

Competition Board concludes preliminary investigation into online sales

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Introduction

On May 5 2018 the Competition Board published its reasoned decision of February 15 2018 (18-05/74-40) following its preliminary investigation into allegations that Jotun Boya Sanayi ve Ticaret AŞ had violated Article 4 of Law 4054 on the Protection of Competition. The allegations concerned claims that Jotun had determined the resale prices and sales conditions of authorised dealers and restricted their online sales through a prohibitive provision in its dealership agreements.

When examining the claims against Jotun, the Competition Board focused on the allegations that Jotun had:

- determined resale prices for dealers;
- not provided its products directly to the market;
- restricted the sales conducted by dealers to end users;
- distributed work between dealers;
- discriminated between its dealers; and
- restricted passive sales.

Further, the board noted that there were indications that Jotun had interfered with its dealers' sales conditions for projects and restricted online sales. The board stated that this conduct should be assessed under Article 4 of Law 4054.

Sector and relevant market

The Competition Board initially provided an overview of the sector and indicated that paint is one of the coatings that protects and colours indoor and outdoor surfaces. In this context, the board noted that paint competes with various coatings from a supply perspective. The board also noted that, under European Commission and its own precedents on the matter, the coating and paint production and sales market could be classified as:

- industrial coating;
- decorative coating;
- marine and protective coating;
- bobbin coating; and
- automobile coating.

The board left the relevant product market definition open since such definition would not affect the

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conclusion of its assessment and defined the relevant geographical product market as Turkey.

Determining resale conditions for dealers

The Competition Board initially stated that although Jotun had notified dealers of purchase and sale prices for large-scale projects, there were no indications that relevant communication also took place for retail sales. Further, the board indicated that resale price maintenance occurs when a manufacturer directly or indirectly obliges the reseller to use a fixed minimum or maximum price. Therefore, restricting a reseller from independently determining its own resale prices falls under the scope of Article 4(a) of the Block Exemption Communiqué on Vertical Agreements 2002/2.

The board noted that Jotun's conduct leaned more towards setting a maximum price that included a special discount for large-scale projects than resale price management. As a result, Jotun's conduct did not have an anti-competitive aim or produce such effects; rather, there was a competition element specific to the projects in question.

The board also assessed Jotun's conduct by comparing sales prices (ie, the prices that Jotun had recommended to two different dealers for a single product). The board found that the sales price of the two dealers were different from each other and the listed prices. In this regard, the board indicated that such findings suggested that Jotun had not determined resale prices for retail products.

Alleged restrictions of online sales

After requesting copies of Jotun's dealership agreement, the Competition Board received the old dealership agreement and the renewed dealership agreement. The board found that the renewed agreement restricted the online sales of Jotun's products and noted that online sales had increased, both in Turkey and worldwide, due to:

- lower search costs for customers;
- lower distribution costs for undertakings; and
- wider geographic scope and access to consumers.

The board also stated that the European Commission had issued an e-commerce sector report and highlighted the importance of vertical restraints within this sector. The following have become increasingly widespread in this context:

- price restrictions;
- online platform sales prohibitions;
- price comparison tool restrictions; and
- exclusions for undertakings that perform online sales via distribution networks.

The European Commission's perspective on distribution agreements asserts that the freedom of dealers to perform online sales should not be restricted.

Further, the board referred to:

- the EU Vertical Agreements Block Exemption Regulation (2790/1999/EC);
- the European Commission's Guidelines on Vertical Restraints (2010/C 130/01); and
- several EU court precedents.

Under the Guidelines on Vertical Restraints, distribution agreements that neither entail hardcore restrictions nor exceed the relevant market share threshold are excluded from the application of Article 101 of the Treaty on the Functioning of the European Union. However, restrictions on active and passive sales by a supplier that uses a selective distribution system are considered hardcore under the EU regulation.

The guidelines also consider direct restrictions on passive sales and any conduct that produces the same results as anti-competitive. As well as direct restrictions on passive sales, the following behaviour is prohibited within the scope of indirect restriction of passive sales:

- restricting website access to a customer located in another exclusive distributor's territory or redirecting this customer to the supplier's or distributor's website;
- cancelling a customer's order if the customer's credit card information suggests that they are not located in the exclusive territory;
- restricting the percentage of total online sales; and
- determining the resale price of the distributor for online products by comparing the sales prices of traditional sales channels.

Pierre Fabre

According to the Guidelines on Vertical Restraints, for the above restrictions to benefit from the protective cloak of individual exemption there must be an objective cause for the product to be physically sold. Therefore, the Competition Board referred to the French Competition Authority's decision in *Pierre Fabre*, which held that the self-care and cosmetics firm's restriction of online sales bore anti-competitive purposes and was denied an individual exemption. **(1)**

In its appellate review, the European Court of Justice (ECJ) noted that the restriction on online sales did not include a product-specific objective cause and therefore could have anti-competitive purposes. The board held that the defences concerning the products subject to the agreement in *Pierre Fabre* – namely, that the use of the relevant products required expert recommendation and online sales damaged the brand image – were rejected by the ECJ.

The board remarked that the European Commission's approach to restrictions on online sales emphasised an objective just cause which was based on product specifics. Further, the prohibition on restricting online sales was fundamentally limited to prescription medicines and products that could not be sold online following public bans. Therefore, online sales restrictions that are imposed on a product and cannot be objectively justified are considered intentional anti-competitive behaviour.

Coty

The Competition Board also referred to the ECJ's decision in *Coty*, which examined online sales restrictions for online platforms. The court held that, considering the specifics of the products in this case, no passive sales restriction applied. In other words, to protect the brand image of luxury products, restrictions relating to sales conducted via third-party online platforms could be imposed on the distributors.

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Paragraph 24 of the Guidelines on Vertical Restraints Agreements categorises online sales as 'passive'. Therefore, restrictions on such sales are considered restrictions on passive sales.

The board held that, notwithstanding the context of selective distribution systems, suppliers may prohibit sales to unauthorised distributors; however, they may not restrict active or passive sales to end users on the retail level. Therefore, although Jotun had established a selective distribution system, the provision restricting online sales of authorised distributors would cause the vertical agreement to fall beyond the scope of the Block Exemption Communique on Vertical Agreements.

The board opined that prohibiting online sales as a whole would be disproportionate with the purpose of restricting the sales to unauthorised distributors and would not benefit from an individual exemption. It further noted that Jotun could have adopted less restrictive arrangements in order to prevent the distributors from conducting sales to unauthorised distributors (eg, imposing restrictions on the customers' purchase amount via online sales, which can also be imposed on physical sales points under certain conditions).

As Jotun's market power for decorative paint is limited and thus the effects of the foregoing restriction would also be limited, the board did not initiate an in-depth investigation. However, it advised Jotun to alter and renew its dealer agreement to exclude the prohibition of passive online sales pursuant to Article 4 of Law 4054.

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Endnotes

(1) C-439/09 *Pierre Fabré Dermo Cosmétique v Président de l'Autorité de la Concurrence*.

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