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The Turkish Competition Authority holds that the non-solicitation obligations in bancassurance insurance agency agreements may qualify as legitimate ancillary restraints *(HDI Fiba / Fibabanka / Fiba Sigorta)*

ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), BLOCK EXEMPTION (REGULATION), VERTICAL RESTRICTIONS, INSURANCE, UNFAIR COMPETITION, TURKEY, EXEMPTION (INDIVIDUAL), ANCILLARY RESTRICTION

Turkish Competition Authority, *HDI Fiba / Fibabanka / Fiba Sigorta* , Case No. 23-37/686-237, Decision, 10 August 2023 (Turkish)

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This case summary includes an analysis of the Turkish Competition Board's (the ***"Board"***) *Fibabanka* decision [***1***] in wherein the Board evaluated the request for an individual exemption for the Life Insurance Agency Agreement between HDI Fiba Emeklilik ve Hayat A.Ş (***"HDI Fiba"***) and Fibabanka AŞ (***"Fibabanka"***) and the Non-Life Insurance Agency Agreement between Fiba Sigorta AŞ (***"Fiba Sigorta"***) and Fibabanka AŞ. (the ***"Agreements"***) (HDI Fiba, Fibabanka and Fiba Sigorta will be together referred to as ***"Parties"***). The Board's decision analyzes, among others, non-solicitation clauses that prohibit Parties from soliciting each other's bancassurance executives and sales employees until twelve months after the Agreements expire. Upon assessment of the Agreements within the scope of Law No. 4054 on the Protection of Competition (***"Law No. 4054"***), the Board concluded that the Agreements cannot be granted a negative clearance pursuant to Article 8 of the Law No. 4054 or benefit from the block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (***"Communiqué No. 2002/2"***). However, concluding that the Agreements met all of the requirements included in Article 5 of Law No. 4054, the Board ultimately decided to grant an individual exemption to the Agreements for their entire duration. The decision is especially important in relation to the Board's analysis of non-solicitation obligations as legitimate restraints in commercial cooperations rather than anti-competitive agreements or restrictions.

Background

The Agreements relate to a bancassurance agreement in which Fibabanka is appointed as the authorized agency for the marketing, distribution and sale of the life and non-life insurance products of HDI Fiba and Fiba Sigorta. Fibabanka will operate as the exclusive agency of the insurance companies for the marketing and sale of insurance products through a bank channel. In turn, Fibabank will not act as an insurance agent for third parties for the subject

of the Agreements outside of very exceptional cases. The Agreements will be in force for fifteen years and relate to distribution through ATMs, internet and phone networks and all other online and offline distribution channels (***"distribution channels"***). For the entire duration of the Agreements, Fibabanka will act as the exclusive agency of HDI Fiba and Fiba Sigorta and will not have an agency relationship or conduct a distribution agreement for the marketing, sale and distribution of life and non-life insurance products with third parties. The Agreements also include non-compete, most favored customer and non-solicitation (for employees and banking customers) clauses.

In relation to the non-solicitation clauses, all Parties are prohibited from soliciting each other's employees until twelve months after the Agreements expire. The restrictions only relate to bancassurance executives and sales personnel and aims to ensure the protection of trade secrets such as know-how and customer information. The obligations prohibit Parties from encouraging employees to terminate the employment contract and do not apply to employees who respond to job advertisements and employees who apply or have applied for employment without the Parties' explicit encouragement.

The Board's assessment within the scope of Article 4 of the Law No. 4054

The Agreements relate to a vertical relationship wherein the life insurance products of HDI Fiba and the non-life insurance products of Fiba Sigorta are marketed, distributed, and sold by way of the appointment of Fibabanka as an agency. The Turkish Competition Authority's published "Guidelines on Vertical Agreements" (***"Guidelines"***) acknowledges that limitations placed on the agency concerning the agreements it mediates or concludes on behalf of its client are not generally under the scope of Article 4 of Law No. 4054 and thus, they are usually not a subject to the exemption regime. However, the Guidelines also indicate that non-competition obligations, including those related to the period following the termination of the agreement, concern inter-brand competition and may lead to anticompetitive effects if they create a foreclosure effect in the relevant market where the contracted goods and services are being sold. Therefore, they may fall under Article 4 of Law No. 4054.

Considering the above, the Board held that the Agreements are not suitable for a negative clearance decision since they include non-compete obligations, a most-favored customer obligation and non-solicitation obligations (for bank customers and banking employees) and these may lead to anticompetitive effects if they create a foreclosure effect in the relevant market where the contracted goods and services are being sold.

The Board's assessment within the scope of the Block Exemption Communiqué

For any vertical agreement to benefit from a block exemption, the supplier's share in the relevant market(s) must not exceed 30% pursuant to Article 2(2) of Communiqué No. 2002/2. Both HDI Sigorta and Fiba Sigorta's shares do not exceed 30%. However, non-compete clauses that are longer than five years are not able to qualify for a block exemption (unless very limited exceptions apply). Therefore, considering that the Agreements will be in force for fifteen years, the Board held that the Agreements did not qualify for a block exemption under Communiqué No. 2002/2.

The Board's assessment within the scope of Individual Exemption (Article 5 of the Law No. 4054)

The Board evaluated the conditions for an individual exemption set forth under Article 5 of Law No. 4054. Four conditions exist under Article 5, all of which must be satisfied for an agreement, decision, or concerted practice to benefit from an individual exemption. These conditions are as follows: (a) they must ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision

of services; (b) consumers must benefit from the above-mentioned; (c) they must not eliminate competition in a significant part of the relevant market; and (d) they must not restrict competition more than necessary to achieve the goals set out in (a) and (b) above.

Ultimately, the Board concluded that the Agreements satisfy all of these conditions. In relation to the first three conditions, the Board held, in sum, that (i) the specifics of the dynamic market conditions deemed risk of foreclosure low and (ii) the Agreement's aim of cost and operational effectiveness together with Fibabanka's technological and corporate investments will result in better quality services and lower contributions.

The Board's analysis mainly focused on condition (d). The last condition set forth under Article 5 of Law No. 4054 requires that the Agreements must not restrict competition more than necessary to achieve the goals set out in (a) and (b). In other words, this condition requires that if there are other ways in which the economic or technical improvements in condition (a) can be achieved in a way that restricts competition less, the Agreements may not be granted an individual exemption. In this light, the Board has assessed whether the different types of clauses (i.e. the non-compete, the most favored customer clause and non-solicitation) were necessary to achieve the goals the commercial cooperations has set out.

In relation to the non-solicitation clauses concerning banking customers of Fibabanka, the Board assessed the restriction for HDI Fiba and Fiba Sigorta to not solicit any of Fibabanka's customers to purchase any life or non-life insurance products. The said article does not directly prevent the sale of products and customers may still directly purchase the products from HDI Fiba and Fiba Sigorta depending upon their own preference, which means that the condition only restricts an active effort to sell to Fibabanka customers, not passive sales. On top of the necessity of the clause in relation to the protection of confidential information and trade secrets, the reason for the relevant clause is said to relate to the prevention of unfair competition and free-riding from the acquired customer information, which may lead to the loss of motivation for Fibabanka to broaden its customer portfolio and distribute the products to more customers. Therefore, the said clause only prevents the direct marketing activities that would stop Fibabanka from improving its agency activities.

The Board assessed that previously such clauses were accepted by the Board if limited to active marketing (together with a limited period of time) and necessary considering the product/services customer information. In the case at hand, the Board held that the non-solicitation clause for customers which is only applicable during the Agreements, meets the necessity condition of Article 5 of Law No. 4054.

The Board deems non-solicitation clauses in commercial cooperations as legitimate restraints

The Parties to the Agreements included a non-solicitation obligation prohibiting Fibabanka from encouraging HDI Fiba or Fiba Sigorta's employees from terminating their employment or leaving their jobs and *vice versa.* However, the clauses only apply to bancassurance executives and sales personnel and are not applicable in case the employees apply to job inquiries themselves. The obligation aims to protect know-how and trade secrets such as customer information. The Parties explained the reasoning for the prohibitions among other things that; (i) confidentiality obligations are difficult to implement in the business world, and therefore (ii) non-solicitation obligations are necessary and applicable in legitimate commercial cooperations between employers that will have pro-competitive effects, (iii) previous Board decisions held that such obligations, which are limited to the employees carrying out the operations within the framework of the commercial cooperations and are not absolute restrictions, are necessary for the protection of trade secrets and know-how and do not restrict competition more than necessary and (iv) non-solicitation obligations aim to prevent unfair competition under Turkish commercial law.

The Board especially referred to previous decisions in which it held that reciprocal non-solicitation obligations were accepted to satisfy the conditions for an individual exemption as they were limited to (i) the parties, (ii) did not relate to transition to third parties and (iii) related to preventing unfair competition through a number of employees that were in possession of significant trade secrets. The Board accepted the obligations as necessary considering that the case at hand also concerned obligations that aim to protect trade secrets, such as customer information and know-how and only concerns transition between the Parties to the Agreements and not to third parties. In light of the above, the case at hand shows that the Board confirms its previous stance that non-solicitation obligations in commercial cooperations may constitute a necessary restriction that is imposed by parties in order to ensure the expected efficiency of the agreement. To that end, the Board concluded that the relevant obligations in the case at hand do not restrict competition more than necessary and granted an individual exemption to the Agreements.

The decision at hand is significant, because it is one of the first decisions wherein the Board provides a glimpse of its approach of when it may accept non-solicitation clauses as legitimate ancillary restraints outside of merger control cases and within the scope of commercial cooperations. Even though the Board did not define or refer to the non-solicitation obligations at hand directly as ancillary restraints, the Board explicitly states that the articles in the Agreements do not restrict competition more than necessary as they qualify as restraints that serve to ensure the effectiveness of the cooperation. Therefore, a careful reading of the meaning of the decision confirms that the Board may qualify non-solicitation obligations as legitimate ancillary restraints within the scope of commercial cooperations but adopts a case-by-case approach to decide if so. In this light, the decision provides guidance on which factors the Board considers for a non-solicitation obligation in commercial cooperations to qualify legitimate obligations. Indeed, the Board emphasizes that the obligations in the case at hand aim to protect trade secrets such as the know-how between Parties together with client and customer information and only affect the transit between Parties and not to third parties.

Recently, the Board has concluded several other investigations that also included project-specific non-solicitation obligations as legitimate ancillary restraints outside of merger control cases. It is expected that these decisions will shine further light on and clarify the Board's approach in relation to this matter.

Conclusion

As a conclusion, the Board granted an individual exemption to the Agreements upon elaborate assessment as to whether the non-compete, most favored customer and non-solicit obligations restricted competition more than necessary within the scope of Article 5 of Law No. 4054. From the analysis of the Board, it would be reasonable to conclude that the Board is of the opinion that the non-solicit obligations may qualify as legitimate ancillary restraints if are directly related, necessary, proportionate and reasonable within the scope of the commercial cooperation in question.

[1] The Board's Fibabanka decision (10.08.2023, 23-37/686-237).