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Turkish Competition Board: narrow MFC clauses benefit from block exemption

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Introduction

Earlier this year, the Turkish Competition Board evaluated allegations that DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ (Trendyol) violated article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). Trendyol had been accused of abusing its market power in multi-category e-marketplaces within the market for online food and fast-moving consumer goods (FMCG) by way of cross-subsidisation. It had entered into agreements with the sellers in the FMCG online market which included narrow most-favoured customer (MFC) clauses.⁽¹⁾

Facts

Trendyol was incorporated 2009 and sold various products and services in different product categories through its website. It had been active in e-commerce since 2009 and adopted a "marketplace" business model in October 2017. It had entered the market as a retailer, and strengthened its position as an intermediary over time.

Trendyol provided food order delivery services through Trendyol Food service and FMCG order delivery services through Trendyol Market service. Trendyol Food was introduced to the market in September 2020 in Istanbul and was extended to the rest of Türkiye in May 2022. Trendyol Market was introduced to the market in June 2020 in Istanbul and was gradually expanded to operate in a total of 65 cities in Türkiye in the following months.

Decision

Abuse of dominant position through cross-subsidisation

Within the scope of its assessment on the relevant product market definition, the board considered:

- the substitutability of online channels and traditional channels;
- the substitutability of applications that conduct direct sales and platforms offering intermediation services; and
- the substitutability of sales services for grocery products offered through multi-category e-marketplaces.

Ultimately, the board defined the relevant product market as the market for online FMCG orders.

Trendyol had losses due to its below-cost sales in its Trendyol Food and Trendyol Market services. Regarding the cross-subsidisation allegations, the board underlined that it was important to determine whether Trendyol had financed these losses through the revenues it had achieved in the market for multi-category e-marketplaces, in which it had enjoyed a dominant position.

To that end, the board examined whether:

- Trendyol conducted below-cost pricing in Trendyol Food and Trendyol Market; and
- Trendyol subsidised these below-cost sales with its e-marketplace revenues.

In order to determine whether Trendyol had indeed engaged in below-cost pricing, the board conducted a predatory pricing analysis regarding Trendyol Food and Trendyol Market services. In line with its decisional practice and the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (the Guidelines), the board indicated that, in order for predatory pricing to constitute a violation:

- it must have been conducted by an undertaking that has a dominant position;
- the undertaking had deliberately incurred losses or foregone profits in the short term through below-cost sales prices (ie, sacrifice); and
- the conduct must have been capable of foreclosing the market to an equally efficient competitor.⁽²⁾

The board found that Trendyol Food service had had a negative profit margin from almost since it was introduced to the market and, therefore, that Trendyol had indeed engaged in below-cost pricing in the market for online food orders.

From here, the board proceeded to analyse whether Trendyol's below-cost pricing had foreclosed the market to its competitors or had been likely to result in market foreclosure. Having reviewed the market shares of Trendyol Food and its competitors (mainly Yemeksepeti and Getir Food), the board remarked that, despite Trendyol Food's below-cost pricing strategy, Getir Food had been able to consistently increase its market share and Yemeksepeti had continued to be the market leader regardless of losing a significant portion

of its market share. The board also analysed the number of restaurants that Trendyol Food, Yemeksepeti and Getir Food worked with, as well as the number of their users.

Based on these parameters, the board concluded that Getir Food (which had entered the market before Trendyol Food) had been able to continue growing in the market during the time when Trendyol Food engaged in below-cost pricing. Therefore the board could not resolve that the competitors of Trendyol Food were foreclosed from the market. The board held that, although the profits and market share of Yemeksepeti (which had been the dominant undertaking in the market) decreased after two strong competitors entered the market, this was a result of competition in the market rather than of predatory pricing. The board also emphasised the fact that Getir Food and Trendyol Food had captured market share from Yemeksepeti within two years of entering the market, demonstrating that the relevant market was dynamic and rapidly changing.

As for Trendyol Market, similar to Trendyol Food, the board determined that it had been operating with a negative profit margin since it became active and therefore that Trendyol had engaged in below-cost pricing.

Again, the board evaluated the market positions of Trendyol Market and its competitors based on their market shares. The board found that, although the market shares of some of the competitors (such as Migros, Carrefoursa, Istegelesin, Yemeksepeti and Hepsiburada) had decreased since Trendyol Market entered the market, it could not be concluded that this was due to Trendyol Market's below-cost pricing strategy. This was due to the fact that there were other competitors who had managed to increase or retain their market share (such as Getir, Şok, Bim and A101) during the same period. Having also reviewed the profitability of the undertakings in the relevant market, the board remarked that:

- Yemeksepeti had always been profitable and had even increased its profit after Trendyol Market entered the market; and
- other competitors had profited in some months and made losses in other months.

However, the board held that the losses of competitors could not be merely based on Trendyol Market's entrance into the market and its below-cost pricing. This was due to the fact that there were other competitors which had managed to increase or retain their market share and which possessed significantly higher market shares than Trendyol Market.

As a result, the board concluded that Trendyol did not violate article 6 of Law No. 4054 by abusing its dominant position in the market for multi-category e-marketplaces through cross-subsidising its revenues in the markets for online food order services and online FMCG order services.

MFC clauses for Trendyol Market Services

Within the scope of the preliminary investigation, the board also examined the allegations that Trendyol had imposed MFC clauses on the sellers for its Trendyol Market services. Further to the allegations, the board examined the agreements concluded between Trendyol and the sellers in relation to Trendyol Market services and determined that the relevant agreements involved narrow MFC clauses. According to these clauses, Trendyol had prevented the sellers from determining different prices in their physical and online sales channels to their prices in Trendyol Market. However, based on the statements of Trendyol and the stores that Trendyol worked with, the board determined that Trendyol had not actively monitored whether the sellers complied with the MFC clauses in the agreements and Trendyol had not imposed any sanctions or warnings in case of non-compliance.

The board clarified that the agreements between Trendyol and the stores qualified as vertical agreements and evaluated whether the MFC clauses included in these agreements benefited from block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2).

First, the board analysed whether Trendyol's market share in the market for online FMCG order services had exceeded the 30% market share threshold indicated in Communiqué No. 2002/2. It resolved that it had not exceeded the relevant threshold. Second, the board examined whether the agreements between Trendyol and the stores had included any provisions which would prevent the agreements from benefiting from block exemption (such as provisions concerning resale price maintenance or restrictions on passive sales) and concluded that the agreements had not involved these types of provisions.

As a result, the board decided that the narrow MFC clauses included in the agreements between Trendyol and the stores benefited from block exemption under Communiqué No. 2002/2.

The board's analysis regarding the assessment of MFC clauses under Communiqué No. 2002/2 is consistent with its recent decisional practice on this front where the board has held that both wide and narrow MFC clauses benefit from block exemption.⁽³⁾

Dissenting opinion on predatory pricing analysis and MFC clause analysis

As a result of its assessment, the board decided by majority vote that:

- Trendyol had not violated article 6 of Law No. 4054 by abusing its dominant position by way of cross-subsidisation;
- the narrow MFC clauses in the agreements between Trendyol and the stores benefited from block exemption under Communiqué No. 2002/2; and
- there was no need to initiate a full-fledged investigation against Trendyol.

However, one of the members of the board (Hasan Hüseyin Ünlü) argued against the decision on both grounds.

First, he argued that, although it was held that the third condition for predatory pricing analysis (ie, the conduct should be capable of foreclosing the market to an equally efficient competitor) was not satisfied on the grounds that Getir existed and even continued to grow in the market, the mere fact that a competitor was able to continue to be active in the market should not mean that this condition had not been met. In particular, Ünlü indicated that the possibility of market foreclosure did not only concern existing competitors, but also potential competitors that intended to enter the market. Therefore, the mere fact that Getir was still active in the market was not sufficient to conclude that Trendyol's predatory pricing or cross-subsidisation strategy had not resulted in market foreclosure.

Second, Ünlü also challenged the assessment of MFC clauses in the decision essentially on the grounds that, while Getir and Trendyol Food were able to enforce both wide and narrow MFC clauses in their agreements because their market shares were below the 30%

threshold, Yemeksepeti could not enforce even narrow MFC clauses in the market given that it had proposed commitments to terminate the MFC clauses within the scope of a previous investigation.⁽⁴⁾ In this respect, Ünlü underlined that:

- while Yemeksepeti had been the dominant undertaking in the market in 2020, it rapidly lost market share in the following years and the market had a more balanced three-player structure today; and
- in the current situation, two of these players could impose wide and narrow MFC clauses while the other player could not impose even narrow MFC clauses.

Following these two points, Ünlü maintained that it should have been evaluated whether it was necessary to equalise the conditions for all undertakings for the evolution of the market and establishing competition.

On these grounds, the relevant board member argued that the board should have decided to initiate a full-fledged investigation to further examine these matters.

Comment

This is a landmark decision which includes a very comprehensive predatory pricing analysis in a multi-sided digital market involving e-marketplaces. The decision sheds light on the board's approach towards price-based exclusionary abuse cases in dynamic and rapidly changing digital markets.

On another level, further to the assessment of MFC clauses in the decision and the dissenting opinion on this front, the decision also raises questions of:

- whether the board's enforcement in digital markets might itself result in unfavourable market conditions to the detriment of some players; and
- whether the board's interference with the undertakings' practices in the market can sometimes lead to unintended complexities in these rapidly changing environments.

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Endnotes

(1) The board's decision 23-01/2-2, dated 5 January 2023.

(2) Please see paragraph 50 of the Guidelines and the board's:

- *Arkem* decision 21-10/140-58, dated 25 February 2021;
- *Kamil Koç* decision 19-40/658-283, dated 14 November 2019;
- *EAE* decision 19-39/603-257, dated 12 November 2019;
- *Huawei* decision 19-20/286-122, dated 30 May 2019;
- *Habaş* decision 19-11/125-53, dated 7 March 2019;
- *Glanbia* decision 19-19/268-116, dated 23 May 2019.

(3) Please see the board's:

- *Getir Food* decision 22-42/606-254, dated 15 September 2022;
- *Trendyol Food* decision 22-23/364-154, dated 18 May 2022;
- *Hepsiburada* decision 21-22/266-116, dated 15 April 2021;
- *Kitapyurdu* decision 20-48/658-289, dated 5 November 2020;
- *Travel Agents* decision 18-40/645-315 dated 25 October 2018.

(4) Please see the board's *Yemeksepeti* decision numbered 21-05/64-28, dated 28 January 2021.