



## **DMA: EU, Turkey and Beyond**

**Authors:** Gönenç Gürkaynak, Esq., Ebru İnce, Çiğdem Gizem Okkaoğlu, Evgeniya Deveci and Petek Güven, ELIG Gürkaynak Attorneys-at-Law

### **Introduction**

Over the recent years, digitalisation and digital services have been at the core of many innovative advantages for businesses and end users alike. These benefits range from online intermediation services to software application stores. This variety offers better and more efficient choices for users while increasing competition within the digital markets industry.

As digital markets started offering advantages increasingly, they also started to attract the attention of regulatory authorities. They believed regulations should be introduced so that these widely used digital markets and platforms, which have the potential to provide significant benefits to consumers, do not end up being utilised for the detriment of consumers.

Following the increasing regulation trend in many countries in recent years towards digital markets, the most fruitful attempt proved to be the DMA, a regulation proposal presented by the European Commission (“*Commission*”) in December 2020 and approved by the European Parliament in March 2022.

### **An Overview of the DMA**

#### **Preamble**

The Commission’s main concern behind the proposal was based on the trend of relatively large platforms seemingly benefitting from the allegedly strong network effects of the industry, to the detriment of SMEs. These platforms were stated to represent “*key structuring elements of today’s digital economy, intermediating the majority of transactions between end*

*users and business users.*”<sup>1</sup> This conduct appears to have led the Commission to ascertain certain “gatekeepers” within the industry who retain an allegedly rooted and stable position, often as a result of “*the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers.*”<sup>2</sup>

This position allegedly held by the gatekeepers was expressed to result in “*significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users.*”<sup>3</sup> This, in turn, was expressed to lead to negative effects on the “*contestability of the core platform services concerned.*”<sup>4</sup> The Commission therefore considered these facts and stated that regulatory initiatives by Member States may not be sufficient to address these points, and that without action at EU level, “*fragmentation of the Internal Market*”<sup>5</sup> is highly possible.

The Commission, by relying on the aforementioned reasons, provides the objective of the proposal as follows: “*to allow platforms to unlock their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability so as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment*”<sup>6</sup>.

The need to address these questions in the digital economy was mainly *based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations.*<sup>7</sup>

## Scope

The scope of the DMA is mostly limited to core platform services and undertakings with gatekeeper status in these digital markets. Core platform services, which according to the Commission is where “*the identified problems are most evident and prominent and where the*

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) (“DMA”), Section 1, para. 2.

<sup>2</sup> *ibid.*

<sup>3</sup> DMA, Section 1, para. 3.

<sup>4</sup> *ibid.*

<sup>5</sup> N 3

<sup>6</sup> DMA, Section 1, para. 10.

<sup>7</sup> The Commission, *Shaping Europe’s Digital Future* (2020) [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en). Access Date: 20.04.2022.

*presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene,”*<sup>8</sup> are defined to include a myriad of online services, most notably online search engines, social networking services, video-sharing platform services, and cloud computing services.<sup>9</sup> Undertakings providing these core platform services are presented with certain conditions when their gatekeeper status is scrutinised.

For an undertaking which provides core platform services to be granted gatekeeper status, it must:

- (i) significantly impact the internal market;
- (ii) operate a core platform service which serves as an important gateway for business users to reach end users; and
- (iii) enjoy an entrenched and durable position in its operations or that such an entrenched and durable position is foreseeable in the near future.<sup>10</sup>

The DMA states that such gatekeeper status can be determined “*either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, or based on a case-by-case qualitative assessment by means of a market investigation.*”<sup>11</sup>

While these conditions are drafted comprehensively, they may be revised by the Commission and that some undertakings may be designated as gatekeepers based on results of market investigations, even if they do not necessarily meet these conditions. The Commission further stated that it should be authorized to adopt delegated acts in accordance with the proposed regulations “*to specify the methodology for determining whether the quantitative thresholds, and to regularly adjust it to market and technological developments where necessary.*”<sup>12</sup>

### Obligations for gatekeepers

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<sup>8</sup> DMA, Section 1, para. 5.

<sup>9</sup> DMA, Article 2(2).

<sup>10</sup> DMA, Article 3(1).

<sup>11</sup> DMA, Section 1, para. 7.

<sup>12</sup> DMA, para. 17.

Chapter III of the DMA lists practices that gatekeepers often implement when offering their services, and presents extensive obligations for gatekeepers to be cautious of in order to avoid unfairness in the markets and towards consumers.

Gatekeepers are obliged to (i) refrain from combining personal data sourced from core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services; (ii) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper; (iii) refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers; (iv) allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper.<sup>13</sup>

Gatekeepers must also enforce caution and must refrain from using, in competition with business users, any data not publicly available; from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party; provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users.<sup>14</sup>

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<sup>13</sup> DMA Article 5

<sup>14</sup> DMA, Article 6

A gatekeeper should inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.<sup>15</sup>

A gatekeeper should inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.<sup>16</sup>

### **DMA's Sanctions for Non-Compliance**

The DMA offers a number of sanctions and penalties for non-complying undertakings, mainly to ensure fair and equal treatment within the markets and for users, rectify any wrongdoing by the undertakings, and to safeguard future compliance with the Commission's regulations, decisions and requests.

Non-complying gatekeepers may be ordered by the Commission to cease and desist with the non-compliance within certain deadlines and to provide explanations on how it plans to comply with the decision.<sup>17</sup>

In the cease and desist decisions sent to gatekeepers who purposely or negligently fail to comply with the DMA's abovementioned obligations, the Commission may impose fines "*not exceeding 10% of the non-complying undertaking's total turnover in the previous financial year.*"<sup>18</sup>

Article 27 further imposes periodic penalty payments. The Commission may decide to impose periodic penalty payments "*not exceeding 5% of the average daily turnover in the preceding financial year per day, calculated from the date set by that decision,*"<sup>19</sup> in order to compel them to comply with said obligations, or to supply correct and complete information to rectify the wrongdoing.

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<sup>15</sup> DMA, Article 7

<sup>16</sup> *ibid.*

<sup>17</sup> DMA, Article 25(3).

<sup>18</sup> DMA, Article 26(1).

<sup>19</sup> DMA, Article 27(1)

In light of these, the proposed regulation differs from the traditional approaches to market regulations in terms of its scope and nature, and it is complementary to the existing competition law rules that it envisages *ex-ante* obligations. Due to this, it must be noted that specific and separate expertise is highly essential when assessing whether gatekeepers fulfill their obligations.

### **Recent Developments on Digital Markets in Turkey**

The Turkish Competition Authority (“TCA”) first considered legislative actions concerning digital markets in January 2021. However, its sector inquiries that focus on online marketplaces begun earlier in June 2020<sup>20</sup> and that focus on online advertising begun in March 2021<sup>21</sup>, in order to determine behavioural and structural issues surrounding these sectors and to offer solutions accordingly.<sup>22</sup> Each of these sector inquiries served as preparatory components facilitating the TCA’s legislative actions.

These actions proceeded with the TCA publishing its Preliminary Report on E-Marketplace Platforms (“*Preliminary Report*”) in May 2021. The Preliminary Report was based upon findings and facts obtained through the sector inquiry, and it offered policy recommendations for the identified potential competition concerns within the e-marketplace platform market. The Preliminary Report’s conclusions and policy recommendations suggest that the attempted legislative work is directed towards gatekeeper arrangements, which corresponds with topics addressed by the DMA.<sup>23</sup> The final category concerning gatekeeper regulations is quite parallel to the Commission’s proposal, especially considering that both regulations suggest imposing *ex-ante* obligations on undertakings designated as “gatekeepers”.

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<sup>20</sup> Press Release, Anadolu Ajansı, Competition Board Launched Its Sector Inquiry on Online Platforms, Available at: <https://www.aa.com.tr/tr/ekonomi/rekabet-kurulu-e-pazaryeri-platformlarina-yonelik-sektor-incelemesi-baslatti/1912371> Access Date: 25.04.2022

<sup>21</sup> TCA, Press Release, Competition Board begun its Online Advertising Sector Inquiry, Available at: <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulu-cevrim-ici-reklamcilik-se-aa233ec4677eeb11812c00505694b4c6>, Access Date: 25.04.2022

<sup>22</sup> TCA, Preliminary Report on Online Marketplace Platforms, para. 710, Available at: <https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf> (Only in Turkish) Access Date: 25.04.2022

<sup>23</sup> The Preliminary Report assessed that it would be sufficient to build policy recommendations upon the following three complementary categories: (i) to remove uncertainties deriving from existing competition law regulations and to review secondary legislation accordingly (ii) to implement a “*Platform Conduct Code*” as a reference to bilateral relations intended for asymmetric market power surrounding the sector including the establishment of “*transparent*”, “*open*” and “*predictable*” agreement terms and, (iii) to determine *gatekeeper* undertakings and to implement a premise *ex-ante* legislative regulation designating behaviours that such gatekeepers need to avoid. (See, TCA, Preliminary Report on E-Marketplace Platforms, para.712, Available at: <https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf> (Only in Turkish) Access Date: 25.04.2022)

During the legislation preparations, the TCA sent information requests (“*RFI*”) to undertakings active in the same core platform services markets covered by the DMA, although the RFIs were quite comprehensive in nature and were mostly specific to the Turkish market.

The TCA published its Final Report<sup>24</sup> on E-Marketplace Platforms on April 14, 2022 (“*Final Report*”) as the last step in incorporating sector inquiries, findings and considerations indicated in the Preliminary Report. Even though the Final Report abstained from defining gatekeepers and left it for the legislative regulations to be defined, it incorporated some instructions and suggestions regarding the obligations of gatekeepers.<sup>25</sup>

The competition advocacy advices and views of the TCA are not binding. Taking into account that the DMA is considered to be the main reference point of the Preliminary and the Final Reports, it is likely that these sector reports will be followed by legislative changes. It is especially expected that regulations focusing on gatekeepers mentioned both in the Preliminary and the Final Reports will be incorporated as an addition to Article 6 of the Law No. 4054 on the Protection of Competition (“*Law No. 4054*”), which regulates abuse of dominant position, or even as a separate article while also being reflected in the secondary legislation.

As stated by the Chairman of the TCA, Birol Küle, the TCA is currently working on digital market regulations that are expected to be enacted by mid-2022.<sup>26</sup> Regulations for digital

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<sup>24</sup> TCA, Final Report on E-Marketplace Platforms, para.773, Available at:

<https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-raporu-pdf-20220425105139595-pdf> (Only in Turkish) Access Date: 25.04.2022

<sup>25</sup> The Final Report’s suggestions can be summarized as follows: (i) the gatekeepers should not impose contractual or de facto wide MFN clauses, (ii) the gatekeepers should not limit sellers’ ability to reach out to public authorities for the problems they may experience with the marketplace, (iii) the gatekeepers should not use non-publicly available data collected through the sellers for their own competing products, (iv) the gatekeepers should not advantage their own products while ranking the results, (v) the gatekeepers should allow free, efficient, high-quality and real-time performance tools to allow sellers to monitor their profitability, (vi) there should be no barrier against data-portability to other platforms, (vii) the sellers should be allowed free, efficient, high-quality and real-time access to the data provided by the seller and the data derived from this initial data, (viii) the gatekeepers acquisition transactions should be subject to a merger control filing before the Board, irrespective of whether the notifiability thresholds are met. (See: TCA, Final Report on E-Marketplace Platforms, para.773, Available at: <https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-raporu-pdf-20220425105139595-pdf> (Only in Turkish) Access Date: 25.04.2022)

<sup>26</sup> Anadolu Ajansı, *Chairman of the Competition Authority, Küle: We are working on digital market regulations* (2021) Available at: <https://www.aa.com.tr/tr/ekonomi/rekabet-kurumu-baskani-kule-dijital-pazara-yonelik-yasa-hazirliyoruz/2286880#:~:text=%22Dijital%20devrim%20ya%C5%9Fan%C4%B1yor%22,Onlar%C4%B1n%20aleyhine%20olmayaca%C4%9F%C4%B1na%20s%C3%B6z%C3%BC%20veriyorur.> Access Date: 05.05.2022.

markets, namely the DMA in the EU, industry research conducted by foreign competition authorities as well as the TCA, and the experience and know-how gained from investigations concerning digital markets are likely to form the basis of digital market regulations in Turkey.

It is of utmost importance for the effective functioning of digital markets that these *ex ante* regulations are not too intrusive in order not to hinder competition and innovation. Any legislative study should also weigh up the costs and benefits of additional intervention. Accordingly, the contemplated new regulatory regime should require the TCA to test in advance whether interventions are likely to enhance competition. In any event, regulatory reform of any kind should aim to be flexible, forward-looking and future-proof to adapt to technological change and accommodate the diverse tech ecosystem. Indeed, imposing strict restrictions to a sector which is purely driven by innovation may pose risks to decrease market players' appetite to innovate and invest.

Regulations on digital markets also bear the risk of being obsolete very quickly. In ever-changing markets, regulations have to keep pace with the market changes, otherwise inefficiencies can arise. In an era (and a sector) of rapid change, one-size-fits-all solutions are unlikely to work out well. Instead, it is important to start with a focus on a specific problem and seek well-tailored and well-informed solutions, thinking through the benefits, the second-order impacts, and the potential for unintended side-effects.

### **Regulation Initiatives by Other Competition Authorities**

Various international competition authorities have been scrutinising the developments in the digital sector as the urge to introduce amendments in the face of challenges posed by digital markets rise to a significant level.<sup>27</sup>

Considering the rapid growth of digital markets, the CMA published its initial Digital Markets Strategy Report<sup>28</sup> in 2019, along with some significant developments intended for digital markets. Prior to the CMA's decision to establish the Digital Markets Unit ("*DMU*"), the CMA directed its research towards digital markets by publishing the final report on its online

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<sup>27</sup> Competition and Markets Authority ("*CMA*"), The CMA's Digital Markets Strategy. (2021) Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/959399/Digital\\_Markets\\_Strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf) Access Date: 26.04.2022

<sup>28</sup> CMA. Digital Markets Strategy. (2019). Available at:



platforms and digital advertising market study<sup>29</sup> and assembling a Digital Markets Taskforce,<sup>30</sup> and consulted on revised Merger Assessment Guidelines (“*MAGs*”)<sup>31</sup>.

More recently, in 2022, the UK Digital Regulation Cooperation Forum (“*DRCF*”), comprised of the CMA, the UK’s Office of Communications, the Information Commissioner’s Office (“*ICO*”) and the Financial Conduct Authority (“*FCA*”), introduced a “technology horizon-scanning program”<sup>32</sup> to provide insight on the rising digital markets and technologies and how they should be regulated.

In 2019, the US Stigler Center for the Study of the Economy and the State (“*Stigler Center*”) published its Stigler Report,<sup>33</sup> which consists of various studies and in-depth analyses on digital platforms and presents the concerns addressed by these studies, offered various policy solutions that can be implemented towards digital platforms.<sup>34</sup> Subsequently, in 2020, a report concerning the Investigation of Competition in Digital Markets<sup>35</sup> was published with the purpose to document concerns surrounding digital markets, detect anticompetitive conduct in the sector and evaluate whether existing regulations are sufficient enough to resolve these issues. However, the US regulation initiatives for digital markets and platforms are not yet as comprehensive and precise as the Commission’s proposal.

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<sup>29</sup> CMA. Market study into online platforms and digital advertising, July 2020, final report. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/959399/Digital\\_Markets\\_Strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf) Access Date: 26.04.2022

<sup>30</sup> CMA. Digital Markets Taskforce, advice on a new pro-competition regime for digital markets. December 2021. Available at: [https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital\\_Taskforce\\_-\\_Advice.pdf](https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf) Access Date: 26.04.2022

<sup>31</sup> CMA, Consultation on CMA Merger Assessment Guidelines. (2020). Available at: <https://www.gov.uk/government/news/consultation-launched-on-cma-merger-assessment-guidelines> Access Date: 26.04.2022

<sup>32</sup> The National Law Review, *5 Global Digital Markets Regulatory Issues To Watch In 2022* (2022). Available at: <https://www.natlawreview.com/article/5-global-digital-markets-regulatory-issues-to-watch-2022>. Access Date: 05.05.2022.

<sup>33</sup> Stigler Committee on Digital Platforms, Final Report (2019) Available at: <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>. Access Date: 27.04.2022

<sup>34</sup> *ibid.* p. 4.

<sup>35</sup> US, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in digital Markets (2020) Available at: [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) Access Date: 28.04.2022

The German Competition Authority, Bundeskartellamt, also contributed to this latest wave by amending its competition act to facilitate the provisions concerning conduct of the large digital firms along with the Digitalization Act<sup>36</sup> published in the beginning of the 2020.<sup>37</sup>

In 2021, the OECD published its report focusing on digital sectors<sup>38</sup> which include detailed analysis of proposed regulations of various competition authorities. The Report aimed to compare various approaches and arguments surrounding the proposed regulations in digital sector. The Report draws attention to accelerating concentration in digital markets and concerns arising from it while discussing whether competition law, by itself, constitutes a sufficient vehicle to remove the raised concerns. Furthermore the Report highlights that proposed regulations put forward attributes such as transparency, innovation, fairness and contestability.<sup>39</sup>

There have also been some regulatory and legislative developments in Australia<sup>40</sup> and Japan.<sup>41</sup>

## **Conclusion**

As the digital sector starts to play a bigger role in the markets, competition authorities showcase efforts to bring innovative solutions to the challenges arising as a result of the sector's recent growth. With the recent developments and various legislative or regulatory works conducted by the different competition authorities, it appears that recent competition developments tend to focus on policy in the digital era.

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<sup>36</sup> Bundeskartellamt, Digitalization Act. 2020. Available at: <https://www.bmwk.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html>

<sup>37</sup> Bundeskartellamt, Press release, Amendment of the German Act against Restraints of Competition. Available at:

[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19\\_01\\_2021\\_GWB%20Nouvelle.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Nouvelle.html) Access Date: 27.04.2022

<sup>38</sup> OECD, (2021) Ex ante Regulation of digital markets, OECD Competition Committee Discussion Paper. Available at: <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf> Access Date: 24.04.2022

<sup>39</sup> *ibid.* p.52

<sup>40</sup> Australian Competition and Consumer Commission (“ACCC”), published its Digital Platforms Inquiry Final Report (2019) (Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>) following its announcement of inquiry into digital platforms in 2017. (See, <https://www.accc.gov.au/media-release/accc-commences-inquiry-into-digital-platforms> Access Date: 28.04.2022

<sup>41</sup> Japan Fair Trade Commission (“JFTC”) published its Final Report on Evaluation of Competition in the digital Advertising Market (Summary Available at: [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_210427.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_210427.pdf)) and its studies concerning Summary of a Bill on Improving Transparency and Fairness of Specified Digital Platforms (Summary Available at: [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_200218.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200218.pdf)) following establishment of *Headquarters for Digital Market Competition in 2019*. Available at: [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_190927.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_190927.pdf) Access Date: 27.04.2022

Considering the works and actions taken so far, the European Commission and the CMA seem to be taking the lead in regulations concerning digital sector, whilst it is anticipated that the Fair Trade Commission (“*FTC*”) will also participate in the recent rush and introduce some concrete developments concerning the digital sector soon.

TCA’s legislative efforts in this regard are also remarkable and it is highly anticipated that TCA will also introduce an *ex-ante* gatekeeper regulation soon. The Final Report published by TCA includes detailed assessments in line with evaluations displayed in the Report published by OECD and the policy recommendations in the Final Report bear significant similarities to the proposals presented by DMA.

Article contact: Gönenç Gürkaynak, Esq. Email: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

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