

# e-Competitions

## Antitrust Case Laws e-Bulletin

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### The Turkish Competition Authority examines if an online food ordering platform holds a dominant position and whether the MFC clauses in its agreements violate competition law (*Getir*)

**ANTICOMPETITIVE PRACTICES, DOMINANCE (ABUSE), DOMINANCE (NOTION), BLOCK EXEMPTION (REGULATION), INVESTIGATIONS / INQUIRIES, RELEVANT MARKET, TURKEY, MFC CLAUSE, ONLINE PLATFORMS**

Turkish Competition Authority, *Getir*, No: 22-42/606-254, Decision, 15 September 2022 (Turkish)

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This article summarizes the Turkish Competition Board's (" *Board* ") *Getir* Decision [1] (" *Getir Decision* "), where allegations that *Getir Perakende Lojistik A.Ş.* (" *Getir* ") violated Articles 4 and 6 of the Law No. 4054 on the Protection of Competition (" *Law No. 4054* ") through its platform services regarding online food ordering/delivery were examined within the scope of a preliminary investigation.

The allegations concerned the most favored customer (" *MFC* ") clauses and practices on member restaurants of *Getir*. The Board rejected the allegations and did not launch a full-fledged investigation on the grounds that the practices regarding the narrow and wide MFC clauses implemented by *Getir* for its member restaurants fall within the scope of the Block Exemption Communiqué on Vertical Agreements (" *Communiqué No. 2002/2* ").

## Relevant Markets

The transactions realized on *Getir*'s platform (*Getir Yemek*) serves (i) customers-end user group and (ii) restaurants-commercial user. In this respect, the platform carries the nature of a two-sided market. The users who place orders are generally not charged, while the restaurants pay service fees based on the total value of the order.

The Board defined the relevant product market as the online food ordering-delivery platform services market, emphasizing in parallel with the Board's previous decisions that similar services provided via telephone, the restaurant's own website, or their own mobile applications do not substitute for online food ordering platform services.

## The Board's Assessment as to Whether *Getir* is in Dominant Position

Article 6 of the Law No. 4054 which is akin to Article 102 of the TFEU prohibits the abuse of dominant position. Within this scope, for a practice to constitute a violation of Article 6 of the Law No. 4054, dominant position and abuse are the two crucial elements to co-exist. In accordance with Article 3 of Law No. 4054, dominant position is defined as “*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*”. Therefore, if an undertaking abuses its ability to act independently from competitive pressures, this practice may constitute a violation of Article 6 of the Law No. 4054.

In the *Yemek Sepeti Decision (2016)* [2], where the MFC clauses implemented by online platforms were evaluated elaborately by the Board, market share was the focal point to assess the dominant position in the online food ordering platform services market. As remarked in various Board decisions, the primary indicator of dominant position is the market share, and it was evaluated that Yemek Sepeti controlled almost the entire market at that time. In addition, the Board detected that the prevention of the offering of better conditions in the competitor platforms by MFC practices resulted in the emergence of exclusionary impacts in the market, constituting the abuse of dominant position. Therefore, it was decided that Yemek Sepeti violated Article 6 of the Law No. 4054, and it had to terminate any type of MFC practice preventing the offering of better conditions on the competitor platforms.

In the online food ordering-delivery platform services market, online platforms that provide intermediary services between its member restaurants and consumers who want to benefit from the services offered by these restaurants collect commission fees on the order amounts they mediate. Since Getir Yemek is an online platform, and its sales represents the total of the transactions while the commission income obtained by the platform is the item that constitutes its main income, it was considered necessary to evaluate the market shares in terms of the commission income. After all, although the commission rates and implementation methods vary, commission income is a crucial parameter for the demonstration of the market power. Therefore, the Board considered the calculation of the market shares of Getir Yemek and its competitors based on their commission income, which does not differ significantly from the one based on the number of orders.

Although Getir Yemek has successfully entered the market and become an important player, since Yemek Sepeti maintains its market leadership, the Board considered that Getir Yemek does not have the market power to act independently of its competitors and customers, which means Getir Yemek is not in a dominant position within the scope of Article 6 of the Law No. 4054.

## The Board’s Assessment of MFC Clauses

MFC clauses can be scrutinized under two subsections:

- (i) Narrow MFC Clauses: Prohibits the member restaurants from offering lower prices in their direct sales channel.
- (ii) Wide MFC Clauses: Prohibits the restaurant from offering lower prices in their direct sales channel and also in the platforms that are competing with Getir Yemek.

The allegations in *Getir Decision* revolve around narrow and wide MFC clauses imposed by Getir on its member restaurants. It is also worth noting that the written contracts signed between the restaurants and Getir do not include any concrete provision regarding MFC. That said, the Board has identified that Getir is implementing *de facto* narrow and wide MFC practices.

In a previous decision of the Board (*Kitapyurdu.com Decision*) [3], the Board found that Kitapyurdu.com, an online bookstore, systematically monitored the prices offered on its competitors' platforms to check whether the publishers sell their books for a lower price. As such, Kitapyurdu.com requested that the publishers correct the lower prices of their books that are offered on the competitor platforms.

It was observed that also Getir frequently checks the prices applied by the member restaurants on the competing platforms, particularly on Yemek Sepeti. If the restaurant offers lower prices or lower minimum purchase prices, or better contents on the competing platforms compared to the ones offered on Getir Yemek, Getir negotiates with that restaurant to offer the same better conditions on Getir Yemek or to increase their prices on the competing platform. These restaurants have also been subject to certain penalties, such as blocking their access to the platform temporarily or permanently unless these requests are fulfilled. Considering the foregoing, the Board held that Getir Yemek applies narrow and wide MFC clauses to member restaurants of the platform.

Although MFC clauses may have positive impacts on the competition, according to the Board's E-Commerce Platforms Sector Inquiry Final Report, [4] they are prone to cause effects that are restrictive of competition, such as the price rigidity and anti-competitive coordination in the market, the decrease in market entries, the easier exits from the market and/or the hindrance of the growth in the market. These unfavorable consequences were observed in the *Booking.com Decision* [5] as well, whereby the Board concluded that the vertical agreements that Booking.com was a party to cannot enjoy the group exemption stipulated in Communiqué No. 2002/2 due to the threshold of market share that was previously 40%.

Since Getir Yemek and restaurants operate in different levels of the production or distribution chain, and Getir Yemek is a platform service that enables restaurants to meet consumers with the services they offer, it was observed in the Getir Decision that this relationship is a vertical agreement within the scope of the Communiqué No. 2002/2. In this vein, according to the Guidelines on Vertical Agreements [6], in order for an agreement that contains an MFC clause restricting competition, to benefit from the block exemption, the market share of the concerned undertaking must not exceed 30%, and other conditions specified in the Communiqué No. 2002/2 must be fulfilled. Since Getir Yemek's market share in terms of both order amount and commission income remains below 30%, and the relevant vertical agreement fulfills the other conditions set forth in the Communiqué No. 2002/2, the Board held that Getir Yemek benefits from the block exemption.

## Conclusion

Getir Decision underscores the nuanced intersection of competition law and evolving business practices in the online food delivery sector. By rejecting allegations of Articles 4 and 6 violations, specifically related to MFC practices, the Board has reaffirmed its commitment to thoroughly evaluating the competitive landscape. The decision not to proceed with a full-fledged investigation sheds light on the delicate balance competition authorities must strike to foster innovation and fair market dynamics while ensuring compliance. As the digital marketplace continues to evolve, Getir Decision prompts a reevaluation of how competition law adapts to emerging business models, particularly within the intricate realm of online platform services.

[1] Getir Decision (15.09.2022; 22-42/606-254).

[2] Yemek Sepeti Decision (09.06.2016; 16-20/347-156).

[3] Kitapyurdu.com Decision (05.11.2020; 20-48/658-289).

[4] Turkish Competition Authority (2022), E-Commerce Platforms Sector Inquiry, Final Report, <https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-raporu-pdf> .

[5] Booking.com Decision (05.01.2017; 17-01/12-4).

[6] Turkish Competition Authority (2022), Guidelines on Vertical Agreements, <https://www.rekabet.gov.tr/Dosya/guidelines-on-vertical-agreements-20231123140524385.pdf> .