Regulating Digitalization in Türkiye

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contents

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'Regulating Digitalization in Türkiye'

The Law No. 6563 on the Regulation of Electronic Commerce (the "E-commerce Law") of Türkiye has been considered inefficient to address the problems created in the face of rapidly changing technology and digitalization. It was amended with the Law on the Regulation of Electronic Commerce Amendment Law (the "Amending Law") adopted by the Turkish Parliament on 1 July 2022. Influenced by the European Union's Digital Markets Act (DMA) and the Digital Services Act, the Amending Law was published in the Official Gazette on 7 July 2022 and was entered into force on 1 January 2023.

The new Law aims to protect the competitive environment, prohibit unfair commercial practices and monopolization, and ensure a healthy growth of the e-commerce sector in Türkiye. Yet, it brings radical changes to the previous legislation. The operations of sector players will be significantly affected by the new definitions and by the new obligations and restrictions that were introduced and imposed in the Amending Law.

Separately, the Draft Digital Markets Bill to amend the Law on Protection of Competition (the "Competition Law") was published in October 2022. Amendments that come with the Draft Bill aim to regulate and protect the fair and competitive environment in the digital markets while ensuring further compliance with the EU legislation.

This special issue of the Network Industries Quarterly features five short articles which mainly explore the potential effects of the changes in the E-commerce Law and the Competition Law. This issue also presents an analysis on the recent developments and challenges in the regulation of data privacy in Türkiye.

The first contribution by **Ekingen** aims to explain how the amendments to the regulation of e-commerce have affected online multi-sided platforms and their current position in digital markets in Türkiye.

Ikiler and **Yüksel** compare the Proposed Amendment with the DMA and the German Competition Act to identify procedural, substantive and fundamental differences between those legislations and also discuss whether and for which circumstances there would be a need for the Proposed Amendment despite the E-Commerce Law.

Arslan and **Tanoğlu** also compare the Amendment Law with EU regulations. Given the fact that the market in Türkiye is still growing, the authors discuss whether these regulations risk over-regulating the market.

Girgin, Horozoğlu, and **Çal** examine the effect of the E-commerce Law and Draft Digital Markets Bill on Competition Law on e-commerce platforms and market competition.

Ersoy focuses on the regulation of data privacy in Türkiye. Ersoy examines recent developments and challenges, and by taking previous experiences in the field of data protection law in Türkiye, the author provides reflections for the future.

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The Legal Treatment of Online Multi-Sided Platforms in Turkey: New Obligations for E-Commerce Marketplaces Laid Down in Amendments to the Law on the Regulation of E-Commerce

Erman Ekingen*

The arrival of online multi-sided platforms has caused many significant changes in the treatment of competition issues in digital markets. Its effect can be seen in many discussions regarding setting new rules for digital markets. Considering all these changes and recent controversies surrounding the digital world, specific regulations were also needed in Turkey due to the importance of online multi-sided platforms and their effects on general competition in digital markets. As a result, a law amending the law on the regulation of e-commerce was published on 7 July 2022. This paper aims to explain how the amendments to the regulation of e-commerce have affected online multi-sided platforms and their current position in digital markets in Turkey.

Introduction

As many daily routines have become digitalised and have started to be conducted in online environments, the number of online multi-sided platforms worldwide has increased. This is why these platforms have recently become the subject of economic and legal discussion. From the legal point of view, the regulation of digital markets and the regulation of the obligations on online multi-sided platforms that have crucial roles in digital markets have been topics much discussed all over the world in recent years. As a result of these long-standing discussions, which also exist in Turkey, a new law regarding the regulation of online multi-sided platforms and making some amendments to the existing rules regarding e-commerce in Turkey was passed.

Regarding the regulation of online multi-sided platforms, the Turkish Competition Authority (TCA) conducted some research and on 7 May 2021 submitted the E-Commerce Marketplaces Preliminary Report.[1] After the publication of the preliminary report, public opinion and international developments in the regulation of online multi-sided platforms were also taken into account, and on 14 April 2022 the E-Commerce Marketplaces Final Report was published.[2] This highly detailed report made specific policy recommendations that affect the responsibilities of online multi-sided platforms with market power. Basically, as in the European Union's (EU) Digital Markets Act (DMA),[3] it recommended implementing rules in which a small number of large powerful online multi-sided platforms are subject to a specific sectoral regime of asymmetric obligations.

In parallel with the review of the sector by TCA, problems arising from Law No. 6563 on the Regulation of Electronic Commerce[4] (Law No. 6563) were solved by making certain amendments to the law. The Law Amending Law No. 6563 on the Regulation of Electronic Commerce (Law No. 7416) was published on 7 July 2022.[5] The details of the implementation of the amendments were determined by the Regulation on Service Providers and Intermediary Service Providers in Electronic Commerce published on 29 December 2022.[6] The present paper investigates how the amendments to Law No. 6563 have affected online multi-sided platforms and their current position in digital markets.

Why Was It Necessary to Amend Law No. 6563?

Law No. 6563 on the Regulation of Electronic Commerce was adopted on 23 October 2014, and it entered into force on 1 May 2015. The law regulates the principles and procedures regarding e-commerce and covers commercial communication, the responsibilities of service providers and intermediary service providers, contracts made with electronic communication tools, obligations to provide information regarding e-commerce and the sanctions

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1 Turkish Competition Authority, "E-Pazaryeri Platformları Sektör İncelemesi Ön Raporu," (2021), <https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-on-rapor-teslim-tsi_son-pdf>, Accessed 15 March 2023.

2 Turkish Competition Authority, "E-Pazaryeri Platformları Sektör İncelemesi Nihai Raporu," (2022), <https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-raporu-pdf>, Accessed 15 March 2023.

3 European Parliament, "Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)," <https://eur-lex.europa.eu/eli/reg/2022/1925/oj>, Accessed 15 March 2023.

4 RG, 5.11.2014, No.29166.

5 RG, 1.7.2022, No. 31889.

6 RG, 29.12.2022, No. 32058.

to be applied. However, since the law came into force, new business models and product groups have been included in the e-commerce ecosystem due to developments in information and communication technologies and the COVID-19 epidemic. All these changes in the last few years caused rapid development and changes in electronic commerce processes. This situation brought about problems that actors in the e-commerce ecosystem had not previously encountered and required the rules on e-commerce activities to be adapted.[7]

The general justification for Law No. 7416 explicitly emphasised current significant effects of e-commerce marketplaces which enable one to make contracts or place orders for the supply of goods or services in the e-commerce environment. With the growth of e-commerce, e-commerce marketplaces which can be categorised as online multi-sided platforms are recognised as essential sales channels. As the justification for Law No.7416 stated, the ratio of e-commerce to general trade in Turkey, which was 9.8% in 2019, nearly doubled to 17.7% in 2021 and this ratio is expected to shortly increase further.[8] The most important reason for this is the tendency of end-users to use online multi-sided platforms for many different daily activities.

Therefore, the fact that online multi-sided platforms brought about changes in the rules on e-commerce trading and that there is concentration in the market regarding e-commerce marketplaces caused Law No. 6563 to be amended. This amendment aimed to control and monitor the results of this new and significant effect created by e-commerce marketplaces.

The Focus of the Amendment to Law No.6563

Before it was amended, Law No. 6563 was not able to solve the problems created by new business models brought about by technological developments and digitalisation. Due to rapid development and change in digital markets, the effects of anti-competitive practices emerged very quickly. Therefore, the focus of the amendment was on e-commerce actors and their general behaviour, with the aims of preventing unfair competition and monopolisation in digital markets, facilitating the entry of new actors into markets and ensuring balanced and healthy market growth. The amendment to Law No. 6563 introduced sector-specific rules on e-commerce actors and their market behaviour. One of the most critical issues in the amendment was that it introduced a definition of new trade actors and many new obligations on them.

In the amendment to Law No. 6563, online multi-sided platforms such as Trendyol, Amazon, Hepsiburada, ÇiçekSepeti and Morhipo, which are described as e-commerce marketplaces, were defined as e-commerce intermediary service providers. In this new definition, which is unique among other countries' laws, the changing positions of multi-sided platforms in the market were considered. The amendment meant that there would be different sanctions and obligations for e-commerce marketplaces to those for other online multi-sided platforms. Unlike the first version of Law No. 6563, which focused on the relationships between e-commerce undertakings and e-commerce marketplaces and end-users and the related liability regime, this amendment focused on the relationship between e-commerce undertakings and e-commerce marketplaces.

In addition to defining new trade actors in e-commerce, the amendment to Law No. 6563 also introduced an essential new criterion for determining responsible actors in e-commerce. This new criterion was economic integration. Broadly, economic integration is a term used to refer to a situation in which natural or legal persons and trading companies and businesses associated with these persons have horizontal and vertical control relations.[9] The adoption of the principle of economic integration in the amendment to Law No. 6563 is significant in terms of the responsibility of e-commerce intermediary service providers. It broadened this responsibility to include the responsibility for persons with whom they are economically integrated.

Obligations on Online Multi-Sided Platforms Introduced in the Law Amending Law No. 6563

Among the obligations on e-commerce intermediary service providers, the amendment added rules affecting online multi-sided platforms to Law No. 6563. These new rules established a liability system by considering factors such as economies of scale, economies of scope, network effects, consumer dependence and service provider dependence operating in the e-commerce environment, data ownership, and the advantages of using data and services embedded in e-commerce environments. The system aimed

7 TBMM, General Justification for Amending the Law on the Regulation of Electronic Commerce, <https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss345.pdf>, Accessed 1 March 2023.

8 General Justification for Amending the Law on the Regulation of Electronic Commerce, p.8.

9 General Justification for Amending the Law on the Regulation of Electronic Commerce, p.11.

to protect the conditions of practical and fair competition, reduce the dependence of e-commerce service providers on e-commerce marketplaces and monitor the activities of e-commerce intermediary service providers.

To achieve these aims, a liability system similar to that in the DMA was introduced by Law No. 7416. However, instead of specifying a single comprehensive definition such as a gatekeeper, a liability system that gradually increases obligations according to the net transaction volumes of e-commerce intermediary service providers in a calendar year was adopted. The liability system introduced by Law No.7416 consists of four stages. The first stage covers obligations that all e-commerce intermediary service providers must comply with. The subsequent phases cover e-commerce intermediary service providers with a net transaction volume of over ten billion, over thirty billion and over sixty billion Turkish liras in a calendar year. In each stage new obligations are added to the previous ones.

There are three dimensions to the obligations in the first stage covering all e-commerce intermediary service providers:

Illegal content. Article 9/2 of the amended Law No. 6563 obliges e-commerce intermediary service providers to remove illegal content from their platforms once they realise it is illegal. They must also notify relevant public institutions and organisations about this.

Unfair commercial practices in e-commerce. Law No.7416 specifies that e-commerce intermediary service providers must attempt to prevent unfair commercial practices against sellers who use the platform. The law also specifies six different forms of unfair commercial practice.

Practical and fair competition. Some new obligations on e-commerce intermediary service providers are also specified regarding enhancing practical and fair competition in digital markets. E-commerce intermediary service providers are prohibited from offering for sale or acting as intermediaries in the sale of goods bearing their trademarks, those of persons with whom they are economically integrated and those of persons whose trademarks they have the right to use in e-commerce marketplaces in which they provide intermediary services. If these goods are offered for sale in different e-commerce environments, e-commerce intermediary service providers cannot provide access to these environments, and they also cannot promote each other. In addition to the obligation to refrain from offering their brands for sale under their trademarks, e-commerce intermediary service providers also cannot engage in marketing and promotion activities via search engines by using the names of well-known brands without their consent.

The other stages in the liability system for e-commerce intermediary service providers mainly focus on the practical and fair competition dimension. The obligations in the second stage on e-commerce intermediary service providers with net transaction volumes over ten billion Turkish liras are related to using data power. Data obtained from consumers can only be used for intermediary services, and sellers must be provided with access to numerical data regarding their sales through the platform. In addition, e-commerce intermediary service providers are obliged to obtain a license from the Ministry and to renew it to continue their activities.

The obligations in the third stage covering e-commerce intermediary service providers with net transaction volumes over thirty billion Turkish liras cover details regarding their total advertising and discount budgets. In addition, most-favoured-nation (MFN) clauses cannot be included in intermediary service agreements between e-commerce intermediary service providers and sellers.

The obligations in the last stage covering e-commerce intermediary service providers with net transaction volumes over sixty billion Turkish liras cover two critical issues. The first is that e-commerce intermediary service providers cannot enable banks with which they are economically integrated to conduct activities related to realising the services they offer, including loan transactions. The second is related to electronic money. E-commerce intermediary service providers cannot allow activities to be carried out regarding acceptance of electronic money issued by institutions with which they are economically integrated.

The Potential Effects of the New Obligations on Online Multi-Sided Platforms on General Competition in Digital Markets

The amendments to Law No. 6563 aimed to impose new obligations on online multi-sided platforms, which are the most critical and influential actors in e-commerce worldwide. It was reasonable to attempt to regulate the internal dynamics of digital markets by controlling the impact of a small number of prominent and influential online multi-sided platforms on the market with these new obligations. The aim was to protect competition in digital markets. However, the amendments made by Law

No. 7416 not only controlled the impacts of e-commerce marketplaces such as Trendyol, Amazon, Hepsiburada, ÇiçekSepeti and Morphio, which have significant market shares, but also caused severe problems regarding general competition in digital markets.

First, the most fundamental problem caused by these amendments is related to the four-stage liability system. It is reasonable and common, as examples in different competition systems in the world show, for powerful online multi-sided platforms in digital markets to be treated differently to other actors in the market. In different competition systems worldwide some specific obligations are imposed on these powerful platforms in order to create a fair and open competitive environment. However, the first stage in the liability system for e-commerce intermediary service providers specified in Law No. 6563 covers all e-commerce marketplaces regardless of the providers' monopoly power to make high profits.

The new liability system was created to develop a control mechanism for e-commerce marketplaces that currently exist in the market and have a strong influence. However, the unforeseen effects of this system are large enough to significantly affect the growth of other market players and create barriers against entry into digital markets. Due to the heavy obligations that the system imposes on all e-commerce marketplaces, the effectiveness of potential competitors of powerful platforms in the market was disrupted.

Therefore, by attempting to prevent them from abusing their power in the market by means of the new liability system, there is a considerable risk that the most powerful e-commerce marketplaces will remain unrivalled with these new obligations. With the barriers against market entry created by the new obligations, powerful platforms will be more effective in digital markets. This is completely contrary to the aim of imposing the obligations.

Another issue that has potential to negatively affect general competition in digital markets due to the uncertainties it creates concerns the obligations imposed on all e-commerce intermediary service providers regarding unfair commercial practices. The amendment to Law No. 6563 prohibits unfair commercial practices in e-commerce being imposed, of which Law No.7416 specifies six different forms. However, it can be understood from the text of the law that some other practices can also be described as unfair commercial practices so not only six forms of unfair commercial practice exist. In fact, Article 11 of the Regulation on Service Providers and Intermediary Service Providers in Electronic Commerce, published on 29 December 2022, specifies other forms of unfair commercial practice in addition to the six listed in Law No. 7416. The fact that there is no limit to the obligations on e-commerce intermediary service providers regarding unfair commercial practices and that they can be regulated even by the provision in the regulation adversely affects general competition and undertakings in the market. In particular, undertakings that do not have immense market power but wish to enter the market will be the most affected by this situation, as the current uncertainty will represent a massive risk for them.

Conclusion

Rapid development and changing processes in digital markets and the emergence of new business models created a need to consider the details regarding the roles and effects of online multi-sided platforms in these markets. As a result, in Turkey a new law regarding the regulation of online multi-sided platforms and amending the previous rules regarding e-commerce was passed. Law No. 7416 was published in July 2022 to make some amendments to Law No. 6563. These amendments created a new liability system for e-commerce intermediary service providers which are known as e-commerce marketplaces. The new liability system was created to develop a control mechanism for e-commerce marketplaces that currently exist in the market and have a strong influence. However, the unforeseen effects of this system are large enough to significantly affect the growth of other market players and create barriers against entry to digital markets. Although these effects have not yet been seen, the new liability system has potential to adversely affect general competition in digital markets in the long run.

The Proposed Amendment to the Turkish Competition Act: Will the Emperor Have New Clothes?

Att. Bora İkiler* and Att. Barış Yüksel**

The Turkish Competition Authority (TCA) has been prioritising digital markets for some time. The TCA conducted an inquiry regarding the e-commerce sector which identified structural problems and pointed to a need for ex-ante regulations, and attempted to address more pressing issues by means of ex-post interventions. While the TCA was working on a major amendment to Act no. 4054 on the Protection of Competition (Proposed Amendment), which was influenced by both the Digital Markets Act of the European Union (DMA) and Section 19a of the German Competition Act (GWB), the Ministry of Trade figuratively beat the TCA to it as comprehensive amendments were made by Act no. 6563 on Regulating E-Commerce (E-Commerce Act), making the Ministry of Trade the indisputable regulator of the e-commerce sector. In this article, we compare the Proposed Amendment with the DMA and the GWB to identify procedural, substantive and fundamental differences between these pieces of legislation. We also discuss whether there is still a need for the Proposed Amendment despite the E-Commerce Act and if so why.

The Proposed Amendment to the Turkish Competition Act: Will the Emperor Have New Clothes?

Since the late 2010s, digital markets have been one of the most prominent focuses of the Turkish Competition Authority (TCA). Indeed, the TCA has conducted numerous investigations of prominent multinational[1] and national[2] undertakings that operate in different digital markets. Some of these investigations concerned issues such as data portability,[3] excessive marketing,[4] data combination practices[5] and abusive commercial practices[6] that stem from structural failures in the market[7] rather than anti-competitive conduct by dominant undertakings. While ex-ante regulations are deemed to be more suitable tools to tackle structural failures compared to competition law,[8] the lack of ex-ante regulations governing digital markets encouraged the TCA to modify existing competition law instruments to create temporary solutions to problems stemming from structural failures.

In the meantime, the TCA conducted a sector inquiry regarding e-marketplace platforms which underlined the need for ex-ante regulations due to the inadequacy of competition law to deal with concerns identified in its E-Commerce Final Report.[9] As the name suggests, the E-Commerce Final Report only focused on the e-commerce sector, and other 'core platform services'[10] mentioned in the Digital Markets Act of the European Union[11] (EU) were not examined.[12] Before any amendments could be made/proposed to Act no. 4054 on the Protection of Competition (Competition Act) based on the findings in the E-Commerce Final Report, comprehensive amendments were made by Act no. 6563 on Regulating E-Commerce (E-Commerce Act). The E-Commerce Act bestowed the relevant departments of the Ministry of Trade with significant regulatory powers that have the potential to considerably alter the current structure of the market. Following the entry into force of the E-Commerce Act, a proposed amendment to the Competition Act (Proposed

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1 The TCA conducted and concluded (finding infringements) four separate investigations of Google and one investigation of Meta. Currently, a fifth investigation of Google is ongoing.

2 The TCA conducted and concluded two investigations (one finding an infringement and the other closed with an acceptance of commitments) of Yemeksepeti (one of the leading online food ordering service platforms in Turkey). There are ongoing investigations of Sahibinden.com (the largest platform in Turkey that provides online services for the sale/leasing of real estate and vehicles) and Trendyol (the largest e-marketplace in Turkey, which also operates other platforms providing various services).

3 TCA Nadirkitap Decision number 22-16/273-122 dated 07.04.2022.

4 TCA Google AdWords Decision number 20-49/675-295 dated 12.11.2020.

5 TCA Meta Decision number 22-48/706-299 dated 20.10.2022.

6 TCA Yemeksepeti Commitment Decision number 21-05/64-28 dated 28.01.2021.

7 Zingales et al. (2019); Jason et al. (2019); Australian Competition and Consumer Commission (2019); Competition and Markets Authority (2020); Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020).

8 Dunne (2015).

9 Turkish Competition Authority Supervision and Enforcement Department I (2022), E-Pazaryeri Platformları Sektör İncelemesi Nihai Raporu, 2022 (Ankara: Rekabet Kurumu).

10 The core platform services identified in the DMA which are deemed to contain structural failures that would require intervention via ex-ante regulations are online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.

11 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

12 On March 6, 2021, the TCA announced the launch of an inquiry into the online advertising sector. With this inquiry the TCA aimed to assess the structure and functioning of the industry, structural and behavioural competition concerns, the adequacy of existing competition law tools to establish effective competition and new tools to address these emerging areas. The TCA called on stakeholders to submit their comments and recommendations on these matters. The report on the inquiry has not yet been published.

Amendment) which was modelled on the DMA and Section 19a of the German Competition Act (GWB) was also published.[13]

A Comparative Assessment of the System Envisaged in the Proposed Amendment

The Proposed Amendment differs from the DMA and resembles Article 19a of the GWB in that it is not a new piece of legislation but consists of various additions to the Competition Act. However, there are also significant similarities between the Proposed Amendment and the DMA. Most importantly, according to the Proposed Amendment the TCA may only regulate core platform services (which are the same as those covered by the DMA) by designating undertakings with significant market power (SMP). The concept of SMP in the Proposed Amendment is a carbon copy of the term 'gatekeeper' in the DMA.[14] Although the ex-ante obligations imposed on gatekeepers by the TCA resemble those in the DMA, the effects of Article 19a of the GWB are also seen in some ex-ante obligations that are only slightly different to their counterparts in the DMA.

While the general system of the Proposed Amendment is similar to that of the DMA, closer scrutiny reveals crucial differences between the two. These differences may be categorised in three main groups: (i) procedural differences; (ii) substantive differences; and (iii) fundamental differences. In this article we merely point out the differences that are deemed to be the most important. It should be noted that many other nuances are not mentioned due to their relative insignificance.

Procedural Differences

Both the DMA and the Proposed Amendment stipulate that undertakings which exceed certain quantitative thresholds[15] (turnover, number of customers and durability of market power) automatically (upon self-notification) become subject to ex-ante regulations.[16] In addition, in both pieces of legislation, undertakings which do not exceed the quantitative thresholds may be designated as gatekeepers based on certain qualitative criteria, which resemble those employed in traditional dominance analysis. However, there are considerable differences between the designation processes based on qualitative criteria. Whereas the DMA envisages a very detailed market investigation in which all the facts and circumstances surrounding each case are carefully assessed within 12 months, a brief assessment to be finalised in 60 days is deemed sufficient in the Proposed Amendment. Hence, on the surface it seems that the TCA would have much greater discretion than the EU Commission when designating gatekeepers based on qualitative criteria.

Another critical procedural difference is related to the determination of the ex-ante obligations imposed on gatekeepers. In the DMA, the same pre-determined ex-ante obligations are imposed on all gatekeepers.[17] Therefore, the EU Commission does not have the discretion to determine which ex-ante obligations are imposed on a specific gatekeeper. The contrary is true in the Proposed Amendment, which contains a list of ex-ante obligations, and the Turkish Competition Board (the Board) has the discretion to determine which obligations should be imposed on specific gatekeepers on a case-by-case basis.

Substantive Differences

There are slight differences between almost all the ex-ante obligations in the Proposed Amendment and those in the DMA. However, there are three ex-ante obligations in the Proposed Amendment which are materially different to those in the DMA.

First, the Proposed Amendment requires gatekeepers to ensure that 'app stores' can be easily removed by end-users, whereas no such rule exists in the DMA. If enacted, this obligation could lead to significant complications in practice both because gatekeepers may have to incur costs to change the design of their software specifically for Turkey (given that a similar obligation does not exist elsewhere) and because end-users who remove app stores by mistake may have difficulty in reinstalling them or similar software.

Second, the personal data combination ban (i.e. the obligation not to combine personal data obtained from the provision of a particular service with personal data ob-

13 The text of the Proposed Amendment was not made public but it was shared with various stakeholders to obtain their opinions.

14 In this article our use of the term 'gatekeeper' also encompasses the term SMP in the Proposed Amendment.

15 The quantitative thresholds in the DMA are specified in the text of the legislation whereas those to be applied in Turkey are to be be determined by the Turkish Competition Board (Board) via secondary legislation.

16 Both the DMA and the Proposed Amendment require undertakings that exceed quantitative thresholds to prove that due to exceptional circumstances they do not satisfy the qualitative criteria to be designated as having SMP (or being gatekeepers).

17 The ex-ante obligations imposed on gatekeepers that provide different core platform services may differ but all the gatekeepers that provide the same core platform services are subject to the same ex-ante obligations.

tained from the provision of other services) in the Proposed Amendment is much stricter than that in the DMA. While the DMA allows data combination when there is explicit consent by the data owner, the Proposed Amendment does not allow gatekeepers to combine data even if the data owner explicitly consents to it. Furthermore, the Proposed Amendment stipulates that data combination practices are deemed unlawful if they prevent the entry of new undertakings or hinder the activities of existing competitors. This is somewhat unusual for an ex-ante obligation since the TCA would have to assess the effects of data combination before determining whether it is unlawful. In practice this would eliminate the difference between ex-ante regulation and ex-post application of competition law. Additionally, the main purpose of restricting data combination practices should be to protect data owners (i.e. to prevent exploitative practices). However, in the Proposed Amendment the main concern associated with data combination practices is market foreclosure, which is the archetypical exclusionary practice.

Last, the Proposed Amendment contains a very broad prohibition of discrimination in which gatekeepers must refrain from discriminating between end-users/commercial users based on unfair or unreasonable conditions. This obligation also blurs the line between ex-ante regulation and ex-post application of competition law. Indeed, a thorough affect-based assessment must be conducted to determine whether the basis for an allegedly discriminatory practice was unfair or unreasonable. Such detailed assessment would contradict the general reasoning of ex-ante regulations.

Fundamental Differences

A closer look at the procedural and substantive differences (both the more prominent ones mentioned in this article and others that are not) between the two pieces of regulation shows that a fundamental difference lies at the core of all the foregoing. This fundamental difference relates to the trade-off between legal certainty and adaptability. The DMA clearly defines its subjects and the obligations imposed on them and introduces strict rules on changing the rules on a case-by-case basis. The Proposed Amendment, on the contrary, grants the Board wide discretionary power and envisages a system in which both the subjects of the Act and the obligations that would be imposed on them are mainly decided on a case-by-case basis. The former approach guarantees legal certainty but the enforcer could have difficulty in responding to new situations that are not addressed in the original text of the legislation. The latter approach creates a more adaptable legal framework in which the enforcer may more easily respond to new situations but foregoes legal certainty to the detriment of undertakings that could be designated as gatekeepers.

Will the Proposed Amendment See the Light of Day?

As was mentioned at the beginning of this article, significant amendments were made to the E-Commerce Act and the e-commerce sector is already subject to heavy ex-ante regulations. While a comprehensive comparison between the Proposed Amendments and the E-Commerce Act is beyond the scope of this article, it would not be wrong to argue that the Proposed Amendment seems to be redundant to the extent that it concerns the e-commerce sector. Moreover, jurisdictional conflicts may arise between the Ministry of Trade and the TCA as both pieces of legislation have similar provisions and there would be a high risk of double jeopardy if they were applied simultaneously and independently. Indeed, past experiences[18] in regulated sectors suggest that such problems are somewhat difficult to solve.

As was noted above, the current approach, which is reflected in the most recent text of the Proposed Amendment, suggests the solution of both pieces of legislation addressing similar issues in the e-commerce sector (issues involving other core platform services would be addressed exclusively by the amended Competition Act) but ensuring the same conduct is not sanctioned more than once under different pieces of legislation. Another alternative may be to revisit the Proposed Amendment to eliminate any overlaps between the Competition Act and the E-Commerce Act (e.g. a basic solution would be to remove e-commerce from the scope of core platform services in the Proposed Amendment). However, for now the only core platform service in which Turkey has unique problems seems to be e-commerce. Other core platform services are provided almost entirely by international players such as Google, Meta, Amazon, Apple and Microsoft, which generally adopt the same policies throughout the world. This means that once ex-ante regulations such as the DMA become effective, these companies will design their business models in compliance with these regulations. In this case, the presence of similar regulations in Turkey would not make a significant difference in practice and the costs of issuing and implementing these ex-ante regulations may outweigh

18 For a detailed discussion regarding similar problems in the electronic communications sector, see Ardıyok and Yüksel (2015).

the benefits.[19] In such circumstances, it may be more practical to widen the scope of the E-Commerce Act and grant the Ministry of Trade the authority to remedy any residual concerns in other core platform services.

On the other hand, it should also be considered that an action annulling the most significant provisions in the E-Commerce Act, which concerns the ex-ante regulation of the e-commerce sector, has been submitted to the Turkish Constitutional Court (TCC). The review process is ongoing. If the TCC decides that the relevant provisions are unconstitutional, the current legislative framework will dramatically change and the Proposed Amendment would become much more relevant. Assuming that this is a real possibility, it may be rational for the legislator to wait until the TCC renders its decision and to determine how to proceed with the Proposed Amendment afterwards.

Above, we conducted a positive assessment to identify possible developments that may be expected in the near future by interpreting the facts at hand. We will conclude with a brief normative assessment. Given that the proposed ex-ante regulations regarding digital markets in general and the e-commerce sector in particular are mostly based on economic arguments the foundations of which can be traced back to theories of industrial organisation, it is crucial for the relevant regulatory authority to have sufficient expertise and resources to monitor compliance and implement the rules. With the current institutional framework in Turkey, the TCA is a better candidate than the Ministry of Trade in that respect. Moreover, given the fact that these ex-ante regulations would only affect a few players with considerable economic power, it would also be prudent to devise an institutional framework that is best suited to preventing regulatory capture. Again, the TCA, which has financial and administrative independence along with a well-developed institutional culture, seems to be the better alternative in that respect as well. Still, although it may be more appropriate to have the TCA as the ex-ante regulator of digital markets, it is critical to avoid overregulation. To do that, the Proposed Amendments may be revised by taking into consideration the specific situation in Turkey. While this article is not concerned with optimisation of the Proposed Amendment, we note that considerable efficiency gains may be realised with two relatively basic revisions. First, markets in Turkey where no apparent structural problems are observed should not be subject to ex-ante regulations to avoid the costs of overregulation. The most obvious overregulation in that respect in the Proposed Amendment is the inclusion of cloud services, where there have never been any structural or behavioural problems so far in the scope of core platform services. Second, it should be ensured that ex-ante regulations would only be applied in exceptional circumstances to address problems related to structural failures, whereas practices that traditionally fall in the category of abuse of dominance would continue to be addressed using the pre-existing effect-based analysis techniques.

Considering the foregoing, it would not be surprising to see the Proposed Amendment becoming a remnant of history and finding a place among many other legislative proposals that were introduced with great expectations only to become obsolete. However, this would probably not be the best outcome from a normative perspective. In any case, the destiny of the Proposed Amendment is still uncertain.

19 For a detailed discussion of the costs and benefits of regulation, see Renda et al. (2013).

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Regulating E-Commerce in Turkey: A Step Taken Too Early

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E-commerce law amendments have brought significant changes to e-commerce in Turkey. In this article we explain the amended law and compare it with EU regulations.

Introduction

Rules in the e-commerce sector, which have recently been under the common lens of many authorities, have undergone significant changes in Turkey with e-commerce law amendments. Law No. 7416 Amending the Law on the Regulation of Electronic Commerce[1] (Amended Law) was published in the Official Gazette on 7 July 2022. The regulation applies to e-commerce intermediary service providers, i.e. e-marketplaces and sellers in e-marketplaces.

In general it is agreed that e-marketplace business models have three standard features: (i) they serve more than one group of customers; (ii) the demands of these customer groups have indirect network effects; and (iii) these network effects can only be internalised by the platforms.[2] Regarding these features, e-marketplaces are characterised as two-sided or multi-sided markets depending on the number of customer groups they serve. Specifically, they bring together different user groups such as potential advertisers, sellers and buyers/consumers, and mediate or facilitate transactions between these groups. TV channels and newspapers that connect viewers and advertisers, shopping centres that connect retailers with shoppers, digital platforms that connect users, content providers and advertisers, and telecom networks that connect fixed and mobile phone users are examples of multi-sided platforms.[3]

Given the rapid growth of the e-commerce sector, various authorities developed an interest in investigating the industry to understand the competitive and anti-competitive issues raised by the business models of e-marketplaces and to determine appropriate policies to manage them. With this aim, the Turkish Competition Authority (TCA) published its Final Report on the E-Marketplace Sector Inquiry[4] (Sector Report) on 14 April 2022. The Sector Report's policy recommendations included (i) to adopt a regulation for undertakings with significant market power, (ii) to implement a sector-wide 'code of conduct,' (iii) to revise the secondary legislation.

Simultaneously, the Amended Law – prepared as an initiative of the Ministry of Trade – came into effect. Recently on 29 December 2022, the Ministry of Trade issued a Regulation on Electronic Commerce Intermediary Service Providers and Electronic Commerce Service Providers[5] (E-Commerce Regulation) to clarify the details of the Amended Law.

Although the Amended Law has provisions resembling provisions in the Platform-to-Business Regulation (P2B Regulation), the Digital Markets Act and the Digital Services Act in Europe, it imposes heavier obligations on the companies but controversially lacks legal certainty. In addition, the fact that the e-commerce sector in Europe has reached a level of maturity and the market in Turkey is still growing raises the question of whether these regulations risk over-regulating the market.

The Development and Reach of E-Commerce in Turkey

According to a report by Strategy& (part of the PricewaterhouseCoopers network)[6] the Turkish e-commerce market grew by 64 percent in 2021 compared to the previous year. The report predicts that increased adoption of

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1 The Official Gazette number 31889 dated 7 July 2022 can be accessed at: https://www.resmigazete.gov.tr/eskiler/2022/07/20220707-2.htm (Last accessed 20 March 2023)

2 Doğan C. (2021), "E-Ticaret Platformları Özelinde Çok Taraflı Pazarlar: Rekabet Hukuku Ve İktisadı Açısından Yaklaşım," Doktora Tezi, s. 9, 28-29.

3 OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm (Last accessed 27 March 2023)

4 The TCA's Final Report on the E-Marketplace Sector Inquiry dated 14 April 2022 can be accessed at: https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-raporu-pdf-20220425105139595-pdf (Last accessed 20 March 2023)

5 The Official Gazette number 32058 dated 29 December 2022 can be accessed at: https://www.resmigazete.gov.tr/eskiler/2022/12/20221229-5.htm (Last accessed 20 March 2023)

6 Strategy& (March 2022), "Turkish E-commerce Ecosystem Outlook," p. 2. The report can be accessed at: https://www.strategyand.pwc.com/tr/tr/pdf/e-ticaret-ekosisteminin-gorunumu.pdf (Last accessed 27 March 2023)

e-commerce solutions by sellers and permanent changes in consumer behaviour will push the market towards the TRY 400-450 billion level in 2026 and the penetration in total retail will exceed 22%. According to NielsenIQ data,[7] online spending in Turkey covered 5.7% of total fast-moving consumer goods sales in 2021 and shows dynamic growth.

In its BSH decision,[8] in which the TCA rejected BSH Ev Aletleri Sanayi ve Ticaret A.Ş.'s negative clearance/individual exemption request for its distribution agreements banning sales by authorised resellers in e-marketplaces, the TCA announced its assessment that the share of e-commerce in Turkey is still relatively low compared to developed countries.[9] Indeed, according to the TÜBİSAD Report, which the TCA referred to, this share is approximately above 12% in developed countries (USA, Germany, France, Japan, and Spain).[10] If we exclude China, which has a very high share (28 percent), the average for developing countries is 6.7 percent. The TCA explains that the reason behind this slow pace is the fact that large-scale retailers started their e-commerce activities relatively late, and that SMEs still struggle with adapting their businesses to cyberspace.[11] The data show that e-commerce in Turkey is still in the development stage although it has experienced rapid growth in recent years (especially after the COVID-19 pandemic).

Steps Taken to Regulate E-Marketplaces in Europe

The EU Commission's P2B Regulation went into force on 12 July 2020. The P2B Regulation sets rules to create a fair, transparent and predictable business environment for small businesses and traders on online platforms.[12] Following this development, in November 2022 the EU Digital Markets Act (DMA) and Digital Services Act (DSA) entered into force. The DMA provided objective criteria for qualifying a large online platform as a so-called 'gatekeeper.' In order to avoid potential competition concerns in the digital economy, the DMA defined a series of obligations that gatekeepers need to respect, including prohibiting them from engaging in certain behaviours.[13] On the other hand, the DSA sets obligations on digital services that act as intermediaries by connecting consumers with goods, services and content. These obligations include illegal content moderation, seller tracking, protection of minors and ensuring transparency.[14]

Comparing the EU Regulations and the Amended E-Commerce Law in Turkey

As will be shown below, although the amendment made to the E-Commerce Law seems to resemble the EU Commission's efforts to regulate digital markets, it also significantly diverges from them in various points by creating a heavier burden on market players.

Categorising e-marketplaces and sellers according to their transaction volumes. To begin with, the Amended Law extends the definitions of e-commerce intermediary service providers (ISPs) and e-commerce service providers (SPs), and adds electronic commerce platforms, electronic commerce marketplaces, electronic commerce information systems (ETBISs), net transaction volumes and single economic entities to the law, which are generally in line with the EU acquis. In practice, ISPs correspond to e-marketplaces, whereas SPs are sellers operating through the e-marketplace. The Amended Law establishes a definition of net transaction volumes to categorise ISPs by their transaction volumes in the internal market. With these criteria, the Amended Law aims to introduce differentiated obligations on ISPs based on their net transaction volumes, which is merely a quantitative criterion.

Private label bans. One of the main differences between the regulations in the two jurisdictions is that the Amended Law imposes private label bans on e-marketplaces regardless of their transaction volumes, while there are no equivalent provisions in EU legislation. Therefore, an ISP cannot sell or act as an intermediary in the sale of goods bearing its trademark or that of persons with whom it is economically integrated. Infringement of this provision is sanctioned with an administrative fine of 5% of the net sales of the company.

Obligation to obtain an e-commerce licence. Another heavy burden imposed on e-marketplaces is the obligation

7 See https://nielseniq.com/global/en/insights/analysis/2022/turkeys-e-commerce-growth-trend-presents-big-opportunities-for-online-players/ (Last accessed 27 March 2023)

8 Turkish Competition Board decision number 21-6/859-423 dated 16 December 2021.

9 BSH decision, para. 56.

10 TÜBİSAD (2019), "E-ticaret Pazar Büyüklüğü Raporu."

11 BSH decision, para. 56.

12 For further information see https://digital-strategy.ec.europa.eu/en/policies/platform-business-trading-practices (Last accessed 20 March 2023)

13 For further information see https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en(Last accessed 20 March 2023)

14 For further information see https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348)Last accessed 20 March 2023)

to obtain a so-called e-commerce licence. With this amendment, ISPs with a net transaction volume exceeding TRY 15 billion (approx. 780 million USD) and with more than 100,000 transactions a year have a duty to pay the licence fee, which is calculated according to the net transaction volume of the e-marketplace.[15] In addition, the Amended Law requires renewal of the licence once the ISP exceeds a greater threshold. For instance, an e-marketplace with a net transaction volume of TRY 35 billion has a duty to pay 0.03% of TRY 30 billion in addition to 0.05 percent of TRY 5 billion (the net transaction volume exceeding the TRY 30 billion threshold). If the e-marketplace gains a net transaction volume of TRY 50 billion the next year, it is once again obliged to pay 0.03 percent of TRY 30 billion in addition to 0.05% of TRY 15 billion and 1% of TRY 5 billion (the net transaction volume exceeding the TRY 45 billion threshold).

Unfair commercial practices. Furthermore, the new Article 1 of the Amended Law provides a non-exclusive list of unfair commercial practices which resembles that in the P2B Regulation. However, the P2B Regulation has significantly more detailed provisions, thus providing more legal certainty. For instance, while the Amended Law prohibits unilaterally amending a contract, amending it to the detriment of a SP and including provisions in it allowing an ISP to make such unilateral amendments, the P2B Regulation provides a notification requirement before amendment.

Online advertisement restrictions. Another Turkey-specific rule is that e-marketplaces are no longer able to conduct marketing and advertising activities via online search engines by using the registered trademarks of other ISPs and SPs which constitute an essential part of the domain name registered on the ETBIS without their consent.

Banning access between different e-commerce environments. As was mentioned above, the Amended Law categorises ISPs by their transaction volumes and sets differentiated obligations on them. For large ISPs, it provides an obligation to establish a mechanism to separate their different e-commerce environments. Therefore, an e-marketplace is obliged to separate its e-commerce platform and e-commerce service providers (e.g. its online food delivery platform and online fast grocery services) if they are established under the same economic entity.

Restrictions on advertisement and promotion budgets. The Amended Law puts limits on advertisement and promotion budgets, which differ according to the net transaction volume of very large ISPs. This is also a Turkey-specific rule.

Restrictions on courier activities. The Amended Law provides that Gross ISPs cannot engage in freight forwarding or transport, or cargo activities, except for sales in their e-commerce marketplaces, sales they make as SPs and sales that are outside the e-commerce sector.

Conclusion

We consider that a regulation concerning the e-commerce sector should not risk reducing incentives to invest in the industry and complicating the growth process of Turkey's e-commerce and e-export area. Therefore, ensuring legal certainty and taking the long-term effects of such a regulation into consideration is mandatory. Otherwise, incentives for investors to invest in the Turkish e-commerce market are likely to decrease. In any event, we consider that the best practice would be to approach these regulations with the utmost caution since there is an imminent risk that restricted activities may have adverse effects on employment and consumer benefits in the short and medium terms. Lastly, we would like to point out that over-regulating the market may decelerate the innovation and R&D process in a way adversely affecting the customer experience.

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How Will Turkey's E-Commerce Law and Draft Bill on Competition Law Affect E-Commerce Platforms?

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In Turkey in 2022, significant changes were made concerning the regulation of electronic commerce (e-commerce) and e-commerce platforms. The first big change – the Law Amending the Law on the Regulation of Electronic Commerce (E-Commerce Law) – was published on 7 July 2022. Subsequently, the Regulation on Electronic Commerce Intermediary Service Providers and Electronic Commerce Service Providers (Regulation) was published on 29 December 2022.

Separately, in October 2022 a Draft Amendment Bill (Draft Digital Markets Bill) amending Law No. 4054 on the Protection of Competition, with significant changes concerning digital markets, was published in order to test public opinion. The bill aims to regulate digital markets in Turkey and to protect the competitive environment of these markets in view of the EU's Digital Markets Act (DMA) and Section 19a of the German Act against Restraints on Competition. The Draft Digital Markets Bill has already caused a stir in the Turkish legal world.

What are these? Platform, Provider and SMP?

The E-Commerce Law and Regulation are intended to determine the principles and procedures regarding e-commerce and cover commercial communications, the responsibilities of service providers and intermediary service providers, contracts made with electronic communication tools, obligations to provide information regarding e-commerce and sanctions to apply in cases of non-compliance.

They impose obligations on e-commerce service providers operating e-commerce marketplaces (online platforms)[1] and electronic service providers selling goods or providing services through e-commerce marketplaces (providers).[2] The new rules stipulate that the obligations on both online platforms and providers will apply gradually according to their net transaction volumes,[3] ranging from obligations that apply to all relevant undertakings, to medium-scale platforms,[4] large-scale platforms[5] and very-large-scale platforms.[6] Similar criteria are adopted for providers.

Perhaps the most significant obligation is an exponential increase in e-commerce licence fees – up from 3/10,000th of a net transaction volume exceeding TL 10 billion (between TL 10 and 20 billion) to 25% of a net transaction volume exceeding TL 65 billion. Considering that the licensing fees for e-commerce marketplaces with a transaction volume of TL 65 billion and above amount to over TL 2.9 billion, this obligation may deter e-commerce marketplaces from exceeding this transaction volume and in fact acts as a de facto ceiling.

On the other hand, it can be argued that the Draft Digital Markets Bill generally follows the DMA's "gatekeeper" definition but introduces a new concept called "undertakings with significant market power" (SMPs).[7] SMPs are undertakings that: (i) provide one or multiple core platform services; (ii) have a significant impact on access to end-users or on the activities of business users; and (iii) have the ability to maintain this impact or demonstrate a potential to maintain it. It is foreseen that certain quantitative and qualitative thresholds will be set for this definition. However, unlike the EU regulations,[8] these thresholds are not included in the Draft Digital Markets Bill. If it is enacted, it is expected that the Turkish Competition Authority will determine the thresholds in a separate communiqué.

Similar provisions in the Draft Digital Markets Bill and the E-Commerce Law

(i) The use of data obtained from commercial users in competition with the same commercial users

Provisions in the Draft Digital Markets Bill and the E-Commerce Law both prohibit the use in competition of data obtained from commercial users. The Draft Digital Markets Bill foresees that SMPs will be prohibited from using data obtained

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1 E-commerce marketplace service providers are intermediary service providers that enable contracts to be made and orders to be placed for the provision of goods and services by providers in an e-commerce marketplace.

2 Service providers make contracts for the supply of goods and services and receive orders for the supply of goods and services in an e-commerce marketplace or in their own e-commerce environments.

3 The total values of final invoices or documents substituting invoices, including all taxes, funds, fees and the like and excluding cancellations and refunds.

4 Undertakings with net transaction volumes over TL 10 billion (approx. EUR 500 million) and over 10 million transactions in a calendar year.

5 Undertakings with net transaction volumes over TL 30 billion (approx. EUR 1.4 billion) and over 10 million transactions in a calendar year

6 Undertakings with net transaction volumes over TL 60 billion (approx. EUR 2.8 billion) and over 10 million transactions in a calendar year

7 Undertakings that operate on a certain scale in terms of one or more core platform services and have significant impacts on access by end-users or on the activities of commercial users and have the ability to sustain this impact in a stable and permanent manner or are predicted to have access to the ability to sustain this impact in a stable and permanent manner.

8 Digital Markets Act and Digital Services Act.

from commercial users in competition with them.[9] Similarly, medium-sized platforms are prohibited from using data obtained from providers that operate on the platform in order to compete with them.[10] A basic example of this would be Amazon competing with a seller which sells t-shirts by analysing their data and starting to sell Amazon-branded t-shirts. Both the E-Commerce Law and the Draft Digital Markets Bill include the necessary regulations to prevent such situations and eliminate concerns about platforms being able to use excessive power over their competitors (or potential competitors) due to the sheer amount of data that they have.

(ii) Data portability

Another issue addressed similarly in both the E-Commerce Law and the Draft Digital Markets Bill is data portability. The Draft Digital Markets Bill specifies that SMPs are required to ensure free and effective data portability upon request.[11] The E-Commerce Law also regulates that medium-sized platforms in the same way should ensure the free transfer of data acquired from the provider.[12] The Turkish Competition Board (Board) concluded in its Nadirkitap[13] decision that the company had abused its dominant position by not providing its second-hand book-sellers' data to them without a legitimate reason.[14] The Board also has an ongoing investigation into Sahibinden[15] regarding allegations that it prevented data portability in online platform services.[16]

(iii) Most-favoured-nation clause

Commercial users conducting business in different channels and providing better products or services in those different channels have also been regulated in a similar way. This issue is also known as the most-favoured-nation clause (MFN). The Draft Digital Markets Bill also regulates that SMPs cannot prevent their commercial users from working with their competitor undertakings by offering proposals to end-users through other channels, or providing different prices or conditions while working with competitors of the SMPs.[17] Similarly, the E-Commerce Law prohibits large-scale platforms from restricting a provider's ability to offer goods or services through alternative channels.[18] The Board's decisional practice also demonstrates that preventing better conditions from being offered on competing platforms in MFN practices has exclusionary effects on the relevant markets.[19] The E-Commerce Law and the Draft Digital Markets Bill have also been regulated in compliance with relevant Board decisions.

Additionally, the E-Commerce Law prohibits large-scale platforms from imposing advertising bans on providers. Similarly, the Draft Digital Markets Bill provides that SMPs cannot restrict commercial users from working with the SMP's competitors, from bidding to end users on their own platforms or through other channels and from advertising on other channels.

What are the differences?

Besides the similar provisions noted above, there are certain provisions that put further obligations on the relevant parties that are covered separately by the Draft Digital Markets Bill and the E-Commerce Law.

Generally, the E-Commerce Law only covers e-commerce platforms that are active in online economic and commercial activities while excluding travel agencies, civil aviation, private pensions, banking, insurance, financing, capital markets, payment services, betting and gambling and electronic communications. Although it can be said that the E-Commerce Law has a huge impact on e-commerce platforms, it can also be argued that its scope, given the activities regulated, is relatively limited. In contrast, the Draft Digital Markets Bill provides blanket coverage of undertakings active in digital markets, including online intermediation services, online search engines, online social networking services, video/voice-sharing and distributing services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud-computing services and online advertising services. However, in line with the DMA the Draft Digital Markets Bill generally aims to rein in giants active in the above-mentioned fields to ensure a competitive environment rather than regulate digital markets as a whole.

9 Article 6(a)-g of the Draft Amendment Bill amending Law No. 4054 on the Protection of Competition.

10 Additional Article 2(2)-a of the Law Amending the Law on the Regulation of Electronic Commerce.

11 Article 6(a)-l of the Draft Amendment Bill amending Law No. 4054 on the Protection of Competition.

12 Additional Article 2(2)-b of the Law Amending the Law on the Regulation of Electronic Commerce.

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17 Article 6(f) of the Draft Amendment Bill amending Law No. 4054 on the Protection of Competition.

18 Additional Article 2(3)-c of the Law Amending the Law on the Regulation of Electronic Commerce.

19 Turkish Competition Board's Yemeksepeti decision dated 09.06.2016 and numbered 16-20/347-156; Turkish Competition Board's Booking decision dated 05.01.2017 and numbered 17-01/12-4; Turkish Competition Board's Arçelik-Sony decision dated 08.12.2010 and numbered 10-76/1572-605; Turkish Competition Board's Kitapyurdu decision dated 05.11.2020 and numbered 20-48/658-289.

The obligations in the Draft Digital Markets Bill related to SMPs addressing issues resulting from what the Authority describes as unfair commercial practices include (i) providing free access to the data generated on the platform to producers, (ii) providing sufficient information about their services upon requests by commercial users and (iii) providing access to information to advertisers, aiming to reduce information asymmetry.

In addition to the obligations described above the Draft Digital Markets Bill also imposes the following obligations on SMPs: (i) commercial users cannot be discriminated against by imposing unfair or unreasonable conditions, (ii) non-public data may not be used in competition with commercial users, (iii) tying the goods and services they offer to users with any other goods or services is prohibited, (iv) users cannot be tied with an exclusive access or membership requirement, (v) interoperability should be established, (vi) users should be able to easily change the software, application or application stores that are pre-installed on the operating system of devices, (vii) there should be no discrimination among commercial users.

Separately, the most significant change introduced in the E-Commerce Law is that online platforms are prohibited from offering or intermediating in the sale of goods bearing their own brands or for which they have the right to use a trademark in the e-commerce marketplaces where they offer intermediary services. This aims to prevent online platforms, i.e. e-commerce intermediary service providers, from exploiting their advantageous positions in the market.

Regarding advertising in e-commerce markets, the E-Commerce Law imposes restrictions on the advertising budgets of both large-scale platforms and providers. Separately, there are also further restrictions, such as very-large-scale platforms and providers being prohibited from providing any financial services, including lending.

Possible effects on e-commerce and competition

As noted above, the fact that e-commerce license fees rise exponentially according to transaction volumes may actually limit incentives to gain a bigger share of the market for the relevant undertakings, as it would be harder for them to conduct intermediary services in a reliably profitable manner above a certain threshold.

In addition, the fact that the E-Commerce Law prevents large-scale online platforms from selling goods with their own brands on their platforms is already quite an extensive change that will affect the market as a whole. Moreover, restrictions provided in the Draft Digital Markets Bill to alleviate information asymmetry and prohibit exclusivity and interfering with advertising methods will also have the force to change the Turkish e-commerce market as a whole (if they are enforced as envisioned in the draft). This could mean that in addition to huge platforms such as Trendyol and Hepsiburada, other intermediary service providers may also be limited so that unfair advantages do not occur in a wide range of relevant markets.

Furthermore, the fact that interoperability and compatibility are at the forefront of these restrictions may also provide avenues for new market entrants as competitors with various platforms. In addition, the fact that a repeated violation by an SMP may result in an administrative fine of up to 20% of the relevant undertaking's annual gross revenue could be a significant deterrent for these parties against infringing on the restrictions provided in the Draft Digital Markets Bill. However, the 20% limit could be decreased as a result of the public opinion process.

Conclusion

Once enacted, the Draft Digital Markets Bill will bring about implementation of many obligations and restrictions in many areas for SMPs. Likewise, the E-Commerce Law introduces a new e-commerce system in which both platforms and providers have various obligations. It remains to be seen whether these strict regulations and limitations imposed on platforms in Turkey will in fact affect the market in favour of users and consumers on these platforms.

Regulating Data Privacy in Turkey: Recent Developments, Challenges and Reflections for the Future

Çiçek Ersoy*

In Turkish law, privacy is protected by various legislative sources, including the Turkish Constitution, the Turkish Criminal Code No. 5237 and the Turkish Data Protection Act No. 6698, which is based on EU Directive 95/46/EC on data protection. The Turkish Criminal Code defines numerous crimes related to protection of privacy such as 'Recording Personal Data' (Art. 135), 'Unlawfully Disseminating or Capturing Data' (Art. 136), 'Failure to Destroy Data' (Art. 138) and 'Preventing and Impairing the System, Altering or Destroying Data' (Art. 244). Besides the criminal sanctions regulated by the Turkish Criminal Code and imposed by the criminal courts, the right to privacy is protected by the Act on the Protection of Personal Data No. 6698 (DPA),[1] which entered into force in April 2016. The DPA is enforced by the Turkish Personal Data Protection Authority (the Authority), which is a financially and administratively autonomous public legal entity endowed with regulatory and supervisory powers. The Authority is composed of the Board of Personal Data Protection (the Board) and the Presidency. The Authority's decision-making body is the Board (Art. 19/IV DPA). The purpose of the DPA is to protect fundamental rights and freedoms, particularly the right to privacy, in the processing of personal data, and to set forth obligations, principles and procedures which are binding on natural and legal persons who process personal data.

Since 2016, a settled case law has been developed as a result of Board decisions. In the past seven years, the Board has announced various pieces of secondary legislation with the aim of ensuring clarity and consistency in the implementation of the DPA. These are as follows: the By-Law on Data Controller Registry,[2] the By-Law on Erasure, Destruction and Anonymisation of Personal Data,[3] the Communiqué on Principles and Procedures to be Followed in Fulfilment of the Obligation to Inform[4] and the Communiqué on the Principles and Procedures for Requests to the Data Controller.[5] Besides this secondary legislation, the Board has announced guidelines which provide a framework for the implementation of the DPA and the secondary legislation. The most important guidelines and draft guidelines are as follows: the Best Practice Guidelines on Personal Data Protection in the Banking Sector,[6] the Guidelines on the Processing of Biometric Data,[7] the Guidelines on the Use of Cookies,[8] the Guidelines on the Right to be Forgotten – Evaluation of the Right to be Forgotten Specific to Search Engines,[9] the Recommendations on the Protection of Personal Data in the Field of Artificial Intelligence,[10] the Guidelines on Personal Data Security (Technical and Administrative Measures)[11] and the Draft Guidelines on the Investigation of Loyalty Programmes under the Personal Data Protection Legislation.

In implementing the DPA, the principles in the General Data Protection Regulation (GDPR) are followed and constantly and regularly considered by the Authority. The Board keeps a close eye on GDPR practices and recent global developments, and this approach is successfully reflected in its decisions. The Board often points out the necessity of complete harmonisation of Turkish law with the GDPR in different environments and is leading a comprehensive revision of Turkish data protection law aiming at adopting global trends and developments in privacy law.

There have been several key decisions in which the Board has explicitly stated that the DPA shall be interpreted and implemented in compliance with the GDPR. In the recent Car Rental Case,[12] which was about processing personal data by means of exclusively automated profiling, evaluating the software used by rental companies and providing these companies with a blacklist, the Board imposed fines

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1 https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law

2 https://www.kvkk.gov.tr/Icerik/5442/VERI-SORUMLULARI-SICILI-HAKKINDA-YONETMELIK

3https://mevzuat.gov.tr/mevzuat?MevzuatNo=24038&MevzuatTur=7&MevzuatTertip=5

4https://kvkk.gov.tr/Icerik/5443/AYDINLATMA-YUKUMLULUGUNUN-YERINE-GETIRILMESINDE-UYULACAK-USUL-VE-ESASLAR-HAKKINDA-TEBLIG

5 https://www.resmigazete.gov.tr/eskiler/2018/03/20180310-6.htm

6https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/12236bad-8de1-4c94-aad6-bb93f53271fb.pdf

7https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/bd06f5f4-e8cc-487e-abe1-d32dc18e2d7e.pdf

8https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/fb193dbb-b159-4221-8a7b-3addc083d33f.pdf

9https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/11b6fd99-d42a-45b1-a009-21f2d36ded21.pdf

10https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/25a1162f-0e61-4a43-98d0-3e7d057ac31a.pdf

11https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/7512d0d4-f345-41cb-bc5b-8d5cf125e3a1.pdf

12 https://www.kvkk.gov.tr/Icerik/7288/2021-1303

on the ground of unlawful data processing. In this case the Board focused on joint data controllership by car rental firms and software companies, although joint controllership is not clearly regulated by the DPA.

The right to be forgotten is also not explicitly recognised in the DPA, but it is mentioned in decisions of the Constitutional Court (Decision of 3 March 2016, application no. 2013/5653), the Supreme Court General Assembly Civil Chamber (Decisions of 17 June 2015, application nos. 2014/4-56 and 2015/1679) and in recent decisions of the Board (Decision of 23 June 2020, application no. 2020/48).[13] Practice in Turkey regarding the right to be forgotten is based on the well-known González decision of the Court of Justice of the European Union (CJEU)[14] and it is clear that the Board adopts a very similar approach to European Law.

Considering experiences in Turkey in the field of data protection law in the past seven years, a comprehensive revision of the data protection law and practice in Turkey seems inevitable. To achieve this aim, the following suggestions may be implemented:

The provisions in the DPA (Art. 12/V DPA) regarding data breaches should be revised and legal practice should be harmonised with the GDPR. Under the current legislation, the Board is to be notified of all incidents without any exceptions, which increases the workload of the Authority.

The conditions for processing special categories of personal data (Art. 6 DPA) should be revised. Under the current legislation, the DPA has stricter requirements than the GDPR, which causes serious problems especially regarding processing employee data.

In order to ensure legal security and predictability, transparency of the Board's decisions is of great importance. Publication of the decisions should be made mandatory.

The strict conditions in the DPA (Art. 9 DPA) regarding transfers of personal data abroad have been heavily criticised, especially by international firms operating in Turkey. In practice, data can now only be transferred abroad if the data subject's explicit consent is obtained. This strict narrow provision is a serious obstacle in commercial and business operations. A flexible system should be designed by amending Art. 9 DPA.

Under the current legislation, the courts authorised to hear appeals against decisions by the Board are the basic criminal courts. These courts are not able to provide effective review of the Board's decisions. A well working appeal system operated by competent expert courts should be considered a safeguard to achieve clear, transparent and justifiable implementation of the DPA.

The Privacy by Design and Privacy by Default principles, which are not explicitly regulated in the DPA, should be adopted in Turkish law.

13https://kvkk.gov.tr/Icerik/6871/2020-927, https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/95d8ad1b-e849-48c6-ba93-02ecedeffde5.pdf.

14 https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:62012CJ0131

Call for proposals for a book chapter on *Digital Mobility*

The Florence School of Regulation Transport Chapter – Professors Matthias Finger and Juan Montero as co-editors – is currently preparing a comprehensive edited volume on digital mobility to be published by Edward Elgar in 2024. We are look for chapters covering one of the four following areas:

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-The use of digitalization for planning, operating, maintaining, regulating and governing transport, both sectorally and multimodally.
-Newly emerging digital transport interfaces (platforms) and services, ranging from sectoral to multimodal platforms (e.g., mobility-as-a-service) at local, regional, national and global levels.
-New approaches and initiatives to regulating digital interfaces and digital transport more generally at local national and supranational levels.

CONTACT

If you are interested to contribute a chapter to our book on Digital Mobility, pls submit a 300 to maximum 500 word abstract by July 31st 2023 to matthias.finger@epfl.ch.

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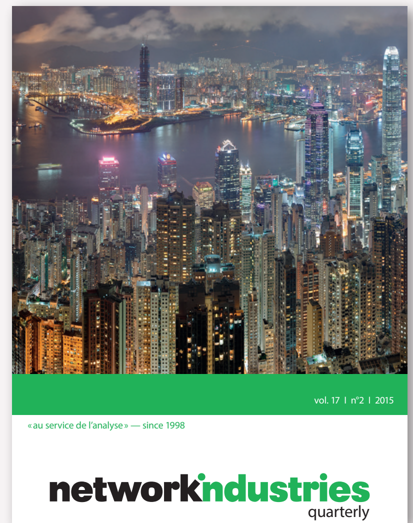

Past Issues

Vol 24 Iss 4 (December)

Infrastructures and Sustainability

Against the backdrop of the European Green Deal and the subsequent 'Fit for 55' Package, the basic infrastructures will have to become more sustainable over the course of their entire lifecycles, i.e., from design to building, maintenance, operations and eventual decommissioning.