

Fight for the Cheap Prices and Better Conditions: Recent Outlook of the Turkish Competition Authority to MFC Practices Adopted Against Different Settings

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Most favoured customer (“*MFC*”) practices became one of the hottest topics on the Turkish Competition Authority’s (the “*Authority*”) agenda especially with the rise of e-commerce businesses. With the increased use of different types of MFC practices across various businesses and different supply levels (i.e. the B2C retail level or the B2B wholesale level), the legal framework for MFC practices under the Law No:4054 on the Protection of Competition (“*Law No:4054*”) shapes with each passing day. The Turkish Competition Board’s (the “*Board*”) recent Kitapyurdu Decision¹ alongside the Authority’s Preliminary Report on the Sector Inquiry Concerning E-Marketplace Platforms² (“*Preliminary Report*”) sheds light on the evaluation of different types of MFC arrangements against different settings under the Turkish competition rules.

Some background information on the assessment of MFC arrangements

Overall, MFC arrangements may appear in three main forms³, and different types of MFC arrangements are subject to different assessments. Moreover, MFC practices adopted in different supply levels⁴ may be also distinguished. Different analysis may apply to different conditions that prevail when relevant undertakings’ and their competitors’ position in the relevant market, the specific characteristics of the market and the object and (possible) effects of the MFC practices are taken into consideration. Generally speaking, the Turkish competition rules and the Board’s case law do not provide an all-encompassing assessment for each form of MFC arrangement. Yet the evolving Board decisions and the Authority’s legislative work may be consulted for better understanding.

Historically MFC practices have been analysed in traditional markets⁵. With the rise of e-commerce business and especially online platform businesses, there have been various cases⁶

¹ Kitapyurdu (November 5, 2020; 20-48/658-289).

² E. İnce et. al., *E-Pazaryeri Platformları Sektör İncelemesi Ön Raporu*, Sector Inquiry Preliminary Report, 2021, p. 197-217.

³ Different types of MFC arrangements may be defined as follows (i) MFC-plus arrangements; which guarantee most favourable terms to a buyer, (ii) narrow MFC arrangements; which compare terms with the direct channel of the supplier and require the application of the same terms adopted by the supplier, and (iii) wide MFC arrangements (also referred as *equal-to-MFC*); which extend to sales over other platforms or resellers (i.e., competing buyers) and requires application of same terms offered by the supplier to other buyers.

⁴ Such as the wholesale level (B2B) and retail/platform level (B2C).

⁵ Sony/Arçelik (December 8, 2010; 10-76/1572-605).

⁶ Booking.com (January 5, 2017; 17-01/12-4) and Yemek Sepeti (June 9, 2016; 16-20/347-156).

in which especially wide MFC arrangements have been scrutinized by the Board, mainly for their exclusionary and market foreclosing effects when applied by undertakings holding significant market power (with a market share above 40%). Moreover, recently, MFC practices have been subject to an in depth assessment under the Guidelines on Vertical Agreement amended in 2018 (the “**Vertical Guidelines**” or the “**Guidelines**”). Indeed, the Vertical Guidelines, recognized potential pro-competitive effects of MFC clauses alongside potential anti-competitive effects. Generally speaking, the Guidelines stipulated that MFC clauses would be regarded to pose risks if the market powers of the undertakings benefiting from such practices are high (i.e., above 40%) and/or if and to the extent they have a resale price maintenance and collusion facilitating effect. However, MFC practices without competition restricting features and applied by undertakings with market share below 40% were regarded to benefit from the Block Exemption Communique No: 2002/2 on Vertical Agreements (“**Communique No: 2002/2**”). Whilst providing general guidance, the Vertical Guidelines did not distinguish between the different types of MFC arrangements.

Having said that, a glimpse into the assessment of different types of MFC arrangements against different settings was recently provided with the Board’s recent Kitapyurdu Decision and Preliminary Report.

Kitapyurdu Decision suggesting a more relaxed approach for simply re-sellers

Recently, the Board reviewed, *inter alia*, MFC practices of an online book retailer, Kitapyurdu which engages in B2C online book sales across Turkey and also operates in the publishing, distribution, printing and IT areas via entities within the same economic unit. Kitapyurdu acted as a reseller that purchases books from different publishers and distributors and sells purchased books online through its website. Multiple complaints were brought by the publishers concerning the restriction of the sale of certain books - some including the best-selling books, and the Authority launched a preliminary investigation to assess the matter.

One of the complainants, Ediz Yayınevi – Emre Öbek, alleged, *inter alia*, that Kitapyurdu and its affiliates, leveraged its advantageous position and high market share and requested highest discounts and therefore lowest pricing conditions for a best-selling book and hindered sales of the best-selling book over the platform when refused to be provided with the favourable conditions. Indeed, Kitapyurdu was alleged to close the sales of the relevant book on its website with a note which read “the relevant book may not be supplied” on its website despite no complications attached to the supply of the relevant book. The complainant also noted that small scaled publishers also faced similar problems. On the other hand, another complainant, Metamorfoz Yayıncılık, alleged, *inter alia*, that Kitapyurdu requested extraordinary discounts and restricted sales of its books, especially during the Covid-19 pandemics period despite no supply complications.

After reviewing Kitapyurdu's practices in light of the relevant complaints, the Board concluded that Kitapyurdu's practices *vis a vis* the publishers and the distributors constituted vertical restrictions and must be evaluated under Article 4 of the Law No.4054. The Board assessed that Kitapyurdu engaged in MFC plus practices, in which it compared its prices with competitor prices and requested additional discounts from the publishers if it detected lower competitor prices. Moreover, the Board evaluated that Kitapyurdu engaged in wide MFC practices, in which it requested publishers or the distributors to apply the same pricing conditions they applied to its competitors to Kitapyurdu. Overall, the Board's findings confirmed Kitapyurdu's reluctance to sell books that are not offered at a favourable or the rate offered to the other market players.

Additionally, the Board assessed Kitapyurdu's business model which was based on the sale of books supplied by the publishers or distributors to consumers at a profit margin added over the discount offered to the listing price set for the books. Accordingly, the Board distinguished MFC practices applied on the wholesale level (B2B) and retail/platform level (B2C), stressing that the latter directly affected consumers. On this note, Kitapyurdu Decision stood out as the first decision whereby the Board provided a glimpse of insight on evaluation of MFC arrangements in different supply levels. All in all, the Board evaluated that Kitapyurdu applied MFC practices at the wholesale level.

Overall, the Board analyzed Kitapyurdu's position *vis a vis* the market for online retail book sales and suggested that Kitapyurdu did not enjoy any dominance in the relevant market, and indeed, had a market share below 40%. Accordingly, it carried an assessment similar to the guidance provided in the Vertical Guidelines. After examining the position of Kitapyurdu in the online retail book sales market in Turkey and concluding that its practices *vis a vis* the publishers and the distributors indeed sought to ignite competition in the relevant market, the Board evaluated that Kitapyurdu's MFC practices benefitted from the Communiqué No: 2002/2. Accordingly, the Board did not launch a full-fledged investigation.

Having said that, the Board's assessment included a warning about the exceptional practices of Kitapyurdu whereby it asked its suppliers to interfere with the lower retail prices charged by some competitors. Accordingly, the Board noted that if such interferences were to amount to intervention to the resale price of the competitors via the suppliers, such practices may be regarded to amount to restriction of competition and a further investigation may have to be carried out. On this note, the Board's relevant assessment somewhat echoed the concerns provided in the Vertical Guidelines.

Overall, the reasoned decision stands as one of the most detailed decisions which provide insight on assessment of different MFC practices under Turkish competition law and more specifically *vis a vis* the Communiqué No:2002/2 and the Vertical Guidelines. Moreover, it may be considered to suggest a more relaxed approach towards MFC practices adopted within

simple reseller business models of undertakings without a significant share in the relevant market and applied at dealings on wholesale levels.

Preliminary Report hinting a stricter approach for gatekeeper marketplaces

On the other hand, the Authority recently released its Preliminary Report on e-marketplace platforms, whereby it evaluated the potential pro-competitive and anti-competitive effects of MFC practices in the digital markets. Overall, the Preliminary Report evaluated only wide and narrow MFC practices and the Authority suggested various theories of harm applicable especially to MFC practices adopted by the gatekeeper marketplaces. In this regard, the Authority noted that despite certain pro-competitive effects, the inter-platform competition primarily driven by the commission and other similar conditions applied by the marketplaces may be hindered.

Accordingly, the Authority suggested that the wide MFC practices applied by gatekeeper marketplaces may, *inter alia*, reduce sellers' and marketplaces' motivation and incentive to seek for better prices and conditions and therefore compete, lead to increased prices, price rigidities and collusions, raise barriers to entry and have exclusionary and market foreclosing effects. Overall, the Authority noted that the efficiencies created from the adoption of wide MFC practices by gatekeeper marketplaces would not set off the harm created. Moreover, the Preliminary Report suggested that narrow MFC practices, which are generally considered to be rather innocent and harmless against other MFC practices, applied by gatekeeper marketplaces may have a similar impact – especially if the relevant marketplace is considered to be “indispensable” for the seller or the relevant marketplace is considered to be a market leader for the relevant product group.

Taking into consideration the distinct features of wide and narrow MFC arrangements and their effect on inter-platform competition, the Authority advised the adoption of secondary legislation governing MFC arrangements in platform markets.

Overall, the Authority's findings and assessments suggest a rather strict approach for evaluation of MFC practices *vis a vis* the digital platform businesses. Moving forward, an E-Marketplace Sector Inquiry Preliminary Report Workshop was carried out by the Authority⁷ with the participation of various stakeholders and we are yet to see how the suggestions in the Preliminary Report will unravel based on feedback provided in the relevant workshop.

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⁷See <https://www.rekabet.gov.tr/en/Guncel/e-marketplace-sector-inquiry-preliminary-8ca8eaf3d4e3eb11813500505694b4c6> (Last accessed on July 27, 2021).