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Turkish Competition Authority's Vigilance on Digital Markets: Examining Recent Initiatives and Their Implications

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Introduction

In line with the global trend, the Turkish Competition Authority (**TCA**) has recently displayed a remarkable level of interest in addressing competition concerns in digital markets. Maybe being one of the months where the output of the TCA has peaked its highest, in April 2023 the TCA announced (i) the publication of the [Preliminary Report on the Online Advertising Sector Inquiry](#), (ii) the initiation of a sector inquiry into the mobile ecosystems ("**Mobile Ecosystems Sector Inquiry**") and (iii) the publication of the TCA's working paper titled "[Reflections of Digital Transformation on Competition Law](#)" (**Working Paper**). In this post, we will delve into each of these developments, providing a brief overview of their significance and exploring the implications they hold for the TCA's upcoming enforcement of digital markets.

Preliminary Report on the Online Advertising Sector Inquiry

The Preliminary Report on the Online Advertising Sector Inquiry is prepared within the scope of the TCA's sector inquiry that was initiated back on 21 January 2021 with an aim to "*closely monitor national and international developments in online advertising area, identify behavioural and/or structural competition problems in the sector, and come up with solutions to these problems*" and published on the TCA's website on 7 April 2023. The Preliminary Report is open for consultations until the close of business on 7 July 2023 and it will be followed by the final report which is expected to be published within 1/2 years.

In the announcement of the Preliminary Report, the TCA pointed out that online advertising has exceeded all traditional advertising channels with the growth rate it has achieved in recent years. In fact, as of 2021, in Turkey. As a result of all these developments, the TCA claimed that a sector inquiry has become necessary to analyse the dynamics at work in the sector, to identify behavioural and/or structural competition problems and to develop solutions for these problems in order to ensure the effective and right application of competition law.

Within the framework of the sector inquiry, the state of competition in Turkey in terms of online advertising types and the substitution relationships between them have been analysed. In addition,

online advertising technology services, which are used in the buying and selling of display ads, have been thoroughly examined. In this regard, the Preliminary Report reveals that since Google is engaged in each and every category of advertising technology services and provides various products, it has a very high market share across all of the services it provides in the ad tech supply chain.

Under the “*Conclusion Section*” of the Preliminary Report, the TCA categorizes the competitive concerns that it has identified in the online advertising landscape under seven main headings. Accordingly:

- The first problem highlighted is the conflict of interest arising from vertical integration in the ad tech supply chain. This conflict of interest may arise because vertically integrated ad technology providers are caught between the interests of their own services and the interests of their clients, or because a vertically integrated ad technology provider caters for services to both advertisers and publishers. In addition, Google’s market power and possible practices in this area are assessed to be of such a nature that may further strengthen these conflicts of interest and turn them into cut-clear competition problems.
- The second issue addressed is the concern about Google’s ability to engage in tying and self-preferencing. As Google operates at every stage of the advertising supply chain and has a strong position in each, the TCA points to a concern that Google may leverage the power it has in ad tech services and in the provision of certain ad inventories to other ad tech services.
- Thirdly, the Preliminary Report determines that Google is in a much stronger position than its competitors in terms of data access, as it offers many complementary services, and the concern is that Google may use the advantage it gains by combining the data it gathers via its different services to the detriment of its competitors.
- The fourth problem highlighted is the transparency problem in the ad tech supply chain, which is suggested to manifest itself in three ways. First, advertisers and publishers have sufficient knowledge and control over only a part of the supply chain, and actors in the advertising supply chain do not have full information about the difference between the price paid by the advertiser and the price received by the publisher. Second, the complexity of auctions in the ad tech supply chain makes advertisers and publishers highly dependent on advertising technology providers to buy and sell inventory. Finally, concern has been voiced out about undertakings preventing independent parties from measuring the performance of their services.
- The fifth problem identified is the concern that digital platforms have become inevitable commercial partners for news publishers due to the important role they play in delivering news content to readers, and this situation entails the unconditional acceptance of the terms offered by the platforms by news publishers. The Preliminary Report points out that these conditions may lead to a decrease in the advertising revenues of news publishers and, in some cases, to a shift of these revenues to digital platforms.
- The sixth concern arises in respect of Google’s Privacy Sandbox, i.e., Google’s elimination of the use of third-party cookies in the Chrome browser. It is stated that the Privacy Sandbox, whose functioning is largely based on third-party cookies, creates uncertainty and concerns in the online advertising sector. With the Privacy Sandbox, there is a concern that Google will gain an advantage in terms of user tracking and data collection, disadvantage its competitors and other stakeholders, and favour its own advertising technology providers and owned and operated advertising inventory.
- The seventh concern addressed concerns Apple and Google’s access restrictions to user identifiers (Mobile Advertisement Identifiers – “**MAID**”) by third-party applications running on iOS and Android. It is emphasized that MAIDs are a critical source of data for the profitability

and sustainability of mobile online advertising activities and that Apple currently prevents third-party applications from accessing MAIDs by default through its App Tracking Transparency policy. Similarly, Google has recently announced its policies that will limit the sharing of user data with third parties via the changes introduced subsequent to the Privacy Sandbox. The potential anti-competitive concerns that Apple and Google's policy changes may create in the mobile online advertising and mobile application market are considered appropriate to be addressed in detail as part of a distinct sector inquiry on mobile ecosystems.

Mobile Ecosystems Sector Inquiry

Just five days after publishing the Preliminary Report on the Online Advertising Sector Inquiry, on 12 April 2023 the TCA announced the initiation of another sector inquiry into mobile ecosystems. As per the announcement of the TCA, the sector inquiry is initiated to understand the (potential) competitive and anti-competitive effects of mobile ecosystems and the formulation of effective policies based on these effects.

Under the announcement, the TCA stated that the close relationship between each component of the mobile ecosystem, i.e., between operating systems, applications, app stores, etc., may lead to competition concerns. The Sector Inquiry highlights voiced out concern about the sector, namely that undertakings holding significant market power operate simultaneously in numerous mobile ecosystem submarkets thanks to Big Data and network effects. According to the TCA, such functioning may create unwanted results such as fuelling exclusionary effects for competing products/services, limiting consumer preferences, and, therefore, adversely affecting innovation competition.

As touched upon in the previous section, the trigger for the mobile ecosystems sector inquiry can be traced back to the Online Advertising Sector Inquiry Preliminary Report's section titled "6.7. *Apple and Google's Practices in Mobile Online Advertising*". In this section, the TCA concluded that "*it is foreseen that the policy changes of Apple and Google, which have an impact on the mobile application markets, and the possible anti-competitive concerns that may arise from the changes, will be examined in more detail within the scope of the sector inquiry*". Accordingly, the TCA is expected to examine, *inter alia*, privacy-focused policy changes of iOS and Android from a competition law perspective within the scope of this market study and, as usual, the TCA welcomes any comments or suggestions to be made within this context.

Reflections of Digital Transformation on Competition Law

On 18 April 2023, the TCA announced and published yet another report in relation to digital markets, namely its working paper titled "*Reflections of Digital Transformation on Competition Law*" where the authority shared its vision of the digital markets and enforcement priorities. Under the announcement, the TCA elaborated on the subject of its study ("*the enforcement of Turkish competition law in digital markets and the difficulties encountered in these markets*" and further concludes that "*the policy changes needed for these markets has taken its final form*"). By this token, the study provides a comprehensive catalogue that brings together the TCA's perspective on digital markets, the current legal instruments within the scope of the Turkish competition legislation, the TCA's practices in this field, and the establishment of its own vision on the Turkish

competition legislation for the near future.

In the Working Paper, the TCA categorises possible anti-competitive concerns related to digital markets into seven different headings. Regarding each competitive concern, under the sections titled “Suggestions for Turkey” the TCA points out possible solutions to deal with them. The need for a regulatory initiative mentioned repeatedly in these chapters, which appears to be the rationale behind the draft of Turkey’s own DMA-like amendments, is currently being evaluated to be incorporated into Turkish competition law. For completeness, unlike the DMA, current thinking in Turkey is to amend the current Competition Law of Turkey to grant the TCA similar tools as the DMA, as opposed to drawing out a new regulatory instrument.

Data Combination

The actions of gatekeepers/undertakings holding significant market power to process/combine the competition-related data they collect are considered to be an area in need of regulation. Against this framework, the Working Paper mentions that adopting the DMA approach, which is based on consent, in other words, which implicitly recognizes that data combination will limit competition in the market unless consent is obtained may be preferable.

In addition, apart from personal data, the TCA also considers that it would be appropriate to introduce regulation that would prevent undertakings holding significant market power from processing competitively sensitive data obtained from commercial users for purposes other than the provision of the relevant service of the gatekeeper unless they provide the commercial user with clear, unambiguous, and sufficient options.

Excessive Data Collection

The report states that there is no doubt that excessive data collection can be considered an exploitative practice within the scope of the prohibition of an abuse of a dominant position. However, the Report also notes that there are no concrete proposals for a legislative process on excessive data collection in any other country.

Moreover, the TCA points out the fact that the framework within which data collection activities should be carried out is already regulated by data protection law which is modelled after the GDPR. Within the scope of these discussions, the report concludes that, within the framework of the TCA’s existing powers, it would be appropriate to intervene *ex-post* (based on Article 6 of the Competition Law prohibiting abuse of dominance) when the TCA determines that the competition in the market is distorted as a result of data collection that is disproportionate to the economic activity. Therefore, the TCA concluded that there is no need for *ex-ante* regulation regarding this particular topic.

Data Portability

The report envisages to introduce a data portability obligation to cover platforms holding

significant market power in relation to the transfer of the data of both natural persons and commercial users on the platform – either directly by themselves or indirectly by enabling the transfer to another platform or to a third party authorised by them. The report suggests that it may be useful to draft a general regulation without referring to specific markets and/or data. In order to achieve the expected benefits of the data portability regulation, the TCA considers that data portability should cover data provided voluntarily by the user and based on observation and may even include data based on inferences, under certain conditions. According to the TCA's assessment, the data should not only be related to the past, but should also include real-time data including the nearest possible time, and may even include future data under certain conditions. The report also adds that the details regarding these technical conditions can be regulated via secondary legislation.

Interoperability

Although interoperability obligations have been brought up intensively in the context of social media, the report also argues that it may be beneficial to generalise this obligation, rather than keep it sector-specific. For the time being, the TCA is of the opinion that full protocol interoperability should not be imposed, unless a very significant market failure is identified, and the obligation should be proportionate to the existing market failures.

According to the TCA, the regulation should be done in a way that does not undermine the innovation and investment incentives of undertakings, and caution should be taken not to disclose non-essential data to third parties. Moreover, data privacy should not be ignored in the transferred data, and in this respect, consent and anonymization options should be evaluated. The TCA also advises that independent experts, specialists or third parties may be consulted if necessary for the supervision of interoperability. Secondary regulation is expected to determine the details regarding interoperability.

Self-preferencing

Similar to the DMA, the TCA considers adopting an ex-ante ban on using non-public data in competition with commercial users for undertakings holding significant market power. Secondly, for the TCA, it would also be appropriate to introduce an ex-ante prohibition for undertakings holding significant market power from favouring their own goods or services over the goods or services of commercial users in terms of ranking or other conditions. The importance of the expression "*or other conditions*" was clearly emphasized, as it is considered that it would not be accurate to cover only ranking as a self-preferencing practice of undertakings holding significant market power.

Tying and Bundling

The report suggests that it would be appropriate to pass regulation for undertakings holding significant market power in digital markets to avoid tying practices, as it may harm consumers by causing market closure in the tied product market. Again, the TCA refers to an ex-ante intervention

in terms of tying and bundling practices.

Exclusivity Practices, MFN Clauses and Unfair Contract Terms

The report identifies the risk of tipping due to the presence of strong network effects in digital markets, and since exclusivity practices increase this risk by preventing multi-homing of commercial users, the report also considers that contractual or *de facto* exclusivity practices of undertakings holding significant market power should be regulated. According to the TCA, the exclusionary effect of broad MFN clauses in online markets is concrete, it argues that these clauses should be prohibited for undertakings holding significant market power in digital markets. It is argued that a late intervention would not be able to solve market failures in digital markets where network externalities emerge as the most fundamental market failures, and therefore even narrow MFN clauses should be included in the prohibition.

Regarding unfair contract terms, the report determines that the *ex-ante* regulation of unfair practices of undertakings holding significant market power, such as the imposition of certain commercial conditions on commercial users when working with competing platforms or offering products and services in their own sales channels, is critical for the effective establishment of competition in the market.

Finally, to deal with these issues, the report suggests that it would be appropriate to implement regulation to collectively address exclusivity practices, MFN clauses and unfair contract terms of platforms holding significant market power.

Lack of Transparency

Transparency, which is stated to be necessary for the effective functioning of digital markets, is essentially addressed in three different aspects. Firstly, it is stated that in the form of a code of conduct, an obligation should be envisaged by relevant public institutions, for all undertakings in the market to inform consumers about the terms and conditions and ranking parameters of the service they receive and about the advertisements they encounter while receiving this service.

Secondly, it is considered that if the relevant undertaking is an undertaking holding significant market power, “*ranking*” may be addressed within the scope of self-preferencing, and regulation should be introduced in relation to these concerns.

Finally, for advertisers, publishers, and intermediary undertakings in the supply chain of the online advertising market, the report assesses that regulation should be put in place to increase transparency and address related concerns regarding the price or performance measurement criteria arising from the platforms from which they receive ad services.

M&A

The report states that a detailed analysis process is necessary for M&A activity in data-driven

markets. The report further argues that once the data is owned since digital platforms can have very wide authority over the use of the data, the most effective way to resolve data-driven market failures is to consider the possible data-driven effects in M&A proceedings. While making these assessments, the necessity to determine the value of the data held by undertakings in the relevant market is also underlined. In addition, the Working Paper refers to the TCA which is stated to expand the scope of the TCA's assessment of M&A notifications.

For completeness, the TCA exempts certain transactions involving a takeover of a technology undertaking from the target-wise turnover thresholds. The TCA defines technology undertakings as undertakings that (i) are active or (ii) have R&D activities, in the Turkish geographic market or (iii) that provide services to customers in Turkey. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies. The Authority's move is significant as it is a strong signal that the TCA is willing to be one of the frontrunner competition authorities around the world to regulate acquisitions involving technology start-ups. It should be noted that the Working Paper's conclusions should not be taken as final given that the TCA's announcement highlights that "*interaction and feedback from stakeholders will contribute to this study*", indicating that it is open for steering and guidance from the market participants.

Conclusion

The Publication of the Preliminary Report on the Online Advertising Sector Inquiry, the initiation of the Mobile Ecosystems Sector Inquiry, and the publication of the working paper titled "*Reflections of Digital Transformation on Competition Law*" in April 2023 show that the TCA's pipeline in terms of the digital markets is as crowded as ever and that it will continue to prioritise engagement with various aspects of the digital sphere.

These studies are important, as they set out the TCA's agenda for the years to come in the context of its proactive engagement with stakeholders to steer away from possible pitfalls concerning regulation. Timely and strategically right engagements should have a direct contribution to the results to be achieved by the TCA's studies.

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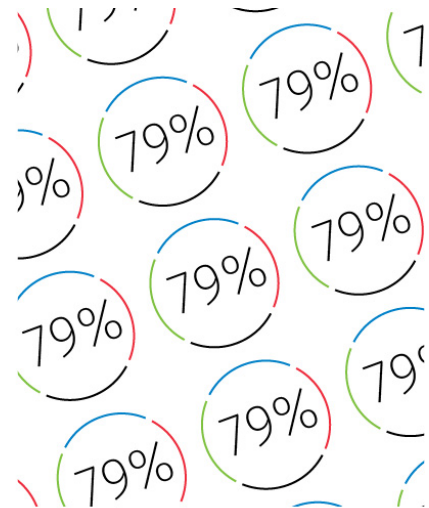
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