

Restriction of sales through online marketplaces considered hardcore restriction by the Turkish Competition Board: the Turkish Competition Board's BSH exemption decision

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[Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence \(C-439/09\) EU:C:2011:649; \[2012\] Bus. L.R. 1265; \[2011\] 10 WLUK 295 \(ECJ \(3rd Chamber\)\)](#)

[Coty Germany GmbH v Parfumerie Akzente GmbH \(C-230/16\) EU:C:2017:941; \[2018\] Bus. L.R. 1371; \[2017\] 12 WLUK 111 \(ECJ \(1st Chamber\)\)](#)

Legislation cited

Proposal for a Regulation on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices SEC(2022) 198 final

***I.C.C.L.R. 424 Abstract**

*Sales restrictions through online marketplaces (or online marketplace restrictions) have recently been an important topic within the context of the Turkish competition law. Within this scope, the legislative works concerning online marketplace restrictions in Turkey bears a significant similarity to the competition law rules in the European Union. On February 8, 2022, the Turkish Competition Authority published on its official website the Turkish Competition Board's decision ¹ (BSH Exemption) regarding the online marketplace restrictions imposed by BSH Ev Aletleri ve Sanayi Ticaret A.Ş. (BSH) on its authorised dealers. BSH is one of the biggest manufacturers of small and big household appliances with a large distribution and after-sale network in Turkey. The Turkish Competition Authority, carried out a comprehensive and detailed analysis upon BSH's application to determine whether its absolute online marketplace restriction on its authorised dealers be granted exemption from the competition law rules. In the light of its examinations and detailed analysis, the Turkish Competition Board decided that sales restrictions through online marketplaces does not fall under the scope of Block Exemption Communiqué on Vertical Agreements numbered 2002/2 and also does not meet any of the four criteria of individual exemption. As a result, the *I.C.C.L.R. 425 restrictions are granted neither block nor individual exemption. This decision is of great importance as it clarifies the Turkish Competition Board's most up-to-date approach towards restriction of sales through online marketplaces, which, with the BSH Exemption , has become more conservative than the one of the European Commission. The Turkish Competition Board, in BSH Exemption , considered the restrictions of sales through online marketplaces as "hardcore restrictions", whilst similar restrictions are clearly not seen as hardcore restrictions under the European Commission's precedent. This article presents an overview of the BSH Exemption and compares the current approach of the Commission with the approach of the Turkish Competition Board.*

Introduction

With the recent developments in information and communication technologies, online sales channels have been widely used by the sellers and consumers.² Especially during the COVID-19 pandemic, economic and social activities are started to be carried out through the digital platforms. The tendency towards online platforms enabled the execution of the trade of more goods and services through e-commerce. The rise of the online sales during the COVID-19 pandemic therefore resulted in further attainability to market access for consumers. This situation led to an increase in the competition among firms and enhanced their urge to reach more consumers online. The online marketplaces, as the multi-sided platforms³ that serve as intermediaries connecting customers with sellers in a single channel or platform,⁴ earned a large share from the enlargement of e-commerce.

Recent developments in digital sectors have triggered the Turkish Competition Authority (Authority) to examine the online marketplaces more closely. In this manner, one of the recent works published by the Authority is the Preliminary Sector Report on Online Marketplace Platforms (Preliminary Report). According to the Preliminary Report, global retail sale volumes shrunk by 3% while e-commerce retail sales volume increased by 27.6% in 2020.⁵ The Preliminary Report highlighted that the main growth especially occurred in the online marketplaces. From this perspective, online marketplaces demonstrate decisive influence over the sector's competitive environment⁶ and provide a single shopping platform for many categories of the products sold in Turkey. These online *I.C.C.L.R. 426 marketplaces are mainly Amazon Turkey, Hepsiburada,⁷ N11,⁸ Trendyol,⁹ ÇiçekSepeti,¹⁰ EpttAvm,¹¹ GittiGidiyor¹² and Morhipo.¹³

The Preliminary Report also highlighted that the figures show an important rise in e-commerce activities in comparison with the recent years,¹⁴ implying that e-commerce will become an indispensable element in retail trade. The Preliminary Report further emphasised that Turkey is one of the countries that holds the highest potential in the rise of e-commerce.¹⁵ It is clearly understood from the Preliminary Report that the Turkish Competition

Board (Board) views e-commerce as a critical sales channel. As such, it could be expected that the Board carefully assesses the anti-competitive effects of the online marketplaces restrictions imposed on authorised dealers by the suppliers.

The e-Commerce Sector Inquiry Report published by the European Commission (Commission) also puts emphasis on the differentiating distribution strategies of manufacturers and retailers, accelerating movement towards a selective distribution system and increasing restrictions regarding online sales through marketplaces.¹⁶ The Commission indicated that (i) manufacturers tend to place various criteria for retailers in order to gain more control over the distribution system of their own goods and, (ii) the restraints adopted by manufacturers vary from pricing restrictions and platform bans to the exclusion of pure online players from distribution networks.

As the competitive concerns regarding the restriction of sales through online marketplaces increase, the Commission, with a view to provide more legal certainty to the market players, works on the legal framework applying to vertical restraints. This legal framework concerns the restraints imposed by the suppliers over their distributors/dealers. For this reason, an extensive review process regarding the [Vertical Block Exemption Regulation](#)¹⁷ (VBER) started in 2018, which will expire on 31 May 2022.¹⁸ The planned amendments in the [VBER](#) are mostly aim at (i) catching up with the pace of the digital economy, (ii) the growth of e-commerce **I.C.C.L.R. 427* and online platforms and, (iii) focus on the application of the [VBER](#) and the guidelines to online sales and advertising.

The Draft Revised [Vertical Block Exemption Regulation](#)¹⁹ published by the Commission involved criteria regarding determination of online marketplace restrictions. The Commission framed the mentioned criteria in the light of the case law of the Court of Justice of European Union (EU), in particular of *Pierre Fabre*²⁰ and *Coty*.²¹ The Commission referred to this particular case law because they introduce a clearer assessment regarding the restriction of sales through online marketplaces. In the light of these judgments, it was embraced that if such restrictions do not function as de facto prohibitions, they cannot be considered hardcore restrictions. Correspondingly, the Commission proceeds with this approach even if these restrictions inflict certain limitations to the online sales that are not entirely parallel with the standards imposed with regards to the sales actualised through traditional and retail channels.²²

Throughout this article, we will present an overview of the Board's recent BSH Ev Aletleri ve Sanayi Ticaret A.Ş. (BSH) decision (*BSH Exemption*) where the restriction of sales through online marketplaces are considered "hardcore restrictions" and provide a general comparison of the approach adopted in the Board's *BSH Exemption* along with a comparison with the landmark decisions in the EU.

Turkish Competition Board's BSH Exemption decision

Following the negative clearance²³ /individual exemption²⁴ application made by BSH, the Board started its comprehensive evaluation regarding the agreements between BSH and its authorised dealers in a selective distribution system.²⁵

BSH operates in the market for durable consumer goods in Turkey with its master brands, Bosch and Siemens, as well as its brand Gaggenau. The provisions set forth in the agreements signed between BSH and its dealers allowed the dealers **I.C.C.L.R. 428* to make sales through their own website but prevented the dealers from selling through online marketplaces. Furthermore, the agreements also involved various enforcement proceedings to be performed over authorised dealers in case the restrictions are violated.²⁶

Following its analysis on information and documents obtained within the scope of the case, the Board assessed that the concerned agreements should be evaluated within the scope of Article 4 of the Law No. 4054 on the Protection of Competition (Law No. 4054). Law No. 4054 regulates the scope of agreements, concerted practices and decisions restricting competition.

The Board highlighted that the suppliers in some occasions attempt to restrict the sales activities of resellers through their own websites or through online marketplaces. The Board proceeded with its assessments stating that suppliers try to justify such restrictions in various ways, such as basing their reasoning behind the restrictive practices on protecting the brand image and the originality of the products or making sure the quality of the pre-sale and after-sale services etc.²⁷

The Board remarked that although these justifications are, on their face, based on legitimate concerns, some of the platforms providing online marketplaces developed certain mechanism²⁸ to overcome and balance such concerns.²⁹ The arguments presented by BSH in order to justify the imposed restrictions are mainly revolved around (i) efforts to prevent imitated products, (ii) enhancing qualified consumer relations, (iii) improving delivery and pre-sale and after-sale services, and also indicated that such restrictions were imposed in order to preserve brand image of the distributed products.³⁰ As a result of the evaluations, the Board ended up with a counter argument corresponding to all the defensive arguments and concerns presented by BSH. The Board concluded that mentioned restrictions failed to introduce proportionate means to eliminate expressed concerns and were ineffective in achieving the objectives of BSH.³¹

The Board's assessments regarding the block exemption

In order to benefit from the block exemption³² under the Block Exemption Communiqué on Vertical Agreements numbered 2002/2 ("Communiqué No. 2002/2"), the examined agreements should not incorporate any "*Limitations Rendering Agreements Not Caught By Block Exemption*", so-called the black list, provided in the art.4 of the Communiqué No.2002/2. In case where the agreement does not involve any element from the black list, it can benefit from the block exemption. *I.C.C.L.R. 429

The Board remarked that BSH realises its sales through selective distribution systems. Prevention of passive sales in selective distribution systems is one of the elements of the blacklist and therefore considered a "hardcore restriction". In the Guidelines on Vertical Agreements³³ ("Vertical Guidelines") a restriction applied by a supplier in order to prevent distributors/dealers/buyers from make sales on their own websites are clearly defined among the types of passive sales restriction.³⁴ Therefore a restriction adopted by a supplier with the purpose of preventing to distributors/dealers/buyers from make sales on their own websites is placed it within "hardcore restrictions". Therefore, an agreement involving a clause which prevents resellers to make sales through their own website is directly deemed to be out of scope of the block exemption. In parallel to this, restrictions that fall out of scope of the block exemption due to having a hardcore restriction generally cannot benefit from the individual exemption either.

Nevertheless, the Vertical Guidelines does not provide an extinct and clear approach as to whether restricting distributors' from making sales through online marketplaces may be considered a hardcore restriction. Although the Vertical Guidelines are parallel and almost identical to the Commission's Guidelines on Vertical Restraints³⁵ ("Commission's Guidelines"), Paragraph 28 of the Vertical Guidelines, which does not have its equivalent in EU regulation and was added to the Vertical Guidelines in 2018, is the primary reason causing such confusion:

"the supplier may introduce certain conditions on the use of internet as sales channels, similar to the ones it may introduce on physical points of sale or on the catalogues in which the advertisements and promotions are published. ... The justification of the conditions introduced must be objectively concrete, reasonable and acceptable in terms of the factors such as increasing the nature and quality of the distribution, brand image and/or potential efficiency, etc. Similarly, the supplier may demand that the buyer only sell through 'sales platforms/marketplaces' which fulfill certain standards and conditions. However, this restriction should not aim to prevent distributor's online sales or price competition. *As such, a general prohibition of sales over platforms without objective and uniform conditions and justifications in line with the specific characteristics of the product may be assessed as violations.*"³⁶

In light of this information, the Board first explained that similar to Commission's practice, internet sales are, generally speaking, considered passive sales in the Turkish competition law practice. Indeed, the Vertical Guidelines clearly indicates that the sales made through internet or through similar channels are generally

considered passive sales.³⁷ The Vertical Guidelines further clarifies that preventing the distributors from realising sales through their own websites are considered passive sale restrictions³⁸. **I.C.C.L.R. 430*

The most important assessment of the *BSH Exemption* has been made on this point. The Board stated that the restriction of sales through marketplaces (i) means direct or indirect prohibition of online sales, (ii) is against the "principle of equivalency" and serves as a deterrent factor for the usage of internet by the resellers as a distribution channel and (iii) restricts the active and passive sales realised by the members (dealers/distributors) of the selective distribution system to the end-users. Based on these statements, the Board determined that the restriction of sales through online marketplaces are (i) not based on objective grounds considering the nature of the product and (ii) not based on any qualitative criterion. Therefore, the Board concluded that the online marketplace restrictions are considered "hardcore restriction" and therefore, cannot be granted block exemption as per the Communiqué No.2002/2.³⁹

To sum up, the Board characterised the online marketplace restrictions as a "restriction of internet sales", even though the dealers were able to sell their goods through their own websites. The Board based its judgment on the fact that restrictions imposed on sales through online marketplaces serves a disincentive for dealers from using internet as a distribution channel.⁴⁰

The Board's assessments regarding the individual exemption

After finding that the restriction of sales through online marketplaces cannot be granted block exemption, the Board moved onto assessing as to whether the same restrictions may be granted with an individual exemption.

While conducting the individual exemption analysis, the Board determines whether an agreement satisfies the following four conditions set forth in art.5 cumulatively:

- a) The agreement must promote new developments and improvements or economic or technical progress in the production and distribution of goods and provision of services,
- b) Consumers must benefit from the positive effects,
- c) The agreement must not eliminate competition in a substantial part of the market,
- d) Competition must not be restricted more than necessary to achieve the objectives listed in (a) and (b).

With this respect, the Board first assessed BSH's arguments. These arguments asserted that restriction of sales through online marketplaces would create efficiency gains. BSH indicated that the imposed restrictions were essential to protect the brand image and to prevent the free-riding. However, the Board stated that the arguments of BSH regarding the protection of brand image and prevention of free-riding are not more than "speculative claims", after the competitors of BSH expressed that restriction of sales through online marketplaces is not a preferred method for them to reach those objectives. The Board found that the restriction of sales through online marketplaces neither serve as adequate means to prevent free **I.C.C.L.R. 431* riding and nor preserve the efficiency of the distribution system or brand image in this case.

Second, the Board determined that the restriction of sales on the online marketplaces is unlikely to provide consumer benefits considering the fact that online shopping has been widely used by the Turkish consumers in recent years. When examining the reasons behind customers' preferences towards online shopping at regard of physical channels, it can be seen that online channels provide (i) lower prices (ii) wider product range (iii) and saving on time. The importance of online shopping channels for customers, ones again comes to hand considering that with online shopping, customers are able to reach different product range with different prices in a shorter time. The Board referred to the Customer Surveys conducted within the context of *BSH Exemption* decision and stated that 56% of the customers that participated in consumer survey and also purchase domestic appliances prefer online marketplaces. Correspondingly, the Board put forward that such restrictions will have a negative impact on consumer welfare basing its conclusions on the increasing volume of the sales through online marketplaces and the preference of the consumers to buy home appliances through online marketplaces⁴¹.

The Board also referred to the Preliminary Report and stated that the consumers attribute high level of significance to the "comments on the products", "comments on the sellers" and the "score of the sellers" in online marketplaces. Therefore, the Board concluded that online channels provide consumers with better opportunities for price search than physical channels provide. As a result, the Board did not agree with defensive arguments of BSH which claimed that such restrictions indeed benefit consumers.⁴²

Third, the Board remarked that restricting the sales of authorised dealers through online platforms may have a negative impact on the competition. More precisely, the Board indicated that it (i) would reduce intra-brand and inter-brand competition, (ii) would have an adverse effect on the entry to the online markets and, (iii) may block the access to a significant part of the internet sales of authorised dealers. The Board also highlighted that the restriction of sales on the online marketplaces is likely to distort competition to the detriment of weaker undertakings.⁴³

Within this scope, concentration ratio of market in 2019 and 2020 has been analysed. The ratio was based on the market shares of four leading undertakings' in the white goods market in Turkey. The Board considered the scenario where all the market players enforces similar vertical restrictions and, as a result, the cumulative effects of all these restrictions would be able to limit competition in the market. In light of this, the Board expressed that the restriction of sales through online marketplaces holds potential risk of restricting the competition.⁴⁴

Fourth, the Board evaluated whether there is any alternative and less restrictive system from a competition law perspective that may be adopted by BSH to reach the objective set by the agreement between BSH and its dealers. The Board determined that it is possible for the suppliers to set rules related to the sales through online marketplaces for the resellers that would enable consumers to see whether **I.C.C.L.R. 432* the seller in an online platform is the authorised dealer. According to the Board, it is still possible to protect the brand image of BSH through less restrictive methods. One of these methods which were exemplified by the Board was setting rules for the sales conducted in online marketplaces, instead of restricting sales through online marketplaces.⁴⁵

In the light of explanations above, the Board concluded that the agreement between BSH and its dealers cannot be granted with an individual exemption as it does not meet any of the requirements set above. As a result, the Board determined that BSH's distribution system constitute a violation of art.4 of Law No. 4054 and cannot benefit from block exemption within the scope of the Communiqué No. 2002/2 or from an individual exemption as per art.5 of the Law No. 4054.⁴⁶

Why this case matters and how it is different than the Board's precedent body and the European practice

The Turkish Competition Board's approach

The Board's conclusion in *BSH Decision* stated that the restriction of sales through online marketplaces is hardcore restrictions. This determination may have a crucial impact on the way in which suppliers' distribution systems are assessed in the Turkish competition law. As a matter of fact, this is the first decision where the Board stated clearly that the online marketplace restrictions are considered hardcore restrictions.

The Board's precedent, in which the Board assessed the internet sales, includes several other important decisions. However, these decisions did not include any assessment regarding the online marketplace restrictions. For example, in its *Antis-1*⁴⁷ and *Antis-2*⁴⁸ decisions, the Board examined whether the condition imposing a requirement to receive permission to resale Dermalogica's professional cosmetic products via the Internet could be granted with an exception through justifiable means. The Board found that Dermalogica's professional products are sold only in beauty centres and require key personnel specifically trained for application of those cosmetic products. In this respect, the Board stated that the motive behind Antis' selective distribution system is based on the nature of its professional cosmetic products and its requirement to preserve the brand image. To that end, the Board emphasised that in order for Antis to address end users' expectations from the professional cosmetic products offered in the beauty centres, the provision incorporating the request for a permission to sell its products online does not surpass necessary means required to reach the aim set out by selective distribution system. In the light of its examinations, the Board decided that both agreements could benefit from the individual exemption.

In *Jotun*,⁴⁹ a preliminary investigation launched against Jotun, a paint manufacturer. The Board evaluated whether Jotun determined resale price and *I.C.C.L.R. 433 conditions and restricted its authorised dealers' online sales through a prohibitive provision within its dealership agreements. Although the Board concluded that Jotun did not determine resale prices or conditions of its dealers, it highlighted that Jotun's selective distribution agreements clearly restricted the authorised resellers from selling Jotun's products on the internet. While evaluating the matter, the Board referred to the competition law rules in the EU, along with several precedents of the Court of Justice of the European Union (ECJ)⁵⁰ (i.e. *Pierre Fabre* and *Coty* decisions).⁵¹ As the Board determined that even though Jotun established a selective distribution system, a provision restricting online sales of authorised resellers would cause the agreement to fall out of the scope of the block exemption. Therefore, the Board proceeded by evaluating whether Jotun's selective distribution agreements would benefit from individual exemption. Following its assessments, the Board concluded that the means adopted by Jotun surpasses the adequate scope to obtain such objective. As a result the Board concluded that Jotun's selective distribution agreements could not be granted with an individual exemption.

The approach in the EU

As explained above, an absolute ban of online sales constitutes hardcore restriction as per the Turkish competition law. This rule is not different in the European practice. As such, an absolute ban of online sales constitutes a hardcore restriction and therefore is identified as a restriction of competition by object under the Commission's practice.

Indeed, this is quite clear as per the Commission's Guidelines.⁵² In addition, in the *Pierre Fabre*⁵³ which was brought by the French Court of Appeal for a preliminary ruling before the ECJ and concerned restrictions against online sales for anticompetitive purposes implemented by a cosmetics firm, it was assessed that an individual exemption cannot be granted to absolute online sales ban because the restriction on the internet sales did not provide a product-specific objective justification or reason. Subsequently in *Pierre Fabre* it was concluded that the adopted restrictions possessed a characteristic of restricting the competition by object.⁵⁴

However, the European approach towards the restriction of sales through online marketplaces was not clear until the ECJ's *Coty*⁵⁵ decision. In the Bundeskartellamt *Sennheiser* decision,⁵⁶ for instance, the Bundeskartellamt examined whether bans on sales made via Amazon Marketplace prohibits authorised distributors from distributing these products via an online platforms to end customers. The Bundeskartellamt concluded that specified quality requirements did not serve as a mean to improve platforms efficiency and therefore cannot be deemed justifiable with regards the arguments based on its effects on product presentation and service *I.C.C.L.R. 434 quality. A similar approach was also adopted by Bundeskartellamt in its *Adidas Germany*⁵⁷ and *Asics*⁵⁸ decisions and by the L'Autorité de la concurrence (French Competition Authority) in its *Adidas France*⁵⁹ decision.

In the *Coty*⁶⁰ decision, the ECJ assessed that Coty Germany, a company that is active in the sale of luxury cosmetics through a selective distribution system, contemplate to facilitate the luxury image of its products through its selective distribution system. The ECJ determined that the luxury goods are in need of an application of a selective distribution system for the purposes such as (i) preservation of the quality of those goods and, (ii) as a way to ensure its proper usage. Therefore in *Coty*, it was determined that a selective distribution system primarily designed to preserve the luxury image of those goods does not restrict competition. Consequently, the ECJ concluded that prohibition imposed by a supplier of luxury goods on its authorised distributors concerning usage of online marketplaces for the sale of those goods is appropriate to preserve luxury image of those goods.

While evaluating the circumstances surrounding the case, the ECJ also referred to its *Pierre Fabre*⁶¹ decision to remark the distinction among two cases. In this respect, the ECJ stated that Pierre Fabre's products did not characterised as luxury goods, but cosmetic and body hygiene products and therefore *Pierre Fabre*'s practice were restricting the use of the Internet as a means of marketing. Following its examinations, the ECJ decided that the online marketplace restriction imposed by Coty Germany could benefit from the block exemption because (i) such online marketplace restrictions do not prevent the distributors from choosing its customers and (ii) online

marketplace restrictions are not regarded as passive sale restrictions since the consumers can always purchase directly from the distributor's website instead of the restricted online marketplace.⁶²

In its *Coty*⁶³ decision, the ECJ determined that restriction of sales through online marketplaces are not considered hardcore restrictions as they can be justifiable with regards to luxury goods. The Court determined that distributors' sales made through "their own websites" and sales made through "online marketplaces" constituted separate practices and cannot be evaluated under the similar categories. The ECJ delivered its final judgment determining that online marketplace bans applied to the use of third-party platforms by distributors in distribution agreements s imposed in relation to luxury goods do not constitute "hardcore restrictions" within the meaning of [arts 4 \(b\) and \(c\) of the VBER](#).⁶⁴

One of the points where BSH differs from Court of Justice's *Coty* decision is that, in BSH, restriction of sales through online marketplaces is regarded as equivalent to "restriction of passive sales". According to BSH decision, the **I.C.C.L.R. 435* restrictions imposed by the supplier on the dealers' sales made through online marketplaces constitute a "hardcore restriction". This assessment contradicts with the judgment made in *Coty* where it has been determined that this kind of restraints on online sales does not raise hardcore restrictive concerns. However in the Board's *BSH Exemption*, it was determined that it is not possible for such a restriction to benefit from the block exemption and the chance of being granted with an individual exemption to such practices is also low.

Following the *Coty* decision, the Commission also clearly indicated that restriction of sales made through online marketplaces does not constitute a hardcore restriction, regardless of whether the distribution model adopted by the supplier is based on a selective distribution system or exclusive distribution. In the Competition Policy Brief in 2018, the Commission stated that "marketplace bans do not amount to a hardcore restriction under the [VBER](#) irrespective of product category concerned."⁶⁵

One of the first decisions derived in accordance with *Coty* was brought by the French Competition Authority. Stihl, a manufacturer active in mechanical garden tools market, was alleged to restrict sales made through online marketplaces. The French Competition Authority separately focused on restriction of online sales and the restrictions imposed on using third-party platforms. Although the French Competition Authority determined that restriction of online sales generate an anticompetitive practice, with regards to restrictions imposed on using third-party platforms the French Competition Authority referred to *Coty* and determined that third-party platforms restrictions can be justifiable for not only luxury products, but also with regards to other types of products. Similarly to conclusion in *Coty*, French Competition Authority finally assessed that the ban on sales of luxury products via online marketplaces is not a "hardcore restriction" and can also be extended to similar restrictions applied to sales of non-luxury products.⁶⁶

In another judgment issued by Amsterdam Court of Appeal, it has been determined whether prohibition of sales made through unauthorised platforms constituted an unjustifiable restriction towards internet sales. It has been alleged that Action Sport sold Nike products on Amazon, contrary to NEON's Selective Retailer Distribution Policy (the Policy). Amsterdam Court of Appeal found that the applicability of the [VBER](#) to the adopted Policy does not depend on whether the sold products qualify as luxury products, rejecting the contrary arguments presented by the parties. Amsterdam Court of Appeal determined that a online marketplace ban differs from a prohibition of the use of internet sales by referring to the *Coty* and determined that ban on sales through unauthorised platforms does not constituted a "hardcore restriction" within the meaning of [art.4 of the VBER](#).⁶⁷

In light of above, the conclusion in the *BSH Exemption* appears to be contradicting with the most recent European practice, where restriction of sales through online marketplaces are block-exempted and do not constitute a hardcore **I.C.C.L.R. 436* restriction. With the *BSH Exemption*, the Board adopted a rather strict approach towards sales limitations imposed on online marketplaces compared to the European practices.

Conclusion

In its recent *BSH Exemption* decision, unlike the European practice, and unlike its own precedents, the Board did not make a distinction between the restriction of online sales and the online marketplace restrictions. As such, the

Board concluded that the sales through online marketplaces are considered passive sales and restriction of sales through online marketplaces therefore constitutes a hardcore restriction as per Communiqué No.2002/2. Therefore, distribution systems restriction of the sales of the distributors through online marketplaces by suppliers in Turkey, as per *BSH Exemption*, might be considered a violation of the art.4 of the Act No.4054, since it is perceived as a hardcore restriction. The approach of the Board towards the restriction of sales through online marketplaces might evolve in the future based on the approach adopted in the [VBER](#) after it enters into force. But for now, it seems highly risky from the competition law perspective for the manufacturers active in Turkey to prevent their authorised dealers from selling through online marketplaces considering the latest approach of the Board.

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Footnotes

- ¹ Turkish Competition Board's *BSH Exemption decision dated December 16, 2021 and numbered 21-61/859-423*, <https://www.rekabet.gov.tr/Karar?kararId=a937082b-551b-472e-9673-792142e416ad>, available only in Turkish.
- ² Organisation for Economic Cooperation and Development (OECD), "Vertical Restraints for Online Sales" (OECD, 2013), pp.5-6, <https://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.
- ³ Multi-sided platforms harmonise separate consumer groups based on their requests. Multi-sided platforms need to keep an account of interactions made among various consumer groups to designate their pricing and investment strategies (D.S. Evans, "Some empirical aspects of multi-sided platform industries" (2003) 2(3) Review of Network Economics 191, <https://www.degruyter.com/document/doi/10.2202/1446-9022.1026/html>).
- ⁴ *Report from the European Commission to the Council and the European Parliament Final Report on the Ecommerce Sector Inquiry, Commission Staff Working Document, para.99* https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.
- ⁵ *Turkish Competition Authority, Preliminary Sector Report Regarding Online Marketplace Platforms (2021), para.28*, https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-on-rapor-teslim-tsi_son-pdf, available only in Turkish.
- ⁶ *Turkish Competition Authority, Preliminary Sector Report Regarding Online Marketplace Platforms (2021), para. 118*.
- ⁷ D-Market Elektronik Hizmetler ve Ticaret A.Ş. (Hepsiburada) is offering a wide range of electronic and non-electronic devices through its e-commerce activities via its online marketplace platform (www.hepsiburada.com).
- ⁸ Doğu Planet Elektronik Ticaret ve Bilişim Hizmetleri A.Ş. (N11) is an online marketplace platform offering wholesale services in raw material, bulk products, end products through many websites. N11 is also active in brokering services in logistics (www.n11.com).
- ⁹ DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (Trendyol), controlled by Alibaba Group, provides services in various product groups through multiple websites. Trendyol is also active in payment and electronic money services (www.trendyol.com).
- ¹⁰ Çiçek Sepeti İnternet Hizmetleri A.Ş. (Çiçeksepeti) is an online marketplace offering and delivering wide range of flower, fruit and chocolate baskets for its costumers (www.ciceksepeti.com).
- ¹¹ PTTEM Teknoloji ve Hizmetler A.Ş. (EpttAvm) is an online marketplace platform providing services in commercial activities in b2b and b2c marketing (www.pttem.com).

- 12 GittiGidiyor Bilgi Teknolojileri Sanayi ve Ticaret A.Ş. (GittiGidiyor) is an online marketplace providing a platform for it consumers to sell and buy goods and services (www.gittigidiyor.com/).
- 13 Boyner Büyük Mağazacılık A.Ş. Morhipo İstanbul Şubesi (Morhipo) provide services in online sales in various categories such as clothing, housing and lifestyle, cosmetics, footwear, accessories through its online marketplace (www.morhipo.com).
- 14 See *Turkish Competition Authority, Preliminary Sector Report Regarding Online Marketplace Platforms (2021)*, para.28.
- 15 *Turkish Competition Authority, Preliminary Sector Report Regarding Online Marketplace Platforms (2021)*, para. 35.
- 16 Report from the Commission to the Council and the European Parliament (2017), Final Report on the E-commerce Sector Inquiry, p.6, https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.
- 17 [Commission Regulation \(2010\), \(EU\) No.330/2010 of on the application of art.101\(3\) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. \[2010\] OJ L 102/1-7.](#)
- 18 European Commission, Published Initiatives, "EU competition rules-revision of the Vertical Block Exemption Regulation", https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12636-EU-competition-rules-revision-of-the-Vertical-Block-Exemption-Regulation_en.
- 19 European Commission, Draft Revised Vertical Block Exemption Regulation, https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en.
- 20 Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence, Ministre de l'Economie, de l'Industrie et de l'Emploi (C-439/09) EU:C:2011:649*.
- 21 Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) (C-230/16) EU:C:2017:941*
- 22 A. Jones, *Expert Report for the European Commission on the Review of the EU Vertical Block Exemption Regulation: Cases Dealing with Online Sales, and Online Advertising, Restrictions at EU and National Level (European Commission, 2021)*, p.17 https://ec.europa.eu/competition-policy/system/files/2021-06/kd0921156enn_VBER_online_sales.pdf.
- 23 A *negative clearance* granted by the Turkish Competition Board demonstrates that the notified application (i.e. agreement, decision, practice, merger or acquisition) does not conflict with provisions set under arts 4, 6, or 7 of Law No.4054 and therefore does not constitute a violation of competition. (See, ELIG Gürkaynak, Turkey: Competition and Antitrust, Negative Clearance, Mondaq, <https://www.mondaq.com/advicecentre/content/1660/Negative-Clearance>).
- 24 An *individual exemption* is granted by the Board in cases where restrictive practice: (i) ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services; (ii) allow the consumers a fair share of the resulting benefit; (iii) not eliminate competition in a significant part of the relevant market; and (iv) not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (i) and (ii). An individual exemption granted by the Board displays that the agreement/practice/decision satisfy all of the aforementioned conditions and therefore exempted from the application of Article 4 of Law No. 4054. (See, Mondaq, "Turkey: Competition and Antitrust, Individual Exemption", <https://www.mondaq.com/advicecentre/content/1584/Individual-Exemption>).
- 25 *Selective distribution systems* can be defined as practices where the supplier agrees to provide goods or services to distributors based on specific conditions. Accordingly, distributors also commit to not to distribute mentioned goods and service to unauthorised dealers. (See, *Turkish Competition Authority, Guidelines On Vertical Agreements*, para.36, [https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-vertical-agreements-\(2018\)ing-20180420105658388.pdf](https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-vertical-agreements-(2018)ing-20180420105658388.pdf).)
- 26 Turkish Competition Board's *BSH Exemption*, para.4-25.
- 27 Turkish Competition Board's *BSH Exemption*, para.196.
- 28 For example, the Board remarked in its assessments that pursuant to the Commission's Final Report on the Ecommerce Sector Inquiry, Amazon adopted two different methods to eliminate the concerns of brand owners. First, Amazon provided supplier and dealers with "*landing pages*" distinguishing their corporate identity. Secondly, amazon established "*Premium Beauty Stores*" in order to preserve the image of the luxury brands. (See, Turkish Competition Board's *BSH Exemption*, para.98.)

- [29](#) Turkish Competition Board's *BSH Exemption*, para.98.
- [30](#) Turkish Competition Board's *BSH Exemption*, para.106.
- [31](#) Turkish Competition Board's *BSH Exemption*, para.308.
- [32](#) A *block exemption* is commonly applicable to vertical agreements and granted by the Board when certain conditions set under Communiqué No.2002/2 regarding market shares of supplier and buyer are met. Agreements that are granted with the block exemption are exempted from the application of art.4 of Law No. 4054. (See, ELIG Gürkaynak, "Turkey: Competition and Antitrust, Block Exemption", Mondaq, <https://www.mondaq.com/AdviceCentre/Content/1586/Block-Exemption>.)
- [33](#) *Turkish Competition Authority, Guidelines on Vertical Agreements*.
- [34](#) The restriction imposed by a supplier on sales that are not effectuated by active efforts of distributors/dealers/buyers are considered as a *restriction of passive sales*. The passive sale bans imposed by the suppliers on their distributors are considered hardcore restrictions as per Communiqué No.2002/2. (See, Vertical Guidelines, paras 24-25).
- [35](#) European Commission, Guidelines on Vertical Restraints, [2010] OJ C 130/1.
- [36](#) See, Vertical Guidelines, para.28.
- [37](#) Vertical Guidelines, para.24.
- [38](#) Vertical Guidelines, para.25.
- [39](#) Turkish Competition Board's *BSH Exemption*, para.321.
- [40](#) Turkish Competition Board's *BSH Exemption*, para.321.
- [41](#) Turkish Competition Board's *BSH Exemption*, para.351.
- [42](#) Turkish Competition Board's *BSH Exemption*, para.354.
- [43](#) Turkish Competition Board's *BSH Exemption*, para.381.
- [44](#) Turkish Competition Board's *BSH Exemption*, para.363.
- [45](#) Turkish Competition Board's *BSH Exemption*, paras.388-393.
- [46](#) Turkish Competition Board's *BSH Exemption*, para.408.
- [47](#) The Turkish Competition Board's *Antis-1 decision dated 08.05.2008 and numbered 08-32/401-136*.
- [48](#) The Turkish Competition Board's *Antis-2 decision dated 24.10.2013 and numbered 13-59/831-353*.
- [49](#) The Turkish Competition Board's *Jotun decision dated 15.02.2018 and numbered 18-05/74-40*.
- [50](#) Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence, Ministre de l'Economie, de l'Industrie et de l'Emploi (C-439/09) EU:C:2011:649*.
- [51](#) Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) EU:C:2017:941*
- [52](#) See Commission's Guidelines on Vertical Restraints, [2010] OJ C 130/1.
- [53](#) Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence, Ministre de l'Economie, de l'Industrie et de l'Emploi (C-439/09) EU:C:2011:649*.
- [54](#) Silvia Bortolotti, "EU: Pierre Fabre-The EU Court of Justice last judgment on the Internet sales", <https://www.idiproject.com/news/eu-pierre-fabre-eu-court-justice-last-judgment-internet-sales>.
- [55](#) Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) EU:C:2017:941*.
- [56](#) *Sennheiser, Bundeskartellamt (2013), B7-1/ 13-35*.
- [57](#) *Adidas, Bundeskartellamt (2014), B3-137/12*.
- [58](#) *Asics, Bundeskartellamt (2015), B2-98/11*.
- [59](#) Press release, "The Autorité de la concurrence has closed an investigation against Adidas", 18 November 2015: Online Sales, <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/18-novembre-2015-online-sales>.
- [60](#) Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) EU:C:2017:941*, [26]–[29].
- [61](#) Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence, Ministre de l'Economie, de l'Industrie et de l'Emploi (C-439/09) EU:C:2011:649*, [44] and [46].
- [62](#) Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) EU:C:2017:941*, [28]–[29] and [52]–[53].
- [63](#) Judgment of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH (C-230/16) EU:C:2017:941*, [52]–[53].
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