

Is it taking too long?: An Analysis of the Turkish Competition Authority's Individual Exemption Assessments

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While the Article 4 of the Turkish Competition Act prohibits the anticompetitive agreements, concerted practices and decisions, Article 5 covers the exemption from this prohibition as in the 101(3) of the Treaty on the Functioning of the European Union ("TFEU"). According to the Article 5 of the Competition Act, Turkish Competition Authority ("TCA") can grant individual exemption to agreements, concerted practices between undertakings, and to decisions of associations of undertakings from the prohibition of the Article 4 if all the following terms exist together:

(a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

(b) Benefitting the consumer from the abovementioned developments and improvements,

(c) Not eliminating competition in a significant part of the relevant market,

(d) Not limiting competition more than what is compulsory for achieving the goals set out in conditions (a) and (b).

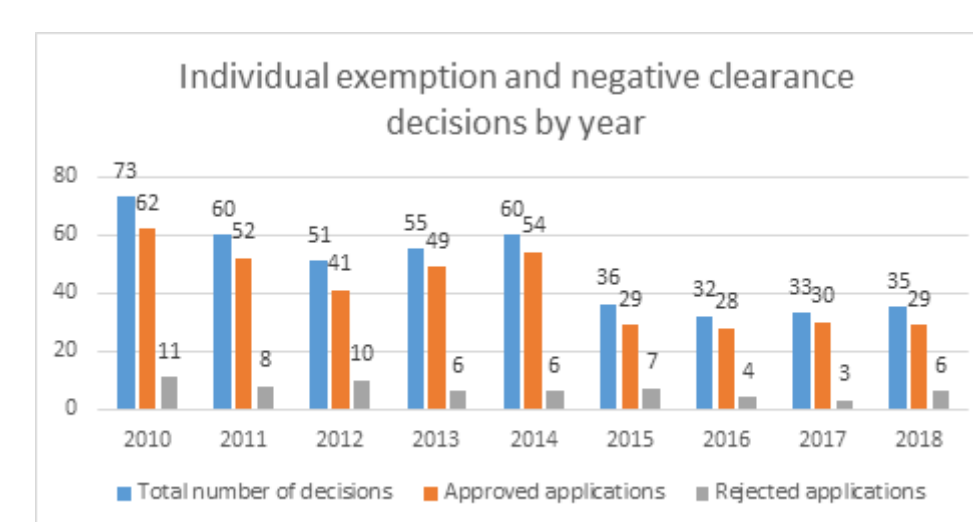
The TCA also adopts block exemption regulations for a group of agreements that fulfill certain conditions with pre-defined market share thresholds and rules, due to the reason that the conditions of the exemption set out above are considered to be met.

While the TCA can grant individual exemption to certain agreements on a condition or for a definite period under the Article 5, there is no rule governing the duration or time-limit of the TCA's assessments upon applications. Acknowledging the differences between the scope and content of each individual exemption and negative clearance application, still, analysis shows that there is no consistency and steadiness between the cases in terms of their time span, mainly due to the lack of any rule towards such procedure. While some individual exemption requests are concluded in the Competition Board within a week, the others can take even years to close. We have conducted an in-depth analysis regarding the time dimension of the individual exemption and negative clearance decisions of the TCA from 2010 to 2018 from publicly available information in order to contribute to the agency effectiveness in Turkish competition law practice.

The TCA rendered 435 decisions in total upon individual exemption and negative clearance applications between 2010 and 2018. 374 of these decisions granted the applicants with an individual exemption or a negative clearance while 61 is rejected or decided not to be in the scope of the Competition Act.

The graphic below shows the total number of decisions with acceptance and rejection breakdowns on annual basis:

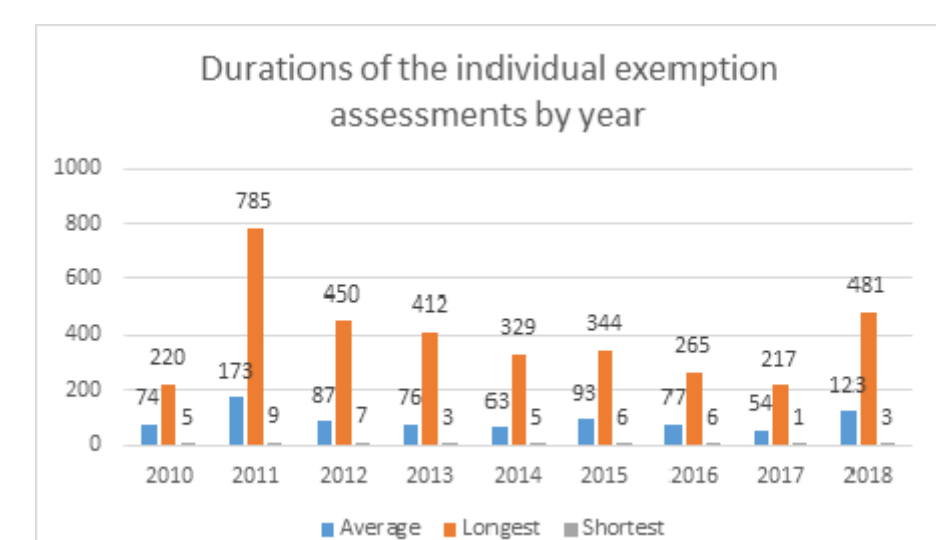
Graphic - 1: Individual exemption and negative clearance decisions by year



While the rate of approval and rejection do not follow any particular pattern to focus on, the number of applications clearly is in decrease as the graphic shows. In fact, the total number of individual exemption decisions, which shows the number of filings, dropped approximately 52% between 2010 and 2018. This may indicate the ascending trend in the unwillingness of the entities for individual exemption filings.

On the other hand, average duration between 2010 and 2018 for a decision to be rendered on an application is 92 days. However, the gap between the shortest review and the longest one is immense, with shortest being one day and longest being 785 days. Below is the graphic showing the average, longest and shortest durations of the individual exemption assessments of the TCA on annual basis:

Graphic - 2: Durations of the individual exemption assessments by year[1]



It is seen from the analysis that the average duration for a case to be closed is changing over years; however, with the exception of 2011 there is a tendency towards a rise in the duration of a case being assessed under individual exemption request. Particularly for the last year, the average duration of an individual exemption case increased by 127.8% with respect to 2017 and became 123 days. In this respect, average duration time for 2018 is 33.7% higher than the overall average of the period between 2010 and 2018, which was 92 days.

The data on the number of applications (Graphic - 1) and the data on the durations of the TCA's assessments (Graphic - 2) enable us to identify certain issues arising from the lack of a rule that governs the time-limit for these individual exemption assessments. While the average number of applications between 2010 and 2014 is 59.8, after the year 2014, the average number of applications is dropped dramatically (approximately 43.1 %) and the average number of individual exemption requests was 34. This average figure for the years between 2014 and 2018 inevitably caused the lessening of the TCA's workload in relation to individual exemption and negative clearance requests, however, the duration of the assessments still increased.

For a long time, following the abolishment of mandatory filing provision in the Competition Act, entities are conducting self-assessment when deciding whether an agreement can benefit from individual exemption or not. With this ease on entities to decide when to apply to the TCA for individual exemption, the increasing duration of the TCA's assessments may have also caused the companies to go cold feet for filing an individual exemption application. Such unwillingness of the entities to apply for individual exemption is troublesome since individual exemption decisions of the TCA acts as a beacon for the markets and helps to prevent anticompetitive agreements to come into being.

In our above analysis on the duration of the assessments (Graphic - 2), the start of the duration is not calculated from the application date but the date on which the latest information is submitted by the application upon the TCA's request. Adequately, the TCA requests additional information and documentation from the applicants if it deems the submitted information is not enough to conclude the case. However, in some cases the TCA's response time to an application for requesting additional information is far too long. Where applicable, we analyzed the durations between the initial filing of the application and the closing of the case, and the landscape changes dramatically. According to this analysis, the average duration for a case to be closed was 127 days between 2010 and 2018, and the increase over years is observable. The average duration for an individual exemption case to close is increased by 82% from 2016 to 2018. Such scene suggests that the case can wait for a considerable amount of time before any information is requested from the applicant. This suggestion is confirmed by the analysis of the year 2018, where the TCA responded to four individual exemption applications with requests of information after 6 to 9 months, which is not so desirable from agency effectiveness standpoint. Such long response times may also cause the companies to apply less and less for individual exemption, since the agreements that the individual exemption is requested for lose their importance over such period of time.

In addition to the lack of recent decisions guiding entities to do business without violating competition, the increasing period of the TCA's individual exemption assessment is causing entities to implement riskier and riskier agreements over time. Due to these unwanted outcomes, it is clear that the exemption assessments of the TCA shall be bound with an extendable time-limit as in the EU acquis. Therefore, any argument regarding the amendments to be made on the Turkish Competition Act should also take into account of the time-limit for individual exemption assessments.

We are thankful to our colleagues Diren Karadağ, Burak Bedük and Aslı Ak for their input on the analysis of the TCA's decisions.

[1] The start of the duration is calculated from the latest information is submitted to the TCA by the application upon the TCA's request.