internet sales. Nevertheless, suppliers are entitled to pay fixed amounts to their distributors regardless of their sales income, to support their reselling efforts (through internet or physical stores).

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 may benefit from an exemption. Advertisements directed to a specific group of customers or a specific geographical region, or both, and (unsolicited) emails will be considered as active sales. For instance, advertisements directed to a particular geographical region, which are published through third-party platforms or market places are active sales for that region's residents. Moreover, suppliers may require quality standards for the website or

may require the provision of certain services to the customers who purchase through the internet.

In a selective distribution system, a supplier may require its distributor to possess at least one physical store; however, such requirement should not aim to exclude the distributors that only sell through the internet (pure online players) from the market or restrict their sales. Suppliers may also impose additional requirements on their distributors, but more importantly, such 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 qualifications and quality, brand image and potential efficiencies. Likewise, a supplier may require the distributor to resell only through 'sales platforms or market places' that fulfil certain standards and conditions. However, this requirement should also not aim to restrict the distributor's internet sales and price competition.

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 ('equivalence principle').

In other words, the conditions should not restrict internet sales directly or indirectly. Therefore, one can consider requirements as hardcore restrictions if they violate the equivalence principle and discourage distributors from using the internet as a distribution channel.

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'?

See question 32.

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 under the Turkish competition regime on the basis of Communiqué No. 2002/2, provided that the market share of the supplier does not exceed 40 per cent in the relevant market to which it provides the goods or services. In addition, a selective distribution system may benefit from block exemption provided that there is no RPM; no restriction on active or passive sales to end-consumers; or no restriction on system members that prevents them from supplying the contracted goods to each other. According to Communiqué No. 2002/2, and the Board's decisions, it is not required for parties to disclose the criteria for selection in order to receive an exemption.

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 must require a selective distribution system to be established in order to maintain their quality or to ensure their proper use. In *Sevil Parfümeri* (9 September 2009, Decision No. 09-41/987-249), the Board stated that products such as jewellery, perfume and cosmetics require special training of employees and strategic locations for point 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). Thus, such products may be the subject of a selective distribution system.

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?

As explained in question 34, 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. In this regard, buyers who are retailers are allowed to sell the contract products or services to end-consumers on the internet. However, from the wording of Communiqué No. 2002/2, buyers at the wholesale level are not allowed to make either active or passive sales of the contract products or services to end-consumers. Indeed, in *Antis Kozmetik* (24 October 2013, Decision No. 13-59/831-353), the Board argued that internet sale restrictions on the distributor of the selective distribution system is a vertical restraint that may not benefit from the block exemption, since passive sales in a selective distribution system cannot be restricted. More recently, in the *Jotun* decision, the Board noted that internet sales are primarily categorised as passive sales, as per paragraph 24 of the Guidelines, and therefore restriction of such sales would be deemed as the restriction of passive sales. In this context, 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, with respect to the recently amended provision of the Guidelines, the supplier may require its distributor to possess at least one physical store (see question 32).

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 March 2004, Decision No. 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 granted an exemption on the agreement under Communiqué No. 2002/2. More recently, pursuant to the Board's *Arçelik* (18 October 2011, Decision No. 11-53/1353-479) and *Consumer Electronics* (7 November 2016, Decision No. 16-37/628-279) decisions, the prevention of the sale of contract products to unauthorised distributors is considered in the scope of the group exemption provided under Communiqué No. 2002/2, if the supplier's market share does not exceed 40 per cent in the relevant market. If the market share threshold is exceeded, the restriction may still benefit from an individual exemption.

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

Pursuant to article 6 of Communiqué No. 2002/2, a vertical agreement restricting competition in the market may benefit from block exemption; however, such a block exemption may be revoked where the vertical agreement network comprises more than 50 per cent of the market.

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, selective distribution agreements will likely lead to competition concerns where they are combined with single branding obligations. Additionally, if the cumulative restrictive effects of multiple selective distribution systems operate in the same market, the selective distribution agreement may hinder competitors in the relevant market if it is combined with non-compete obligations. In such circumstances, the criteria stated in a single branding obligation under the Guidelines will apply to the analysis of whether the vertical agreement has an anti-competitive impact on the market. Nevertheless, it should be noted that restricting passive sales to end-customers by way of applying territory restrictions is prohibited under Communiqué No. 2002/2.

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

Although exclusive purchasing obligations are not specifically mentioned in Communiqué No. 2002/2, article 4(d) of the Communiqué indicates that selective member buyers cannot be restricted from purchasing and selling from each other. In *EÜAŞ* (3 August 2011, Decision No. 11-44/960-313), the Board decided that an exclusive purchase agreement with a four-year term could benefit from the block

exemption. In its recent *Bayer* decision (29 March 2018, Decision No. 18-09/160-80), the Board examined Medifar's obligations under the agreement between Bayer and Medifar (ie, the obligation to notify Bayer if Medifar won the tender to supply medicines to hospitals, or the obligation to buy Bayer's products to comply with its contractual obligations against the hospitals regarding the supply of medicines) and concluded that Bayer became the exclusive supplier of the medical products. Although the agreement could not be granted a block exemption as Bayer's market share exceeds the threshold set by Communiqué No. 2002/2, the Board granted an individual exemption to the agreement under article 5 of Law No. 4054.

41 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Such restrictions have not been considered in the 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, non-compete agreements require the buyer not to manufacture, and to purchase the contract products or services only from the supplier. Non-compete obligations could be considered as restrictive under the Turkish competition law regime. According to article 5 of Communiqué No. 2002/2, 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, may not benefit from the block exemption (eg, *Takeda*, 3 April 2014, Decision No. 14-13/242-107; *Sanofi Aventis*, 22 November 2012, Decision No. 12-59/1570-571).

However, pursuant to Communiqué No. 2002/2, non-compete agreements may benefit from the block exemption provided that the market share of the supplier does not exceed 40 per cent in the relevant market, and the term of the agreement does not exceed five years.

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 3(h) of Communiqué No. 2002/2 indicates that exclusive supply agreements may benefit from block exemption provided that the buyer's market share does not exceed 40 per cent in the relevant market in which the buyer purchases the products or services. Further, the Guidelines state that the buyer's market share of the market in which it sells the products or services is also a substantial factor when determining whether an exclusive purchase obligation may benefit from block exemption. Thus, even if the buyer's market share in the relevant market is below 40 per cent, the Board will consider the buyer's market share in which it sells (downstream market) the products or services. The *Bayer* decision mentioned above also constitutes an important precedent regarding the Board's approach towards exclusive supply. In the decision, the Board found that the agreement between Bayer and Medifar also includes exclusivity provisions that require Bayer to supply its products only to Medifar within the territory of Turkey. Under this provision, Bayer had no right to bid on any tender (except group tenders and bulk purchase tenders) in Turkey on behalf of itself. Considering Bayer's market share exceeds the threshold set by Communiqué No. 2002/2, the Board did not grant a block exemption but granted an individual exemption under article 5 of Law No. 4054.

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 hardcore 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 January 2018, Decision No. 18-02/20-10). The complainants' allegation was that Petrol Ofisi AŞ, Milan Petrol San Tic AŞ and TP Petrol Dağıtım AŞ restricted competition by not allowing their distributors to purchase auto gas LPG from suppliers other than themselves. The Board stated that the undertakings under scrutiny laid down the condition of purchasing auto gas LPG from the suppliers entrusted by them for buyers to be able to purchase liquid fuels (ie, gasoline and diesel), from them, in their dealership agreements. Pursuant to article 4 of Law No. 4054, a tying practice should at least be against the essence of the agreement subject to evaluation or to commercial customs in order to be considered under the scope of article 4 of Law No. 4054. In the case at hand, the Board found that the tying practice between auto gas LPG and liquid fuel products has become a trade custom within the sector and is in compliance with the essence of the concerning agreement owing to certain sector-related reasons explained in the decision. To that end, the Board concluded that a vertical restraint through tying does not infringe article 4 of Law No. 4054 within the circumstances presented above.

Notifying agreements

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

Parties are not obliged to notify agreements containing vertical restraints to the Board. Pursuant to the Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings, an exemption will be granted by the Board on its own initiative where the conditions in the agreement satisfy article 5 of Law No. 4054. In this regard, fines will not be imposed on undertakings, associations of undertakings or persons in the managing bodies of undertakings for not notifying agreements, concerted practices or decisions of association of undertakings.

Paragraph 45 of the Guidelines states that parties to a vertical agreement may apply for individual exemption regarding the agreements that do not benefit from block exemption under the Guidelines on Voluntary Notification.

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?

Other than the procedure for notification stated in question 47, there is no other procedure with respect to notification for clearance or exemption.

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?

The Board is entitled to launch an investigation into alleged anticompetitive conduct ex officio or in response to a complaint. The Board will conduct a preliminary investigation if it finds the notice or complaint to be serious. The preliminary report of the Authority's experts will be submitted to the Board within 30 calendar days of the preliminary investigation decision being taken by the Board. The Board will then decide, within 10 calendar days, whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send notice to the undertakings concerned within 15 calendar days. The investigation will

Update and trends

Recent developments

The Authority published revised Guidelines on 30 March 2018, which provide valuable guidance on the assessment of two important commercial practices, namely internet sales and MFN clauses, under the Turkish competition law regime. The new text added to the Guidelines brings legal certainty and clarity for several contemporary issues, as it incorporates the principles already set forth by the Board's decisional practice and promises further compliance and increased harmony with EU law. The regulatory changes entailed by the newly added paragraphs can be categorised as follows:

- description of certain restrictions with regard to online sales that would exclude the relevant agreement from the benefit of the block exemption provided under Communiqué No. 2002/2 (ie, hardcore restrictions for online sales);
- conditions that suppliers may impose on internet distribution channels, which must be objective, fair and acceptable; and
- provisions regarding online sales restrictions in selective distribution systems.

Examples of hardcore restrictions provided by the Guidelines include:

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

The Guidelines state that the prohibition of active sales of exclusive distributors may benefit from block exemption provided under Communiqué No. 2002/2. As for selective distribution systems, if a distributor launches a website for reselling products on the internet, this will not be deemed as a new physical sales point.

In terms of MFN clauses, the Guidelines introduce new provisions that assess MFN clauses under the 'rule of reason' approach. It is noteworthy that the amended Guidelines deviate from the draft version that was submitted for public comment. The draft version of the amended Guidelines merely stated that MFN clauses may lead to RPM; in contrast, the updated version now provides that an MFN clause in and of itself may not result in determining the resale price, although it still recognises that there may be a risk of RPM. The Guidelines also indicate that MFN clauses should be evaluated on a case-by-case basis, and that this analysis should be based on a number of factors, such as:

- the position of the parties and their competitors within the relevant market;
- the purpose of the MFN clause; and
- the specific aspects of the relevant market and the MFN clause in question.

An MFN clause may benefit from the block exemption provided under Communiqué No. 2002/2, provided that the market share of the beneficiary of the relevant MFN clause does not exceed 40 per cent, together with other conditions as set forth under Communiqué No. 2002/2. If the market share threshold is exceeded, an individual exemption assessment should be conducted by taking into consideration the pro-competitive and anticompetitive effects of the relevant MFN clause.

Accordingly, in the case of small-scale buyers with no market power, MFN clauses will have a positive effect on the competition in the market given that these clauses allow relevant buyers to benefit from favourable prices and conditions in the market. In instances where the concentration level of the upstream market is low (ie, the upstream market is sufficiently competitive), competitive harm may not exist given that in such a situation, current and potential competitors may choose from sufficient alternatives. In the case of a non-transparent market, the negative effects of MFN clauses would be relatively low given that effective implementation of these clauses in the market is unlikely. To sum up, the amendments to the Guidelines constitute the most significant developments in this area in the past 12 months.

As regards significant decisions, *Duru* is noteworthy given that the Board adopted the rule of reason approach and took the following into account:

- inter-brand competition in the market;
- competitive pressure in the retail market from discount stores and retail chains;
- Duru's low market share;
- the low concentration level in the market;
- the fact that retailers often price products below the recommended prices; and
- the lack of evidence regarding any enforcement or monitoring mechanism involved in implementing the recommended prices set by Duru.

Regardless of these findings, the Board also issued an opinion letter stating that Duru should indicate in its price lists that the relevant prices are 'maximum' or 'recommended sales prices' and terminate any conduct that may lead to determining resale prices and discount rates or fixing resale prices by any other means.

In *Jotun*, the Board noted that internet sales are primarily categorised as passive sales as per paragraph 24 of the Guidelines. In this context, 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.

be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Board.

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?

Provisions regarding vertical restrictions are frequently applied in Turkey. Vertical restraints comprising resale price restrictions, selective distributions systems, conditions on exclusive territory or customer allocation, and passive sales could be considered the priorities of the Turkish competition regime.

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, such 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?

As stated in question 49, the Board is the sole responsible authority for decisions, including imposing penalties on the violating undertakings. A company infringing the 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 association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. The minimum amount of fine that may be imposed under Law No. 4054 is set at 26,028 Turkish lira for 2019.

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 production 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, the same penalty may be imposed.

The Board is also able to conduct on-site inspections (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 (eg, by refusing to grant the staff of the Authority access to business premises) 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 anticompetitive conduct merit damages. These aspects are supplemented with private lawsuits. Articles 57 et seq of Law No. 4054 entitle any person who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to bring damages claims against the violators to recover up to three times their personal damages, plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a treble damages principle exists in law. In private suits, the incumbent firms are adjudicated before regular civil courts. Most civil courts wait for the decision of the Board before building their own decision on the Board's decision since civil courts do not usually analyse whether there is an anticompetitive agreement or concerted practice, and defer to the Board to render its opinion on the matter, thus treating the issue as a prejudicial question.

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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