

TURKISH COMPETITION AUTHORITY PROPOSES REGULATION ON E-COMMERCE PLATFORMS

1. Sector Inquiry Background on E-Commerce Platforms

For the past few years, the Turkish Competition Authority (the “**TCA**”) increased its focus on competition concerns emerging from trade digitalization. As the COVID-19 pandemic has increased online sales’ volumes and reinforced the growth of e-commerce platforms, the Competition Board (the “**Board**”) initiated a sector inquiry on e-commerce platforms on 11 June 2020 to examine the possible competition problems related to e-commerce platforms and provide solutions to these problems. On 7 May 2021, the TCA published its preliminary sector inquiry report on e-commerce platforms (the “**Preliminary Report**”), revealing its preliminary findings and initial policy recommendations. Almost one year later, on 14 April 2022, the TCA published the sector inquiry final report on e-commerce platforms (the “**Final Report**”). The Final Report reiterates the findings on the Preliminary Report regarding competition concerns but slightly revises its policy recommendations. The TCA’s final policy recommendations are an ex-ante regulation that targets gatekeepers, a platform code of conduct to be supervised by the Trade Ministry and fostering existing competition law rules through secondary legislation.

2. The TCA’s Main Competition Concerns

The Final Report examines e-commerce platform practices by categorizing them as concerns relating to **(i)** inter-platform competition, **(ii)** intra-platform competition and **(iii)** exploitative practices and reiterates the Preliminary Report’s main competition concerns.

The Final Report emphasizes that the most favored nation (the “**MFN**”) or exclusivity clauses imposed on sellers by gatekeepers prevent data portability between platforms, complicate new

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entry and growth of competitors and thus decrease inter-platform competition. The Final Report's main concern regarding intra-platform competition is self-preferencing; in other words, hybrid e-commerce platforms' tendency to favor their own products or services over their competitors (i.e, third-party sellers using the platform). According to the Final Report, such self-preferencing may occur by prioritizing the e-commerce platform's own products in the listing/sorting algorithms, using third party sellers' data to promote the platform's own products, providing advantage to the sellers that use the platform's other services, such as e-wallet or shipping. Lastly, the Final Report reiterates that e-commerce platforms' practices may exploit consumers and third-party sellers. Excessive collection of consumer data and breaches of confidentiality, information asymmetry, and unfair trade terms imposed on third-party sellers are listed among the concerns relating to e-commerce platforms' exploitative practices.

To demonstrate that the concerns raised in the Preliminary Report remain valid, the Final Report analyzes recent developments in the market since the Preliminary Report's publication. In this regard, the Report contains a very detailed overview of the current state of the market, including precise data of retail e-commerce development, internet penetration rate, internet usage intensity and financial inclusion. According to these data, e-commerce volume in Turkey has increased by 66% between 2019 and 2020, and by 75.6% in the first six months of 2021, compared to the same period of the previous year. Indeed, the Report emphasizes that e-commerce platforms are the driving force behind e-commerce volume growth, indicating that in 2020 and in the first 6 months of 2021, between approximately 96% and 97% of the businesses operating in trade-commerce sold through these platforms.

One concern stated in the Preliminary Report was the threat of increased concentration due to mergers between e-commerce platforms and killer acquisitions. The Final Report mentions the Getir's acquisition of N11 to stress the increasing concentration of the market and to support the concern relating to the increased concentration level. It is worth mentioning that the Getir/N11 acquisition was unconditionally cleared by the TCA.

The Report refers to the TCA's decision to launch an investigation against Trendyol, the largest e-commerce platform in Turkey, which was found to interfere with algorithms and overuse third-party sellers' data to favor its own brands/activities. The decision imposed interim measures requiring Trendyol **(i)** to cease its practices that provide an advantage to its own products and services over its competitors, and/or that will lead to discrimination between the sellers in its marketplace, **(ii)** not to share or use any data obtained from marketplace activities to favor its own products and services, and **(iii)** to store the parametrical and structural changes made through algorithms, software source codes that are developed specifically for internal use and user access logs, user authorization logs and administrator supervision logs used in business processes for a period of at least eight years.

3. The TCA's Final Policy Recommendations

The Final Report's policy recommendations are comprised of three pillars:

- Ex-ante regulation targeting gatekeepers;
- The platform code of conduct; and
- Strengthening secondary legislation.

(a) Ex-Ante Regulation Targeting Gatekeepers

The Final Report proposes the introduction of an ex-ante regulation targeting gatekeepers' anticompetitive practices. The Final Report states that the TCA is currently working on such legislative proposal that is envisaged to be finalized soon.

The Final Report restates the Preliminary Report's suggested set of rules:

- Not imposing a contractual or de facto-wide MFN clause on the sellers;
- Avoiding the use of non-public data that is produced through third-party sellers' activities, and which compete with the platform's own products;
- Not favoring their own products in the listing;
- Not creating any technical or behavioral barriers to transfer third-party sellers' or consumers' data to other platforms;
- Providing free, effective, quality and real-time access to performance tools to third-party sellers; and
- Providing sellers with free, effective, quality and real-time access to their own data on the platform and the data produced from these platforms.

The Final Report states that in addition to the above-listed obligations, the TCA's legislative study aims to impose certain obligations **(i)** to prevent big market players from implementing exclusivity clauses, **(ii)** to ensure platform services' horizontal and vertical interoperability, and **(iii)** to establish platform transparency by providing sufficient information to commercial users on the scope, quality and performance of basic and ancillary platform services and pricing principles.

The Preliminary Report's recommendation to introduce mandatory notification for all the acquisitions made through e-commerce platforms regardless of the turnover thresholds is not indicated in the Final Report since the merger control rules have been revised to catch killer acquisitions in the digital sector. Thus, according to Communiqué No. 2022/2 on Amending Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Turkish Competition Board's Approval published in the Official Gazette on 4 March 2022, the local turnover threshold will not apply to technology companies' acquisitions (such as e-commerce platforms and fin-tech companies) that operate in the Turkish geographical market, are engaged in R&D activities or provide services in Turkey. Therefore, a technology company acquisition will trigger

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a merger filing in Turkey even if the target company has zero turnover. The amendment came into force on 4 May 2022 and will trigger more scrutiny on e-commerce platforms' acquisitions.

(b) The Platform Code of Conduct

According to the Final Report, the asymmetric bargaining power between e-commerce platforms and platform services' commercial users may subject commercial users to unfair trade terms. The Final Report states that unfair trade terms are not to be included in the ex-ante regulation and suggests the adoption of a "Platform Code of Conduct."

The Report explains that this asymmetry in bargaining powers may not only be due to the dominant position of e-commerce platforms but may also be a result of the sellers' loyalty to the latter. Therefore, the Report considers that this specific policy recommendation should be applied in a broader sense by including e-commerce platforms that are not in a dominant position and should be implemented by the relevant Ministries such as the Trade Ministry. The TCA's suggestion of a Platform Code of Conduct is a soft law instrument that would guide e-commerce platforms on best practices. On the other hand, the Trade Ministry is currently working on a legislative proposal that includes rules to balance the sellers' asymmetric bargaining power and e-commerce platforms. However, the details and the scope of the proposal are not yet public.

(c) Strengthening of the Secondary Legislation

The TCA emphasizes that the tendency for rapid concentration in digital markets calls for stricter implementation of the existing competition law rules. According to the Final Report, as MFN and exclusivity clauses may have more restrictive effects on competition, the secondary legislation should consider these issues.

The TCA states that the secondary legislation should also be strengthened to avoid the exploitative practices of e-commerce platforms. Within this context, the Final Report states that secondary legislation clarifying how exploitative practices of e-commerce platforms, such as consumer data over-collection, confidentiality breaches, benefiting from consumers' information asymmetry and unfair contractual and trade terms should be interpreted within the scope of abuse of dominance.

4. Conclusion

The Final Report demonstrates a comprehensive and diligent approach towards regulating e-commerce platforms. While the developments in the e-commerce sector continue unhindered, the TCA is determined to intervene to increase competition between and within e-commerce platforms. The TCA's suggestion is a policy mix of ex-ante regulation and ex-post application of competition law.

The TCA already introduced specific merger control rules in acquisitions involving e-commerce platforms and changes to other secondary legislation are expected. Although a certain timeline is

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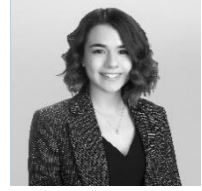
publicly unavailable, an ex-ante regulation for gatekeepers to complement conventional competition law rules is on the horizon.

CONTACT



Competition Law Counsel
Neyzar Ünübol

nunubol@kolcuoglu.av.tr



Associate
Esen Çakır

ecakir@kolcuoglu.av.tr