

Turkey

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Market share threshold under the Communiqué on block exemption regarding vertical agreements

Article 3 of EC Regulation No. 2790/1999 on the application of article 81(3) of the Treaty to categories of Vertical Agreements and Concerted Practices¹ (the Regulation) applies a market share test for determining whether vertical agreements concluded by suppliers in the relevant market shall benefit from block exemption under the Regulation. The first paragraph of the said article states that the block exemption provided for in article 2 of the Regulation shall apply on condition that the market share held by the supplier does not exceed 30 per cent of the relevant market on which it sells the contract goods or services.

Entry into force of Market Share Cap in Turkish Law

A brand-new provision amended to the Communiqué on Block Exemption regarding Vertical Agreements No. 2002/2 (the Communiqué) has introduced a threshold for the market share, which shall be entitled to benefit from the block exemption under such Communiqué.² Prior to the amendment, all vertical agreements concluded between two or more undertakings operating at different levels of the production or distribution chain with the purpose of purchase, sale or resale of particular goods or services were deemed to benefit from block exemption as per article 2 of the Communiqué, provided that provisions of such vertical agreements fulfilled the conditions in the Communiqué. However, the new provision amended under the second paragraph of article 2 provides that ‘The exemption provided under this Communiqué shall be applicable provided that the market share of the supplier in the relevant market where it provides goods or services, which are the subject of the vertical agreement, does not exceed 40 per cent.’ This provision indicates that suppliers with a market share exceeding 40 per cent in the relevant market shall not benefit from block exemption, even if they fulfil the criteria set forth under the Communiqué.

Notwithstanding the general rule that the threshold must be calculated on the basis of the market share of the supplier, article 2 provided the same exception as the one in the Regulation under paragraph 2 and it states that it is the market share held by the buyer to be taken into account in the case of vertical agreements containing exclusive supply obligations.

Although such threshold was not provided for under the Communiqué before the amendment, the Turkish Competition Board (the Board) referred to the threshold of 30 per cent in the Regulation in one of its decisions dated 22 April 2005, No. 05-27/317-80, and discussed whether Turkish legislation on vertical agreements is in line with that of EU.

In this decision, one of the suppliers stated that it has been clearly indicated in the Accession Partnership Document that it is required for Turkey to bring its legislation on vertical agreements in line with the EU’s regulations and Turkey undertook to harmonise its relevant legislation with the Regulation in its National Program published on 24 March 2001. In this view, it was argued that although there is a threshold of 30 per cent market share in EU legislation, no compli-

ance with the EU Competition Law was achieved until that date because no threshold was envisaged in the Communiqué. Hence, the supplier submitted the argument that when an assessment is made under the Communiqué, such 30 per cent threshold must be taken into consideration.

The Board ruled that since there is no difference between the Communiqué and the Regulation in terms of the criteria to be applied to a vertical agreement, the allegation of whether or not harmonisation with EU legislation has been achieved is debatable. The Board stated that if there were a threshold under the Communiqué, one of the suppliers would not be able to benefit from block exemption but would be subject to the assessment of individual exemption and in any case, the assessment as to the withdrawal of block exemption would be no different than that as to the withdrawal of individual exemption.

Ultimately the Board disregarded the threshold in its ruling and concluded that the exemption be withdrawn from both of the said suppliers, despite the fact that market shares of such suppliers in the market at the time were respectively 20 per cent and 80 per cent. This ruling of the Board reveals that prior to the amendment in the Communiqué, the Board did not apply any threshold in rendering decisions with respect to the exemption granted to vertical agreements, even though arguments based on such thresholds had been raised before the Board.

In two significant decisions of the Board regarding the withdrawal of block exemption for agreements concluded by suppliers with end sale points,³ the Board held that at the time when disputed agreements were executed by the supplier, they were benefiting from the block exemption under the Communiqué; however, enterprises with market share above 40 per cent in the relevant market were left outside the scope of block exemption due to the amendment made in the Communiqué.

In the decision dated 10 September 2007, No. 07-70/863-326, the Board ruled that since there is no obligation to notify the agreements restricting the competition in the market within the meaning of article 4 of the Law on the Protection of Competition numbered 4054 (the Law), enterprises with a market share exceeding the 40 per cent threshold may benefit from individual exemption, provided that they fulfil the conditions required for exemption provided for in article 5 of the Law.

Subsequent to the entry into force of the amended provision relating to the 40 per cent threshold, the Board renewed its jurisprudence according to the changing legislation. In its decision dated 10 September 2007, No. 07-70/864-327, the Board ruled that no condition such as obliging sale points to buy certain a percentage of the previous year’s sales should be imposed on sale points, nor should advantages relying on such condition be granted. With respect to the measures to be taken on sale points by the supplier for the purposes of foreclosing actual exclusivity, the Board held that:

- non-competition obligations laid down in the agreements concluded with end sale points, which are granted exclusive sale rights as the result of public and private sector tenders open to the participation of all undertakings organised in a competitive

and transparent structure and under non-biased terms, may be applicable provided that they do not exceed two years; and

- sponsorship agreements held at certain locations with the purpose of supporting certain sports, arts or entertainment events, where beverage supply is a secondary element for advertisement, may be applicable provided that they do not exceed 60 days in one year.

Such decisions of the Board imply that an application for negative clearance should be filed to the Board for vertical agreements concluded by suppliers with a market share exceeding 40 per cent of threshold in order to ensure that the transaction does not qualify as the acts laid down by article 4 of the Law, which aim for, affect or are likely to affect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services. For such agreements to qualify for individual exemption, the following requirements stipulated under article of the Law must be fulfilled:

- (i) ensure new developments and improvements or economic or technical development in the production or distribution of goods and in the provision of services;
- (ii) provide benefits to the consumer from the above-mentioned developments and improvements;
- (iii) not eliminate competition in a significant part of the relevant market; and
- (iv) not limit competition more than is necessary to achieve the goals set out in (i) and (ii)

Notes

- 1 Regulation 2790/99 OJ [1999] L 336/21, [2000] 4 CMLR 398.
- 2 Announced in the Official Gazette dated 25 May 2007, No. 26532, and entered into force on 01 July 2007.
- 3 Board's decision dated 10 September 2007, No. 07-70/863-326; Decision dated 10 September 2007, No. 07-70/864-327.

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