The Turkish Competition Board updates its guidelines on vertical agreements

Introduction

A number of studies have been undertaken in order to revise the Guideline on Vertical Agreements ("Vertical Guideline") in line with the developments in the European Union legislation, as well as to address the needs in the relevant sectors. Following the workshop that was held on 12.12.2017 by the Turkish Competition Authority ("Competition Authority") at which the suggestions and opinions regarding the updated Vertical Guideline were discussed; the Competition Authority updated the Vertical Guideline on 30.03.2018.

Regulations Regarding Internet Sales

The first update in the Vertical Guideline is related to internet sales. There is no doubt that the increase of internet sales in Turkey raises the debate of introducing the new regulations into Turkish competition legislation. Prior to the update, the only regulation on internet sales was a statement that internet sales were regarded as passive sales. However, the updated version of the Vertical Guideline has introduced a more detailed regulation on internet sales. Primarily, the restriction imposed by a supplier on distributors/dealers/buyers with regard to making sales on their own websites is defined as a type of passive sales restriction. Pursuant to the Vertical Guideline, the following restrictions on internet sales, in particular, will be regarded as prevention of passive sales, and will not benefit from the group exemption under the Block Exemption Communiqué on Vertical Agreements No. 2002/2:

• restriction by an (exclusive) distributor on access to their own website from customers located in the (exclusive) region of another distributor, or redirection of such customers to the website of the manufacturer, or of another (exclusive) distributor;
• termination of the transaction when the (exclusive) distributor determines from the address information, such as the delivery, postal, credit card, etc. of the customer that the address is not located in the (exclusive) region of the distributor;
• imposing restrictions on the ratio of internet sales to total sales;
• having the distributor pay a higher price for products to be offered for resale over the internet compared to the products to be offered at physical points of sale.
Furthermore, the Vertical Guideline regulates that the supplier may set forth certain conditions with respect to the use of internet sales channels, similar to the ones it may introduce on physical points of sale, or in the catalogues in which advertisements and promotions are published. These conditions are exemplified as follows: the quality conditions of the website in which the products are offered for sale, the requirement of providing certain services to online consumers, and the obligation of owning at least one physical point of sale. The justification of the conditions introduced must be objectively solid, reasonable and acceptable, in terms of factors, such as increasing the nature and quality of the distribution, brand image, and/or potential efficiency, etc.

Also, as the conditions of physical sales and internet sales are different from each other, the criteria introduced for these two distribution channels do not necessarily have to be the same. However, since these criteria must serve the same purpose that is to ensure comparable results, and have the ability to confirm the differences arising from the nature of these two distribution channels (“equivalence principle”). In this regard, if the conditions laid down by the supplier are contrary to the equivalence principle and discourage the use of internet, the relevant conditions may be considered as severe restrictions. Finally, with the update to the Vertical Guideline, the existing provision on the selective distribution system is accorded with the provisions on internet sales.

Regulations Regarding the Most Favored Nation / Customer Condition

The second update in the Vertical Guideline is on the most-favored nation/customer (“MFC”) clause. It is commonly believed that the fact that there is no explanatory provision with respect to the MFC conditions in the Turkish competition law legislation causes uncertainties, in practice. For this reason, the Competition Authority has considered that it would be appropriate to include the regulations on the MFC conditions in the Vertical Guideline, as well. As a matter of fact, the regulations with regard to the MFC conditions under the Vertical Guideline are more explanatory and detailed as compared to the ones under the EU legislation.

Also, a new title “Most-Favored Customer Clause” was inserted under “Analysis of Various Vertical Restrictions,” where detailed explanations are provided with regard to the MFC clauses. As stated in the Vertical Guideline, the competitive consequences of the use of the MFC clauses varies as, on the one hand, it may have positive effects on competition in the market, while on the other hand, it may also lead to some negative competitive effects. In this regard, for the competition law assessments involving MFC clauses, it is necessary to examine, in detail, the competitive position of the beneficiaries and competitors in the relevant market, the purpose for which the contract is placed, the characteristics of the market, and the clauses.

Conclusion

The latest update to the Vertical Guideline has introduced new regulations with regard to “Internet Sales” and “Most-Favored Nation / Customer Conditions.” Through the emergence of electronic commerce, the customers have the opportunity to buy and sell products and services over the internet, which is an alternative distribution channel to the physical points of sale. Also, along with the growth of electronic commerce, the MFC clause is often being used, and has become an important competition law tool for the competition authorities. In this regard, in order to harmonize the use of electronic commerce with the needs arising from the competition law applications, and to comply with the EU legislation, the new provisions introduced to the Vertical Guideline are significant.