

## ***Assessment of the Turkish Competition Board Decisions Regarding Restriction of Online Sales***

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Online sales' numerous advantages have rendered them increasingly popular during the past years. The internet, due to its unique characteristics, provides companies with an enlarged geographic scope, thus enabling them to promote their products widely, avoiding, at the same time, the operational costs of a brick and mortar shop. From the customers' perspective, it enhances consumers' variety of choice and their ability to virtually compare prices from several stores. Competition law treats online sales in the similar fashion as traditional selling methods, i.e. brick and mortar shops. Both in the European Union (EU) and in Turkey, it is generally accepted that the main competition concerns raised by hardcore vertical restraints within traditional sales networks, namely restriction of competition by price fixing and facilitating of collusion, can also occur in online sales, without overlooking the differences between the two selling methods.<sup>1</sup> This article attempts to provide insight into the approach of the Turkish Competition Board (Board) to the matter, regarding the restrictions on online sales in vertical relationships, in light of the EU case law.

### **- An Exception to Hardcore Restrictions: Exclusive Distribution Networks**

In the EU, the amended Vertical Restraints Block Exemption Regulation (VRBER) provides a safe harbor for vertical agreements, regarding both traditional sales methods and online sales. The VRBER exempts vertical agreements from the prohibition of Article 101(1) of the Treaty on the Functioning of The European Union (TFEU), to the extent that they do not contain any of the hardcore restrictions set forth in Article 4. Agreements containing such hardcore restrictions are unlikely to fulfill the conditions of Article 101(3) TFEU, therefore, unlikely to obtain individual exemption.

Further to the VRBER, the Guidelines on Vertical Restraints (Guidelines) provide detailed guidance for agreements involving restrictions on online sales, within the context of exclusive distribution networks. Exclusive distribution networks can be comprehended through the dichotomy of active and passive sales. Sales to unsolicited demand of customers are considered passive, whereas sales by way of actively approaching individual customers via direct mail, advertisements targeted at a specific customer group or territory are considered active. In an exclusive distribution network, the supplier may restrict the active sales of a buyer to a certain territory or customer group. The Guidelines do not place particular emphasis on the dichotomy of active and passive sales in terms of selective distribution, contrary to exclusive distribution.

### **- Online Sales in the Context of Exclusive Distribution Networks**

In exclusive distribution networks, online sales are generally classified as passive. The buyer's online sales to the territory or customer group of another exclusive distributor can be

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<sup>1</sup>[http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/apr11fullsource.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11fullsource.authcheckdam.pdf)  
Interview with Alexander Italianer; "But that doesn't mean that we should treat online sales differently from offline sales (...)", accessed January 5, 2015.

considered active if the sales are specifically addressed to certain customers as “a form of active sales”<sup>2</sup> towards them. Therefore, though setting up an online shop is generally considered a form of passive sales under the Guidelines, the use of internet might as well lead to active selling into other distributors’ exclusive territories or customer groups. With this regard, for example, the Guidelines consider the territory-based banners as a form of active sales.

#### - The Board’s Approach and Jurisprudence: Defining Online Customers as a Single Customer Group

The Turkish competition regulations are closely modelled after the EU law. Article 4 of Communiqué No. 2002/2 on the Block Exemption on Vertical Agreements (Communiqué No. 2002/2) sets out the hardcore restrictions in vertical agreements, which may exclude the vertical agreement from the protection of the block exemption. However, the hardcore restrictions do not specifically cover online sales, and the only reference to online sales is within the context of exclusive distribution. Paragraph 24 of the Guidelines on Communiqué No. 2002/2 on the Block Exemption on Vertical Agreements (Guidelines on Communiqué No. 2002/2) provides that, generally, online sales are considered to be passive sales.

The Board maintains a consistent approach in defining online customers as a distinct customer group, particularly in systems where only one undertaking is provided with an exclusive distribution license for Turkey. This approach is confirmed in *GAP*,<sup>3</sup> *Aerpostale*,<sup>4</sup> *Marks and Spencer*<sup>5</sup> decisions.

In *GAP*, the supplier (subsidiaries of GAP Inc.) entered into a franchise agreement with its distributor (GAP Mağazacılık), providing the latter with an exclusive license to sell GAP products in Turkey to end users. As per the franchise agreement, the supplier would not sell its products to end users in brick-and-mortar stores or provide the foregoing right to third parties, reserving the right to sell in Turkey through the internet or other technological means. The Board evaluated this restriction not as a means of restriction on the distributor’s sales, but as a way of establishing an alternative exclusive customer channel (i.e. online customers), thus an exception to the hardcore restriction of Article 4(b). The Board reasoned that establishing a second sales channel within an exclusive territory would increase intra-brand competition in Turkey. In this case, the agreement that bans the active sales of the distributor to a distinct customer group would benefit from the block exemption under Communiqué No. 2002/2.<sup>6</sup>

The Board later maintained this position in *Aerpostale* and *Marks and Spencer*, where agreements of similar structures were analyzed. The Board provided that so long as the agreement creates an alternative exclusive customer group and restricts the distributor’s sales to this specific group all together, such restriction would benefit from the block exemption.

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<sup>2</sup> Guidelines, para. 53.

<sup>3</sup> *GAP* (08.11.2007, 07-85/1036-398).

<sup>4</sup> *Aerpostale* (09.02.2012, 12-06/190-52).

<sup>5</sup> *Marks and Spencer* (15.4.2010, 10-31/485-181).

<sup>6</sup> Eventually, the agreement was granted individual exemption for five years from the date of its effect, since it included other provisions regarding non-compete obligations.

The Board defines the alternative customer channel as “online customers”; that being said, sales through any website designed for online selling would be considered active sales. The Board expects that a distinction between online customers and brick-and-mortar customers in Turkey would increase intra-brand competition. In the above precedents, the Board indicated that such an alternative exclusive customer channel (online customers) would create a competitor to the exclusive brick and mortar distributor. Therefore, the ban on establishing a website for a certain customer group under these specific circumstances was not deemed as a hardcore restriction that would otherwise exclude the franchise agreement from the block exemption.

The main points are whether the Board could have identified other ways less restrictive of competition, and whether a group as wide as online customers in Turkey would constitute a single customer group under Article 4(b)(1) of Communiqué No. 2002/2.

#### - Online Sales in the Context of Selective Distribution Networks

The Guidelines provide that a supplier may request from its distributor to fulfill certain quality criteria to be a member of its selective distribution system. Such restrictions may encompass restrictions on online sales. So long as these criteria do not turn into an outright ban on online sales and they do not restrict competition by object, they may benefit from an individual exemption. In regards to selective distribution, the Guidelines do not make a reference to the dichotomy of sales in active and passive, as they do for exclusive distribution. However, the criteria for selective distribution systems must not restrict competition by object. If a ban on online sales is characterized as a restriction of competition by object, the agreement would not benefit from the block exemption.

#### - Outright bans in Selective Distribution Networks

Both the EU and the European national competent authorities have been consistent in their practice regarding the outright ban of online sales, which is not covered by the VRBER.

*Pierre Fabre Dermo-Cosmétique*<sup>7</sup> is, probably, the milestone case of the European Court of Justice (ECJ) on the matter. Pierre Fabre is a cosmetic and personal care products manufacturer, marketing its products through a selective distribution system. Such a system is not *per se* prohibited under Article 101(1) TFEU, provided that the distributors are chosen on the basis of objective and uniform criteria. The *Conseil de la Concurrence*<sup>8</sup> held that Pierre Fabre’s agreement was anticompetitive because it contained a clause requiring sales to be made in a physical space, in the presence of a qualified pharmacist. Pierre Fabre appealed to the *Cour d’Appel de Paris*, which, in its turn, referred the case to the ECJ for a preliminary ruling. The ECJ ruled that in the context of a selective distribution system, such a contractual clause resulted in a *de facto* ban on online sales and, subsequently, in a restriction by object within the meaning of Article 101(1) TFEU. Similarly, in a judgment consistent with the

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<sup>7</sup> *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi* (Case C-439/09) [2011] O.J. C 355/04.

<sup>8</sup> *Conseil de la Concurrence*, October 29, 2008, Decision n° 08-D-25, regarding practices in the sector of distribution or personal care and cosmetic products sold upon pharmaceutical advice, *Pierre Fabre Dermo-Cosmétique*.

ECJ's ruling on *Pierre Fabre*, the *Bundeskartellamt* imposed a fine of Euro 11.5 million against the German market leader of wholesale supply of contact lenses, CIBA Vision Vertriebs GmbH<sup>9</sup> for applying an outright ban of online sales through eBay.

The Board, on the contrary, seems to adopt a more flexible position regarding the outright ban of online sales. In *Yatsan*,<sup>10</sup> the supplier banned the online sale of its products with no exception. The Board acknowledged that online sales are usually passive, with the exception of defining a customer group for a certain other distributor, or banners for the other customers in another territory, or sending out unsolicited e-mail messages, also, referring to its precedents in *GAP*, and *Aeropostale* and *Marks & Spencer*. The Board reasoned that passive sales may be restricted only under the conditions pointed out in Article 4 of Communiqué No. 2002/2, with the exception of exclusive distribution systems. The Board refused to grant individual exemption, since the ban was not justifiable based on the product, or on the ideal market entry conditions, or the brand image. The Board reasoned that there were less restrictive alternatives to the outright ban on online sales and that such restriction does not result in any customer benefits. The Board concluded that *Yatsan* should remove the ban on online sales and inform the Competition Authority. As further explained below under *Dermalogica*,<sup>11</sup> in cases where the written consent of the supplier is required for distributors' online sales, the Board deems it a restriction rather than an outright ban.

#### - Restrictions on Online Sales

The European Commission (Commission) rules that online sales may not be outright banned; however, it allows restrictions to be imposed on them, particularly in selective distribution systems, provided they are objectively justifiable. Selective distribution is commonly found in the luxury cosmetic products market, since it is believed to preserve the brand's value and air of luxury. In *Yves Saint Laurent Parfums* (YSLP),<sup>12</sup> the Commission reassessed YSLP's selective distribution system, to see if it continued to benefit from the approved individual exemption.<sup>13</sup> The selective distribution system required that online retailers also operate a physical sales point. The Commission affirmed that online sales, given that they were not banned in their entirety, could be subject to selective criteria.<sup>14</sup> In the French case *Bijourama v. Festina*<sup>15</sup> of 2006, which presents similarities to the YSLP case, the *Conseil de la Concurrence* had ruled identically. Bijourama, an online retailer specialized in the sales of watches, jewelry and silverware unsuccessfully attempted to become part of the Festina France selective distribution system. Festina's distribution agreements contained a clause according to which, online sales were permitted only to retailers maintaining a physical point of sales. This particular clause constituted a *de facto* ban to entry for a pure online retailer such as Bijourama. After examining the agreements, the *Conseil de la Concurrence* reiterated that Festina had the right to set objective criteria regarding the selection of its distributors,

<sup>9</sup> *Bundeskartellamt* Press Release, September 25, 2009, "Bundeskartellamt imposes fine on CIBA Vision".

<sup>10</sup> *Yatsan* (23.9.2010, 10-60/1251-469).

<sup>11</sup> *Dermalogica I* (8.5.2008, 08-32/401-136); *Dermalogica II* decision (24.10.2013, 13-59/831-353).

<sup>12</sup> "Commission approves selective distribution system for Yves Saint Laurent parfum" Commission Press Release [2001] IP/01/713.

<sup>13</sup> *Yves Saint Laurent Parfums* Commission Decision 92/33/EEC [1991] IV/33.242.

<sup>14</sup> Guidelines on Vertical Restraints, paragraph 54.

<sup>15</sup> *Conseil de la Concurrence*, 24th July 2006, Decision n°06-D-24, *Festina France*. Upheld by Paris Court of Appeal in *Bijourama v. Festina*, 16 October 2007.

given that there was no outright ban on online sales and that the restrictions were applied consistently throughout the distribution system.

From a Turkish competition law perspective, the Board, in *Dermalogica*, granted individual exemptions for agreements even though they entirely banned online sales subject to the supplier's written consent. In its first *Dermalogica*, the authorized distributors in the selective network were restricted from online sales without Antis's prior written consent. Since the distributors in the selective distribution network were allowed to sell online only if Antis gave its prior written consent, the agreement did not benefit from the block exemption; therefore, the Board conducted an individual exemption analysis. It reasoned that the restriction of online sales for Dermalogica in the selective distribution network may be granted individual exemption for the qualifications of the Dermalogica products, and the fact that it is necessary to maintain brand image through customer satisfaction and health. The Board took notice of the existing intra-brand competition and the fact that only one product was restricted from online sales; therefore, it would not impact the market substantially. The individual exemption was limited to 5 years to observe the effects of technological developments on internet sales. Later in 2013, in its second *Dermalogica*, the Board granted individual exemption for an unlimited period of time.

- Conclusion

Due to its unique characteristics, it could be anticipated that online sales will continue to be a hot topic in Turkish antitrust enforcement in the future. Although the Turkish competition law regime is closely modelled on the EU regulations and the Board has explicitly referred to the developments in the EU (see, *Yatsan*), the Board's position does not seem to be consistent. It remains yet to observe the future decisions of the Board to further analyze its path.

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