

# e-Competitions

## Antitrust Case Laws e-Bulletin

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## The Turkish Competition Authority evaluates a request for an individual exemption or negative clearance for the creation of a joint venture in furniture sector (*FTR Decision*)

**DISTRIBUTION/RETAIL, MERGERS, AGREEMENT (NOTION), OTHER SERVICES, MANUFACTURING, TURKEY, EXEMPTION (INDIVIDUAL), EFFECT ON COMPETITION**

Turkish Competition Authority, *FTR Decision*, Decision No: 22-52/779-321, Decision, 23 November 2022 (Turkish)

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This case summary includes an analysis of the Turkish Competition Board's ("Board") *FTR* decision [1] ("**Decision**") in which the Board determined that the agreement ("**Agreement**"), executed between the undertakings operating in the furniture market in Turkey ("**Parties**") with respect to the formation of a joint venture (FTR Dış. Tic. Mobilya AŞ of "**FTR**" or the "**Joint Venture**") would not be issued a negative clearance certificate and would not be granted an individual exemption unless certain amendments are made on the Agreement.

### BACKGROUND INFORMATION

The Parties of the Agreement are mainly active in the sale and manufacturing of furniture for bedrooms and mattresses. Therefore, the Board indicates within its Decision that the relevant product market could be defined as different product segments such as "seating group", "bedroom furniture", "dining room", "office furniture", "child and teenager room", "kitchen and bathroom furniture". Having said that, the Board also indicates that considering that the Parties' activities overlap in terms of different product segments, the relevant product market could be defined as the markets for the "sale and manufacture of furniture" or "sale and manufacture of branded furniture" in which the activities of most of the Parties overlap. In terms of geographic market definition, the Board opted not to define a geographic market definition even though it considered that the Parties operate in Turkey and the conditions of competition do not differ nationwide.

The Agreement regarding the formation of the Joint Venture designates that the activities of FTR would be mainly related to consultancy and intermediary services. The Board's Decision indicates that the intermediacy services are planned to concern R&D projects, research with respect to the market, business developments, consumers, and marketing, analyses in terms of product standards, services regarding logistic operations, and after-sale services. Furthermore, the Joint Venture also aims to provide necessary coordination among the Parties with respect to the countries and customers therein regarding export activities. In this respect, through the Joint Venture, the Parties could determine the raw materials required for the orders made in other countries and accordingly gather the

appropriate supplier and the manufacturing company within the scope of export receipts. Therefore, the activities of FTR would also include marketing services in the countries where the products would be sold. For the purposes of such activities of the Joint Venture, the Parties may also create a common brand depending on the orders/demand from the customers abroad, and this brand would only operate for the products to be exported and not for the sales within Turkey.

The Agreement includes provisions regarding the export transactions under two different aspects, one of which is receiving a request from other countries to purchase FTR products, and the other one concerns the assessment of the received order. Based on this, the company(-ies) abroad may directly reach FTR or the shareholder(s) of the Joint Venture with respect to the potential orders for the products to be sold by FTR. Further to the potential customer's request, the shareholders of the Joint Venture consider their capacity and manufacturing opportunities, and if they deem their abilities sufficient to meet the requested order, they would ultimately decide to accept and offer a price for the order or to reject the request. Afterwards, the Parties may arrange a roadmap to manufacture the requested order by way of making each part produced by a different Party based on the Parties' own capacities and capabilities.

## **REASONS FOR NOT GRANTING NEGATIVE CLEARANCE**

In its negative clearance evaluation, the Board primarily emphasized that the shareholders of the Joint Venture (i.e. FTR) would continue to operate as competitors in the furniture sector in Turkey, despite FTR's focus on export-oriented activities. The Board further noted that following the establishment of the Joint Venture, the shareholders would be able to share information about specific strategic aspects, such as production volume and capacities, within the scope of FTR's export activities. With this in mind, the Board concluded that even though FTR's activities are solely export-oriented, there is still a risk for coordinated effects in the Turkish market which may arise from the exchange of sensitive information between the shareholders of the Joint Venture. The Board also bolstered its concerns about the coordinated effects by pointing out the presence of common employees who are involved both in the Joint Venture and the board of directors of the Parties. In light of the foregoing, given that the Agreement might lead to potential anti-competitive effects within the meaning of Article 4 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), the Board decided not to issue a negative clearance certificate to the Agreement.

## **ASSESSMENTS WITH RESPECT TO GRANTING AN INDIVIDUAL EXEMPTION**

The Board proceeded with an individual exemption assessment in terms of the Agreement under Article 5 of Law No. 4054 and noted that the Agreement would be a candidate for individual exemption only if it would (i) ensure new developments or improvements or economic or technical improvement in the production or distribution of goods and the provision of services, (ii) contribute to a consumer benefit, (iii) would not consequently eliminate competition in a substantial part of the relevant market, and (iv) would not restrict competition more than necessary to achieve the objectives outlined in (i) and (ii). For an agreement to be exempted from the application of Article 4 of Law No. 4054, the conditions set forth above must be fulfilled cumulatively.

In its assessment, the Board determined that the Parties could effectively fulfill a significant volume of export orders by allocating tasks based on their respective areas of expertise, resulting in cost reduction through the Joint Venture. Moreover, the Board evaluated that the establishment of a strong brand image by FTR in order countries could potentially have a positive impact on the Turkish market by generating high demand from other countries. Regarding consumer benefits, the Board acknowledged that while transaction's improvements might not directly benefit consumers, the neutral effect would not create any adverse consequences. Therefore, based on these considerations, the Board concluded that both the first and second conditions above have been satisfied.

As for the third and fourth conditions, the Board mainly focused on assessing concerns related to the exchange of competitively sensitive information between the Parties. The Board noted that Article 7 of the Agreement outlines the planned establishment of a platform to facilitate information sharing for the purpose of enhancing the Joint Venture's export capabilities. Despite the Parties' assurance that competitively sensitive information within the platform would only be accessible to authorized individuals at FTR, the Board considered that this mechanism alone would not sufficiently address the concerns regarding the complete elimination of sensitive information sharing between competitors. Consequently, the Board decided to incorporate a provision into the Agreement explicitly stating that the competitively sensitive information (such as pricing, stock, costs, etc.) as well as information concerning the domestic market, would not be collected or shared among the Parties for Joint Venture's export operations. The Board considered that the inclusion of such a provision is sufficient to alleviate concerns regarding the exchange of competitively sensitive information. Moreover, the Board determined that subparagraph (gg) of Article 7 of the Agreement mandates regular meetings for the Parties to get to know each other better, might increase the risk of exchange of competitively sensitive information. Therefore, the Board concluded that it was necessary to remove the relevant provision from the Agreement.

Consequently, further to its substantial analysis, the Board concluded that the Agreement could benefit from the individual exemption regime for ten years, provided that certain amendments are made. Specifically, the Board concluded that the provision concerning the regular meetings (subparagraph (gg) of Article 7) has to be removed from the Agreement and a clear provision stating that the collection and sharing of competitively sensitive information between the Parties will be limited to what is strictly necessary for the execution of the Joint Venture's export operation has to be incorporated into the Agreement.

## CONCLUSION

The Decision holds importance as it offers thorough and detailed assessment with respect to the exchange of competitively sensitive information among competitors. The Decision does not only provide valuable insights into the Board's approach to address concerns regarding the exchange of competitively sensitive information between competitors, but also highlights the impacts of such practices on the domestic market in the context of joint ventures operating in export business.

[1] The Board's *FTR* decision, dated 23.11.2022 and numbered 22-52/779-321.