

## Competition - Turkey

### Authority releases legislation encouraging pro-competitive collaborations

Contributed by **ELIG**

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#### Introduction

The most significant development with respect to competition law in Turkey over the last two months is the announcement for public consultation of two important secondary legislative instruments - the draft Block Exemption Communiqué on Specialisation Agreements and the draft Guidelines on Horizontal Cooperation. While these are still in draft form and have not been conclusively enacted by the authority, they point towards the authority's increased willingness to create greater predictability with respect to horizontal cooperation.

To date, the authority has already promulgated secondary legislation setting forth the parameters for block exemptions for technology transfer agreements and research and development (R&D) agreements (through the Block Exemption Communiqué on Technology Transfer Agreements (2008/2) and the Block Exemption Communiqué on Research and Development Agreements (2003/2)). With the addition of the draft guidelines and the draft communique, the authority will have accumulated a considerable amount of secondary legislation concerning the crucial issue of collaborations between competitors, which will enable undertakings to engage in pro-competitive collaborations while steering clear of the anti-competitive conduct prohibited by competition law.

The release of this legislation is also in keeping with the authority's past practice of paying close attention to developments in EU competition law and seeking to harmonise Turkish competition law instruments with EU law. As a result, the draft communique and the draft guidelines largely resemble EU Regulation 1218/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialisation Agreements, and the Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, respectively, in terms of both content and organisational structure. Detailed descriptions of the two instruments are provided below.

#### Draft communique

The draft communique covers several types of specialisation agreement, as follows:

- unilateral specialisation agreements, whereby one party undertakes to stop producing a particular product either in whole or in part and to procure that product from a competing undertaking active in the same market, and the competing undertaking in turn undertakes to produce or supply such product;
- reciprocal specialisation agreements, whereby two or more undertakings active in the same product market undertake completely or partially to stop producing certain products, which are to be different products for each undertaking, and undertake to procure such products from designated counterparties; and
- joint production agreements, whereby two or more undertakings active in the same product market, or attempting to enter the relevant market, undertake to produce certain products jointly.

The exemption provided by the draft communique also applies to the licensing of IP transfer agreements which are directly related to, or necessary for, the functioning of the relevant specialisation agreements. Moreover, the exemption remains in effect even in cases containing exclusive sale or exclusive purchase obligations, or where the parties also agree on the joint distribution of the relevant products.

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The following elements are not covered by the block exemption:

- maintenance of the sale price to third parties, with the exception of direct purchasers, in the case of joint production agreements;
- any sharing of territories or customers; or
- the limitation of production or sale amounts.

However, mutual or one-sided specialisation agreements may contain provisions regarding the relevant product volume, and joint production agreements may set the production capacity or volume, or sale targets in the case of joint distribution.

Most significantly, the block exemption provided by the draft communique applies only in cases where the parties' aggregate market shares do not exceed 20% in any of the relevant markets. However, the draft communique provides that:

- in cases where the initial aggregate share was below 20%, but later exceeds 20% (but not 25%), the exemption will continue to apply for a further two years after that in which the 20% mark is exceeded; and
- in cases where the initial aggregate share was below 20% but later exceeds 25%, the exemption will continue to apply for another year after that in which the 25% mark is exceeded.

Needless to say, the two exceptions cannot be combined to increase the grace period for more than two calendar years. The imposition of this relatively low market share threshold reflects the authority's intention to grant access to such collaborative efforts in the case of newcomers or weaker market players, while remaining vigilant against collaborations by stronger market players.

### **Draft guidelines**

The draft guidelines are generally organised into six main categories:

- information exchanges;
- R&D agreements;
- joint production agreements;
- joint purchasing agreements;
- commercialisation agreements; and
- standardisation agreements.

As set out in the introduction, the draft guidelines purport to provide guidance on the application of Article 4 (governing horizontal competition law violations) and Article 5 (on individual exemptions to the application of Article 4) of the Law on the Protection of Competition (4054) to each of the above categories. While there is a block exemption communique with respect to R&D agreements, most of the categories enumerated above are subject to a regular Article 4 and Article 5 analysis. As such, the draft guidelines are more general in character than other guidelines promulgated by the authority, which deal with specific issues raised by prior secondary legislation.

With respect to each category, the draft guidelines contain sections generally outlining the anti-competitive concerns regarding the relevant type of cooperation, and then laying out the elements that are pertinent to Article 4 and Article 5 analyses. The Article 4 elements are in turn organised according to:

- the ways in which the relevant type of cooperation can lead to anti-competitive effects;
- the ways in which the relevant type of cooperation may have anti-competitive purposes; and
- the market characteristics which must be kept in mind when conducting an ultimate analysis with respect to whether the relevant type of conduct violates Article 4.

The Article 5 elements are organised according to the required elements for individual exemptions, as follows:

- the efficiency gains which are achieved by the relevant type of cooperation;
- the impact of such gains on consumers;
- whether competition in the relevant market is not substantially constrained and
- whether competition is not constrained any more than necessary to achieve the pro-competitive effects.

Each section then provides a few examples to help explain the legal analyses and provide guidance with respect to situations which tend to arise regularly.

Some sections of the draft guidelines particularly stand out in terms of the clarification they bring to the pertinent body of law and the level of elaboration contained in the particular section. One such example is the information exchange section, where the draft guidelines go into great depth and provide a comprehensive list of market characteristics that are pertinent to a competition law analysis. In particular, the draft guidelines list the following elements:

- market transparency;
- level of concentration in the market;
- level of homogeneity with respect to the product;
- level of stability in market dynamics; and
- similarity of the market players.

The draft guidelines also elaborate on the characteristics of the information which may be exchanged, such as:

- whether the information is strategic or sensitive from a competition point of view;
- whether the information is shared with all market players or only selectively;
- whether the information is provided with respect to each undertaking or in the aggregate;
- the extent to which the information is current;
- the frequency of the information exchanges;
- the extent to which the information is already publicly available; and
- the extent to which the information is offered to the public.

While some of these elements had been elaborated on by the board in different past decisions, by listing and elaborating all of the pertinent elements, the draft guidelines bring a significant level of predictability and clarity to a disorganised body of practice.

Another section which stands out is that on R&D agreements, as it provides in-depth elaboration on the issue of market definition with respect to such efforts. While R&D efforts sometimes simply target the advancement of an existing product, they may also result in the creation of a new competing product in an existing market or a completely new product that creates a new market altogether. Furthermore, R&D efforts often target the development of technological processes which generate revenue based on IP rights as opposed to tangible products. Therefore, the draft guidelines distinguish between:

- existing product markets, generally applicable in the case of R&D efforts targeting the enhancement of existing products;
- existing technological markets, applicable to R&D efforts where the end result is a technological process which may be exploited based on intellectual property rights; and
- competition in innovation, which generally applies to R&D efforts concerning the creation of a new product.

The draft guidelines provide much-needed elaboration on the last category and set forth that in such cases an enquiry concerning competing innovative efforts (eg, where multiple pharmaceutical companies research the same type of medicine) should be conducted in addition to any relevant existing markets which may be identified. However, this last enquiry is undertaken only when the characteristics of the innovation efforts by different competitors in a market are sufficiently distinct to engage in a meaningful competition analysis.

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