Kluwer Competition Law Blog

Turkish DMA: What's in the Package?

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Part I: Prohibitive Provisions

This blog post is the first in a series of two blog posts. The objective of this series is to provide a brief overview of the Draft Amendment of the Turkish Competition Act ("***Draft Law***", "***Turkish DMA***", "***Draft***" or "***Law***"). The first blog post focuses on the substantive provisions whereas the second blog post deals with procedural elements of the Draft Law.

While the first version of the Draft Law was shared with stakeholders in October 2022, a revised version of the Draft is shared with certain parties for their opinion in June 2024, soliciting their feedback and input. The Turkish DMA is expected to be discussed in the Turkish Parliament in late 2024 and to be enacted by the end of the same year. This series of blog post is based on the version shared with stakeholders in June 2024. Therefore, the Draft may be subject to further amendments during the enactment process.

The Draft Law: General Preamble

Before delving into the specifics of the Draft, it seems pertinent to offer a brief overview of the issues highlighted in the general preamble. As indicated in the general preamble of the Draft, the rapid evolution of internet technologies in recent years has had a profound impact on digital markets and consumer habits. Considering these developments, it has become imperative to update Law No. 4054 on the Protection of Competition ("***Competition Act***") in a manner that aligns with the ongoing transformation in internet technologies. Moreover, the economic structure of digital markets (see) impedes the dynamics of competition between economic units and the increasing power of gatekeepers in digital markets and the permanence of this power in some cases lead to unfair practices against business users. This adversely impacts competition and contestability in terms of the provision of the relevant core platform services ("***CPS***"), ultimately leading to a reduction or even elimination of the benefits expected from competition (see).

The general preamble includes several significant findings concerning the competition in the digital markets.

- *Firstly*, large undertakings' significant market power makes it "*structurally difficult*" for competition to emerge in digital markets. These undertakings possess a huge amount and variety of data and control entire ecosystems, which hinders market players, regardless of their

innovative and efficient nature, from competing effectively.

- *Secondly*, this structural competition problem leads to an asymmetric bargaining power between gatekeepers and users. Business users' dependency on these undertakings leads to unfair practices and a negative impact on competition and contestability in the provision of the relevant CPS.
- *Thirdly*, existing competition rules are insufficient to address the competition problem in digital markets. Existing rules are applied *ex-post* and are not applicable to the unilateral behaviours (harming the effective functioning of the market) of non-dominant market players.
- *Fourthly*, there are difficulties in defining the relevant market, determining market power, identifying infringing conduct and establishing the relevant remedy. Besides, digital markets often present competition problems beyond conventional theories of harm, such as self-preferencing, blocking access to data, preventing interoperability, excessive data collection, and imposing unfair conditions.
- *Fifthly*, the *ex-post* application of current competition rules does not effectively correct digital market issues and thus there is a need for ex-ante rules to address problems before they cause harm.
- *Finally*, potential leveraging of market power, by certain gatekeepers, to ancillary services such as payment services, and other technical services supporting the provision of payment services and cargo services, may lead to creation of an integrated ecosystem.

Based on all these reasons, the Draft aims to implement regulations that establish and protect competition *ex-ante* in digital markets. The amendments aim to determine the obligations to be imposed on gatekeepers providing CPS, to strengthen the monitoring and supervision powers regarding these obligations, and to provide legal certainty for the sanction mechanism.

Amendments Foreseen Under the Draft: Prohibitive Provisions

The amendments aim to prohibit gatekeepers providing CPS from abusing their market power. In this regard, the Draft introduces certain obligations and prohibitions for gatekeepers. Gatekeepers are defined as undertakings that operate on a certain scale and with significant influence over access to end-users or over the activities of business users in respect of one or more CPS, and that have the power to, or that can be foreseen to, exercise such influence on an entrenched and durable basis. The definition includes three core components:

- having a certain scale in one or more CPS,
- operating with significant influence over access to end-users or over the activities of business users and
- having (or potentially having) an entrenched and durable position in CPS.

Supplementary legislation will clarify the quantitative thresholds such as annual gross revenues, number of business or end-users, etc., that are required from a CPS provider to be classified as gatekeeper. Undertakings meeting these thresholds will notify the Turkish Competition Authority ("***TCA***") on the fact that the undertaking exceeds the relevant thresholds for gatekeeper designation. In such case, the (rebuttable) presumption that the undertakings are gatekeepers would be applied. Upon notification, TCA will determine *(i)* whether the undertaking is a gatekeeper, *(ii)*

if so, for which CPS the undertaking is considered as gatekeeper and *(iii)* also notifies the undertaking of its obligations for each CPS.

When the Draft is analysed, it is seen that there are thirteen prohibitions and obligations in total. In line with the Competition Board's ("***Board***" or "***TCB***") decision to be taken as per Article 8/A-1 (designation of gatekeeper together with the obligations applicable to a given gatekeeper); the gatekeepers shall follow the following provisions:

> *"(a) It shall not favour its own goods or services over those of business users or third parties in the ranking or ranking-related crawling, indexing, and shall provide fair, transparent, and non-discriminatory conditions for ranking."*

This provision aims to prohibit self-preferencing by gatekeepers. The earlier version of this provision is amended from three perspectives. *Firstly*, the scope of the provision is extended to cover "*third parties*" as well. In this regard, gatekeepers' self-preferencing behaviours against third parties will also fall within the scope of this prohibition (unlike earlier draft) (See the criticism by Do?an, p. 286-287). So, the application of this provision will not be limited to hybrid platforms. *Secondly*, the self-preferencing behaviour had been limited to solely include the actions concerning ranking. In the previous draft, any discrimination was falling within the scope of the provision. In this regard, the fairness and transparency requirement has been required solely for the ranking. *Third*, it was added to the provision that the ranking should also be non-discriminatory. In the earlier draft, a non-discriminatory ranking was not required. All in all, this provision is revised to be fully in line with Article 6(5) of the DMA.

On a different note, the TCA has already applied Article 6 of the Competition Act (prohibiting abuse of dominance, similar to Art. 102 of TFEU) to the self-preferencing cases in its numerous precedents. *Firstly*, the Board applied administrative monetary fines (together with behavioural injunctions) on *Google* in its investigation concerning the allegation that *Google* abused its dominant position in the general search market by complicating the activities of its competitors in the online shopping comparison services market. The Board ruled that *Google (i)* has a dominant position in the general search services and online shopping comparison services markets; and *(ii) Google* has violated Article 6 of the Competition Act by placing its competitors, offering shopping comparison services, at a competitive disadvantage, complicating the activities of competitors and thereby distorting competition in the market for shopping comparison services.

Secondly, the Board investigated the allegation that *Google* abused its dominant position in the general search services by promoting its local search and accommodation price comparison services to exclude its competitors. The Board concluded that *Google* has a dominant position in the general search services market and that *Google* has violated Article 6 of Competition Act by giving its local search and accommodation price comparison services an advantage over its competitors in terms of position and display on the general search results page and by preventing competing local search sites from entering the Local Unit, thereby complicating the activities of competitors and distorting competition in the markets for local search services and accommodation price comparison services.

Thirdly, TCA investigated the allegations that *Trendyol*, a wholly owned subsidiary of *Alibaba*,

abused its dominant position in the market for multi-category e-marketplace by creating an undue advantage for its own private label products. The Board concluded that *Trendyol*, the dominant player in the market for multi-category e-marketplace, has abused its dominant position by taking an unfair advantage over its competitors. According to the Board, *Trendyol* created an undue advantage for its own private label by intervening in the search algorithms and using the data of business users active on *Trendyol* for its retail business.

> *"(b) It may not use aggregated and non-aggregated data provided to the relevant platform by business users of core platform services or ancillary services or end-users of such business users or generated as part of the activities of such parties on the relevant platform when competing with business users."*

Platforms can obtain a significant amount of data on the transactions performed on the platform (between business users and end-users) and can process this data to build valuable databases. The platform, thus, has access to extremely valuable data including but not limited to the products that business users sell, the consumers of such products, the amount and price of sales of a given product. Moreover, the platform does not have to make any effort to collect such data as the business model of the platform, by its very nature, allows the platform to directly access such data. Besides, the platform can also process such data and find out any variable affecting the demand of a given product.

Article 6/A-b aims to prevent gatekeepers from gaining unfair commercial advantage by using aggregated and non-aggregated data while competing with business users. Competing for the purpose of this provision includes offering or developing the gatekeeper's own products or services. Thus, if a gatekeeper uses such data to decide what product to sell, or to develop a new product, such actions will be within the scope of this prohibition. This prohibition is in line with the Article 6(2) of the DMA and 19a(2)(4)b of the German Competition Act. Anecdotally, this provision largely coincides with Article 2(2)a of the Law numbered 6563 on the Regulation of Electronic Commerce ("***Turkish E-commerce Law***"). On a different note, the Board, through the aforementioned *Trendyol* decision, concluded that using the data of the business users while competing with business users constitutes an abuse of dominant position.

> *"(c) It cannot make the goods or services it offers to business users and end-users dependent on other goods or services offered by it."*

This prohibition concerns tying conduct of gatekeepers and is closely modelled after Article 19a(2)(3)b of German Competition Act. Similar provisions were included in the DMA (Article 5(5), 5(7), 5(8) and 6(3)). Tying may allow gatekeepers to use their market power in one market as a leverage to another related market to decrease competition and gain competitive advantage in the adjacent markets. Tying may be used to foreclose rivals in tying markets, deprive the competitors of the critical mass, and also increase the entry barriers. Tying is generally considered as a form of abuse of dominance. In fact, the Board, through its *Google-Android* decision, applied an

administrative monetary fine on *Google* on the ground that it abused its dominant position in the market for licensed mobile operating systems by imposing contractual restrictions on mobile device manufacturers to strengthen the position of *Google* search and *Google WebView* in *Android* mobile devices. Moreover, the Board, initiated, in early 2024, an investigation against *YemekSepeti*, the leading online food ordering platform in Turkey and a subsidiary of *Delivery Hero*, concerning the claim that *YemekSepeti* required its business users to use *YemekSepeti*'s own courier service and thus complicated the activities of business users using *YemekSepeti*'s food ordering platform.

> *"(d) It may not condition the access, registration, or login of business users or end-users to core platform services on their subscription or registration to other core platform services offered by it."*

This prohibition also prohibits tying conduct of the gatekeepers. It basically prevents gatekeepers from conditioning the use of its CPS to the use of its other CPS. Thus, this provision aims to prevent leveraging market power from one CPS to another one. Yet, leveraging market power is not inherently harmful to the competition. Thus, a certain level of market power should also be sought for the market where the market power is leveraged. In fact, whereas DMA Article 5(8) prohibits the same conduct, it requires certain quantitative criteria for the market where the market power is leveraged to. The approach adopted by the DMA is more accurate from competition policy perspective as it does not directly exclude the potential efficiencies associated with tying agreements by focusing on the potential exclusionary effects. On a different note, the Board initiated an investigation against *Meta* concerning the allegations that *Meta* abused its dominant position by tying its newly launched *Threads* service with its *Instagram* service.

> *"(e) It allows end-users to easily uninstall software, applications, or application stores pre-installed in the operating system of the devices, to switch to different software, applications, or application stores, to install and effectively use third-party software, applications, or application stores, to easily change the default settings, to offer third-party software, applications or application stores to user preference and to select them by default, and to fulfil the technical requirements for these. This obligation includes directing the end-user to a selection screen during the first use of online search engines, web browsers, and virtual assistants, where the end-user selects the default application and the main platform service providers."*

This prohibition also prohibits the tying conduct of the gatekeepers. The gatekeepers, basically, will be required to allow end-users to uninstall software, switch to different software and change the default settings. This prohibition, in essence, aims to deprive the gatekeepers of the "*default*" advantage and open the markets to competitors. The earlier version of this provision is amended to be in line with Article 6(3) of the DMA. Yet the exceptions foreseen under Article 6(3) DMA were not included within Article 6/A-e. On a different note, the Board's *Google-Android* decision also includes remarks on the Board's stance regarding such tying arrangements.

> *"(f) It shall not restrict or make it difficult for business users to work with competing undertakings, to communicate or contract with end-users acquired through the relevant underlying platform service or to make offers to end-users for the same goods or services through third-party platforms or other channels, and to offer different prices or conditions for a particular good or service when working through their own or other channels or with competing undertakings."*

This provision aims to prevent gatekeepers from prohibiting business users from being active through different channels and is thus expected to enable business users to operate through different platforms and their own sales channels to reach a wider consumer base. This does not only, liberate the business user side of the market, it also renders end-users (consumers) to have different channel options for the goods and services they need. This is expected to increase inter-platform competition and thus result in more favourable prices and conditions for consumers. This provision is closely modelled after Article 5(3) and 5(4) DMA and Article 19a(2)(2) German Competition Act. Anecdotally, this provision largely coincides with Article 2(3)c of the Turkish E-commerce Law.

The Board initiated an investigation against *Apple* concerning the allegations that *Apple* abused its dominant position by preventing app developers from using alternative payment systems on *Apple Store*, and by imposing certain provisions on mobile app-developers which prevent redirections. TCA's initial findings indicate that app developers are prevented from providing in-app information to their users on payment channels outside the app, such as the website of the app developer. This behaviour may restrict consumers from accessing better options. *Apple* also prohibits app developers to include links in the app to redirect consumers towards alternative channels outside the app. *Secondly*, *Apple*'s own payment system is mandatory for in-app purchases. Thus, transactions involving in-app digital content purchases must be made by *Apple*'s payment system for which *Apple* receives 30% commission fees. The investigation is initiated in June 2024 and expected to be finalized in late 2025 unless *Apple* provides commitments to address TCA's concerns.

> *"(g) It may not combine, process, and use personal data obtained from core platform services with personal data obtained from other services it offers or third parties, and may not use it for other services, especially targeted advertising unless it is directly preferred by the end-user within the framework of a clear, unambiguous and sufficient option or unless it is necessary for the fulfilment of a contract to which the end-user is a party or the relevant core platform service offered. It may not process and use competitively sensitive data obtained from business users for purposes other than the fulfilment of the relevant core platform service unless the business user directly prefers it within the framework of clear, clear and sufficient choice."*

This provision has two dimensions: data collected from end-users and data collected from business users. In principle, it prohibits gatekeepers from combining, processing, and using the personal data obtained through the CPS for other purposes such as targeted advertising.. This has two exemptions. *First*, this prohibition does not apply in cases where the end-user has given his or her consent directly through an informed decision in the context of a clear, unambiguous and sufficient choice. *Secondly*, this prohibition will not be applicable in cases where such use is necessary for the fulfilment of a contract to which end-user is a party. Similarly, gatekeepers are not allowed to process and use the competitively sensitive information obtained from business users for purposes other than the fulfilment of the CPS unless business users directly consent through an informed decision within the framework of a clear, unambiguous, and sufficient choice. The aim of this provision is to prevent gatekeepers from blocking market entries and foreclosing the market by using the data obtained within the scope of the CPS without the consent of the (business and end) users. The earlier version of this provision is revised to be in line with Article 5(2) of the DMA by adding the explicit consent exception.

In terms of data combination, TCA investigated *Meta*'s data combination activities. The Board assessed that *Meta* is in a dominant position in the markets for *(i)* personalised social networking services, *(ii)* consumer communication services and *(iii)* online display advertising. The Board also ruled that *Meta*, by combining the data collected from *Facebook*, *Instagram*, and *WhatsApp* services, complicated the activities of its competitors operating in the personal social networking services, and online display advertising markets and also created an entry barrier to the market. The Board found that *Meta*, within the scope of personal social networking services, collects information such as username, password, date of birth, e-mail address, telephone number, device information, account used in financial transactions, usage habits, content in posts, and so on. *Meta*, within the scope of consumer communication services, collects information such as username, password, telephone number, profile photo, profile information, location information, device information, account used in financial transactions, contacts in the user's contacts, usage habits. The Board also found that *Meta* also uses the aforementioned information obtained within the scope of CPS in its other services and combines the information obtained from different services. *Meta*'s aforementioned data combination behaviour was considered as an exclusionary abuse and the effects of such behaviour in the market for social networking services and the online display advertising services market have been analysed. The Board concluded that the data in question is critical for the provision of both social networking and online advertising services and concluded that it is not possible for competitors to create or access a data set equivalent to the data set combined by *Facebook*, which in turn creates an entry barrier for both markets. Moreover, it is also found that advertisers prefer *Meta* due to *Meta*'s data combination behaviour as *Meta*'s competitors lack such ability, and this increased *Meta*'s advertising revenue. Thus, the Board concluded that *Meta* abused its dominant position by distorting competition in the markets for social networking services and online advertising services by combining the data obtained from its different services and caused consumer harm.

> *"(h) It provides free, effective, continuous, and real-time access to the aggregated and non-aggregated data provided to the relevant platform by business users using core platform services or ancillary services or end-users of these business users or generated within the scope of the activities of these parties on the relevant platform, free of charge, effective, continuous, and real-time access of the relevant business*

> *users and third parties authorised by them upon their request. In this context, personal data processing activities and processes for providing access to personal data of end-users are carried out in accordance with the Law on the Protection of Personal Data dated 24/3/2016 and numbered 6698."*

Whereas Article 6/A-h regulates access to data, Article 6/A-i regulates data portability. Both provisions are complementary in nature. In the presence of direct and indirect network externalities, data can provide its owner with different opportunities and advantages. In such cases, data can be used to increase the entry barriers and foreclose the markets to other undertakings. Through Article 6/A-h, gatekeeper undertakings are under the obligation to provide access to data. This is expected to decrease the switching costs and increase market entries. Similar provision is regulated under Article 6(10) DMA.

> *"(i) End-users using core platform services or ancillary services, business users or end-users of these business users shall be allowed to transfer the data provided to the relevant platform or generated within the scope of the activities of these parties on the relevant platform, upon their request, free of charge and effectively, and shall provide tools to facilitate data portability free of charge. In this context, personal data processing activities and processes for the transfer of data, including personal data of end-users, by business users are carried out in accordance with Law No. 6698."*

This provision regulates data portability. Data portability can decrease entry barriers and render markets more competitive. This provision is modelled after Article 6(9) DMA. The main difference is, unlike DMA, it also covers the data of the business users. Anecdotally, this provision largely coincides with Article 2(2)b of the Turkish E-commerce Law. The Board, to date, concluded two different investigations concerning data portability. The *first* one concerns *Nadirkitap* where the Board concluded that *Nadirkitap*, the leading online used-book sales platform, abused its dominant position by complicating the activities of its competitors by not providing the data of its business users intending to market their products through other platforms. The *second* one, the Board initiated an investigation against *Sahibinden*, the leading ad platform for vehicles and real estate, concerning the allegations that *Sahibinden* prevented its business users from transferring their data from *Sahibinden* to another platforms. The Board concluded that *Sahibinden* has made it difficult for its business users to use other ad platforms by preventing business users to from transferring their data from *Sahibinden* to competing platforms. The Board considered preventing data portability as a form of abuse of dominance (see also here for a more detailed case commentary on this blog).

> *"(j) In order to enable the provision of core platform services or ancillary services by other undertakings, it shall enable interoperability, limited to the relevant core platform service, and access to the operating system, hardware, or software features necessary to ensure interoperability, effectively and free of charge, and fulfil the*

> *technical requirements for this."*

Gatekeepers will be under the obligation to allow interoperability, limited to the relevant CPS, to enable other undertakings to provide CPS or ancillary services. The gatekeeper will be under the obligation to provide access to the operating system, hardware, or software features necessary to ensure interoperability. Gatekeeper undertaking also needs to fulfil the technical requirements for such interoperability and cannot ask any remuneration for such service. Interoperability obligation clearly aims to reduce the entry barriers and transaction costs in CPS. Similar provisions included within Article 6(4) and 6(7) of the DMA. Yet, the provisions under DMA are more specific compared to the Draft Law. Article 19a(2)(5) of German Competition Act also includes similar (yet more broadly written) prohibition.

> *"(k) If requested by business users, it provides adequate information on the scope, quality, performance, and pricing principles of the core platform services and ancillary services and the conditions of access to these services."*

This provision aims to address the asymmetric information problem between the gatekeeper and business users to enhance competition in the market through increased transparency. Gatekeepers will be under the obligation, if requested by the business users, to provide business users with information on the scope, quality, performance, and pricing principles of the CPS and ancillary services. The gatekeeper will also be under the obligation to provide information on the conditions of access to these services. This obligation imposed on gatekeepers will provide business users with the opportunity to compare pricing and quality parameters of alternative platforms providing similar services and make more informed decision. A similar provision was also included in Section 19a (2)(6) of the German Competition Act.

> *"(l) It shall provide advertisers, publishers, advertising intermediaries, or third parties authorised by them to whom it provides online advertising services with free, complete information on the visibility and availability of the advertising portfolio, including, upon request, the pricing conditions, auction process, and price determination principles regarding the bids submitted, the fee paid to the publisher for the relevant advertising services, and access to advertising verification and performance measurement tools and the necessary data, including aggregated and non-aggregated data, to independently verify their own advertising inventories."*

This provision, like Article 6/A-k, also aims to address the asymmetric information problem between the gatekeeper and business users to enhance competition in the market through increased transparency. Gatekeepers shall provide if requested, advertisers, publishers, advertising intermediaries, or third parties authorised by advertisers, publishers, or advertising intermediaries with free and complete information on the visibility and availability of the advertising portfolio including pricing conditions, auction process, and price determination principles regarding the bids

submitted and the fee paid to the publisher for the relevant advertising services. The gatekeepers will also be under the obligation to provide access to advertising verification and performance measurement tools and the necessary data, including aggregated and non-aggregated data, to independently verify their own advertising inventories. This provision ensures that advertisers, publishers, and advertising intermediaries have access to sufficient information on the fundamentals of the advertising process. This in turn will help advertisers and publishers to make informed choices regarding advertising suppliers. Similar provisions are included under Article 5(9), 5(10) and 6(8) of the DMA.

> *"(m) It shall provide fair, reasonable, and non-discriminatory conditions for business users in terms of access to its online intermediation services, online search engines, and online social networking services."*

This provision is applicable to those acting as gatekeepers, providing any of the online intermediation, online search engines and online social networking services. The objective of this prohibition is to prevent gatekeepers from discriminating among business users in terms of business users' access to online intermediation, online search engines, and online social networking services. The quasi-indispensable gateway role of gatekeepers for business users in reaching end-users gives rise to an asymmetric bargaining power dynamic between gatekeepers and business users. Such an imbalance in bargaining power may result in unfair commercial conditions for business users. Thus, the prohibitions in question aim to prevent negative consequences on consumer welfare, such as restriction of end-user preferences and choices, decrease in quality and innovation, and increase in prices, and thus to prevent the effects of increasing entry and growth barriers in favour of gatekeepers, which are the CPS providers, and thus to obtain the benefits expected from fair and competitive markets. The obligations determined within this scope are necessary and proportionate to eliminate the unfairness associated with the practices of the gatekeepers and to ensure the competitiveness of the CPS they offer.

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