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RESTRICTIONS ON E-COMMERCE AND COMPETITION LAW

Competition law in digital markets, which is the hype theme of the recent years, was discussed at the İstanbul Competition Forum organized by the Turkish Competition Authority (the "TCA"), with participation of UNCTAD, on 25-26 November. The main consideration of the first panel titled "Digitilization and Competition Law and Policy" was competition law implications of new business models introduced by digital platforms, and the TCA's approach to competition law aspects of e-commerce was also discussed.

As the scale of e-commerce is growing rapidly, it is a must to adapt to e-commerce, especially for companies which have a business model based on physical retailing. On the other hand, it is an undeniable truth that e-commerce poses a threat to the established business model of physical retailing. The source of the threat is the "free riding problem" which arises when consumers benefit from physical retailing's advantages (such as examining and trying the physical products, comparing products, getting informed by sales assistant etc.) but purchase through online channels offering lower prices due to lack of cost items related to physical retailing. Free riding problem may cause companies with an established physical retailing business to adopt a protectionist approach towards e-commerce. However, in compliance with competition law regarding vertical arrangements and practices on e-commerce may bring the risk of facing a competition investigation and monetary fines. Below is a brief summary of the TCA's approach on which restrictions can get green light and which are not allowed.

Block Exemption Communiqué on Vertical Agreements does not allow restriction of passive sales to an exclusive region or exclusive group of customers assigned to a distributor. Passive sales are defined as sales done without any active efforts by the distributor. Online sales are generally considered as passive sales, and e-commerce restrictions imposed by the supplier on its distributors is generally considered as an infringement of the competition law. Suppliers should not restrict online sales of distributors. However, it is acceptable to restrict e-mail advertising

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targeted to an exclusive region or exclusive group of customers assigned to another distributor, except for the cases where the demand for e-mail advertising comes from the customer himself.

Imposing a certain quantity quota on online sales is as an infringement of the competition law as well. For example, requiring the distributor to limit its online sales to 20 percent of its total purchase from the supplier would be considered as a quota on online sales. In selective distribution systems, distributors may be obliged to have at least one physical store if this reinforces the quality of distribution, brand image and/or creates potential efficiencies. Another practice that does not benefit from exemption is applying different prices to distributors based on the channel they sell the products. Supplier should not ask for higher prices for the products that are going to be sold online. Otherwise, this practice would be viewed as an indirect restriction of online sales.

However, the supplier may limit the online sales by requiring certain criteria on the website through which the product will be sold. It is also possible to restrict online sales on third party online platforms (online marketplaces) that do not meet certain criteria. Those criteria should be based on product characteristics and objective justifications in order to benefit from the block exemption¹. Coty Case² in EU clears that protection of the luxury image can be an objective justification for restricting sales through online platforms like Amazon.

The TCA's Sony decision³ also considers online sales through platforms. However, the focus of the investigation was the suppliers' intervention on the prices its distributors offer on online platforms (resale price maintenance) rather than a total restriction of sales through platforms. Therefore, the decision does not provide guidance on acceptable justifications for restricting sales through online platforms.

To sum up, it is possible to impose restrictions on online sales based on objective justifications, but the purpose should not be to limit the competitive pressure and price competition coming from e-commerce. Online sale restrictions should be carefully designed according to the objective justifications arising from product characteristics such as need for after sale services, quality considerations and brand image.

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¹ The TCA's Jotun Decision, Date 15 February 2018, no 18-05/74-40

² Coty Germany GmbH, 6 December 2017, C-230/16

³ The TCA's Sony Decision, Date 22 October 2018, no 18-44/703-345