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Guide to classifying and evaluating risks of most-favoured customer clauses

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Introduction

Digital transformation significantly affected the way in which markets operate and paved the way for the emergence of innovative business models built on novel practices. The rise of digital platforms is among the most prominent examples of this trend. However, these innovations and novelties were somewhat alien to the established frameworks and classifications of competition law, which meant that undertakings engaging in these new areas faced certain legal uncertainties with respect to their practices. For online platforms (especially those with considerable market shares), the most-favoured customer (MFC) clauses which were commonly used and formed a cornerstone of certain strategies became a risk in terms of competition law, requiring business models to be revised accordingly.

This article summarises how MFC clauses became a major competition law issue in Turkey, especially for large online platforms, and how the relevant case law has developed. It aims to provide a guide for classifying a range of MFC-like clauses and evaluating the competition law-related risks.

New face in town

The term 'MFC clause' was first used by the Turkish Competition Board in 2010 in Arçelik-Sony (8 December 2010, 10-76/1572-605) within the context of a contract manufacturing agreement, whereby Arçelik, a major white appliance supplier based in Turkey, undertook to guarantee that the prices which it charged to Sony for the goods (LCD TVs) sold under the agreement would be at least as advantageous as the prices that it charged to other parties for similar goods. In its assessment, the board noted that these clauses were commonly used in trade, and that they posed competition law-related issues only in cases where the level of competition in the relevant market was low or the parties to the agreement had considerable market power. As this was not the case in Arçelik-Sony, the board held that the MFC clause did not restrict competition and that there was no need for further assessment.

While Arçelik-Sony was the first time where a brief assessment regarding the potential effects of MFC clauses was made in Turkey, the decision does not constitute a milestone. This is because the relevant clause was merely a restriction imposed by the buyer on the supplier within a traditional contract manufacturing agreement that would not warrant an atypical analysis. The game-changing development was the use of similar clauses by digital platforms that did not have a traditional supplier-buyer relationship with the undertakings that used those platforms to reach end customers.

As demonstrated below, while each application was different, the online platforms, of which there were few in the market, tended to base their business model on MFC clauses to ensure that the undertakings that used their platforms would not offer better conditions to consumers elsewhere over the Internet. Yet, as the number of competing platforms started to increase, they tried to gain scale by attracting more customers to their platform. While new entrants employed a number of tactics, some of them tried to succeed by enabling undertakings that would use their platform to offer better conditions to customers than those offered by the now-incumbent platforms. It was not long until new entrants discovered that platform MFCs constituted an important barrier in that respect and decided to challenge their validity by using competition law as leverage.

Case law development

The first case where the Turkish Competeition Board examined online platforms' MFC clauses in detail was Yemek Sepeti (9 June 2016, 16-20/347-156). This case concerned an alleged violation of Article 6 of Law 4054 on the Protection of Competition (Competition Law), which prohibits the abuse of a dominant position. Yemek Sepeti (which is now owned by Delivery Hero SE, one of the leading online food ordering and delivery marketplaces), was the incumbent online food delivery platform in Turkey, with a significant market share and unparalleled geographical coverage. Certain competitors of Yemek Sepeti argued (mostly encouraged by recent investigations initiated in certain European countries against the MFC clauses used by Booking.com) that Yemek Sepeti held a dominant position in the market for online food delivery platform services and was abusing this dominant position by hindering the entry of competitors via the MFC clauses. After confirming that Yemek Sepeti held a dominant position with a market share of more than 90%, the board undertook an assessment of the MFC clauses that were in place between Yemek Sepeti and the restaurants that used its online platform.

The relevant clauses were divided into two subcategories:

- MFC clauses that required restaurants not to offer better terms in their own food delivery channels (narrow MFC clauses); and
- MFC clauses that required restaurants not to offer better terms in any other channel, including competing platforms (wide MFC clauses).

The board analysed the effects of the wide MFC clauses in detail and concluded that their anti-competitive effects outweighed the efficiency gains that they created under the specific circumstances of the case at hand, especially considering Yemek Sepeti's significant market power. The board decided that the narrow MFC clauses did not constitute a violation but refrained from conducting a detailed effects-based assessment in this particular case. As a matter of fact, the board specifically noted that it would not further evaluate the pro-efficiency (especially to tackle the free-riding problem) and anti-competitive aspects of the narrow MFC clauses as these were not a subject of the investigation.

MFC clauses that were similar to the above were also evaluated in Booking.com (5 January 2017, 17-01/12-4), this time under Article 4 of the Competition Law, which prohibits anti-competitive agreements. Unlike the Yemek Sepeti case, it was unclear whether Booking.com held a dominant position in the market in which it operated (ie, the market for online hotel reservation platform services), but it still had a market share that exceeded 40%, according to the calculations of the Turkish Competition Authority. The 40% threshold was critical in this case as it meant that the vertical agreements to which Booking.com was a party did not benefit from the group exemption granted by the Block Exemption Communique on Vertical Agreements (Communique 2002/2). After clarifying that Booking.com did not benefit from the block exemption, the board went on to assess whether the agreements between Booking.com and hotels, which contained both narrow and wide MFC clauses, could benefit from an individual exemption, the conditions of which are set out in Article 5 of the Competition Law.(1)

In Booking.com, the board evaluated the narrow and wide MFC clauses separately and in detail and reached the following conclusions:

- Both types of MFC clause fell within the scope of Article 4.
- Neither of these clauses constituted a violation by object, and further evaluation of their effects was required.
- Only the wide MFC clauses failed to satisfy the conditions for an individual exemption and constituted a violation. The narrow MFC clauses were deemed to be compliant with the law, regardless of Booking.com's considerable market share.

Revision of relevant legislation

The Competition Board's findings in Yemek Sepeti and Booking.com were integrated into the Competition Authority's Guidelines on Vertical Agreements, published in 2018. The updated guidelines stipulate that MFC clauses may benefit from the protective cloak of Communique 2002/2 if the market share of the relevant platform is below the 40% threshold, without distinguishing between wide and narrow MFC clauses. The guidelines also provide certain explanations as to how the effects of MFC clauses will be evaluated within the scope of an individual exemption analysis.

Ongoing issues

Although the relevant precedents of the Competition Board and the explanations incorporated in the Guidelines on Vertical Agreements established legal certainty to a significant degree, some concerns remain with respect

to the use of MFC clauses.

One of these relates to the way in which compliance with MFC clauses is monitored. This is especially true in the case of MFC clauses between actual suppliers and buyers, where the supplier undertakes to offer the most advantageous conditions to a specific buyer, as this requires the buyer to be able to check the conditions offered to its competitors.

This issue came before the board in Pankobirlik (28 July 2020, 20-36/489-215). In this case, the board once again held that MFC clauses may benefit from the block exemption as long as the 40% threshold is not exceeded. As such, the MFC clauses used by Pankobirlik (a union of buyers' cooperatives of sugar beets) with respect to its suppliers (sugar beet producers) was found to comply with the relevant legislation. However, the board concluded that Pankobirlik should refrain from obtaining the price lists offered to other buyers, even though these lists were to be used for monitoring compliance with the MFC clauses, since they were deemed to constitute competitively sensitive information. Thus, the suppliers that preferred to use MFC clauses had to find alternative methods of ensuring compliance (eg, appointing an ndependent third party to review the price lists and notify the buyer when better terms were offered to other buyers, without specifying the identity of the relevant buyer).

Another problem stems from the diversity of the MFC-like clauses used in practice. Platforms that act only as marketplaces for third parties and do not conduct their own sales generally use similar MFC clauses (which resemble those examined in Yemek Sepeti and Booking.com). However, platforms that also (or only) act as actual resellers (and therefore should be deemed as buyers in the traditional sense) require different mechanisms to guarantee that they are getting the best deals from their suppliers. In Kitapyurdu.com (5 November 2020, 20-48/658-289), some of these mechanisms were brought to the Competition Board's attention.

Kitapyurdu.com operated in the market for online retail book sales and held a market share of less than 40%. Unlike Yemek Sepeti and Booking.com, Kitapyurdu.com was not a marketplace for third-party sellers, but a reseller that purchased books from different publishers and sold them online through its own websites. As explained in the decision, in order to ensure that it remained competitive with respect to other book resellers, Kitapyurdu.com regularly monitored the prices charged by its competitors at the retail level and contacted the suppliers when it detected any competitors offering more advantageous terms. In those contacts, Kitapyurdu.com generally asked the suppliers to further discount the wholesale price or also grant Kitapyurdu.com any additional discounts or offers that were available to its competitors. In certain exceptional cases, Kitapyurdu.com also asked suppliers to interfere with the lower retail prices charged by some competitors.

The Competition Board held that Kitapyurdu.com's requests for additional discounts and access to similar or better discounts and offers that were available to competitors could be deemed as wholesale MFC clauses and considered that such practices benefited from the protective cloak of Communique 2002/2 as Kitapyurdu.com's market share was less than 40%.

With respect to the exceptional cases whereby Kitapyurdu.com had asked suppliers to interfere with the lower retail prices charged by some competitors, the Competition Board examined the actual practice. The assessments of the relevant case showed that despite the wording of some of the communications between Kitapyurdu.com and its suppliers, which on their face appeared problematic, Kitapyurdu.com had not tried to force the suppliers to interfere with the resale price of its competitors and rather figure out whether these lower prices were stemming from better conditions offered at the wholesale level. The board concluded that the aim of such communications was to ensure that Kitapyurdu.com was not put at a less advantageous position with respect to its competitors. Hence, the board decided that these could also be treated as wholesale MFC clauses that benefited from the block exemption.

Still, the board noted that if Kitapyurdu.com were to interfere with the resale prices of its competitors through the suppliers, this could no longer be regarded as an MFC clause and a further investigation as to whether such practices may amount to resale price maintenance would have to be conducted.

Comment

In light of the above, the current situation with respect to the treatment of MFC clauses in Turkish competition law may be summarised as follows:

- The use of various types of MFC clause and other clauses that serve the same purpose by buyers or pure marketplace platforms benefits from the block exemption, as long as the market share of the party benefiting from these clauses is less than 40% and these clauses do not amount to an interference with the resale prices of competitors.

- Suppliers' compliance with MFC clauses cannot be monitored by requiring the supplier to directly report the terms and conditions offered to other competitors, as these constitute competitively sensitive information.
- The use of MFC clauses by buyers or pure marketplace platforms whose market share exceeds the 40% threshold falls within the scope of Article 4 – or, if the relevant party holds a dominant position, Article 6 – of the Competition Law but does not constitute a violation by object. Hence, these may be deemed to be violations only if their net effect on competition is negative (ie, when the harm stemming from the reduction in competition exceeds the efficiency gains enjoyed by consumers).
- MFC clauses used by pure marketplace platforms are divided into two subcategories – namely, wide MFC clauses and narrow MFC clauses. It is unlikely that wide MFC clauses used by platforms with a market share of more than 40% will benefit from an individual exemption, and such clauses will likely violate Article 4 of the Competition Law (or Article 6, if the relevant party holds a dominant position).
- With respect to narrow MFC clauses used by pure marketplace platforms, these will likely satisfy the conditions for individual exemption when used by non-dominant platforms with a market share of more than 40%. At present, the legal status of narrow MFC clauses used by dominant platforms remains unclear.

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Endnotes

(1) Under Article 5 of the Competition Law, agreements between undertakings, concerted practices and decisions of associations of undertakings are exempt from the application of Article 4, provided that:

- they ensure new developments or improvements or economic or technical improvement in the production or distribution of goods and the provision of services;
- the consumer benefits from the above;
- they do not eliminate competition in a significant part of the relevant market; and
- they do not restrict competition more than necessary to achieve the goals set out in the first and second bullets above.

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