The Turkish Competition Board publishes a guide to vertical agreements

Turkey, Anticompetitive practices, Non-competition clause, Exclusive purchasing agreement, Agency agreements, Vertical restrictions, All business sectors

Turkish Competition Board (Rekabet Kurulu), 3 June 2009, Guide on Vertical Agreements

(http://www.rekabet.gov.tr/dosyalar/...)


Pursuant to Article 5 of the Act for the Protection of Competition numbered 4054 ("Competition Act"), the Turkish Competition Board ("CB") has the authority to issue communiqués granting block exemptions to agreements which fulfill certain conditions.

The CB has issued a Block Exemption Communiqué on Vertical Agreements dated 14 July 2002 and numbered 2002/2 ("Communiqué") [1]. In order to clarify the application of the amended Communiqué, the CB published the Guide regarding Vertical Agreements [2] ("Guide"). The main points of the Guide are summarized below.

**Vertical Agreements Involving the Use of Intellectual Property Rights**

In the Guide, vertical agreements involving the use of intellectual property rights are regulated separately. The Guide listed the elements necessary for the relevant vertical agreement to be considered within the scope of block exemption pursuant to Article 2/4 of the Communiqué as follows:

The provisions regarding intellectual property rights concern directly the use, sale, and resale of contract goods and services.

The use, sale, and resale of the contract goods and services must be the main purpose of the agreement.

In the agreement, the identity of the transferee and the transferor is important. In case the intellectual property rights are transferred to the purchaser or are to be used by the purchaser, it is possible to benefit from the exemption provided by the Communiqué.

The provisions regarding the transfer and use of intellectual property rights do not include the limitations of competition having a similar purpose and effects with vertical restrictions not exempted in the Communiqué.

**Vertical Agreements Concluded Between Competing Undertakings**
In accordance with the 5th paragraph, art. 2 of the Communiqué, vertical agreements concluded between competing undertakings may not benefit from block exemptions, with one exception. This exception applies to vertical agreements where the provider is both the producer and the distributor of the products subject to contract and where the purchaser is the distributor of the products which compete with the products subject to contract, but not the producer of these contracts. As explained in the Guide, the exception to the rule that competing undertakings may not benefit from the block exemption, the undertakings may only be competing at the level of distribution.

**Agency Agreements**

The restrictions imposed on the agency in relation to the agreements intermediated or executed by the agency on behalf of its client are not, in principle, subject to the exemption regime because these restrictions do not comply with Article 4 of the Competition Act. However, simply because an agreement is titled as “agency agreement” does not mean that the relevant agreement falls outside the scope of Article 4 of the Competition Act. The Guide explains that the factor determining whether the agreement falls within the scope of Article 4 or not is whether the agency takes a commercial or financial risk regarding transactions that the agency is appointed by its client to execute. If one or more of the following conditions occur, the relation between the parties falls within the scope of Article 4 of the Competition Act (Guide paragraph 12).

- Contribution of the agency to the costs relating to the sale and purchase of products and services, including transportation,

- Obliging the agency to contribute to the transaction in order to increase sales directly or indirectly,

- The agency's being at risk concerning the financing of products subject to the agreement or the cost of loss products and the impossibility for the agency to return unsold products to its client,

- The agency's being obliged to provide after-sales assistance, repair, and guarantee services,

- Obliging the agency to make investments which are necessary to be active in the market and may only be used in this market,

- The agency's being liable to third persons for damages caused by sold products.

- The agency's taking a risk other than not receiving its commission in case the customer fails to fulfill the conditions of the agreement. As indicated in the Draft Guide, the risks mentioned above and costs are only examples, and it is possible to make additions to that list.

**Non-Compete Obligation**

Article 5 of the Communiqué concerns the rules regarding any non-compete obligation imposed on the purchasers in vertical agreements. The period of the non-compete obligation is regulated separately for the duration of the agreement and the period following the expiry of the agreement.

**Non-Compete Obligation during the Duration of the Agreement**

The rule is that a non-compete obligation exceeding five years cannot benefit from a block exemption, with only one
exception. As indicated in the Communiqué, if the non-compete obligation is imposed on the purchaser for an indefinite period, the block exemption cannot be applied. The tacitly renewable non-compete obligations exceeding five years do not fall within the scope of the block exemption. However, in case its term does not exceed five years or it is possible to renew the agreement after five years with the express consent of both parties and no situation to prevent the purchaser from terminating the non-compete obligation after the period of five years, the non-compete obligation can benefit from the block exemption (Guide paragraph 34).

If the CB determines that the non-compete obligation was imposed on the purchaser for a period exceeding the limits in the Communiqué, the provision imposing this obligation may be separated from the other provisions of the agreement, the CB may consider the duration of the non-compete obligation as if it were reduced to the maximum foreseen in the Communiqué. Another important point that concerns non-compete obligations is that there must be no factual obstacles preventing the purchaser from avoiding the non-compete obligation after five years.

As indicated above, there exists an exception of the principle granting the purchaser a non-compete obligation for at most five years. If the facility which the purchaser uses for activities arising from the agreement is fully owned by the provider - from the point of view that the prohibition granted by the provider regarding the sale of competing products in its own facility without consent is a reasonable restriction - the non-compete obligation imposed on the purchaser has no time limitation. Thus, it is possible to impose a non-compete obligation on the purchaser as long as the purchaser uses the facility (Guide paragraph 38).

Non-Compete Obligation after the Termination of the Agreement

In principle, it is not possible to impose a non-compete obligation following the expiry of the agreement. However, if certain conditions are fulfilled, a non-compete obligation of up to one year after the expiration of the agreement may be imposed on the purchaser. However the prohibition;

- must be related to products and services competing with the products and services subject to the agreement,
- must be limited to the facility or area in which the purchaser is active during the agreement and
- is necessary in order to protect the know-how transferred to the purchaser by the provider.

The Guide also analyzes restrictions usually included in vertical agreements, such as single branding, exclusive distribution, exclusive customer allocation, and selective distribution.


[2] The Guide regarding Vertical Agreements was published on 3 June 2009 on the official website of the CA and can be reached using the following link: http://www.rekabet.gov.tr/dosyalar/...


[4] In case the agency does not take any commercial or financial risk in relation to the agreement that it concluded or intermediated on behalf of its client, the relation between the agency and its client is outside the scope of Article 4 of the Competition Act.

For instance, in case the provider got a loan in favor of the purchaser, the repayment of the loan cannot be regulated in a way to obstruct the purchaser from avoiding the non-compete obligation at the end of five years. The purchaser has the right to pay all his debts, if there are any, after the expiry of his non-compete obligation for five-years. In a similar vein, if the provider provides some equipment to the purchaser, at the end of the non-compete period the purchaser must be afforded the opportunity to purchase this equipment for market value.

In other words, in case the provider holds the ownership of the facility within the scope of a right in rem or personal right (such as lease, bailment, and right of usufruct) granted by third persons who are not related to the purchaser, then it may be possible to impose on the purchaser a non-compete obligation for a period of more than five years.

The use and disclosure of know-how not publicly known may be prohibited for an indefinite period.