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# Turkish Competition Board emphasises importance of not turning recommended and maximum resale prices into price-fixing practices

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### Introduction

On 30 July 2021, Monsanto Gıda ve Tarım Tic Ltd Şti (Monsanto), a manufacturer of agricultural and vegetable seeds, herbicides and digital agricultural products, applied to the Turkish Competition Authority for the grant of negative clearance or exemption in favour of the additional protocol amending the dealership and running account agreement between Monsanto and its 11 dealers. The additional protocol included provisions on recommended resale price and maximum resale price.

Upon this application, the Turkish Competition Board decided that:

- the provisions as to recommended resale price and maximum resale price in the additional protocol were within the scope of article 4 of the Law No. 4054 on the Protection of Competition.<sup>(1)</sup> Therefore, negative clearance could not be granted to the additional protocol; and
- considering Monsanto's market share in the relevant product market in Turkey and that the dealers could determine the resale prices freely and independently, the additional protocol benefitted from the protective cloak of the block exemption as per the Block Exemption Communiqué on Vertical Agreements No. 2002/2.<sup>(2)</sup>

This article:

- explains the board's assessment as to the relevant product market and geographic market;
- explains the board's assessment on the additional protocol in terms of both negative clearance and the block exemption; and
- provides a brief analysis of the board's decision.

### Decision

#### **Relevant product market and geographic market**

The product subject to the agreement to be amended by the additional protocol was Monsanto's Dekalb-branded corn seeds.

The board defined the relevant product market as the "hybrid corn seed market" on the grounds that:

- although there are "hybrid" and "standard" corn seeds in the corn seed sector, there are different production processes for hybrid and standard seeds;
- farmers see hybrid and standard seeds as different products in terms of demand; and
- the supply in the commercial production of corn seed tends towards hybrid corn seed.

With respect to the geographical market, the board defined the relevant geographical market as "Turkey". It opined that no element in the file required an assessment at the regional level.

#### **Additional protocol**

##### *Recommended resale price and maximum resale price*

The additional protocol gave Monsanto the right to:

- recommend the resale prices of Dekalb-branded corn seeds purchased by its dealers; and
- set a maximum resale price for these products.

Accordingly, under the additional protocol, Monsanto could publish recommended resale prices for its products from time to time. However, the dealers could set their resale prices freely and independently.

The additional protocol also allowed Monsanto to set the maximum level of its dealer's resale prices and notify the maximum resale price to the dealer, provided that:

- the dealer exceeded the recommended resale price by more than a certain percentage without appropriate market conditions and/or legal basis;
- the dealer failed to remedy the relevant breach (ie, exceeding the recommended resale price by more than the relevant percentage) by lowering the price to a reasonable level within three business days of Monsanto's written notice; and

- Monsanto obtained the approval of the board regarding the compliance of the maximum resale price practice with Law No. 4054.

The additional protocol also provided that if Monsanto notified a maximum price to the dealer but the dealer continued selling products at prices higher than the maximum price, the dealers would do the following to minimise the harm caused by any prices applied above the maximum price:

- pay penalties to Monsanto;
- pay compensation for the damage that Monsanto incurred due to the breach; and
- proactively inform their customers that the sales at the prices above the maximum price were made independently by the dealer.

#### *Negative clearance*

Article 8 of Law No. 4054 reads as follows:

*Upon the application by the undertaking or associations of undertakings concerned, the Board may, on the basis of information in hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to Articles 4, 6 and 7 of Law No. 4054.*

Moreover, article 4 of Law No. 4054 lists certain restrictions that are prohibited under Turkish competition law. Fixing the purchase or sale price of products or services, or elements such as cost and profit that form the price, and any terms of purchase or sale, fall within the prohibition set out in article 4(1)(a) of Law No. 4054. In order for a restriction on competition that falls under article 4 of Law No. 4054 to comply with the law, the restriction should either benefit from a block exemption or an individual exemption pursuant to article 5 of Law No. 4054.

The board considered that the provisions introduced by the additional protocol did not constitute a direct intervention in the sale price of the dealers. However, they had the potential to result in a practice listed under article 4(2)(a) of Law No. 4054. Therefore, the board decided that the additional protocol could not be granted negative clearance.

#### *Block exemption*

While the restriction of a reseller's discretion and ability to determine its own prices is prohibited under article 4 of Law No. 4054, both Communiqué No. 2002/2 and the Guidelines on Vertical Agreements set out that a supplier can determine maximum resale prices or recommend resale prices, provided that they do not transform into fixed or minimum resale prices.

As provided under Communiqué No. 2002/2 and the Guidelines on Vertical Agreements, undertakings with less than a 30% share in the relevant market(s) for products or services subject to the vertical agreement may recommend resale prices to their dealers and customers or determine maximum resale prices. Taking into consideration the wording of Communiqué No. 2002/2 and the Guidelines on Vertical Agreements, a safe harbour is not provided if the undertakings party to the vertical agreement have more than a 30% market share in the relevant market(s).

The market share threshold used to be 40%, before Communiqué No. 2002/2 was amended by Communiqué No. 2021/4 on 5 November 2021. This was approximately three months after Monsanto's negative clearance or exemption application.

Accordingly, within the scope of the block exemption assessment, the board first examined the market shares of Monsanto and its competitors in the hybrid corn seed market in Turkey (including the Dekalb-branded corn seeds subject to the agreement). The board conducted this examination using the new market share threshold (ie, 30%) which entered into force after Monsanto's negative clearance or exemption application and during the review period of the Turkish Competition Authority. Following this examination, the board determined that Monsanto's market share in the hybrid corn seed market in terms of sales value and sales volume was below the 30% threshold stipulated in Communiqué No. 2002/2.

Subsequently, the board examined whether the additional protocol contained any restraints that could not benefit from the protective cloak of the block exemption granted by Communiqué No. 2002/2. As a result of this review, the Board reached the following findings:

- The additional protocol set out recommended and maximum resale prices. In accordance with the additional protocol, the dealers could determine the resale prices freely and independently.
- The additional protocol provided that if a dealer failed to comply with the maximum resale price and continued to do so despite being notified and given a deadline by which to comply, sanctions would be imposed against the dealer.
- Sanctions would only apply if there was a certain degree of persistence of non-compliance with the maximum resale price. The sanction system did not apply to non-compliance with the recommended resale price.
- Monsanto did not impose a fixed maximum resale price. It thereby provided flexibility to its dealers and respected their right to determine their prices freely.
- Dealers would not be sanctioned if they could justify their price increases with market conditions.
- The agreement to be amended by the additional protocol contained no exclusivity or non-compete obligation provisions. The dealers were free to terminate their commercial relationship with Monsanto. The dealers could evaluate the application of the recommended and maximum prices freely in line with their own commercial decisions.

In light of these findings, the board concluded that the additional protocol contained no restraint that excluded the vertical agreements from the scope of the block exemption. The board emphasised that the dealers were able to determine the resale prices freely and independently.

However, the board underlined that granting an exemption to the additional protocol would not relieve Monsanto of its legal responsibility to not turn the recommended and maximum resale price practices into price fixing by way of pressure or encouragement.

#### **Comment**

The board decided that the additional protocol benefitted from the protective cloak of the block exemption since:

- Monsanto's market share in the hybrid corn seed market in Turkey was below 30%; and
- the additional protocol contained no restraints that would exclude vertical agreements from the scope of the block exemption. The dealers could determine the resale prices freely and independently.

The board's *Monsanto* decision is noteworthy on two separate fronts:

- First, the board took into account the wording of the vertical agreement subject to the assessment, where it was stated that the dealers were free to set their resale prices independently. However, the board also underlined that the recommended and maximum resale price practices provided in the agreement should not turn into price fixing practices through methods such as pressure or encouragement. The board stated that if the practices turned into price fixing, the undertakings could be liable under article 4 of Law No. 4054 despite an exemption being granted to the agreement.
- Second, the market share threshold – one of the conditions for block exemption under Communiqué No. 2002/2 – was amended on 5 November 2021, approximately three months after Monsanto's negative clearance or exemption application. The market share threshold used to be 40%. The board examined Monsanto's market share in the relevant product market in Turkey using the new market share threshold (ie, 30%).

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#### **Endnotes**

(1) Article 4 of Law No. 4054 prohibits agreements and concerted practices between different undertakings as well as the decisions of association of undertakings that have as their object, effect or potential effect the restriction of competition.

(2) 8 September 2022, No. 22-41/567-229.