



***The Unstoppable Rise of Fintech and the Competing Efforts of Authorities to Catch Up:  
The Turkish Competition Authority published its Analysis Report on Fintech***

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On December 9, 2021, the Turkish Competition Authority (“**Authority**”) published its report entitled “Analysis Report on the Financial Technologies in Payment Services” (“**Report**”) which evaluates the effect of the use of financial technologies (“**Fintech**”) in the financial sector, the obstacles to innovation and competition in the relevant markets and the entry of big technology (“**Big Tech**”) companies (e.g., Facebook, Amazon, Google, Apple) into the market. The Report notes that Fintech includes: (i) innovative products and services that emerged in the financial sector as a result of the radical technological transformation, (ii) new entrants other than the incumbent players that offer these services, and (iii) Big Tech companies which started to offer financial services.

The Report states that its findings reflect the analysis of the information collected from 45 undertakings/undertaking associations and 7 public authorities. Accordingly, the stakeholders include banks, Fintech companies, technology companies, e-commerce marketplaces and various professional associations. It also notes that although the findings mainly relate to the Fintech revolution in payment services, they are also applicable to other Fintech developments such as crowd-funding and crypto-currency to the extent that they are relevant.

The Report first explains the reasons for the emergence of Fintech and their effects on the financial sector, then evaluates the difficulties faced by the new players in promoting their products and services and the obstacles to innovation and competition in the market and subsequently analyses the potential consequences of the entry of Big Tech companies into the market.

**I. The Reasons for the Emergence of Fintech**

The Report provides that (i) digitalization and differentiated service expectation, (ii) the problems associated with the conventional banking system and the existence of an unbanked population,<sup>1</sup> and (iii) the impact of the customer portfolio are the factors that contribute to the emergence and the development of Fintech.

Accordingly, the Report notes that technological developments related to the banking and payment services such as digital identity verification and electronic contracts provide flexibility to undertakings offering financial services and enhances innovative product creation and supply in the market. Moreover, Fintech companies generally provide limited and specialized services - which enable them to produce fast and appropriate solutions meeting different demands of the consumers. All in all, the relevant trend sets the digitalization and differentiated service expectation in the market.

Regarding the conventional banking system, the Report states that the previous 2007-2008 crisis in the banking sector has led to the tightening of the regulations and risk aversion by banks, and, as a result of this, the banking products and services on offer have remained limited. According to the Report, the unbanked population is due to those tight regulations put in place to protect consumers and avoid risks in order to maintain financial stability.

As for the impact of consumer portfolio, the Report notes that Big Tech companies can, and accordingly, have started to offer their existing services along with financial services as a one stop shop to their users.

The Report also reviews statistics on the development of Fintech and notes that as of the first five months of 2021, the majority (505 out of 589) of all Fintech startups established in Turkey are still active in the sector.

## **II. Obstacles to Fintech Development and Challenges For New Players**

The Report finds that there are three main obstacles to Fintech development: (i) exclusionary actions of incumbent undertakings, (ii) problems associated with the regulations and (iii) problems stemming from the market structure.

### **1. Exclusionary Actions of Incumbent Undertakings**

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<sup>1</sup> Defined as “the population without an account at a financial institution or through a mobile money provider” by the World Bank. Accessed via <https://globalfindex.worldbank.org/> on January 4, 2022.

The Report notes that some strategies adopted by incumbent undertakings against Fintech companies may fall under the radar of competition law. These can be (i) unilateral conduct of an incumbent undertaking, (ii) anti-competitive agreements and concerted practices between incumbent firms and (iii) killer acquisitions.

#### **(a) Unilateral Actions**

The Report notes that pursuant to the Article 6 of the Law No. 4054 on the Protection of Competition (“*Law No. 4054*”), certain actions of dominant incumbent undertakings may be considered as abuse of dominance.

Generally speaking, for an analysis under Article 6 of the Law No. 4054, the relevant market should be defined. Accordingly, the Report notes defining dynamic markets may be difficult, since considering, among others, that (i) new entrants can reach a significant market share in a short time with innovations, (ii) it is difficult to reveal the supply-demand relationship because of the network externalities and multi-sided market structure, (iii) there is not only "competition in the market" but also "competition for the market" as the developing technology leads to radical changes in the products and services that eventually change the market. Accordingly, the Report underlines sensitivities with market definition and notes that a broader or a narrower market definition may lead to wrongful interventions.

Usually, subsequent to the determination of the relevant market a dominant position analysis is made. In this respect, the Report states that considering the number of institutions holding banking licenses in Turkey and the market shares of these institutions, no single or joint dominant position could be considered for the operation of the banking infrastructures. However, it also notes, by referring to the findings of the Authority for Consumers & Markets (in Netherlands), that each bank may be considered to hold a dominant position in terms of owning its own customer data since, for example, for the provision of the account information services to a customer, the bank where the relevant customer has her payment account will be in a dominant position as it would be the only undertaking holding the relevant account information needed for the provision of the relevant service.

In this regard, the Report explains the commercial relationship between Fintech companies and incumbent undertakings in providing payment services and notes that although Fintech companies can provide services directly to customers, they are mostly positioned between banks and consumers/businesses in providing their services. Accordingly, Fintech companies

need the existing banking infrastructure at some point in the provision of payment services and the infrastructure needed for Fintech companies may vary depending on the nature of the service provided. This creates a vertical relationship where Fintech companies, on the one hand, receive services from the banks that are active in the upstream market, and on the other hand, compete with these banks in the downstream market.

The Report notes that, therefore, similar to the telecommunication, retail and port services sectors, the undertakings that are active in the upstream market may abuse their dominant position by margin squeeze and refusal to supply.

Thereafter, the Report lists the conditions that need to be met for condemning certain unilateral conducts (*i.e.*, refusal to deal and margin squeeze) of an undertaking in a dominant position by referring to the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position.

In relation to the abuse of dominant position by margin squeeze, an undertaking that is active in vertically related markets and holds a dominant position in the upstream market sets the margin between the prices of the upstream and downstream products at a level that does not allow even an equally efficient competitor in the downstream market to trade profitably on a lasting basis.<sup>2</sup> The undertaking which is dominant in the upstream market may engage in margin squeeze by increasing the price for the product it supplies in the upstream market or decreasing the price for the product it supplies in the downstream market or by doing both simultaneously. This enables the dominant undertaking to transfer its market power over the upstream product to the downstream market and leads to the restriction of competition.<sup>3</sup> Moreover, refusal to supply, a typical example of abuse of a dominant position, can take the form of halting an ongoing supply relationship concerning the goods, services or inputs,<sup>4</sup> or it can be in the form of refusing the demands of potential customers for supply.<sup>5</sup>

Accordingly, as noted above, the Report notes that Fintech companies do not have the necessary infrastructures for their activities due to both regulatory rules and market dynamics,

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<sup>2</sup> G. Gurkaynak, *Turkish Competition Law*, 2021, p. 225.

<sup>3</sup> Margin squeeze definition in the Guidelines is based on the Board's decision *Türk Telekom/TTNET* (19 November 2008, 08-65/1055-411).

<sup>4</sup> *Maysan* (18 February 2016, 16-05/107-48); *Roche* (n.612); *Volkan/Öz Edirne* (n.921); *Novartis* (n.614).

<sup>5</sup> Guidelines on Abuse of Dominance, p. 9; *Tüyyap* (25 October 2018, 18-40/644-314). For the EU case law, please see, e.g., Case C-7/97 *Oscar Bronner GmbH & Co KG v. Mediaprint* [1998] ECR I-7791; *Clearstream* (Case COMP/38.096) Commission Decision [2009] OJ C 165/5 (upheld Case T-301-04).

making it imperative for these companies to obtain the relevant services from banks to provide their own services. Therefore, the new entrant Fintech companies are in need of using the infrastructure of the banks. Hence, banks are active in both the upstream market and the downstream market. This creates the risk that the incumbent undertakings may exclude the Fintech companies via refusal to supply and margin squeeze. Indeed, in case the incumbent undertakings that dominate the upstream market refuse to supply to Fintech companies, it may result in the latter being largely excluded from the market. However, the Report also notes that, when analyzing the allegation of refusal to supply, it should not be overlooked that the incumbent undertaking may have a legitimate justification since the financial system is built on trust and the relevant Fintech company may not be meeting the security standards required by the incumbent undertaking to allow access to its infrastructure.

Consequently, the Report underlines that for the assessment of exclusionary behaviors under Article 6 of the Law No. 4054, the Turkish Competition Board (“**Board**”) conducts an effects-based analysis. The Report then states that, within the scope of such an analysis, factors such as the position of the dominant undertaking, barriers to entry and growth in the relevant market, economies of scale/scope, network effects, and the location of competitors, customers or suppliers should be taken into account.

### **(b) Anti-Competitive Agreements and Concerted Practices**

The Report analyzes the strategies developed by competitors through agreements or concerted practices with the aim of restricting competition in the relevant markets whilst reminding that such conducts are considered as restriction by *object* under Article 4 of the Law No. 4054. It assesses that with respect to payment services where associations of undertakings are active and coordination among competitors is relatively easy, it is necessary to closely examine whether the standards adopted by undertakings and the conditions imposed on Fintech companies are based on anti-competitive agreements or concerted practices. The Report also notes that the recent decisions of the competition authorities such as the German Competition Authority (“**Bundeskartellamt**”) show that the decisions of the associations of undertakings or the bilateral agreements between the undertakings are designed in a way to exclude new players in the market.

The Report highlights that the issue that may come to the fore in terms of Article 4 of the Law No. 4054 in the context of Fintech, would be the vertical agreements between undertakings

that operate in financial markets. It notes that such vertical agreements which are common in the financial sector due to various business models used in the supply of payment services may include provisions that may make entry into the market more difficult, cause price rigidity or facilitate coordination between competitors, and ultimately restrict competition in the market.

The Report also provides that exclusionary actions taken jointly by incumbent undertakings against new players through vertical or horizontal relations, such as demanding unreasonable prices for the input provided to Fintech companies, unjustified disruption of services provided to Fintech companies, or boycotts against these companies are considered as agreements that restrict competition by *object*. In this regard, the incumbent undertakings may be held liable for engaging in a by-object restriction, without making any analysis on the effect of the conduct.

The Report also summarizes the Board's decisions<sup>6</sup> where it was found that certain conditions imposed in agreements between banks have the *effect* of excluding from the market certain undertakings such as other payment and e-money institutions. The Report finds that in the decisions concerning the exemption applications in the market, the Board makes an effects-based analysis. It evaluates that, in accordance with the effects-based approach embodied in the Board's decisions, in order to assess the effects of the standards and conditions imposed by the incumbent undertakings on Fintech companies, it should be examined whether the relevant standards and conditions are objectively necessary. Accordingly, standardization or commercialization agreements concluded by the incumbent undertakings may increase the efficiency in the market in some cases,<sup>7</sup> while in some cases these agreements include conditions that do not serve for a reasonable purpose or are of a discriminatory nature, which results in complicating the activities of new players in the market.

### **(c) Killer Acquisitions**

The report also remarks that there are frequent instances where incumbent undertakings chose to acquire Fintech companies rather than directly compete with them. As a result of the acquisition of the Fintech companies by the incumbent undertakings, the technologies

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<sup>6</sup>The Board's *SBM Payment Gateway* decision dated 24.12.2020 and numbered 20-55/769-341. The Board's *Bonus* decision dated 07.09.2017 and numbered 17-28/462-201; the Board's *BKM Card Data Storage* decision dated 12.06.2018 and numbered 18-19/337-167; the Board's *Money Transfer* decision dated 08.08.2018 and numbered 18-27/442-212.

<sup>7</sup> The Board's *Joint ATM* decision dated 22.05.2018 and numbered 18-15/284-142.

developed by these Fintech companies may fail. Such acquisitions may lead to a significant impediment to effective competition as they restrict innovation and create exclusionary effects in the relevant market.

By referring to the practices of foreign competition authorities, such as United Kingdom Competition Authority (***“Competition and Markets Authority” or “CMA”***)<sup>8</sup> the Report states that it is possible for the Board to intervene in such acquisitions under the “significant impediment to effective competition” doctrine pursuant to the Article 7 of the Law No. 4054. In particular, the CMA argues that an interventionist approach should be applied to acquisitions that are likely to result in consequences such as ending the activities of the acquired undertaking and preventing potential innovation.

The Report states that, as a reflection of the interventionist approach regarding transactions in Turkey, in 2020, Article 7 of the Law No. 4054 has been amended so that not only the transactions leading to the creation or strengthening of dominant position but also the transactions that significantly impede effective competition can be prohibited. Therefore, the acquisitions of Fintech companies will also be examined in terms of whether they cause a significant impediment to effective competition by restricting innovation.

## **2. Regulatory Framework**

### **(a) Regulatory Interventions against Exclusionary Actions**

The Report remarks that it is important to impose general and inclusive *ex-ante* rules that prevent exclusionary actions as opposed to relying on existing competition law instruments in this area since, among others, (i) for competition law interventions, certain conditions must be met and it is not easy to determine whether these conditions are met in every case, (ii) competition law interventions may only have an effect on the individual case and (iii) the competition law interventions are used *ex-post* (*i.e.*, after the infringement has been made).

In this regard, the Report notes that many countries implement regulations that encourage open banking or make open banking even mandatory. According to the Report, open banking, in a broad sense, means that access to different banking infrastructures and customer data from banks are granted to players in the downstream market so that these players can provide value-added services in the downstream market.

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<sup>8</sup> <https://www.gov.uk/cma-cases/experian-limited-credit-laser-holdings-clearscore>, Accessed on: 04.01.2022

To that end, the Report explains the regulations regarding open banking in different countries and Turkey, and states that the developments in Turkey indicate that the scope and depth of applications for direct access of non-bank financial institutions to payment systems will increase. The Report also remarks that the Fintech companies' access to various infrastructures and data pools under the uniform banking standards as determined by the regulatory authorities will contribute to the development of competition in the market by reducing the operational costs of Fintech companies and enabling interoperability between different systems.

### **(b) The Problems Associated with the Regulatory Framework**

According to the Report, the problems associated with the conventional regulatory framework that hinders the development of Fintech may be grouped under three main headings: (i) the lack of rules governing the new products and services, (ii) the rules not being suitable for new types of services and products, and (iii) the rules being too restrictive and costly for Fintech companies.

With respect to the lack of regulation, the Report states that most new products and services offered by Fintech companies are out of the scope of the rules designed to govern the conventional banking services. This situation makes it difficult for the incumbent undertakings, which bear the cost of complying with the regulatory rules, to compete in the downstream market with new players operating on different business models without being subject to the regulatory rules. Nevertheless, the operations of Fintech companies also create some risks about consumer protection and financial stability which calls for regulation. Following that, the Report points out that, in Turkey, the activities of payment institutions and electronic money institutions as non-bank financial institutions have been regulated and rules protecting consumers and financial stability were designed specific to these activities.<sup>9</sup>

Regarding the suitability of the rules to new technologies, the Report emphasizes that the rules should be updated so that they do not prevent the Fintech companies from offering new products and services, and notes that new rules should be adopted to enable the use of blockchain and cloud technologies in the financial sector in Turkey.

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<sup>9</sup> See, e.g. the Law No. 6493 on the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions



Finally, the Report underlines that heavy and intense regulatory rules ultimately create barriers to entry into financial markets, particularly in the payment services area. Indeed, the Report states that Fintech companies that have limited activities and thus create lower risks on the financial stability and the economy of the countries should not bear the cost of the rules designed to avoid the huge macroeconomic risks stemming from the operation of banks that are *too big to fail*.

Against this background, recognizing the delicate balance between promoting competition and innovation in the sector and ensuring financial stability and consumer protection, the Report suggests that there should be an asymmetric regulatory framework considering the risks posed by different undertakings on the financial sector so that new players can compete with the incumbent undertakings under fair conditions. For example, the Report states that Fintech companies providing payment services should have direct access to the payment settlement system under a licensing regime which is not as rigid as the regime applying to the banks, so that they would not be dependent on banks for the access to the settlement system.

### **3. The Problems Stemming from the Market Dynamics**

According to the Report, Fintech companies face certain entry barriers arising from market dynamics. Firstly, Fintech companies need to gain the consumer's trust in order to compete with incumbent banks that have strong ties with consumers. Second, there are barriers arising from the market structure. Accordingly, since there is no mechanism whereby the data about the sector can be pooled and shared with the possible investors, the cost of capital for Fintech companies is high. Also, one of the possible obstacles that Fintech companies encounter arises from the business models that utilize network effects. For example, in payment systems where the settlement system is not used and the payments are made from the bank account of the user, both the payer and the payee must be registered in the payment system. Hence, the increase in the number of registered payees increases the network effects, which creates a barrier to entry for Fintech companies. Finally, incumbent undertakings may provide various services that commonly share their main costs and this may put them in an advantageous position in reaching the economies of scale, which may also create an entry barrier. The lack of interoperability among devices and different payment platforms and the fact that financial institutions other than banks do not own the information about the financial status of the customers may be listed as other entry barriers.

### **III. The Entry of Big Tech Companies into the Financial Sector**

In the final part, the Report discusses the potential effects of the entry of Big Tech companies into the financial sector. It first notes that, while entering into the market, Big Tech companies may benefit from the advantages stemming from their loyal customer portfolio, easy access to capital, the customer data they hold, economies of scale and scope, brand recognition and the lobbying power. Indeed, they will be able to provide financial services at low costs to their current customer portfolio in addition to existing services by utilizing the data they hold.

The Report then analyzes Super Apps offered by Big Tech companies which provide multiple services (*e.g.*, from financial services to ordering meals) and collects consumer data in relation to all services offered through the relevant app. The Report notes that the entry of Big Tech companies may have a more serious effect on competition in the financial sector given their data advantages. On the other hand, the Report also remarks that Big Tech companies have disadvantages over Fintech companies as consumers have doubts about the extent their privacy is protected by the former.

Having recognized the pro-competitive effect of Big-Tech companies' entry into the market (*i.e.*, the end of the oligopolistic structure in the payment services), the Report discusses the potential exclusionary conduct of such companies in the market. In this respect, the Report states that in case where the Big Tech company provides the multi-sided platform as the online marketplace for the supply of Fintech services, it may (i) provide the financial services of different undertakings to the users, (ii) become a gatekeeper, for example, in the provision of payment services through its own platform, (iii) enter into the markets concerning the most profitable service of the incumbent undertakings and (iv) leverage its market power in the provision of marketplace to the provision of the relevant financial service.

### **IV. The Report's Final Recommendations**

The Report concludes and recommends, *inter alia*, the following;

- i. The common competitive concern regarding Fintech companies is their possible exclusion from the market by the incumbent undertakings' refusal to grant access to existing infrastructures, hence the rules should be designed in order to prevent this. Also, the rules should be differentiated for different players so that Fintech companies would not bear the costs that would prevent them from entering into market.

- ii. The intervention by competition authorities should address atypical problems in the markets arising as a result of the effect of digitalization (*e.g.*, holding data). Accordingly, since each data set is unique and a customer's data can be considered as key for providing service to the relevant customer, it may be concluded that the undertaking holding the relevant data is in a dominant position.
- iii. Regulatory sandboxes may be used where new Fintech products and services can be tested in a limited market without being subject to regulatory rules so that the regulator may grasp a better understanding for the optimal regulation in relation to these products.
- iv. To encourage the development of Fintech companies, there may be certain state aids and tax incentives. Moreover, a public data repository may be established which may help investors in making their decisions about whether to invest in Fintech companies.
- v. Public authorities should cooperate to establish a holistic policy in relation to Fintech.

## **V. Conclusion**

The Authority's Report shows its willingness (i) to take active part in encouraging the development of Fintech in Turkey and (ii) to intervene in any practices that may exclude the Fintech companies from the market.

Accordingly, the Authority identifies possible practices that incumbent undertakings may engage for excluding Fintech companies from the market and explains the competition law framework that will provide a basis for intervention in such cases. Moreover, it discusses how the current regulation may create an obstacle to Fintech Development and explains possible solutions by providing examples for a regulatory design that would be fit for purpose. Finally, it analyzes the possible consequences of Big Tech companies' entry into the financial services market. It finds that such entries may be more effective than the entries of small Fintech companies in increasing competition in the relevant markets but, at the same time, create additional competition law concerns as Big Tech companies may leverage their market power in the markets for provision of their own platforms to the markets for the provision of financial services.

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