

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON VERTICAL RESTRAINTS FOR ON-LINE SALES

-- Note by Turkey --

This note is submitted by Turkey to the Competition Committee FOR DISCUSSION under Item VII at its forthcoming meeting to be held on 26-27 February 2013.

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1. With each passing year as the world moves deeper into 21st century, our daily lives become more digitalized. Information technology increases their effect on how people communicate, how they spend their leisure time and also how they shop. In the past decade the share of online sales vastly increased and as it's the case with almost all technological markets this brought the question, forca the competition practitioners, whether the traditional tools used to handling cases in traditional markets are well suited for the competition issues that may arise in this more "technological" sector.
2. Although it can be argued that this new growing sector tagged along some competition problems, it also brought what competition authorities mostly desire: several benefits directly for consumers. Online retailing enabled consumers to shop whenever they want from wherever they want with a chance to explore countless stores within few hours. With this decrease in transaction costs, consumers now have the chance to compare the quality and price of increased number of products which results in increase in both consumer welfare and degree of competition. Consumers can instantly get informed about a product through videos and user reviews which are widely available through the web. They can also have the ability to check the lowest price of the product that they desire using the price-check web sites, a process which clearly has a positive impact on the price competition among on-line retailers.
3. Besides its listed advantages, expansion of on-line retailing also made consumers vulnerable to certain abuses. Credit card frauds or retailers selling without stock or proper planning and thus making consumers wait for the product for prolonged times are maybe the most encountered problems in Turkey. While these abuses definitely have a negative impact on both the competitive process and consumers severely, it is expected that they are dealt with consumer protection provisions because of their nature.
4. As mentioned above, as the online retailing grew bigger and started to account for an important part of the sales, the importance of the competitive process in this sector also grew. In this respect application of the competition law regarding vertical restraints posed new questions for all authorities as well as for the Turkish Competition Authority (the TCA).
5. The TCA declares resale price maintenance as a hard-core restraint like most of the other jurisdictions. Although it is yet to be decided about a case where RPM provisions are forced to an online retailer, it can be deducted from the TCA's past decisions that those provisions will be accepted as infringements of the law and unlikely to be exempted.
6. The reasoning behind this is simple. RPM provisions applied to online retailers take away their main strength: to reflect their cost advantages to consumers and price lower than brick-and-mortar retailers. Besides, they are usually defended by their role in avoiding free-riding on classic retailers' investments. Although this argument is widely put forward, it can be said that TCA is looking that firms should provide solid proofs for this argument to be accepted. The signs of this approach could be seen from a recent decision dealing with RPM in LCD TV market. In *Anadolu Elektronik*¹, the TCA found that wholesaler of

¹ Decision dated 23.06.2011 and numbered 11-39/838-262.

LCD TVs imposed RPM clauses to its retailers which included electronic markets such as Media Markt as well as its own retailers of white goods. Although the undertaking concerned claimed that a rule of reason analysis is required in order to take into account the positive effects of the practice, the TCA did not accept this argument and imposed a fine on the undertaking as it sees RPM as a hard-core restraint directly infringing the law. The TCA stated that the defense lacked solid proof of positive effects required for exemption, although the market is one of those that preemptively considered one of those where pre-sale services are important.

7. As nowadays online retailers also supply consumers with a wide variety of pre-sale services, such as product review videos, expert reviews and also user reviews, the argument about free-riding further loses its virtue. Also these pre-sale services cost less to produce than their traditional counterparts such as to hire a full-time assistant and in addition to that they are costless to reproduce for each customer.

8. This nature of online pre-sale services makes it also unlikely to accept the argument that a RPM provision could be used to protect online retailers' investments.

9. When non-price restraints are taken into consideration, the TCA seems to have a more tolerant approach when the undertakings do not ban internet sales directly but reserves them for themselves instead.

10. In its *Marks&Spencer* decision² where a franchise agreement is examined under exemption rules, the TCA concluded that the provision allowing *Marks&Spencer* to reserve itself the right to make online sales should be understood as the suppliers act to reserve an exclusive consumer group. After considering this provision as a mean aimed at allocating exclusive customer groups between the buyer and the supplier itself, the TCA reached the conclusion that the restraint is within the limits of the Block Exemption Communiqué on Vertical Agreements which allows restriction of active sales to exclusive customer groups and territories.

11. Same type of restraint was also the subject of two other TCA decisions³. Again in both decisions the TCA concluded that suppliers acted to reserve online sales solely to themselves did not cause the agreement to be deprived of exemption. Moreover, in these two decisions the TCA also argued that by appointing an undertaking to distribute through classical shops, the supplier was basically increasing the number of firms selling to the market. The TCA also noticed that having two different suppliers selling via different channels would increase intra-brand competition.

12. As mentioned the TCA considers acts of suppliers to reserve online sales exclusively to themselves is within the limits of the exception to the territorial/consumer restrictions imposed to buyers whereas it chooses to deal with a direct restriction of online sales provision under individual exemption analysis.

13. The TCA have two decisions in this context. In its *Yatsan* decision⁴, it states that the ban imposed onto the buyer in order to restrain online sales could be considered as one of the hard-core restrictions listed in the Block Exemption Communiqué as it restricts the passive sales of the buyer. In the same decision, the TCA conducts an individual exemption analysis. In this analysis, it lists several justifications that it may consider while evaluating a constraint regarding online sales. First of all, the TCA acknowledges that restricting the online sales of a product could be exempted if there is an objective

² Decision dated 15.04.2010 and numbered 10-31/485-181.

³ Decision dated 08.11.2007 and numbered 07-85/1036-398 and decision dated 09.02.2012 and numbered 12-06/190-52.

⁴ Decision dated 23.09.2010 and numbered 10-60/1251-469.

justification on the basis of public safety. Furthermore, the TCA states that in some cases passive sales, including online sales, could be restricted for a period of time if the supplier is trying to penetrate into a new market and thus need protection for a period of time to have a full return from its investments. However as the products considered in this decision are beds and the supplier has a well know brand, the TCA dismisses these arguments. The Authority also refuses the undertaking's arguments that the ban is issued to protect its brand value of the product and also to prevent free-riding. In its reasoning, the TCA points out that there are less restrictive means a supplier can undertake such as imposing quality standards to online sales, requiring buyer to have a physical store, imposing offline sales quotas and limiting sales per consumer in order to achieve argued efficiencies. In this respect, the TCA reaches the conclusion that as there are less restrictive ways available to the supplier to protect its brand value and to prevent free-riding, the complete restriction of the buyers' ability to sell online can not be granted individual exemption.

14. Whereas in *Antis* decision⁵ the TCA grants individual exemption to an agreement which sets up a selective distribution system between a semi-professional selective cosmetic products supplier and its buyers, despite restrictions regarding the online sales. In its assessment, the TCA favors the argument that it is hard for consumers to choose the right product in respect to their skin type and age without the help of the sales person and testing; a process which could not be achieved through online sales. According to the TCA, by restricting online sales, the supplier will be able to avoid any negative impact on its brand image which it states could emerge if the consumers buy the products online without testing.

15. Although it has few decisions in this area, some deductions could be made to reach the TCA's point of view regarding vertical restraints in online retailing. First of all, as with other sectors, the TCA views RPM as a hard-core restraint which is unlikely to be granted an exemption. When non-price restraints are taken into consideration, although it can be said that the TCA values a restriction on buyers' capacity to sell online similar to a RPM provision, on the other hand it grants exemption when online sales are not banned but exclusively reserved for supplier. Here it can be said that as long as the goods is supplied through the web by someone TCA does not evaluate if the buyers can.

⁵ Decision dated 08.052008 and numbered 08-32/401-136.