



Self-Preferencing in Turkey: The Trendyol Decision

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Introduction

The Turkish Competition Board (“**Board**”) imposed an administrative monetary fine of TL 61,342,847.73 (approx. EUR 2,000,000) on Turkey’s largest e-marketplace, DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (“**Trendyol**”) on July 27, 2023, on the grounds that Trendyol abused its dominant position (“**Decision**”).¹

Hosting more than 250,000 sellers, Trendyol is the first decacorn e-marketplace platform in Turkey with around 30 million customers. It also commercializes its private label products (i.e. TrendyolMilla) on its platform, competing with third party sellers it hosts.

As a result of its investigation, the Board, in short, concluded that Trendyol (i) holds a dominant position in the market for multi-category e-marketplace, and (ii) has abused its dominant position by taking unfair advantage over its competitors, through interventions to the algorithm and using the data of third-party sellers active on its e-marketplace.

This article provides an overview of the landscape surrounding the Decision as well as its implications.

I. Background

The Turkish Competition Authority’s (“**Authority**”) scrutiny over the e-marketplace platforms dates back to the COVID-19-related measures in 2020. The Authority started its sector inquiry on e-marketplace platforms in mid-2020 and published its preliminary report on May 2021. Both the preliminary report (“**E-Marketplace Preliminary Report**”) as well as the final report published in April 2022 had important findings regarding Trendyol’s position in the market as well as the competitive landscape of the market for e-marketplace platforms.

¹ The Board’s *Trendyol* decision dated 26.07.2023 and numbered 23-33/633-213.

Mid-2021 marked the launch of a preliminary investigation into Trendyol’s practices for the self-preferencing allegations through interventions to the algorithms and coding. Based on the documents seized during the consequent dawn-raids, the Board reached the following findings:

- i. Trendyol intervened in the algorithms in a way to favour its private-label offerings, and offered the “next day delivery” opportunity only to its own products,
- ii. Trendyol used the data of sellers hosted on its marketplace for creating its own marketing/design strategy to the advantage of its own retail activity, and,
- iii. Trendyol discriminated between sellers on the marketplace through interventions to the algorithm and lack of transparency regarding sponsored products.

Consequently, the Board launched a full-fledged investigation, and imposed interim measures² to mitigate the risks associated with the Trendyol’s conducts pursuant to Article 9 of the Law No. 4054. The Board came to the conclusion that Trendyol has a strong position in the market for multi-category marketplaces and has gained a significant market share in recent years across all categories, but particularly in the fashion sector. Therefore, the Board held that, until the final decision, the conducts that were being investigated could result in substantial and irreparable harm to competition if they are not prevented. It was the very first time the Board has chosen to implement interim measures during an investigation involving algorithmic competition law concerns. The interim measures involve, among others, the following,

- i. Ceasing all kinds of actions, behaviour and practices which provide Trendyol with an advantage against its competitors, including the algorithms and coding interventions to other products and services within the context of the e-marketplace activity; and avoiding such actions during the investigation,
- ii. Ceasing sharing and using any kind of data obtained and produced from the e-marketplace activity for other products and services under its economic integrity, and avoiding such actions during the investigation,

² The Board’s *Trendyol Interim Measure* decision dated 30.09.2021 and numbered 21-46/669-334.

- iii. Ceasing all kinds of actions, behaviour and practices, which may discriminate among the sellers in the marketplace; including the interventions made through algorithms and coding, and avoiding such actions during the investigation,
- iv. Taking all necessary technical, administrative and organizational measures to ensure the auditability of the interim measures listed above.

However, the interim measure decision was partially annulled by the Ankara Administrative Court³ on the grounds that certain interim measures (i) relate to the time where Trendyol was not identified as a dominant undertaking (i.e. 2017 and 2018) and (ii) are not based on sufficient proof of a violation and the possibility of substantial and irreparable damage warranting the interim measures.

II. The Board's Decision

The Authority has not published its reasoned final decision as of the date of this article, but it only announced a short-form announcement. That said, the e-Marketplace Preliminary Report, the decision concerning the interim measures as well as the rulings of the administrative courts relating to the interim measures provide and insights into the Board's approach.

a. Trendyol's Dominant Position

The E-Marketplace Preliminary Report highlights the following: (i) consumers prefer Trendyol over other marketplaces⁴, (ii) consumers predominantly upload Trendyol on their mobile phones,⁵ (iii) 48.9% of Trendyol's merchants consider it an indispensable commercial partner⁶ and (iv) Trendyol became the category leader in 2020⁷. The Authority also remarked that after marketplaces reach a certain scale and scope, they would potentially grow rapidly. In this sense Trendyol's distinct performance from other prominent marketplaces in 2020

³ Ankara 9th Administrative Court's decision dated 25.05.2022 and numbered 2021/2069 E. and 2022/1157 K..

⁴ The Turkish Competition Authority, "e-Pazaryeri Platformları Sektör İncelemesi Önerisi" ("e-Marketplace Platforms Sector Inquiry Preliminary Report"), April 2021 (Available at: <https://www.rekabet.gov.tr/Dosya/seykor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf>), para 151.

⁵ Ibid. para 156.

⁶ Ibid. para. 416.

⁷ Ibid. para 240.

indicates that Trendyol surpassed this threshold.⁸ Thus, it is established that fashion category is at the forefront of Trendyol's sales.⁹

Considering the various parameters outlined in the decision regarding the interim measures, the Board observed that Trendyol's market dominance primarily stems from its sales in the fashion category. In conclusion, the Board evaluated that in the fashion category; Trendyol is the first undertaking that comes to mind for consumers and is therefore an important determinant of the dynamics in the market. As a result, the Board considered Trendyol in a dominant position in the market for multi-category e-marketplace due to its high and disproportionate market share, barriers to entry and lack of buyer power.

b. Trendyol's Self-Preferencing Conducts

In the short-form decision, the Board held that Trendyol abused its dominant position by taking unfair advantage for its own retailing business by (i) intervening to the algorithms and (ii) using the data of the third-party sellers.

Self-preferencing is a rather new concept as it was only introduced with the development of the digital markets and on this basis; the Board defined the self preferencing as the dominant undertaking's conduct to position itself of a greater advantage in their products or services compared to those of their competitors with whom they compete on the basis of the same platform service. The reason why self-preferencing is of concern from a competition law perspective is that undertakings in a dominant position in a platform service gain an unfair competitive advantage by projecting their market power to another related market. With the development of digital platforms, network effects, economies of scale, ease of vertical integration, possibility to project market power in a much shorter time and much more easily and at no cost make the self-preferencing behaviour more visible. All things considered, the Board assessed self-preferencing as a manifestation of abuse of dominant position through discrimination, constituting a violation under Article 6 of Law No. 4054 (similar to Article 102 TFEU).

⁸ Ibid. para 162.

⁹ Ibid. para 297.

Beyond algorithm interventions, the Board also regarded the utilization of third-party data as anti-competitive behavior and a manifestation of self-preferencing. The data voluntarily provided by commercial users or collected by the undertaking providing the relevant service in relation to transactions carried out by end-users/third parties using the relevant platform service are highly sensitive and provide information from a wide range of parameters such as price, price elasticity, supply status and consumers' point of view, and therefore constitute an important competitive factor.

In this sense, the Board noted that a dominant undertaking that possesses such data may sell or offer the same product or service, or produce or develop the same product or service itself, acting only with the advantage of such data ownership and without incurring any commercial risks and entry costs. As for data-driven self-preferencing (also referred to as forced free-riding in the literature), the relevant undertaking takes advantage of its competitors' innovative practices without incurring any risk, which weakens competitors' incentive to innovate, hinders the introduction of new products and services, and on this basis harms consumer welfare. Data collected may also adversely affect competition by causing information asymmetry as third party commercial users cannot access similar data.

All in all, the reasoned decision is anticipated to provide additional insights into self-preferencing within digital markets, expanding upon the Board's past findings.

c. Obligations Imposed on Trendyol

In addition to the administrative monetary fine, the Board imposed several obligations to Trendyol, which are essentially as follows:

- i. Avoiding all interventions made through algorithms and coding that will provide an advantage to its private label products regarding its retail activity carried out through its own marketplace.
- ii. Avoiding the use of all kinds of data obtained and generated/generated from the marketplace activity for private label products related to the retail activity and taking all necessary technical, administrative and organizational measures to ensure this,

- iii. Keeping the parametric and structural changes made on the algorithm models used for product ranking and brand filtering purposes within the scope of the marketplace activity for 3 (three) years in a versioned and accurate manner,
- iv. Keeping all codes belonging to the algorithms used for product sorting and brand filtering purposes within the scope of the marketplace activity and all codes affecting the algorithms used for product sorting and brand filtering purposes for 3 (three) years,
- v. Keeping user access and authorization records and administrator audit records for all software used for the execution of business processes within the scope of the marketplace activity for 3 (three) years in an accurate manner.

III. Conclusion

Trendyol's dominant position in the market for multi-category e-marketplace is not surprising news, but the Decision is expected to guide the stakeholders in using of third party data for self-preferencing in the future. Indeed, the Turkish lawmaker enacted a new e-commerce law in 2022, introducing specific limitations on the ability of e-marketplaces to sell private-label products within Turkey. This step is expected to alleviate concerns associated with private-label activities in the future.

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