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COMPETITION BOARD'S DECISION ON THE PROHIBITION OF SALES THROUGH E-COMMERCE PLATFORMS

In parallel with changing consumer habits of the widespread use of the Internet, the restriction of sales made through online marketplaces (e-commerce platforms) has become an issue that frequently comes to the fore. Recently, the Competition Board (the "**Board**") ruled that BSH Ev Aletleri Sanayi ve Ticaret A.Ş.'s (BSH) restriction on authorized dealers to sell BSH products through e-commerce platforms constitutes a violation of Article 4 of Law No. 4054 on the Protection of Competition (the "**Competition Law**") and that an individual exemption cannot be granted. The relevant decision is the first to reveal the Board's approach on restriction of sales through e-commerce platforms and it clarifies whether provisions that prohibit authorized dealers from making sales through e-commerce platforms are in compliance with the Competition Law.

1. The Scope of BSH's Request for Exemption

BSH, a company active in the white goods and small household appliances sector, requested the Board to grant a negative clearance/exemption for its distribution system, where authorized dealers are allowed to sell BSH products on their own websites, but are completely prohibited from selling the same on e-commerce platforms. BSH stated that the reasons behind a ban on sales through e-commerce platforms imposed on dealers are to protect brand image, as well as to ensure the effectiveness of its selective distribution system and to ensure customer satisfaction. BSH also claimed that the sales to be made through these platforms will lead to the use of the products' intellectual property rights by third parties other than its authorized dealers and that BSH will not be able to control the platforms' security systems' efficiency in terms of data security.

2. The Board's Assessment

The Board determined that prohibiting authorized dealers from selling BSH products through e-commerce platforms violates Article 4 of the Competition Law and that this restriction cannot benefit from a block exemption as per the Block Exemption Communiqué on Vertical Agreements. The Board also assessed whether the relevant restriction could benefit from an individual exemption and concluded that it does not meet the conditions for such exemption.

The Board concluded that the ban of sales through e-commerce platforms does not meet the first of the individual exemption conditions, namely the efficiency gain. In this respect, the arguments brought forward by BSH regarding the preservation of the effectiveness of the distribution system and the brand image were not deemed sufficient. The Board considered that most of BSH's competitors in the relevant sector prefer sales made through e-commerce platforms due to reasons such as increased visibility and easier access for customers. The main reason for this preference of those who do not sell online is that they find physical sales to be sufficient. The Board also considered that the free-riding problem does not only concern e-commerce platforms.

The Board also evaluated whether such prohibition would result in a significant restriction of competition and reached the conclusion that the restriction of sales made through e-commerce platforms may potentially create significant adverse effects on competition as it may reduce price competition, intra-brand and inter-brand competition, hinder entry to the market, prevent authorized dealers from accessing a significant part of the internet sales channel and reduce competition in the market to the detriment of small and weak undertakings.

Lastly, the Board evaluated that the problems related to the protection of brand image, prevention of free-riding and providing a better consumer experience could be solved with less restrictive ways than forbidding sales through e-commerce platforms. Consequently, the Board considered that a complete ban on e-commerce platforms is not proportionate, when suppliers could resort to other methods, such as the introduction of certain criteria for sales made via e-commerce platforms, the improvement or working conditions with the latter or the creation of an obligation to establish a customer complaint tracking system.

Having concluded that the complete ban of sales on e-commerce platforms restricts competition more than necessary and, thus, does not meet the last condition of exemption, the Board assessed that the goals of protecting brand image and solving the free-riding problem may be reached in less restrictive alternative ways, by applying concrete and objective standards, similar to those applied to the dealers' own websites to the sales made via e-commerce platforms.

3. The Impact of the Decision

The Board's approach in the BSH decision differs from the approach adopted in European Union (EU) competition law. In the EU, as first shaped by the Coty decision,¹ and later reflected in the Draft Guidelines on Vertical Restrictions of the European Commission, the ban of sales made by authorized dealers over e-commerce platforms in selective distribution systems can meet the exemption conditions. The Board evaluated that the ban in the Coty decision was brought to protect a luxury product image and it pointed out that the EU approach can only be applied in terms of luxury products, a category under which the BSH products do not fall. Another reason for the adoption of a different stance from the one in the Coty decision is the e-commerce platforms' high level of importance in Turkey. In this respect, the Board has adopted a strict approach in relation to the total restriction of sales made through e-commerce platforms by suppliers' dealers and such approach may also have repercussions in different sectors.

CONTACT



Competition Law Counsel
Neyzar Ünübol

nunubol@kolcuoglu.av.tr



Associate
Esen Çakır

ecakir@kolcuoglu.av.tr

¹ Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH, 6 December 2017