

New Competition Law Rules on Online Sales

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The Turkish Competition Authority (“TCA”) has completed revising the Guideline on Vertical Agreements (“**Guideline**”) and published the updated version on its official website on March 30, 2018. The updated version of the Guideline introduces new rules, in particular on online sales which has become a significant distribution channel in recent years. So, this might be a good time for suppliers to review their online sales arrangements with their distributors.

Online Sales: An Emerging Distribution Channel

In its announcement on the updated Guidelines, the TCA stated that the development of the internet as a new distribution channel enables consumers to access a wide set of information, products and sellers and allow them to compare prices, while it also enables suppliers to market their products to a wider geography with lower costs. Also emphasizing the rapid increase in online sales’ yearly average growth rate in Turkey, the TCA has noted that a regulation on online sales has become necessary.

How Does the Guideline Define Passive Sales?

As a general rule, distributors should be free to sell passively to all customers, i.e. to respond to unsolicited requests by customers situated outside the reserved territories or other than the reserved customer groups/channels. A vertical agreement that restricts passive sales cannot benefit from the exemption provided by the Block Exemption Communiqué on Vertical Agreements (“**Vertical Communiqué**”).

Pursuant to the updated Guideline, in principle, each dealer must have the right to make sales over the internet and any restriction thereof would be considered as a passive sales restriction. Within this context, sales made by means of customers visiting the dealers’ websites or getting in contact with the dealer or requesting automatic updates from the dealer are considered as “passive sales”. The Guideline further provides that whether or not the dealer provides different language options for its website would not change the “passive” nature of these transactions.

Which Actions Will Constitute A Restriction on Passive Sales?

Pursuant to the Guideline, in particular, the following four actions will be deemed as a restriction on passive sales and accordingly, any vertical agreement that includes such restrictions will not benefit from the group exemption granted by the Vertical Communiqué:

- Restriction by an (exclusive) distributor of access to its own website from customers located at another (exclusive) distributor’s region or directing these customers to the supplier’s or other (exclusive) distributor’s websites;

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- Termination of the transaction by the (exclusive) distributor if it discovers that the customer is not located within its (exclusive) region based on the customer's delivery, cargo, credit card etc. address information;
 - Restriction on the ratio of online sales to the total sales (except for those cases whereby a supplier, without preventing online sales, requires the relevant distributor to make a certain portion of its sales through physical stores to protect the efficiency of physical stores or introduces various conditions to ensure compliance of the online sales to the general distribution system);
 - Reaching an agreement that requires the distributor to pay a higher price to the supplier for those products that it would resell online in comparison to those that will be sold at physical stores.

The first two restrictions above relate to the region and customers that the buyer will sell the relevant product or service. Restricting sales requested from a particular region or a customer group through internet by applying the foregoing restrictions will be deemed as a hard-core restriction. Similarly, determining a maximum sales limit for online sales will also be deemed as a hard-core restriction. Finally, pursuant to the Guideline, if the supplier determines different wholesale prices directly or indirectly, this will be considered under the fourth restriction. Supplier's power to affect the distributor's choice on distribution channel by increasing the difference between physical store sales' and online sales' prices may hinder the distributor's activities through internet.

Any exceptions?

Pursuant to the Guideline, online sales made by a distributor to an exclusive region of another distributor or an exclusive customer group via promotion or similar means will be deemed as "active sales" and vertical agreements restricting these types of sales may benefit from the exemption granted by the Vertical Communiqué. Similarly, advertisements and unsolicited e-mails directed to a specific customer group and/or geographical region through internet will also be deemed as "active sales".

In addition to the above, although having the dealer to pay a higher price for products it would offer online compared to the products offered at physical store sales (i.e. restriction four above), the supplier can make a fixed payment to the buyer to support the buyer's sales efforts (online or physical store sales) regardless of their sales revenue and amount.

Finally, the supplier may introduce certain conditions for the use of internet as a distribution channel similar to the ones it may introduce for physical stores or catalogues on which advertisements and promotions are published such as quality standards for the website. Important point to note is that these conditions may not, either directly or indirectly, aim to prevent online sales by the distributor.

Take Time to Review Your Online Sales Arrangements

As summarized above, the Guideline qualifies certain actions as restrictions on passive sales. However, this is not a limited list, so it is important to remember the general framework that the Guideline provides while reviewing whether an arrangement on online sales may constitute a restriction or not. Pursuant to the Guideline, it is not necessary for the requirements applied on physical sales and online sales to be identical, as the sales conditions for these two distribution channels differ. However, it is important that the requirements applied to both distribution channels should serve the same purpose, ensure comparable results and verify the differences between these two distribution channels that arise from their nature (i.e. equivalence principle). In other words, these requirements should not directly or indirectly result in restricting online sales. If a requirement introduced by a supplier is in breach of the equivalence principle and discourage buyers to use internet as a distribution channel, such requirement will constitute a hard-core restriction.

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