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***The Turkish Competition Authority Publishes its Final Report on its E-marketplace Sector Inquiry***

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The Turkish Competition Authority (“**Authority**”) published its Final Report on the E-Marketplace Sector Inquiry (“**Final Report**”)<sup>1</sup> on April 14, 2022, after a period of almost a year after publishing its Preliminary Report on the E-Marketplace Sector Inquiry (“**Preliminary Report**”)<sup>2</sup> on May 7, 2021.

The sector inquiry on e-marketplace platforms (“**Sector Inquiry**”) was initiated as per the Turkish Competition Board’s (“**Board**”) decision dated June 11, 2020 and numbered 20-28/353-M with the aim of analysing both the competitive and anti-competitive effects of e-marketplace platforms and introduce a policy proposal accordingly.

The Final Report is constructed upon the findings and analysis of the Preliminary Report. It preserves (i) the evaluations in the Preliminary Report regarding the characteristics and structure of the e-marketplaces, (ii) the assessments regarding the competition law related concerns in e-marketplaces, and slightly changes its policy recommendations.

The last topic addressed in the Final Report focuses on the post Preliminary Report developments that were occurred in the market and incorporates conclusive policy proposals in the light of the findings obtained through the both reports.

This article aims to provide the reader with an overview of the key points of the Final Report.

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<sup>1</sup> Please see the following link: <https://www.rekabet.gov.tr/Dosya/sector-raporlari/e-pazaryeri-si-raporu-pdf-20220425105139595-pdf> , available only in Turkish. Access Date: 06.06.2022.

<sup>2</sup> Please see the following link: <https://www.rekabet.gov.tr/tr/Guncel/e-pazaryeri-platformlari-sektor-inceleme-a197b17532afeb11812e00505694b4c6> available only in Turkish. Access Date: 06.06.2022.

## **A. Final Report Updates the Statistics and Reiterates the Assessments Provided in the Preliminary Report**

The Final Report preserved its evaluations regarding the general framework provided in the Preliminary Report with regards to the market structure and functioning along with the resulting structural market failures and potential competition concerns. Within this scope, it was remarked that network externalities, multi-homing, economies of scope and scale, multi-sidedness, data-driven business models contribute to the market power of the e-marketplace platforms. As a result of these market characteristics, e-marketplaces are associated with high barriers of entry and expansion and tendency to evolve into a single platform (tipping). Competition concerns are discussed theoretically with the conceptual scopes of (i) inter-platform competition, (ii) intra-platform competition, (iii) consumer related competition concerns and examination findings, and these mentioned issues are evaluated for Turkey.

In the Final Report, the statistics pertaining to the market outlook which were provided in the Preliminary Report have been updated with the data pertaining to 2021 and first two months of 2022. According to the 2021 data presented in the Final Report, the ratio of households with internet access, the rate of individuals using the internet, the frequency of internet usage of the consumers, internet shopping and the internet access rate of the businesses increased in 2021, compared to the values in 2020.

In the Final Report, values pertaining to the e-commerce volume figures in Turkey were also presented, particularly referring the data of E-Commerce Information Platform of the Ministry of Trade and TUBİSAD. Based on the most up-to-date statistics in hand, the Final Report emphasized the accelerating significance of the e-marketplaces for the businesses and consumers.

Following its explanations regarding e-commerce, e-marketplaces and the structure of e-marketplaces, the Authority then laid out the main competition concerns in the market under the following three categories; (i) inter-platform competition, (ii) intra-platform competition and (iii) consumer related concerns, as they were categorized in the Preliminary Report.

**Inter-platform Competition:** The Authority is of the opinion that wide most favoured nation (“*MFN*”) clauses lead to the following competition concerns; (i) decrease in price competition and increase in the retail price, (ii) price rigidity and anti-competitive collaborations, and (iii) entry barriers and expansion barriers. The Authority’s approach is

therefore more favourable towards “narrow MFNs” where the seller’s obligation not to determine a lower price than its price on the platform is limited to its own website.

The Authority considers exclusivity and non-compete obligations imposed on sellers by platforms to be another competition concern in the market as they would decrease sellers’ multi-homing abilities and would thereby hamper the inter-platform competition. The Authority believes that ensuring multi-homing is critical in this market due to first-mover advantage stemming from network effects and economies of scale.

Restrictions on data access and data portability of consumers and sellers adopted by gatekeepers are further deemed anti-competitive by the Authority.

**Intra-platform Competition:** The Authority believes that the platforms which are also active at the retail level (“*hybrid platforms*”) may practice self-favouring or discrimination between sellers and therefore restrict intra-platform competition.

It is also argued by the Authority that the platforms may restrict competition through the asymmetric bargaining power they have against the sellers. According to the Authority, this generally occurs due to; (i) the platforms’ excessive pricing strategies vis-a-vis their sellers, and (ii) the platforms’ unfair trading conditions applied on the sellers. The Authority also mentions that the structure of the market has the potential to lead to hub-and-spoke type cartels. In such a case, the e-marketplace platform would be the hub that organizes and enforces the cartel whereas the sellers of such platform would be the spokes that are parties to the cartel.

**Consumer Related Competition Concerns:** In the Final Report, consumer related potential competition concerns are categorised as (i) price-based concerns, where the competition issues stem from the platforms’ excessive and selective pricing strategies; (ii) consumer dependency / loyalty programs, where the competition issues arise when such practices restrict the consumers’ multi-homing abilities; (iii) data-based concerns, relating to “zero-price services”, quality competition, excessive data collection and confidentiality, targeted advertising, information asymmetry, consumer vulnerability and transparency, product reviews; (iv) decrease in innovation, where the concerns stem from the possibility of higher prices and fewer choices for consumers.

## **B. Final Report Takes into Account the New Developments Regarding E-Marketplaces**

The Final Report discusses the developments that occurred following the publication of the Preliminary Report. The fact that these developments were taken into consideration differentiated the Final Report from the Preliminary Report and also caused it to become more comprehensive. Close and the precise examination of the developments that occurred further to the publication of the Preliminary Report almost effectuated a three year long display of the market. The general scope of these developments as presented in the Final Report is provided below.

### **1. Investigation and Interim Measure Decisions Regarding Trendyol**

The Authority initiated an investigation against Trendyol upon the allegation that Trendyol violated Law No. 4054 with its practices in multi-category online e-marketplaces.<sup>3</sup> The Preliminary Report drew attention to the increasing market power of Trendyol which was incorporated into Alibaba Group. These determinations were further objectified during the preliminary investigation before the fully-fledged investigation. In addition, during the on-site inspections conducted during the preliminary investigation, the Authority discovered documents indicating that Trendyol: (i) interfered with listing algorithm to the unfair advantage of its own products, (ii) utilized data belonging to the third party suppliers in terms of establishment of its own brands' marketing strategy, (iii) conducted discriminatory practices with regard to the sellers in its platforms by interfering with the algorithm. Within the scope of gathered evidences and considering that Trendyol gained significant market share in the multi-category online marketplace platforms market, especially in fashion category along with other categories particularly in the last years, the Authority evaluated that, mentioned practices are likely to cause significant and irreversible damages until the final decision and therefore, decided to impose interim measures on Trendyol.<sup>4</sup>

### **2. The Acquisition of N11 by Getir Perakende Lojistik AŞ (Getir)**

Getir Perakende Lojistik AŞ ("**GETİR**") acquired the sole control over N11, which was one of the e-marketplaces in the focus of the Sector Inquiry and was under the joint control of the Doğuş Holding AŞ and SK Planet Co., Ltd., via acquiring a certain amount of N11's shares

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<sup>3</sup> Board's decision dated 23.09.2021 and numbered 21-44/650-M .

<sup>4</sup> Board's decision dated 30.09.2021 and numbered 21-46/669-334.

through capital increase.<sup>5</sup> GETİR, entering into the market in July of 2015, procured a certain amount of growth in the market in a short period of time with the various and multiple services that it provided, such as: Getir10, Getir Büyük, Getir Su, Getir Yemek, Getir Çarşısı ve Getirbitaksi. In this context, the Authority considered that the concerned acquisition may contribute (i) to the market share growth of N11 which is active in the e-marketplace and is losing market share as found by the Preliminary Report, and (ii) therefore to increase the competition in the market and (iii) the maintenance of competition in a more equitable environment.

### 3. The Outcome of Public Consulting Process

The policy suggestions in the Preliminary Report were shared with the public and the sector stakeholders. It is indicated in the Final Report that the Authority examined the opinions of both sector stakeholders and the public and these opinions brought huge benefits in finalization of the policy proposals of the Final Report.

- **Opinions on the Market:** In this regards, it was argued that physical retail sale activities and e-commerce activities were in competition and the multi-category e-marketplaces do not constitute a standalone market separate from the other retail channels. In the Final Report the above mentioned view was not taken into consideration as the Final Report provided the following assessment *“the Authority considers that the empirically grounded findings of the Preliminary Report are more solid and stronger compared to the opinions mainly based on market observation.”*
- **Opinions on the Surveys Conducted within the Scope of the Sector Inquiry:** Opinions provided to the Authority with respect to the surveys taken as basis in the Preliminary Report argued that: (i) no information provided with regards to the scales and competence of the participated sellers, (ii) there is a doubt whether the survey is comprehensive. Based on this, the Authority remarked that 1.860 consumers that were e-marketplace users and 5.196 sellers participated in the relevant surveys. Within the scope of the consumer survey, it was also added that the demographic data (consumer’s gender, age, household population, monthly household income, marital status, status of having a child, socioeconomic status, education and employment status etc.) were also collected and analyzed.

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<sup>5</sup> Board’s decision dated 17.12.2021 and numbered 21-62/880-430.

- **Opinions on the Policy Recommendations Presented in the Preliminary Report:**

The opinions on Gatekeeper Regulation, Platform Code of Conduct and Recommendation of Strengthening the Secondary Legislation were provided within the scope of the Preliminary Report. With regards to the gatekeeper regulations, it was remarked that (i) it should be taken into consideration that Turkish market is more competitive compared to the EU, (ii) the qualitative data should also be taken into consideration along with the market share in determination of the gatekeepers, (iii) it could harm the innovation and (iv) cause over-regulation. With regards to the Preliminary Report's Code of Conduct recommendation, the following opinions stating that (i) this regulation is not necessary, (ii) it cannot be implemented in a fair manner and (iii) it may harm the principle of legal certainty, were provided. With regards to the Recommendations on Strengthening the Secondary Legislation, affirmative opinions were received and it was remarked that the idiosyncratic attributes of the e-marketplaces should be considered during the preparation process of this regulation.

**C. Final Reports Concludes the Policy Recommendations of the Authority Regarding the E-Marketplaces**

The Final Report ends up with two main policy proposals concerning competition law legislation in order to address the above mentioned competition concerns in the market<sup>6</sup>: (i) Ex-ante Gatekeeper Regulation; (ii) Strengthening of the Secondary Legislation

**1. Ex-Ante Gatekeeper Regulation**

Within the scope of its first policy recommendation, the Authority refers to the on-going legislation preparations with respect to gatekeepers and suggests imposing the following ex-ante obligations on the e-marketplace platforms with gatekeeper status:

- (i) not to employ exclusivity or wide MFN clauses;
- (ii) not to use data obtained through sellers' operations within the platform, with respect to the gatekeeper e-marketplace platform's products that compete with sellers' products;

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<sup>6</sup> The Platform Code of Conduct Recommendation of the Preliminary Report is removed from the final policy proposals list. It is indicated that this piece of regulation is essential to cope with the asymmetric bargaining power of platforms and may need to be implemented on a broader scale, including non-dominant e-marketplaces; the authorization of Ministry of Commerce within the scope of the Economic Reforms Action Plan to carry out legislative work concerning this issue is referred in this respect.

- (iii) not to favour their own products or the products belonging to their group companies in their platform rankings;
- (iv) to provide their sellers with free, efficient, high-quality, and real-time access to the performance tools so that the sellers are able to monitor the profitability of their sales on the platform;
- (v) not to create any technical or behavioural barriers for consumers and sellers of the platform to transfer their data to other platforms;
- (vi) to provide sellers or third parties authorized by sellers with free, efficient, high-quality, and real-time access to their own data or data derived from such data;
- (vii) to ensure interoperability between their main platform services and ancillary services;
- (viii) to warrant platform transparency by providing their sellers with sufficient information regarding the scope, quality, performance, and pricing of their main and ancillary platform services.

## **2. Strengthening of the Secondary Legislation**

Within the scope of its second policy recommendation, the Authority suggests strengthening the secondary legislation accordingly, in particular by way of:

- (i) revising market share thresholds and theories of harm in terms of exclusivity and MFN clauses;
- (ii) defining and clarifying platforms' exploitative behaviours;
- (iii) introducing a secondary legislation that completes the changes in the main legislation.

The compiled version of the Authority's policy recommendations is provided in the table below:

<b>Competition Aspect</b>	<b>Competition Issue</b>	<b>Strengthening the Secondary Legislation of Competition Law</b>	<b>Ex-Ante Gatekeeper Regulation</b>
Inter-Platform	Wide MFN	✓	✓

Competition	Narrow MFN	✓	✓
	Exclusivity	✓	✓
	Access to Data/ Transfer of Data		✓
Intra-Platform Competition	Self-preferencing		✓
	Getting Advantage on its Own Products by the Seller Data		✓
	Platform Transparency		✓
Consumers	Data Binding and Processing		✓
	Killer Acquisitions	✓	✓

As it is seen, the Authority closely monitors online marketplaces which gained a steady ground as a substantial tool of e-commerce. The Final Report represents a comprehensive analysis on the digital markets and digitalization in Turkey by way of following the developments especially in the EU. Considering previous decisional practice of the Board, together with the on-going investigations involving the major players active in the digital markets, it could be said that the Final Report combines the practical experience of the Authority with its theoretical knowledge. Therefore, it is considered an important preparatory step to facilitate the regulative studies as it necessitates strengthening the legislation and paves the way for the legislative regulations on e-marketplaces.

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