Kluwer Competition Law Blog

# A New Age for Digital Markets in Turkey? The Draft Amendment to the Law No. 4054 on the Protection of Competition

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**Introduction**

This blog post will give an overview of the draft amendment (the "**Draft Amendment**") to Law No. 4054 on the Protection of Competition (the "**Law No. 4054**"). The key points of the Draft Amendment concern:

- Introducing definitions of core platform services into Law No. 4054 and allowing the possibility to introduce regulations on the conduct of certain undertakings offering these same services;
- Determining the new obligations to be imposed on the undertakings holding significant market power in core platform services;
- Monitoring and auditing compliance with these obligations; and
- Providing certainty regarding the sanctions to be imposed in case the relevant undertakings fail to comply with the obligations.

This blog post will provide an overview of (i) the main definitions, (ii) the obligations to be imposed on the undertakings, (iii) the processes envisaged for compliance with these obligations, and finally (iv) amendments regarding the article about on-site inspections that are included in the Draft Amendment.

**What are the Key Definitions Brought by the Draft Amendment?**

The Draft Amendment primarily amends Articles 1 and 2 of Law No. 4054, which regulate the purpose and scope of the Law. In addition, the Draft Amendment extends the scope of Law No. 4054 to cover the prohibited conducts and obligations to be imposed on the undertakings holding significant market power in core platform services to prevent them from abusing their market power.

Accordingly, the Draft Amendment provides additional definitions in Article 3 of Law No. 4054. These definitions include detailed descriptions of the undertakings operating in digital markets and the services they offer.

Therefore, the relevant article of the Draft Amendment includes the definitions of the following terms, most of which are self-explanatory: (i) data that is not publicly available, (ii) undertaking holding significant market power, (iii) end-user, (iv) core platform services, (v) online intermediation services, (vi) online search engine services, (vii) online social networking services, (viii) video sharing platform services, (ix) number-independent interpersonal communications services, (x) operating systems, (xi) web browsers, (xii) virtual assistants, (xiii) cloud computing services, (xiv) online advertising services, (xv) business users and (xvi) ancillary services.

The definitions of the main concepts of "*undertaking holding significant market power*" and "*core platform service*", which are at the centre of the amendments, are provided as follows:

- **Core platform services:** Online intermediation services, online search engines, online social networking services, video/sound sharing and broadcasting services, operating systems, number-independent interpersonal communication services, cloud computing services, web browsers, virtual assistants, and online advertising services provided by the provider of any of the aforementioned services.
- **Undertaking holding significant market power:** Undertaking that has a certain scale in terms of one or more core platform services and operates in a way that has a significant impact on access to end users or on the activities of business users and which has the power or is foreseen to be able to have the power to maintain this impact in an established and permanent manner.

Core platform services are regulated in a way to cover a range of services in digital markets. As seen above, the Draft Amendment adopts the same approach for the core platform services with the recently published Digital Markets Act ("**DMA**") of the European Union and exhaustively lists the activities that will be subject to the obligations, in other words, core platform services. The Draft Amendment, however, foresees the issuing of an additional communiqué by the Competition Board (the "**Board**") to determine the thresholds that will be relevant to make an assessment for the concept of undertakings holding significant market power.

**How to Determine the Undertakings Holding Significant Market Power?**

According to Article 3 of the Draft Amendment, for a core platform service provider to be considered as an undertaking holding significant market power, it is understood from the definition that the following conditions are required to be satisfied cumulatively:

- Having a certain scale in terms of one or more core platform services;
- Operating in a way that has a significant impact on access to end users or on the activities of business users; and
- Having the power or being foreseen to be able to reach the power to maintain this impact in an established and permanent manner.

These concepts are in line with the criteria for the designation of "*gatekeepers*" in the DMA. However, unlike the DMA, the Draft Amendment does not set out the limits of the criteria to be taken into account for an undertaking to be designated as an undertaking holding significant market power. These requirements will be introduced in detail by the communiqué (the "**Communiqué on the Implementation of Article 8/A of Law No. 4054**") to be issued by the Board within six months following the entry into force of the new amendments.

The Draft Amendment stipulates that the Board shall take into account two types of criteria while designating the undertakings holding significant market power. On one side, quantitative thresholds such as annual gross revenue, the number of end-users or the number of business users will be considered. On the other side, qualitative criteria such as network effects, data ownership, vertically integration and conglomerate structure, economies of scale and scope, lock-in and tipping effects, switching costs, multi-homing, user trends, mergers and acquisitions carried out by the undertaking will also be analysed.

Therefore, an undertaking may be designated as holding significant market power by the Board either *ex officio* or to be made by the third parties, based on qualitative requirements, even if the limits to be specified by the quantitative thresholds in the communiqué are not exceeded.

**The process of designation of holding significant market power**

First, the undertakings providing core platform services shall apply to the Competition Authority (the "**Authority**") within 30 days in case they exceed the thresholds that will be determined by the Communiqué on the Implementation of Article 8/A of Law No. 4054. Along with the application, undertakings may also submit their objections to the Authority, if any, about why they think they do not hold significant market power.

As a result of the evaluation to be carried out within 60 days following the completion of the application, the Board shall determine whether the undertaking holds significant market power and which of the obligations listed under Article 6/A of Law No. 4054 the undertaking will be subject for each platform service it offers. As stated in the previous section, the Board may also make the same determination *ex officio* or upon complaint. In addition, the Board may, even if quantitative thresholds are not exceeded, reach a conclusion based on the assessment of qualitative requirements.

If the undertaking is designated to be holding significant market power, the Board shall determine a reasonable period of time, not exceeding 6 months, for the undertaking to comply with the provisions of Article 6/A.

The undertaking that is designated to hold significant market power may submit its objective justification defence regarding its inability to fulfil its obligations stipulated to the Authority, together with sufficiently substantiated and concrete information and documents, if any, within 6 months starting from the service of the decision. The Board shall evaluate and decide on whether it considers this defence within 60 days; if the Board does not accept objective justification, it shall decide that the relevant obligation shall be fulfilled.

In addition, the Board may, upon request or *ex officio*, change, review or withdraw its decision, in any of the following cases where:

- There is a significant change in any of the facts on which the decision designating the undertaking as holding significant market power was based on;
- The decision is based on incomplete, incorrect or misleading information provided by the undertakings;
- The obligations imposed are insufficient.

If the Board determines, *ex officio* or upon complaint, that the obligations stipulated are not complied with, the preliminary investigation or fully-fledged investigation will be launched as per Articles 40 and 59 of Law No. 4054.

If the undertaking is designated to hold significant market power, this decision will be valid for 3 years. In case the undertaking does not apply to the Authority within 90 days before the end of the 3-year period, the relevant undertaking is deemed to hold significant market power for the next 3 years, as well.

**What are the Obligations that the Undertakings Holding Significant Market Power Should Comply with?**

The Draft Amendment provides a list of conducts to be added as Article 6/A to Law No. 4054, which should be complied with by the undertakings holding significant market power. These are *ex-ante* obligations that undertakings should comply with in order to prevent anti-competitive conduct in the core platform markets for goods and services by undertakings holding significant market power and to ensure the maintenance of a fair and competitive market structure in the core platform services provided by such undertakings. The communiqué (the "**Communiqué on the Implementation of Article 6/A of the Law No. 4054**"), which is envisaged to be issued by the Board within six months following the entry into force of the new amendments, will provide further information on the implementation of these obligations.

In parallel with the DMA, the obligations set out below will be applied, to the extent appropriate to all core platform services for undertakings that have been designated to hold significant market power.

Under the Draft Amendment, undertakings holding significant market power should;

- Refrain from discriminating their own goods and services in ranking, scanning, indexing or in other conditions, compared to the goods or services of business users and ensure that the relevant conditions are fair and transparent.
- Refrain from using data that are not publicly available while competing with other business users.
- Refrain from making the goods or services offered to business users and end users dependent on other goods or services offered by themselves.
- Refrain from requiring business users or end users to subscribe or register with any core platform services of this undertaking holding significant market power as a condition for accessing, logging in or registering any core platform services.
- Allow end users to easily uninstall software, applications or app stores that have been preinstalled into the operating system of the devices, to switch to different software, applications or app stores, to install and effectively use a third-party software, applications or app stores, to allow default settings to be easily changed, to allow third-party software, applications or app stores to be offered to user preference and chose by default and fulfil technical requirements in that regard.
- Refrain from restricting or obstructing business users, from working with competitor undertakings, from making offers to or making agreements with end users over platforms or other channels, from advertising their goods and services via these channels, and refrain from

preventing them to offer different prices or conditions for a certain good or service while working with competitor undertakings over their own channels or over different channels.
- In a way as to prevent competitor undertakings from entering the market and to prevent those already in the market from competing effectively

1. Not combine personal data they obtain from the core platform services with personal data obtained from any other services they offer or with personal data obtained from third parties.
2. Not process these data by combining or using it for/in the context of other services, especially in targeted advertising, unless it is necessary for the performance of a contract to which the end user is a party.
3. Not process the competitively sensitive data obtained from business users for purposes other than the provision of the relevant service, unless it provides clear, precise, and sufficient options to the business user.

- Provide relevant business users free, efficient, continuous, and real-time access to the aggregated and non-aggregated data which is provided by business users while using core platform services or ancillary services, or by end users of these business users or is produced within the scope of the activities of these parties on the relevant platform, upon request of the relevant business users and third parties authorized by them.
- Enable end-users using core platform services or ancillary services, business users, or end-users of such business users to, free of charge and effectively, transfer their data provided by them or generated within the scope of activities of these parties on the relevant platform, upon their request and provide free of charge tools to facilitate data portability.
- Enable the interoperability of core platforms services and/or ancillary services with other related products or services, efficiently and free of charge and fulfil the technical requirements for this.
- In order to maintain the provision of core platform services or ancillary services by other undertakings, provide free-of-charge access to the necessary operating system, hardware or software features, limited to the relevant core platform service, and fulfil the technical requirements for this.
- Upon their request, provide business users with adequate information on the scope, quality and performance of core platform services and ancillary services, as well as pricing principles and conditions of access to these services.
- Provide to the advertisers, publishers, and advertising intermediaries which it provides online advertising services or to third parties that are authorized by those, free, continuous, and real-time complete information about the commercial terms regarding offers and access to advertising verification and performance measurement tools and the data required for the use of these tools.
- Refrain from discriminating between business users by imposing unfair or unreasonable terms on business users.

**What are the Fines in Case of Non-Compliance with the Obligations?**

The Draft Amendment also includes provisions on administrative fines and remedies to be applied in case of a failure to comply with the above-mentioned obligations.

Accordingly, similar to a case of violation of core competition law articles of Law No. 4054, the Board may decide to apply structural remedies in the form of requiring undertakings to transfer certain businesses, partnership shares or assets in the event of a failure to comply with the obligations stipulated under Article 6/A of the Law No. 4054. Unlike a violation of Articles 4, 6

and 7, a violation of Article 6/A can directly motivate a decision ordering a structural remedy, without the need to issue a prior behavioural remedy in a previous decision.

In such a case, it will be sufficient to demonstrate that the behavioural remedy will not yield any result.

One of the most relevant amendments envisaged by the Draft Amendment is the administrative fine to be imposed on the undertakings holding significant market power in case of a failure to comply with the obligations to which they are subject.

In case of a violation of Articles 4, 6 and 7 of Law No. 4054, the relevant undertaking may be imposed an administrative fine of up to ten per cent of its annual gross revenues. With the Draft Amendment, this rate has been increased twice, i.e., up to twenty per cent of their annual gross revenues, in case the undertaking holding significant market power violates the obligations stipulated under Article 6/A. If the relevant provision enters into force, it can be expected to be very effective in practice and to result in very high administrative fines.

Moreover, in case the Board determines that undertakings holding significant market power violated Article 6/A at least two times within five years, it may prohibit the mergers or acquisitions by these undertakings for up to five years, in order to eliminate the damages arising from repeated violations or to prevent serious or irreparable damages that may arise.

The envisaged provisions under the Draft Amendment of the Law No. 4054 provide that the undertakings holding significant market power may be obliged to comply fully and actively with the obligations to which they are subject. Accordingly, they shall take all the necessary measures and report the relevant processes upon request of the Authority. The undertakings holding significant market power are deemed unconditionally responsible for complying with the obligations.

**Proposed Amendment Regarding the Board's On-Site Inspection Authority**

Article 7 of the Draft Amendment is envisaged to add the expression "*and, in cases where resolving requires special expertise or technical knowledge for the implementation of Article 6A, experts with special knowledge, skills or experience to be appointed by the Board if deemed necessary*" to follow the expression of "*experts employed at the disposal of the Board*" in Article 15 of the Law No. 4054 titled on-site inspection.

In addition, it is regulated that undertakings offering at least one core platform service in Turkey, regardless of whether they reside in Turkey or not, will be obliged to fulfil technical and administrative requirements that would enable them to perform the powers set forth in this article.

One of the most important tools used by the Board in revealing competition violations is on-site inspection. However, the online nature of digital services allows platforms to offer services outside the country in which they are established. Therefore, if the platforms do not have an office in Turkey where the employees to be addressed during an on-site inspection are employed and remote access to the servers abroad is provided, it will not be possible to conduct an on-site inspection.

With the Draft Amendment, undertakings offering at least one core platform service in Turkey are

held responsible for fulfilling the technical and administrative requirements that will enable the use of this authority in order not to render the Board's on-site inspection authority ineffective for undertakings that do not have headquarters in Turkey or do not have centralized technical and administrative equipment.

Another issue envisaged by the Draft Amendment is that similar to the DMA, if deemed necessary when implementing Article 6/A independent third parties with technical knowledge could be assigned by the Board to participate in the examination, in addition to the experts already working under the Board's authority.

**Conclusion**

Currently, there is no draft regulation on the quantitative criteria to be taken into account for the determination of undertakings holding significant market power. The Draft Amendment sets out in detail the conducts that undertakings holding significant market power should refrain from while operating in the market and sets the fines to be imposed in case of non-compliance with these obligations considerably high. This confirms that the relevant undertakings operating in digital markets, which have been under the scrutiny of competition authorities for a long time, will be given substantial responsibility.

Considering that much secondary legislation will be required, and the application processes of undertakings will start once the legislations enter into force, digital markets and the undertakings operating in these markets may be expected to be under the scrutiny of the Authority for a long period. In this context, the relevant undertakings should initiate their compliance processes with the new regulations as soon as possible by taking into consideration the framework outlined by the DMA.

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