



Evolution of the Turkish Competition Authority's Approach Towards MFN Clauses: E-Marketplace Sector Inquiry Report

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Introduction

On March 14, 2022, the Turkish Competition Authority (“**Authority**”) published its much anticipated E-Commerce Platforms Sector Inquiry Final Report¹ (“**Report**”). The Report is extensive in scope and it aims to present a snapshot of the market and provide policy recommendations to address the market failures detected by the Authority. In this article, however, the section on the most favored nation (“**MFN**”) clauses will be focused on and more particularly it will be discussed whether MFN clauses can be employed by digital platforms in the light of findings of the Report. Decisional practice of the Turkish Competition Board (“**Board**”) will also be under the spotlight to provide further colour.

I. Decisional Practice of the Board

Under this section we review the decisional practice of the Board pertaining to MFN clauses. But first, we think that a noteworthy development must be mentioned from the outset. With the recent amendments to the Block Exemption Communiqué on Vertical Agreements No 2002/2 (“**Communiqué No 2002/2**”), the safe harbor envisaged by the Communiqué is decreased to 30% from 40%. Thus, for MFN agreements to benefit from the amended Communiqué, the market share of the undertaking that benefits from the MFN clause must not exceed 30%.

When the Board’s case law is examined, we see that wide and narrow MFN clauses are safe to employ when the market share of the undertaking benefiting from such clause falls below

¹Available only in Turkish: <https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-raporu-pdf> (accessed on 21.04.2022).

30% (then 40%). For example in the Board's *Kitap Yurdu*² and *Pankobirlik*³ decisions, the Board granted the safe harbor of the Communiqué without making a distinction between wide and narrow MFN clauses.

The Board found in its *Kitap Yurdu* decision that Kitap Yurdu was demanding to be provided with the same or better discounts from which its competitors benefitted, and stated that Kitap Yurdu's market shares were within the safe harbor provided by the Communiqué No 2002/2 and concluded its analysis there. Similarly, in *Pankobirlik*, the supply contracts of Pankobirlik stipulated that the suppliers cannot offer a lower price than the price offered to Pankobirlik. The Board granted the safe harbor of the Communiqué due to Pankobirlik's market shares falling under the 40% threshold, subject to removal of the provisions which stipulated that the price lists applied to distributors and dealers shall be sent to Pankobirlik.

The Board's *Hepsiburada*⁴ decision is another important decision but the assessment of the Board is interesting to say to least. The Board started its assessment by first considering whether Hepsiburada is dominant. Upon its assessment, the Board stated that Hepsiburada is not dominant, even under the most narrow market definition⁵. The Board then proceeded to analyze Hepsiburada's agreements and stated that the agreement envisaged a wide MFN clause⁶. The Board stated that this clause was not enforced in light of the answers submitted by several undertakings and that the clause did not create any effect⁷. However, the Board then stated that since the MFN clause may foreclose the market to other online platforms that operate with lower commission, it may create barriers to entry to market and price stringency, thus the clause created effects that are restrictive of competition⁸. Therefore, interestingly, the Board considered the wide MFN clause restrictive of competition after accepting that it did not create any effects. More interestingly, a few paragraphs before, the Board also stated that MFN clauses are not "*per se*" violations⁹. Consequently, the Board concluded its assessment by stating that the MFN clause benefitted from the Communiqué No 2002/2.

The Board's *Yemeksepeti*¹⁰ decision is another noteworthy decision, in which the Board fined the dominant Turkish online food delivery platform for its use of wide MFN clauses but did

² *Kitap Yurdu* (05.11.2020,20-48/658-289).

³ *Pankobirlik* (28.07.2020, 20-36/489-215).

⁴ *Hepsiburada* decision (15.04.2021,21-22/266-116).

⁵ *Ibid* para 26-31.

⁶ *Ibid* para 55.

⁷ *Ibid* para 59-61.

⁸ *Ibid* para 62.

⁹ *Ibid* para 57. See also to that effect *Booking* decision (05.01.2017, 17-01/12-4).

¹⁰ *Yemeksepeti* decision (09.06.2016, 16-20/347-156).

not consider narrow MFN clause as a violation. The Board determined that wide MFN clauses resulted in termination of promotions provided on competing platforms¹¹. The Board then stated that when a significant portion of the sellers/providers' sales are subject to MFN clauses, potential sellers lose the motivation to decrease their prices. This in turn, hinders new entries, innovative products and business methods¹². Consequently, the Board has stated that since no platform is able to differentiate its products/services and the determination that a significant portion of these platforms either exit the market or exist as marginal players, means that MFN clause created exclusionary effects in the market¹³.

A similar analysis is made in the Board's *Booking.com*¹⁴ decision, in light of the dynamics of the digital markets. According to Booking.com's agreements at the time, accommodation facilities were unable to offer better prices for hotel rooms on the internet than on Booking.com. The Board stated that the wide MFN condition lessened competition in terms of commission because competing platforms were unable to get better prices from the accommodation facilities in exchange for better commissions¹⁵. The Board also stated that the relevant clause hindered competing platforms entry to the market. In a market where indirect network externalities also exist, accommodation facilities were unable to offer better prices in exchange of lower commissions. This in turn hinders the ability of new platforms to offer competitive offerings and reach the necessary scale¹⁶. In other words, the Board stated that wide MFN clauses hindered the ability of new platforms to differentiate themselves and ignite their platform. On this basis, the Board rendered a violation decision.

The Board also analyzed the narrow MFN clause in its *Booking.com* decision and stated that, within the framework of commitments offered, amended contracts benefitted from an individual exemption for 5 years¹⁷. The Board's reasoning in restricting the individual exemption with 5 years was that the sales made through the accommodation facilities own website may be more important in the future¹⁸.

Lastly, in its *Yemeksepeti Commitment*¹⁹ decision the Board stated that chain restaurants, individual restaurants and restaurants with branches have the motivation to offer better prices

¹¹ Ibid para 40.

¹² Ibid para 139.

¹³ Ibid para 161.

¹⁴ *Booking.com* decision (05.01.2017, 17-01/12-4).

¹⁵ Ibid para 281-283.

¹⁶ Ibid para 284.

¹⁷ Ibid para 346.

¹⁸ Ibid para 330.

¹⁹ *Yemeksepeti Commitment* Decision (28.01.2021, 21-05/64-28).

at their own websites. Furthermore, it is stated that Yemeksepeti asked for brochures and equated the conditions offered on Yemeksepeti with conditions on brochures. As a result of the fact that the brochures offered by some restaurants and the in-restaurant menus are the same, the narrow MFN clause also effected prices at the restaurant²⁰. In continuation, the Board stated that restaurants were in an effort to develop their own channels in order to avoid Yemeksepeti's high commissions. As a result of the narrow MFN condition, this effort may go to waste²¹. The Board also stated that Yemeksepeti being a "gate-keeper" due to the number of restaurants on its platform and user network and the facts that there is no effective competitor of Yemeksepeti and majority of the deliveries are made on Yemeksepeti, made platforms dependent to Yemeksepeti²². Lastly the Board stated that narrow MFN clause may hinder the entrance of competitors because, new competitors may not have market power to dictate restaurant to offer the same discount on their platform²³.

II. Assessments of the Report

Before delving into the assessments of the Report, we note that even though the term "gate-keeper" is used numerous times, the meaning of this term is quite vague at the time of writing. The definition will carry importance since it will directly impact an undertakings ability to employ MFN clauses (particularly wide MFN clauses) if designated as a "gate-keeper". The decisions of the Board also do not provide a meaningful definition to shed light on the term. Indeed, the Board used the term "gate-keeper" in a recent decision, albeit without a concrete definition and merely stated that Yemeksepeti is a gate-keeper due to its user network and the number of restaurants on its platform²⁴.

The Report states that the Authority is currently working on a legislation pertaining digital markets and "gate-keepers" are considered to be defined as undertakings with "significant market power". However, the term "with significant market power" is also vague and it does not allow us to discern exactly which undertakings will be considered to have "significant market power". As far as we are concerned there is no degree of dominance under the Law No 4054 on the Protection of Competition ("*Law No 4054*"). In other words, there is no meaningful distinction between an undertaking which is dominant with 60% market share or 90% market share.

²⁰ Ibid paras 7-8.

²¹ Ibid para 9.

²² Ibid para 10

²³ Ibid para 11.

²⁴ Ibid, para 10.

a) Reports assessment on wide MFN clauses:

According to the Report, wide MFN clauses entail three competitive concerns.

i) Lessening the competition based on commission in the market and increase of retail prices as a result of the latter:

The Report states that since the force behind the growth of e-commerce platforms are provided by the user base, it is vital for platforms that want to get a foothold in the market to provide the products and services to consumers under the most favorable conditions²⁵. In the absence of MFN clauses, the main determinant of sales prices and conditions at e-commerce platforms in a competitive market are commissions. The lower the commission, the lower the price will be. This fact drives platforms to compete on commission rates²⁶.

In continuation, the Report states that wide MFN clauses eliminates the motive to provide better prices because, when the seller provides a better price to the platform that offers it a lower commission, the seller must also provide the same price to the platform which benefits from the MFN clause. This then creates a significant cost the seller must bear on its own. However, the platform which benefits from the MFN clause will benefit from better prices without incurring any costs²⁷. It is further stated that this holds true when the platform increases the commission rates. Since the seller will be bound by the MFN clause, if it increases the prices on the platform, it must also raise its prices on other platforms, effectively rendering it unable to price more favorably on platforms that offers it better conditions²⁸.

ii) Price stringency and facilitation of anti-competitive coordination

The Report states that even if a new comer offers very low commissions, even a zero commission, the seller will have a very low motivation to offer low prices for consumers. On this front the Report states that the new platform will have a lower demand and prices offered for this low demand must also be provided to the beneficiary of the MFN clause. In other words, the seller will not have the motivation to provide low prices for the new comer, knowing that it must also provide these benefits to the MFN beneficiary²⁹. Furthermore, the Report states that, a platform which knows that its competitors employ MFN clauses, may refrain from providing better conditions because the MFN beneficiary will also benefit from

²⁵ The Report, para 397.

²⁶ Ibid, para 398.

²⁷ Ibid para 400.

²⁸ Ibid para 401.

²⁹ Ibid para 421.

these conditions³⁰. In this sense, the Report states that wide MFN clauses will eliminate platforms drive to compete with each other and that it may create price stringency.

iii) Decrease in market entry, facilitation of exit from the market and/or hindrance of growth in the market

The Report states that in the absence of MFN clauses, a new competitor which seeks to enter the market can do so by offering better and more attractive offerings than the incumbent undertakings and facilitate its growth. On this front, the Report references its consumer survey and state that “convenient prices” comes at the forefront of the reasons for consumers to shop online³¹. According to the Report, the presence of wide MFN clauses will prohibit the platform with a lower commission to gain market share and on the contrary, will make incumbent platforms more attractive³². This in turn may result in tipping³³.

b) Reports assessment on narrow MFN clauses:

As per the Report, wide MFN and narrow MFN clauses may create the same effects when the marketplace is indispensable for the seller and when the seller’s direct sales channel (e.g., its website) is substitutable with the platforms website in the eyes of the consumers. Under this scenario, if a competing platform cannot offer a commission equal or less than the costs incurred via the seller’s own website and if sales volume the seller may acquire from this platform is not sufficient enough to leave the “indispensable platform”, it would not be logical for the seller to offer lower prices on that competing platform than its own website. When looked from another angle, if the indispensable platform increases commissions, the seller will also increase its sales prices due to increase in costs and will be forced to increase the prices on its direct sales channel. The seller, knowing that consumers are indifferent to its sales channel and the platform will have the motivation to increase its prices on other platforms to preserve its direct sales channels’ appeal³⁴.

Based on the foregoing, the Report is concerned with narrow MFN clauses when the conditions are met, the platform which benefits from the MFN clause must be indispensable and that consumers must view the direct sales channel of the seller, as a substitute to the platform. On this basis, the Report then proceeds to analyze whether the direct sales channels of the sellers are direct substitutes of platforms. According to the consumer surveys, 76.6% of

³⁰ Ibid para 422.

³¹ Ibid para 425.

³² Ibid para 426.

³³ Ibid para 427.

³⁴ Ibid para 430.

the consumers that shop online do so through market places and 14.6% shops through the seller's website. Therefore, the Report states that consumer's preferences concentrate on market places³⁵. In continuation, the Report states that a significant number of sellers do not have their own websites and concludes that seller's websites are not substitutes of market places. Since narrow MFN clauses do not involve other platforms, the Report states that sellers would still maintain the motivation to sell with lower prices on platforms that offer low commissions. Consequently, according to the Report, even if narrow MFN clauses are employed by gate-keepers, it would not be possible to concretely foresee the competitive effects and a case-by-case analysis must be conducted³⁶.

III. Conclusion

It is almost safe to say that, wide MFN clauses cannot be employed by "gate-keeper" undertakings. Indeed, according to the Report, when wide MFN clauses are employed by "gate-keepers", the efficiencies will not be big enough to counteract the negative effects³⁷. Although a comparison can be made with the definition provided by the Digital Markets Act of the European Commission, the term "gate-keeper" is not yet defined and the Board decisions do not provide a meaningful guidance. Until such time the term is defined, it would be prudent for dominant undertakings to refrain from employing wide MFN clauses. The recent *Yemeksepeti* and *Booking.com* decisions show that, wide MFN clauses are considered to hinder the abilities of new competitors to differentiate themselves. That said, safe harbor provided (i.e., 30% market share threshold) by the Communiqué No 2002/2 still applies and undertakings that satisfy the threshold can safely employ wide MFN clauses. However, the Report calls for strengthening of the secondary legislation due to the fact that MFN clauses, exclusivity clauses and exploitative practices carry the risk of lessening and disrupting competition on the merits³⁸ and thus, this may be subject to change in the future. For non-dominant undertakings (whose market shares fall outside the safe harbor), employing wide MFN clauses may not be perilous. Even though the findings in the Report do not paint a grim picture and it is obvious that the market did not yet tip in favor of any market player, the Authority signals that it may jealously guard the structure of the market. Indeed, the recent *Hepsiburada* decision may be giving signals in this direction. Thus, the Authority may block the application of wide MFN clauses even when employed by non-dominant players.

³⁵ Ibid para 431.

³⁶ Ibid para 433-434.

³⁷ Ibid para 717. Under its proposed "Gate-keeper Regulation", the Report also states that gate-keepers shall not employ wide MFN clauses, para 773.

³⁸ Ibid para 766.

As for narrow MFN clauses, the Report adopts a more hospitable stance. Indeed, even though it states that narrow MFN clauses' harmful effects would be higher when employed by gatekeepers, it calls for a case-by-case analysis³⁹. Accordingly, it seems so that even the "gatekeepers" can employ narrow MFN clauses if they can establish with concrete data that the direct sales channel of sellers is not substitutable with its platform in the eyes of the consumers. Indeed, the Report takes into account the fact that 76.6% of the shoppers prefer platforms as opposed to the sellers own website, in reaching its conclusion. That being said, the recent *Yemeksepeti Commitment* decision, still signals caution. The discerning factor, however, may be the fact that Yemeksepeti had no effective competitor⁴⁰. On the contrary, the Report states that the competition is among e-market places⁴¹. Consequently, where there is sufficient competition between platforms, even a "gate-keeper" may argue that narrow MFN clauses do not restrict competition.

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³⁹ Ibid para 717.

⁴⁰ Yemeksepeti Commitment Decision (28.01.2021, 21-05/64-28), para 10.

⁴¹ The Report 433.