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Administrative court partially annuls Competition Board's interim measures against Turkey's first online retail decacorn Trendyol

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Introduction

On 25 May 2022, the Ankara Ninth Administrative Court partially annulled⁽¹⁾ the Turkish Competition Board's 30 September 2021 decision,⁽²⁾ which had imposed interim measures on DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ.

Prior to this decision, the company had been subjected to a full-fledged investigation, which was initiated by the Board on 23 September 2021.⁽³⁾ The interim measures aimed to prevent serious and irreparable harm that Trendyol's anti-competitive conduct could cause.

Trendyol is a major multi-category online marketplace that also sells its branded products through in its own marketplace.

Facts

In terms of self-preferencing concerns, the Board first delved into the evidence relating to Trendyol's conducts creating an advantage for its retail business by way of interfering with the platform's algorithm. Within the scope of its assessment, the Board found evidence that Trendyol interfered with its platform's algorithm to make the number of followers for its retail-branded products appear greater than its competitors. Further, the Board found that Trendyol created and completed an internal task to remove the follower number from the online platform for its own retail brands to alter customer perceptions regarding such brands.

The Board also remarked that Trendyol concealed the seller score and follower number for some of its own brands and enabled a next-day delivery option for such products. In addition, the Board found that Trendyol altered the platform algorithm in order to list its own branded products before competitor brands, enabling a superficial advantage for Trendyol retail brands in the platform's scoring system, as well as precluding its own branded products from the sorting score that would normally determine the list order.

The Board further determined that Trendyol leveraged the seller and consumer data, using its platform to gain an advantage for its own retail brands. The Board noted that Trendyol's leveraging by way of data usage would probably distort competition in the market, given that such data could not be accessed by third-party sellers.

Lastly, the Board determined that Trendyol has discriminated among the sellers operating in the Trendyol platform by way of interfering with the platform algorithm. Relevant findings indicated that Trendyol provided sorting assistance to some of the sellers operating in the platform, enabling them to appear before their competitors in the platform's seller list. In addition, the Board noted that one of Trendyol's internal training videos expressed that third-party brands that advertise on the platform would appear on the top spots in the organic sorting list, even after the advertisement period is over. Consequently, the Board determined that Trendyol has discriminated among the sellers that operated on the platform by lacking transparency as regards advertising placement rules for sponsored products.

Within the scope of interim measure assessment, the Board evaluated the growth rates of Trendyol, as well as its competitors in the market for multi-category e-marketplaces. The Board found that between 2015 and 2021, Trendyol outscored its competitors in terms of growth rates within that period based on total transaction volume. In addition, the Board noted that, according to a [consumer survey conducted for the E-Marketplace Sector Inquiry](#), 49.6% used Trendyol, making it the country's most-used e-marketplace among consumers. The results of the survey also indicated that 48.9% of sellers or merchants consider Trendyol to be an indispensable commercial partner, topping all Trendyol's competitors. Accordingly, the Board noted that the sellers operating in the market could not generate a significant countervailing buyer power, given that almost half of the sellers had no incentive to switch to alternative e-commerce platforms. To that end, the Board determined that the findings regarding countervailing buyer power indicated that the sellers were unable to bargain against Trendyol's policies.

In terms of the entry and expansion barriers, the Board remarked that Amazon's negligible expansion in the market since entering in 2018 signified that even a prominent player, which Amazon is, could not easily expand in the relevant market, and a substantial investment is required for generating demand for an e-commerce platform.

On that basis, the Board determined that Trendyol was in a dominant position in the market for multi-category e-marketplaces. In order to prevent serious and irreparable harm that could be caused until the final decision is rendered, the Board ordered Trendyol to:

- terminate all types of conduct, practice and behaviour that gave their own brands an unfair advantage over other products and services, including any interference via algorithms and coding, and avoid such behaviour during the remaining part of the investigation process;
- stop sharing and using all types of data it collects from its marketplace activities to benefit other products and services under its corporate umbrella, and avoid such behaviour during the remaining part of the investigation process;
- terminate all types of conduct, practice and behaviour that could discriminate between sellers on the marketplace, including any interference via algorithms and coding, and avoid such behaviour during the remaining part of the investigation process;

- take all technical, administrative and organisational measures to ensure that the interim measures listed above can be reviewed;
- keep a record of all parametric and structural changes made to all algorithm models used by Trendyol for product searches, seller listing, seller rating calculation, etc, for at least eight years, including version numbers and with incontestable integrity;
- keep the source codes for all software specially developed for use by Trendyol for at least eight years, including version numbers and with incontestable integrity; and
- keep the user access and authorisation records and administrator audit records for all software used by Trendyol in order to execute business processes for at least eight years with incontestable integrity.

Decision

The Ankara Ninth Administrative Court examined the appeal under the following three categories of unlawful conduct attributed to Trendyol:

- interference with the algorithms utilised in Trendyol marketplace to gain advantage over its competitors in the retail market and enabling of "next day delivery" services for its retail products only;
- usage of other retailers' data to gain advantage over its competitors and utilised such data to form its marketing and design strategies; and
- discrimination among the sellers operating in the marketplace by means of interferences to the algorithm and lack of transparency regarding sponsored products.

In terms of the first category, the Court assessed each finding that supported the Board's reasoning that the first conduct category was unlawful and would potentially cause irreparable harm to determine whether such findings are valid. The Court determined that the first seven of the total 22 of the Board's findings could not be used as evidence for abuse of dominant position, given that these were findings dated before the period that Trendyol was determined to have been in a dominant position (ie, 2017 and 2018).

In terms of the eighth finding, which the Board perceived as an indicator that Trendyol had concealed the seller score for its own branded products, the Court concluded that the Board's determination was unfounded against Trendyol's argument that concealing seller score in cases where Trendyol acts as a seller had objective justifications. The Court also concluded that the Board's assessment regarding the ninth finding was unfounded. The ninth finding was considered as evidence that Trendyol had enabled next-day delivery services for its own retail products only. However, the Court found that the Trendyol Express feature of Trendyol could be accessed by all sellers operating on the Trendyol platform since July 2019, with 15,240 sellers using the feature. On that basis, the Court determined that the eighth and ninth findings could not evidence strong doubt of violation and the potential for serious and irreparable harm in a way that would justify imposition of interim measures.

However, the Court upheld the Board's assessment that Trendyol interfered with the algorithms used in Trendyol marketplace to gain an advantage over Trendyol's competitors in the retail market based on findings 10–14 and deemed the interim measures imposed based on this assessment lawful.

In terms of the second category, the Court upheld the Board's decision to impose interim measures against usage of other retailers' data to gain advantage over competitors and use of such data to form marketing and design strategies.

In terms of the third category, the Court requested additional information from Trendyol regarding the 21st and 22nd findings, which the Board considered as evidence indicating that Trendyol discriminated among the sellers operating in the marketplace by means of interferences to the algorithm and lack of transparency regarding sponsored products. The Court remarked that, upon the review of the responses to its information request, these findings comprised of error notices. The Court further remarked that Trendyol's interference with the algorithm restored the relevant sellers' positioning in the sorting list, which had been distorted due to the error.

On this basis, the Court remarked that the Board's decision lacked an assessment to determine whether the allegedly discriminated sellers were in equal position as the other sellers, which was required for establishing a violation based on discriminatory conduct. Additionally, the Court remarked that it was lawful for Trendyol to take positive action towards the sellers, which faced technical problems, and that Trendyol's conduct subject to the 21st and 22nd findings was not discriminatory but indeed incentivising for a new entrant to the market.

Further, the Court remarked that the Board could only determine whether Trendyol had discriminated the sellers and whether such conduct amounted to abuse of dominant position by way of the final decision. Accordingly, the Court concluded that in the absence of a final decision of the Board, a decision to impose interim measures due to discriminatory conduct would exceed beyond the purposes of an interim measure, serve as a means for penalty and would contradict the rule of law principle. Therefore, the Court found that the Board's assessment that Trendyol discriminated among the sellers operating in the marketplace by means of interferences to the algorithm and lack of transparency regarding sponsored products was unlawful.

In parallel with its remarks regarding the discriminatory conduct, the Court annulled the third of the interim measures (according to the above list), given that it was imposed against Trendyol's discriminatory conduct. Further, the Court partially annulled the fourth interim measure, which required Trendyol to take all technical, administrative and organisational measures to ensure that the first three interim measures could be reviewed, given its close connection to the third interim measure.

Last, in terms of the fifth, sixth and seventh interim measures, which required Trendyol to keep data records for at least eight years, the Court partially annulled the respective measures, on the grounds that no information and/or documents had been submitted to the case file that justified the measure to keep data records for such a period. To that end, the Court partially annulled the relevant measures in a way that would only require Trendyol to keep such data records until the date of the Board's final decision.

Comment

The Board rarely resorts to interim measures,⁽⁴⁾ partially due to the fact that in early stages of an investigation it is relatively hard to establish whether conduct is unlawful and would give rise to irreparable harm, both of which are required for rendering an interim measure decision.

The Court's *Trendyol* decision demonstrates that it is challenging to evidence and establish whether conduct is both unlawful and likely to cause irreparable harms, especially if the conduct under scrutiny is unilateral conduct that amounts to an alleged abuse of dominance. To

that end, the decision may be considered a milestone that further solidifies the Board's disinclination to render interim measure decisions.

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Endnotes

(1) No. 2021/2069 E and 2022/1157 K, dated 25 May 2022.

(2) 21-46/669-334.

(3) 21-44/650-M.

(4) The Board has imposed interim measures in the following decisions:

- *CRN*, No. 06-81/1036-300, dated 6 November 2006;
- *TTNET*, No. 07-59/676-235, dated 11 July 2007;
- *WhatsApp*, No. 21-02/25-10, dated 11 January 2021; and
- *Trendyol*, No. 21-46/669-334, 30 September 2021.