Kluwer Competition Law Blog

Turkish DMA: What's in the Package?

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Part II: Procedural Provisions

This blog post is the second in a series of two blog posts. The aim of the series is to provide a brief overview of the ("***Draft Law***", "***Turkish DMA***", "***Draft***" or "***Law***"). In the first blog post, we focused on the general preamble of the Draft together with the details of the prohibitive provisions. In this second blog post, we will focus on the procedural aspects, including gatekeeper designation, determination of gatekeepers' obligations, and potential consequences of violations.

Changes Foreseen in the Draft: Purpose and Scope

The first article of Law No. 4054 on the Protection of Competition ("***Competition Act***") regulates the purpose of the Competition Act which is to prevent agreements, decisions, and practices that prevent, distort, or restrict competition in the markets for goods and services and also to prevent dominant undertakings from abusing their dominant position. Through the amendment, the purpose of preventing the abuse of market power by undertakings that are gatekeepers in terms of core platform services has been added. In addition, the purpose of establishing and maintaining a fair and competitive market structure in the core platform services has also been added to the same article. The preamble of the relevant article underlines the possibility of irreversible competition problems, caused by gatekeepers, arising from the weak competitive power of users of digital services and information asymmetry among the gatekeepers and users.

Geographic Scope

Article 2 of the Competition Act regulates its scope. It is amended by including a provision stating that the prohibited behaviours and the obligations imposed on gatekeepers (regardless of their place of establishment or domicile) providing core platform services to end-users or business users residing or domiciled in the Republic of Türkiye shall also fall within the scope of the Competition Act. As stated in the preamble of the relevant article, with this provision, it is emphasised that the behaviours of digital platforms, the majority of which operate on a global scale, are not headquartered in Türkiye and provide services to users located in Türkiye, will also be within the scope of Competition Act regardless of their place of establishment or place of residence. Although it is possible to reach this conclusion through the *effect theory* under Article 2 of the Competition

Act, the legal certainty on this issue has been increased with the provision added to the Draft.

Definitions

The Draft also includes the definitions of the following concepts: Gatekeeper, End User, Core Platform Service, Online Intermediation Services, Online Search Engine Services, Online Social Networking Services, Video Sharing Platform Services, Number Independent Interpersonal Communication Services, Operating Systems, Internet Browsers, Virtual Assistants, Cloud Computing Services, Online Advertising Services, Business Users and Ancillary Services. The previous version of the Draft also included the definition of non-public data, but this definition was removed from the latest draft.

Prohibition of Double Jeopardy

It further includes a provision aiming to address potential double jeopardy. In the second paragraph of Article 6/A, it is pointed out that the procedures and principles regarding the implementation of Article 6/A will be determined by the communiqué issued by the Turkish Competition Board ("***Board***"). In the following subsection, the Draft Law states that in cases where an administrative fine is applicable as per Article 2 (additional provision) of the Turkish E-commerce Law for the prohibitions and obligations set forth under Article 6/A of the Draft Law, no administrative fine should be applied as per Article 16/3 of Competition Act. This provision does not constitute an obstacle to the imposition of other administrative sanctions determined by the Board as per the Competition Act. However, the Board shall consider the measures implemented within the scope of E-commerce Law in determining other administrative sanctions. Thus, it is clearly acknowledged that no administrative fine will be imposed on the gatekeepers for the same conduct punished as per Article 2 (additional provision) of the E-Commerce Law.

Amendments Foreseen Under the Draft: Procedural Aspects

Article 8/A titled "*Designation of Gatekeepers and Compliance*" of the Draft regulates the designation of gatekeepers, determining the obligations of gatekeepers and also gatekeepers' compliance with the Draft Law. We will review each of these topics below:

Gatekeeper Designation

A gatekeeper is deemed to be a core platform service provider that *(i)* has a certain scale in one or more core platform services, *(ii)* operates with significant influence over access to end-users or over the activities of business users and *(iii)* has (or potentially having) an entrenched and durable position in core platform services. A provider of core platform services exceeding the quantitative thresholds (to be determined by the relevant communiqué), such as annual gross revenues, number of users, etc., is deemed to be an indicator that the undertaking fulfils the above-mentioned conditions. This understanding will be reflected in a communiqué in which the quantitative

thresholds will be determined in detail. Any undertakings exceeding these thresholds must notify the TCA on the presumption that they are gatekeepers. The burden of proof to rebut this presumption will be left to the gatekeeper, and the right to object that it is not a gatekeeper will also be recognised in the same notification.

Undertakings providing core platform services must notify the TCA of the exceedance of the thresholds set out in the communiqué no later than 30 days after the relevant threshold has been exceeded. In this notification, the undertaking shall provide the TCA with the documents showing that the thresholds have been exceeded. The undertaking may also submit its objections, if any, that the undertaking is not a gatekeeper. In this case, the burden of proof lies on the undertaking. If the undertaking argues that it is not a gatekeeper despite exceeding the relevant thresholds, the case handlers assigned to conduct the review are required to conduct the necessary review and provide their written opinion to the undertaking within 60 days of the completion of any requests for information and documents. Within this period, the case handlers will determine whether the undertaking is a gatekeeper and, if so, for which core platform services the undertaking is designated as a gatekeeper.

Even if the quantitative thresholds set by the communiqué are not exceeded, the Board may also make a determination within the framework of qualitative criteria such as network effect, data ownership, vertically integrated and conglomerate structure, economies of scale and scope, lock-in and evolution effect, transition costs, multi-homing, user trends, mergers and acquisitions realized by the undertaking (Article 8/A-7). Therefore, the Board can still designate undertakings not exceeding the thresholds as gatekeepers. Yet, since undertakings not exceeding the thresholds do not have an application, the burden of proof for this designation is on the TCA.

Anecdotally, the Draft Law foresees a different threshold for undertakings falling within the scope of the E-commerce Law. As per the Draft Law, while determining the thresholds in terms of annual gross revenues in the relevant communiqué, the Board shall take the net transaction volume threshold in Article 2/3 (additional provision) of the E-commerce Law for the undertakings falling within the scope of the E-commerce Law. Since the Draft directly refers to the annual gross revenues, for the remaining thresholds (e.g. number of users) the communiqué will be applicable.

Determination of the Obligations of Gatekeepers

The process of gatekeeper designation and determining the obligations is interlinked. The case handlers' written opinion on the designation includes the list of obligations for each core platform service that the gatekeeper provides. The undertaking shall submit its first written defence, if any, regarding its inability to fulfil the specified obligations or its inability to fulfil them within the specified period, together with concrete information and documents, to the TCA within 30 days following the notification of the opinion. The case handlers shall evaluate this defence and prepare an additional written opinion within 60 days and notify the undertaking. The undertaking shall submit its second written defence, if any, to the TCA within 30 days following the notification of the opinion. The Board shall render its final decision within 15 days following the date of receipt of the defence. The period determined by the Board for the fulfilment of the obligations will start to run as of the notification of the final decision.

The Board may, upon request or *ex officio*, revoke, withdraw, or modify its decision in the

following cases: *(i)* the facts on which the decision is based changed due to the rapidly changing nature of the core platform services or the thresholds determined were affected by market developments; *(ii)* undertakings provided incomplete, false or misleading information; or *(iii)* the obligations imposed by the decision were not sufficient to solve the problems in the market. Thus, there is still room for the Board to re-evaluate its decision.

Fulfilment of Obligations by Gatekeepers and the Review of Gatekeeper Status

The gatekeepers will have 6 months to fulfil the obligations imposed, by the Board, among the obligations listed in Article 6/A of the Draft Law. The Board has discretion and may provide a shorter period than 6 months to the gatekeepers to comply with the obligations. (Yet, the European Commission does not have such discretion for the 6 months period regulated under the DMA. As per Article 3(10) of the DMA, the gatekeeper shall comply with the obligations within 6 months after a core platform service has been listed in the designation decision.) The Board's decision will be valid for 3 years and shall be deemed to be valid for another 3 years in case no notification is made to the TCA at the latest 90 days before the expiration of this period. The Draft does not regulate how the obligations will be fulfilled and how undertakings will comply with the obligations. In the earlier versions of the Draft Law, there was a reporting mechanism. Yet, this mechanism was removed from the latest version of the Draft Law.

Termination of the Infringement, On-site Inspections, Sanctions and Commitments

Termination of the Infringement

As per Article 9 of the Draft Law, if the Board determines, upon notification, complaint, or request of the Ministry of Trade or *ex officio,* that Articles 4, 6, 6/A, or 7 of the Draft Law have been infringed, it shall notify the undertaking, through its final decision, about the behaviour to be performed or avoided for the establishment of competition. The Board also notifies the undertaking concerned that the structural measures to be taken by the undertakings are in the form of divesting certain activities or partnership shares or assets. The behavioural and structural measures must be proportionate to the infringement and necessary for the effective termination of the infringement. Structural measures shall only be resorted to if the behavioural measures previously imposed have not yielded results. If the inadequacy of the behavioural measures is determined through the final decision, the undertaking concerned will be provided with at least 6 months to comply with the structural measure.

However, in cases where gatekeepers are found to have violated Article 6/A at least twice in the last five years in respect of the same core platform service, it is not necessary to have a behavioural measure issued with a final decision before a structural measure can be decided in terms of Article 6/A. Moreover, if it is determined that the gatekeepers have infringed Article 6/A at least twice in the last five years in terms of the same core platform service, the Board may prohibit mergers or acquisitions carried out by these undertakings in the digital markets for up to three years (this was five years in earlier drafts) in order to eliminate the damages arising from repeated infringements or to prevent serious or irreparable damages likely to arise.

On-site Inspections

Article 15 of the Competition Act regulates the TCA's authority to conduct inspections. The TCA has the authority to examine undertakings' books, data, and documents and take copies of these documents. Through the amendment, undertakings offering at least one core platform service in Türkiye, regardless of whether they are established in Türkiye or not. These examinations will be conducted by TCA's own staff. In the earlier versions of the draft, there was a provision allowing the use of experts for cases requiring special expertise or technical knowledge. Yet, this was removed from the latest Draft. Apparently, lawmakers expect potential gatekeepers to have an office within the borders of Türkiye where TCA can use its on-site inspection power. Moreover, TCA should be able to access relevant information that would enable it to evaluate whether any of the obligations have been breached. For example, the TCA should be able to review the search algorithms of a search engine or an e-commerce platform to assess whether these undertakings manipulated their search algorithms to favour their own goods or services.

Sanctions

The Draft Law foresees additional sanctions for the infringement of different obligations to be added to the Competition Act.

Firstly, an administrative fine at the rate of 0.1 % of the annual gross revenues of the undertakings will be applied to the undertaking concerned in cases where undertakings,

- Offering at least one core platform service in Türkiye, regardless of whether they are established in Türkiye or not, does not fulfil the technical and administrative requirements that will enable the TCA to use on-site inspection powers,
- Provide incomplete, incorrect, or misleading information or documents in the notification made pursuant to Article 8/A of the Draft Law, or not providing the information or document within the specified period or not providing at all,
- Fail to comply with the notification obligation pursuant to Article 8/A of the Draft Law.

Secondly, in terms of the breach of Article 6/A, an administrative monetary fine of up to 10 % of the undertaking's annual gross revenues could be applied. Moreover, if it is determined that the gatekeepers have violated Article 6/A at least twice in the last five years in terms of the same core platform service, an administrative fine of up to twenty per cent of the annual gross revenue is possible.

Thirdly, article 17 of the Competition Act could also be applicable. If undertakings offering at least one core platform service in Türkiye, regardless of whether they are established in Türkiye or not, do not fulfil the technical and administrative requirements that will enable the TCA to use on the site inspection powers, the Board shall impose an administrative fine for each day at the rate of 0.5 % of the annual gross revenues of the undertaking concerned.

Commitments

As per the new amendments, commitments could also be provided for the infringement of 6/A of

the Draft Law. As per the Draft Law, undertakings may, during an ongoing preliminary investigation or investigation, submit commitments to address problems arising under Articles 4, 6, or 6/A. If the Board is of the opinion that the competition problems can be eliminated through such commitments, the Board may decide not to initiate an investigation or to terminate the ongoing investigation by making these commitments binding for the undertaking concerned.

Comments on the Draft Law

The draft Law is undoubtedly the most important step towards the regulation of digital markets in Türkiye. In essence, the Draft provides the TCA with an additional tool to intervene in the markets. The TCA currently has the authority to intervene against anti-competitive agreements between undertakings (Article 4), abuse of dominant positions by dominant players (Article 6) and anti-competitive concentrations (Article 7). Through the amendments, the TCA will have the power to intervene in cases where gatekeepers abuse their gatekeeper power in core platform services. However, this addition has been introduced as an alternative to abuse of a dominant position by labelling it as abuse of gatekeeper power, and the Board has been provided with an additional tool. Since the process for the gatekeeper designation and its obligations under Article 8/A of the Draft is based on the application of the undertaking and the subsequent determination of the prohibitions and obligations by the Board, it can be said that Article 6/A will apply with priority, at least for violations falling within the scope of both Article 6 of Competition Act and Article 6/A. For example, self-preferencing behaviour of dominant undertakings constitutes an abuse under Article 6 of the Competition Act. Self-preferencing is also listed under Article 6/A of the Draft Law among the ex-ante prohibitions. Thus, if an undertaking (which is both dominant and also meets the gatekeeper criteria) conducts a self-preferencing behaviour, in theory, such behaviour could be punished under Article 6 and Article 6/A. Yet, we expect the TCA to apply Article 6/A with priority and punish (if necessary) solely for the infringement of Article 6/A. The ease of proof regarding the prohibitions under Article 6/A, de facto, already motivates the Board to apply Article 6/A as in such case the Board will not have to define a relevant market or determine the dominance

All in all, the Draft is a scientific and well-founded piece of (draft) legislation. Looking at both the procedural and substantive provisions, it is easy to see that they are largely in line with those of the DMA and the German Competition Act. However, there are issues that may be addressed before the Draft is enacted.

Firstly, the Draft does not specify the procedure to be followed in the event of a potential infringement of the *ex-ante* prohibitions. The earlier version of the Draft included a reference to the ordinary investigation procedure under the Competition Act, yet this has been removed. While agreeing to the removal of such reference, we believe that leaving this issue completely blank is extremely risky in terms of legal certainty.

Secondly, regarding the issue of administrative fines to be imposed for the infringements of *ex-ante* prohibitions, there is a discrepancy between the current enforcement system of the Competition Act and the proposed amendments. Specifically, if the Board, by using the interim measure tool, imposes an obligation on undertakings to refrain from or to engage in a certain behaviour, the consequence of the violation is a daily fine calculated based on the turnover. For example, if the

Board orders an undertaking to refrain from data combining and the undertaking still carries on such behaviour, an administrative fine for each day at the rate of 0.5 % of the annual gross revenues of the undertaking will be applied. Besides, there is no upper limit for such an application. In 20 days, it will be 1%, in 200 days it will be 10% in 1000 days it will be 50% of the annual gross revenue. So, basically, not following the Board's order is a daily monetary fine without any upper limit and it is quite a deterrent for undertakings. In the context of the sanctioning mechanism, this situation contains an important contradiction. It is our view that the consequence of violating the ex-ante prohibitions; rather, we have reservations about this controversy and believe that it should be reviewed. To be more precise, if the Board orders a dominant e-commerce platform to refrain from self-preferencing and yet the platform still carries on such behaviour, the daily fine of 0.5 % (without any upper limit) will be applied. Yet, if the Board designates the very same undertaking as a gatekeeper and includes the self-preferencing behaviour among the list of the obligations to be applied to the gatekeeper, the upper limit of the fine will be 10% (besides the Board never goes up 10%). So, basically, being designated as a gatekeeper perhaps, in some cases, will provide a safe harbour for certain undertakings. And we believe this is not in line with a proper sanctioning mechanism.

Thirdly, the Draft introduces several obligations and prohibitions, many of which can be evaluated within the framework of a leveraging theory of harm. However, the absence of any criteria for the market to which market power is leveraged precludes the possibility of identifying any positive effects that may result from such behaviours in the market. It is necessary to establish quantitative criteria, as in the DMA, for the markets to which market power is leveraged. For example, as per Article 5(8) of DMA, the gatekeeper shall not require users to subscribe to, or register with, any further core platform services listed in the designation decision pursuant to Article 3(9) or which meet the thresholds in Article 3(2), point (b), as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services listed in that Article. Thus, the DMA requires a quantitative criterion for the markets where the market power is leveraged. A similar approach should also be adopted under Draft Law.

The Turkish DMA is expected to be discussed in the Turkish Parliament in late 2024 and may therefore subject to further amendments during the enactment process. In the previous drafts, most of the criticism from academics and market participants has been reflected in the latest Draft. It remains to be seen whether the above criticisms will be reflected in the version that will be submitted to the Parliament. I believe that heated debates will arise during the preparation of the supplementary legislation. At that point, the TCA will have to bring together all the parties affected by the Turkish DMA and determine, considering different business models, the relevant thresholds accordingly. This will undoubtedly increase the TCA's workload considerably. However, TCA has the institutional capacity to handle the increased workload.

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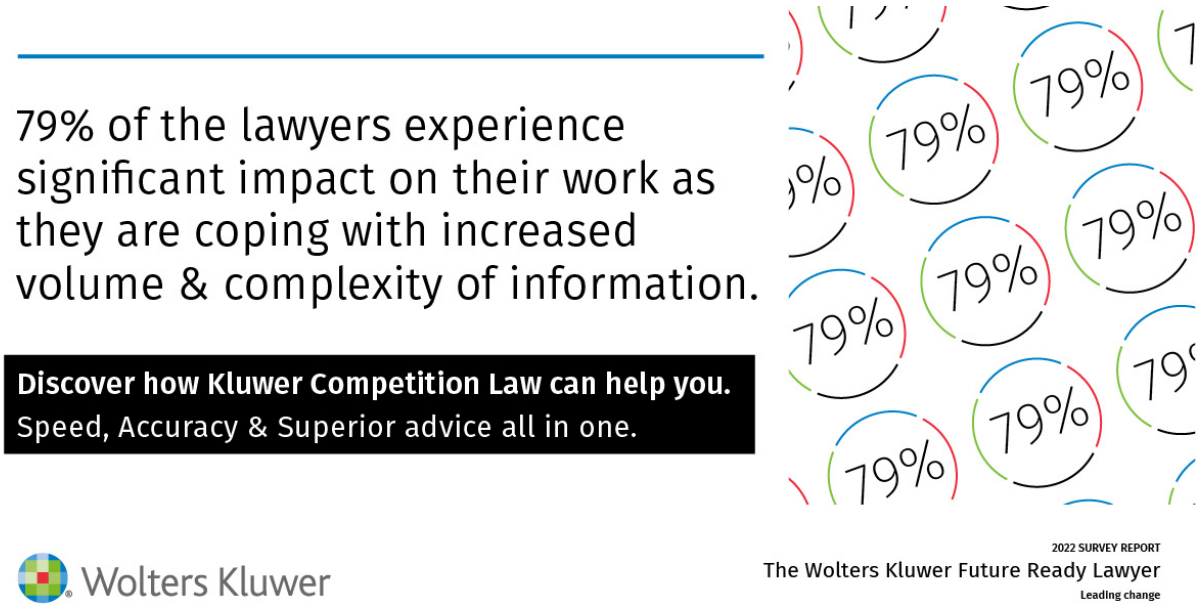

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