EU & TURKEY'S COMPETITION LAW REGARDING TO VERTICAL RESTRICTIVE PRACTICES: MODEL SECTOR TRACTOR AND AGRICULTURAL EQUIPMENTS

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JANUARY 2010

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EU & TURKEY'S COMPETITION LAW REGARDING TO VERTICAL RESTRICTIVE PRACTICES: MODEL SECTOR TRACTOR AND AGRICULTURAL EQUIPMENTS

A THESIS SUBMITTED TO

THE GRADUATE SCHOOL OF SOCIAL SCIENCES

OF

IZMIR UNIVERSITY OF ECONOMICS

BY

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(20033103012)

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF SCIENCE

IN

THE GRADUATE SCHOOL OF SOCIAL SCIENCES

JANUARY 2010

İZMİR

ABSTRACT

EU& TURKEY'S COMPETITION LAW REGARDING TO VERTICAL RESTRICTIVE PRACTICES:

MODEL SECTOR: TRACTOR AND AGRICULTURAL EQUIPMENTS

Berbero• lu, Ülker Aslı

European Studies Master Of Science

Supervisor : Yrd. Doc. Dr. Kerem BATIR

January 2010, 169 pages

This study was carried out towards the competition law applications related to the vertical restrictions in Turkey and European Union based on the regulations, agreements and the sample decisions of competition authorities.

According to the Commission Regulation 2790/1999 of European Union, the contractual provisions including the vertical restrictions related to this market for the entrepreneurs having the market share by 30% are excluded. In scope of harmony process with the European Union, Turkey has arranged its regulations in basis of Group Exemption Communiqué nr. 2002/2 related to the Vertical Agreements in parallel to this arrangement however it determined the market share equivalence as 40%.

In this study, sample sector analysis was held to illuminate the reflection of the condition that the distributors in the tractor and agricultural equipment market could not apply the provisions including the competition restrictions in the their vertical agreements because of the market share equivalence arrangement to the agricultural machines' sector in Turkey.

In the first chapter of my thesis mainly the major components, scope and types of "vertical agreements" and "exclusivity" were determined then in the second chapter, the provisions of article 81 of Rome Agreement, the provisions of Commission regulation 2790/1999 related to the vertical agreements were explained. In the third chapter, it was focused to explain the applications of the legal arrangements related to the Turkish Competition Law, Protection of Competition law 4054 and the Group Exemption Communiqué related to the Vertical Agreements 2002/2 issued in parallel to EU Commission Regulation on the exclusive vertical agreements. In the fourth chapter, the Turkish and European Union Competition Authorities' comments and decisions about the exclusive vertical agreements related to the distribution of the goods and services in the tractor and agricultural equipments' sector.

Key Words : 1- Vertical Agreement
2- Tractor Market
3- Agricultural Equipment Market
4- Competition Restriction
5- Market Share Thereshold

ÖZET
AB & TÜRK REKABET HUKUKUNDA D•KEY KISITLAMALARA •L•• K•N UYGULAMLAR:
MODEL SEKTÖR: TRAKTÖR VE Z•RAAT MAK•NALARI
BERBERO LU, Ülker Aslı

Avrupa Çalı maları Yüksek Lisansı

Tez Yöneticisi : Yrd. Doc. Dr. Kerem BATIR

OCAK 2010, 169 Sayfa

Bu çalı ma Türkiye ve Avrupa Birli i'ndeki dikey kısıtlamalara ili kin rekabet hukuku uygulamalarını mevzuat, anla malar ve Rekabet otoritelerinin örnek kararları ba lamında hazırlanmı tır.

Avrupa Birli i'nin 2790/1999 sayılı Komisyon Tüzü ü hükmüne göre %30 Pazar payına sahip te ebbüslerin bu pazara ili kin dikey kısıtlamalar içeren anla ma hükümleri gurup muafiyeti kapsamı dı ında bırakılmaktadır. Türkiye, Avrupa Birli i mevzuatına uyum çalı maları çerçevesinde kendi mevzuatı 2002/2 sayılı Dikey Anla•malara li kin Gurup Muafiyeti Tebli inde bu düzenlemeye paralel olarak düzenleme yapmı ancak pazar payı e i ini %40 olarak belirlemi tir.

Bu çalı mada traktör ve ziraat makinaları pazarındaki da ıtıcıların Pazar payı e i i düzenlemesi sebebiyle dikey anla•malarında rekabet sınırlaması içeren hükümler getirememelerinin Türk çiftçilerine, Türkiye'deki tarım ve ziraat makinaları pazarına yansıması hakkında örnek sektör incelemesi yapılmı tır.

Tezimin birinci bölümünde esas olarak, "dikey anla•malar" ve "münhasırlık" kavramlarının ana unsurları, kapsamı ve türleri belirlenmi tir. kinci bölümünde, Roma Antla ması'nın 81 maddesinin unsurları, 2790/1999 sayılı Komisyon Tüzü ü'nün dikey anla malara ili kin hükümleri ele alınmı tır. Üçüncü bölümde, Türk Rekabet Hukukundaki yasal düzenlemeler 4054 sayılı Rekabetin Korunması Hakkında Kanun ve AB Komisyon Tüzü ü paralelinde çıkarılan 2002/2 sayılı Dikey Anla malara li kin Gurup Muafiyeti Tebli i hükümlerinin münhasır dikey anla malara uygulamaları üzerinde durulmu tur. Dördüncü bölümde ise traktör ve ziraat makinaları pazarında malların ve servis hizmetlerinin da ıtımına ili kin münhasır dikey anla malarına Türk ve Avrupa Birli i Rekabet Otoritelerinin görü ve kararları ele alınmı tır.

Anahtar Kelimeler : 1- Dikey Anla•ma
2- Traktör Pazarı
3- Ziraat Makinaları Pazarı
4- Rekabet Sınırlaması
5- Pazar Payı E i i

To My Dear Husband, My Daughter Asya And My Parents.

ACKNOWLEDGMENTS

I express sincere appreciation to Yrd. Doc. Dr. Kerem Batır for his guidance and insight throughout the research. Thanks go to the other faculty members, Yrd. Doc. Dr. Siyami Alp Limoncuo•lu and Yrd. Doc. Dr. Zeynep •i•li, for their suggestions and comments. To my husband, Baturalp and my parents, I offer sincere thanks for them unshakable faith in me and their willingness to endure with me the vicissitudes of my endeavors. To my daughter, Asya, I thank my baby for waiting her mothers' graduation.

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ABBREVIATIONS

BER **:** Block Exemption Regulation

Board **:** Turkish Competition Board

COJ **:** Court of Justice

CBI **:** Confederation Of British Industry

Ch. : Chapter

CMLR : Common Market Law Reports

CMLRev : Common Market Law Review

Commission : European Commission

Court : European Union Court Of Justice

D : Demand

EU : European Union

EEC : Europe Economy Community

EC : European Community

ECLR : European Competition Law Review

ECR : European Court Reports

ECU : European Currency Unit

Edt. : Editor

EUR : Euro

F : Federal

ICN : International Competition Network

ibid : In The Same Place

JO : Journal Official

MC : Marginal Cost

MR : Marginal Revenue

NBER : National Bureau of Economic Research

No. : Number

op.cit. : Said Literary Work

OJ : Official Journal

OECD : Organization for Economic Co-operation Development

OFT : Office of Fair Trade

P : Price

Q : Quantity

RT : Rome Treaty

S.Ct. : Supreme Court

Sp.Ed. : Special Edition

SA : Joint Stock Company

UK : United Kingdom

US : United States Reporter

USA **:** United States Of America

UNCTAD **:** United Nations Conference on Trade and Development

v. **:** Versus

Vol. **:** Volume

WTO **:** World Trade Organization

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INTRODUCTION

Agriculture is a form of production that is carried out under conditions of variable climate and soil. Agriculture is a countryside activity. Production in agriculture is carried out by seasonal activities depending on nature. Education level of farmer is low in Turkey. The agricultural instruments and tractor market is developed to meet the requirements of consumer prices arisen from the original features of the agriculture. Vertical agreements or activities are assessed within the context of Competition Law including competitive restriction where players have agreed on the agricultural instruments and tractor market which is a competitive market.

Turkey has undertaken to bring its legislation regarding competition rules in conformity with that of the European Union and to ensure proper implementation in order to achieve the economic integrity aimed for by the Customs Union through the Association Council Decision No. 1/95 and the full membership to the European Union. The competition regulations which are an extremely dynamic field of law

Regulations which comprise an extremely dynamic field of law will be assessed under a different section in the Progress Reports on Turkey's EU Membership Process.

In this context, Law No. 4054 on the Protection of Competition put into effect on 13 December 1994. The body has been established due to "Communiqué

Regarding the Establishment of Competition Authority" that the Competition Authority can take the decisions like issue a communiqué and guideline and violation of competition based on law, mergers and acquisitions, negative clearance and exemption which provide the applicability of the law. Competition Authority continues to act since 1997 and found competitive solutions to the markets with the decisions it has taken. Competition Authority on one hand continues a relationship with EU on the other hand it plays an active role by affiliating the international platforms like OECD, UNCTAD, WTO, ICN.

The Competition Authority tries to keep competitive environment by continuing the benefits on behalf of the consumer due to the specific features of the agriculture and market by the decisions regarding agricultural instruments and tractor market. The Authority did not compose the vertical agreements regarding agricultural equipments and tractor market with a special communiqué but investigated within the context of Block Exemption Communiqué on the Vertical Agreement no 2002/2 that is a general regulation.

On preparing my thesis it was benefited from the resources mostly regarding EU and Turkish Competition Law, decisions of EU Commission and Court of Justice and Turkish Competition Authority decisions and additionally foreign and Turkish resources as a fundamental data resources published.

In the first chapter of my thesis the concept of the main elements, scope and types of "exclusive vertical agreements" were determined after the general assessment of the vertical agreements theoretically.

In the second chapter, the factors of 81st article of the Rome Agreement, the limits of the approaches of the Court of Justice and European Union Commission for the exclusive vertical agreements were determined. In this chapter, also the general lines of the Commission Regulation is settled that numbered with 2790/1999 and made very important amendments on the Community Competition Policy directed towards vertical agreements oriented.

In the third chapter of my thesis, Turkish Competition Policy and the recent developments in Turkish Competition Law were handled. In principle, the Act on the Protection of Competition No. 4054 and Block Exemption Communiqué on Vertical Agreements no 2002/2 of Competition Authority are settled.

Finally, in the fourth chapter, the approaches and decisions of EU and Turkish Competition Authorities regarding vertical agreements concerning agricultural instruments and tractor market were discussed as model sector investigation.

CHAPTER I

VERTICAL AGREEMENTS IN COMPETITION LAW

I. VERTICAL AGREEMENTS AND THE CONCEPT OF COMPETITION LAW

I.1."COMPETITION" CONCEPT

Competition is an effort of the undertakings which are aimed to perform some certain commercial purposes independently from each other[1]. The concept of competition designates some actions not a certain situation[2]. In this context, competition describes the race proposing to take decision freely between the undertakings in the goods and services markets, to offer better quality and service at a cheaper price[3]. This race may be seen on one or some of the factors like price, quality, after sale services which are taken into account by the consumers during their selections. In that race carried out on these factors it is required to apply these instruments like making agreements, investments, increase or decrease the production level.

Competition concept is related with the case in which only many purchaser and seller are located and none of them has any power to be able affect the market[4].

Competition does not only describe the competition but also describes the potential competition at the same time. The potential competition that may be considered as "despite it has no activity in the market it is the affect created by the undertakings which have the potential to enter the market" that although it does not

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[1] ULA•, KISA, S.:" *Avrupa Topluluğu Rekabet Hukukunda Hakim Durumun Rekabet Karşıtı Eylem ve İşlemlerle Kötüye Kullanılması* ", *Post Graduate Thesis,* Bank Commercial Law Research Institute, Ankara, **(2005)** 3

[2] AT•YAS, I.: "*Rekabet Politikasının İktisadi Temelleri Üzerine Düşünceler* ", *Competition Review,* No:1, Volume 1, No. 1, Ankara, **(2000)** 27

[3] CANTURK, I.: "*Rekabet Ortamı ve Rekabet Kurulu Kararları* ", *Competition Authority Press,* Ankara, (**2000)**

[4] AKINCI, A.:" Rekabetin Yatay Kısıtlanması", *Competition Authority Press,* Ankara, **(2001)** 5

exist in real terms and can not be evaluated as a Market share it decreases the affect of the active Undertakings located in the market[5].

The scope of the Competition Law is to provide the undertakings to act as they operate in the competition market for the undertakings operate in the market in which these conditions are not realized by taking measures required competitive conditions are to be met. For that reason, the activities directed to control the market for the markets in which competitive conditions were not established as well as the activities aimed to impair the competitive conditions of the undertakings[6].

The first essential legal arrangement appears in the Sherman Law dated 1890 in the United States of America. It is gathered under three main headings as horizontal and vertical restraint of the Competition and the activities to govern the market. European Competition Law includes the effects of American Competition Law which was arranged in the articles 81 and the subsequent of the European Competition Law.

I.2. VERTICAL AGREEMENTS

I.2.1. In General

Undertakings made many activities during performing production activities. These activities set forth the characteristic in the manner of Competition Law of the relationship between supplier and purchaser. Each undertaking designates the activities to perform directed to production whether in its body or by purchasing from outside. Some authors summarize this decision stage as "make or purchase"[7]. But, this activity is not just a decision-making period than supposed. Undertaking

[5] OZTUNALI, A.: "*Yatay Yoğunlaşmalarda Tek Teşebbüs Hakimiyeti, 4054 Sayılı Rekabetin Korunması Hakkında Kanun ve AB Mevzuatı Uygulamaları* ", Volume 4.1.4, Ankara, **(2003)** 39
[6] AKINCI, A.: op. cit.6
[7] OSTER, S.M.: "*Modern Competitive Analysis*", Oxford University Press, Newyork, **(1999**) 199

may perform the same activity within its body from the market environment or by the method that includes certain factors of both methods[8].

The undertaking may even internalize the transactions by performing distribution function (vertical integration) and has the capability to distribute the product by the independent distributors (vertical agreements)[9].

Competition Authority has decided that the agreements made between the institution which owns credit card and the member business places are vertical agreements in the Benkar's decision[10].

In this chapter, "independent distribution channel" mainly will be investigated after describing shortly different options producer is faced with.

I.2.2. Vertical Relationship Types

I.2.2.1. Vertical Agreements

Vertical agreements are the agreements concluded between undertakings operating at different levels of production or distribution chain which they grant and give license, producer and wholesaler, supplier and consumer. Hence, the separation factor of vertical agreement is that these agreements are the agreements between the parties between undertakings at the same stage in the production or distribution chain. Vertical agreements are agreements between two or more undertakings each of which operates, for the purpose of the agreement, at a different stage of the production or distribution chain. These agreements made are required to make

[8] BOSCHECK, R.: "The EU Policy Reform on Vertical Restraints-An Economic Respective", *World Competition*, 23(4), **(2000)** 5

[9] AREEDA, P., KAPLOW, L.: "*Antitrust Analysis,Problems, Text, Cases*", 5th Edition, New York, Aspen Law&Business,**(1997)** 609

[10] Competition Authority Decision, Dossier no: D4/1/L.K-01/2 Decision Number, 03-57/671-304 Decision Date; 15.8.2003

market work[11]. Besides this, it has the effect of restrain on competition it has also other positive sides like distribution and rationalization after sale services, enable the consumer to find product easier. However, restrictive vertical agreements may also be permitted regarding to exclusive distribution, geographical market or consumer sharing, redetermination of sales prices.

The question arises in which manner the competitive rules are to be applied to these agreements due to vertical agreements are essential to make markets work and in another way it has the effect of restrain on competition. If vertical agreements are accepted out of competition rules then these agreement which are necessary to make markets work will make markets hard to work by restraining competition. If per se is prohibited like in horizontal agreements by taking into consideration the effects of restraining competition then undertakings will try to realize all the stages of the production and hence this will create one or more undertaking that governs the market which completed its vertical growth.

The assertion that the agreements restraining the freedom for sellers to sell their goods at their prices will be per se extralegal is not involved in antitrust law. It is explained that all types of restraints are not extralegal and if there is reasonable causes then some additional restraints are required to be allowed. If the conditions of Article 81/1 in the European Community Application were satisfied then the concept is dominated that there is no importance of the difference between horizontal and vertical, whether it is horizontal or vertical the competition will be applied to all agreements that restrict competition. However, because the 81/3 exemption is regulated in European Community this approach causes a problem. It

[11] Markets are comprised of complex activity areas of undertakings involved in horizontal and vertical axis. Horizontal axe states the undertakings acting same or equivalent activities and are required to compete with each other. Vertical structuring which is comprised of purchase-sale, reproduction in different commercial stages in which goods or services are offered to consumer, end purchaser starting from raw material procuring process and distribution channels in markets.

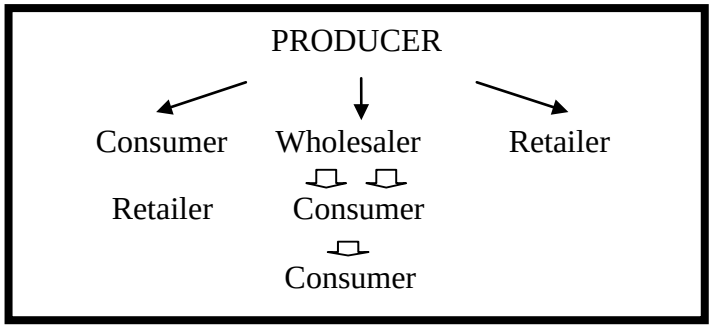
is a greater possibility the vertical agreements fulfill the conditions described in article 81/3. Hence, vertical restraints issue may be resolved in a better way by the exemption. In addition, the commission has issued group exemption regulations regarding exclusive purchase, monopolist transactions and exclusive distribution agreements, motor vehicle distribution agreements, insurance sector, technology transfer agreements, research end development agreements. The probability of giving both individual and group exemption to horizontal agreements is already very low. Because the Law on the Protection of Competition no 4054 has the solutions parallel with the European Community regulation said the solution will be valid also for Turkey. Because the analyzing in the exemption system according to vertical agreements whether are to be subjected to different regulation or keeping out side of competition law will also bring the effective inspection it is the best solution. This issue is essential because the dealership systems are common in Turkey.

Vertical agreements usually include the restraints which are charged from one party to another. These restraints are in the form that regulates the procurement or distribution of a certain product[12].

Distribution agreements are the agreements that merge the stages with each other from the production to the end user. Vertical agreement concept is wider than distribution agreement concept. Thus, the product trade aimed only "resale" is involved under the heading of the distribution agreements however vertical agreement concept besides resale it includes purchase and sale also. For instance, despite the raw material purchase agreement granted by the purchaser not for the resale but to use as an intermediary input in its production is a vertical agreement but not a distribution agreement.

[12] Many vertical agreements are considered as partial substitute of vertical integration as the conclusions created by.

Distribution agreements may be between producer and a distributor who acts in any stage of the distribution and also may be between two distributors who act in different stages of distribution. Alternative distribution methods which are used to deliver the product purchased by producer to the consumers are summarized in Figure 1[13]. In case a producer delivers its product to consumer directly without any independent distributor there exists no distribution relationship. Therefore, it is not accepted as distribution agreement because there is no redistribution.



Alternative Distribution Method - Figure -1

I.2.2.2 Vertical Integration

Another option that undertakings use in establishing their organizations is vertical integration. Vertical integration is the integration, between the undertakings that act on different stages from production to sale of any product namely, "vertical integration" is the degree that the undertaking joins or takes over the undertaking to which owns its downstream purchaser or its upstream supplier. In the production processes that are not on a single line but based on a number of production level in case production is carried out completely internal it will provide cost advantage. On the other hand, the coordination issue arises in case all the production is not

[13] KARAKURT, A.: *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar" Post Graduate Thesis*, Competition Authority Press, Postgraduate Thesis Series No:11, **(2005)** 8

internalized and some of them are supplied from independent sellers in between the undertakings. Although the coordination issue may be resolved by the agreement this solution will be both complex and costly. In addition, for each transaction provided from outside there will be a transaction cost on behalf of undertaking.

Vertical integration, in distribution stage, may be established by purchase the current distribution chain of the undertaking and may be realized by establishing its distribution chain also. They are the distinctive function increases for choosing "vertical integration in distribution" method also by providing the distribution of the products which are produced by producer. Said activity acquisitions will appear as the decreases for the items like purchase cost, coordination and transaction cost. The result when comparing the case where producers have their distribution network with other methods will bring light about which method is to be selected[14].

I.2.2.3. Horizontal-Vertical Agreement Distinction

Horizontal agreements are the restraints established by the undertakings at the same stage of production chain[15]. The agreement established by the undertakings which act in the same sector with each other in financial life, may cause the market structure to be less competitive[16]. The restrain of the competition between undertakings by establishing an agreement is called as collusion[17]. This term may cause an explanation conflict with the term cartel. Collusion is used in a broader

14 KARAKURT, Alper, "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*", op.cit. 10

15 ASLAN I. Y.,: "*Rekabet Hukuku Teori, Uygulama ve Mevzuat*", Ekin Bookstore, Bursa, **(2005)** 212

16 CATALCALI,O.,T.: "*Kartel Teorisi İhracat Kartelleri ve Kriz Kartelleri*", Competition Authority Expertise Series, 5th Term, Ankara, **(2000)** 8

17 CATALCALI, O.,T., ibid

sense including the agreements that restrict full competition. Cartel is one of the agreements restraining the competition.

Cartel is defined by Hexner as a business relationship that affects the good and service markets significantly established between the voluntary and temporary amongst the independent and private entrepreneurs by acting coordinately. In this definition it is underlined that cartels are established more than one independent undertakings, the relationship between each other relies on the voluntary, serve for the needs of the undertakings which are not long lasting and created themselves. Brems defined the cartel as " A cartel is a voluntary, written or oral agreement among financially and personally independent, private, entrepreneurial sellers or buyers fixing or influencing the values of their parameters of action, or allocating territories, products or quotas, for a future period of time". Being as an appendix to this definition made by Hexner it is expressed that the agreements established with the undertakings affiliated to main undertaking can not be qualified as cartel, trade unions and the undertakings having vertical integration are not cartel. The definition of cartel is made within the frame of the definitions above in the books today. Cartel is defined by Carlton and Perlof as "A group of undertakings who have agreed explicitly to coordinate their activities"; according to Besanko and Braeutigam it is "A cartel is a group of producers that collusively determine the price and output in a market".[18] In the perspective of competition law as defined by Akinci[19] "Cartel is the name given to the agreements established by more than one undertaking to control market and limit competition". Scrutinizing the common features of these definitions cartel has three important

[18] The views of these writers were quoted in CATALCALI, O.,T., ibid
[19] The view of this writer is quoted in AKINCI, A., ibid

factors. At first, cartel should be established among *independent undertakings*. Secondly, they are required to agree to *limit* or *restrict* competition establishing the base of the free market economy that act collusively. Thirdly and lastly, cartel should be established for the product or products placed on *a certain market*. However, it is also required to underline that cartel in fact is an agreement, association or practice among undertakings act on the same sector[20] not valid in law. Vertical agreements are the agreements between undertakings involved in proceeding beginning from raw material purchase agreements to the stage where products are being delivered. These are the agreements like raw material and semi-finished purchase agreements, some subcontracting agreements, wholesale and retail distribution agreements. Vertical Restraint agreements are the competition restraining agreements that they are between the undertakings operating at different levels of production chain. These type restraints are generally the restraints like exclusive distribution, geographical market or consumer sharing and redetermination of sales prices. Besides this, it has the effect of restrain on competition it has also other positive sides like distribution and rationalization after sale services, enable the consumer to find product easier[21].

I.2.2.4. The Effects Of The Vertical Agreements On Competition Order

The distinction between intra-brand and inter-brand competition is an essential distinction in the eye of exposing the competitive effects of vertical restraints.

Distributors in general are faced with two different competitions. One of them is "inter-brand" caused from the products of rival suppliers, the other one is

[20] in other words, an horizontal agreement
[21] ASLAN,I.Y., *"Rekabet Hukuku Teori, Uygulama ve Mevzuat*",op. cit.213

"intra-brand" caused from other distributors supplying goods and service from the same supplier[22].

In mid to late 1980s, a new strand of economic literature was developed analyzing the role of vertical restraints when competition exist between suppliers selling through separate retail channels This literature focused on the strategic use of vertical restraints by suppliers to effect the market outcome. The basic idea is that vertical restraints by suppliers upon its retailers will affect the nature of intra-brand competition between these retailers in the downstream market. Since these retailers also compete with the other suppliers' retailers, this will ultimately affect the nature of the competition between suppliers[23].

There are three important caveats that apply to the policy implications of this" strategic theory of vertical restraints". First, the impact of such restraints clearly depends on the extent of inter-brand competition[24]. Secondly, it is important to observe that the different types of vertical restraints affecting intra-brand competition between retailers may well have different effects in this setting[25]. Thirdly, this strand of literature has focused on situations where suppliers distribute their products through distinct retail channels[26].

[22]HUGHES, M., FOSS, K.: "*The Economic Assessment of Vertical Restraints Under U.K. and EC Competition Law*", ECLR 10, U.K., **(2001)** 424
[23]BUETTNER T.,COSCELLI A.,VERGE T., WINTER R.A.:"*An Economic Analysis Of The Use of Selective Distribution by Luxury Goods Suppliers*" European Competition Journal, April 2009, 211
[24] BUETTNER T., COSCELLI A., VERGE T., WINTER R.A.,op. cit.,P.212
[25] BUETTNER T., COSCELLI A., VERGE T., WINTER R.A.,op. cit.,P.212
[26] BUETTNER T., COSCELLI A., VERGE T., WINTER R.A.,op. cit.,P.213

I.2.2.5. The Effects Of The Vertical Agreements On Inter-Brand Competition

Inter-brand competition is a race where undertakings are included that they produce or supply commercially the same or similar products in the eye of consumer and offer to the market by distributors again[27].

The most essential factor is the final sales price of the product in the competition race. The supplier is not allowed to determine resale price because final sales price determines both intra-brand and inter-brand competition.

All the components affecting the consumer choice, and therefore affecting the inter brand competition are called as "Competition Area"[28]. The width of the competition area and being standardized of the said product is inversely proportional. In case the standards of the product are very close or same with the rival products in the market this causes the product prices are to be very close each other. For this reason, the standardization level of the products is one of the most important component determining inter-brand competition conditions.

The concentration level of the market that is the number of actors in the market and power balance is also one of the components determining inter-brand competition. But in case a horizontal cooperation agreement among these actors then this horizontal relationship causes inter-brand competition to be removed or reduced.

One of the components affecting inter-brand competition is vertical restraints. In case the vertical relationship between supplier and distributors is at the vertical integration level or in exclusive possession then the competition level in the market

[27] KARAKURT,A.,*"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.11
[28] KARAKURT,A.,*"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op.cit.11

will be affected in negative direction[29]. Vertical agreements make it difficult for consumers to achieve market by creating barriers to entry, closing the market to rival suppliers and therefore prevent the inter-brand competition. The distribution chain will be under the control of supplier in vertical integration. Because, supplier will either establish the distribution chain or will purchase the current system. In case this distribution system is to be the only channel or a channel that has much strong to deliver product to end consumers it will make it difficult for the products of rival suppliers to be achieved by end consumers. The relationship of the supplier with the independent distributors being in exclusive possession also will cause the same result similar to vertical integration, although they are legally independent it will prevent the rival suppliers to use these distribution channels[30]. The reason of reduction caused by exclusive vertical agreements in the inter-brand competition level is the increase of costs in the rival undertakings by said agreement structure. Exclusive vertical agreements affect the absolute or relative cost level of the competitor negatively depending on the market share bounded. Thus, Exclusive vertical agreements cause both potential rivals and current rivals to enter to both markets, to establish vertical integration or to search new independent undertakings[31].

Most vertical restraint is essential usually in the markets where inter-brand competition is not sufficient. Activity gains caused by vertical restraints like exclusive area allocation or franchise will be reflected to consumers. However, the

[29] KARAKURT,A.,*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op.cit. 12

[30] KARAKURT,A.,*"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* opt.ciT,13

[31]KARAKURT,A.,:*"Küresel Yarışta Rakibin Maliyetini Arttırma "*, Competition Authority Review, Ankara, **(2005)** 29

efficiency gains raised by vertical restraints will be absorbed as profit without achieving to consumer in the markets where there is no inter-brand[32].

It is stated in Commission Notice, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/20, Article numbered 102 that it is limited the scope of application of Article 81 Rome Treaty to undertakings holding certain degree of market power where inter-brand competition may be insufficient.

The distributor may distribute more than one rival brand at the same sales point in vertical agreements which have no exclusive condition. In that case, "interior intra-band competition" will occur. A case of advantage in favor of consumers will occur, allowing to access products together which have different brands belonging to same market. Since exclusive vertical agreements enforce the distributor to sell a single product of supplier it will remove interior inter-brand competition.

I.2.2.6. The Effects Of The Vertical Agreements On Intra-Brand Competition

In the intra-brand competition that mean economical race between undertakings act on same or different stages like production, distribution or sales of the same brand the main decisive factor is the characteristics of the undertakings which are involved in this race. The marketing strategies applied by the resellers to get ahead in the competition with other distributors of the same brand and efficiency increases depending on this will form a basis for the competition between the resellers[33]. As mentioned above, Court of Justice of European Community on the suit of "Consten and Grundig V. Commission" used the term of "intra-brand" for the

[32] KARAKURT,A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.13
[33] KARAKURT,A."*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op.cit.13

first time. In this case, the Court of Justice brought in a verdict that if an agreement "in the direction of harming in the manner of actually or potentially, directly or indirectly that may endanger the liberty of trade among member states, the goal of achieving a single market established among member states" then it would be assessed within the meaning of Article 81/1. Two effects included in Article 81/1 of Rome Treaty that is the goal or effect of restrain of competition and effect of trade among member states are not interchangeably provisions. In order to evaluate an agreement under the coverage of prohibition it is required that both provisions should be valid together[34].

One of the components determining the intra-brand competition level is the characteristic of the vertical relationship. If the reseller is within the same economical unity with the supplier it means intra-brand competition is almost none existing. In case the distribution right of the products in the scope of contract signed by supplier, exclusive distributor involved in a certain area is protected absolutely against distributors acting in other areas, parallel import or intermediary institutions which make export then intra-brand competition should be removed completely. In cases where supplier does not impose terrestrial restrain in the vertical relationship with his distributor and at the same time some certain parameters like price, quantity, etc which establish the competition are determined as independent by the distributor then intra-brand competition will be highest level[35].

[34] KARAKURT A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.13

[35]BADUR Emel, "*Türk Rekabet Hukukunda Rekabeti Sınırlayıcı Anlaşmalar (Uyumlu Eylem ve Kararlar)*", *Post Graduate Thesis,* Competition Authority, postgraduate thesis series No:6,Ankara, **(2005)** 86

Parallel import causes a competition environment or in other words with juridical intra-brand competition[36].

Exhaustion principle is related with competition environment that appears among the actual goods with same brands and is assumed as intra-brand within the scope of competition law. Exhaustion regime to be followed may change the dimension of intra-brand competition significantly for one brand. The undertaking which has the right of use of a brand legally within the boundaries of a nation may be exposed also to the international competition of the same branded products depending on the exhaustion regime to be followed and may have the monopoly situation with regard to that brand within the boundaries of said country[37]. Exhaustion principle concepts are divided into two sections as protectionist and liberal. Protectionist approach adopts national or regional exhaustion principle and liberal approach adopts international exhaustion principle.

According to national exhaustion principle, after the good related with right was offered to market within the boundary of a nation by holder of right or some other person authorized by him/her holder of right cannot impose a restrain within the scope of intellectual property rights that he/she has regarding redistribution of the goods or be subject to trade. In other words, he/she can not intervene said the goods to be resold and free circulation of them within the country[38]. This principle allows the parallel import to be prohibited. For the goods subject to intellectual property rights intra-bound competition within the country that accepts this principle has been restrained because there is no parallel import and the citizens live in this country are deprived of the arbitrage created by low price within other countries.

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[36] KARAKURT,A.*"Avrupa Topluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.16

[37] TEKDEM•R Y., *"Marka Hakkının Tükenmesi İlkesi ve Paralel İthalat Sorununa İktisadi Bir Yaklaşım"* Competition Review, Ankara, 9

[38] TEKDEM•R Y.,ibid,10

The permissions of holder of right regarding the good to be subject to trade again, are assumed to be exhausted for the countries involved in region by bringing good to be subject to right within any country in which regional exhaustion principle is involved. This principle may prevent the parallel import. Hence, within the region intra-brand competition may be restrained (like preventing active sales) only within the boundaries drawn by valid competition rules. Outside of these boundaries the restrain of inter-brand competition is considered to be contrary to the principle of free movement of goods and it is not allowed. However, because parallel import caused from outside or region can be prohibited like in territorial exhaustion principle, the ways have been removed which originated from outside of region and increase intra-band competition. For instance, regional exhaustion principle is applied in the EU member countries[39].

According to the international exhaustion principle reflected by liberal point of view, this right is exhausted by bringing it to market in any where in the world. In contrast to others this principle enables parallel trade to operate free. Hence, the third parties who demand may import this good after bringing the good subject to intellectual property rights in any place in the world and the holder of right and the persons authorized by him/her acting in the country from where it is imported cannot prevent this importation on the basis of intellectual property rights[40]. It is allowed an intensive intra-brand competition in the market that good involved in the country in which parallel importation is carried out.

Competition Law is not based on the measure of agreement are to be vertical or horizontal but is based on whether it restraints or not competition. Vertical competition restraints especially are essential in the countries where there is not

[39] TEKDEM•R Y.,ibid
[40] TEKDEM•R Y.,ibid

inter-brand competition. Because, it is necessary to encourage the intra-brand competition for the markets in which intra-brand competition is not existed or week. For that reason the vertical agreements that restrict the intra-brand competition will be prohibited. On the contrary, it is possible to give exemption to vertical agreements which meet the conditions of the Article 5 of Act on the Protection of Competition[41].

Because monopoly sales agreements are intended to establish regional monopoly with respect to their contents they are aimed at least to avoid from intra-brand competition. For that reason, there is an ongoing contradiction between monopoly purchase agreements and competition laws. However, it does not mean that monopoly agreements are always against the law and will be prohibited. For monopoly purchase agreements group exemption is granted in Turkish Law both under the context of European Community Competition Law and Law on the Protection of Competition[42].

Distribution agreements generally provide rationalization in distribution and marketing of a product. On the contrary, they have a restrictive effect on intra-brand competition as the results like territory created and consumer protection[43].

The consumer's features that are industrial users or end users affect the intra-brand competition level. End consumers have no bargaining power due to acting individually, it is expensive to price research amongst distributors, and they have not sufficient knowledge about product market and sales conditions. All of them decrease the intra-brand competition amongst the distributors of the product that is to be purchased by end consumers. The competition amongst distributor's increases

[41] TEKDEM•R Y.,ibid,
[42] BADUR, Emel, op. cit. 89
[43] BADUR, Emel, op. cit. 111

because of industrial consumers is professional, having powerful bargaining and knowledge.

The vertical agreements that decrease the competition amongst distributors of the same brand will cause a negative effect on inter-brand competition[44]. The consumer's features that are industrial users or end users affect the intra-brand competition level. End consumers have no bargaining power due to acting individually, it is expensive to price research amongst distributors, and they have not sufficient knowledge about product market and sales conditions. All of them decrease the intra-brand competition amongst the distributors of the product that is to be purchased by end consumers. The competition amongst distributor's increases because of industrial consumers is professional, having powerful bargaining and knowledge. The vertical agreements that decrease the competition amongst distributors of the same brand will cause a negative effect on inter-brand competition.

Commission Notice[45], Article numbered 119/6 stated that in general, a combination of vertical restraints aggravates their negative effects. However, certain combinations of vertical restraints are better for competition than their use in isolation from each other. For instance, in an exclusive distribution system, the distributor may be tempted to increase the price of the products as intra-brand competition has been reduced. The use of quantity forcing or setting of a maximum resale price may limit such price increases.

In Turkish law, the Competition Authority perceives the intra-brand competition as reinforcing the current situation at supplier level, at distributor level regarding competition environment in market that creates dominant position, to treat

[44] BADUR, Emel, op. cit. 117
[45] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/22

equally other undertakings meeting the provisions of same and acceptable types, aimed to prevent settlements and decisions between undertakings that cause these negative results.

I.2.2.7. Ways Of Increasing And Decreasing The Competitiveness Of Vertical Agreements

Commission Notice[46], Article103 is stated that negative effects on the market that may result from vertical restraints which European Commission competition law aims at preventing are the following:

(i) Foreclosure of other suppliers or other buyers by raising barriers to entry, linking purchaser who is the other part of agreement to himself/herself exclusively by Supplier by means of vertical restraint channel will prevent rival supplier to work with purchaser eventually who is party to the agreement[47]. This effect will arise in case supplier has a certain power in the market. Removing the negative conclusion lies behind the decision of the Competition Authority mentioned above of giving harvester thresher distributorship by treating equally other undertakings except Trakmak Traktor ve Ziraat makinaları Tic. A.S that meet the same and reasonable conditions.

(ii) reduction of inter-brand competition between the companies operating on a market, including facilitation of collusion amongst suppliers or buyers; by collusion is meant both explicit collusion and tacit collusion (conscious parallel behaviour); Supplier or purchasers may restraint the inter-brand competition by signing agreements amongst themselves open or implicitly, oral or written thereby facilitating cooperation between them.

[46] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/21,
[47] COMANOR, W.S., FRECH, H.E.: "The Competitive Effects of Vertical Agreements", *American Economic Review*, 75(3), U.S.A., **(1985)** 539-546

(iii) reduction of intra-brand competition between distributors of the same brand; Limits that restraint the intra-brand competition in the markets where competition level is sufficient, restraints that restraint the intra-brand competition in the markets where inter-brand competition level is sufficient will not affect the competition level in markets so much[48]. On the contrary, as described in Commission Notice[49], Article 166, the agreements restraining intra-brand competition of the undertakings that will new enter such kind of markets facilitate the undertaking to penetrate market and create effect for increasing inter-brand competition in long term. Commission Notice[50], Article 6 is stated if there is insufficient inter-brand competition, the protection of inter- and intra-brand competition becomes important.

(iv) the creation of obstacles to market integration, including above all, limitations on the freedom of consumers to purchase goods or services in any Member State they may choose. Market intergration is a goal of Eurapean Commission competition policy. Commission Notice[51], Article 7 is stated that market integration enhances competition in the Community. The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreement or concerted practices that have as their direct or indirect object the restrictions relate to the territory into which or the customers to whom the buyer may sell the contract goods or services. Commission Notice, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/11, Article 49 is stated that hardcore restriction relates to market partitioning by territory or by customer[52]. This kind of agreements

[48] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op.cit. 17
[49] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/23
[50] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/3
[51] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/3

is considered excessive violation for the competition environment because it prevents the market integration. Vertical restraints also have positive effects except negative effects we have described. These positive effects are originated especially from increasing non-price competition by vertical restraints and providing improvements in service quality[53].

The problems described below might be able to be removed by the help of said vertical restraints.

1 – Entering new markets; Supplier who will enter market new with a new brand may bring a provision to its distributors to make special investments for the purpose of being recommended and known by the consumer. In that case, it may be required the recognition of exclusive area protection for the distributors.

2 – Undertaking's benefit from promotion investments of competitor; to solve a free rider problem. One distributor may free-ride on the promotion efforts of another distributor. This type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Bon-compete type restraints can help to overcome this situation of free-riding.

As described in Notice[54], Article 166, it is mentioned that in order to rising free rider problem in the pre-sale services at the same time the product should be new or technically complicated and high-priced at a certain level. In a case that one of these conditions is absent the consumer will not require to make investigation at different sales points regarding a product that not expensive or will not require to have pre-

[53] KARAKURT,A."*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*" op. cit.18
[54] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/23

sale service because he/she has sufficient information about old product that already purchased it.

According to the Commission's Notification the free-rider problem will arise in the limited conditions where promotion investment is not intrinsic to a certain brand and promotion investment is established at the sales point of purchaser.

3 – Distributor's benefit from the influence of image, advertisement and the capability of consumer attraction of another distributor. The belief that distributors distribute only quality products causes consumers to think that the quality of product sold is high also and hence affects the demand for product. The distributors who have not such an image on the eye of consumer will not require to make additional investments like creating himself/herself images because they will benefit from the title of distributor that owns image while selling the same product[55]. If product's image, distributor's image and price provide for the product to be recommended by consumers then exclusive distribution and selective distribution system arranged in agreement will provide said good will be brought to market only by the distributors that have certain characteristics for a limited period of time. Commission Notice[56], Article 116(3) is stated that such benefits are more likely with experience goods or complex goods that represent a relatively large purchase for the final consumer.

4- Guaranteeing the customer specific investments (Hold-Up Problem); sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular

[55] KARAKURT, A.,*"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op.cit.18
[56] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/23

requirement of one of his customer. The investor may not commit the necessary investments before particular supply arrangements are fixed.

An investment made by the suppliers considered to the relationship-specific when, after termination of the contract, it cannot be used by the supplier to supply other customers and can only be sold at a significant loss. An investment made by the buyer is considered to be relationship-specific when, after termination of the contract, it cannot be used by the buyer to purchase and/or use products supplied by other suppliers and can only be sold at a significant loss. An investment is thus relationship-specific because for instance it can only be used to produce a brand-specific component or to store a particular brand and thus cannot be used profitably to produce or sell alternatives.

It is not sufficient that investment to be only customer specific for guarantee the investment and allow vertical restraints. Thus investment must be a long-term investment that is not recouped in the short run. And the investment must be asymmetric; i.e. one party to the contract invests more than the other party. When these conditions are met, there is usually a good reason to have a vertical restraint for the duration it takes to depreciate the investment. Commission Notice[57], Article numbered 116/(4) is stated that the appropriate vertical restraint will be of the non-compete type or quantity-forcing type when the investment is made by the supplier and of the exclusive distribution, exclusive customer-allocation or exclusive supply type when the investment is made by the buyer.

5- Protecting know-how that is transferred to supplier or purchaser. Commission Notice[58], Article 116/(5) is stated that the specific hold-up problem that may arise in the case of transfer of substantial know-how. The know-how, once

[57] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/24
[58] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/24

provided, cannot be taken back and the provider of the know-how may not want it to be used for or by his competitors. In as far as the know-how was not readily available to the buyer, is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction. This would normally fall outside Article 81(1).

6 – Providing distribution network in optimal quantity and density, acquiring scale economy in distribution. Supplier may acquire scale economy in distribution and establish optimal distribution network by distributing its products with limited number of distributors. In that case, supplier may impose vertical restraints like selective distribution, exclusive distribution or quantity enforcing[59].

7 – Guaranteeing the credit given to other side of agreement by purchaser or distributor. Commission Notice[60], Article numbered 116/(7) is stated that the usual providers of capital (banks, equity markets) may provide capital Sub-optimally when they have imperfect information on the quality of the borrower or there is an inadequate basis to secure the loan. The buyer or supplier may have better information and be able, through an exclusive relationship, to obtain extra security for his investment. Where the supplier provides the loan to the buyer this may lead to non-compete or quantity forcing on the buyer. Where the buyer provides the loan to the supplier this may be the reason for having exclusive supply or quantity forcing on the supplier.

8- Quality Standardization; It is possible vertical restraints like quality standardization, single brand, selective distribution or franchise agreements to

[59] KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*" op. cit.26
[60] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/23,

increase the attractiveness of the product on behalf of end consumers by attributing certain measures to distributor regarding quality standard[61].

These justifications that make vertical restraints rational which are included in Guidelines on Vertical Restraints, Article 166 are not limited to articles mentioned above. In general, a combination of vertical restraints aggravates their negative effects. However, certain combinations of vertical restraints are better for competition than their use in isolation from each other. For instance, in an exclusive distribution system, the distributor may be tempted to increase the price of the products as intra-brand competition has been reduced. Commission Notice, Article numbered 119/(6) is stated that the use of quantity forcing or the setting of a maximum resale price may limit such price increases.

Commission Notice[62], Article 117 states that the case is in general strongest for vertical agreements of a limited duration which help the introduction of new complex products or protect relationship-specific investments. Commission Notice[63], Article 119/(9) declares that; the more vertical restraint is linked to investments which are relationship-specific, the more justification there is for certain vertical restraints. The justified duration will depend on the time necessary to depreciate the investment. In the case of a new product, or where an existing product is sold for the first time on a different geographic market, it may be difficult for the company to define the market or its market share may be very high. However, this should not be considered a major problem, as vertical restraints linked to opening up new product or geographic markets in general do not restrict competition. This rule holds, irrespective of the market share of the company, for two years after the first putting on the market of the

[61] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.21
[62] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/24
[63] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/25

product. Commission Notice[64], Article numbered 119/(10) applies to all non-hardcore vertical restraints and, in the case of a new geographic market, to restrictions on active and passive sales imposed on the direct buyers of the supplier located in other markets to intermediaries in the new market. Commission Notice[65], Article numbered 119/(8) declares that the more the vertical restraint is linked to the transfer of know-how, the more reason there may be to expect efficiencies to arise and the more a vertical restraint may be necessary to protect the know-how transferred or the investment costs incurred.

Commission specified that the period of vertical restraints that are implemented in the cases of "undertaking benefiting from the promotion investments of competitors, keeping know-how transferred to supplier or purchaser, providing distribution network in optimal quantity and density, acquiring scale economy in distributing and quality standardization" may be required to cover the period in which supplier continues to sell product to purchaser[66].

II.2.2.8. Vertical Agreements Oriented Competition Policy

Competition policy has been included in the list of Community activities set out in Article 3 since the inception of the Community in 1958. It was embedded in the Treaty right from the start as a set of wider policy goals oriented towards the objective of European economic integration[67]. Competition policy is basically applying rules to make sure that companies compete each other and, in order to sell

[64] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/26
[65] EC Commission, Guidelines on Vertical Restraints, OJ (13.10.2000), C 291/25
[66] KARAKURT, A.,*"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.22
[67] JONES,A.,SUFRIN, B.: "*E.C. Competition Law Text, Cases and Materials*", Oxford University Press, Volume 4., U.K., **(2001)** 32

their products, innovate and offer good prices to consumers[68]. Sometime, companies, Member States or other bodies may be tempted to take action to reduce competition. Preserving well-functioning product markets therefore requires competition authorities to review, prevent or prosecute any such anti-competitive behaviour. One of the roles of the European Commission is to perform this function in the European Union[69].

We mention theoretical studies that are effective to be aroused Vertical Agreements oriented competition policy, below;

Bork, Posner and Telser who made studies on effects of vertical agreements and are leading representatives of the idea known as Chicago School have defended an intervener vertical restraint policy to the small extent possible. Chicago School thinks that vertical restraints preclude illegal price implementations of retailers, optimize the investment level, and minimize the transaction costs[70].

Another important idea of Chicago School is that vertical agreements will not change the horizontal market structure by the methods like increasing capital required to enter market.

Today that there are different thoughts towards vertical restraints widely accepted idea that these restraints increase the efficiency in case certain situations arise, but there is also the possibility to cause results that adversely affect the competition. It is not seem possible to evaluate the vertical restraints positively or negatively under a single roof theoretically.

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[68] "What's competition Policy?" European Commission Competition, Delivering For Consumers, http://ec.europa.eu/competition/consumers/index_en.html, (10. 11.2009)

[69] "What's competition Policy?" European Commission Competition, Delivering For Consumers, http://ec.europa.eu/competition/consumers/what_en.html (10.11.2009)

[70] The studies of these writers were quoted in KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar* " op. cit.23

Different restraints in vertical relationship has to be subjected to distinction, each restraint should be assessed within conditions of such vertical relationship.

According to Tirol' idea; theoretically the only defensible way of vertical restraints is "rule of reason". Many vertical restraint may increase or decrease comfort depending on conditions. Legality or illegality cannot be "per se" validated. This approach bears a heavy burden for competition authorities. A careful classification for theorists and it gains importance to determination in which ambiences the vertical restraints have the possibility to decrease the social welfare[71].

According to the Kay's argument there are few general rules which have applicability to vertical restraints. The same restraints may be profitable or may be effective just in reverse direction, in this respect the assessment due to circumstance is an unavoidable conclusion. The best approach is to observe conclusion elementarily instead of observe the type and first effect[72]. The important reforms related to the application of commission competition rules have been carried out thus the significant amendments had been done in respect of the vertical agreements. The European Commission's Annual Reports on Competition Policy[73] give an overview of the main developments in EU competition policy and major enforcement actions. According to 2008 Annual Report on competition policy; in the field of state aid, the Commission has moved towards a more economic effects-based analysis of the support measures notified by Member States through the adoption of a general block exemption regulation and the introduction of a balancing test. The Commission also adopted a White Paper on damages actions for breach of

[71] The studies of these writers were quoted in KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar* " op. cit.23

[72] The studies of these writers were quoted in KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar* " op. cit.30

[73] The European Commission's Annual Reports on Competition Policy shall be accessible at , http://ec.europa.eu/competition/index_en.html

the EU antitrust rules. The White Paper represents a step forward to overcoming the obstacles currently encountered by victims of competition problems from receiving effective compensation. Pursuing its fight against cartels, the Commission has introduced a mechanism to settle cartel cases with the agreement of the parties involved, through a simplified procedure, which allows to deal more quickly with cases and free up resources to pursue other cartel cases and open new investigations. For the first time, the 2008 Annual Report includes a special chapter on a topic considered to be of particular importance in the field of competition policy. The topic chosen is "Cartels and consumers". In 2008, the Commission fined 34 undertakings in seven cartel decisions. In cases such as the Banana cartel, consumers directly suffered from higher prices until the Commission broke up the price fixing cartel. According to Commission services estimates, the harm to the economy caused by the cartels fined by the Commission between 2005 and 2007 amounts to at least €7.6 billion. In the fight against abuses of dominant market positions, the Commission adopted in 2008 important decisions in the energy and IT sectors. As a follow up to the Commission's energy sector competition inquiry and after sustained investigations by the Commission, the German energy company *E.ON* voluntarily offered to divest significant parts of its business to address the concerns raised in the course of the investigation. This will allow new competitors to enter the German energy market and offer more choice to consumers in Germany. The separate management of the transmission infrastructure will also improve the functioning of the European energy market by providing equal access to all players. Also in 2008, the Commission imposed a second penalty payment of €899 million on *Microsoft*

for its non-compliance with a 2004 Commission decision requiring it to share essential interoperability information with its rivals on reasonable terms[74].

II. EXCLUSIVE VERTICAL AGREEMENTS

III.1. AN EXCLUSIVE VERTICAL AGREEMENT

The vertical agreement in which the main provision is to make business exclusively with the other party of the agreement for purchasing, selling or reselling of a good or service between two or more undertakings that are active in different levels of the production or distribution chain is called "exclusive vertical agreement". Two major elements are demanded. First the agreement must be vertical and second there must be a requirement for exclusivity. "**Single branding agreement**" which results in purchaser's purchasing all his needs in a certain market from just a single provider is the most important "**exclusive vertical agreement**" in which the provider enters into the obligation of selling the goods or services of the agreement to only one purchaser[75].

III.1.1. Vertical Agreement

These are the agreements or adaptive behaviours related to purchasing or selling of certain goods by the parties and contracted between two or more business undertakings in different rings of the production and distribution chain according to the true nature of the agreement. The basis in this definition is that the parties must not be competitors with each other.

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[74] "Competition Commission Publishes 2008 Annual Report on Competition Policy" , Europa Press Releases Rapid, Brussels, 19th August 2009 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1241&format=HTML&aged=0&language=EN&guiLanguage=en , (01.11.2009)

[75] KARAKURT, A.: "Küresel Yarı ta Rakibin Maliyetini Arttırma", opt.cid. 28

III.1.2.Exclusivity Condition

The concept of exclusivity is the combination of three principles. I am going to define these three principles below.

(i) The obligations of the purchaser and the provider; With regard to Block Exemption Communiqué on Vertical Agreements 2002/2 the term provider is defined as "the undertaking who is party to the agreement and which sells to the purchaser the goods or the services which are the subject of the agreement" and the term purchaser is defined as "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". In the exclusive agreement between the provider and the purchaser there can be an obligation for one of the parties to do or not to do on an activity.

(ii) Purchasing, selling or reselling of a good or a service must be the subject.

To make business with exclusively the other party of the agreement; the obligation imposed on the purchaser or the provider depends on the principle to purchase goods from or sell goods only to the other party of the agreement in purchasing, selling or reselling of the goods or services according to the nature of the agreement[76].

III.2. TYPES OF EXCLUSIVE VERTICAL AGREEMENT

III.2.1. Single Branding Agreements

[76] KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*" op. cit.34

Single Branding Agreement is an obligation which brings limitation of non-price competition as result of provider's encouraging the purchaser to buy the goods or the brand of a single producer.

"In the 138th paragraph of the Commission Statement; non-compete arrangements formed by the obligation and incentive plans that cause the purchaser's purchasing all his needs in a certain market are identified as "single branding agreement"[77].

The obligation is imposed on the purchaser to purchase the goods or services that are subject of the agreement exclusively from the provider or the third persons addressed by the provider. Besides, through single branding agreement, the purchaser stipulates not to produce, sell or resell any products rival to the goods or services that are subject of the agreement. If the provider applies a loyalty rebate to the purchaser, it results with purchaser's supplying his needs exclusively from one provider by arranging incentive plans like target rebate, this agreement must be accepted as single branding agreement.

In single branding agreement which results that the purchaser supplies all his needs in a certain market just from one provider, as the exclusionist right owner, provider, enchains the purchaser who activates in the sub-market, it prevents the competitive providers from reaching the purchasers in the sub-markets. Single branding agreements contain "**non-compete arrangements**" formed by the obligation and incentive plans that cause the purchaser's purchasing all his needs in a certain market. "**Exclusive Purchasing Agreements**" containing non-compete obligations also have a market closing effect[78]. Single brand agreements prevent the

[77] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.35

[78] KARAKURT,A.: "Ekonomik ve Hukuki Açıdan Piyasa Kapama Etkisi", Competition Authority Press, Ankara, (2005)

competition between the brands by reducing the price elasticity of demand as it forbids the purchasers' supply of goods from non-contractual providers.

Single branding agreement also has effects to increase the competition. If the distributor sells and resells goods from more than one brand, these brands will increase the sales volume of the distributor by making promotion activities. The total cost of the promoted brand will increase. In such a situation, if the promotion activities are not peculiar to the brand or if the brand choice of the final consumer can be directed to another brand with the guidance of the distributor, the distributor who makes distribution of more than one good can direct the customer to the competitive goods that do not have any promotion. This is a problem of sharking. As the total cost of the good which does not have a promotional activity is going to be lower, customer can prefer this good. In this situation the provider who makes promotional activities is going to sign a single branding agreement with the distributor to prevent the competitive goods from benefiting promotional investments. In this way, it is going to solve the decrease in its market and play an important role to increase its investment level up to an optimum level.

II.2.2. Exclusive Dealing Agreements

The term "requirements contract" would be used instead of exclusive dealing. This concept is generally come across in the applications of Competition Law of the USA. The agreement in which the purchaser supplies its needs exclusively from one provider in a certain period of time or the obligation for not supplying any goods from its competitors imposed on the supplier is called exclusive dealing agreement[79].

[79] KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*" op. cit.40

European Union Commission Guidelines on Vertical Restraints announcement item 119 identifies exclusive dealing agreement as the agreements which results that one of the parties supplies the whole or almost whole of its need from the other party as the nature of the agreement clauses or the effects in the application of the agreement.

Exclusive dealing agreements can have negative effects on the order of competition like preventing competitive providers' from having business with the purchasers who are parties in the vertical agreements, having loyalty to the provider and establishing a ground for extreme pricing.

III.2.3. Exclusive Purchasing Agreements

In exclusive agreements, purchaser has to buy the goods or the serviced that are the subject of the agreement exclusively from one provider. Nevertheless, it cannot be prevented that the provider can sell to the other independent purchasers.

As the minimum purchasing obligation does not impose the obligation for buying whole of the goods or the services from the provider but a certain amount of the goods or services that are the subject of the agreement, it is accepted as exclusive dealing agreement.

Exclusive dealing agreements are compete-reducing agreements in brand as they only impose the obligation on the purchaser to purchase the goods or the services that are subject to the agreement from the provider. Thus, as the purchaser is free to purchase or distribute the competitors' goods or services, the mentioned type of agreement as a rule does not negatively affect the competition level between the brands[80].

[80] KARAKURT,A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*" op. cit.41

As Alper Karakurt states, in application for the exclusive dealing agreements there is also an obligation of non-compete. In this situation while the purchaser supplies the good or the service that is subject of the agreement from just one provider, its production, selling or reselling of the competitive goods or services that are subject of the agreement is going to be forbidden at the same time. In this way, both the competition in-brand and between brands is going to be restricted.

In many EU member states brewers conclude agreements with outlets such as public houses, which, in return for certain benefits from the brewer, oblige the outlet to purchase beer (and perhaps other drinks) exclusively from the brewer(or another named supplier). This obligation is frequently accompanied by a non-compete provision preventing the sale of competing products from the outlet. In many Member States the problems associated with such agreements result from Networks of similar agreements being operated by all brewers on the market. In practice, this may mean that it is extremely difficult for a new brewer to gain Access to the market of for any brewer to increase its market share. Access to retail outlets is foreclosed[81].

III.2.4. Exclusive Distribution Agreement

Exclusive distribution agreement can be defined as determining just one distributor for a region or for a customer group for the distribution of the goods by the provider.

Producers want to sign exclusive distributor agreement especially under conditions when there is an uncertainty over the market. In this way the producers

[81] JONES,A., SUFR, B.: op. cit.167

assures the price of the good at an optimal level depending on “demand” and “cost” by giving sole trading right to each of the distributor[82].

III.2.5. Exclusive Customer Allocation Agreement

Commission Notice, Guidelines on Vertical Restraints, Article numbered 172 declares that the supplier, agrees to sell his products only to one distributor for resale to a particular class of customers. At the same time, the distributor is usually limited in his active selling to other exclusively allocated classes of customers.

Exclusive distribution and exclusive customer allocation can be arranged in the same agreement. In this situation, more than one exclusive distributor will be appointed to a region but they will have exclusive customer groups apart from each other. So the operation of the distributor system will be kept by preventing the distributors from making active sales to each other’s customers.

III.2.6. Exclusive Supply Agreement

In Rome Treaty Article 81(3) and Article 1 (c) of the Commission Regulation on Vertical Agreements and Its application to the suitable Activities 2790/1999 (EC) dated 22 December 1999, it is defined as provider’s selling the products or services determined in the agreement to only one purchaser in the community for the aim of a certain use or reselling. Exclusive supply as defined in Article 1(c) of Block Exemption Regulation is the extreme form of limited distribution.

Article 202 of the Commission Notice on the Guidelines on Vertical Restraints, declares that in the exclusive supply agreement it is specified that there is only one buyer inside the Community to which the supplier may sell a particular final product.

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[82] KARAKURT, A., “*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar*” op. cit.42

For intermediate goods or services, exclusive supply means that there is only one buyer inside the Community or that there is only one buyer inside the Community for the purpose of a specific use. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

Commission has the idea that exclusive supply obligation includes the direct or indirect responsibilities resulting with the provider's selling to a single purchaser[83].

III.2.7. Tying Agreement

Tying exists when the supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier or someone designated by the latter. The first product is referred to as the tying product and the second is referred to as the tied product. If the tying is objectively justified by the nature of the products or commercial usage, such practice may constitute an abuse within the meaning of Article 82(1). Article 81 may apply to horizontal agreements or concerted practices between competing suppliers which make the sale of one product conditional upon the purchase of another distinct product. Commission Notice, Guidelines on Vertical Restraints, Article numbered 215 declares that tying may also constitute a vertical restraint falling under Article 81 where it results in a single branding type of obligation for the tied product.

III.3. VERTICAL AGREEMENT CATEGORIES IN RESPECT OF THEIR EFFECTS

In EU Competition Law vertical agreements or vertical restriction are not evaluated in respect of their shapes but their conditions in the market. It is possible

[83] KARAKURT, A., "*Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.44

to categorize vertical restriction in four group in respect of their effects on the market and types of agreements in each groups has effects on competition level both in brand and between brands. The effects of vertical restrictions can show difference according to the market structure.

The agreements restricting the competition can contain several or all of these four groups.

III.3.1. Single Branding Group

The common point of the vertical agreement types consisting of a single brand group must contain rules resulting with the purchaser's purchasing of a good or a service from a single provider[84]. These rules in accordance with the contracted agreement evaluates the stimulation systems for the purchaser or force for quantity or affiliation agreement restrictions in a single brand group and imposes obligation on the purchaser to purchase the goods or services from a single supplier and non-compete responsibility for supplying competitive goods or services that are the subject of the agreement from a single provider.

Exclusive Purchase Agreement, Single Branding Agreement and Exclusive Dealing Agreement are from exclusive vertical agreements and evaluated in this group.

Its basic effects on competition: (1) Other suppliers in that market cannot sell to the particular buyers and this may lead to foreclosure of the market and (2) as far as the distribution of final goods is concerned, the particular retailers will only sell one brand and there will therefore be no inter-brand competition in their shops (no

[84] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.48

in-store competition)[85] (3) it makes market shares more rigid and this may help collusion when applied by several suppliers, and (4)in the case of tying, the buyer may pay a higher price for the tied product than he would otherwise do. Article 107 of the Guidelines on Vertical Restraints, declares that all these effects may lead to a reduction in inter-brand competition.

The reduction in the competition between brands can be eliminated through the existence of strong ex-ante competition between the providers to get single branding agreements; but as this period gets longer, it is not going to be possible for this effect to eliminate the absence of competition between the brands completely[86].

III.3.2. Limited Distribution Group

Commission Notice, Guidelines on Vertical Restraints, Article numbered 109 declares that under the heading of limited distribution come those agreements which have as their main element that the manufacturer sells to only one or a limited number of buyers. It comes across in application as the restriction of the number of purchasers or type of purchasers included in a certain region or consumer groups. This group includes the enforcement of demand and quantity exclusive on the provider; herein the agreement of responsibility between the provider and the purchaser results in provider's selling to a certain market or basically to a single purchaser[87]. The number of the purchaser is restricted in three ways. Each land that a single purchaser will distribute is determined as a geographical region and selling of a distributor in a region to the distributors in the other regions is forbidden. In the second way, the consumers that the distributors can sell are categorized and the

[85] PEEPERKORN.L.: *"Dikey Anlaşmaların İktisadi Boyutu"* Translated by BA• I•,M., Competition Review, No.10,Ankara, *(2002)* 81
[86] PEEPERKORN.L., ibid.81.
[87] PEEPERKORN.L, ibid.80

number of the distributor to sell each consumer group is restricted. Lastly, stipulation of some specialties for the purchasers to make sale by the provider is another method to restrict the number of distributors[88].

Exclusive distribution, exclusive customer division agreements, exclusive sales agreements and selective distribution agreements are included in this group of agreements. The agreements except from selective distribution agreement are amongst exclusive vertical agreements.

Commission Notice, Guidelines on Vertical Restraints, Article numbered 110 declares that there are three main negative effects on competition; (1) certain buyers within the market can no longer buy from that particular supplier, and this may lead in particular in the case of exclusive supply, to foreclosure of the purchase market, (2) when most or all of the competing suppliers limit the number of retailers, this may facilitate collusion, either at the distributor's level or at the supplier's level, and (3) since fewer distributors will offer the product it will also lead to a reduction of intra-brand competition. In the case of wide exclusive territories or exclusive customer allocation the result may be total elimination of intra-brand competition. This reduction of intra-brand competition can be turn lead to a weakening of inter-brand competition.

III.3.3. Resale Price Maintenance Group

In resale price group, the main element is the agreements/restrictions that a purchaser cannot resell above or below a certain price or include obligation for selling a determined target price[89]. Commission Notice, Guidelines on Vertical

[88] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.49
[89] KARAKURT, A., *"Avrupa Topluluğu ve Türk Rekabet Politikasında Münhasır Dikey Anlaşmalar"* op. cit.50

Restraints, Article numbered 111 declares that under the heading of resale price maintenance come those agreements whose main element is that the purchaser is obliged or included to resell not below a certain price, at a certain price or not above a certain price. Even the maximum and recommended resale prices have a small possibility to make a negative effect theoretically, it can be interpreted as determining the stable resale price if it is applied by all the distributers[90].

Commission Notice, Guidelines on Vertical Restraints, Article numbered 112 declares that there are two main negative effects of resale price maintenance on competition: (1) a reduction in intra-brand price competition, and (2) increased transparency on prices.

III.3.4. Market Partitioning Group

Commission Notice, Guidelines on Vertical Restraints, Article numbered 113 declares that under the heading of market partitioning come agreements whose main element is that the buyer is restricted in where he either sources or resells a particular product. This component can be found in exclusive purchasing, where an obligation or incentive scheme agreed between the supplier and the buyer makes the latter purchase his requirements for a particular product, for instance beer of brand X, exclusively from the designated supplier, but leaving the buyer free to buy and sell competing products, for instance competing brands of beer. It also includes territorial resale restrictions, the allocation of an area of primary responsibility, restrictions on the location of a distributor and customer resale restrictions.

Commission Notice, Guidelines on Vertical Restraints, Article numbered 114 declares that the main negative effect on competition is a reduction of intra-brand

[90] PEEPERKORN.L.,op.cit.81

competition that may help the supplier to partition the market and thus hinder market integration.

CHAPTER II

EXCLUSIVE VERTICAL AGREEMENTS AND EU LAW: ARTICLE 81 OF THE TREATY OF ROME AND THE COMMISSION REGULATION NO. 2790/1999

I. TREATY OF ROME ARTICLE 81

I.1. THE SCOPE OF TREATY OF ROME ARTICLE 81

The application of the Competition Law on the decisions of enterprise unions, concerted action or the agreement between the enterprises depends on whether they have the qualification to affect or to be able to affect the competition order[91].

The articles 81 and 82 of the Agreement which founded the European Community are the provisions which define the main rules in competition policy application. The agreement between more than one party, concerted action and the decisions of the union and the provisions regarding the restriction of the competition take place in the article 81[92].

The purpose of Article 81[93] EC is to preclude restrictive agreements between independent market operators, whether horizontal or vertical.

The framework of the agreement has been defined by the decisions of the Commission and Court of Justice. In the Franco-Japanese Ballbearing decision[94], according to the Commission, in the application of the agreement provisions do not require the presence of all the elements needed to establish an agreement with regard

[91] AKINCI, A., opt. cid.185
[92] AKINCI, A., op. cit.35
[93] Old Article 85th
[94] Re Franco-Japanese Ball bearing Agreement , OJ (1974) L 343/19, (1975) C.M.L.R

to private law. The declaration of one party stating that it will restrict its actions with its own will is also enough for the application of the agreement provisions. In Quinine Cartel decision[95], it is stated that the case named as gentleman's agreement will be in the scope of the agreement which is indicated in the 1st paragraph of the Article 85. In National Panasonic case[96], though there is legally not a valid agreement between the Panasonic Company and the authorized dealers, the consensus between the Panasonic Company and the dealers regarding the restriction of the competition has been accepted as an agreement by refusing the defenses of the cases like concerted action[97].

The Article 81 consists of three paragraphs and when we separately examine the arrangements in the paragraphs;

(i) The Prohibition: Article 81 (1) sets out prohibition. It prohibits collusion between undertakings which has as its object or effect the prevention, restriction or distortion of competition within the common market and which may affect trade between Member States. It sets out examples of such preventions, restrictions or distortions. The list is illustrative, not exhaustive. For the prohibition in Article 81 (1) to apply the following must be established[98]:

- The existence of undertakings,
- Collusion between those undertakings,
- Collusion which has as its object or effect the prevention, restriction or distortion of competition,
- An effect on trade between Member States, and

[95] Re Cartel Quinine, OJ (1969) L 192/5, (1969) C.M.L.R. D42,D59
[96] Community v. National Panasonic (UK) Ltd., OJ (1982) L 354/28, (1983) 1 C.M.L.R. 497
[97] AKINCI, A., op. cit.
[98] JONES, A., SUFRIN, B. , op. cit..86

- An appreciable effect on both competition and trade[99].

The phrase "inter-member states" has great significance as it underlines the areas of jurisdiction of the Community Law and the Member States Law[100].

(ii) Nullity: Although Article 81(2) specifically states that an agreemnet, decision, or concerted practice prohibited by Article 81(1) is automatically void, the ECJ has held that nullity affects only the clauses in the agreement prohibited by the provision[101]. The agreement as a whole is void only if the prohibited clauses cannot be severed from the remaining terms of the agreement. According to Regulation 17 (1959-62) OJ Spec. Ed.87, Article numbered 1 declares that the nullity is automatic and is not dependent upon any prior decision to that effect.

(iii) Exemption: Agreements, decisions, and concerted practices may be exempted from the prohibition of Article 81(1) under Article 81(3). Exemption may be granted to an agreement, decisions, and concerted practices which fulfil the four criteria (two positive and two negative) set out in Article 81(3). Those criteria are; any agreement, decision, and concerted practices which contributes to improving the production of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,

- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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[99] Art. 81 does not provide that the effect on competition and trade must be an appreciable one. The Court of Justice (ECJ) has, however, held that an agreement falls outside the prohibition if its effect on the market is insignificant

[100] KERSE, C.S.:"*E.C. Antitrust Procedure"*, 4th Edition, London, **(1998)** 14

[101] Case 56/65 Societe La Technique Miniere v. Maschinebau Ulm GmbH (1966) ECR 234, (1966) CMLR 357

Exemptions are granted either to individual agreements or to categories of agreements by way of block exemptions. The Commission currently has sole power to declare Article 81(1) inapplicable pursuant to Article 81(3)[102] .

I.2. THE INTERPRETATION AND APPLICATION OF ARTICLE 81(1)

I.2.1. Being Affected of the Trade Between the Member States

The Treaty of Rome has been drawn up in four languages which are English, German, French and Italian. The words used for the term "affect" in these languages caused different results to appear while interpreting the article. In the Bosch case, it was stated for the first time that the ambiguity resulted from the difference between the texts and the meaning that will be given to the word "affect" need to be analyzed with regard to the aim and soul of the Treaty of Rome. The aim of the Treaty of Rome is to protect the trade between the member states from all types of interventions. As it aimed at enabling the development of the trade in its normal and natural course, it decided that it needs to be searched whether the affection is negative or positive[103]. In Windsurfing International case[104], as the agreement which affects the trade between the member states restricts the competition, it was found to be sufficient to violate the Article 81(1).

In AEG-Telefunken v. Commission case[105], ECJ stated that whether the trade between the member states is not currently present or is low does not mean that the trade volume will not increase in the future. It accepted in its decision that when the

[102] JONES,A.SUFRIN,B.,op. cit.87
[103] Case 13/61, Robert Bosch GmbH et al. v. Kleding-Verkoopbedrijif de Geus en Uitdenbogerd, (1962) 1 CMLR
[104] Case 193/83 Windsurfing International Inc v. Commission (1986) ECR 611, (1986) 3 CMLR 489,95
[105] Case 107/82 AEG-Telefunken v. Commission (1983) ECR 3151;(1984) 3 CMLR 325, 60

agreement is evaluated in terms of its effects to the potential competition, it has the chance to affect the trade between the member states.

In Vereening van Cementhandelaren case[106], as the agreement of determination of the concrete price made by the local producers between themselves in German concrete market is applied to the whole member state lands, it would create an effect of disintegration of the markets in national sense and thus it decided that it blocks the economic integration and it protects the home production and it affects the trade between the member states.

In Pronuptia case[107], it assumed that the franchise agreements that cause disintegration between the franchisees or between the franchisee and the franchiser affect the trade between the member states though the related enterprises operate in the same member state.

I.2.2. The Agreement's Feature to Block, Restrict or Destroy the Competition; Aim and Effect Aspects

In order for the agreement to get affected from article 81(1), it must have a blocking, restrictive or ruining aim or effect in the common market. We have to define the term "agreement" mentioned here. For the presence of an agreement, it is enough for the enterprises to put their common purpose forward in a definite way regarding their behaviors in the market[108]. The statement of common purpose does

[106] Case 8/72 Vereeniging van Cementhandelaren v. Commission (1972) ECR 977, (1973) CMLR 7,29

[107] Case 161/84 Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgalis (1986) ECR 353, (1986) 1 CMLR 414,26

[108] Case T-7/89 SA Hercules Chemicals NV v. Commission (1991) ECR II-1711, (1992) 4 CMLR 84,2

not have to be in a legally binding way[109]. This way of statement can be oral, besides it can be signed or unsigned[110].

In order to determine this situation, firstly it should be analyzed whether the aim of the agreement is to restrict the competition or not; if the aim is not to restrict the competition, then, as a second step, it should be examined whether the agreement restricts the competition in its effect aspect.

In ECJ VdS case[111], in the occasion that the aim of the agreement is to restrict the competition, it decided that Commission does not also have to show its negative effects over the competition.

In order for the agreement to violate the article 81(1), the agreement must be subject to de minimize analysis and it must affect the trade between the member states as well as it must have an aim or effect of restricting the competition.

Both the Commission and ECJ were not contented with examination of the present effects of the agreement in its first applications regarding the article 81; at the same time, they considered the possible effects of the mentioned agreement that can occur in the future[112].

I.2.3. The Ruining Of the Competition In A Perceivable Way

According to the Court of Justice, the rate which shows how much the agreement affects the trade changes due to their own conditions of each circumstance.

[109] Case 41/69 ACF Chemiafarma NV v. Commission (1970) ECR 661, 106-114
[110] Case 234/83 SA Binon-Cie v. SA Agence et messageries de la presse (1985) ECR 2015, (1985) 3 CMLR 800, 17
[111] Case 45/85 VdS v. Commission (1987) ECR 405, (1988) 4 CMLR 264, 39
[112] KARAKURT,A,,"Avrupa Toplulu• u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op.cit.63

The first one of the criteria that is used in determining the degree of affection has been put forward in Maschinenbau Ulm case[113]. The Court of Justice also stated that the agreement should be evaluated within real market conditions[114].

The second criteria that is used to determine the degree of affection is the evaluation of the market features where the agreements will be effective along with the market shares of the parties. The Court of Justice compared the big size of the Holland sugar market and the sales that are made within the framework of the concerted action by the enterprises that are members of the cartel and it decided that the Holland sugar market got dramatically affected from this[115].

Together with the subjective criteria mentioned above, objective criteria have also been brought to the determination of the noticeability by the Commission decisions. These objective criteria were brought to the Völk case[116] of ECJ for the first time; it was decided that every agreement that provides the conditions of the article 81(1) of the Treaty of Rome will not be within the scope of general prohibition, de minimis doctrine is valid, in other words, the agreement must create an effect of ruining the competition in a perceivable way. This case is the first decision in which "de minimis" rule was accepted by ECJ.

The Commission has lastly issued De Minimis Notice[117] that went in effect at the end of 2001 by creating criteria regarding whether an agreement will be evaluated as a violation of competition within the scope of article 81(1) or not. According to the de minimis doctrine which is also accepted by the Court of Justice,

[113] Case 56/65 Societe Technique Miniere v. Maschinenbau Ulm (1966) ECR 235, Cases 56 and 58/64 Etablissement Consten Sarl and Grundig-Verkaufs GmbH v. Commission, (1978) ECR 131
[114] AEG v. Riechermann (1972) OJ L 143/39,41
[115] Case 40/73 CooperativeVereniging Suiker Unie UA v. Commission (1976) ECR 1663
[116] Case 5/69 Fanz Völk v. Vervaecke (1969) ECR 295, (1969) CMLR 273
[117]Commission Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (De Minimis), OJ (2001) C 368/13

an agreement's being out of the scope of Competition Law can be possible when its effect subject to trade is in an imperceptible level[118].

While evaluating an agreement within the scope of "de minimis" rule, ECJ evaluates by looking at the size and power of the enterprises in the market and the structure of the market.

I.3. ARTICLE 81(3) AND INDIVIDUAL EXEMPTIONS PROCEDURE

The exception of invalidity by itself, which is predicted in the article 81(2) for the concerted actions, decision and agreement that restricts the competition, whose borders were determined by the article 81(1), is the provision of exemption that is indicated in the R. A. article 81(3). In the 1st paragraph of the article 81, while it is stated that the agreements which affect the trade in a restrictive way are forbidden, it is also decided in the 3rd paragraph of the same article that some activities that restrict the competition can be permitted.

Exemptions can be granted individually or to groups or categories of agreements. Agreements which comply with the conditions set out in the Community block exemptions are automatically exempted from Article 81(1) without the need for notification. An agreement which appears to infringe Article 81(1) and which does not fall within a block exemption must, as a general rule, be notifies to the Commission before it can qualify for exemption.

Regulation 17(1959-62) OJ Spec. Ed. 87, Article numbered 9(1) declares that the Commission has the exclusive power to grant exemptions. The Commission does not share its authorization with member states or competition authorities regarding the exemption.

[118] AKINCI, A., op. cit. 195

If the agreement provides four conditions that are predicted in the article 81(3), the exemption will only be exempted from the provision of article 81. The agreement cannot be exempted from the prohibitions of other competition regulation and the article 82.

In Marta Hachette case, the Court of First Instance stated that it would be impossible for any agreement, which restricts the competition that provides the provisions of the article 81(3), not to take exemption[119].

The enterprises which demand personal exemption are responsible for proving that the provisions of article 81(3) are provided. The Commission expects from the parties to show that the positive sides of the agreement will not be possible to appear in competitive conditions[120].

I.3.1. Satisfaction of the Four Criteria Set Out In Article 81(3)

I.3.1.1. Criterion 1: The Agreement Must Lead To an Improvement In The Production Or Distribution Of Goods Or The Promotion Of Technical Or Economic Progress

In order to prove that there is a contribution to the development, it must be put forward that there are objective advantages which have the qualification to compensate the negative sides that the agreement creates in the competition area[121]. In order for a development to occur within the scope of the article 81(3), the benefits of the agreement must be more than the disadvantages which can restrict the competition[122]. Though the term "goods" is used in the letter of the article, the

[119] Case T-17/93 Matra v. Commission (1994) ECR II-595, 85
[120] European Commission , XIV the Report on Competition Policy, Brussels-Luxembourg, 1984, 150
[121] Case T-7/95 Langnese-Iglo v. Commission, (1995) ECR II-1533, (1995) 5 CMLR 602, 180
[122] Case 45/85 VdS v. Commission, (1987) ECR 405, (1988) 4 CMLR 264, 61

agreements which provide development regarding to the supply of services are also evaluated within the scope of exemption.

Regarding the benefits that result from economical or technical development or from the development in production and distribution of the goods, we can give the examples below:

Launching a new or a more advanced product into the market or keeping the situation where the present product is connected to the ongoing cooperation, presenting a wider product range to the consumers or shortening the delivery time of the product to the consumers, replacing an old technology with more efficient production techniques, extending a present high-technology in the Community or the supply of the faster spreading of this technology are evaluated as "benefit".

The agreements which serve for common weal and Community interest also make economical contribution[123]. Thus, the Court of First Instance, in the Metropole Television decision[124], stated that the Commission must consider the aspects about public interest while giving exemption. In Binon v. AMP case[125], ECJ considered that the agreement must give the readers a great freedom of choice in terms of newspaper periodicals.

I.3.1.2. Criterion 2: Allowing Consumers a Fair Share of the Resulting Benefit

The Commission didn't place objective criteria describing the concept of "fair share".

[123] KARAKURT, A., "Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla•malar" op. cit.72
[124] Case T-528/93 Metropole Television v. Commission (1996) ECR II-649, (1996) 5 CMLR 386, 116-118
[125] Case 243/83 Binon v. SA Agence et messegeries de la presse (1985) ECR 2015, (1985) 3 CMLR 800, 46

Providing that the agreement obeys the first condition of the article 81(3), its benefits can be direct or potential to the consumers.

Some benefits which are directly reflected to the consumers, such as flexible and consistent supply, environment protection, meeting the consumer preferences, launching more advanced products to the market, increase in the service quality, can be given as example to the concept of taking "fair share".

In order to provide this provision, the concept of consumer who must take fair share from the agreement includes not only the final consumer but also all the enterprises that operate in any level of the production or distribution which make use of the related good or service[126].

The disadvantages of some agreements can put the benefits of that agreement to background. For example, the agreement types, which eliminate the product preferences of the consumers[127] or prevent the enterprises from reflecting their cost advantage on the consumers, are evaluated within this concept[128].

I.3.1.3. Criterion 3: Indispensable Restrictions

An agreement which satisfies the first two positive criteria set out in Article 81(3) will not be exempted unless the restrictions contained within it are indispensable to the achievement of the benefits of the agreement[129].

According to the article 81(3), the restriction of competition mentioned in the agreement must not include more than one restriction which is compulsory for the created benefit to occur.

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[126] KARAKURT, A., "Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op. cit..72
[127] Case T-7/95 Langnese-Iglo v. Commission (1995) ECR II-1533 (1995) 5 CMLR 602, 124
[128] KARAKURT, A., "Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op.cit.73
[129] JONES/SUFRIN,op.cit.197

For example, when compared with the benefits that the cooperation will create, if the cheese producer cooperation, which deals with the production of the rennet material used in cheese production and which is nearly in a position of monopole in the market, brings an exclusive purchase obligation to its members which makes them to buy their whole rennet need only from itself, this situation was evaluated as a restriction beyond the compulsory[130].

In Nungesser case, ECJ didn't give exemption to the agreement that provides absolute terrestrial protection in the distribution of the corn seed on the account of the fact that the competition is restricted beyond the compulsory in order to contribute the technical or economical development or in the production or the distribution of the goods[131].

I.3.1.4. Criterion 4: The Agreement Must Not Afford The Parties The Possibility of Substantially Eliminating Competition

The last requirement is that the agreement as a whole must not lead to the substantial elimination of competition. The aim of this provision is the assurance of the continuation of the real and potential competition in the market where the restriction of the competition is partially permitted[132].

A definition of the relevant market (product and geographic) will therefore be an essential prerequisite to a determination under this fourth criterion. Broadly, the barriers to entry, the size and strength of competition and the larger the combined market share of the parties involved, the more like that competition will be found to have been eliminated.

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[130] Case 61/80 Cooperatieve Stremsel en Kleurselfbriek v. Commission (1981) ECR 851, (1982) 1 CMLR 240, 18
[131] Case 258/78 Nungesser v. Commission (1982) ECR 2015 (1983) 1 CMLR 278, 77
[132] Case T-7/95 Langnese-Iglo v. Commission (1995) ECR II-1533, (1995) 5 CMLR 602, 148

II. THE COMMISSION REGULATION NO. 2790/1999

II.1. THE BACKGROUND

The first block exemption was Regulation 67/67 on exclusive distribution agrements[133], adopted in the wake of the ECJ's Consten and Grunding judgment, when it became clear that Article 81(1) could catch many distribution agreements, particularly those containing territorial restrictions. The block exemption format allowed the Commission to wave through block a large numbers of agreements on the basis that they contained certain provisions and omitted others, without any examination of their actual economic effects They allowed the Commission to engage in effect in a harmonization exercise of commercial transactions across Europe[134].

Regulation 67/67 was replaced in time by two Regulations, 1983/83 on exclusive distribution and 1984/83 on exclusive purchasing[135], the latter of which contained detailed rules for the petrol and beer sectors. They were follwed, after *Pronuptia* judgement[136] by a block exemption on franchising agreements[137]; after the *Maize Seeds* judgement[138] by one on patent licensing[139], then on know-how licensing[140] and later on technology transfer[141]; and by block exemptions on research and development agreements[142] and specialization agreements[143]. There were block

[133] 1967 O.J. (L 84) 67.
[134] The Antitrust Bulletin, Vol 51, No.4/Winter 2006, P.931.
[135] 1983 O.J. (L) 1 and 5, respectively.
[136] Case 161/84, Pronuptia v. Schillgalis, 1986 E.C.R.353, 1 C.M.L.R.414(1986)
[137] Regulation 4087/88, 1988 O.J., (L 359)46.
[138] Case 258,Nungeesser KG v. EC Comm'n, 1982 E.C.R.2015, 1 C.M.L.R.278 (1983)
[139] Regulation 2349/84 O.J. (L.219)15.
[140] Regulation 556/89, 1989 O.J.(L.16) 1.
[141] Regulation 240/96, 1996 O.J.(L.31) 2.
[142] Regulation 418/85, 1985 O.J.(L.53) 5, as amended by Regulation 2236/97, 1997 O.J.(L306)12.
[143] Regulation 417/85, 1985 O.J.(L53) 1, as amended by Regulation 2236/97, 1997 O.J.(L306)12.

exemptions in the special sectors of motor vechiles[144] and insurance[145].The coverage of block exemptions was uneven; there was never on efor selective distribution agremenents other than in the motor vechile sector, or for services that were not related to goods, or for the distribution of intermediate goods[146], and even when the patent licensing and know-how licensing exemptions transmogrefied into that on technology transfer, there was stil no exemption on trademark, copy-right or design-right licensing[147].

From the point of the application of many common principals because of their common features to franchise, exclusive purchasing and exclusive distribution agreements, European Union combined the group exemption regulations, which I mentioned above, regarding these agreements and it launched the Commission Regulation no. 2790/1999 about vertical agreements[148].

By this Regulation, a vertical agreement that violates the article 81(1) is enabled to make use of automatic exemption in case it provides the provisions of the group exemption regulation[149].

II.2. ARTICLE 2 – THE MAIN EXEMPTION

II.2.1. An Umbrella Exemption Applying To All Vertical Agreements

The Regulation is much broader than the previous Regulation. It is not restricted agreements relating to goods for resale[150]. The Regulation is much broader

[144] Regulation 1475/95, 1995 O.J. (L145) 25, replacing Regulation 123/85, 1985 O.J.(L15)16.
[145] Regulation 3932/92, 1992 O.J. (L398)7.
[146] None these were covered by regulations1983/83 or 1984/83
[147] The Antitrust Bulletin, Vol 51, No.4/Winter 2006, P.932.
[148] Commision Regulation (EC) No 2790/1999 of December 1999 on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ. L 336, 29.12.1999, p.29)
[149] Karakurt, A., "Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op.cit.140

than the previous Regulation. Regarding the statement of the vertical agreements within the scope of the Regulation in the article 2.1; Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

As it is understood from the definition, the vertical agreements only with the aim of purchasing, selling and re-selling the goods and services can make use of group exemption. The Regulation also applies to selective distribution systems which did not previously benefit from any Community block exemption.

- The exemption applies to agreements concluded between two or more undertakings so long as each undertaking operates, for the purposes of the agreement[151], at different levels of the production of distribution chain.

- The block exemption covers purchase and distribution agreements. The regulation does not exempt agreements or restrictions or obligations that do not relate to the purchase, sale or resale of goods or services, such as rent agreements.

II.2.2. Association Of Retailers Of Goods

The provision permits vertical agreements concluded between an association of retailers, no member of which together with its connected undertakings has a total turnover of more than Euro 50million, and its members or between an association and its suppliers[152]. In order for the vertical agreements between the enterprise union to be evaluated within the scope of this Regulation, the vertical agreements, which are primarily between the members of the enterprise union or which are like a

[150] Contrast the position in Reg. 1983/83

[152] JONES, A.,SUFRIN, B., op.cit.536

decision taken by the enterprise, must be evaluated within the scope of the Notice[153] regarding the horizontal agreements of the article 81. At the end of the evaluation of the horizontal agreements[154], after the cooperation of the union's members regarding the purchasing and selling, the vertical agreements between the enterprise union and the members or the suppliers will be evaluated within the scope of this Regulation[155].

II.2.3. Provisions Relating To The Assignment Of Intellectual Property Rights

The assignment of IPRs, such as trade Marks, copyright, or know-how, may be essential or extremely useful to the effective performance of a vertical agreement. The exemption therefore applies to vertical agreements containing ancillary provisions relating to the assignment or use of IPRs which are directly related to the use, sale or resale of goods or services by the buyer or its customers[156]. The Commission sets out the five conditions which must be fulfilled before block exemption applies to vertical agreements containing restraints on IPRs provisions.

- The IPR provisions must be part of a vertical agreement, i.e. an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

- The IPRs must be assigned to or for use by the buyer;

- The IPRs must be assigned to or for use by the buyer;

- The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or his customers. In the case of franchising where marketing

[153]Commission Notice, Guidelines on Applicability of Article 81 of the Treaty to Horizontal Cooperation Agreements, OJ (2001) C 3/2
[154] Commission Notice, Guidelines on Vertical Restraints, 29
[65] KARAKURT, A.,"Avrupa Toplulu•u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar", op. cit.146
[156] JONES,A.,SUFRIN, B.op. cit.536-537

forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

- The IPR provisions, in relation to the contrast goods or services, must not constrain restrictions of competition having the same object or effect as vertical restraints which are not exempted under the Block Exemption Regulation.

II.2.4. Agreements Between Competing Undertakings

Article 2(4) states that the Regulation generally does not apply to agreements concluded between competing undertakings (even if operating for purposes of the agreement at different levels of the production or distribution chain), however:

It shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) The buyer has a total annual turnover not exceeding EUR1000 million, or

(b) The supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods,[157] or

(c) The supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.[158]

II.2.5. Agreements Falling Within The Scope Of Another Block Exemption

According to the article 2(5) of the Regulation, the vertical agreements whose subject is in the scope of a group exemption will not be evaluated within the scope of this Regulation.

[157] Dual distribution: Guidelines on Vertical Restraints, (2000) OJ C291/1, paragraph27
[158] JONES,A.,SUFRIN,B.,op. cit.539

II.3. ARTICLE 3 – THE MARKET SHARE CAP

II.3.1. The 30 Per Cent Threshold

In the article 3 of the Regulation, in order for the agreement or concerted action to be subject to the exemption provisions, it is concluded that the market share of the provider in terms of the sales of the goods or services indicated in the agreement should not exceed 30%. This Regulation brought a new application to the block exemption, which was not found in the previous Regulation.

Where there is an exclusive supply obligation, a supplier agrees to supply only one buyer inside the Community, the relevant market share is that of the buyer, not the supplier.

Guidelines on Vertical Restraints declares that where the vertical agreement is concluded between three parties each at different level of trade the market shares at both levels are relevant.

II.3.2. Defining the Market

The Commission Notice on definition of the relevant market or Commission decisions and Court judgments taken under Article 81, 82 and the Merger Regulation[159] provides general and useful guidance on market definition.

While defining the 30% market share, the related product market and geographical market must be identified. Commission Notice on the definition of the relevant market declares that the related product market contains the goods and services that are accepted as changeable with one another in terms of qualities, prices and usage purposes by the buyer. The relevant geographical market has been defined as the area where the enterprises are interested in the supply and demand of the

[159] Council Regulation 4064/89 (1989) OJ L395/1. As amended by Council Reg.1310/97 (1997) OJ L180/1

goods and services, where the competition conditions are homogenous on a large scale and which can especially be separated from the neighbor geographical regions whose competition conditions are perceivably different.

II.3.3. Exceeding The Market Shares

Though the main rule in the calculation of 30% market share is to take the sales values of the goods or services as a basis, in case these data cannot be reached, reliable market data such as sales volumes can be taken as a basis. These data which will be used must be the data of the previous year.

Commission Regulation no: 2790/1999, article 9(2) declares that while the market share of the enterprise is below 30% in the year when the agreement began to be applied, then, this share rises above 30%; but if it does not exceed 35%, the exemption will be more valid during two calendar years which follows the year in which the 30% market share is first exceeded. However, if it exceeds 35%, the exemption will be valid during one calendar year which follows the year in which the 35% market share is first exceeded. However, in both cases, the enterprises will not make use of this by exceeding both two calendar years.

II.3.4. Portfolio of Products Distributed Through The Same Distribution System

Where the supplier uses the same distribution system to distribute several goods or services some of which are, and some are not, in view of the market share thresholds, covered by the block exemption the block exemption exempts only the former[160].

II.4. ARTICLE 4 – THE HARDCORE RESTRICTIONS

[160] JONES,A.,SUFRIN,B.,op. cit.539

II.4.1. The Block Exemption Is Not Applicable To Vertical Agreements Containing Hardcore Restraints

The vertical agreements which include any of the hard restrictions which are indicated in the list taking place in the article 4 of the Regulation will be removed out of the scope of the group exemption as a whole. The insertion of just one of these clauses precludes the entire vertical agreement from being exempted under the Regulation.

The Block Exemption Regulation exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4, is contained in or practiced with the vertical agreement. If there are one or more hardcore restrictions, the benefit of the BER is lost for the entire vertical agreement. Guidelines on Vertical Restraints declares that there is no severability for hardcore restrictions.

II.4.2. Article 4(a): Fixed or Minimum Sales Prices

Article 4 (a) prohibits clauses resulting in the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. While the determination of the fixed or minimum sales price can be made by direct methods like agreement provision or concerted action, it can also be made by indirect methods like the provider's giving discount regarding to its accordance with a particular price level, the determination of the distribution margin, the cancellation of the agreement, warning or punishment[161]. However, as it is stated in Commission Notice, Guidelines on Vertical Restraints, if the provider offers a maximum or an advice price to the buyer, this is not evaluated as the determination of the sales price once more.

[161] KARAKURT, A.,"Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op.cit.153

II.4.3. Article 4(b): Restrictions Of The Territory Or The Customers To Whom The Buyer May Sell

Article 4(b) prohibits clauses that restrict the territories into which, or the customers to whom, the buyer can sell the contract goods or services. The provision prohibits both direct restrictions and provisions that, in practice, prevent or deter a distributor from making sales outside of specific territories or customer groups. Article 4 itself sets out four exceptions to the prohibition:

The first exception is: restriction on sales into exclusive territories or to an exclusive customer group reserved to another. It allows a supplier to restrict active sales by a distributor into an exclusive territory or to an exclusive consumer group reserved either to it or another buyer.

The sales that will be made by the customers of the buyer or the active sales to the regions where the exclusivity is not the matter cannot be restricted.

The Commission states in its Guidelines that use of the internet to advertise dose not amount to active sales.

The second exception permits a prohibition on a buyer at the wholesale level of trade from making active or passive sales to end customers.

The third exception states that where a selective distribution system is operated it is possible to prohibit members of the system from selling actively or passively to unauthorized distributors.

The fourth exception states that a supplier may preclude a buyer of components for incorporation into another product selling actively or passively to a customer who would use them to manufacture a product which competes with that produced by the supplier.

II.4.4. Article 4(c) and (d): Restrictions In Selective Distribution Systems

Article 4(c) provides that members of a selective distribution system may not be precluded from making active or passive sales to end users and Article 4(d) provides that members of a system may not be precluded from making cross-supplies inter se. The provider cannot bring any restriction to the retailer members regarding their sales to the end users, though they have the right to assign only one distributor or a limited numbers of distributors in a particular region in the selective distribution network. However, the provider can restrict the freedom of the distributor's determination of the place of the management building. Within this framework, as it is stated in Commission Notice, Guidelines on Vertical Restraints, if the selected distributor begins a new working place in a different area from the decided management building, this can be restricted.

II.4.5. Article 4(e): Restrictions on Suppliers Of Components

Where a supplier supplies a buyer with components which the latter incorporates into its goods, a restriction may not be imposed which prevents the supplier from selling the components to customers or repairers which have not been authorized by the buyer to repair or service its goods.

II.5. ARTICLE 5 – SEVERABLE, NON-EXEMPTED OBLIGATIONS

II.5.1. Obligations Which Are Not Exempted But Which Are Severable

The restrictions which have a contradiction against the article 5 of the Regulation that takes place in the vertical agreements are left out of the scope of exemption. The insertion of such a clause does not prevent the possibility of the remaining provisions of the agreement benefiting from the block exemption. As it is stated in Commission Notice, Guidelines on Vertical Restraints, only the agreement provision, which has a contradiction against the article 5 of the Regulation, will be deprived of the benefits of the group exemption.

Article 5, in comparison with Article 4, focuses on non-compete clauses that are capable of foreclosing the market and restricting inter-brand competition.

Commission Regulation No:2790/1999, article 1(b) declares that non-compete obligation means that any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than %80 of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year.

II.5.2. Article 5(a): Non-Compete Obligations

Article 5(a) prohibits non-compete obligations imposed in excess of five years. The provision of non-competition, which can tacitly be renewed with a period that is longer than five years, has been accepted for indefinite period.

An exemption applies, however, where the buyer of the goods or services operates from premises owned by the supplier or leased by it from a third party not connected with the buyer. In this case non-compete obligation can be imposed for the

duration of the buyer's occupancy of the land. But artificial ownership constructions intended to avoid the five-year duration limit cannot benefit from the exemption[162].

II.5.3. Article 5(b): Non-Compete Obligations After The Termination Of The Agreement

Article 5(b) prevents obligation imposed on the buyer which prevents it from manufacturing, purchasing, or selling or reselling goods or services after the termination of the agreement unless the prohibition: relates to competing goods or services; is limited to the premises and land from which the buyer has operated during the agreement; is indispensable to protect know-how[163] transferred by the supplier under the agreement; and is limited to a period of one year[164].

II.5.4. Article 5(c): Non-Compete Obligations And Selective Distribution Systems

Commission Notice, Guidelines on Vertical Restraints declares that the block exemption covers the combination of selective distribution with non-compete obligation, obliging the dealer not to resell competing brands in general. The general period of 5 years, taking place in article 5(a), will also be applied here. Article 5(c) dose not allow the supplier to prevent dealers from buying products for resale from specific competing suppliers.

II.6. ARTICLE 6 - WITHDRAWAL OF THE BLOCK EXEMPTION BY THE COMMISSION

[162] Guidelines on Vertical Restraints, (2000) OJ C291/1, paragraph 59
[163] "Know-how" is defined in the Commission Regulation No:2790/1999, article 1(f)
[164] JONES,A.,SUFRIN,B.op. cit.547

As it is arranged in article 6 of Commission Regulation no: 2790/1999, if a vertical agreement is included in the scope of the article 81(1) by itself or with the similar agreements of the rival provider or buyers and if it does not meet all the conditions taking place in the article 81(3), its legality presumption which was provided with group exemption can be taken back. As it is stated in Commission Notice, Guidelines on Vertical Restraints, the vertical agreement, which was drawn up with a provider or a buyer that does not exceed the limit of 30% market share, will also be left out of the benefits of the Regulation if it does not create an objective benefit which will balance the damages it created over the competition.

The task of proving the creation of the conditions in order to take the group exemption back belongs to the Commission. Since the date when the decision of taking-back is made, the relevant agreement will be out of the scope of group exemption and the decision will be valid to the forward.

Because of the collective effect that ruins the competition, the responsibility will only be given to the enterprises that contribute to this effect in a perceivable way. The agreements, which are made by the enterprises that have a very insignificant contribution to the collective effect, will not be evaluated within the scope of the article 81(1) [165].

II.7. ARTICLE 7 – WITHDRAWAL OF THE BLOCK EXEMPTION BY A NATIONAL COMPETITION AUTHORITY

As it is arranged in Commission Notice, Guidelines on Vertical Restraints, according to the 7th article of Commission Regulation no: 2790/1999, if the effects

[165] Whitbread, OJ (1999) L 88/26, (1999) CMLR 118, 117

of a vertical agreement which violates the competition are felt in any member state territory or in a part of it which shows all the features of another geographical market, the authorized body of the member state can take back the benefit provided by group exemption with regard to the laws which are arranged by the national law.

II.8. ARTICLE 8 – REGULATIONS TO DEAL WITH NETWORKS OF AGREEMENTS

In the article 8 of Regulation, if the parallel networks which are created by similar vertical restrictions cover more than 50% of the market, these parallel networks are permitted to be taken out of the scope of Regulation no:2790/1999 by a Regulation that the Commission will prepare. As it is stated in Commission Notice, Guidelines on Vertical Restraints, if the entrance to the relevant market or the competition in the market is perceivably restricted, then not to apply the exemption through a new Regulation will come up.

II.9. GENERAL RULES IN TERMS OF THE EVALUATION OF THE VERTICAL AGREEMENTS

Council of European Communities accepted the Group Exemption Regulation Regarding the Vertical Restrictions no: 2790/1999[166] in 1999; unlike the previous arrangements, it gave the enterprises the chance to make agreements which contain vertical agreements in a larger area[167].

There are principals accepted by the European Competition Authorities which will be considered while evaluating the vertical agreements subject to the individual exemption which do not take place within the scope of Regulation or the vertical

[166] EU Journal (EUJ) [1999] L 336/21, [2000] 4 CMLR 398
[167] EKD , B.: "Dikey Anla malar Yoluyla Piyasanın Kapatılması", Kayseri Symposium, **(9 Nisan 2004)** 116

agreements that define the scope of the Regulation no:2790/1999. These principals must be analyzed in order to put forth the general approach of European Competition Authorities regarding the vertical agreements.

Regarding exclusive distribution and territorial protection, export restrictions and market sharing, determination of price, non-competition and exclusive purchase restrictions which are brought by the vertical agreements, we can see the principals of ECJ in its decisions:

The fact that the vertical agreements will not be evaluated within the scope of the article 81(1) was first mentioned in Consten and Grundig case[168]; however, European Union Court of Justice decided that this claim is not acceptable. In the decision of Consten and Grundig V. Commission case, it clearly stated that the first clause of the article 81 can be applied to both vertical and horizontal agreements. This was one of the first decisions that the Court gave and it was put forth as a principal decision. On 1st April 1957, an exclusive distributorship agreement was made for an indefinite period of time between the German Grundig and French Consten companies. By this agreement, Consten took the right of usage of the Grundig trademark and registered it as GINT (Grundig international) in France. Then, another company named UNEF started selling Grundig products, which it bought from German sellers, at cheaper prices than it in France. Consten blocked the parallel import of UNEF by winning the cases of violation of trademark right and unfair competition, which it opened with regard to the trademark right it holds. When the case was brought to the Court, Consten and Grundig said that the vertical agreement did not violate the competition and the article 81 could only be applied to horizontal agreements. Also, Grundig indicated that both Consten and UNED sold

[168] Case 56&58/64 Consten and Grundig v. Commission (1966) ECR 299, (1966) CMLR 418, 343

and distributed its own products After re-indicating that the article 81 can also be applied to the vertical agreements as well as it is applied to the horizontal agreements, the Court has found out that the violated competition because of providing absolute territorial protection is not in Grundig trademark but between the two distributors Consten and UNEF and it evaluated this situation as a violation of competition. This case has a special significance because the "competition in trademark" concept was first used by the Court[169].

Court of Justice accepted for the first time that the recognition of the presence of right and the usage of the authorization that will originate from this are different and the usage of the authorizations that originate from the rights that are recognized by national laws are restricted by the rules of Community Competition Law[170].

Court of Justice explained the doctrine of the consumption of right in Centrafarm B.V. v. Sterling Drug Inc. decision as below:

"Regarding the patent right, the core of patent right is to reward the works of the owner of the patent right and to guarantee the presentation of his invention to market by himself or by someone else with his own will…

Though this sometimes blocks the free movement of the goods, this authorization originates from the patent rights in the national laws and the patent right owner has such an authorization of blocking…

However, patent right owner's or the licensee's determination of how and where the product will be sold once after having launched that product about the invention to the market creates a restriction of trade between the member states;

[169] Badur,E., op. cit. 62-63
[170] AKINCI, A., op. cit.63

because the authorizations of the patent right owner or the licensee over that product has ended…"[171]

Court of Justice stated that exclusivity can be accepted in the event that it is necessary to penetrate in a new market[172].

Consequently, in Societe La Technique Miniere v. Maschinenbau Ulm GmbH[173] the ECJ indicated that an exclusive distribution agreement would not restrict competition if the appointment of exclusive distributor was necessary in order to enable a manufacturer to penetrate a new market[174].

In Delimitis v. Henniger Brau[175] the ECJ forcefully restated the necessity of appraising beer tie agreements within their legal and economic context before finding that they infringed Article 81(1). The object of a commitment to purchase beer and other drinks exclusively from named suppliers was not to restrict competition. On the contrary, the Court specifically referred to the benefits which flowed from such an agreement, for example: the guarantee for a supplier of an outlet for its products; the assurance that the retailer would concentrate its sales efforts on the distribution of contract goods; the ability for the retailer to gain Access to the market on favourable terms; and the guarantee for the retailer a supply of products. Since the object of the agreement was not restrict competition the agreement would only be prohibited by Article 81(1) if this was its effect[176].

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[171] Case 15/74 Centrafarm B.V. v.Sterling Drug Inc., (1974) ECR 1147, 1162-1163
[172] Case 56/65 Societe Technique Miniere v. Maschinenbau Ulm (1966) ECR 235, s.249, (1966) CMLR 357
[173] Case 56/65, Societe La Technique Miniere v. Maschinenbau Ulm GmbH [1966] ECR 234, 249-50, [1966] CMLR 357,375-6.
[174] JONES, A.,SUFRIN, B.op. cit.162
[175] Case C-234/89, (1991)ECR 1-935,(1992)5 CMLR 210
[176] JONES,A.,SUFRIN B.op. cit.167

In Miller case[177], ECJ commented that the provisions that block the export by their nature restrict the competition as their aim is to split the market. The export restrictions, which have the characteristics of violation of article 81, can be actual applications which are like the cancellation of the agreements of the distributors that are selling to the member state purchasers, as well as like the direct agreement provisions that blocks the distributor in a member state country to sell to the purchasers coming from other member states[178].

The determination of the resale price or the minimum sales price is the violation of the article 81(1) and giving exemption to these provisions has only been applied in exceptional cases. In Javico case[179], reseller's commitment to the provider about his selling the goods indicated in the agreement to the market which is out of the Community was not found enough by ECJ for the aim of restriction of the competition. In Dr. Miles, the Supreme Court held that a manufacturer should not be able to retsrict the freedom of the dealers "who own what thay sell"[180]. The decision in Dr Miles was born into controversy. In the 1920s and 1930s, during the great depression, the rule was unpopular because it precluded manufacturers from imposing a floor on selling prices and so stabilizing and limiting the spiraling downward pressure on retail prices. Further the outlawing of Retail Price Maintenance precluded suppliers from preventing price cutting by large retailers which crushed smaller, more vulnerable, businesses[181]. The provider only determines the sales price that he will apply to the redistributors; he cannot determine the resale price. On the other hand, by providing the provision of competition in trademark

[177] Case19/77 Miller International and Javico AG v. Yves Saint Laurent Parfums SA (1998) ECR I-1983, (1998) 5 CMLR172, 14
[178] Volkswagen, OJ (1998), L 124/60, (1998) 5 CMLR 33, 115
[179] Case C-306/96 Javico International and Javico AG v.Yves Saint Laurent Parfums SA (1998) ECR I-1983, **(1998)**
[180] JONES A.: "Resale Price Maintenance: A Debate About Competition Policy •n Europe?",*European Competition Journal*, **(August 2009)** 482
[181] JONES A., op. cit. 483

sufficiently in order to continue the competition between the trademarks, the provider has to transmit its goods to the end consumer in reasonable conditions and increase the quality of presentation.

Where a vertical agreement admits the possibility of passive territorial sales and does not require the distributors to charge minimum retail prices, the Court does not take the view that the object of the agreement is to restrict competition. Rather, the ECJ has stressed that it is necessary to look to the effect of the agreement before it can be determined whether or not competition has been restricted[182].

Not only the exclusive purchasing agreements that creates the result that the buyer supplies all the goods mentioned in the agreement from only one supplier, but also the restrictions which guarantee that the buyer supplies a significant part of the goods mentioned in the agreement from the supplier have been accepted as incoherent by the article 81[183].

In National Panasonic case[184], after indicating that generally the distributorship agreements are legally binding, it is stated that this situation will not mean that this will not be applied to the unwritten vertical agreements or gentleman's agreements regarding the competition rules.

De Minimis Notice is in accordance with Commission Regulation No: 2790/1999 in terms of hard competition restrictions regarding the vertical agreements. While evaluating the distributorship agreements, one of the types of vertical agreements, within the scope of article 81(3), the Commission thinks that if the providers focus their marketing activities in a particular area, this will create an objective benefit. It has been accepted that the exclusivity provision provides the first

[182] JONES A., SUFRIN B., op. cit.162.
[183] European Commission, XII th Report on Competition Policy, Brussels-Luxembourg, 1982, 12
[184] National Panasonic, OJ (1982) L 354/28, 43

provision of the exemption arrangement in the article 85(3) in the sense that it directs the distributor's activities to the provider's goods and its increases the pre-sale and after sale service quality which are provided to the buyers by the distributor[185]. Also, exclusive purchasing and noncompetition liability has been accepted as beneficial as it provides a continuous cooperation between the provider and the distributor.

Another restriction that creates similar effects with noncompetition liability is the "English clause". English clause permits the buyer to supply goods from the rival supplier in the presence of particular conditions. In the event that the right of purchasing goods from rival suppliers is used, the alternative supplier is an enterprise whose scale is suitable for supplying minimum particular amount of goods, the buyer forwards the lower offer to the supplier and the supplier states that he can not meet this mentioned price, then, it can be identified with different conditions such as the buyer's supplying goods from an alternative source[186]. In the events that the buyer has to tell the better price to the provider in order to benefit from the English clause, the provider can prevent the buyer from buying goods from the rivals other than him by decreasing its price. In Commission Notice, Guidelines on Vertical Restraints, Article numbered 152, it is accepted that this type of English clause creates same effects with the noncompetition. However, the price transparency in the market can rise with the information taken in this way as well as the risk between the rival providers can also rise. However, if this condition was not added to the agreement at buyer's request and if some precautions are taken in order to prevent the provider

[185] Cegetal, OJ (1999) L218/14 (2000) 4 CMLR 106, 58
[186] KARAKURT, A.,"Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op. cit.39

from learning the company identity, which gives a better offer, from the buyer, the sides of the English clause which can restrict the competition can be abolished[187].

The Commission has put forward the four-stage procedure that it will follow while evaluating the vertical restrictions within these general principals.

- With regard to the characteristic of the mentioned vertical agreement, the relevant market must be identified in order to determine the market share of the provider of buyer.

- If the mentioned enterprise does not exceed the 30% limit of market share, the vertical agreement will be evaluated within the scope of the Group Exemption Regulation by reserving other provisions.

- If the mentioned enterprise exceeds the 30% limit of market share or contains some provisions that take the agreement out of the scope of the Regulation, it must be determined whether the vertical agreement is included in the scope of the article 81(1) or not.

- In the event that the mentioned vertical agreement is in the scope of the article 81(1), it must be analyzed whether it contains the exemption provisions with regard to the article 81(3) or not.

CHAPTER III

[187] KARAKURT, A.,"Avrupa Toplulu u ve Türk Rekabet Politikasında Münhasır Dikey Anla malar" op. cit.39

EXCLUSIVE VERTICAL AGREEMENTS AND TURKISH COMPETITION LAW

I. LAW NUMBER 4054 ON THE PROTECTION OF COMPETITION

I.1. PURPOSE

Article 167 of the Constitution has loaded the government the charge and responsibility of taking "precautions that provide and develop healthy and regular operation of money, credit, capital, commodity and service markets" and preventing " actual monopolization and syndication or arisen as the result of agreement in the markets". The primary factor to play role in the preparation of Law Number 4054 on the Protection of Competition is to meet this Constitutional provision[188].

Purpose of the law is to prevent the agreements, resolutions and applications which hinder, annihilate or restrict competition in commodity and service markets and inhibit the enterprises which dominate the market from abusing their domination, and provide the protection of competition by performing the necessary arrangements and auditing. Then, subjects that annihilate free competition and enter into the scope of this law consists of inter-enterprise agreements and adaptive behaviors, enterprise union resolutions, mergers and assignments and abuse of dominant status.

As a matter of fact, Court of Justice of the European Communities (ECJ) often refers to article 3(f) that regulates "establishment of a competition system that would not be annihilated" with the purpose of extending the scope of articles 81 and 82 in

[188] Authority of Competition, "Adventure of Enactment of Law number 4054", *http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=70*, (10.10.2009)

the events it is forced to apply these although the referred article is not one of the directly applicable provisions[189].

Article 20 of the Law expresses the purpose of the law perfectly as the provision of establishment and development of commodity and service markets in a free and healthy competition environment.

I.2. SCOPE

By the enactment of the Law on Protection of Competition, the legal gap in Turkish Law in the matter of protection of competition and competition freedom is filled. The Law contains rather convenient and effective controls oriented to the purpose of protection of competition[190].

Agreements, implementations and resolutions which hinder, annihilate and restrict competition performed between any enterprise operating in commodity and service markets within the borders of Republic of Turkey or influence these markets, and abuse of enterprises dominant in the market ad any legal proceeding and act having the nature of merger and assignment which would reduce competition significantly, and proceedings related to caution, binding, regulation and auditing oriented to the protection of competition are in the scope of this Law.

Only resolutions or agreements of enterprise unions which would influence the competition in Turkish market enter in the scope of the Law. International conventions and government aids are kept out of the scope of this law.

[189] ASLAN, •. Y., "*Rekabet Hukuku Teori, Uygulama ve Mevzuat*", op.cit. 30
[190] SANLI, C.K., "*SONUÇ*", www.**rekabet**.gov.tr/word/keremcem/14.sonuc.doc, (07.10.2009)

I.3. PURPOSE AND EFFECT OF LIMITING COMPETITION

In accordance with Article 4 of Law number 4054 on the Protection of Competition, inter-enterprise agreements, concerted actions and such resolutions and actions of enterprise unions having the purpose of hindering, annihilating or restricting competition in a certain commodity or service market directly or indirectly or creating or having the nature of creating this influence are found contrary to law and banned.

Considering the reason for Article 4 of the Law, it appears that the criterion of Turkish Civil Code to comply with validity conditions doesn't apply to the agreement. Therefore, legal validity and bindingness condition shouldn't be looked for in the assessment of pretended relations or intent consensus between the parties as an agreement[191].

These cases prohibited in the article of law are listed as sampler provided that they are not limitative; a) determination of purchasing or selling price for commodities or services, elements such as cost, profit that compose the price and any purchasing or selling condition. b) Sharing commodity and services markets or sharing or control of any market resource or elements, c) Control of supply or demand quantities for commodities or services or determination of these out of the market, d) Aggravation, restriction of the operations of rival enterprises or throwing out the enterprises active in the market by way of boycotts or other acts or obstructing the entrance of newcomers, e) application of different terms to equal people for equal rights, liabilities and actions excluding exclusive dealership, f) Contrary to the nature of the agreement and commercial practise, entailing the purchase of a commodity or service together with another commodity or service or

[191] Decree of Competition Authority, File Number 2003-3-46 (Interrogation), 09-09/179-51DecN., 5.3.2009 D.

binding a commodity or service demanded by the buyers in the status of mediating enterprise to the condition of exhibiting another commodity or service by the buyer or putting forth terms related to re-supply of any supplied commodity or service. Turkish Competition Law has also banned the agreements with the possibility of expressly limiting potential competition, different from article 85/1 of Rome Treaty[192].

A three staged inspection is required in order to determine whether inter-enterprise agreements, concerted actions and resolutions and acts of enterprise unions are contrary to law in the scope of law. First, whether the agreement or resolution is aimed to limit competition should be inspected. It is necessary to search whether the economical power of the parties to an agreement or resolution may reasonably limit competition in order to prohibit the agreement or resolution only because its "purpose" is contrary to the law.

Conditions of the subject event in which whether Article 4 of the Law is violated should be evaluated internally. For instance; Competition Authority has decided in a Decree that sharing of information on current Market shares and current prices and general Market estimates by enterprises member to the association, in meetings under the roof of the association has no purpose or influence to hinder, annihilate or restrict competition and it doesn't have the nature of violation in the scope of article 4 of Law number 4054.[193]

Properties such that the documents don't contain any legal bindingness form the point of parties and some of them are not undersigned doesn't pose an obstacle for the assessment of the said documents as an agreement from the point of

[192] ASLAN, •.Y, *"Rekabet Hukuku Teori, Uygulama ve Mevzuat*", op. cit.180
[193] Decree of Competition Authority, File Number: 2009-4-140, Decree Number: 09-41/998-255, Decree Date: 9.9.2009

Competition Law. As a matter of fact, the Authority has concluded in a Decree[194] that pleas in the direction that form condition is not looked for in agreements in terms of competition law, that those attending the meeting are not authorized to represent the concerned firms and they haven't their signatures on the agreement undersigned in the meeting doesn't remove the existence of the agreement contrary to Law number 4054. Thus, any evidence and proof tool obtained in accordance with law may be used to prove the existence of agreement.

If the purpose of agreement or resolution isn't to limit competition, then whether the agreement generates effects that actually limit competition by combining with market conditions should be searched. If the agreement or resolution doesn't generate effects that actually limit competition, then whether the agreement or resolution is suitable to generate effects that would limit competition in the future should be inspected. If the agreement or resolution restricts or removes potential competition, then it may be prohibited. Existence and level of obstacles for market entry should be examined while inspecting the potential competition[195]. Determination of the concerned geographical and product market is required for all these inspections.

In order that Competition Authority may intervene an agreement or implementation, it should have a competition limiting aspect, its purpose or effect should limit competition or it should possibly limit competition in the future.

[194] Decree of Competition Authority, Decree Number: 93/750-159, Decree Date: 26.11.1998
[195] ASLAN, •.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat" op. cit.181

II. "VERTICAL AGREEMENTS" UNDER TURKISH COMPETITION LAW

II.1. DISTRIBUTION AGREEMENTS

II.1.1. Competition Limiting Provisions Of Distribution Agreements

Law rules that would apply to distribution agreements shall be determined by considering the rights and liabilities contained in the agreement. Status of distribution agreements versus general law rules shall not be evaluated in this part of my dissertation study, but my study shall be on common properties and status of distribution agreements against the provisions of competition law.

Distribution agreements are agreements that interconnect the stages which provide the reach of produced products to end consumers by means of distribution networks formed by the authorized dealers of producers and importers. In other words, the producer and distributor each form a step of distribution agreements entered between them and wholesaler and retailer[196]. These agreements are very similar to each other in nature despite they are made between different suppliers and resellers and the competition restrictions existing in these agreements form contradiction to article 4 of Law number 4054 on the Protection of Competition. Legal result of all agreements, both horizontal and vertical, contrary to Competition Law is invalidity. However, it is clear that distribution agreements provide positive effects on the economy by establishing the production and distribution process of enterprises in the best way provided to carry some conditions like many vertical agreements. Therefore, the said agreements should be evaluated in the framework of exemption predicted in article 5 of the Law.

Distribution agreements are vertical agreements. However, every vertical agreement is not a distribution agreement. Horizontally made distribution

[196] ASLAN, •.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op. cit.215

agreements are excluded from the scope of group exemption communiqués of Competition Authority since they are regarded dangerous from the point of restricting or eliminating competition.

Vertical agreements may be used to increase competition and effective distribution as well as to increase economic integration and block competition[197]. Due to this reason, a generalization is not possible in the direction that vertical limitations annihilate or increase competition. Competition Authority gives decrees considering the conditions of the concrete event and market properties.

Every industry needs distribution. Self establishment of sale and service network required for offering the products of the supplier is taken dimly due to reasons such as especially high costs, success of local enterprises in relationship with consumers, re-sharing of stock costs with the dealer, and vertical integration is avoided. Therefore, producers and importers establish their sale and service networks in majority by authorized dealership and authorized service agreements made with distributors and services having no property connections.

Council of State has identified the uses of establishing a distribution system in IGTOD decree by comparing with traditional distribution methods[198].

Distribution agreements may possibly generate problems in two ways concerning the competition law. First, in terms of effects of the contract between the supplier and distributor on the parties, namely liabilities in the agreement which limit competition, and second, in terms of competition limiting effects of this agreement on third parties[199].

II.1.1.1. Provisions Which Allow Exclusive Sale Right

[197] ASLAN,•.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op.cit.215
[198] Council of State 10TH Department, Base No: 2001/2278 Decree No: 2003/4479
[199] ASLAN, •. Y.,: "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op.cit.215

Distribution agreements which allow exclusive dealership right to the buyer have a competition restrictive effect in essence due to the reason that it hinders the supplier to sell commodities to other dealers in the region and/or prohibiting direct sale of the supplier to the agreement region, and it is in the scope of Article 4 of Law number 4054[200]. In accordance with paragraph (b) Clause 1 article 4 of Law number 4054 on the Protection of Competition, Market sharing is legally banned. The concept of Market sharing agreement states the allocation of regions, customers, suppliers or trade channels under a concerned market to the enterprises operating in that market in accordance with an agreement entered. Such agreements are considered in competition law in the scope of actions that form cartels due to their effects to remove, annihilate or reduce competition and sanction is imposed and banned[201]. Exemption may be provided to the agreements in the event of existence of conditions predicted in article 5 of the Law. Accordingly, if there exist positive aspects of the agreement and the consumer benefits from this, competition isn't completely eliminated at a significant part of the concerned market and restriction of competition is compulsory to reach these positive results, the agreement may be exempted from the prohibition in article 4 of the Competition Law. Competition Authority has exempted by effected communiqués the exclusive distribution agreements, motor vehicles distribution agreements, franchising agreements and exclusive buying agreements which bear certain conditions as a group from article 4 of the Competition Law.

Agreements are made to give the distributor the right of being exclusive dealer of subject products supplied by the supplier within a certain region and prohibit sale activities out of this region. Thus, the country is divided into regions and each region

[200] Competition Journal, page 200, www.rekabet.gov.tr/word/dergi9hepolux.doc , (15.09.2009)
[201] TÜRKKAN, E., "*Pazar Paylaşımı Anlaşmaları ve Rekabet* ", *Competition Diary*, (14.07.2009)

has a monopoly dealer. Only such a provision provides **simple monopoly** to the distributor. Furthermore, if the other distributors are prohibited to sell in this region, in this case the monopoly right becomes **reinforced monopoly**. The buyers of the region limited by the distribution agreements may even be obstructed to supply the subject product from other regions. Thus, dealers may not look for customers out of their limited region and be obliged to forward customer demands from other regions to the authorized dealer of that region. In this event, monopoly right of the dealer is converted to **absolute monopoly**. Communiqués of the Competition Authority don't allow exemption to the concerned articles of agreements that bear provisions that prevent passive sales in this way.

II.1.1.2. Provisions Prohibiting Competition

Provisions, agreements and behavior which limit competition are prohibited by Competition Law number 4054. However, liabilities that limit competition are allowed in the event that they bear the conditions indicated in the Law and are in the scope of communiqué.

Competition prohibitions placed in the contract duration related to competition prohibition may generally be included within exemption scope, but the prohibition of competing should be examined more carefully after the contract expires. In some events, competition prohibition is allowed to continue for some time more after the expiry of the contract. Thus, the dealer is prevented to sell other products by using the fame of the supplier and thus be rivals with the supplier. In such cases, competition prohibition is always required to be well defined and sufficiently short[202].

[202] ASLAN, •. Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat",op. cit.220

In its decree[203] directed to cigarette market, Competition Authority has indicated that the exclusivity condition in the stand agreement made between the cigarette producers and dealers and tight oligopoly structure of the cigarette market shall injure the efficiency of newcomer enterprises or small share enterprises already present in the market at the points of sale. In this sector where advertisement is prohibited, stands where products are exhibited shall become important and a situation shall arise in favour of older and rather powerful enterprises of the market due to exclusive stand agreements. As competition in the market would be effected negatively, it is decided to conclude such agreements throughout the cigarette sector.

In its decree[204], Competition Authority has decided the invalidity of the provisions of the agreement entered between newspaper and magazine dealers and distribution companies which bring competition limitation related to the sale of rival newspapers and magazines, and that precautions required for the sale of other newspapers at the same dealers should be taken.

II.1.1.3. Provisions Related to Price Determination

Paragraph (a) of article 4 of Law number 4054 on the Protection of Competition bans direct or indirect price determination agreements. However, in general, suppliers put provision in distribution agreements to determine prices especially with the purpose of providing prestige to their products. But the aforesaid law provision bans these agreement provisions.

In its decree[205] related to fuel sector product market, Competition Authority has decided that price determination article included in the agreement undersigned

[203] Decree of Competition Authority, Decree Number: 02-45/533-221, Decree Date: 25.7.2003
[204] Decree of Competition Authority, Decree Number: 99-5/37-12, Decree Dates: 19.7.2000, 4.2.1999
[205] Decree of Competition Authority, File Number: D1/1/CS-03/1, Decree Number: 03-64/770-356, Decree Date: 2.10.2003

between distribution companies and dealers in Turkish fuel market enters the scope of Article 4 of the Law, that it would be sufficient to determine the maximum sale price in order to establish a dealership network efficient in fuel distribution market or limitations as recommended sale price would be sufficient, that the provisions in the contract related to fixed price determination would generate the result of limiting competition more than adequate, and the agreement is out of the scope of Group Exemption Communiqué number 2002/2 related to Vertical Agreements.

II.1.2. Limitation Of Trade Freedom Of Third Parties By Distribution Agreements

II.1.2.1. Parallel Trade

The buyer may undertake to provide a certain regional protection to the buyer in the contract entered between the buyer and distributor. This means that the buyer undertakes not to give commodities to another person for the purpose of distribution and re-selling in the region where the distributor is exclusively authorized. If the third party demands commodities for the purpose of re-selling within the region of subject distribution agreement, the buyer shall refuse this demand. In this case, the third party shall demand from the distributors of other regions. If there exist provisions to ban demands from other regions, that is, passive sales in distribution contracts, these can't benefit from exemption provisions. Distributors have to meet the demands from the regions of other distributors. The distributor may not file a suit with the aim of preventing the import of subject commodities in accordance with customs legislation which are offered to the foreign market in accordance with law[206].

[206] ASLAN,•.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op. cit.224

In its decree[207] concerning sun glasses of brands Police, Vogart, Sting, Competition Authority has reached the conclusion that "it is necessary to define the concept of parallel importation to be the importation of a commodity by third parties from another country in accordance with the legal procedure and offering it to the market while the same is offered to the market in a country by the rightful owner, when evaluated from the point of Competition Authority regulations which have the purpose of ensuring a competitive market, and that the existence of this right (of third parties) would be acknowledged and protected from the aspect of competition legislation."

Parallel import is the importation of a commodity being subject to intellectual property right to the country to which the importation is performed without the consent and approval of the rightful owner after it is offered to the market in another country[208]. From the moment the branded commodity is offered to the market in Turkey, it can't be pleaded that the rightful owner has the right to hinder the re-selling of the commodity or the importation of the original commodity by another party to the country through legal ways provided that its rights protected in the framework of the legislation related with the protection of the brand are reserved[209].

Here, always the trade freedom of third party is mentioned. Placing provision in the agreement in the markets where inter-brand competition is intensive with the purpose of preventing parallel import is another thing. It should not be mixed with prevention of trade freedom of third parties. This provision placed in the agreement may be valid in markets where inter-brand competition is intense, but it binds only

[207] Decree of Competition Authority, File Number: D2/2/Ö.•.-99/1 (Investigation) Decree Number: 00-44/472-257 Decree Date: 6.11.2000
[208] TEKDEM•R, Y.: "*Marka Hakkın ın Tükenmesi İlkesi ve Paralel İthalat Sorununa İktisadi Bir Yaklaşım* ", *Competition Review*, Volume 13, Ankara
[209] ASLAN, •.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op. cit.225

the parties to the agreement. Trade freedom of third parties which are not a party to the agreement is not restricted in this way.

In order to try preventing parallel import by third parties shall cause hindering rival enterprises to enter the market. This may not hinder parallel import in the direction of articles 4(d) and 6(a) of Law number 4054 on the Protection of Competition.

II.1.2.2. Passive Trade

A distribution system is the agreement chain between the enterprises in various stages of agreement chain made between the enterprises in various stages of production chain. Passive sales which don't adversely affect the useful results that cause the distribution systems to be included in group exemption within the country should be permitted. When we look for these passive sales, the reply is like that: The producer should not make passive sale by giving commodities to people within the region of the distributor other than the general distributor with which an agreement is not entered. Because the concentration of the authorized distributor may not be realized in order to increase the market share of the commodity and therefore specialization in production and rationalization in distribution disappears. The authorized distributor should not make passive sale by giving commodities to non-contractual parties within the region of dealers other than its dealers and its other dealers. Because this action destroys distribution network and hinders the running of dealership system. The dealers may not refuse commodity demands from third parties selling to buyers residing out of the region where they are authorized or to regions of other authorized dealers while residing within their own regions; they should give the commodity in this level and so, passive trade should be realized.

Provisions that cause the removal of passive trade should not exist in the agreements between the general distributor and the dealers.

In a decree[210], Competition Authority has assessed a complaint with the subject that selling in the region of authorized dealer by passive trading in beverage sector is contrary to Competition Law number 4054 and Court of First Instance has placed provisional injunction on the cola beverages obtained out of the authorized dealer and therefore, they have suffered. The agreement between the authorized dealer and Supplier may not possibly hinder the monopoly distribution or inter-regional trade of the offered commodities of the distributor across the regions (parallel trade) actually or via agreement or such interpretation of the provisions of monopoly distribution agreement is not possible. Since such an implementation shall exceed the scope of competition limitations permitted by the group exemption communiqués published in the direction of Article 5 of Law number 4054, it shall enter the scope of prohibitions listed in article 4 of the same law. On the other hand, there isn't the power and right to prevent, by way of depending on brand rights, the re-selling (parallel trade) of the manufactures been offered to sale in other regions, in the region of the authorized dealer by third parties. Hindering of parallel trade between the determined regions is one of the acts prohibited by the Law number 4054 on the Protection of Competition and it isn't among the competition limitations also permitted by the group exemption communiqués. However, competition restriction related to hindering parallel trade which is the subject of complaint is realized not by an inter-enterprise agreement or implementation but actually with a court decision. If competition is restricted due to the decisions given by or proceedings exercised by the places of jurisdiction or administration without providing the nature of enterprise,

[210] Decree of Competition Authority, File Number: D/3/1/• .YA.-00/1 (Preliminary research), Decree Number: 00-25/258-140, Decree Date: 4.7.2000

the provisions of Law shall not apply and a compulsory procedure about the concerned people can not be established. Therefore, although a contradictory situation exists in the event subject to complaint from the point of the Law number 4054, no action can be taken concerning the complaint because the event generating the result of restricting competition is formed in the direction of adjudication. Competition Authority has decided with this decree that, although contrary to the law, preventing passive sales by court's decision is out of the power of the Authority.

Prevention of passive sales is a concept concerning the sharing of the country between dealers in vertical agreements. It expresses that commodity crossing between these regions is possible even if passive. On the other hand, international trade is not a field where we shall use the phrases passive and active sale. In this field concepts such as prevention of parallel trade or parallel import should be recommended[211].

II.2. EXCLUSIVE DEALERSHIP CONTRACT

Definition of exclusive dealership contract by Hasan ••güzar[212]; "Exclusive dealership contract is a contract having the nature of framework which regulates the legal relationships between the manufacturer and exclusive dealer such that through it the manufacturer undertakes sends all or a part of its manufactures only to an exclusive dealer to sell in a certain geographical region as monopoly, and on the other hand, the exclusive dealer undertakes to sell the commodities subject to the contract for and on behalf of itself and operate to increase the sale of these commodities."

[211] ASLAN,•.Y, "Rekabet Hukuku Teori, Uygulama ve Mevzuat", .op. cit.229
[212] Hasan •• GÜZAR, "*Tek Satıcılık Sözleşmesi* ", Ankara, **(1989)** 14

Distinctive elements of the exclusive dealership contract are regularity, acting for and on behalf of itself, exclusive sale right and operation to increase the sale.

Exclusive dealer shall buy the commodity subject to contract continuously along a certain or indefinite time period. Exclusive dealer is a tradesman economically and legally independent from the supplier who sells the commodities bought to its own customers for and on behalf of itself. This element distinguishes the exclusive dealer from the other independent sub tradesmen.

The manufacturer undertakes not to sell directly to the region of the exclusive dealer by the exclusive dealership contract. In this case simple monopoly is ensured to the exclusive dealer. If the manufacturer ensures the other exclusive dealers in other regions not to sell to the regions of the other dealers, the monopoly is reinforced. Furthermore, if the manufacturer has also undertaken to take the precautions to prevent sale in the region of the exclusive dealer by third parties, absolute monopoly is under consideration[213].

II.2.1. Competition Limiting Provisions of Exclusive Dealership Contract

Paragraph (b) Clause 1 Article 4 of Law number 4054 on the Protection of Competition prohibits the sharing of commodity or service markets between enterprises. Provisions of the exclusive dealership that ensures monopoly sale right in a certain region are in the scope of this prohibition. However, prohibition of Article 4 may not apply to the contract in the event of the existence of conditions indicated in Article 5 of the Law.

If competition between brands is intensive in the concerned product market, the exclusive dealership contract entered concerning the sale of a certain brand may

[213] •NAN, N., *"Tek Satıcılık Sözleşmesi ve Üçüncü Kişiler "*, Batider, C.XVII No.2, Ankara, **(1993)** 58

obtain exemption since competition is not eliminated in an important part of the concerned product market even if the contract has limited the inter-brand competition.

However, if a rival brand is almost extinct in the concerned product market, in this case inter-brand competition shall be the only competition in the market. Since the regional protection provision provided by the exclusive dealership contract entered in this market shall remove competition to a large extend, this contract can not benefit from the exemption.

From the point of Turkish Law, forming a single Market is not sensitive so much as in EU. Republic of Turkey is anyway a unitary state. Therefore, especially in the markets where inter brand competition continues, limitation of inter brand competition may be handled more easier by providing territorial protection in vertical agreements. In other words contract provisions that provide monopoly sale right may benefit from the exemption[214].

Paragraph (a) Article 4 of Law number 4054 on the Protection of Competition prohibits direct or indirect price determination. It can not be said that price determination bears the conditions of exemption. Therefore, it doesn't seem possible for the provisions of exclusive dealership contract related to price determination to benefit from exemption and these provisions shall be invalid. In accordance with its nature, it is accepted that the exclusive dealer party to the exclusive dealership contract cannot sell products rival to the commodities subject to the contract.

Since exclusive dealership contracts are continuous contracts, the contracts may be concluded for definite or indefinite periods. Whatsoever is the duration of the contract, exemption may be given at most for 5 years in accordance with Clause

[214] ASLAN,•.Y., "Rekabet Hukuku Teori, Uygulama ve Mevzuat", op. cit.236

2, Article 5 of Law number 4054 on the Protection of Competition. If the conditions continue, this exemption duration may be renewed at its expiry.

II.2.2. Use of Exclusive Dealership Right Against Third Party

When we examine from the point of contracts law whether monopoly right arising from exclusive dealership contract may be used to prevent sale in the contract region by third parties, there isn't any contract link between the third party and the exclusive dealer which monopoly right is violated or the producer which distribution system is annihilated. Due to this reason, a suit can not be filed against third parties based on the field of contracts law. This is the result of the rule of relativity of contracts[215]. However, if the supplier has undertaken with the exclusive dealership contract to prevent third parties to sell commodities to the region of the exclusive dealer, then the exclusive dealer may file a suit against the supplier based on the contract. Or, if a liability is assumed with the contract related to all exclusive dealers not to make sale to their exclusive regions and this provision is not regarded invalid by the Competition Authority, rights of the exclusive dealers are reserved to file suits to each other in the framework of the conditions of Article 111 of Code of Obligations. As a result, it is not possible for the third parties to sell the commodities subject to the contract to the region of exclusive dealer in the scope of principles of non-contractual liability.

II.3. EXEMPTION

Competition Authority may decide to exempt inter-enterprise agreement, concerted action and enterprise union resolutions from the implementation of the provisions of article 4 in the event of existence of all conditions indicated in Article 5

[215] •• GÜZAR, op. cit.97

of the Law number 4054. These conditions indicated in article 5 of the Law are (a) provision of improvement and new developments or economical or technical developments in the production or distribution of commodities and presentation of services, (b) benefiting of the consumer from this, (c) Competition not eliminated in an important part of the concerned market, (d) Limitation of competition not more than necessary to acquire the purposes in paragraphs a and b. Exemption may be given for a certain duration as well as it may be given based upon the fulfilment of certain terms and/or certain liabilities. Exemption decisions are valid from the date of agreement or execution of concerted action or enterprise union resolution or realization of condition if bound to a condition.

All aforesaid conditions included in the law article should exist altogether; even one of the conditions missing is sufficient to reject the exemption request. As a matter of fact, Competition Authority[216] has decided in the direction that there is no need to examine the other conditions as it is understood that the condition of provision of improvement and new developments or economical or technical developments in the production or distribution of commodities and presentation of services in paragraph a of article 5 is not realized.

Article 5 of the Law number 4054 predicts two types of exemption, namely individual exemption and group exemption. Individual exemption is given upon the application of the parties with a written notice to the Competition Authority and the Authority resolution in the result of Authority inspection. On the other hand, group exemption is provided through a communiqué of the Competition Authority automatically to agreement types in certain subjects in case these provide the communiqué conditions without needing the notice of the parties or any Authority

[216] Decree of Competition Authority, File Number: D1/1/M.Ö.-98/5 (INVESTIGATION) Decree Number: 00-1(b)/11-5, Decree Date: 12.01.2000

resolution. In my dissertation study, especially Group Exemption Communiqué number 2002/2 related to Vertical Agreements published by the Competition Authority shall be narrated after individual exemption and group exemption are mentioned.

II.3.1. Individual Exemption

While assessing individual exemption, Competition Authority shall evaluate whether contract provisions which are the subject of exemption request hinder the provision of the conditions predicted in article 5 of the Law.

a) Provision of improvement and new developments or economical or technical developments in the production or distribution of commodities and presentation of services: The first positive condition looked for in order that a contract may be exempted from article 4 of the Law number 4054 and exemption is granted under article 5 requires an economical assessment. Economic benefit or advantage meant in the paragraph should be understood as also the concrete contribution of these to economy in objective sense, but not only the advantage or gain that the enterprises would provide from their point. Although the enterprises may possibly claim that an agreement for their benefit may also be useful for economy in the final analysis, the benefit here is not indirect benefit, but direct and concrete benefit. Although it is required to evaluate which events provide economic benefit according to the properties of the concrete event, it is accepted that, in general, economic benefit is provided in the event of existence of cases such as reduction of production and distribution costs, increase in quality, provision of continuity of commodity supply, facilities in entry to markets and discovery of new products or production techniques.

In the resolution of Competition Authority; "The obligation that provision of improvement and new developments or economical or technical developments in the production or distribution of commodities, which is the first positive condition, is fulfilled by means of dealership contracts of Besler Gıda. Implementations such as giving certain exclusive regions to each dealer, sale of the dealer to the sale points in this region in suitable conditions and collection of returns by the dealer from the market are activities providing the presentation of vegetable oil, which is the concerned product, for sale at the best condition and therefore development in the distribution of Besler Gıda products."[217]

It is evaluated in Competition Authority decree that; "In distributorship system, the distributor can concentrate on sale and marketing activities in its own exclusive region and distribution channels are rationalized. Running of the system causes the meeting of consumer demand in time and avoiding unnecessary stock and as a result, costs are reduced and investments increase as the income increases. Therefore the contract generates useful results in the sense of paragraph (a) article 5 of the Law."[218]

It is evaluated in Competition Authority decree that; " The reason of • i•ecam to invest on the subject of production of polycarbonated bullet-proof safety glasses have military nature and are related with defence policies rather than commercial profit purposes. • i•ecam intents to produce this product in Turkey. • i•ecam shall continue to keep the production know-how and technology for the referred product after the expiry of license agreement term. A new technology shall be gained to Turkey with the production of polycarbonated bullet-proof safety glasses."[219]

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[217] ASLAN,•.Y., *"Rekabet Hukuku Bakımından Dikey Anlaşmalar Teori ve Uygulama"* ,Ekin Bookstore, Bursa, **(2004)** 83-84

[218] Decree of Competition Authority, File Number: D3/T.E.-99/11 (Negative clearance/Exemption), Decree Number: 99-53/537-363, Decree Date: 21.11.1999

[219] Decree of Competition Authority, File Number: D1/1/H.H.Ü.-99/1 (Negative clearance/Exemption), Decree Number: 99-44/466-295, Decree Date: 28.09.1999

b) Benefiting of the consumer from this: In order that an agreement having competition limiting effects in the sense of article 4 of the Law is granted exemption, the improvement obtained from the distribution of commodities or presentation of services should be reflected to the consumer. In other words, an agreement which can be called advantageous from the point of economy can not benefit from exemption as long as it can not reflect this advantage to the consumer. The consumer term meant here is not only the end consumers, but also all users such as the dealers, distributors and even producers besides the end consumers. As a matter of fact, implementation in European Union Law is in the same direction. Therefore it should be accepted that the consumer term is used in its wide sense.

Although expectation from the point of benefiting of consumer is a decrease in the level of prices, also conditions such as increase in quality, efficient after sale services, increase in product diversity, easy reach of consumer to the product, providing continuity in the commodity supply, gaining new commodities to economy are assessed in the scope of advantage that the consumer would obtain.

Competition Authority has decreed[220] that; "As the implementations such that Besler Gıda products are distributed to sale points by suitable vehicles and returns are collected by the dealers cause improvements in distribution, this provides advantage to Besler Gıda in competition as well as the consumer shall directly benefit from this improvement."

c) Competition not eliminated in an important part of the concerned market: According to this first negative condition looked for in giving exemption decision, the agreement subject to exemption should not cause annihilation of competition in an important part of the concerned market, in other words, the economic

[220] Decree of Competition Authority, File Number: D3/A.Ç.-99/9 (Negative clearance/Exemption), Decree Number: 99-53/575-364, Decree Date: 22.11.1999

development or benefit provided and advantage of the consumer should not be obtained as a result of annihilation of the competition. The assumption that, in cases where there isn't efficient competition in the market, the economic benefits expected from the agreement shall not realize or at least, benefits shall not be more than losses lays in the base of this condition. Factually, divergence of enterprises from competition pressure in the market shall cause the economic advantages expected from the agreement not realized, at least in long term. Matters to be considered while assessing whether competition is eliminated in an important part of the concerned market are whether there are already entrance obstructions in the market, whether there is a dominant enterprise, whether entrance obstruction is created through vertical agreements, and how much the market structure and consumer preferences are restricted.

Competition Authority has decided in its Ülker decree[221] that the condition in paragraph (c) article 5 of the Law is not fulfilled since the provisions in the distributorship agreement that re-determine sale price and cause the hindering of passive sales would cause the complete elimination of inter-brand competition due the fact that the market has an oligopolistic structure.

d) Limitation of competition not more than necessary to acquire the purposes in paragraphs (a) and (b): Competition law grants exemption because of benefits provided to some agreements. Contradiction to this last condition predicted in article 5 of Law number 4054 may exist in the events where competition is limited more than required to obtain the purpose followed or there is no need to limit competition at all. Accordingly, if there is a method that limits competition less in obtaining the economic development or improvement reflected to the consumers, it is not possible

[221] Decree of Competition Authority, File Number: D3/T.E.-99/11 (Negative clearance/Exemption), Decree Number: 99-53/537-363, Decree Date: 22.11.1999

to grant exemption to the mentioned agreement. According to this principle that can be stated as "temperance" or "balance" principle in brief, limitation should be relevant with the positive purpose to be obtained and necessary to obtain that purpose. Contradiction to this principle causes the limitation of competition more than required to obtain the purpose followed or limitation of competition although there is no need to limit it at all. Enterprises are liable to prefer the lest competition limiting method in the realization of economic benefits they aim by the agreement. If it is possible to obtain the benefit expected from the agreement without the limiting provisions or relaxing these provisions, then grant of exemption may not be under consideration. Since temperance principle may change depending to the aim followed with the agreement, first the agreement should be interpreted and aim should be determined. Hindering collaboration of the buyers with other suppliers bears the risk of closing the market. Although, in general, investment to the buyer in certain rates and entering exclusiveness provisions against it by the suppliers are acceptable implementations in the vertical agreements which are established with purposes such as reaching scale economies, provision of efficiency, existence of limitations going beyond providing the return of investments may generate negative effects on competition.

The Authority has decided in its Besler decree[222] that re-determination of sale price and hindering passive sales are not required to reach positive economic results.

Exemption may be granted for an infinite time or a certain duration. If it granted for a certain duration, it may be renewed at the end of this duration. When the Authority grants this exemption, it may bring some conditions for the firms.

[222] Decree of Competition Authority, File Number: D3/A.Ç.-99/9 (Negative clearance/Exemption), Decree Number: 99-53/575-364, Decree Date: 22.11.1999

Therefore, grant of exemption may be linked to the fulfillment of these conditions.[223] The Authority has delivered its opinion in the part of its Decree[224] with title "H.3.2. assessment of exemption duration" in the direction that infinite time exemption may be granted in case independent audit is performed.

When we examine the decree of Competition Authority related to product supply agreement between Pfizer laçları Ltd. ti. And Dilek Ecza Deposu A. . as a sample for exemption examination; the product market subject to the decree is "medicine distribution" market and the geographic market is the borders of Republic of Turkey. The Authority is convinced that the contract may not be assessed in the scope of benefit from Group Exemption Communiqué number 2002/2 related to Vertical Agreements, that is, it may not benefit from group exemption due to the reason that Pfizer would not sell medicine to pharmaceutical warehouses having a market share under %2.5 according to the data of Informational Medical Statistics ((IMS) by article 4.3 of the contract subject to exemption request, and that sales by the customers of Dilek Ecza Deposu are restricted by article 8.7 of the contract, on the other hand, when assessed from the point of individual exemption, it may benefit from individual exemption as article 8.7 of the contract bears all conditions listed in Article 5 of Law number 4054 on the Protection of Competition, however, it is not possible to grant individual exemption to article 4.3 of the contract which cannot meet the conditions listed in the same Law article. The Authority has decided that it is possible to grant individual exemption to the contract in the scope of article 5 of Law number 4054 in case article 4.3 of the contract is taken off. While the existence

[223] Competition Authority, Exemption Regime, *http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerikhtml&icId=53&detId=59&ustId=53*, (01.09.2009)
[224] Decree of Competition Authority, Decree Number: 08-06/63-20, Decree Date: 17.1.2008

of the conditions listed in the paragraphs in article 5 of the competition law are assessed;

When assessment is made from the point of paragraph (a) article 5 of the Law; it is determined the number of pharmaceutical warehouses which take medicines from Pfizer sell to pharmacies shall be reduced seriously with the threshold of %2.5 market share introduced in article 4.3 of the contract, and also almost all warehouses that attend tenders would stay out of the market after a certain time and this shall not create an improvement in the presentation of distribution services of the commodities although it is described as an improvement by Pfizer in the sense of reducing procedural costs. As expressed in the theoretical explanations section of the paragraph, the benefit provided should not be directed to the enterprise itself, but also contribute to economy, concerned product market, rivals and consumers; and the benefit provided should be objective. Therefore, the reasons brought forward by Pfizer relating to efficiency in distribution or saving in distribution costs with article 4.3 of the contract are decided to be insufficient to fulfill the condition of providing "improvement and new developments or economical or technical developments in the production or distribution of commodities and presentation of services" or "economical or technical development" as expressed in paragraph (a) article 5 of Law number 4054. On the other hand, it is understood that the limitation brought to the export of products in article 8.7 of the contract shall hinder the situation that the medicine production of Turkey based on the medicine consumption of the previous year shall fall short and this shall negatively affect the distribution system in Turkey and thus, consumers against excess demand increase encountered due to sales to foreign countries in case the medicine produced in Turkey is directed to markets where they are sold for higher prices; in addition, it shall cause more budget and

source to R&D by Pfizer by hindering the economic situation of Pfizer companies, active in markets where Pfizer sells medicine more expensive than Turkey to meet the cost of R&D works that it carries out to develop new medicine molecules, to go bad due to “cheap import” in the market; and since Pfizer cannot control the hygiene of the export out of Turkey, problems occurring in cases such as the exported medicines are false, expired or transported under unhealthy conditions while they should be transported in cold chain may threat human health and in such cases it shall cause to prevent negative effects on Pfizer title and trademark. Therefore, in terms of article 8.7 of the contract, it is decided to fulfill the condition of providing “improvement and new developments or economical or technical developments in the production or distribution of commodities and presentation of services” or “economical or technical development” as expressed in paragraph (a) article 5 of Law number 4054.

When assessment is made from the point of paragraph (b) of the Law; it is seen that the consumers shall not provide benefit from the saving related to the procedural costs which Pfizer claims to generate with the regulation in article 4.3 of the contract, availability of the medicine cannot be increased despite the dramatic decrease in the number of distributors and the consumers shall not benefit from the advantages arising as the result of this procedure, fight with false medicine cannot be realized by such a regulation, therefore no benefit shall be provided from the developments expressed in paragraph (b) of the Law. The limitation brought directed to export in the framework of article 8.7 of the contract contributes to the availability of the products subject to the contract in Turkish market and this situation facilitates the access of consumers to products having vital importance from the point of public health and public order. Therefore, the Authority has decided that

article 8.7 of the contract subject to application fulfils the condition in paragraph (b) article 5 of Law number 4054.

When assessment is made from the point of paragraph (c) article 5 of the Law; with the opinion that local pharmaceutical warehouses which are the balancing element in the concerned product market from the point of market shares shall completely go out of the market in a certain time period due to %2.5 market share threshold brought by article 4.3 of the contract, and tendering warehouses and pharmacies shall be affected quite adversely, decision is given that it shall cause the elimination of competition in an important part of the concerned product market and it does not provide the condition looked for in paragraph (c) article 5 of the Law. Although the general behavior of the Authority related to provisions brought by article 8.7 of the contract that hinder parallel import is to grant exemption to provisions that hinder parallel import aberrantly, protection of parallel import may be placed in second plan due to the specific characteristics of medicine industry. Also in the concrete event, positive effect of parallel import shall be realized in foreign markets and negative effect shall be realized for Turkish medicine consumers in the form of the absence of Pfizer medicines. Therefore, the authority has decided that the regulation in article 8.7 of the contract is required in terms of preventing this negative effect and it doesn't limit competition in an important part of the concerned product market.

When assessment is made from the point of paragraph (d) article 5 of the Law; the Authority has decided that, since article 4.3 of the contract does not provide the conditions looked for in paragraphs (a) and (b) article 5 of the Law, it also does not provide the condition of paragraph (d). Although the effect of the limitation brought in the framework of the liability determined in article 8.7 of the contract is observed

in Turkish market, this liability is decided to meet the conditions listed in article 5 of the Law because the initiative of selling to a customer who has reasons to sell to abroad belongs to the pharmaceutical warehouse, Pfizer hasn't any instruction or recommendation, and Pfizer clearly puts forth its will in the direction of selling more of its products by using the experience and distribution channels of the pharmaceutical warehouses with which it considers to sign contracts as the one concluded.

Competition Authority has decided to grant individual exemption to the contract in the scope of second clause of article 5 of Law number 4054 on Protection of Competition on condition to take out article 4.3 of the above contract subject to examination. In this decree, the Competition Authority gives the individual exemption with the condition of realization of its condition.

Competition Authority should not intervene the contract freedom of parties in a comprehensive and formative manner. In some of its decisions related to granting conditional individual exemptions, Competition Authority almost writes the contract from the beginning. In such cases direct decision of prohibition would be more relevant. A contrary behavior means adopting "an intervening approach" on behalf of "free competition" which would not accord with liberal economy principals[225]. This attitude of the Authority continues. For instance, we can show the decree[226] related to negative clearance / individual exemption granted conditionally to the distribution agreements undersigned between Milangaz, Milgaz, Güne•gaz, Mutfakgaz and Likidgaz enterprises and their dealers, or the decree[227] of negative

[225] ASLAN,•.Y., *"Rekabet Hukuku Bakım ından Dikey Anlaşmalar Teori ve Uygulama",* op. cit.90
[226] Decree of Competition Authority, File Number: D1/1/H.G.K.-99/1, Decree Number: 99-47/503-319, Decree Date: 12.10.1999
[227] Decree of Competition Authority, File Number: D3/• .Y.-99/3, Decree Number: 99-31/282-171, Decree Date: 22.06.1999

clearance / individual exemption granted conditionally to the contracts undersigned between Bosch-Siemens-Profilo Beyaz E•ya and their dealers.

II.3.2. Group Exemption

Communiqués which provide exemption granting as a group to agreement types on certain subjects and demonstrating the conditions for that may be published in case the conditions indicated in Article 5 of Law number 4054 on Protection of Competition are realized. This power is very comprehensive and similar to a law[228]. While individual exemptions may be granted also to concerted actions according to Article 5 of the Law, only certain agreement types may form the subject of group exemption. However, Competition Authority has regulated in Group Exemption Communiqué number 2002/2 related to Vertical Agreements that also vertical concerted actions may benefit from group exemption in the scope of the communiqué. Equivalent of the Statute number 2790/1999 published by European Community Council in our country is "Group Exemption Communiqué number 2002/2 related to Vertical Agreements" of the Competition Authority. Parallel to Council Statute number 2790/1999, in this communiqué the scope of implementation is extended compared to the previous communiqués related to vertical agreements[229]. The communiqués published by the Competition Authority are summarised below.

Competition Authority has published communiqués which grant group exemptions to various agreement types. Our Competition Authority has published the communiqué number 1997/3 and 1997/4 related to exclusive distribution and exclusive purchase agreements; communiqué number 1998/7[230] related to Franchising agreements. Later on it has combined these communiqués under a single

[228] ASLAN,•.Y., *"Rekabet Hukuku Teori, Uygulama ve Mevzuat*", op. cit.290
[229] EKD•, B., op. cit.130
[230] This communiqué is amended by the communiqué number 99/2

communiqué such as the EU Commission and published and effected Group Exemption Communiqué number 2002/2 related to Vertical Agreements in Official Gazette of date 14 July 2002 by extending its scope. Furthermore, Competition Authority has published and effected Group Exemption Communiqué number 1998/3 related to Motor Vehicles Distribution and Service Agreements in Official Gazette of date 1 April 1998 with the power arranged in article 5 of Law number 4054 related to the competition restrictions in the distribution agreements concluded in motor vehicles sector. Changes are predicted in notice of termination durations of Communiqué number 1998/3 and Communiqué number 2000/3 related to Changing Group Exemption Communiqué related to Motor Vehicles Distribution and Service Agreements is published and effected in Official Gazette of date 4 October 2000. Competition Authority has needed a new regulation due to the reason that the communiqué doesn't cover new distribution techniques, that regulations to increase inter-brand competition are required, requirement of promotion of multi brand sales, requirement to provide competition in after sale services, and group exemption communiqué number 2005/4 related to vertical agreements and concerted actions in motor vehicles sector is published in Official Gazette and effected by date 1 January 2006.

Group exemption communiqués show to which agreements containing certain conditions the prohibition in article 4 of the Law would not apply. It is not compulsory to inform the Competition Authority about the agreements complying with group exemption; Article 5 of the Law shall apply automatically to these agreements.

We observe that Competition Authority gives conditional group exemption decrees. Conditional exemption decrees is not compatible with the nature of "group

exemption" according to . Yılmaz Aslan and prediction of some conditions through individual decisions in order that an agreement may benefit from group exemption is contrary to the essence of the system. In such cases the Authority should necessarily examine individual exemption[231].

Only Group Exemption number 2002/2 related to Vertical Agreements published by Competition Authority shall be explained.

II.4. GIVING NEGATIVE CLEARANCE TO VERTICAL AGREEMENTS

When the Competition Authority identifies that a noticed agreement has not any provision or effect contrary to competition law, it should award a negative clearance certificate to this agreement. We can give the decree related to awarding negative clearance to the distributorship agreement signed between Gen-Pa Pazarlama and Ericsson[232] as an example.

III. GROUP EXEMPTION COMMUNIQUÉ NUMBER 2002/2 RELATED TO VERTICAL AGREEMENTS

Vertical agreements which ensure the enterprises to establish production and distribution process in the best way and as a result, and in general an increase in inter-brand competition in the market, lead the agreement groups which should be exempted from the prohibition in Article 4 of the Law. The Authority has abolished its communiqué numbers 1997/3 and 1997/4 related to exclusive distribution and exclusive purchase agreements and communiqué number 1998/7 related to

[231] ASLAN, •.Y. *"Rekabet Hukuku Bakım ından Dikey Anlaşmalar Teori ve Uygulama"*, ,op. cit.91
[232] Decree of Competition Authority, File Number: D2/1/E.K.-01/2, Decree Number: 01-05/34-8, Decree Date: 23.01.2001

Franchising agreements due to the reason that these cover a limited part of the vertical agreements and published much more comprehensive Group Exemption Communiqué number 2002/2 related to Vertical Agreements instead of these three group exemption communiqués. Afterwards, the Competition Authority has amended Group Exemption Communiqué number 2002/2 related to Vertical Agreements with communiqué numbers 2003/3[233] and 2007/2[234]. The last and important change made in this communiqué by the Competition Authority with communiqué number 2007/2 is to narrow the scope of the communiqué by bringing %40 market share threshold. It can not be said that all vertical agreements that may not benefit from the group exemption of the communiqué are in the scope of Article 4 of the Law. If they wish, the enterprises may apply to request individual exemption from Competition Authority for these agreements.

Reason of the Authority's market share threshold is the works to adapt Turkish legislation to EU law. Bringing thirty percent market share threshold applied in "Community dimensions" by the provisions of "Commission Regulation of number 2790/1999/EC and date 22 December 1999 on the application of clause 3, article 81 of EU Convention to vertical agreements and concerted action categories" to Group Exemption Communiqué number 2002/2 related to Vertical Agreements with an amendment has become an early and yet unnecessary application to Turkish Competition Law before Turkey becomes member state of EU. Competition Authority has perhaps predicted the regulation of %40 market share threshold due to this reason.

The Commission has indicated its positive opinion related to application of market share threshold in the Progress Report that a positive development has been

[233] OJ 18.09.2003, 25233
[234] OJ 25.05.2007, 26532

covered related to the legislation directed to apply the acquis as "Competition Authority has adjusted the general group exemption on vertical agreements to clarify that distribution agreements between the companies having 40% or above market share may not benefit from exemption".[235]

Thirty percent threshold implementation is applied to the vertical agreements which affect the trade between AU member states and have Community dimension. That is, vertical agreements which don't have Community dimension, but realized within the borders of only one member state don't enter into the scope of Commission Regulation. Such vertical agreements are subject to specific regulations of member states. When member states are considered, a uniform implementation is not observed based on the said Commission Regulation. While the majority of member states involved in EU competition system don't establish a block exemption system one-to-one similar with EU law for the vertical agreements that don't have Community dimension, a part of the member states base their exemption systems only on individual exemption. Therefore, passing to the implementation of market share threshold before Republic of Turkey becomes a member state of EU has become an early application which brings work load to the Competition Authority. Enterprises haven't become sure whether they are evaluated to be in the scope of exemption after market share amendment for the vertical agreements included in the exemption scope of the communiqué and apply unnecessarily to the Competition Authority with the aim of securing whether the provisions in their agreements violate the Communiqué. This has brought a work load to the Competition Authority.

III.1. SCOPE OF COMMUNIQUÉ

[235] 2007 Regular Report of Commission on Progress of Turkey in Direction of Accession, Chapter 4.8, Competition Policy, 23

Vertical agreements are defined as " agreements made with the purpose of buying, selling or re-selling of certain commodities and services between two or more enterprises operating at different levels of the production or distribution chain" in Article 2 of the communiqué with scope title. In Article 7 of the communiqué, it is regulated that the communiqué shall apply to vertical concerted actions besides vertical agreements considering the same criteria. There are three elements in the vertical agreement according to the definition.

- Two or more enterprises should be party to the agreement. Therefore, agreements concluded with end users who have not the nature of enterprise are not in the scope of Article 4 of the Law and thus, they may not be subject to group exemption[236].

- Enterprises which are party to the agreement should operate in different levels of production or distribution. Distribution agreement between the producer and wholesaler or supply agreement between the raw material producer and the enterprise which uses this raw material in its production or an agreement concluded between three enterprises where the parties are producer, distributor and dealer are accepted vertical agreement.

- The agreement should be entered with the basic purpose of buying, selling or re-selling of certain commodities or services. Here, the purpose of buyer to take the commodity or service subject to agreement from the supplier is not important.

A special regulation which takes the vertical agreements between retailer union members or suppliers to such unions out of the group exemption is not made by the

[236] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 3

communiqué. From this point, implementation area of Turkish group exemption communiqué is larger compared to European group exemption regulation[237].

According to Clause 4, Article 2 of the communiqué with scope title, vertical agreements containing the transfer of intellectual rights to the buyer or use of them by the buyer may benefit from group exemption provided to bear certain conditions. Benefiting of these vertical agreements from exemption shall be possible only if they provide all conditions:

- Provisions related to intellectual rights should be related directly with the use, sale or re-sale of the commodities or services subject to agreement.

- Buying, selling or re-selling of the commodities or services subject to agreement should be the basic purpose of the agreement. This condition is generally ensured in franchising agreements. However, since it doesn't provide this condition to contracts of license transfer only, implementation of the communiqué is not possible.

Transfer of intellectual rights to the buyer or use of them by the buyer should be in question in the agreement. Benefiting of the vertical agreement having the converse regulation, from the group exemption may not be in question. For instance, the enterprise which realizes production and is in the position of supplier (contractor) in toll manufacture contracts provides from the enterprise in the position of buyer the know-how necessary for production. In order that the implementations of causing the producer enterprises produce the products for chain markets which form their own brand may be evaluated in the scope of the communiqué, the chain market

[237] ASLAN,•.Y. *"Rekabet Hukuku Teori, Uygulama ve Mevzuat",* op. cit.297

should not realize the production of the mentioned product and transfer know-how on this subject to the producer in the position of supplier.[238]

- Provisions related to the transfer and use of intellectual rights should not contain competition limitations having the same purpose or effect with the vertical limitations not exempted in the communiqué.

In accordance with the provision of Clause 5, Article 2 of the communiqué, vertical agreements concluded between rival enterprises may not benefit from group exemptions excluding only one exceptional case. In clause (c), Article 3 of the communiqué, without considering whether they operate in the same geographical market, suppliers operating or having the potential to operate in the same product market in Turkey are defined as rival enterprises. The enterprises which don't produce the rival commodity already, but may enter the market by making the necessary investments within one year in case there occurs a relatively small and permanent increase in the price of the mentioned product, shall be assessed as the enterprise having the potential to operate in the mentioned product market.[239] However, it is correct to follow a realistic approach instead of a theoretical one while assessing whether an enterprise is potential rival.

Vertical agreements concluded between rival enterprises benefit from group exemption granted by this communiqué in the exceptional case that the supplier is both the producer and distributor of the commodities subject to the agreement, and the buyer is the distributor, but not the producer of the commodities which competes with these commodities. In other words, vertical agreements where the supplier is both the producer and supplier of the commodities subject to the agreement and the

[238] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 4
[239] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 4-5

buyer is the distributor, but not the producer of the commodities competing with these commodities benefit from the group exemption.

Three different exceptions are accepted in EC, however, only double distribution is accepted as exception in the communiqué. Turkish regulation has a narrower scope compared to European Community regulation. On the other hand, although European legislation brings some turnover restrictions, turnover restrictions don't exist in the communiqué of Competition Authority.[240]

This communiqué is not applied to vertical agreements entering in the scope of another group exemption communiqué. In the event of existence of communiqués regulating a sector or subject specifically, the communiqués of this sector shall be applied instead of Group Exemption Communiqué number 2002/2 related to Vertical Agreements which is a general regulation.

III.2. GROSS LIMITATIONS TAKING AGREEMENTS OUT OF THE SCOPE OF GROUP EXEMPTION

Vertical agreement that contains any one of the limitations listed in Article 4 of the Communiqué and having the purpose of hindering competition directly or indirectly may not benefit from group exemption and enters in the scope of prohibition in Article 4 of Law on Protection of Competition.

(i) Determination of Re-Selling Price: Hindering the freedom of the buyer to determine its own sale price is strictly forbidden in paragraph (a) of first clause of article 4 of the Communiqué. Insofar; it is possible for the supplier to determine the maximum sale price or recommend the sale price on condition that it would not convert to fixed or minimum sale price as the result of the coercion or promotion of any party. This price should be clearly indicated to be maximum or recommended.

[240] ASLAN,•.Y., *"Rekabet Hukuku Teori, Uygulama ve Mevzuat"*, op. cit.299

Competition Authority has regarded restriction of determination of sale price by the buyer, without prejudice to the possibility of imposing maximum price or determining a sale price having the nature of recommendation by the supplier, among the cases that hinder to grant exemption in its decree given related to the implementations of Ford Otomotiv against its dealers, on condition not to form a fixed price or minimum sale price as the result of coercion by any party or promotions offered by any party.[241]

The supplier may implement direct or indirect methods with the aim of determining re-selling price. Determination of profit margin of the buyer, determination of the upper level of the discount ratio that the buyer may apply to a price level publicized as recommended price, application of additional discounts to the buyer in case it obeys the recommended prices or threat of delay, suspension of deliveries or termination of agreement to the buyer in case of disobedience to the prices or implementation of such penal sanctions may be examples to determination of sale price indirectly. Such implementations of determining re-sale price indirectly are in the scope of paragraph (a), first clause, article 4 of the Communiqué.[242]

Competition Authority accepts selling by discount over a certain "market price" also as the determination of re-sale prices.[243]

Even if the producer or main distributor firm has written in the price lists that it is recommended or maximum price, if these prices convert to fixed prices as the result of direct or indirect coercion of the supplier, possibility to benefit from group exemption is eliminated for the agreement. As a matter of fact, Competition

[241] Decree of Competition Authority, File Number: D4/1/M.H.A.-99/1, Decree Number: 4-60/856-200, Decree Date: 20.9.2004

[242] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M,Ankara, 6

[243] ASLAN, •.Y., *"Rekabet Hukuku Bakımından Dikey Anlaşmalar Teori ve Uygulama",* op. cit.69

Authority has indicated this matter in Ford Otomotiv decree and searched whether the recommended prices convert to fixed price.[244]

Competition Authority acts very sensitive in provisions concerning prices and accept ambiguous and suspicious agreement provisions as competition violation or wants it to be changed always interpreting these in opposition[245].

(ii) Region and Customer Limitation: Except 4 exceptional case listed in paragraph (b), first clause, Article 4 of the Communiqué, limitations brought to the buyers with the vertical agreement on the subject of region and customers to sell the commodity or service subject to the contract may not benefit from the group exemption, therefore enter into the scope of prohibition by Article 4 of the Law. Regional Sharing model creates the most adverse effect on the competition. Because in this case, new monopolies shall emerge in each region and these monopolies shall apply excess prices without fearing competition oppression. Customer sharing agreements is not a method easy to apply. Each geographic market sharing indeed means customer sharing naturally. However, to make customer sharing not depending on region sharing possible, also certain advantages should be provided to the customers and a vertical agreement should be entered.[246] The supplier may use direct or indirect methods related to region and customer sharing. Despite any prohibition in the contract, supplier enterprises may take deterrent precautions with the purpose of meeting the demand from a certain region or customer group. For instance, actions like reducing or refusing the premiums or discounts to the buyers selling to customers other than the customers determined by the supplier, reducing the amount of commodities supplied or completely stopping to deliver commodities

[244] Decree of Competition Authority, File Number: D4/1/M.H.A.-99/1, Decree Number: 04-60/856-200, Decree Date: 20.9.2004
[245] Decree of Competition Authority, File Number: 2003-1-112, Decree Number: 04-01/9-6, Decree Date: 8.1.2004
[246] TÜRKKAN,E., ibid.

are the implementations most often encountered in the application directed to region and customer sharing[247]. In the four exceptional events below, bringing restrictions related to the regions or customers to whom the buyer would sell the commodities or services subject to the contract shall not take the vertical agreement out of the group exemption.

1) Provided not to cover the sales made by the customers of the buyer, active sales made by the supplier to an exclusive region or exclusive customer group allocated to it or a buyer may be restricted with the vertical agreement. Article 4(b)(1) of the communiqué regulates the conditions under which the active sales can be banned in order that the agreement may benefit from group exemption. Therefore, if the determination of an exclusive region is in question, active sales to this exclusive region may be forbidden[248]. In order to assess the exclusive region or customer group exclusively, only an exclusive dealer or only the supplier itself should sell actively to that region or customer group. In other words, the region or customer group to which more than one party sells becomes "free" region or customer group and any buyer may sell to this region or customer group actively as it wishes.

Enabling sales by the supplier or others to the region means that exclusive regions are not given and in this case, bringing active sale prohibition to that region may not benefit from the exemption. Competition Authority has decided in its Roche decree[249] that Roche has assigned exclusive dealers in 66 provinces to SSK units although it has reserved its own supply right, but the agreement has gone out of

[247] *Competition Authority Guide,* "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 8-9
[248] Decree of Competition Authority, File Number: 2003-1-112, Decree Number: 04-01/9-6, Decree Date: 8.1.2004
[249] Decree of Competition Authority, File Number: 2004-1-37, Decree Number: 04-46/593-144, Decree Date: 8.7.2004

the scope of group exemption communiqué as it has destroyed this exclusiveness by reserving its own commodity sale right. The Authority has also other decrees[250] in this direction.

As an example to the first exception listed in paragraph (a), first clause of article 4 of the communiqué, a producer enterprise in the position of supplier shall be able to distribute its products to every province of Turkey by means of its assigned distributors and shall be able to ensure regional protection to the distributors[251]. However, restriction of active sales takes the agreement out of the group exemption scope.

Sales realized to individual customers in the exclusive region or exclusive customer group of another buyer through direct marketing methods like letters or visits, establishing sales point or distribution warehouse in the region of another buyer, advertisements or promotions directly targeting the customers in the region or customer group allocated to another buyer, sending e-mails, catalogues to the customers in the region or customer group in the exclusive region of another buyer are assessed as "active sale" unless a demand comes from the mentioned customers.

Meeting the demands coming from the customers in the region or customer groups in the region of another buyer and not resulting from active efforts of the buyer means "passive sale" even if the buyer delivers the commodity to the address of the customer[252]. General advertisements and announcements via media, sales via internet may be shown as examples to passive sales.

[250] Decree of Competition Authority, File Number: 2003-1-112, Decree Number: 04-01/9-6, Decree Date: 8.1.2004
[251] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 9
[252] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 9

The expression "Provided not to cover the sales made by the customers of the buyer" means that the supplier enterprise may only hinder the active sales to be realized by the buyer. In case the supplier brings any liability to the buyer in the direction of limiting the active sales to be realized only by the buyer, it shall not be possible to benefit from the group exemption. In other words, the customers who are not party to the vertical agreement between the supplier and buyer and provide the commodities or services from the buyer, may sell the mentioned commodities or services to anyone they wish without active-passive sale differentiation[253].

Competition Authority has accepted in a decree that "location clause" and exclusiveness have similar nature and that the condition related to sale of the dealer only at the point of its enterprise is sufficient to realize "exclusiveness" condition[254].

2) Sales of the buyer operating in wholesaler level to end users may be restricted.

3) Sale of the members of a selective distribution system to unauthorized dealers may be restricted. In article 3 of the communiqué, selective distribution system is defined as "A distribution system where the supplier undertakes to sell directly or indirectly the commodities or services subject to the agreement only to the distributors selected based on certain criteria, and these distributors undertake not to sell the mentioned commodities or services to the distributors not authorized."

4) In case the parts supplied for assembly are under consideration, sale of these parts by the buyer to the rivals of the supplier in the position of producer may be restricted. For instance, when a television producer sells the buyer the parts of the produced television, sale of the mentioned parts by the buyer to other television

[253] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M,10

[254] Decree of Competition Authority, File Number: 2004-3-55, Decree Number: 04-73/1066-265, Decree Date: 25.11.2004

producers (rival enterprises) may be hindered. However, in case the buyer is hindered to sell these products to other enterprises which are not television producers, it shall not possible to benefit from the group exemption[255].

Active-passive sale differentiation is made only in the first exceptional case. The supplier shall be able to restrict any active-passive sale made by the buyer in the events where the last three exceptional cases are implemented.

(iii) Selective Distribution Systems: Paragraph (c), first clause of article 4 of the communiqué cannot bring provisions restricting the active or passive sales of the system members of retail level to end users provided that the right of banning the operation of a system member at an unauthorized location is reserved. In other words, the buyers which are members of a selective distribution system may sell actively or passively to the end user in a region they wish. However the supplier may hinder the buyer which is the member of the system to change the location of the sale point where it continues operation or to open a new sale point[256]. The other regulation which partially opens the selective distribution system to competition is made in paragraph (d), first clause of article 4 of the communiqué. Accordingly, buying and selling among the system members cannot be hindered in the selective distribution system. That is, exclusive buying liability cannot be brought to the enterprises selecting this system.

In its decree[257] Competition Authority has exempted the agreement from Article 4 of the Law in the framework of Article 5 of the Law by determining that selecting the authorized dealers based on having certain objective characteristics has

[255] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M,11
[256] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M,11
[257] Decree of Competition Authority, File Number: D2/1/E.K.-0/1, Decree Number: 01-06/47-12, Decree Date: 30.1.2004

improved in the distribution of the product and this is to the advantage of the consumer although the selective distribution agreement contains competition restriction due to restricting re-selling possibilities to unauthorized dealers.

(iv) Other Limitations: In accordance with paragraph (e), first clause of article 4 of the communiqué; in the event of commodities composed by assembling parts is in question, sale of these parts by the supplier as spare parts to end users or repairmen unauthorized by the buyer in repair or maintenance may not be prohibited in the agreements between the supplier which sells these parts and buyer which assembles them. As observed, the mentioned limitation is brought by the buyer to the supplier not like the above.

III.3. LIMITATIONS OUT OF GROUP EXEMPTION: NON-COMPETITION LIABILITY

Article 5 of the communiqué contains the regulation related to non-competition liabilities which may be brought with vertical agreements. If the provision related to the liability of non-competition brought to the buyer out of the limits indicated in this article can be separated from the mentioned vertical agreement, contract provisions other than that article benefit from the group exemption. However, if it is a provision that cannot be separated from the integrity of the contract, then the complete contract may not benefit from the group exemption.

In article 3 of the communiqué non-competition liability is defined as “any direct or indirect liability that hinders the buyer to produce, buy, sell or re-sell the commodities or services competing with the commodities or services subject to the agreement; in addition any liability brought directly or indirectly to the buyer directed to buying more than %80 of the commodities or services in the concerned

market subject to the agreement or commodities or services which substitute them, from the supplier or another enterprise pointed by the supplier, based on the purchases of the buyer in the previous calendar year." Purchases of the buyer in the previous calendar year are basic in the calculation of these ratios. If the quantity of purchase of the buyer in the previous calendar year is not definite, total annual need of the buyer is estimated and this quantity may be used[258].

Group exemption shall not be applied to the provision of the vertical agreement which brings to the buyer non-competition liability of indefinite time or time exceeding five years. In case the non-competition liability is decided implicitly to be renewable to exceed five years, non-competition liability is regarded to be indefinite time and group exemptions are not applied to agreement provisions with indefinite time. However, non-competition liability benefits from group exemption in the events in which time doesn't exceed five years or extension after five years is possible with the explicit intent of both parties and there is not any obstruction to the buyer to finish the term of non-competition at the end of five years[259].

Competition Authority has decided that contract duration is regarded as the duration of non-competition liability also due to the reason that the time of non-competition liability is not indicated as well in the agreement which contains the provision of automatic extension at the end of duration[260].

Competition Authority has examined in its Shell decree the cases indicated in Article 5 of the Communiqué on Providing Group Exemption Related to Vertical Agreements, and it is determined especially in petroleum distribution sector that

[258] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M,12
[259] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 12
[260] Decree of Competition Authority, File Number: D1/1/C.S.-03/1, Decree Number: 03-64/770-356, Decree Date: 2.10.2003

duration of fuel dealership contracts are increased to 12-15 years actually with rental contracts which title deeds are annotated and the interconnections of rental contracts and operation contracts[261].

The regulation related to bringing at most five years non-competition liability to the buyer has an exception. Non-competition liability brought to the buyer may be bound to the duration which the buyer uses the mentioned facility if the property of facility to be used by the buyer to maintain its contractual activities belongs to the supplier together with the land or in a framework of right of construction provided from third parties not connected to the buyer, or if the buyer shall maintain its activity in a facility subject to real or personal usage right acquired by the supplier from third parties not connected to the buyer; insofar, non-competition liability covers only the activity to be carried out by the buyer in the mentioned facility in terms of the part of this duration exceeding five years.

The principle that is accepted by the communiqué in general is that any direct or indirect liability may not be brought to the buyer related to the period following the expiry of agreement which prohibits production, buying, selling or re-selling of commodities or services. However, a liability may be brought provided not to exceed one year after the expiry of the agreement on condition that the prohibition is related to the commodities or services competing with the commodities or services subject to the agreement, it is limited to the facility or land where the buyer has operated during the agreement and it is compulsory to maintain the know-how transferred to the buyer by the supplier. Indefinite prohibition right relating to the use and disclosure of know-how not open to public is reserved.

[261] File Number: D1/1/C.S.-03/1, Decree Number: 03-64/770-356, Decree Date: 2.10.2003

Another non-competition liability not permitted with the communiqué is the liability not to sell the branded products of determined rival suppliers brought to the members of selective distribution system. In other words, non-competition liability in selective distribution system should either be brought for all rival commodities or brought for none of them.

Competition Authority has decided that the provision related to buying certain products from the franchisor or third parties determined by the franchisor within franchising system shall benefit from group exemption even if it is contrary to Article 4 of the Law[262].

III.4. PORTFOLIO PRODUCTS DISTRIBUTED BY SAME DISTRIBUTION SYSTEM

It should be useful to have an explanation from the point of implementation scope of the communiqué. If the same distribution agreement is used in the distribution of many products or services, some products may benefit from the group exemption and some may not due to market share threshold. In this case, the agreement may benefit from group exemption for the distribution of products or services which are under market share threshold.

As regulated in Guide article 46, the supplier may continue to distribute the portfolio product excluded from the exemption scope with the product in the scope of exemption using the same distribution network. However, contract should be concluded by excluding competition limiting provisions put for the concerned portfolio product which can not benefit from the group exemption. Either a separate contract should be concluded for this product or the provisions in the contract should

[262] Decree of Competition Authority, File Number: D3/1/A.Ç.-99/3, Decree Number: 99-41/435-274(a), Decree Date: 08.09.1999

be made compatible with Article 4 of Law on Protection of Competition for this portfolio product.

III.5. MARKET SHARE THRESHOLD

III.5.1. Determination of Concerned Market In The Calculation Of 40% Market Share Threshold Included In The Communiqué

The general principle in the determination of market share is that the market share of the supplier indicated in Clause 2, Article 2 of the communiqué is determinative. However, there is a single exception for this; market share of the buyer is determinative in the vertical agreements which bring the liability of supplying only to exclusive buyer regulated in Clause 3, Article 2 of the communiqué.

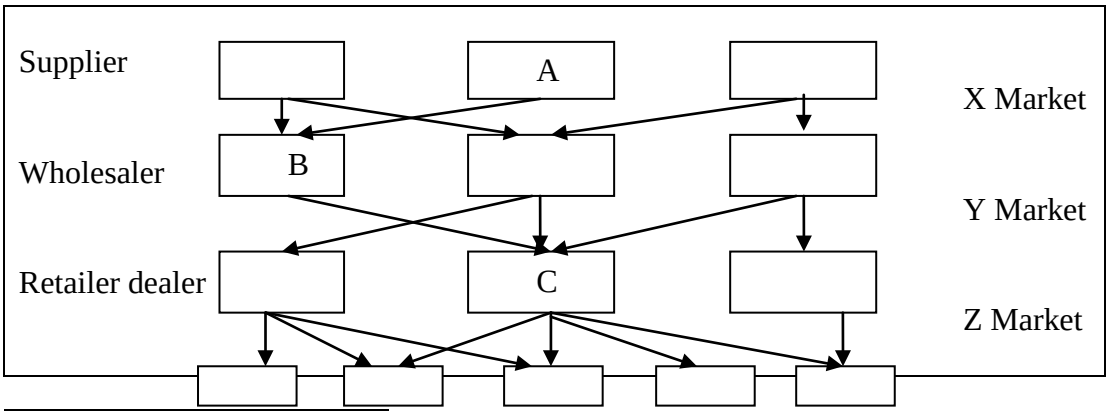
The concerned market should be determined in order to determine the market share. Concerned product and concerned geographic market should be defined for this.

First a preliminary opinion is formed related to the possible concerned markets in defining the concerned product market basing on the present information or information submitted by the enterprises party to the event. In addition, it is important whether alternative products are substitute of each other in this preliminary opinion[263]. While determining the concerned product market in vertical restrictions, the market composed of commodities or services assumed similar in terms of their prices, usage purposes and features from the point of view of consumer is considered and the other elements which shall be able to affect the identified market are also assessed.

[263] *Competition Authority Guide,* "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 17

First a preliminary opinion is formed in defining the concerned geographic market starting from the indicators related to the distribution of market shares of rivals and price differences. Then, it is examined whether the enterprises in different regions form an alternative supply source factually for the customers. The basic point shall be that whether the examined enterprises shall be able to shift the customer orders to enterprises in other regions in short term and with negligible costs[264]. In vertical restrictions, the concerned geographic market is the regions that can easily be distinguished from neighboring regions because the enterprises operate on the subject of supply and demand of commodities and services, competition conditions are sufficiently homogeneous and especially competition conditions are appreciably different from those regions. However, if the examined procedure doesn't worry from the point of competition in the framework of possible alternative market definitions from the point of both product and geography or an influence which annihilate competition from the point of all alternative definitions is in question, market may not be defined[265].

We just examine the example given in Figure -2 related to Vertical Agreements for the definition of market share, we reach the below data.



[264] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 19

[265] Decree of Competition Authority, Decree Date: 15.6.2006, Decree Number: 06-44/551-149, Decree Date: 29.3.207, Decree Number: 07-29/278-104

Consumer

Definition Of Market Share - Figure – 2

1- As the general principle is that the determinative market share is the market share of the supplier, market share of the supplier is its share in the concerned product market and concerned geographic market where it sells to buyers. In the above example this market is market X.

2- From the point of liability to supply to exclusive buyer brought by A to B, share of the buyer B in the total buying in buying market (market X) is considered.

3- As the buyers (such as A and C) in market X and Y are professional buyers, geographic market is larger in general than market Z where the product is re-sold to end consumers.

4- In trilateral vertical agreement with activity in different levels, agreement between A, B and C in the above example, market share of the parties should be realized under %40 threshold at both levels in order to grant group exemption. In the example, market shares of the supplier A and wholesaler B should not exceed %40.

In general the shape of distribution is not considered in the identification of the concerned market in the market where different distribution systems compete. However, in case where the supplier sells a product portfolio, if the consumer perceives the product portfolio as a substitute, but not the product, the concerned product market is determined as all product portfolios.

If the supplier produces both the original equipment and parts necessary for repair and spares of this equipment, the supplier is in the position of exclusive or main supplier in repair and spare parts market. Concerned market determined for the application of group exemption may be defined as an original equipment market containing also the spare parts or separately as original equipment market and an

after sale market depending on elements such as the effect of restrictions, equipment life, importance of repair and parts exchange costs[266].

If vertical agreement contains provisions also concerning intellectual rights which facilitate the marketing of product of the buyer subject to the agreement (such as the usage of trademark of the supplier) in addition to the supply of the product subject to the agreement, the share of the supplier in the market it sells the products subject to the agreement, is determinative in terms of implementation of group exemption[267].

In case the franchisor doesn't supply commodities with the purpose of re-sale, but it provides a bundle of services together with the intellectual rights forming the work method subject to franchise, the franchisor should consider the market share of the franchisee in the market it uses the work method to present service or product to end consumers. If the franchisor supplies certain inputs such as meat and spices besides the work method to the franchisee, the franchisor should also calculate its share in the market where these products are sold while calculating its market share[268].

III.5.2. Calculation Of Market Share In The Scope Of Group Exemption Communiqué

According to article 6/A of the communiqué, market share predicted in this communiqué is calculated based on the market sale prices of commodities or services subject to the agreement and other commodities or services accepted by the buyer to

[266] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 20, article 62
[267] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 20, article 63
[268] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 20, article 64

be substitutable or replaceable in terms of the features, prices and usage purposes and sold also by the supplier. If market sale value data is not present, estimates based on the other reliable market information including also the sale quantities may be used in the determination of the market share of the concerned enterprise. From the point of implementing third clause of article 2 of the communiqué, market purchase values or reliable estimates are used in the calculation of the market share. However, intermediate goods and in-facility production shall not be considered in the calculation of market share[269].

As regulated in Guide article 68, if the supplier distributes both the commodity it produces and rival brand commodity with the distribution company in its body, market share of the supplier is calculated by taking the total market shares of both the commodity it produces and rival commodity.

The following rules apply in the implementation of %40 market share threshold indicated in this communiqué:

a) Market share is calculated using the data of the previous year.

b) Market share contains all commodities and services supplied to the bound distributors with the purpose of selling.

c) If the market share is not more than %40 initially and goes over the threshold later on not to exceed %45, the exemption continues to be valid along two years following the year first the market share threshold is exceeded.

d) If the market share is not more than %40 initially and goes over %45 later on, the exemption continues to be valid along the year following the year first the market share threshold is exceeded.

[269] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 20

e) Rights provided by paragraphs (c) and (d) can not be combined such to cause the duration to exceed two calendar years.

If the market share of the enterprise is determined to exceed 40% threshold but considering these rules, this agreement cannot benefit from group exemption even if it is a vertical agreement that fulfils all the other provisions of the communiqué. However, this doesn't mean that the agreement is in the scope of Article 4 of the Law. If the enterprise wishes, it can request individual exemption from Competition Authority for its vertical agreement.

III.6. REVOKING OF EXEMPTION

III.6.1. Revoking Individually

In the first clause of article 6 of the communiqué, it is regulated that, in case an agreement to which exemption is granted by this communiqué is determined to have effects that doesn't suit the conditions regulated in article 5 of the Law, Competition Authority may revoke the exemption granted by this communiqué. Therefore, even if a vertical agreement is regulated suitable to the communiqué, if it diverges to meet the conditions that have enabled grant of exemption by the effect it causes in the market in implementation stage, exemption protection provided by the communiqué may be revoked by the Authority[270].

Revoking of exemption individually concerns the agreements of certain enterprises.

[270] *Competition Authority Guide*, "Guide Related to Vertical Agreements", Date: 03.06.2009, 09-26/567-M, 16

The Competition Authority has applied a fine in its Yaysat/Biryay/BBD decree to the exclusiveness application that converts to market entry obstruction as well as revoked the exemption provided by group exemption communiqués[271].

Competition Authority[272] has determined that the existence of exclusiveness condition is not required from the point of the mentioned agreement and despite it has benefited from the group exemption of non-competition prohibition not exceeding five years, and revoked group exemption from the point of complete contract by determining such a condition in the contract doesn't bear exemption conditions.

III.6.2.Revoking As Group By A Communiqué

In second clause of article 6 of the communiqué, if parallel networks formed by vertical limitations covers more than %50 of the concerned market, The Competition Authority may take the vertical agreements that contain certain limitations in the concerned market out of the exemption provided by this communiqué by publishing a separate communiqué. Even if the share of the parallel networks in the concerned market is %50, this provision doesn't oblige the Competition Authority to revoke the exemption by a communiqué.

Taking out of the scope of exemption by a communiqué concerns all enterprises which operate in the concerned market and apply the agreements defined by the communiqué.

A minimum of 6 months transition period is predicted for the communiqués to be published in this direction.

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[271] Decree of Competition Authority, File Number: D2/1/B.E.-99/3, Decree Number: 00-49/529-291, Decree Date: 14.12.2000

[272] Decree of Competition Authority, File Number: D4/1/L.K.-01/2, Decree Number: 03-57/671-304, Decree Date: 15.8.2003

CHAPTER IV

TRACTORS AND AGRICULTURAL EQUIPMENTS MARKET: MODEL SECTOR WHERE EXCLUSIVE VERTICAL AGREEMENTS ARE APPLIED

I. GENERAL

In general, offering the products in agricultural tractor and agricultural vehicles to end consumers through re-sellers is realized by distribution methods such as distributorship and dealership agreements. These contracts are vertical agreements that contain competition restrictions in general. For instance, Türk Traktör A.• . is established as the result of joint cooperation agreement between Koç Group and CNH which lead in tractor market and of which subject is distribution of tractors and agricultural vehicles in Turkey, and it is the producer of New Holland brand tractors in Turkey; in addition, CNH is the foreign producer of New Holland tractors, harvesters and Case-IH brand agricultural vehicles and authorized distributor of the commodities of both firms in Turkey is Türk Traktör A.• . Previously the authorized distributor in Turkey was Trakmak Traktör ve Ziraat Makineleri Ticaret A.• . in the framework of joint cooperation contract and this company is taken over by Türk Traktör A.• . by merger. Therefore the producer and distributor have merged and vertical integration is realized. Türk Traktör A.• . markets its commodities to end consumers by its independent dealers with which it concludes vertical agreements which subject is re-selling. Distribution of tractors and agricultural vehicles are made vertically along this chain.

Tractor and agricultural vehicles sector which is a branch of automotive industry is in close interaction with agriculture sector. However, tractor finds a usage area in agriculture sector. Any agreements between enterprises that contain competition limiting provisions are banned in the framework of Law number 4054 on Protection of Competition. Vertical agreements related to the distribution of agricultural vehicles and tractors bring vertical limitations such as exclusive region,

active sale prohibitions, non-competition liability with purposes such as establishing distribution system and increasing sale of the commodity, reaching quick and efficient after sale services for the customers to the remotest parts of Turkey due to the property of the market and agriculture, providing development and spreading of technology with modern agricultural methods, etc. and restrict competition. On the other hand, in accordance with Group Exemption Communiqué number 2002/2 related to Vertical Agreements published based on the third clause of Article 5 of the Law, vertical agreements made between two or more enterprises which operate in different levels of production or distribution chain with the purpose of regulating the buying, selling or re-selling of certain commodities or services are exempted as a group from the prohibitions in Article 4 of the Law provided to bear the conditions indicated again in this Communiqué.

Although the concerned tractor and agricultural vehicles sector is a branch of motor vehicles sector, they are not assessed within the scope of Group Exemption Communiqué number 2005/4 related to Vertical Agreements and Concerted Actions in Motor Vehicles Sector. Motor vehicles definition of this communiqué is made as three or more wheeled motor vehicle with the purpose of use on highways. Tractors or agricultural vehicles are vehicles most of which have no plates, not registered in Traffic Registration Offices, are used especially on agricultural land and suitable for agriculture but not suitable to travel on highways. As clearly understood, tractors and agricultural vehicles strictly don't comply with the definition given for the motor vehicles to be evaluated in the scope of the communiqué and they are not involved in the definition. The Competition Authority implements Law umber 4054 and Group Exemption Communiqué number 2002/2 related to Vertical Agreements published based on the power given by this Law in its examinations of competition violation in

tractor and agricultural vehicles distribution agreements or negative clearance, exemption request assessments.

II. RELEVANT PRODUCT MARKET DEFINITION[273]:

Tractor is predominantly used in agriculture sector as well as non-agricultural activities such as construction sector. Tractor increases efficiency in agriculture by enabling the use of modern production technologies in agricultural production and reduces costs. Tractor is necessary for the use of many vehicles required for mechanization in agriculture, for instance, rotary cultivator, hoeing machine, rotary tiller, plough, etc. and is in the position of the most important factor in agricultural development[274]. Ratio of agricultural population to total population in Turkey is still at the high level of 45%. By providing mechanization in agriculture, it may be under consideration to pull down the ratio of agricultural population and use labour force more efficiently. When assessed in this framework, the tractor required in the usage of many vehicles needed for mechanization in agriculture is in the position of the most important factor in agricultural development[275].

Agricultural vehicles are divided in general as self-propelled machines and machines connected to tractor. Those in the first group have engines to provide motion. On the other hand, those in the second group take their power from the tractor[276].

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[273] For more information on the relevant market definition please see *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law* OJ (1997) C 372/5

[274] Competition Authority Decree, Decree Number: 06-57/726-213, Decree Date: 03.08.2006
[275] Competition Authority Decree, Decree Number: 67/517/84, Decree Date: 28.05.1998
[276] Competition Authority Decree, Decree Number: 08-52/789-318, Decree Date: 11.9.2008

The enterprises shall act according to Article 4 of the Communiqué number 1997/1 in the determination of concerned product market which forms the subject of the agreement. According to this article, the market composed of commodities and services assumed to be the same from the point of view of the consumer in terms of price, usage purposes and features are considered and other elements which can affect the determined market may be evaluated. In case the subject of the agreement is tractor purchase and sale or re-sale, the concerned product market shall be determined as "tractor market" in this framework since it is not possible to talk about the existence of another vehicle that shall substitute for the tractor which has a large usage area in agriculture sector. Or since its substitution is not possible if the subject of the agreement is an agricultural vehicle and this vehicle is equipped with special functions due to the product it cultivates, the concerned agricultural product market shall be that agricultural vehicle, for instance, harvester, cotton picking machine, grape harvesting machine, etc.

In order to be able to define tractor and agricultural vehicles market and to make legal regulations related to this sector, first the properties specific to agriculture should be considered.

Agriculture is a type of production performed under remarkably variable climate and soil conditions. Correspondingly, timeliness has great importance in production procedures. Not be able to perform a critical procedure in time may cause reduction in the crop's output and quality. Even sometimes the whole crop may be destroyed. For instance; the field should be prepared and ploughed and the soil should be aerated for cotton planting between March and April. If the field can not be prepared in this interval, planting of cotton starting from May causes low output or the worse, a season without any crop for the farmer. Therefore an efficient

after sale service support for the tractors and agricultural vehicles used in these procedures has more importance than the quality of the commodity.

Agriculture is an activity of rural country and serving all regions in Turkish geography where agriculture is done may only be possible for the firms having a certain size and market share from the technical and economical point.

Agricultural production is realized by seasonal procedures dependent to the nature. Therefore it is not possible to use the tractors and agricultural vehicles throughout the year. Correspondingly, the life of these vehicles increases. For instance, **average usage life** of a tractor is a long time as 20 years. These vehicles currently need after sale service support.

After sale service support of tractors and agricultural vehicles should have the extensity and property to reach the remotest corners of Turkey quickly and efficiently in accordance with the structural properties specific to agriculture defined above. Therefore an **efficient after sale service support** for the tractors and agricultural vehicles used in these procedures has more importance than the quality of the commodity.

Training level of the farmer is low in Turkey. Both driving these machines and agricultural training with this machine is given to the farmers who shall drive these machines. This support should be maintained efficiently, extensively and continuously along the long life of the vehicles, because increase the confidence of consuming farmer to the product used.

Tractor and agricultural vehicles market has specific properties.

1. **Sale quantities are small** in tractor and agricultural vehicles sector. If it is considered that annual tractor sale is about 42.000 pieces by 2006, it is observed to

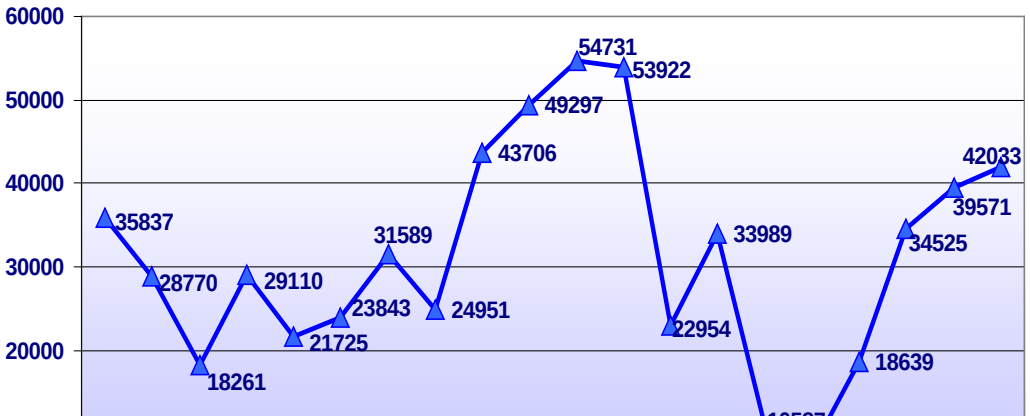
be even smaller than one tenth of the automotive sector when compared with automotive sector.

2. Expectations from tractor and agricultural vehicles vary depending on the diversity of climate, soil, plant properties. And this causes high **version diversity** in the crops. Two firms realizing the highest capacity production in the sector with the option of 107 and 152 different variants, respectively – different tire options, varying speed stages, two wheel/four wheel drive option, tent / cabin tractor option – show effort to meet the needs of farmers to respond to the request of different geographic conditions.

3. The market is highly sensitive to prices because of low income level in agriculture sector. Production and efficiency are highly dependent on climatic conditions and return rate of money is slow in agriculture. Therefore profitability is highly risky and low. Correspondingly, agricultural vehicles leading in the inputs of agriculture sector, price becomes an element that affects demand primarily. Because of this price sensitivity, sale can be realized by keeping profit margins very limited.

As a result of all these, to give extensive, quick, long term and comprehensive after sale service support for the products which contain too much version and don't have high margin prices with their low market shares in the market with limited magnitude in pieces is not possible economically.

4. Agricultural vehicles and tractor sector is a market open to cyclic, large fluctuations. Progress of Turkish tractor market between 1996-2006 is illustrated in the below graphics and it is observed that the **market is open to large fluctuations**.



Progress of Turkish Tractor Market Between 1996/2006 - Graphic - 1

The players having low market share abandon the market in the least shrinkage in the market which magnitude is already limited, and the farmer is left with the crop. It is required to base on not only the sale, but also after sale service support and continuity of the support in the protection of consumer with competition.

5. **Brand extensity** in tractor and agricultural vehicles sector throughout our country has also provide specialization in spare parts and services directed to the brands. By this means, special services and spare parts dealers of 3. parties specialized on the products of extensive brands can also be a part of the service network. As we have indicated above, sale quantities are limited, version diversity is large in the agricultural vehicles and tractor market. Due to this reason, services don't spend labour and time for the brand in a small quantity in a county but they realize specialization on the brands extensive in the sector.

Moreover, there doesn't exist independent firms to give after sale services in Turkey different from Europe which are experienced, large and serve many brands. Currently, majority of the service suppliers throughout our country are small ateliers that is local, untrained, not be able to keep pace to technological developments excluding the authorized service network.

In agriculture, return rate of the money is low, production is open to conditions of nature. Therefore profitability is highly risky and low. Correspondingly, agricultural vehicles leading in the inputs of agriculture sector, price becomes an element that affects demand primarily. Because of this price sensitivity, sale can be realized by keeping profit margins very limited. Although profit margin is low, sale quantity is small, large size of the after sale service network which is scattered to all agriculture regions may only be realized by the firms with large market share.

Another important matter to be indicated concerning the agricultural tractor and agricultural vehicles market in Turkey is that high market shares don't hinder the entry of new players into the market. Following the establishment of Customs Union by the Association Council Decision number 1/95, import products started to enter the market, European origin leading, afterwards import products have started to take shares from the market in increasing rates by 2004 together with new domestic producers although shut-downs are observed with 2001 crisis. In the last period when the current implementations continue, competition has become more intensive in the Turkish sector market let alone the annihilation of competition, import products such as Tafe, John Deere, Landini, Same, Valtra, Lamborghini, Mc Cormick, Deutz-Fahr have entered the market. As seen, high market shares of domestic producers haven't closed the market to new players, on the contrary the market may establish its own equilibrium without any threshold application. None the less, the firms in internal market shall shrink in time and lose their competition power in case the draft is effected in this way; market conditions shall be formed in favour of the firms based on import only, having sale and service in certain centres; in addition, entry of new enterprises to the market in due time may be under consideration by sales of damping nature for market penetration.

III. TRACTOR AND AGRICULTURAL VEHICLES MARKET IN EU AND COMPETITION APPLICATIONS

Provisions of Commission Regulation of date 22 December 1999 and number 2790/1999/EC related to group exemption on the application of clause 3, article 81 of EU Convention to vertical agreements and concerted action categories in EU law applies.

"Community dimension" thirty percent market share threshold applies by the Commission Regulation. Thirty percent threshold implementation applies to vertical agreements having Community dimension which affects trade between EU member states. That is, vertical agreements which don't have any Community dimension, but is realized within the borders of a member state don't go in the scope of Commission Regulation. Such vertical agreements are subject to the regulations specific to member states. When member states are considered, a uniform application based on the said Commission Regulation is not observed. While the large majority of member states included within EU competition system haven't established a block exemption system one-to-one the same as EU law for the vertical agreements not having Community dimension, some of the member states have based their exemption system only on individual exemption.

Looking to the subject from the point of view of agricultural sector which include also tractor and agricultural vehicles market, it is observed that quite a many member state have taken precautions which protect the own producer of the state. If a sample is required, one of the founder members, France, is making regulations on the subject of block exemptions to aim the protection of agriculture sector on a line

different from EU law. Only two by-laws are published by now and the first of them covers the agreements concluded between producers operating in agriculture sector and obliged to comply with some quality standards. On the other hand, the second by-law is related with the agreements to be signed between the producers operating in agriculture sector or between these producers and other enterprises with the purpose of hindering supply and demand unbalances that may arise in emergency cases.

When EU member states are examined one by one, it is observed that market shares of firms operating in tractor and agricultural vehicles market of some member states are much above thirty percent threshold applied in Community dimension[277]. Another prominent matter is that the firms with high market shares are firms having producing factories in the concerned countries. The most important reason to allow high market shares in the concerned market of member states is that agriculture enterprise structure is different. Tractors and agricultural vehicles are not suitable to travel on highways in accordance with their structural characteristics. Therefore, after sale service network is compulsorily established such that to go to the villages at the remotest points and intervene the failure. After sale services in EU are realized through experienced, large independent companies serving many brands.

According to Commission's UK Agricultural Tractor Registration Exchange Case[278], the eight largest manufacturers of agricultural tractors in the UK were accused by the Commission of the EC for anticompetitive practices. Specifically, the Commission argued that the accused firms had formed a cartel aimed at reducing

[277] Market share of leading firm in Finland is 45% while this is 31% in Belgium, 41% in Italy. For detailed information see Juhani Rahkonen, "Developments at Valtra", *Profi*; 2006 Number:2; p.29; February 2006; Telegram, "Belgium's tractor market", *Profi*; Number:3, March 2006; Telegram, "The tractor market", *Profi*; Number:6, **(June 2006)**

[278] Case 92/157/EEC UK Agricultural Tractor Registration Exchange; Commission's decision of 17 February 1992, OJ L 068, 13/03/1992,pp.0019-0033

competition among incumbents and at increasing barriers to new entrants[279]. The agreement concerned an Exchange of information identifying the volume of retail sales and market shares of eight manufacturers and importers of agricultural tractors on the UK market[280]. Commission made a distinction between transparency on historical aggregate data of the industry and information exchange on more recent data at an individual firm level. The need, for such a distinction was based on the argument that, while historical information might help firms forecast the evolution of the market and efficiently plan their long-run investment and production decisions, the exchange of information on recent market shares facilitates the detection and quick punishment of individual deviations from collusion[281].

IV. TRACTOR AND AGRICULTURAL VEHICLES MARKET IN TURKEY

Situation of the sector in our country is not much different from EU member states. Leading firms of the market are those producing in Turkey. These firms are firms which have established countrywide sale and service network providing service and spare parts extending to villages, being the locomotive of modern agriculture sector. If it is considered that annual tractor sales is around 40.000 pieces by 2005, the scale size required to run a dealer and service network more extensive

[279] GEORGANTZIS, N., SABATER-GRANDE G.: "Market Transparency and Collusion: On the UK Agricultural Tractor Registration Exchange", *European Journal of Law and Economics*, 14, Netherlands, **(2002)** 129
[280] GEORGANTZIS, N., SABATER-GRANDE, G.,ibid.130
[281] GEORGANTZIS, N., SABATER-GRANDE, G.,ibid. 129

than automotive sector in a sector even smaller than one tenth of the automotive sector when compared to that sector shall be more easily understood. Moreover, there don't exist experienced, large independent firms that serve many brands to give after sale services in Turkey. Currently, majority of the service suppliers throughout our country are small ateliers that is local, untrained, not be able to keep pace to technological developments excluding the authorized service network.

Tractors are produced in different forms in Turkey. These are complete tractor (CBU:Completely Build Unit) or SKD/CKD (Semi Knock Down, Completely Knock Down) forms toexpress a certain part of a tractor. Domestic demand in Turkey is directed to complete tractor to a large extent. On the other hand, SKD/CKD type production is realized directed to exportation. Almost all demand in Turkey may be met with domestic production. Due to the reason that domestic producers have some cost advantages compared to foreign producers, only very complex tractors may be imported which are not produced in Turkey[282]. Tractor and agricultural vehicles sector in Tukey is not much different that EU. When we examine the sector according to Automotive Industry Association data, we can make the following interpretation:

1. Leading firms of the market operate in the market since 1950s. **They have reached large distribution networks and high market shares within this long process**. In the below table, market share of two leading firm in 2006 as per wholesale of both domestic production and imported tractors, market share of domestically produced tractor and quantity of domestic production is as follows.

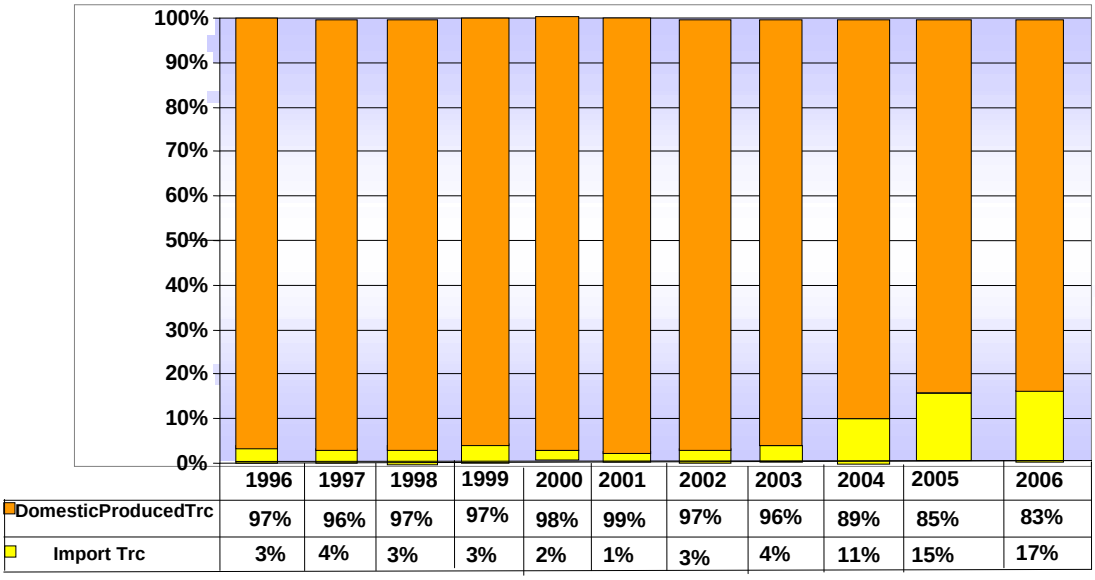
[282] Competition Authority Decree, Decree Number: 03-27/322-138, Decree Date: 24.4.2003

2006	Wholesale Market Share	Domestic Production Tractor Market Share	Piece
1st in Sector	% 36.5	% 43	15,000
2nd in Sector	% 34.5	% 38	13,178
Total	% 71	% 81	28,178

Market Share Of Two Leading Firm - Figure - 3

2. **<u>An average of %93 supplied to the market in our country in the last ten years is domestic industry production</u>**. This has lead the way to a great number of domestic tractor sale and thus, production.

At the beginning of the next page graphics, domestic industry produced tractor and imported tractor percentage which wholesale is realized in Turkish tractor market from 1996 to 2006 is demonstrated.



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
DomesticProducedTrc	97%	96%	97%	97%	98%	99%	97%	96%	89%	85%	83%
Import Trc	3%	4%	3%	3%	2%	1%	3%	4%	11%	15%	17%

Domestic Industry Produced Tractor And Imported Tractor Percentage From 1996 To 2006 - Graphic - 2

3. Tractor firms in the global market may catch up sufficient scale economy and thus efficiency by balancing the quantitative size of their production facilities by their supply to world market. **On the other hand, domestic producers which have limited exportation possibility can reach the required scale economy only by the quantities they acquire in domestic market**.

	Annual Capacity (pcs)
Türk Traktör Fabrikası	36.000
Uzel	25.000
Tümosan	30.000
Hattat Tarım	3.000
Erkunt Traktör	4.000
Ba•ak Traktör	3.000
TOTAL	100.000

Domestic Producers' Quantities Acquire in Domestic Market - Figure - 4

4. Quantity of sales dealers and authorized services of two leading firm by 2007 is as shown in Figure-5.

New Holland Trakmak	**Uzel**
99 Sales Dealers	106 Sales Dealers
414 Authorized Services	397 Authorized Services

Quantity of Sales Dealers And Services Of Two Leading Firm - Figure - 5

V. DECREES OF COMPETITION AUTHORITY CONCERNING TRACTOR AND AGRICULTURE VEHICLES MARKET

There exist eighteen decrees given by the Competition Authority on the players of sector related to tractor and agriculture vehicles sector. Three of them are related

to negative clearance and exemption, three competition violation, twelve decisions related to mergers and take over, and these have placed determinative principles in the direction of the rules to be applied to the vertical agreements concluded in this sector.

V.1.MERGER AND TAKE OVER DECISIONS

These vertical agreements provide rationalization in the distribution and marketing of tractors and agricultural vehicles but however limit in-brand competition by the results such as territory and customer protection. However they increase inter-brand competition and balance this negative aspect. While assessing whether competition limitation violates the concerned articles of the Law, the competition Authority has always given its decisions by assessing the individual events internally.

For instance; Competition Authority has decided that in-brand competition environment should be protected in harvester market which is an agricultural vehicle[283]. According to this decree, it is decided that creation of a dominant situation as indicated in Article 7 of the Law or reinforcing of an existing dominant situation, therefore reducing the competition significantly as the result of takeover of 37,5% of Trakmak Traktör ve Ziraat Makinaları Tic. A. . by New Holland N.V. is not in question for tractor and other agricultural vehicles and tools market of the concerned product market in the framework of Article 7 of Law on Protection of Competition and Communiqué number 1997/1 on Mergers and Take Over To Be Permitted by Competition Authority. However, in case the mentioned procedure is realized as such in terms of harvester market, transfer and merger is permitted on condition to establishment of distributorship by behaving equally to the other firms

[283] Competition Authority Decree, Decree Number: 67/517-84, Decree Date: 28.05.1998

which fulfil the same and reasonable conditions other than Trakmak Traktör ve Ziraat Makinaları Tic. A. . with the purpose of preventing the negative results related to the competition environment in the market as this take over shall be a dominant situation reinforcing procedure in the level of supplier and dominant situation creating procedure in the level of distributor. For the further action of this decree, Turkey harvester distributorship is given to Harman Traktör ve Biçerdöver San. Ve Tic. A.• . Thus, in-brand competition is ensured in the harvester market.

The Authority has concluded that the article of Share Buying Contract entered between Fantuzi and Terex Germany related to hindering of transfer of intellectual property rights to indirect rivals may not be assessed as a sub limitation from the point of competition law. Therefore, it is convinced that the limitation related to bringing a limitation on the intellectual property rights that Fantuzi Group has acquired by means of its companies other than its companies subject to the transfer procedure and/or is valid for the markets indirectly connected to the concerned product market is not required to realize the transfer procedure[284].

V.2. NEGATIVE CLEARANCE AND EXEMPTION DECREES

Tractor and agricultural vehicles market players can not benefit from group exemption due to the %40 market share threshold application brought by the last amendment made in the Group Exemption Communiqué number 2002/2 related to Vertical Agreements by the Competition Authority and have requested for granting individual exemption to dealership agreements containing competition limitation. For instance; the Authority has decided that the provisions in the contract containing competition limitation cannot benefit from group exemption because of exceeding %40 market share threshold predicted in the Group Exemption Communiqué number

[284] Competition Authority Decree, Decree Number: 08-69/1124-440, Decree Date: 4.12.2008

2002/2 related to Vertical Agreements in the harvester and cotton picking machine market[285]. In the same decree, the Authority has examined the individual exemption request of Türk Traktör A.•. for harvester and cotton picking dealership and authorized service contracts in the framework of Article 5 of Law number 4054. The contracts subject to the decree are related to sales and after sale service of harvesters and cotton picking machines. Harvesters and cotton picking machines subject to the decree are self-propelled agricultural vehicles. However since both machine group are equipped with special functions specific to the crops harvested, they have no substitutes. Therefore, concerned product market subject to the decree is "harvester and cotton picking machine markets and service markets for these". Concerned Geographical Market is the market of Republic of Turkey. Three contracts have become subject to the application. The first one is the sale contract of harvester of brand New Holland concluded between Türk Traktör and authorized equipment dealers. In the contract that binds the dealership network established by adopting selective distribution system, sale of rival product commodities is banned in the region where the Dealer is authorized and the liability of minimum purchase, prohibition of active sale out of the region and operation in the direction of joint marketing strategies are brought. The Authority decided that there has to be done some amendments in non-competition prohibition after the expiry of contract. The second contract subject to the decree is the sale contract of Case-IH brand cotton picking machines concluded between Türk Traktör and its authorized dealers. The liability of not selling rival products in the authority region, active sale prohibition out of the region, minimum purchase liability, active sale prohibition out of authority region and joint marketing strategies compliance liability are brought to the dealers

[285] Competition Authority Decree, Decree Number: 08-52/789-318, Decree Date: 11.9.2008

by this contract. The article related to the duration of competition prohibition present in the harvester contract is exactly put also into the cotton picking dealership contract. The third contract subject to the decree are service contracts. Exclusive region is recognized. However, authorized servicing for rival brands is allowed. Authorized dealers may provide passive service and spare parts sale out of their region. In the contract, indefinite prohibition is put to the authorized services in terms of disclosing commercial secrets and operating policies.

Duration of harvester sale contract, one of the contracts subject to exemption decree, is one year while the duration of cotton picking machine sale and service contract is three years. A separate service contract is made for the harvester but not for the cotton picking. Cotton picking contract has established the dealers in the framework of the principle of 3S, where sale, service and spare parts services are all given by the dealer. Harvester dealership contract is made according to the principle of selective distribution.

Since exemption may be granted to these three contracts in the event of fulfilling the conditions listed in Article 5 of the Law, the Authority has assessed the contracts in the scope of Article 5 and reached the below opinion.

1- Because that harvesters and cotton picking machines are machines of complex design, produced in a long time and costly, they should be designed and made robust and superior durability standards. Customers of the harvesters and cotton picking machines are contractors that maintain work seasonally and work all around Turkey. There is need for a large distribution and after sale service network to provide technical support and suitable parts to these machines all along the season. The main company undertakes to a great extent to make the dealers acquire the technical equipment they need and be informed about new developments, carry out

advertisement and publicity, provide central coordination. Since the main company shall avoid to provide these facilities without a contract containing exclusiveness and competition prohibition, a conclusion is reached that the condition of new development, improvement and provision of technical development in the production, distribution of the commodities and offering services.

2- Harvesters and cotton picking machines are expensive and they are machines that need technical knowledge to operate them. Therefore the customers that buy these machines take great risks. It is rather important for the consumers to buy the machine from their own region, take support from the dealers on the subject of operation, and obtain service from reliable authorized services under the guarantee of the supplier firm. Therefore, it is concluded that the consumers shall benefit from dealership relationship arising from the contracts subject to the decree.

3- In harvester market, Türk Traktör as well as Harman A.• . sell New Holland brand harvester and in-brand competition is ensured. In addition, six more rival firms are in the market. There are two producers in the world in the market of cotton picking machine and both are active in Turkish market. Harvester and cotton picking machine producers work by establishing their own dealership networks also in EU countries. Türk Traktör should be in close relations with its dealers due to the characteristics of the machines. The main firm shall be reluctant to establish the dealership network without the restrictions included in the agreement. Due to these reasons, it is concluded that the contracts bear the conditions that competition is not annihilated in an important part of the concerned product market and not limited more than required to obtain the purposes in paragraphs a and b.

When the articles in the contracts related to the competition prohibitions are assessed, the article contains the same expression with the exception brought in

article 5(b)/2 of Group Exemption Communiqué number 2002/2 related to Vertical Agreements and evaluated in the scope of exemption. Whereas the dealers which sign contracts with Türk Traktör acquire themselves the lands and facilities in which they operate. Therefore it is concluded that competition prohibition brought in the scope of this provision should be changed to be limited only with the land and facility provided by the producer.

The Authority has decided to grant individual exemption to these three contracts in the scope of Article 5 of Law number 4054 on Protection of Competition on condition that the part of the competition prohibition for the period following the expiry of the contracts related with the facilities and lands is changed to be limited only with the land and facility provided by the producer.

Again, when the decree[286] given upon the application of CNH to the Authority to grant exemption to the contracts entered with Türk Traktör A.• . and Harman A.• . related to harvesters and cotton picking machines sale market is examined, the aforesaid determinations are made related to harvesters and cotton picking machines sale market in Turkey. CNH leads in the harvester market of Turkey, but other large and small players are also active. Authorized harvester distributors of CNH are Türk Traktör A.• . and Harman A.• . On the other hand, start of production in harvester market is under consideration by local firms in Turkey which face the necessary research and investment. For instance, Ertu rullar Tarım A. . has entered into harvester machines market in 2002 and after producing a total of 6 machines at the start of operation, this quantity is increased to 67 in 2007. Therefore it can be expressed that a potential competition is present in the market. In addition, CNH is the second in cotton picking machines market following John Deere machines. The

[286] Competition Authority Decree, Decree Number: 08-56/884-347, Decree Date: 25.9.2008

reason of less players in the markets compared to other markets is thought to be the nature of products. In the exemption application subject to the decree, the same conclusion the Authority has reached as the above decree, that is, the conditions that Article 5 of the Law look for are satisfied.

The Authority has pointed out in its decree that there are three points to be handled in the scope of competition prohibition and competition limitation in New Holland, Case and Harman contracts. The first subject, the liability of non-competition with products and non-sale of parts not equivalent to original parts for 5 years brought to the importer firm to expire by the expiry of the contract is found reasonable because it shall be valid along the period of 5 years within the agreement duration. On the other hand, when it is considered that CNH shall invest to activate the importation and distribution network, perform training related to usage of products, share its technical knowledge, it is concluded that competition prohibition is required from the point of carrying out cooperation and its scope is limited only due to the reason of limiting the importer and in this respect, the competition prohibition may be assessed in the scope of exemption. The second subject is the indefinite competition prohibition included in the section related with Harman Traktör. This prohibition may not be accepted reasonable and its modification is pointed out. Third subject is the articles that bring minimum purchase/sale condition to the importer. Minimum purchase/sale condition has the nature of restricting competition in case it is realized such as to close the sales of the buyer and not allow a comfortable area for the sales of other brands. However, purchase/sale conditions are concluded to be taken as a performance criteria and are reasonable in this framework because minimum purchase/sale quantity shall be determined by mutual agreement of the parties, in the event of not being able to reach an agreement, facility

of assignment of a specialist with joint agreement is provided, and the products are such costly products produced in small quantities and in long time. The Authority has decided to grant exemption to the contracts in the direction of these subjects.

V.3. COMPETITION VIOLATION DECREES

Competition Authority has also given decisions in the direction whether there is competition violation in the agreements or actions of enterprises in tractor and agricultural vehicles market. The Authority has decided in one of its decrees that exclusiveness shall be eliminated if the supplier or distributor or dealer assigned by the supplier makes active sales to all regions or out of its own region. For instance; in its decree[287] upon the claim that Uzel Makine San. A.• . has restricted its dealer TARPAM's active and passive sales, and determined re-selling price, the Authority has decided such that Uzel dealers make active sales in the region indicated in the authorization certificates sent to them such as there is an exclusive region allocation, but that sales by TARPAM A.• . in Turkey has annihilated exclusiveness.

In a decree[288] related to tractor and agricultural vehicles market, the Competition Authority has decided that Article 4 of the Law number 4054 is not violated since the supplier expects the sale of all products, but not certain products from its dealer which sells its products and determines its dealers accordingly, and this limitation is not included in those listed in Article 4 of the Communiqué number 2002/2.

Again in a decree[289], the Authority has not evaluated non-permitting a seller which dealership been expired, to use the advantages of the dealership process in the

[287] Competition Authority Decree, Decree Number: 06-57/726-213, Decree Date: 3.8.2006
[288] Competition Authority Decree, Decree Number: 07-53/572-188, Decree Date: 20.6.2007
[289] Competition Authority Decree, Decree Number: 07-53/572-188, Decree Date: 20.6.2007

sale of tractors previously bought from the supplier is not an application to violate competition.

CONCLUSION

Competition regulations directed to vertical agreements have taken a long way. It is observed that initially implementations are made that limit vertical agreements too much. However, besides competition limiting effect of the vertical agreements, it is understood that forbidding every vertical agreement affects economy adversely. Therefore it is seen that every vertical agreement should be assessed in its own conditions in terms of its positive and negative effects.

A new period in EU competition law has started by the approval of "Commission Regulation number 2790/1999 on Application of Article 81(3) of Rome Convention to Vertical Agreements and Concerted Actions" which has brought important changes related to vertical agreements. Scope of group exemption

system provided by Commission Regulation number 2790/1999 is limited by %30 market share. The vertical agreements and concerted actions of enterprises with market shares above this ratio containing competition limitation are not permitted to benefit from group exemption. However, the enterprises that stumble on the threshold may always apply for individual exemption for the vertical agreements which bear the conditions in article 81(3) of Rome Convention.

The competition authority in Turkey, Competition Authority has regulated the Group Exemption Communiqué number 2002/2 related to Vertical Agreements which contain regulations parallel to Commission Regulation number 2790/1999.

Thirty percent market share threshold regulated in the Commission Regulation is changed and added as forty percent in 2007 to Group Exemption Communiqué number 2002/2. Yet, thirty percent market share threshold is applied to the vertical agreements that influence trade between EU member states and have Community dimension. That is, vertical agreements which don't have Community dimension, and realized in only one country's borders don't enter the scope of Commission Regulation. Such vertical agreements are subject to regulations specific to member states. Therefore, passing to the implementation of market share threshold before Republic of Turkey becomes a member state of EU has become an early application which brings work load to the Competition Authority Enterprises haven't become sure whether they are evaluated to be in the scope of exemption after market share amendment for the vertical agreements included in the exemption scope of the communiqué and apply unnecessarily to the Competition Authority with the aim of

securing whether the provisions in their agreements violate the Communiqué. This has brought a work load to the Competition Authority.

When the tractor and agricultural vehicles market is examined, it is determined that sale quantities in the sector are low, oversensitive to price, cyclic, open to large fluctuations, and version diversity is great with the purpose of replying the needs of farmers in the products. Leading domestic firms in Turkey market are operating since 50s and they have delivered service and spare parts with extensity to reach the remotest part of Turkey by establishing countrywide sale and service network in this long process and has become the locomotive of modern agriculture sector. This is succeeded by the extensity of after sale services. Shrinkage shall be observed in the market shares of domestic producers and distribution networks because of bringing forty percent market share threshold. As a result of this, it shall not be possible to maintain the current level after sale services. Competition power and growth capabilities in global markets shall be weakened, and benefits of Turkish farmer which is the end consumer shall be reduced.

Although the concerned tractor and agricultural vehicles sector is a branch of motor vehicles sector, they are not assessed within the scope of Group Exemption Communiqué number 2005/4 related to Vertical Agreements and Concerted Actions in Motor Vehicles Sector. Tractors and agricultural vehicles strictly don't comply with the definition given for the motor vehicles to be evaluated in the scope of the communiqué and they are not involved in the definition. The Competition Authority implements Law umber 4054 and Group Exemption Communiqué number 2002/2 related to Vertical Agreements published based on the power given by this Law in its

examinations of competition violation in tractor and agricultural vehicles distribution agreements or negative clearance, exemption request assessments. Whereas, any legal regulations related to this sector shouldn't be made without considering the specific characteristics of agricultural vehicles and tractor market and agriculture. Publication of a separate group exemption communiqué by the Competition Authority related to the vertical agreements and concerted actions in agricultural vehicles and tractor market shall be a right approach.

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