
Developments on Vertical Agreements in Turkey: Draft Guidelines are Open to Public Consultations

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Introduction

On 20 July 2017, the Turkish Competition Authority ("**TCA**") announced its draft amendments to the Guidelines on Vertical Agreements ("**Draft Guidelines**") on its website and provided the opportunity to the interested parties, including both the consumers and the undertakings, which are active in the markets that the amendments relate to, either to explain the market structure for better approach to be pursued or to raise the competitive concerns which may occur as a result of such amendments. In this regard, any comments, recommendations and/or evaluations may be submitted to the TCA until 11 September 2017 via e-mail.

Having stated that this is particularly crucial for ensuring the proper functioning of the relevant markets as well as avoiding ambiguities in the implementation of provisions of Article 4 of the Law No. 4054 on the Protection of Competition ("**Competition Law**") on anticompetitive agreements. Additionally, the Draft Guidelines take into consideration the recent developments in the EU *acquis* and the respective sectoral needs. Within this scope, the main amendments and additions to under the Draft Guidelines concern the agency agreements, most favoured customer clauses and online sales restraints. Accordingly, the objective of this short article is to provide an overview of the above-stated main changes.

Agency agreements

One of the draft amendments under the Draft Guidelines provides more clarity to the current Guidelines on Vertical Agreements by stating that the exclusive agency clause only concerns intra-brand competition and does not generally lead to anti-competitive effects; however, the non-compete obligations, including those related to the period following the termination of the agreement, concern inter-brand competition and may lead to anti-competitive effects if they foreclose the relevant market where the contracted goods and services are being sold. As a result, this provision shall be considered within the scope of Article 4 of the Competition Law. By referring to the wording of the EU *acquis*, the TCA highlights that although the current version of the text (stating that a non-compete obligation in an agency agreement can be evaluated within the scope of Article 4 of the Competition Law only if it creates market foreclosure effect) signals "*rule of reason*" analysis, Article 4 of the Competition Law does not adopt such an approach.

Most Favoured Customer clause

The TCA also aims to assist the undertakings that are eager to make use of a most favoured customer clause ("**MFC**"), which is one of the most popular topics in the recent competition law cases in different jurisdictions with various approaches (e.g. Yemeksepeti and Booking.com cases in Turkey). The MFC clause, as one of the conditions shaping the whole contractual and business relationships of a supplier, ensures that the holder of such a transactional right is treated as favourably as the supplier's most-favoured-customer in relation to the competition parameters such as terms, prices and availability of a product to be supplied. In this regard, the MFC conditions may be designed either under the standard vertical agreements on purchase/supply or resale, or under the online platforms' transactions.

In terms of the MFC clauses in online platforms, Booking.com has been subject to many investigations all around the world and most of those investigations were dealt by different competition authorities in a different way. Hence, there is no single approach regarding the evaluation of the MFC clauses and case-by-case analysis is essential. Actually, Booking.com case is the most recent decision of the TCA relating to the analysis of MFC clauses (in particular, price parity clause) under Article 4 of the Competition Law which sets forth the main rules governing the horizontal and vertical relations between the undertakings and prohibits any agreement, decision and practice preventing, distorting or restricting competition in the relevant markets.

In its evaluations, the TCA emphasizes that some of the MFC clauses may have the effect of restricting competition (such as reducing the price competition in the relevant market and price rigidity, facilitating cartels and collusions, creating entry barriers and exclusionary effects, restricting intra-brand competition), whereas others may lead to efficiency gains (such as investment incentives, reduction in the transaction costs, prevention of freeriding and protection of trademark, decrease in delays and demand uncertainties). Hence, the created effects shall be observed within the context of market position of the beneficiary, characteristic and nature of the market and the MFC clause.

In this regard, the TCA reached a conclusion that the MFC clauses in the agreements concluded between Booking.com and hotels restrict competition in the market; then the TCA evaluated these clauses within the scope of both block exemptions regarding the vertical agreements and individual exemption. However, from the perspective of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"), the concerned decision does not contain detailed analysis since the market share of Booking.com exceeds 40%. Therefore, the new draft additions proposed to the current Guidelines on Vertical Agreements (especially, the practical examples) could be considered as a tool to provide some clarity as to which MFC clauses shall be evaluated within the scope of block exemptions.

Online sales

Finally, the Draft Guidelines also include a number of explanations regarding the online sales restraints which may or may not be considered within the scope of the block exemption rules. Having stated that online platforms enable the consumers to reach a huge range of information, to

compare the prices and to easily access to any seller, whereas the suppliers can sell their products on a relatively lower prices in broader geographical markets; the TCA, first, emphasizes that a restraint on the online sales regulated between a supplier and buyer is categorised as a type of passive sales and then the TCA provides the following list of four online sales restraints (two of them relating restrictions on region and consumer, one relating to the proportion of the overall online sales, and the latest one relating to the prices of online sales) which will not enjoy the block exemption under the Communiqué No. 2002/2 and whose preparation is made on the basis of the relevant acquis:

- agreeing that the (exclusive) distributor shall prevent customers located in another (exclusive) territory to view its website or shall put on its website automatic re-routing of customers to the manufacturer's or other (exclusive) distributors' websites,
- agreeing that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory,
- agreeing that the distributor shall limit its proportion of overall sales made over the internet, and
- agreeing that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline.

On the other hand, the TCA also acknowledges the supplier's right to require some conditions for the use of the internet as the sales channel such as quality standards, sales of certain products and/or existence of a brick and mortar shop. The other issues in the draft guidelines relates to either the explanations of these conditions or minor changes added to the current text for online sales.

In conclusion

The Draft Guidelines, which bring additional explanations in line with the developments in competition law as well as the technology, reflect the European Union's approach which constitutes Turkey's model for competition policy. The document is open to public consultations - any interested party may submit its observations/ suggestions to the Turkish Competition Authority by 09.11.2017.