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COMPETITION BOARD'S COMMITMENT DECISIONS IN DIGITAL PLATFORM SERVICES

Following the amendments to Law No. 4054 on the Protection of Competition (the "**Competition Law**") and the Communiqué on Commitments to be Submitted in Preliminary Investigations and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position,¹ the Competition Board (the "**Board**") rendered several decisions revealing its approach towards the commitment mechanism.² In this regard, by setting out a legislative framework for the implementation of the commitment procedure, the Board approved the commitments of several undertakings, while rejecting others.³

The decisions in **(i)** Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik Anonim Şirketi ("**Yemek Sepeti**") dated 28 January 2021 and numbered 21-05/64-28 and **(ii)** Çiçek Sepeti İnternet Hizmetleri ("**Çiçek Sepeti**") dated 8 Nisan 2021 and numbered 21-20/250-106, published on the Turkish Competition Authority's website on 4 August 2021, also concern the Board's investigations concluded through commitments. These two decisions are the preliminary examples of the commitment mechanism applied in digital platform services. However, the Yemek Sepeti and Çiçek Sepeti decisions are not only significant in terms of the application of commitments, but also because the Board's analysis of new market behaviours that have not been examined within the scope of the previous investigations regarding these

¹ You may access our bulletin containing detailed information on the relevant Communiqué through the following link: https://www.kolcuoglu.av.tr/Uploads/Publication/quarterly_competition_law_bulletin_2021_first_quarter.pdf

² In short, the commitment mechanism allows for a preliminary or fully fledged investigation conducted as per Articles 4 and 6 of the Competition Law to be concluded without the establishment of a violation, by submitting commitments sufficient to eliminate competitive concerns.

³ For example, the Board's **(i)** Havaalanları Yer Hizmetleri A.Ş. decision dated 5 December 2020 and numbered 20-48/655-287, **(ii)** Türkiye Sigorta, Reasürans ve Emeklilik Şirketleri Birliği and OSEM Sertifikasyon A.Ş. decision dated 7 January 2021 and numbered 21-01/8-6 and **(iii)** Arslan Nakliyat decision dated 28 July 2020 and numbered 20-36/485-212.

KOLCUOĞLU DEMİRKAN KOÇAKLI

undertakings. In addition, the decisions also show that several behaviours that the Board did not previously consider as a competition law violation may raise competitive concerns with regard to digital platforms.

1. Yemek Sepeti Decision

With its decision dated 4 June 2020 and numbered 20-27/336-M, the Board launched an investigation against Yemek Sepeti, the online service platform for food orders, to assess whether Yemek Sepeti violated Articles 4 and 6 of the Competition Law by applying a “narrow” most-favoured customer (“**MFN**”) clause, forcing restaurants to apply mandatory discounts (*Zorunlu Joker*) and dictating minimum purchase values (*minimum sepet tutarı*), as well as by the below-cost pricing of the “Yemek Sepeti Vale” business model.⁴ The Board decided that the second commitment package submitted by Yemek Sepeti was sufficient to eliminate the relevant competitive concerns and ceased the investigation by approving the commitments.

The decision contains the following key findings regarding the investigation: **(i)** the “narrow” MFN clause may restrict customer access to products or services with more convenient prices and conditions, **(ii)** the mandatory discount practice may cause the restaurants to be dependent on the Yemek Sepeti platform in the long run and the restaurants may be forced to use their limited resources only for the Yemek Sepeti platform and exclude competitor platforms, **(iii)** dictating the minimum purchase value may cause restaurant prices to rise as a result of increased costs and, thus, users may be deprived from the benefits of competition on the Yemek Sepeti platform and **(iv)** the “below-cost” pricing policy on the platform and courier services market that emerged as a result of the “Yemek Sepeti Vale” practice may disrupt the competition in the platform services market, which may cause exclusion of Yemek Sepeti’s competitors from the market, both in the short and long run.

The Board had also investigated Yemek Sepeti’s practices before with its decision in 2016. In that decision, the Board had determined that Yemek Sepeti’s “wide” MFN practices constituted an abuse of dominant position since it created exclusionary effects in the relevant market by preventing better/different conditions to be offered on competing platforms. However, the narrow MFN clauses were not challenged. Additionally, in this decision, the Board also concluded that the mandatory discount practice was not a competition law violation.

However, in its decision dated 4 June 2020 and numbered 20-27/336-M, the Board only implies that the mandatory discount practice may constitute a competition law violation but does not formally establish an infringement decision. In addition, the Board examines Yemek Sepeti’s practices such as dictating the minimum purchase value and the “Yemek Sepeti Vale” pricing model for the first time in this decision. Since the decision is directly related to commitments,

⁴ The “narrow” MFN practice can be described as the clause stipulating that discounts on Yemek Sepeti shall not be more disadvantageous than the prices offered on the relevant restaurants’ web sites or physical sales points. The practice of “Zorunlu Joker” refers to mandatory discounts that restaurants must offer to Yemek Sepeti customers under the existence of specific conditions. The “minimum sepet tutarı” practice refers to Yemek Sepeti’s discretion to decide on the restaurants’ minimum purchase amounts on the Yemek Sepeti platform. The “Yemek Sepeti Vale” practice means that in addition to the restaurants’ fees, Yemek Sepeti customers must pay an additional fee for the delivery of their orders.

KOLCUOĞLU DEMİRKAN KOÇAKLI

the Board did not reach a definite conclusion on whether these practices constitute an abuse of dominant position, but only stated that these practices may create competitive concerns.

Yemek Sepeti submitted the following commitments: **(i)** the "narrow" MFN practice will be terminated within a period of six months following receipt of the reasoned decision, **(ii)** the mandatory discount practice will be terminated within six to nine months following receipt of the reasoned decision, **(iii)** the minimum purchase value will be determined by the restaurants within one week following receipt of the reasoned decision, and **(iv)** the "Yemek Sepeti Vale" business model will be priced to cover only Yemek Sepeti's couriers' expenses, such as salaries, meals, communication expenses and gas. Accordingly, the Board concluded that these commitments were sufficient to eliminate the competitive concerns described, above, and decided to cease the investigation by approving the commitments.

2. Çiçek Sepeti Decision

With its decision dated 4 June 2020 and numbered 20-27/335-M, the Board launched an investigation against Çiçek Sepeti on the allegation that Çiçek Sepeti restricted its competitors' activities and abused its dominant position through practices creating *de facto* exclusivity. However, the Board decided to cease the investigation, by determining that the second commitment package offered by Çiçek Sepeti would eliminate the competitive concerns.

In its decision, the Board concluded that Çiçek Sepeti, which is dominant in the market for online flower sales platforms, **(i)** verbally warned its dealers not to work with competitor online flower sales platforms, **(ii)** set high sales targets for special days and **(iii)** delivered more flowers and consumables to its dealers on special days. Accordingly, the Board determined that such practices may create *de facto* exclusivity and obstruct the competing online flower sales platforms' activities.

The allegation that Çiçek Sepeti abused its dominant position in the online flower sales platform market by creating *de facto* exclusivity and obstructing its competitors' activities had also been examined by the Board in a previous decision in 2018. However, unlike the latest investigation, the Board had particularly examined the allegations of obstruction of competitors' activities by way of predatory pricing, extensive advertising and promotion expenditures, as well as the constant filing of lawsuits, and eventually decided not to launch a fully fledged investigation. Therefore, the Board's latest decision dated 8 April 2021 and numbered 21-20/250-106 is significant in terms of analyzing whether Çiçek Sepeti's new practices create *de facto* exclusivity or not. However, in its decision, the Board does not conclude that these practices constitute an abuse of dominance, but only states that these practices may create competitive concerns.

As stated above, the Board concluded the investigation by determining that the second commitment package offered by Çiçek Sepeti was sufficient to eliminate the relevant competitive concerns. In this regard, Çiçek Sepeti committed to **(i)** explicitly inform its dealers that they are free to work with competitor online flower sales platforms and are not under any contractual or *de facto* obligation to the contrary, and immediately incorporate a clause to its dealership agreements regarding the same, **(ii)** before signing a dealership agreement,

KOLCUOĞLU DEMİRKAN KOÇAKLI

provide a clarification text to its prospective dealers that they are free to work with competitor online flower sales platforms and are not under any contractual or *de facto* obligation to the contrary, and (iii) take the necessary steps to improve its dealers' bargaining conditions on setting high sales targets on special days.

3. Conclusion

Although the commitment decisions do not include the Board's reasoning to reject the first commitments submitted by Yemek Sepeti and Çiçek Sepeti, the commitment mechanism seems to be succeeding with the second commitments. As the applicable legislation entitles the investigated parties to alter their commitments only one time following the Board's affirmative decision, the Board granting the parties the right to alter their commitments is significant in terms of the effectiveness of the commitment mechanism. Indeed, the second commitments submitted in these decisions are both aimed to directly cease the practices that have caused the competitive concerns.

Another important aspect of these decisions is the Board's analysis on new market behaviors that have not been examined within the scope of the previous investigations regarding these undertakings. That being said, the Yemek Sepeti decision, in particular, demonstrates that the Board's approach on the multi-sided online platforms' changing practices may differentiate over time.

On the other hand, as the commitment decisions do not establish any competition law violations, it could also be argued that these decisions do not provide any guidance as to the conditions under which the identified practices will violate or comply with competition law. Therefore, while the commitment mechanism allows for the elimination of competitive problems within a shorter time, it may also negatively affect the case law development in the long run, especially in areas where competition law applications are not matured, such as online platforms.

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