

**INTERNET SALE BANS AND EU-TÜRKIYE PRACTICES:
APPLICATION IN LIGHT OF THE COTY DECISION**

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The Turkish practice is different from the current EU regulation in terms of the freedom granted to platform sales.

Last November, the Competition Board (Board) launched an investigation on six undertakings operating in the cosmetics and personal care products sector to examine the allegation that they infringed competition rules by fixing the resale prices of their buyers and restricting internet sales. The investigation concerned focused a lot of attention from the cosmetics sector on competition law applications, and caused undertakings to review the agreements they signed with their buyers as well as their practices to see if they were in alignment with the rules. Thus, it will be beneficial to take a closer look at internet sale bans, which seem to be widely implemented in the cosmetics sector. In that framework, this article will first talk about the points of note in EU Commission's Coty Decision, which made a tremendous impression in the sector and is one of the Decisions that drew a lot of attention recently, and then it will focus on the differences in approach between the EU Vertical Guidelines and the Board's Guidelines on Vertical Agreements (Vertical Guidelines), and how the Board approaches bans on online marketplace (e-commerce platforms) sales.

Thanks to its rapidly developing infrastructure than can operate 24/7 regardless of time or location, e-commerce has become an indispensable part of economic life. Although there are many benefits brought about by e-commerce for both consumers and suppliers (*it allows comparing prices and service quality and saves time, facilitates transportation to most places around the world*), the constant increasing trend of internet sales sometimes forces suppliers to fight against free-riding, fraud, and damage to brand image. Usually, suppliers try to tackle these issues by introducing absolute or partial restrictions on the sales of their buyers (resellers) over the internet. Internet sale restrictions, which the suppliers claim may be introduced due to the various reasons listed above, have a negative impact on online shopping

opportunities that constitute the most important tools available to consumers to access cheaper prices, while decreasing the number of suitable price alternatives. The type of competition that emerges between multiple sellers of the same product, known as intra-brand competition in competition law literature, may be negatively affected as a result of the prevention of buyers' internet sales. In selective distribution systems, these restrictions generally take the form of a complete ban on the sales of the product over the internet (absolute restrictions), or restrictions related to the use comparison shopping applications, sales through online marketplaces or placing online ads.

The EU Practice and the Commission's Coty Decision

The prohibition in the agreement signed between the Germany-based luxury cosmetics supplier Coty and one of its authorized distributors, Parfümerie Akzente (Akzente), concerning the latter's online sale of the contract products became the subject of an examination, first by the Commission, and then by the Court of Justice of the European Union (CJEU). The CJEU assessed whether a supplier should be able to restrict the marketplace sales of distributors in a selective distribution system (namely, Coty's buyers) without specifying certain quality standards, and stated that the lack of a contractual relationship between the supplier and the marketplaces prevented the supplier from supervising the compliance of the marketplace sales with the quality standards it requires. In fact, it was noted that the introduction of a requirement on the distributors to have the capability to make sales over their own websites by the supplier in order to protect the image of luxury products served as a guarantee that these products could be associated with the authorized sellers in the selective distribution system. In other words, CJEU ruled that the restriction of marketplace sales within the framework of a selective distribution system was not against competition law under certain circumstances.

In contradiction with the consistency of the case law in stating that banning sales over the resellers' own websites should constitute an infringement of competition by object, assessments on whether the restriction of sales through online marketplaces constitutes an infringement by object or by effect arrive at the conclusion that, under the EU practice, this issue should be analyzed in terms of effect.

In accordance with the CJEU practice, absolute internet sale restrictions placed on distributors by suppliers are hardcore restrictions which take the agreement out of block exemption coverage. As noted in the CJEU's *Pierre Fabre* Decision in 2011, absent an objective justification based on relevant public law and public safety related to the characteristics of the product sold under selective distribution, on its own, protection of the brand image cannot be considered legitimate grounds for the restriction of (all types of) sales over the internet.

In the *Coty* Decision, on the other hand, the prohibition of sales through platforms placed on the authorized dealers by the supplier was not seen as an absolute internet sales ban, and it was noted that the lack of an agreement between the third-party platforms and the supplier constituted a barrier for the desired product quality and harmed the luxury product image, based on which authorized dealers could be prevented from making sales over these platforms.

Thirty per cent market share

In accordance with the EU Vertical Block Exemption Regulation (VBER) and the associated EU Vertical Guidelines, provisions in a vertical agreement which prevent buyer's effective use of the internet by object or which restrict the sales of the contract goods or services to a specific region or customer group are considered hardcore restrictions. Recent efforts to review and revise the provisions of VBER and EU Vertical Guidelines in light of the current structure of e-commerce and the economic developments in the EU have caused a change in perspective in the EU practice concerning marketplace sales. Following the amendments made, it has become possible for suppliers to directly or indirectly prevent sales through online marketplaces in case the buyers and suppliers each have a market share below 30%. In addition, it is now allowed in the EU to price discriminate between products sold over the internet and through the traditional channel (dual pricing); in other words, products can be sold at lower cost in the traditional channel, taking into account the cost differences between the traditional and internet channels.

Turkish practice

In the Turkish competition law practice, the arrangement in the Vertical Guidelines concerning internet sale bans was updated more recently, in 2018, to harmonize with the EU legislation. However, there is a need for a more comprehensive review on whether the last amendments to the VBER, made in May 2022, are applicable in Türkiye, for instance in terms of how the competitive environment and consumers would be affected if marketplace sales were banned. There are various decisions of the Board examining internet sale bans. Restrictions concerning all types of internet sales in a selective distribution system was examined in the *Yatsan* Decision dated 23.09.2010 and numbered 10-60/1251-469. Although the supplier stated that the restriction concerned was intended to protect the product image and prevent free-riding, the Board concluded that these arguments were not based on objective grounds and there was no valid justification for completely banning sales over the internet. This assessment is important in that the decision adopted the Commission's approach, noting that the restriction should not exceed what is necessary. The Board's *Baymak* Decision, dated 26.03.2020 and numbered 20-16/232-113, observed that there were efforts to discourage dealers selling over

the internet by various methods such as premium cuts, contract termination, etc., and ruled that these types of internet sale restrictions would be in violation of the Act no 4054 on the Protection of Competition. The Board's *BSH* Decision, dated 16.12.2021 and numbered 21-61/859-423, on the other hand, addressed marketplace sale bans and examined the prohibition of sales through marketplaces placed on BSH's authorized dealers. The assessment in the file found that the restriction of sales through marketplaces would fall outside the block exemption, since it would mean restricting passive sales in the selective distribution system. The Decision stated that the ban on marketplace sales by authorized sellers could reduce inter- and intra-brand competition, that this ban would restrict authorized sellers' access to a significant portion of the internet channel and thus would distort competition to the advantage of smaller undertakings, and therefore the restriction in question could not be granted individual exemption. The Decision emphasized the importance of the share of marketplaces in internet sales. It is noted that 56% of the consumers who purchased products over the internet bought those products through marketplaces.

As a matter of fact, the Authority's E-Commerce Sector Inquiry Report clearly shows the critical importance of marketplaces for internet sales by numerical data, stating that the rate of internet shopping was 74% globally and 63% in Türkiye in 2020, while in 2021 the rate of shopping over the internet increased by 2.8 points around the world but leaped by 12 points in Türkiye. The fact that marketplaces acquired a significant share in terms of sales volume led to a similarly negative perspective on any restriction placed on marketplace sales.

Within this context, it is clear that in the Turkish practice, a complete restriction of platform sales without an objective reason would lead to restrictive effects on competition. Thus, the Turkish practice differs from the current EU regulation in terms of the freedom granted to platform sales. As mentioned above, the amendments made to the EU Vertical Guidelines allow suppliers to restrict their distributors' internet sales under certain circumstances.

In conclusion, both the EU and the Türkiye practice adopts a negative stance towards complete prevention of internet sales, since they clearly lead to consumer benefit in many areas, including price, variety, decreasing search costs, etc. On the other hand, for Türkiye, it may be said that suppliers cannot place absolute restrictions on their buyers' sales through marketplaces but can implement restrictions under certain criteria. How these practices will evolve, whether the legislation will converge with the EU's and how the Board will handle internet sale restrictions it encounters in the coming period have become very important questions for every sector concerned, including cosmetics.