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Guidelines on the Explanation of the Block Exemption Communiqué on Vertical Agreements No: 2002/2

INTRODUCTION

- (1) In article 5 of the Act on the Protection of Competition No: 4054, the Competition Board (Board) has been empowered to issue communiqués which ensure granting block exemption to types of agreements bearing certain conditions and which determine the conditions in question. Vertical agreements which enable that undertakings set up the process of production and distribution in the best manner and that consequently interbrand competition in the market increases generally are in the lead of the groups of agreements required to be exempted from the prohibition in article 4 of the Act, in case they secure certain conditions. As a matter of fact, with the Block Exemption Communiqué on Exclusive Distribution Agreements No: 1997/3, the Block Exemption Communiqué on Exclusive Purchasing Agreements No: 1997/4, the Block Exemption Communiqué on Franchise Agreements No: 1998/7, and the Block Exemption Communiqué on Distribution and Servicing Agreements of Motor Vehicles No: 1998/3, the Board exempted in block those vertical agreements fulfilling the conditions provided for in the said communiqués, from the application of article 4 of the Act. Despite the fact that the said block exemption communiqués have been provided in a quite detailed manner, it has been established as a result of the practices in the recent period that they covered a limited portion of vertical agreements. The Board has issued the Block Exemption Communiqué on Vertical Agreements No: 2002/2 (Communiqué) which replaces the foregoing three block exemptions except the Communiqué No: 1998/3, and more importantly, which has a much broader scope. The purpose of issuing these Guidelines is to clarify to the possible extent the points to be taken into

account by the Board in the application of the Communiqué, and thus to minimize the uncertainties likely to arise in the interpretation of the Communiqué by undertakings.

- (2) Undertakings which, despite the explanations made in the Guidelines, hesitate about whether or not they may enjoy from the Communiqué No: 2002/2, or which want to request an individual exemption for those agreements that are unable to benefit from the block exemption in question may notify the Board in accordance with articles 10 and 12 of the Act No: 4054.

1. SCOPE OF THE BLOCK EXEMPTION

1.1. Definition of a "Vertical Agreement"

(3) In article 2 of the Communiqué, entitled "Scope", vertical agreements are defined as "agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services". As is mentioned in article 7 of the Communiqué, this Communiqué shall be applied to vertical concerted practices besides vertical agreements by considering the same criteria. From the definition of a "vertical agreement" given above, it is necessary to emphasize three important points:

- Two or more undertakings should be party to the agreement. Therefore, agreements made with end users who do not have the nature of an undertaking are not the subject of a block exemption since they do not fall under article 4 of the Act. However, it should not be forgotten that such commercial transactions of undertakings, performed with end users who do not possess the nature of an undertaking may fall under article 6 of the Act.

- It is required that undertakings party to the agreement operate at different levels of production or distribution. Distribution contract concluded between a producer undertaking in the position of a supplier, and a wholesaler is a simple example of a vertical agreement in this regard. And a supply agreement concluded between an undertaking in the position of a raw material producer, and another undertaking using such raw material in production is caught by the definition of a vertical agreement provided for by the Communiqué. Also, an agreement concluded among three undertakings, its parties being a firm in the position of a producer, a distributor in the position of a wholesaler, and ultimately a retailer who sells products to the consumer is also considered as a vertical agreement, and may benefit from the block exemption on condition that it fulfils the conditions provided for in the Communiqué. What is important here is that undertakings party to the agreement operate at different levels of distribution. Otherwise, in case an undertaking in the position of a wholesaler concludes the same distribution agreement at once with more than one supplier firms which operate at the next upper level of the distribution process, the agreement in question does not conform to the definition of a vertical agreement, provided for in the Communiqué. It is required that the wholesaler undertaking separately concludes the agreement in question with each of the suppliers, rather than concluding the same agreement at once with the competing suppliers.

- It is required that an agreement has been made for the purchase, sale or resale of particular goods or services. Accordingly, the Communiqué covers both purchase (supply) and distribution agreements. In other words, it is not important for what purpose the buyer purchases from the supplier the goods or services which are the subject of the agreement. The buyer might have purchased the goods or services which are the subject of the agreement for purposes of resale, or use in its own production. Even the buyer has purchased from the supplier those goods which are the subject of the agreement, for purposes of leasing them to third persons, the agreement he concluded by the supplier shall be caught by the definition of a vertical agreement provided for in the Communiqué.

However, the leasing contract concluded between the buyer and the third party (for example, financial leasing contracts) may not be accepted as a vertical agreement since there is not any purchase, sale or resale of goods or services.

1.2. Vertical Agreements Involving the Use of Intellectual Rights

(4) In case in a vertical agreement where there are regulations as to the purchase, sale or resale of goods or services, there are at the same time provisions concerning the transfer or use of intellectual rights to or by the buyer, the vertical agreement in question may benefit from the block exemption on condition that certain conditions are fulfilled. In article 2 paragraph 2 of the Communiqué, entitled "Scope", conditions have been mentioned, which are required to be borne so that vertical agreements involving the transfer or use of intellectual rights to or by the buyer may benefit from the block exemption. Being able to consider the vertical agreement in question under the block exemption may be possible with its securing of the entire elements explained below:

- Provisions related to intellectual rights should be directly related to the use, sale or resale of the goods or services which are the subject of the agreement.

- The purchase, sale or resale of the goods or services which are the subject of the agreement should be the main purpose of the agreement. In other words, the transfer of intellectual rights to the buyer or having the buyer make use of them should serve the purchase, sale or resale of the goods or services which are the subject of the agreement, and it should not constitute the main purpose of the agreement. This condition is generally secured in franchise contracts: Intellectual rights transferred to the franchisee for being able to maintain the uniformity of the franchise system are generally the auxiliary elements required for the purchase, sale or resale of the goods or services which are the subject of the agreement. However, as the purchase or sale of a good or service is not in question by any

means in simple licence transfer contracts, it is not possible to apply the Communiqué to such agreements.

- From whom to whom intellectual property rights have been granted in the agreement is important. In case there is the transfer or use of intellectual rights to or by the buyer, the block exemption granted by the Communiqué may be benefitted from. Otherwise, should intellectual rights are transferred by the buyer to the supplier, and certain limitations are imposed on the sales of the supplier, such an agreement's benefitting from the block exemption is not in question. For example, in sub-contracting production contracts, the undertaking which performs the production and is in the position of a supplier (contractor) generally supplies the know-how necessary for the production from the undertaking in the position of a buyer. In order to consider under the Communiqué those practices whereby chain supermarkets forming their own brand have producer undertakings produce these products, it is necessary that the chain supermarket does not perform the production of the product in question, and does not transfer a relevant know-how to the producer in the position of a supplier.

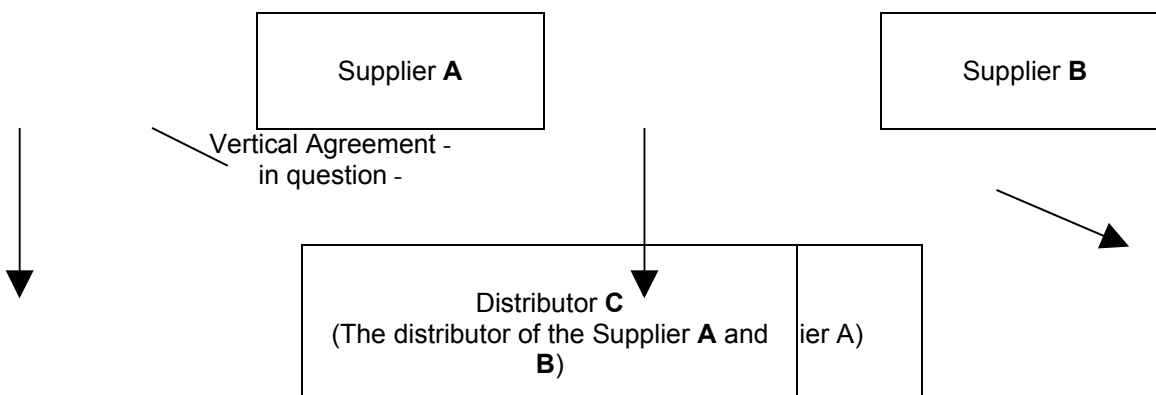
- Provisions related to the transfer or use of intellectual rights should not include limitations on competition the aim or effect of which is the same with the vertical restraints not exempted in the Communiqué.

1.3. Vertical Agreements Concluded Between Competing Undertakings

(5) Pursuant to article 2 paragraph 3 of the Communiqué, vertical agreements concluded between competing undertakings may not benefit from the block exemption, other than only one exceptional case. And the definition of "competing undertakings" takes place in article 3 (c) of the Communiqué. Accordingly, regardless of whether or not they operate in the same geographical market, suppliers who operate or have the potential to operate in the same product market in Turkey are considered as a competing undertaking.

Undertakings which do not already produce a competing good, but which may make the necessary investments and enter the market within 1 year in case there has been a relatively small and sustainable increase in the prices of the product in question, shall be considered as an undertaking which has the potential to operate in the product market in question. While establishing whether it is likely for any undertaking to make such an investment and enter a new market, a realistic approach based on the data in hand rather than a theoretical approach shall be put forward. For instance, no matter how large its financial power is, any undertaking may not be deemed as a potential competitor for another market which has no relation with the product markets where it already operates. However, if it is explicitly known that this undertaking plans to enter the new market in question, then it shall be deemed as a potential competitor for this market.

(6) In the exception introduced to the provision that vertical agreements concluded between competing undertakings may not benefit from the block exemption, undertakings may be competitors of each other only at the level of distribution. In other words, those vertical agreements where the supplier is both the producer and distributor of the goods which are the subject of the agreement, and the buyer is not the producer but the distributor of the goods competing with such goods may benefit from the block exemption. Thus, undertakings in the position of a producer may distribute their products through independent buyers on the one hand, and they themselves may distribute on the other hand. The said exceptional case is illustrated below by a figure:



(7) As is also seen from the figure, the Supplier A and the Supplier B are two competing undertakings operating in the same product market. The Supplier A distributes his products both via its own subsidiary (the Distributor a) and through a vertical agreement it concluded by the independent Distributor C. Due to the fact that the Distributor C distributes at the same time the products of the Supplier B, and the Supplier A operates at the level of distribution via the Distributor a, the Supplier A and the Distributor C are competitors of each other at the level of distribution. As these two undertakings are not competitors of each other at the level of production, the vertical agreement concluded between them is an agreement under the Communiqué. However, in case the Distributor C is the subsidiary of the Supplier B, the Supplier B would be distributing the products of its competitor Supplier A, and the agreement in question may not benefit from the block exemption granted by the Communiqué.

1.4. Its Relationship with the Other Block Exemption Communiqués

(8) In article 2 paragraph 4 of the Communiqué, it is mentioned that this Communiqué shall not be applied to vertical agreements caught by another block exemption communiqué. Thus, in the event of the existence of Communiqués based on a particular subject or sector, these communiqués which involve more detailed and special regulations shall be applied, rather than the Communiqué No: 2002/2 which is a general regulation. For instance, it is not possible to assess a vertical agreement in relation to the distribution of motor vehicles under the Communiqué No: 2002/2. Such an agreement may only be assessed under the Block Exemption Communiqué on Distribution and Servicing Agreements of Motor Vehicles No: 1998/3.

1.5. Agency Contracts

(9) Instead of using independent undertakings in the purchase or sale of goods or services, undertakings may sometimes prefer the agency system. In article 116 of the Turkish Commercial Code (TCC), an agent is defined as "a person whose profession is, without a dependent title such as a trade representative, trade deputy, sales officer or employee, to act as an agent in contracts concerning a commercial enterprise or to conclude them on behalf of that enterprise, within a definite place or region and on a continuous basis, based on a contract." For example, the relationship between an undertaking engaged in the sale of flight tickets and an airline company is generally an agency relationship.

(10) Since limitations imposed on an agent in relation to contracts mediated or concluded by him on account of his client do not generally fall under article 4 of the Act, they are also not the subject of an exemption regime in principle. That the agreement concluded is called an agency agreement does not mean that such agreement is automatically not caught by article 4 of the Act. Here, the factor which determines whether the relationship between undertakings falls under article 4 of the Act is whether a commercial or financial risk is borne by an agent related to activities for which he has been appointed by his client. If an agent has not borne any commercial or financial risk for the contract which he has concluded or where he has mediated on behalf of his client, the relationship between the agent and his client is outside the scope of article 4 of the Act. In such a case, the purchase or sale activity of the agent is considered as a part of the client's activities. In return for bearing the commercial and financial risks due to the agency services associated with it, the client undertaking shall obtain the right of being able to determine the economic activities of the agent in this area. Otherwise, the agent bears all such risks himself, and therefore, it is required that he freely determines his marketing strategy for being able to ensure the return of investments made by him. In such a case, the contract in question may fall under article 4 of the Act, and may be subjected to an assessment under the Communiqué.

(11) Every undertaking committing a commercial activity is at risk, though to a limited extent. For example, an agent's gain depends on his own performance. Similarly, an agent who invests in a workplace and personnel whereby he carries out his activity is also at risk. However, an agent's bearing such risks as to carrying out agency activities does not mean that the relationship between undertakings is under article 4 of the Act.

(12) Risk which is the decisive factor in whether to apply article 4 of the Act shall be assessed by taking into account respective characteristics of each incident. To put it in another way, in determining with whom the risk resides, one will not suffice with assessing the legal relationship between undertakings, but will at the same time take notice of the economic state of the market. When one or more of the below-listed exemplary cases are in question, the relationship between parties shall be dealt with under article 4 of the Act:

- The agent's contribution to the costs associated with the purchase or sale of goods or services, including transport costs.

- Obliging the agent to directly or indirectly contribute to the sales-building activities.

- The agent's bearing the risks such as financing the contract goods kept in stock, or the cost of lost goods, and the inability of the agent to return unsold goods to the client.

- Placing the agent under the obligation to provide after-sales service, repair or guarantee service.

- Making the agent obliged to make investments which may be necessary for being able to operate in the market in question, and which may solely be used in this market.
- The agent's being responsible against third persons due to losses caused by the product sold. -
- The agent's bearing a responsibility other than his inability to receive his commission, due to the failure of customers to fulfil the conditions of the contract. -

(13) In order not to apply article 4 of the Act to the relationship between the client and the agency, it is required that the agency does not assume the above-listed risks or costs. Risks and costs listed herein are exemplary, and it is possible to add the new ones to this list.

(14) However, even if the client bears commercial and financial risks listed above and the like, the agency agreement may fall under article 4 of the Act if it assists in a competition-limiting cooperation. This case may particularly arise when several clients use the same agency, and transfer important information to each other via the agency.

2. LIMITATIONS EXCLUDING AGREEMENTS FROM THE BLOCK EXEMPTION

(15) Vertical agreements involving any of the limitations in article 4 of the Communiqué may not benefit from the block exemption, and therefore they fall under the prohibition in article 4 of the Act.

2.1. Resale Price Maintenance

(16) Article 4 (a) of the Communiqué is related to preventing the freedom of the buyer undertaking to determine its own selling price. Accordingly, it is definitely

forbidden to determine the fixed or minimum selling price of the buyer. However, on condition that it does not transform into a fixed or minimum selling price, it is possible for the supplier to determine the maximum selling price of the buyer, or to recommend the selling price to the buyer. In order for the selling prices, of maximum or recommended nature, declared to the buyer not to transform into a minimum or fixed price, it is required to clearly mention on the price lists issued or on the product that the said prices have the nature of being maximum or recommended.

(17) Besides directly determining the selling price of the buyer by placing an explicit provision in vertical agreements concluded by them, supplier undertakings may also realize the same infringement by indirect means through various practices. Determining the profit margin of the buyer, determining the maximum level of the discount rate that may be applied by the buyer over the level of a price announced to be the recommended price, applying extra discounts to the buyer insofar as he conforms to the recommended prices, or threatening the buyer with delaying, suspending deliveries or terminating the agreement in case he does not conform to these prices, or applying such criminal sanctions de facto may be given as the example of an indirect determination of the resale price. Such practices of indirectly determining the resale price also fall under article 4 (a) of the Communiqué.

(18) Direct or indirect methods aimed at the determination of the resale price would be more effective where prices applied by buyers can be monitored and controlled by the supplier. For example, an obligation which may be imposed on all buyers, about reporting those buyers who sell at prices different from the standard price lists shall considerably facilitate the control, by the supplier, of prices applied in the market.

2.2. Limitation by Territory and Customer

(19) Article 4 (b) of the Communiqué concerns the restrictions imposed on buyers about territories and customers where and to whom they shall sell the contract goods or services. Accordingly, in cases other than the four exceptions listed in the article, it is not possible to impose a territorial or customer restriction on the buyer. At this point, it is useful to explain how the partitioning of territories and customers may emerge in practice. If a provision is placed in the contract about not selling to particular groups of customers or customers in a particular territory, it would not be difficult to establish the infringement. However, partitioning by territory or customer may also be realized by indirect means. Despite the fact that there is not any prohibition in the contract, supplier undertakings may take deterrent measures with a view to preventing the fulfillment of requests from a particular territory or group of customers. For instance, practices like decreasing or denying the rewards or discounts granted to buyers who sell to customers other than those determined by the supplier, diminishing the quantity of the good supplied, or ceasing the provision of good entirely are the most frequently encountered practices in the practice of partitioning by territory or customer. Should there is a practice of assigning serial numbers, or labelling in the market, that shows which buyer has launched the existing products in the market, actions aimed at partitioning by territory or customer may be much more effective. A prohibition imposed on all buyers about not to sell to particular customers shall not be considered as a limitation excluding from the scope of the block exemption the distribution agreement which is the subject of the examination, in the existence of an objective reason about the product. As an example, undertakings in the position of a supplier of certain dangerous substances may prevent buyers from selling such goods to particular customers, based on the reasons such as safety or health.

(20) The types of partitioning by territory or customer listed under four headings in article 4 (b) of the Communiqué are not considered as a limitation

that excludes agreements from the block exemption. The first of these exceptions particularly allows that supplier undertakings which want to set up a distribution network provide themselves or undertakings in the position of a buyer with exclusive territories of sale or exclusive groups of customers. For example, a producer undertaking in the position of a supplier may distribute its products to every single city of Turkey through distributors appointed by it, and it may grant regional protection to distributors. Similarly, a drug manufacturer, for instance, may ensure distribution to pharmacies and hospitals by different distributor undertakings, creating exclusive groups of customers. It is also possible for supplier undertakings to divide customers among buyers both regionally and as the customer type concurrently. The appointment, by an undertaking which is a drug manufacturer, of different distributors to hospitals and pharmacies in every city may be given as an example of the simultaneous practice of partitioning by territory and customer.

(21) Protection granted by means of giving undertakings an exclusive territory or group of customers is not an absolute protection. While selling to the territory or group of customers allocated to them, buyer undertakings may only be protected from active competition from the other buyers within the system. In other words, the supplier undertaking may restrict active sales to the exclusive territory or group of customers allocated to itself or to a buyer. And the restriction on passive sales to be made to this territory or group of customers shall be considered as an infringement excluding the agreement from the block exemption. At this point, the distinction between active sales and passive sales gains importance.

(22) Those sales made to individual customers in the exclusive territory or exclusive group of customers of another buyer by direct marketing methods such as mails or visits are considered as "active sales". Furthermore, setting up a sales outlet or distribution warehouse in the territory of another buyer is also included in active sales. Advertisements or promotions directly targeting the

customers in a territory or group of customers allocated to another buyer may also be listed among the other methods of active sales.

(23) On the other hand, meeting the requests which are from the customers in the territory or group of customers of another buyer and which do not result from the active efforts of the buyer means "passive sales", even if the buyer delivers the good at the customer's address. General advertisements or promotions made through the media shall be considered as a method of passive sales. Sales made through the Internet are also generally passive sales. However, sending e-mails to the customers in the exclusive territory or group of customers of another buyer shall be considered as a method of active sales as long as such a request is not solicited by the customers in question. The same approach shall also be applied in considering sales by posting catalogs.

(24) In order to consider as exclusive the territory or group of customers into which or to whom buyers sell, it is required that only one buyer or the supplier himself sells actively to that territory or group of customers. To put it in another way, if the number of undertakings selling actively to a particular territory or group of customers is two or more than two, that territory or group of customers is no longer exclusive. Any buyer must be able to sell actively to the customers in such a "free" territory or group of customers. To give an example, if an undertaking in the position of a supplier obliges himself to give his products only to two undertakings within the borders of the city of Ankara and does not share out customers between these two buyers in territory or customer type, it is required that active or passive sales to be made by the dealers in the other territories into the territory of Ankara not be prevented in order for such an agreement to be able to benefit from the block exemption.

(25) In the first exclusion specified in article 4 (b) of the Communiqué, there is the wording that "provided that it does not include the sales to be made by the customers of the buyer,....". What is meant hereby is as follows: The supplier

undertaking may only prevent active sales performed by the buyer. Should any obligation be imposed on the buyer aimed at the limitation of active sales to be performed by the customers of the buyer, it shall not be possible to benefit from the block exemption. In other words, customers who are not party to the vertical agreement between the supplier and the buyer and who obtain goods or services from the buyer may sell the goods or services in question to whom they wish without the distinction of active and passive sales. For example, let us presume that in accordance with a distribution agreement concluded between the producer undertaking in the position of a supplier and the dealer in the position of a buyer, the dealer sells products to grocers. In such a case, it is required that grocers which are not party to the agreement have the freedom to sell the products purchased by them from the dealer actively or passively in the territory they wish.

(26) Pursuant to the second exception mentioned in article 4 (b) of the Communiqué, sale by the buyer operating at the wholesale level to end users may be restricted. The imposition of such a restriction is deemed necessary so that the efficiency of the distribution network can be maintained, and goods and services can be offered to the consumer under equal conditions at remote points.

(27) The third exception is related to the substance of the "selective distribution system". In article 3 of the Communiqué, the selective distribution system is defined as "a distribution system whereby the provider (supplier) undertakes to sell directly or indirectly, the goods or services which are the subject of the agreement, only to distributors selected by him, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorized distributors." Particularly in the marketing of branded products such as jewelry and perfume where pre-sales promotional services are important, the physical features of points of sale where these products are sold, and the knowledge and ability of the sales personnel gain crucial importance. Those undertakings in the position of a supplier, which do not want that such

products that have a particular brand image be sold in inappropriate places and by people without the sufficient knowledge and ability generally deem proper the selective distribution system as the distribution network. In order for these products to be able to reach end users in the most efficient way, there is the obligation that the product be only sold by the members of the selective distribution system.

(28) The last exception specified in article 4 (b) of the Communiqué relates to the purchase and sale of parts supplied for purposes of combining. Restriction, by the supplier, on buyers purchasing such parts, in relation to selling them to the competitors of the supplier in the position of a producer is not considered as a limitation excluding the agreement from the block exemption. For instance, while a TV manufacturer sells to a buyer the parts of the television manufactured by it, the buyer may be prevented from selling the said parts to the other television manufacturers (competing undertakings). But, in case the buyer is prevented from selling these products to the other undertakings which are not a television manufacturer, it shall not be possible to benefit from the block exemption.

(29) Any distinction of active and passive sales has not been made other than the first one among the four exceptional regulations mentioned in article 4 (b) of the Communiqué. In other words, any active or passive sales to be made by the buyer in cases where the last three exceptional provisions have a scope of implementation may be restricted by the supplier.

2.3. Selective Distribution Systems

(30) As is mentioned in article 4 (c) of the Communiqué, an active or passive sales prohibition may not be imposed on the members of the selective distribution system in terms of sales to be made to end users. Even though the undertaking in the position of a supplier would create exclusive territories by means of stating that it shall give goods to a limited number of buyers in a certain

territory, active or passive sales to be made by buyers to end users outside the territory may not be prevented. In other words, buyers who are the members of the selective distribution system may sell actively or passively to the end user within the territory they wish. However, it may be prevented by the supplier that a buyer who is the member of the system changes the place of the point of sale where he continues his activities, or opens a new point of sale. Because, as is also mentioned above, the physical features of the point of sale is the most important element affecting the success of the distribution system. Another regulation that opens the selective distribution system to competition, though partially, has been made in article 4 (d) of the Communiqué. Accordingly, undertakings which choose the selective distribution system as the distribution system may not impose the exclusive purchasing obligation on buyers who are the members of the system. That is to say that there is no obligation for the system members to purchase products from the supplier; the members of the system may not be prevented from being able to purchase products from the other member undertakings.

2.4. Other Limitations

(31) Another regulation related to supply agreements where there are products formed by combining parts takes place in article 4 (e) of the Communiqué. In the supply agreement concluded between the supplier who sells such parts and the buyer who combines and uses such parts in production, the supplier may not be prevented from selling these parts as spare parts to end users or to repairers not authorized by the buyer with the maintenance or repair of goods. As is seen, the limitation in question is imposed on the supplier by the buyer, as different from the one above. An example of this case may be the relationship between the supplier who manufactures bicycle chains and the buyer who uses these chains in the manufacture of bicycles. The bicycle manufacturer in the position of a buyer may not prohibit the chain manufacturer in the position of a supplier from selling chains to end users or to unauthorized, in other words, independent

repairers. However, the bicycle manufacturer who is in the position of a buyer may impose on his own repairers authorized by him the obligation to purchase chains merely from him.

3. NON-COMPETE OBLIGATION

(32) Included in article 5 of the Communiqué are the regulations related to the non-compete obligation which may be imposed on buyers in vertical agreements. In case of imposing on the buyer a non-compete obligation that exceeds the limits allowed in this article, the provisions of the contract, containing such obligation may not benefit from the block exemption, if such provisions are severable from the other parts of the contract; the remaining articles of the contract may benefit from the block exemption. Should those provisions of the contract, which contain the non-compete obligation are not severable from the remaining parts of the contract, the entire contract may not benefit from the block exemption.

(33) In article 3 of the Communiqué, the non-compete obligation has been defined as a direct or indirect obligation preventing the purchaser (buyer) from producing, purchasing, selling or reselling goods or services which compete with the goods or services which are the subject of the agreement. Within its meaning in the Communiqué, the non-compete obligation is an obligation that provides for that the buyer does not produce himself and does not supply from another source other than the supplier the goods or services which are the subject of the agreement. However, a distinction has not been made in the Communiqué as to the case where the buyer is obliged to purchase from the supplier the entire goods or services required or resold by him, and the case where he is obliged to purchase a large portion (at least 80 %) of them. In other words, the supplier's

providing the buyer with the opportunity to make a small portion of his purchases up to 20 % from competing undertakings shall not constitute a barrier to deeming the relevant provision a non-compete obligation. In calculation of these rates, the buyer's purchases belonging to the previous calendar year shall be taken as the basis. If the quantity of the buyer's purchases belonging to the previous calendar year is indefinite, the annual total requirement of the buyer may be estimated, making use of this quantity.

(34) The duration of the non-compete obligation imposed on the buyer has great importance. It is not possible for a non-compete obligation whose duration is more than five years to benefit from the block exemption, apart from the exceptions mentioned in paragraph 38. If the duration of the non-compete obligation imposed on the buyer is indefinite, again the block exemption cannot be applied. Non-compete obligations tacitly renewable after exceeding the five-year period also do not fall under the block exemption. However, in cases where the duration does not exceed five years or the extension after five years is possible by the explicit will of both parties, and where there is no situation hindering the buyer from terminating the non-compete condition at the end of the five-year period, the non-compete obligation shall benefit from the block exemption. It is helpful to explain the regulations about the non-compete obligation with an example: A one-year distribution agreement which imposes on the buyer a non-compete obligation as long as the agreement is valid and which is deemed to have been renewed each year unless any of the parties objects a specific period earlier, shall be deemed to be for an indefinite period. However, if it is compulsory for the parties to notify each other of their will explicitly for the renewal of this agreement each year, the agreement shall not be deemed to be for an indefinite period. That is to say, unless the parties notify each other explicitly, within a specific period of time, of their desire to continue this agreement, the non-compete obligation based on a regulation which takes that the agreement has not been extended shall not be deemed for an indefinite period.

(35) Pursuant to the Temporary article 1 of the Communiqué, the duration of this obligation in the agreements which are valid on the date of entry into force of this Communiqué and which include, from this date, a non-compete obligation such that the limits mentioned in the Communiqué are exceeded, is required to be reduced to the limits mentioned in the Communiqué or below, within one year from the date of entry into force of the Communiqué. At the end of this one-year period, if the non-compete obligation has not been reduced to the limits mentioned in the Communiqué or below, either this provision of the agreement, or if this provision is not severable from the other parts of the agreement, the entire agreement shall be invalid. Should the remaining duration of the non-compete obligation in the agreement is 5 years or shorter on the date of entry into force of the Communiqué, the agreement shall be valid for the remaining duration; therefore, the undertaking does not need to make any amendments.

(36) If it is established that the non-compete obligation is imposed on the buyer for a duration beyond the limits provided for in the Communiqué, and that the article of the contract, which includes such obligation is severable from the other parts of the contract, the Board may consider that the duration of the non-compete obligation has been reduced to the maximum limit provided for in the Communiqué. Then, if the non-compete obligation imposed on the undertaking in the position of a buyer has not expired the limit provided for in the Communiqué yet, the buyer shall remain under the non-compete obligation for this remaining period, in other words, until the uppermost limit in the Communiqué expires. If he has been under the non-compete obligation for a period exceeding this uppermost limit, the non-compete obligation shall be invalid, and the undertaking in the position of a buyer shall be completely independent.

(37) Another important point with regard to the non-compete obligation is the requirement for the absence of any de facto situation that prevents, at the end of the five-year period, the buyer from being relieved of the non-compete obligation. For instance, if the supplier has provided a loan to the buyer, the repayment of

this loan should not be arranged such that it hinders the buyer from being relieved of the non-compete obligation at the end of the five-year period. The buyer should have the opportunity to repay the outstanding debts, if any, after the expiry of the period as to the five-year non-compete condition. Similarly, in cases where the supplier has provided certain equipment to the buyer, the buyer should have the possibility to take over such equipment at its market value at the end of the five-year non-compete period.

(38) There are two exceptions to the regulation that a maximum of five-year non-compete obligation may be imposed on the buyer:

- The first exception relates to the case where a part of the investment total necessary for enabling the buyer to realize his activity based on the agreement is covered by the supplier. Accordingly, in case a part of this investment total is covered by the supplier, provided that it is not less than 35 %, the non-compete obligation imposed on the buyer may be extended to ten years at most. However, in this case, the part of the non-compete obligation exceeding five years should only be limited to the activity to be conducted at the facility where this investment has been made. Despite the fact that cost items forming the investment total necessary for enabling the buyer to realize his activity based on the agreement may vary depending on the market of operation, the cost of land, building, warehouse and infrastructure cost, tools and equipment cost, authorization and licence expenses, the cost of minimum stock to be kept compulsorily, and the operating capital are among the most important investment items.

- - And in the case of the second exception, the facility to be used by the buyer in conducting his activities based on the agreement belongs to the supplier entirely. From the opinion that it is a reasonable limitation that the supplier would not allow the sale of competing goods in a facility belonging to him without his consent, the non-compete obligation to be imposed on the buyer has not been subjected to a limitation of duration in any manner. Accordingly, the non-compete obligation may be imposed on the buyer as long as he uses

the facility in question. However, in case where a facility which already belongs to the buyer is leased to the supplier, and where the supplier again makes the buyer who is its original owner use this facility, it is not possible to benefit from this exception. In other words, if the supplier holds the ownership of the facility under a real or personal right (such as lease, lending, and usufruct) secured from the third persons not connected with the buyer, only then a non-compete obligation of more than five years may be imposed on the buyer.

(39) In principle, it is not possible to impose a non-compete obligation on the buyer for the period following the expiry of the agreement. However, in case certain conditions are fulfilled, a non-compete obligation may be imposed on the buyer, provided that it does not exceed one year from the expiry of the agreement. To that end, it is required that the prohibition concerns the goods or services in competition with the goods or services which are the subject of the agreement, is limited to the facility or land where the buyer operates during the agreement, and is compulsory for protecting the know-how transferred by the supplier to the buyer. The use and disclosure of know-how not made available in the public domain may be prohibited indefinitely.

(40) Another practice of the non-compete obligation not allowed is preventing the system members from selling the products of a particular competitor in the selective distribution systems. This provision does not mean that the selective distribution and the non-compete obligation may not be applied jointly. The undertaking which is in the position of a supplier of the selective distribution system may oblige that the selected buyers sell only his products and not sell any of the competing products. However, it may not allow the sale of the products of some competitors, while hindering the rest from using this system. In other words, the non-compete obligation should either be imposed for all or none of the competing products in the selective distribution system.

4. WITHDRAWAL OF THE EXEMPTION

- (41) All vertical agreements fulfilling the conditions sought in the Communiqué No: 2002/2 are exempted from the prohibition in article 4 of the Act. Because, while issuing the Communiqué in question, the Board has presumed that those agreements caught by the Communiqué fulfil the conditions for exemption, listed in article 5 of the Communiqué. However, even if they fulfil the conditions provided for by the Communiqué, there may also be some exceptional cases where certain vertical agreements cannot secure, in terms of their effects, the conditions for exemption in article 5 of the Communiqué. Especially in cases where undertakings party to the vertical agreement hold a considerable market share, and where barriers to market entry reach a substantial extent, it may become difficult for certain types of vertical agreements to secure conditions required for exemption. An important power has been entrusted to the Board for employing in such exceptional cases: In the first paragraph of article 6 of the Communiqué, it has been ruled that the Board may withdraw the exemption granted by the Communiqué to the agreement in case it is established that an agreement granted an exemption by the Communiqué has effects incompatible with the conditions provided in article 5 of the Act. Therefore, even if any vertical agreement has been provided in compliance with the Communiqué, the protection of exemption ensured by the Communiqué may be withdrawn by the Board, if it has moved away from the conditions enabling the obtaining of an exemption, in terms of its effect on the market at the stage of implementation. In such a case, the Board shall ask for the written and/or oral comments of parties prior to taking its final decision. Furthermore, the process of withdrawing the exemption shall not be effective retroactively. Therefore, since the transaction of withdrawing the exemption shall not be retroactive, the agreement shall have benefitted from the exemption within the period until the decision has been taken.

(42) It is inevitable that the practice of withdrawal of the exemption arises particularly in those markets where undertakings which have considerable levels of market share are parties to agreements. However, market shares of undertakings party to the agreement are not the decisive element alone in determining whether or not to withdraw the exemption. It may also be the case that exemption is withdrawn from a vertical agreement concluded by any undertaking in an oligopolistic market where undertakings whose market shares moving close to each other operate. In an assessment to be made at this point, some other elements, besides market shares, such as barriers to market entry, the characteristics of the relevant product, and the degree of dependence of consumers on this product shall be taken into account.

(43) The practice of withdrawal of the exemption may not only be performed by individual Board decisions directed at an undertaking which is party to an agreement, but may also take place through issuing a Communiqué, which shall be binding upon all undertakings in the market. In the second paragraph of article 6 of the Communiqué, it has been stated that in case parallel networks formed by vertical restraints of similar nature cover a substantial part of the relevant market, the Board may, by a communiqué to be issued by it, exclude from the exemption agreements containing certain restraints in the relevant market. Should vertical agreements concluded by undertakings operating in the market create similar effects on the market, restraints included in such agreements shall be deemed as "similar vertical restraints", even though they have been provided differently in wording.

(44) The Board, while deciding whether the practice of withdrawal of the exemption shall be realized by an individual Board decision directed at undertakings which are party to an agreement, or by a Communiqué to be issued for all undertakings in the market, shall take notice of certain elements. Particular elements such as the number of undertakings operating in the market, whether the market power is held only by some of these undertakings,

and the structure of the relevant market shall serve as a factor in determining how to withdraw the exemption.

(45) The Board may not only fully withdraw the exemption from vertical agreements in a particular market, but also may tie the continuation of the exemption to the fulfillment of certain conditions. For example, the duration of the five-year non-compete obligation allowed to be imposed on buyers with the Communiqué No: 2002/2 may be decreased to three years for certain markets, with a Communiqué to be issued. Likewise, the right to determine the maximum selling price of the buyer, granted to suppliers with the Communiqué No: 2002/2 may be lifted for some markets.

5. ABUSE OF THE DOMINANT POSITION

(46) In article 8 of the Communiqué, it is expressed that an exemption granted pursuant to the provisions of this Communiqué shall not prevent the application of article 6 of the Act. In article 6 of the Act, the undertakings in dominant position are prohibited from abusing their position. On the other hand, exemption merely grants a protection against the prohibition in article 4 of the Act, but not the prohibition in article 6 of the Act. What is meant hereby is not that undertakings in dominant position may by no means conclude a vertical agreement nor may they benefit from the block exemption. Whether restraints in a vertical agreement within the scope of the block exemption are the abuse of dominant position shall be decided by taking account of the quality of the relevant market and the vertical agreement.
