

COMPETITION BOARD

Block Exemption Communiqué¹ on Vertical Agreements, Amended by the Competition Board Communiqués No. 2003/3 and 2007/2

Communiqué No: 2002/2

Purpose

Article 1- The purpose of this Communiqué is to determine the conditions for exempting in block vertical agreements, from the application of the provisions of article 4 of the Act on the Protection of Competition dated 7.12.1994 and numbered 4054.

Scope

Article 2- Provided that they bear the conditions mentioned in this Communiqué, agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services -vertical agreements- are exempted in block from the prohibition in article 4 of the Act, based on article 5 paragraph three of the Act.

(Amended: The Competition Board Communiqué No. 2007/2; RG-25.05.2007, 26532) The exemption granted by this Communiqué shall apply in the event that the market share of the provider in the relevant market in which it provides the goods or services that are the subject of the vertical agreement does not exceed 40%.

For those vertical agreements involving exclusive supply obligation, exemption applies on condition that the market share of the buyer in the relevant

¹ OG - 14.07.2002; 24815.

market in which it purchases the goods and services that are the subject of the vertical agreement does not exceed 40%.

Vertical agreements which involve provisions related to the transfer of intellectual rights to the purchaser, or their use by the purchaser, together with the regulations about the purchase, sale or resale of goods or services shall also benefit from the block exemption provided for in this Communiqué, on condition that the said intellectual rights directly concern the use, sale or resale, by the purchaser or the customers of the purchaser, of the goods or services which form the substantial subject of the agreement, and that the transfer or use of such intellectual rights does not constitute the main purpose of the agreement. However, with regard to the goods or services which are the subject of the agreement, this exemption shall be applicable provided that the provisions on the said rights do not involve limitations of competition the purposes or effects of which are the same with vertical limitations not exempted via this Communiqué.

Vertical agreements concluded between competing undertakings may not benefit from the exemption granted by this Communiqué. However, those vertical agreements where the provider is both the producer and distributor of the goods which are the subject of the agreement, and where the purchaser is not the producer but the distributor of the goods which compete with these goods shall benefit from the block exemption granted by this Communiqué.

This Communiqué shall not be applied to vertical agreements which fall under another block exemption communiqué.

Definitions

Article 3- For purposes of the application of this Communiqué, defined below are certain terms which take place in the Communiqué:

a) Act: It expresses the Act on the Protection of Competition No. 4054.

b) In terms of a vertical agreement;

1) Provider expresses the undertaking which is party to the agreement, and which sells to the purchaser the goods or services which are the subject of the agreement,

2) Purchaser expresses the undertaking which is party to the agreement, and which purchases goods or services from the provider, including undertakings which sell goods or services in the account of an undertaking,

3) Customer expresses the one who is not party to the agreement, and who purchases goods or services from the purchaser or provider.

c) Competing Undertakings: They are providers operating or having the potential to operate in the same product market. Product market covers the goods or services which are the subject of the agreement, and the goods or services considered, in terms of the purchaser, to be interchangeable with or substitutable for them as to their product characteristics, prices and intended uses.

d) Non-Compete Obligation: It is any kind of direct or indirect obligation preventing the purchaser from producing, purchasing, selling or reselling goods or services which compete with the goods or services which are the subject of the agreement. Furthermore, taking as the basis the purchases of the purchaser in the previous calendar year, any obligation imposed on the purchaser directly or indirectly that more than 80 % of the goods or services in the relevant market, which are the subject of the agreement, or that of the goods or services substituting for them be purchased from the provider or from another undertaking to be designated by the provider is also considered as non-compete obligation.

e) Intellectual Rights: They express industrial rights, rights of the owner of the work, and neighbouring rights.

f) Know-how: It means the package of information which has been obtained by the provider as a result of its experiences and experiments, and which is not patented, is practice-oriented, confidential, essential and designated. In this definition,

1) The concept of "**confidential**" expresses that know-how is not known or readily accessible by everyone as a whole, or even when its parts are completely gathered and combined,

2) The concept of "**essential**" expresses that know-how involves indispensable information for the purchaser in terms of the use, sale or resale of the goods or services which are the subject of the agreement,

3) The concept of "**designated**" expresses that know-how has been defined in an adequately comprehensive and detailed manner so as to be able to verify that it bears the conditions of being confidential and essential.

g) Selective Distribution System: It means a distribution system whereby the provider undertakes to sell directly or indirectly, the goods or services which are the subject of the agreement, only to distributors selected by it, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorized distributors.

h) (The Competition Board Communiqué No. 2007/2; RG- 25.05.2007, 26532) Exclusive Supply Obligation: Direct or indirect obligation on the provider to sell the goods or services that are the subject of the agreement to only one buyer inside Turkey for the purpose of use or reselling.

For purposes of the application of this Communiqué, the concepts of "undertaking", "provider" and "purchaser" also cover their affiliated undertakings. In determining an affiliated undertaking, provisions that take place in article 4 paragraph two of the Communiqué No. 1997/1 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board are taken as the basis.

Limitations Rendering Agreements Not Caught By Block Exemption

Article 4- Vertical agreements which involve limitations that are listed below and whose goal is to hinder competition directly or indirectly may not benefit from the exemption granted by this Communiqué.

a) Preventing the purchaser from determining its own selling price. It is to such an extent that the provider may determine the maximum selling price or recommend the selling price, on condition that it does not transform into a fixed or minimum selling price as a result of the pressure or encouragement by any of the parties.

b) Introduction of restrictions in relation to regions or customers where or to whom the goods or services which are the subject of the contract shall be sold by the purchaser, other than the following cases.

1) Provided that it does not cover the sales to be made by customers of the purchaser, restriction, by the provider, of active sales to an exclusive region or exclusive group of customers assigned to it or to a purchaser,

2) Restriction of sales of the purchaser operating at the wholesaler level in relation to end users,

3) Restriction of the performance of sale by the members of a selective distribution system to unauthorized distributors,

4) In case there exist parts supplied with a view to combining them, restriction of the purchaser's selling them to competitors of the provider who holds the position of a producer.

c) In the selective distribution system, restriction of active or passive sales to end users, to be performed by the system members operating at the retail level, provided that the right is reserved as to the prohibition for a system member against operating in a place where he is not authorized.

d) In the selective distribution system, prevention of purchase and sale between the system members themselves.

e) In case there exist goods formed by combining parts, prohibition for the provider against selling such parts as spare parts to end users, or repairers not authorized by the purchaser for the maintenance or repair of goods, in agreements between the provider who sells such parts and the purchaser who combines them.

Non-Compete Obligation

Article 5- The exemption granted by this Communiqué shall not be applicable to obligations in the agreement, which are mentioned below.

a) Non-compete obligation imposed on the purchaser, which is for an indefinite period or whose duration exceeds five years.

(Amended: the Competition Board Communiqué No. 2003/3; OG - 18.09.2003, 25233) In case of agreeing that the non-compete obligation may be

implicitly renewed in a way to exceed the duration mentioned above, the non-compete obligation shall be deemed for an indefinite period^{2, 3}.

Should the ownership of the facility to be used by the purchaser while continuing its activities based on the agreement belongs to the provider together with the land or under a right to build over, which has been secured from third persons not connected with the purchaser, or should the purchaser shall continue this activity of it in a facility which is the subject of a real or personal right of use obtained by the provider from third persons not connected with the purchaser, the non-compete obligation imposed on the purchaser may be tied to the duration of use of the said facility by the purchaser; it is to such an extent that the non-compete obligation merely encompasses the activity of the purchaser to be conducted by it in the said facility, in terms of the part of this duration exceeding five years.

b) With regard to the period following the expiry of the agreement, any direct or indirect obligation imposed on the purchaser, prohibiting it from producing, purchasing, selling or reselling goods or services.

² **Temporary Article - (the Competition Board Communiqué No. 2003/3; OG - 18.09.2003, 25233)** In order for agreements concluded before the date of entry into force of this Communiqué [2003/3] to be able to benefit from block exemption provided for in the Communiqué No. 2002/2, it is required to ensure that they conform to the amendment in article 5 sub-paragraph (a) second paragraph within two years of the date of entry into force [18.09.2003] of this Communiqué.

³ The former version of the paragraph: *“However, in case a part of the investment total required for enabling the purchaser to realize its activity based on the agreement is covered by the provider on condition that it is not less than 35 %, the duration of non-compete obligation to be introduced on the purchaser may be until ten years on condition that the part exceeding five years is only limited to the activity to be conducted in the facility where this investment has been made. In case of agreeing that the non-compete obligation may be implicitly renewed in a way to exceed the durations mentioned in this paragraph, the non-compete obligation shall be deemed for an indefinite period.”*

But, a non-compete obligation may be imposed on the purchaser provided that it does not exceed one year as of the expiry of the agreement, with the conditions that the prohibition relates to goods and services in competition with the goods or services which are the subject of the agreement, it is limited to the facility or land where the purchaser operates during the agreement, and it is compulsory for protecting the know-how transferred by the provider to the purchaser.

c) Obligation imposed on the members of the selective distribution system not to sell the branded products of designated competing providers.

Revocation of Exemption

Article 6- (Amended: the Competition Board Communiqué No. 2007/2; RG- 25.05.2007, 26532) In case it is established that an agreement granted exemption by this Communiqué has effects incompatible with the conditions provided in article 5 of the Act, the Competition Board may revoke such exemption granted to the agreement by this Communiqué, based on article 13 of the Act. In this case, before making its final decision, the Competition Board shall ask for the written and/or oral opinion of the provider, and for those agreements that involve exclusive supply obligation, the written and/or oral opinion of the buyer. The Competition Board may also ask for the written and/or oral opinions of the other parties to the agreement or the third parties concerned.

In case parallel networks comprised of vertical limitations of similar nature cover more than 50% of the relevant market, the Competition Board may, via a Communiqué to be issued by it separately, exclude agreements involving certain limitations in the relevant market, from the exemption ensured by this Communiqué.

Communiqués to be issued in accordance with paragraph two shall not enter into force unless at least 6 months have passed from the date of their publication.

Calculation and Application of the Market Share

Article 6/A – (the Competition Board Communiqué No. 2007/2; RG-25.05.2007, 26532) The market share provided in this Communiqué shall be calculated based on the market sales values of the goods or services that are the subject of the agreement, together with the other goods or services that are accepted by the buyer to be substitutable or exchangeable in terms of the product characteristics, prices and purpose of use, and that are also sold by the supplier. In the event that the market sales value data are not available, estimates based on other reliable market information including the amounts of sales may be used in the determination of the market share of the undertaking concerned. For the purposes of the application of Article 2 paragraph three, market purchase values or reliable estimates shall be used in the calculation of market share.

The rules below shall apply in the application of the 40% market share threshold stated in this Communiqué:

- a)** Market share shall be calculated using the data of the previous year.
- b)** Market share includes all goods and services provided to the affiliated distributors for purposes of sale.
- c)** If the market share is not over 40% initially, but later rises above the threshold without exceeding 45%, the exemption shall continue to apply for the two years following the year in which the market share threshold was first exceeded.
- d)** If the market share does not exceed 40% initially, but later rises above 45%, the exemption shall continue to apply throughout the year following the year in which the market share threshold was first exceeded.
- e)** The rights provided by subparagraphs (c) and (d) may not be combined in a way to cause the period to exceed two calendar years.

Application of the Communiqué to Concerted Practices

Article 7- This Communiqué shall also be applicable to concerted practices between undertakings, which fall under article 2.

Implementation of article 6 of the Act

Article 8- Exemption granted pursuant to the provisions of this Communiqué shall not prevent the implementation of article 6 of the Act.

Notification

Article 9- It is not compulsory to notify to the Competition Board those vertical agreements which bear exemption conditions provided for by this Communiqué.

Communiqués Abolished

Article 10- The Block Exemption Communiqué on Exclusive Distribution Agreements No. 1997/3, the Block Exemption Communiqué on Exclusive Purchasing Agreements No. 1997/4, and the Block Exemption Communiqué on Franchise Agreements No. 1998/7 shall be abolished with the entry into force of this Communiqué.

Temporary Article 1- With regard to the agreements which have been benefitting, on the date of entry into force of this Communiqué, from the block exemption provided by the Communiqués No. 1997/3, 1997/4 and 1998/7, but which do not have the conditions to benefit from the block exemption provided for in this Communiqué, in order for them to be able to benefit from the exemption granted by this Communiqué, they are required, within one year as of the date of entry into force of this Communiqué, to be amended in a way to meet the

conditions provided for by this Communiqué. During this period, the prohibition provided for in article 4 of the Act No. 4054 shall not be applicable to the agreements referred to.

Temporary Article 2 – (The Competition Board Communiqué No. 2007/2; RG- 25.05.2007, 26532) Those agreements that benefit from the block exemption granted by the Communiqué No. 2002/2 on the date of enforcement of the Communiqué No. 2007/2, but that remain outside the scope provided by the Communiqué No. 2002/2 Article 2, which has been amended by the Communiqué No. 2007/2, must be brought in compliance with the conditions regulated under Article 5 of the Act No. 4054 within one year of the enforcement of this Communiqué. During this period, the prohibition provided under the Act No. 4054 Article 4 shall not apply to the said agreements.

Entry Into Force

Article 11- This Communiqué shall enter into force on the date it is published.

Execution

Article 12- The provisions of this Communiqué shall be executed by the President of the Competition Authority.