The Turkish Competition Authority adopts guidelines on certain subcontracting agreements between non-competitors

Turkey, Procedures, Exemption (block), Vertical agreement, All business sectors

The Turkish Competition Authority (hereinafter referred as "Authority") has recently adopted "Guidelines on Certain Subcontracting Agreements between Non-Competitors" (hereinafter referred as "Guideline"). Guideline is based on the European Commission Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty \(^1\) (hereinafter referred as "Commission Notice").

The purpose of the Guideline is to declare the Turkish Competition Board ("Board")'s approach for the application of the Act n° 4054 on the Protection of Competition, dated 7 December 1994 (hereinafter referred as the "Competition Act") Article 4 \(^2\) concerning the Agreements, Concerted Practices and Decisions Limiting Competition, to the subcontracting agreements, taking into account Board's past decisions and the legislation of reference \(^3\).

Definition of the Subcontracting Agreements

The Guideline states that subcontracting agreements are of vertical nature \(^4\). Although, there are various legal documents \(^5\) concerning the vertical agreements, Guideline is the only document focused on the principles and the criteria that may be used in the examination of the subcontracting agreements.

The definition of the subcontracting agreements is provided in the Guideline as follows :

"The subcontracting agreements can be defined as agreements under which an undertaking (subcontractor) commits to produce goods, provide services or perform work on behalf of or for another undertaking (the contractor) in line with such undertaking's instructions".

In this context, whether the production of goods, provision of services or performance of work under the subcontracting agreement is upon the request of a third party or not, is not significant.

Restriction on the Usage of Technology and Equipment Provided by the Contractor

Under certain subcontracting agreements, the subcontractor may have to be using the technology or equipment provided by the contractor, in order to be able to fulfill the requirements of the agreement. In such cases, the contractor usually imposes to the subcontractor the condition that the provided technology or equipment may only be used for the purposes of the agreement. Such restriction aiming to protect the economic value of the technology and equipment provided by the contractor, may drive the question of whether the subcontracting agreement is caught by Article 4 of the Competition Act or not.

The Guideline states that the following restrictions may be included in the subcontracting agreements :

The technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting

---

This document is protected by copyright laws and international copyright treaties. Non-authorised use of this document constitutes a violation of the publisher’s rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.
agreement;

The technology or equipment provided by the contractor may not be made available to third parties,

The goods produced, services provided or work performed using such technology or equipment may be supplied only to the contractor or to a person to be indicated by the contractor, or may be carried out only on behalf of the contractor,

provided that such technology or equipment is necessary for the subcontractor to produce the goods and provide the services or perform the work in accordance with the contractor's instructions and under reasonable conditions.

Otherwise, such restrictive provisions within the subcontracting agreements would fall into the scope of the prohibition under Article 4 of the Competition Act.

Necessity of the technology or equipment

The necessity of technology or equipment provided by the contractor for the execution of the agreement by the subcontractor is an essential condition for the Guideline.

Thus, the subcontractor could not be able to produce the goods, provide the services or perform the work subject to the agreement as an independent provider, in the absence of such subcontracting agreement and without the technology or equipment of the contractor.

This means that this restriction shall not be justifiable, where the subcontractor has at its disposal the technology and equipment needed for the execution of the subcontracting agreement or where it becomes clear that it could obtain these technology and equipment from other resources under reasonable conditions [6].

Conditions of necessity

The condition of necessity for the technology or equipment will be satisfied where it is necessary for the subcontractor to make use of:

- industrial property rights owned by or at the disposal of the contractor in the form of patents, utility models, designs protected in a registered or an unregistered manner or other rights, or
- secret knowledge or know-how owned by or at the disposal of the contractor, or
- studies, plans or documents accompanying the information given and prepared by or for the contractor, or dies, patterns, equipment, tools and accessories that are distinctively at the contractor's disposal, which enable the production of goods different in form, function or composition from other goods produced or supplied in the market; even if they are not covered by industrial property rights or do not contain any element of secrecy.
Other Restrictions Under the Control of Art. 4 of the Competition Act

Certain subcontracting agreements include the provisions obliging the subcontractor to obtain inputs such as raw material, to purchase substances in line with the instructions of the contractor, from the contractor itself or a person to be indicated by the contractor.

The Guideline considers that such exclusive provisioning rules are not restrictive of competition provided that they are necessary for the said goods to be produced, services to be provided or work to be carried out with a defined feature, standard or quality. It is also underlined in the Guideline that the contractor has right to include in the agreement the provisions ensuring the goods to be produced, the services to be provided or the work to be performed in the defined standard or quality.

The Guideline also provides some examples of restrictive provisions seen in the subcontracting agreements such as confidentiality, the use of manufacturing process of secret nature or the obligation to transfer the technical improvements made during the execution of the agreements.

The Board considers that post-agreement restriction aiming the protection of the knowledge as know-how or manufacturing process of secret nature transferred by the contractor and the prevention of its unjust utilization will not be considered in violation of Article 4 of the Competition Act.

However, an obligation providing for the transfer the results which the subcontractor have attained through its own research and development activities and which may be used independently, may render the said subcontracting agreement restricting the competition under Article 4 of the Competition Act.

Where the subcontractor is authorized by the subcontracting agreement to use a specific trademark, trade name or get up, outlook, or package, the contractor may restrict the use of these elements solely to goods, services or works which are covered by the agreement.

Individual and Block Exemption

A vertical subcontracting agreement falling under Article 4 of the Competition Act shall benefit from an individual exemption provided that it fulfills the requirements of Article 5 of the said Act.

These agreements may fall under the Communiqué n° 2002/2 pertaining to block exemption. The vertical agreements involving the transfer of intellectual property rights to the buyer, or the use of them by the buyer may benefit from the Communiqué n° 2002/2, provided that they fulfill other relevant conditions. However, under subcontracting agreements, the know-how required for production is generally transferred by the contractor, who is in the position of buyer, to the subcontractor, who carries out the production and is in the position of provider. Therefore, such agreements cannot qualify for the block exemption conferred by the said Communiqué.

However, despite it is not explicitly provided under the Communiqué n° 2002/2 and the Guidelines published in relation to that Communiqué, the subcontracting agreement may be qualified for the block exemption, where the contractor, who is in the position of buyer, transfers to the subcontractor, who is in the position of provider, the detailed specifications whereby the products or the service to be provided are described.

Conclusion
Subcontracting agreements are very common in Turkey within various industrial and manufacturing sectors on domestic and international level, particularly in textile, construction, automotive and naval construction.

Although most of the subcontracting agreements are concluded between non-competitors, the Board tends to evaluate such agreements within the scope of the Competition Act. Board has various decisions reflecting its above explained view. Notwithstanding the above, until publication of the Guideline there was not any legislation regarding the subcontracting agreements between non-competitors. Therefore, the Guideline has fulfilled this gap and enabled the undertakings to be informed on the principles and criteria used by the Board during the examination of subcontracting agreements.


[3] The main importance of the subcontracting agreements are underlined as follows:

"While subcontracting agreements provide opportunities for the development of, particularly, small and medium sized undertakings, it should be stated that the principles set by this Communiqué apply irrespective of the size of the undertakings which are party to the aforementioned agreements".

[4] The subcontracting agreements are defined in the Notice as:

"The Commission considers that agreements under which one firm, called "the contractor", whether or not in consequence of a prior order from a third party, entrusts to another, called "the subcontractor", the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 85 (1) (new art. 81 (1))".


[6] This is generally the case when the contractor provides no information other than the general information merely describing the work to be performed. Under such circumstances, these restrictions may restrain the subcontractor from developing its own business in areas related to the agreement.

[7] The Board considers that such provision is legitimate for protecting the economic value of the said information and does not bring the agreement under Article 4 of the Competition Act. We may state that the know-how and production process information are among such knowledge of secret nature. Here, the important thing is that the knowledge transferred be confidential, in other words, not known or easily accessible by everyone.

[8] Turkish Competition Authority (Rekabet Kurumu), 11 July 2000, Case n° 00-26/289-160, SmithKline Beecham Turgut Holding; Turkish Competition Authority (Rekabet Kurumu), 8 May 2001, Case n° 01-22/198-54, SmithKline Beecham Turgut Holding; Turkish Competition Authority (Rekabet Kurumu), 11 September 2001, Case n° 01-43/427-110, Merck Sharp Dohme Fako Ylaçlarý; Turkish Competition Authority (Rekabet Kurumu), 29 May 2001, Case n° 01-25/240-62, Abbot Labs Fako Ylaçlarý; Turkish Competition Authority (Rekabet Kurumu), 13 July 2006, Case n° 06-51/663-188, Yudum Gýda Unilever.