Competition in Digital Markets 2022

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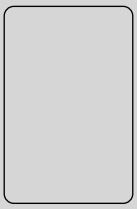

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Herbert Smith Freehills LLP

Lexology Getting The Deal Through is delighted to publish the first edition of *Competition in Digital Markets*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Turkey

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LEGAL AND REGULATORY FRAMEWORK

Legislation

1 | What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

There is no primary legislation specific to competition in digital markets in Turkey. The primary competition legislation in Turkey isLaw No. 4,054 on Protection of Competition (Law No. 4054) and this law applies to competition in each and every market, including digital markets. There are no special rules or exemptions with respect to competition in digital markets in Turkey.

Enforcement authorities

2 | Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The Turkish Competition Authority (the Authority) enforces antitrust rules in Turkey's digital markets. Although there is not a digital markets unit, the Authority operates with several different supervision and enforcement departments, all of which are dedicated to specific sectors. Although none are dedicated specifically to digital markets, Supervision and Enforcement Department I oversees information and communications technology and services and media and advertising services, which broadly relate to digital markets.

Regulatory guidelines

3 | Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

The Authority has not yet issued dedicated secondary legislation (ie, regulation, communiqué or guideline) on the application of competition law rules in digital sectors. However, the Authority initiated a sector inquiry into digital markets. At the beginning of 2020, the Authority started preparatory work for its 'Digitalisation and Competition Policy Report' to set the policies to be implemented in the digital sector in the future. At the time of writing, the Authority is at the stage of requesting and receiving information from the players in digital markets.

The Authority also initiated a sector inquiry into e-marketplace platforms last year. The Authority published a preliminary report on the sector inquiry on e-marketplace platforms on 7 May 2021, and a workshop was made with the participation of all stakeholders including representatives of e-marketplace platforms and sellers on 6 July 2021. The stakeholders are invited to provide the Authority with their comments on the preliminary report by 9 July 2021.

In 2017, the Authority also published a sectoral report titled 'Television Broadcasting Sector within the Context of Digitalisation and Convergence'. With a special focus on the television broadcasting sector, this previous report also aimed to guide the implementation of competition law in the relevant sector within the framework of digitalisation dynamics.

Advisory reports

4 | Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

The Authority has started to prepare the advisory reports on digital markets. The Authority published an announcement that it had started work on a digitalisation and competition policy report at the beginning of 2020. The Authority says it aims to 'approach business models that are at the focus of consumer-friendly innovations with greater sensitivity while shaping the competition policies of the future'. The Authority plans to consider what should be the main purpose or purposes of competition in the digital age and also how the competition rules to be applied to digital platforms will be shaped.

The Authority also announced that it has initiated a sector inquiry into e-marketplace platforms. The Competition Board (the Board) decided to initiate the 'E-marketplace Platforms Sector Inquiry' (the Inquiry) in order to enable the new economy to have a healthy competitive structure by taking into account the (possible) competitive and anticompetitive effects of e-marketplaces. In order to ensure maximum participation and depth of data in the Inquiry, the Authority aims to consult the knowledge not only of e-marketplaces but also consumers that shop through these platforms as well as suppliers that conduct product sales and associations of undertakings that represent such suppliers. After its inquiry of almost a year, the Authority published a preliminary report on the sector inquiry on e-marketplace platforms on 7 May 2021, and a workshop was made with the participation of all stakeholders including representatives of e-marketplace platforms and sellers on 6 July 2021. The preliminary report contains certain determinations on the e-commerce sector with the focus on business models and applications of e-marketplaces along with their competitive and anticompetitive effects; and also suggests possible solutions as policy changes and regulations. The stakeholders were invited to provide the Authority with their comments on the preliminary report by 9 July 2021. The Authority plans to finalise the report and policy proposals, taking into account the public opinions regarding the findings, evaluations and policy proposals of the preliminary report.

In 2017, the Authority also published a sectoral report named 'Television Broadcasting Sector within the Context of Digitalisation and Convergence'. With a special focus on the television broadcasting sector, this previous report also aimed to guide the implementation of competition law in the relevant sector within the framework of digitalisation dynamics.

Advance compliance guidance

5 Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

The Turkish competition law regime does not adopt any system to provide advance guidance on competition law compliance. There is an *ex post* review mechanism called individual exemption for agreements, concerted practices and decisions. Parties to an agreement, concerted practice or decision have the ability to do a self-assessment to see if the conditions of individual exemption are met, so notifying for individual exemption is not a positive duty but an option to obtain legal certainty. The Authority would not carry out an ex ante review under an individual exemption filing and this option is not available for unilateral conduct such as pricing.

Regulatory climate and enforcement practice

6 How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

The Turkish government has adopted certain tailor-made economic agendas and policy choices in order to address the new economy's challenges. The Turkish government's 10th Development Plan (Plan) (2014–2018) shows that the government has included the goal of increasing its innovation capacities as a development priority in its Plan. These goals were listed as agenda priorities within Turkey's science and innovation enforcement policies to create an innovation-enabling environment. In this regard, the Turkish government has clearly and visibly recognised the importance of increasing investments in R&D and innovation activities.

The Authority closely follows the recent national and international developments in the digital economy sector. The Authority announced that it aims to approach business models that are at the focus of consumer-friendly innovations with greater sensitivity. The Authority accepted in its announcement on e-marketplace platforms that e-marketplaces dissociate from traditional markets due to the operation and effects of their platform economy. The TCA's preliminary report on the sector inquiry regarding e-marketplace platforms indicates that 'digital platforms become the main gateway to reach markets and customers' and provided that 'The characteristics of e-marketplaces arising from the platform economy that differs from traditional markets as well as the business models they adopt make it difficult to understand how competition works in this area.' Similarly, the Board finds that the digital sector has different competitive dynamics and thus has a different and more complex structure and operation as compared to provisions of a traditional legislative landscape.

The Authority's intention to put the digital economy, including big tech platforms, under scrutiny in the near future can also be observed from its enforcement track record in recent years concerning platforms (*Google Local Search*,8 April 2021, 21-20/248-105;*Facebook interim measures decision*, 11 January 2021, 21-02/25-10; *Google Search and AdWords*, 12 November 2020, 20-49/675-295;*Google Shopping,* 13 February 2020, 20-10/119-69; *Sahibinden,* 1 October 2018, 18-36/584-285; *GoogleAndroid*, 19 September 2018, 18-33/555-273; and *Çiçek Sepeti*, 8 March 2018, 18-07/111-58).

HORIZONTAL AGREEMENTS

Special rules and exemptions

7 Do any special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets in your jurisdiction?

There are no specific rules that apply to horizontal agreements in digital markets. However, the Guidelines on Horizontal Cooperation will also apply to any horizontal agreements in digital markets as well.

Access to online platforms

8 How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

There are no decisions where the Board addressed horizontal agreements that bring restrictions on access to online platforms.

Algorithms

9 Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

The Authority's decisional practice does not yet include a detailed assessment over the use of algorithms within the sphere of anticompetitive agreements. Therefore, it is not possible to say that the Authority expressly addressed the question of whether there can be an agreement where algorithms coordinate pricing with no human input. The use of algorithms and, in particular, algorithm updates, has so far been tested from the perspective of abuse of dominance theories. In *Google Search and AdWords*(12 November 2020, 20-49/675-295), the Board found no violation on Google's part concerning algorithm updates.

Data collection and sharing

10 Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

While there are no precedents specific to the digital sector as yet, the Turkish competition law regime does recognise and condemn 'hub and spoke' information exchanges. The Authority examines marketplace and sellers' tendency to hub and spoke cartels in digital markets in its preliminary report on the sector inquiry regarding e-marketplace platforms.

Other issues

11 Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

No.

VERTICAL AGREEMENTS

Special rules and exemptions

12 Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

There are no specific rules that apply to vertical agreements in digital markets. The generally applicable Block Exemption Communiqué No.

2002/2 on Vertical Agreements (Communiqué No. 2002/2, the Guidelines on Vertical Agreements (the Guidelines)) will also apply to any vertical agreements in digital markets. In fact, in order to meet the needs of the evolving digital sector and to align with the European Union, on 30 March 2020, the Authority revised the Guidelines and introduced new provisions with regard to online sales and MFN clauses.

Online sales bans

13 | How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

According to the Guidelines, online sales are generally considered as passive sales and cannot be restricted. The Guidelines however introduce some exemptions where restrictions to online sales can benefit from the protective cloak of the block exemption. For instance, particularly in the selective distribution system, suppliers may impose quality conditions for the online sales channels. Furthermore, if there is an objective reason concerning the product (eg, dangerous chemical materials) suppliers may prevent online sales due to safety or health concerns. In order to benefit from the protective cloak, these conditions and restrictions must be objective, fair and reasonable and should not directly or indirectly lead to the prevention of online sales. Having said that, the decisional practice of the Board demonstrates the Board strictly approaches the restrictions to online sales and considers online sales as passive sales, which cannot be restricted (*Jotun*, 15 August 2018, 18-05/74-40). Accordingly, in *Baymak* (26 March 2020, 20-16/232-113) the Board deemed an absolute restriction on internet sales covering both individual websites of the distributors and third-party platforms as a violation of article 4 of Law No. 4054. In *Yataş* (06 February 2020, 20-08/83-50), the Board decided that the online sales are passive sales and the restriction of passive sales may not benefit from block exemption under Communiqué No. 2002/2.

Resale price maintenance

14 | How has the competition authority in your jurisdiction addressed online resale price maintenance?

Pursuant to Communiqué No. 2002/2, vertical agreements of undertakings with market shares that exceed 40 per cent cannot benefit from the block exemption. However, Communiqué No. 2002/2 does not bring an exemption for agreements that directly or indirectly restrict the buyer's ability and freedom to determine its own resale prices and considers them hardcore restrictions.

In the *Sony* decision of 22 November 2018, 18-44/703-345, the Board decided that Sony had (1) monitored the price levels in online platforms; (2) expected compliance with its recommended resale prices; and (3) had the ability to threaten the distributors with withholding incentive payments in case of non-compliance. The Board decided that the said conduct of Sony had restricted the distributors' ability to autonomously determine their online prices. Accordingly, the Board concluded that Sony had violated article 4 of Law No. 4,054 by determining the resale prices of its online retailers and it imposed an administrative fine of 2,346,618.62 Turkish lira.

Geoblocking and territorial restrictions

15 | How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

There is no specific rule or case law concerning restrictions on online sales to customers in other countries. Pursuant to article 4 of Communiqué No. 2002/2, restrictions requiring the buyer not to sell the products or services in certain territories or to certain customers may violate competition laws. However, there are exceptions to this rule. For instance, the supplier may prevent the buyer from active sales to an exclusive territory or to customers allocated to the supplier or another buyer. Furthermore, in a selective distribution system, the buyer may prevent its authorised distributors from making sales to unauthorised distributors. However, restriction of passive sales to exclusive territories or customers cannot benefit from the protective cloak of the block exemption. In any event, the jurisdiction of the Authority is limited to transactions that produce an impact on Turkish markets so, as a general rule, restrictions on sales to customers in other countries should not be caught by the article 4 prohibition.

Platform bans

16 | How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

According to the Guidelines on Vertical Agreements, which were updated on 30 March 2018, online sales are generally considered passive sales and cannot be restricted. In many decisions, the Board considered online platform bans as anticompetitive and analysed the cases accordingly (eg, *Baymak* (26 March 2020, 20-16/232-113); *Yataş* (6 February 2020, 20-08/83-50); and *Marks & Spencer* (11 April 2019, 19-15/208-93).

Targeted online advertising

17 | How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

The Board decided in *Google AdWords* decision that it is not possible or appropriate to find a violation on Google's display of third parties' text ads considering that these practices have aspects that increase competition (*Google Adwords*, 12 November 2020, 20-49/675-295). Similarly, in *Çiçeksepeti* decision, the Board did not consider the display of third party websites' text ads for branded queries to fall under the Law on 4054 (8 March 2018, 18-07/111-58).

The Board closed a pre-investigation launched against Google concerning the allegation that Google's bidding mechanism restrained competition between e-commerce sites. The Competition Board decided that there was no need to initiate a full-fledged investigation as the allegations did not reflect the truth (*Google e-commerce*, 7 November 2019, 19-38/575-243).

Most-favoured-nation clauses

18 | How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

The Guidelines, which were updated on 30 March 2018, recognise the pro-competitive nature of MFN clauses and adopt a 'rule of reason' approach to the analysis of anticompetitive effects of these clauses. The relevant guidelines provide that in the analysis of these clauses, (1) the relevant undertakings' and their competitors' positions in the relevant market; (2) the object of the MFN clause in the relevant agreement; and (3) the specific characteristics of the market, should be taken into consideration. An MFN clause may benefit from the block exemption, provided that the market share of the beneficiary of the relevant MFN clause does not exceed 40 per cent, together with other conditions as set forth under Communiqué No. 2002/2. The evaluation of MFN clauses in the traditional markets differs from those in the online platforms. For example, while the party that is the beneficiary of the clause is the buyer in the traditional markets, whether it is a supplier, buyer or intermediary in the online platform markets depending on the relevant product

market. Therefore, Communiqué No. 2002/2 does not provide any indication as to which party's market share should be taken into account.

The *Booking.com* decision (5 January 2017, 17-01/12-4) sets a landmark precedent that concerns the application of MFN clauses in online markets under the Turkish competition law regime. The case handlers claimed that the provisions related to the price and availability parity clause as well as the best price guarantee (broad MFN clauses) contained within the agreements executed between Booking.com and the accommodation providers, having the effect of restricting competition within the meaning of article 4 of Law No. 4,054. The Board decided that such clauses:

- foreclose the market to the competitors and reduce the competition in the market for accommodation reservation services platforms;
- reduce Booking.com's competitors' incentive to offer lower commission rates to the accommodations that execute broad MFN clauses with Booking.com;
- prevent the application of competitive pressure to the commission rates applied by Booking.com; and
- protect Booking.com from new entrants to the market.

The Board concluded that Booking.com's wide MFN clauses were in violation of article 4. In *Kitapyurdu* (5 November 2020, 20-48/658-289), the Board held that Kitapyurdu.com's requests for additional discounts and/or access to similar or better discounts and campaigns that are applied to competitors could be deemed as wholesale MFC clauses and considered that such practices would benefit from block exemption as Kitapyurdu.com's market share was below 40 per cent.

Multisided digital markets

19 How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

Vertical agreements falling outside the block exemption are not automatically deemed to be in violation of Law No. 4,054 and the undertakings may plead the efficiencies defence. The cumulative conditions for an individual exemption set out under article 5 of Law No. 4,054 are as follows:

1 he agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2 the agreement must allow consumers a fair share of the resulting benefit;
3 the agreement should not eliminate competition in a significant part of the relevant market; and
4 the agreement should not restrict competition by more than what is necessary for achieving the goals set out in (1) and (2).

The Board takes into account potential efficiencies or benefits for consumers to decide whether a restrictive agreement could benefit from an individual exemption. Restrictions should not be more than what is necessary to reach efficiencies and benefits, and the agreement should not eliminate competition in a significant part of the relevant market. The Guidelines on Vertical Agreements do not refer to any specific defences in addition to the 'efficiency defence'. Therefore, possible defence scenarios would heavily depend upon case-specific parameters.

In *Travel Agents* (25 October 2018, 18-40/645-315) and *Kitapyurdu* (5 November 2020, 20-48/658-289), the Board indicated that the relevant agreements or practices that included MFN clauses benefitted from block exemption.

Other issues

20 Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

No.

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

21 What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

Turkish competition law does not have separate dedicated criteria for establishing market power in digital markets. Under Turkish competition law, the market share of an undertaking is the primary point for evaluating its position in the market. In terms of unilateral conduct, dominance in a market is the primary condition for the application of the prohibition stipulated in article 6 of Law No. 4,054. Subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant. Although the Board considers a large market share as the most indicative factor in assessing dominance, the Board also takes account of other factors, such as legal or economic barriers to entry, and the portfolio power and financial power of the incumbent firm.

As well as an online platform's market share, the Board would take into account network effects, entry barriers, innovation as well as the multisided aspects of the relevant activities. All in all, the Board's dominance analysis is still similar to its analyses in brick and mortar markets.

Abuse of market power

22 To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

Article 6 of Law 4,054 regulates abuse of dominance which does not define 'abuse' per se, but does provide a non-exhaustive list of specific forms of abuse. Pursuant to article 6 of Law No. 4,054, the abusive exploitation of a dominant market position is prohibited in general. These examples are as follows:

- directly or indirectly preventing entry into the market or hindering competitor activity in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
- making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions, such as:
  - the purchase of other goods and services;
  - acceptance by intermediary purchasers of the display of other goods and services; or
  - maintenance of a minimum resale price; and
- distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and e limiting production, markets or technical development to the prejudice of consumers.

As Turkish competition law does not define what constitutes an abuse of dominance online, the abovementioned conduct is also applicable to the online space.

Data access

23 How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

The Turkish competition law regime does not precisely address concerns surrounding access to data held by companies with market power in digital markets.

The Authority acknowledged the difficulties in determining the scope of effect and establishing competition violations based on big data. The Authority stated that conventional practices and approaches would clearly prove insufficient to handle issues in the digital market.

In the Turkish insurance case decision of 27 September 2017 (Case No. 17-30/500-219), the Board stated that small insurance companies will have similar advantages by accessing the big data of big companies and this will increase economic efficiency. As a result, the Board granted individual exemption.

Data collection

24 How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

The Turkish competition law regime does not precisely address the collection of data by companies with market power in digital markets. That said, recently, the Board has launched an ex-officio investigation against Facebook and WhatsApp to determine whether the obligation to share data imposed on the WhatsApp users violates article 6 of Law No. 4054. The Board stated that the update in the privacy policy would enable Facebook to collect, process, and use more data.The Board emphasised the scope and significance of WhatsApp data in its decision and also takes an interim measure requiring Facebook to cease the execution of the new privacy policy and notify all of its users regardless of whether they gave the relevant consent or not (11 January 2021, 21-02/25-10). The Board's concerns that utilisation of the WhatsApp data in other markets that Facebook operates in and imposing this as mandatory for using WhatsApp are as follows:

- tying WhatsApp data to other Facebook company products and data;
- Facebook using its power in consumer communication services market to restrict the operations of its competitors in online advertisements; and
- possibility of consumer exploitation as a result of over-collection of data and utilisation of said data for other services.

In the preliminary report on the sector inquiry on e-marketplace platforms, the Authority states that data becomes the currency used in digital markets and emphasises that data collected by marketplaces can constitute an important competitive asset. The Authority indicates in the same report that the customer data that platforms collect increases, they can both develop their marketing strategies by estimating customers preferences more accurately and make advertisements for customers in a more targeted way.

Leveraging market power

25 Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

Yes. The Board's fining *Google Shopping* decision of 13 February 2020 (Case No. 20-10/119-69) concerned the allegation that Google put rival shopping comparison services (CSS) in a disadvantageous position as a result of its Shopping Unit, to which rival CSSs do not have access. The Board states that Google has a dominant position in general search and leverages this dominant position in shopping comparison services. In a similar way, in the *Google Android* decision, the Board determined that Google obtained advantages in terms of economies of scale with Android operating system and mobile applications distribution, and Google allegedly leveraged those economies of scale in a different part of the market, namely with regard to its advertising services.

Other theories of harm

26 What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

In *Yemek Sepeti* (9 June 2016, 16-20/347-156), the Board found that the restaurants that Yemek Sepeti approached regarding the most favoured customer clause had generally preferred to cease providing discounts on other platforms and had in some cases left competitor platforms. As a result, the Board concluded that Yemek Sepeti's most favoured customer practices had harmed other platforms and hindered the ability of competitors to offer different products and services. The Board further decided that preventing restaurants from offering better or different conditions to rival platforms through MFN practices leads to exclusionary effects and is thus an abuse of dominant position.

In *Sahibinden*, the Board concluded that Sahibinden.com abused its dominant position through applying excessive prices in these markets and imposed a monetary fine against Sahibinden.com in the amount of 10,680,425.98 Turkish lira (2 May 2019, 19-17/239-108) (the Ankara 6th Administrative Court recently annulled this decision stating that the decision failed to meet the standard of proof (E.2019/946 K.2019/2625). The Board also initiated a full-fledged investigation against Biletix.com (a Turkish subsidiary of Ticketmaster) to analyse the allegations that Biletix applies excessive pricing to consumers (22 July 2019, 19-22/341-M). The allegations include that Biletix added extra costs to tickets it sells under the categories of service cost, transaction cost and cargo cost and via exclusive agreements it has signed with organisers. The investigation is ongoing.

The Board in *Facebook interim measures decision* considered the market power of Facebook in (1) consumer communication services, (2) social network services and (3) online advertisement services market and decided that Facebook's data sharing requirement imposed upon WhatsApp userscould lead to serious and irreparable damages until a final decision to be rendered at the end of an investigation due to the concern that Facebook can use its power in consumer communication services market to restrict the operations of its competitors in online advertisement (11 January 2021, 21-02/25-10).This is the first time the Authority has taken a dive into the interface between data protection and competition law, and they have assumed jurisdiction over the matter in, leading to the use of an interim measure on consent procedures. It is now clear that as far as the Turkish jurisdiction is concerned the Authority will be involved in highly visible data protection matters, to the extent they assume the existence of a competition law angle in the matter.

MERGER CONTROL

Merger control framework

27 How is the merger control framework applied to digital markets in your jurisdiction?

Article 7 of Law No. 4,054 governs mergers and acquisitions and the principal regulation on merger control is the Competition Law and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. There are no special rules or specific thresholds to be applied to digital markets.

Other authorities may get involved in the review of mergers in certain sectors. For example, the Authority is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers that concern the telecommunication sector, and of the Turkish Energy Markets Regulatory Authority in energy mergers.

Prohibited mergers

28 | Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

No.

Market definition

29 | How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

The Board has not eschewed adopting new market definitions for digital markets when necessary and based on the specific features of each case that it assesses. The Board has generally shown a tendency to introduce separate market definitions for online and offline services which provide the same goods and services. For example, the Board separated the electronic and physical sale of event tickets by defining the relevant product market as 'intermediary services for the electronic sale of event tickets over a platform' in the *Biletix* case (11 November 2013, 13-61/851-359), which involved one of the largest companies for ticket sales and distribution for various cultural, musical and sports events in Turkey. The Board decided that there was a distinction between brick and mortar retailers and online florist services in the *Çiçek Sepeti* decision (16 December 2010, 10-78/1623-623) which concerned an online platform for flower sales. The Board defined the relevant product market as 'online flower sale services'. In *Yemek Sepeti* (9 June 2016, 16-20/347-156) and *Booking.com* (5 January 2017, 17-01/12-4), the Board distinguished and separated the online and offline sales channels since online sales channels' offers are not similarly available or accessible in the offline sales channels.

The Board consistently defines the relevant geographical market as Turkey, without further segmentation on the basis of different regions of the country. Indeed, the abovementioned decisions define the geographic market as Turkey. Only the *Yemek Sepeti* decision (9 June 2016, 16-20/347-156) defines the geographical market as 'each city that Yemek Sepeti is active in' along with Turkey.

'Killer' acquisitions

30 | How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

The Turkish competition law regime employs merger control thresholds based on turnover. Under normal circumstances, Turkish competition law does not cover thresholds of transaction value and market shares to tackle the concerns arising from killer acquisitions in digital sectors. That said, Law No. 4,054 deems mergers and acquisitions that are caught by the SIEC test to be illegal, regardless of the question of whether the relevant turnover thresholds have been exceeded. The jurisdictional thresholds under Communiqué No. 2010/4 act as a filter by excluding some transactions from the notification obligation; as such transactions do not attain a certain economic size. One of the former members of the Board criticised this issue in the dissenting vote reasoned under the Board's *Swedish Match* decision (25 April 2012, 12-22/569-164). Thus, even though killer transactions are not notifiable, they could still be evaluated in accordance with the provisions of Law No. 4,054.

On a related note, the Authority's preliminary report on the sector inquiry regarding e-marketplace platforms suggests that gatekeeper marketplace should file all mergers and acquisitions to the Authority, regardless of the notification thresholds specified in the Communiqué No. 2010/4.

Substantive assessment

31 | What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

Before the amendment of Law No. 4,054 (the Amendment Law), there were no debates about the suitability of merger tools to address digital mergers. The dominance test was applicable to these mergers.

The Amendment Law replaced the previous dominance test with the significant impediment of the effective competition (SIEC) test. With this new test, the Authority will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much the competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions might benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with de minimis impact may also benefit from the new approach. The Board refused to grant approval to the transaction on the grounds that the notified transaction was likely to cause significant impediment of effective competition at the first time in *TIL /Marport* (13 August 2020, 20-37/523-231).

The Turkish merger control regime considers innovation in the assessment of merger. Indeed, Guidelines on the Assessment of Horizontal Mergers and Acquisitions and Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions recognise innovation as a benefit created by competition and a factor for the Board's assessment of mergers. In certain approval decisions of the Board (*Johnson and Johnson/Mentor*, 8 January 2009, 09-01/10-8; *Ticketmaster/Live Nation*, 11 June 2009, 09-27/572-133; *Syngenta/Monsanto's Sunflower Seed Business,* 1 October 2009, 09-43/1097-277; *Atlas Elektronik/Advanced Lithium Systems*, 21 April 2011, 11-25/476-145; *Metair/Mutlu Holding,* 21 November 2013, 13-64/901-381; *Novartis/GlaxoSmithKline Oncology Business*, 4 November 2014, 14-43/796-357; *Apax-Accenture/Duck Creek*, 9 June 2016, 16-20/330-149; and *Linde/Praxair*, 10 October 2017, 17-31/520-224) the parties argued that the transaction would enable them to develop innovative products and encourage innovation in the future. The Board acknowledged in *Cisco Systems/IBM* (2 May 2000, 00-16/160-82) that the transaction would benefit consumers with the development of innovative applications, and therefore concluded that the transaction would not increase the concentration level or significantly lessen competition in the relevant market, despite Cisco's increased post-merger market share.

Remedies

32 | How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

There is not yet any case law concerning remedies in mergers in digital markets.

With the Amendment Law, article 9 now introduces 'first behavioural, then structural remedy' rule also for article 7 violations. The Amendment Law aims to grant the Board the power to order structural remedies for anticompetitive conduct infringing article 7 of Law No. 4,054 as well, provided that behavioural remedies are first applied

and failed. Further, if the Board determines with a final decision that behavioural remedies have failed, undertakings or association of undertakings will be granted at least six months to comply with structural remedies. How the Board will reconcile these two provisions in practice remains to be seen.

Before the Amendment Law, the general approach was that the structural remedies take precedence over behavioural remedies and behavioural remedies can be considered in isolation only if structural remedies are impossible to implement and it is beyond doubt that behavioural remedies are as effective as structural remedies. In order for behavioural remedies to be accepted alone, such remedies must produce results as efficient as divestiture. The behavioural commitments will be re-evaluated by the Board at the end of the three-year period.

UPDATE AND TRENDS

Recent developments and future prospects

33 What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

After rounds of revisions and failed attempts of enactment over a span of several years, the proposal for an amendment to Law No. 4,054 has finally been approved by the Turkish parliament, namely the Grand National Assembly of Turkey. On 16 June 2020, the amendments passed through the parliament and entered into force on 24 June 2020. The newly introduced Amendment Law aims to embody the Authority's more than 20 years of enforcement experience and bring Turkish competition law closer to EU competition law. It is designed to be more compatible with how the law is being applied in practice and aims to further comply with EU competition law. The most prominent changes introduced by the Amendment Law are:

- the de minimis principle for agreements, concerted practices or decisions of association of undertakings;
- the SIEC test for merger and acquisitions;
- behavioural and structural remedies for anticompetitive conduct;
- commitments or settlement mechanisms;
- clarification on the powers of the authority in on-site inspections; and
- clarification on the self-assessment procedure in individual exemption mechanism.

The Authority's secondary legislation is expected to shed some light on the implementation of these changes. These changes, especially the SIEC test, would be important in the enforcement of competition law in digital markets, since the current dominance test is replaced with the SIEC test.

The Authority is working on the Digitalisation and Competition Policy Report, which aims to enlighten the competition policies that it will be implementing in the future. The Authority acknowledged the difficulties of determining the scope of effect and establishing competition violations based on big data and algorithms. The Authority stated that conventional practices and approaches would clearly prove insufficient to handle issues in the digital market. In this scope, closely following the digital economy and potential competition violations that platforms may commit, the Board included new duties concerning digital economy into the work description of the Presidency of Strategy Development Department to ensure that the Authority is in a position to move proactively. These developments show that the Authority could change its enforcement policies concerning digital markets in the future. The Authority also published a preliminary report on the Sector Inquiry regarding e-marketplace platforms on 7 May 2021.

As a result of the full-fledged Android investigation against Google, the Board decided that Google abused its dominant position through some of its agreements executed with device manufacturers and imposed certain remedies on Google in its *Android* decision of 19 September 2018 (18-33/555-273). The Board initially decided that Google did not comply with the remedies imposed in the *Android* decision. Google implemented the additional measures and the Board finally decided that Google was compliant with the remedies set out in the *Android* decision of 9 January 2020 (20-03/30-13).

As a result of the full-fledged *Shopping* investigation against Google, the Board decided that Google abused its dominant position through its display of the Shopping Unit in its general search results in its *Shopping* decision of 13 February 2020 (20-10/119-69). The Board imposed an administrative monetary fine of 98,354,027.39 Turkish liras.

As a result of the full-fledged *AdWords* investigation against Google, the Board decided that Google abused its dominant position by way of hindering the activities of organic results -through which Google does not generate any ad revenues- in the content services market, by showing text ads at the top of general search results, in a manner that the ad characteristic is uncertain, and extensively (12 November 2020, 20-49/675-295). The Board imposed an administrative monetary fine of 196,708,054.78 liras.

As a result of the full-fledged *Local Search* investigation against Google, the Board decided that Google abused its dominant position by way of restricting competition in the markets for local search services and accommodation price comparison services through hindering activities of its rivals by way of preventing local search services from accessing the Local Unit and providing advantages to Google's own local search and accommodation price comparison services as compared to its rivals, in terms of position and display on the general search result page (8 April 2021, 21-20/248-105). The Board imposed an administrative monetary fine of 296,084,899.49 liras.

The Board launched a preliminary investigation against Google (11 April 2019, 19-15/209-M) for the purpose of reviewing Google's commercial approach to and relationship with e-commerce companies. The allegations that Google's tender mechanism regarding the display of e-commerce companies' ads on Google Shopping Unit led to the foreclosure of this area by a single undertaking through high fees, and this hindered the competitive landscape of the market against consumers through reducing the visibility of the e-commerce companies in Shopping Unit. Pursuant to the pre-investigation against Google, the Board decided not to launch a full-fledged investigation against Google (7 November, 19-38/575-243).

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