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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Turkey

- Session II -

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This contribution is submitted by Turkey under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/dmkt.

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Abuse of dominance in digital markets

- Contribution from Turkey –

1. OECD Study on Abuse of Dominance in Digital Markets

1.1. Current State

1. The number of applications and the resulting examinations¹ concerning abuse of dominance in digital markets brought before the Turkish Competition Authority (the Authority) has been increasing in the last 10 years, and currently make up a significant portion of the workload of the related Supervision and Enforcement Department. The Competition Board (the Board) has been establishing a level of case law to deal with the claims of infringement falling under Article 6 of the Act no 4054 on the Protection of Competition (Act no 4054), which concerns abuses of dominant position. With respect to digital markets, the Authority attaches the utmost importance to gathering constant, complete and up-to-date information, in line with the dynamic structure of the markets in question.

2. In that context, we should begin with providing some information on the “Digitalization and Competition Policy Report”. It is a recent initiative by the Board to follow closely the current national and international developments in digital economy to shape competition policy in the near future. The report, when completed, will shed light on issues such as, the goals of competition policy in digital era and the overarching principles to shape competition law applications in digital markets.

3. Additionally, the Board recently initiated the “E-Marketplace Platforms Sector Inquiry,” with the Board decision dated 11.06.2020 and numbered 20-28/353-M². This inquiry has been launched on e-marketplace platforms, which are among the important players of the digital markets and significant actors of the online retail channel. The business models and operation principles utilized by the platforms in question, which are active in digital markets, present various issues that must be addressed under Act no 4054. When examined from a competition law perspective, market power stemming from data ownership and network effects can breed concerns of abuse when we take into account that they have simultaneous market roles as both the owners of the platforms and sellers on those platforms. In that framework and in consideration of the possibility that e-marketplaces could engage in exclusionary and/or abusive conduct through their pricing, platform services and supply practices, the aforementioned sector inquiry is intended to expose the competitive outcomes as well as (potential) anti-competitive concerns created by e-marketplaces.

4. Board decisions taken as a result of investigations concerning abuse of dominance in digital markets conducted by the Supervision and Enforcement Department II within the framework of Article 6 of the Act no 4054 in the last years are listed:

¹ The term “examination” is used to cover both the preliminary inquiry and the investigation procedures conducted by the Authority.

² <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulu-tarafindan-e-pazaryeri-pl-b792ce1d38c7ea11811c00505694b4c6> Accessed: 21.09.2020.

- Investigation decision dated 13.02.2020 and numbered 20-10/119-69³ (concerning the claim that Google excluded its rivals in the online comparison shopping services market),
 - Investigation decision dated 01.10.2018 and numbered 18-36/584-285⁴ (concerning the claim that Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. engaged in exorbitant pricing in the market for online platform services for selling and leasing vehicles and real estate)⁵,
 - Investigation decision dated 19.09.2018 and numbered 18-33/555-273⁶ (concerning the claim that Google's behavior related to the provision of its mobile operating system, mobile applications and services, as well as the agreements signed between Google and device manufacturers violated the Act no 4054),
5. Other ongoing examinations launched by the Supervision and Enforcement Department II (5 investigations in total) are listed below:
- The investigation launched with the Board decision dated 13.12.2018 and numbered 18-47/732-M, concerning the claim that Google abused its dominant position and complicated the operations of undertakings through the updates to its general search services and through its Adwords advertisements⁷,
 - The investigation launched with the Board decision dated 21.02.2019 and numbered 19-08/94-M, concerning the claim that Google abused its dominance in the general search services market to highlight its own local search services and foreclose its rivals⁸,
 - The investigation launched with the Board decision dated 20.06.2019 and numbered 19-22/326-M, concerning the claim that D-Market Elektronik Hizmetleri ve Ticaret A.Ş. and Anka Mobil Tedarik A.Ş. violated Articles 4 and 6 of the Act no 4054 through most favored customer clauses, discrimination, restricting intra-brand competition, refusal to supply and resale price maintenance⁹,
 - The investigation launched with the Board decision dated 04.06.2020 and numbered 20-27/336-M, concerning the claim that Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik A.Ş. violated the Act no 4054 by its exclusive, discriminatory, predatory pricing, most favored customer practices.
 - The investigation launched with the Board decision dated 04.06.2020 and numbered 20-27/335-M, concerning the claim that Çiçeksepeti İnternet Hizmetleri A.Ş. abused its dominant position to complicate the operations of its rivals and

³ <https://www.rekabet.gov.tr/Karar?kararId=828974ff-6cd9-4318-a9fa-ee43a21f9c07> Accessed: 22.09.2020.

⁴ <https://www.rekabet.gov.tr/Karar?kararId=8a58df07-f31b-457e-b936-9fa3afd5fdbf> Accessed: 22.09.2020.

⁵ The decision in question was annulled with the Decision No 2019/946 E. and 2019/2625 K. of the 6th Administrative Court of Ankara, and the investigation has been relaunched.

⁶ <https://www.rekabet.gov.tr/Karar?kararId=7d9ba7e3-2b8f-4438-87a5-26609eab5443> Accessed: 22.09.2020.

⁷ <https://www.rekabet.gov.tr/tr/Guncel/google-reklamcilik-ve-pazarlama-ltd-sti--2c7aacc37a12e91180ec00505694b4c6> Accessed: 22.09.2020.

⁸ <https://www.rekabet.gov.tr/tr/Guncel/google-reklamcilik-ve-pazarlama-ltd-sti--7eb96e0acb44e91180f200505694b4c6> Accessed: 22.09.2020.

⁹ <https://www.rekabet.gov.tr/tr/Guncel/d-market-elektronik-hizmetleri-ve-ticare-7c100ed71aa3e91180fe00505694b4c6> Accessed: 22.09.2020.

violated Articles 4 and 6 of the Act no 4054 through its practices aimed at creating de facto exclusivity.

1.2. Outlook for the future

6. Undertakings, consumers and, consequently, competition has been transformed in various ways by the increasing effect of digitalization on nearly all sectors in the recent years. In comparison to the previous years, there have been remarkable developments in the digital markets during the period shaped by the new economic approach.

7. In light of the spread of digital services when compared to traditional channel, the trend observed in consumer choice towards online channels, the increasing numbers of undertakings operating in the digital markets and the constant development of innovative digital products and business models, it would not be wrong to expect a similar increase in the examinations conducted under Article 6 of the Act no 4054 within the context of abuse of dominant position in digital markets in the future.

1.3. Legal and/or practical difficulties

8. Gathering complete and correct information in each investigation conducted is of utmost importance. When working to create an accurate data set in order to conduct comprehensive and sound analyses, the process of accessing the parties as well as that of gathering quality data from the parties may become hard and complicated, especially for multi-sided platforms, due to various factors such as the diversity of the parties (for instance: consumers making purchases over the platforms, suppliers making sales over the platforms, etc.) and the high number of users on each side.

9. In particular, for investigations where data is required from undertakings based abroad, these undertakings are notified and the information and document request letters are sent via diplomatic missions. In some circumstances where the Authority requests documents and information from foreign undertakings, this request is evaluated under the rules of letters rogatory, and written replies are not provided before the end of the investigation process, with lots of effort put into acquiring a response letter needed for the examination.

10. In general, it may be said that dominant position reviews in digital markets are complicated by the problems posed due to the characteristics of such markets when defining markets and establishing market power. The complicated nature of competition reviews in these markets are revealed by the fact that no consensus has been reached to date, either in practice or in the literature, concerning how to define markets and how to establish market power in digital markets.

11. Various issues including the dynamic structure of digital markets, the existence of platforms which do not require a material or monetary service charge from the users on one side (zero price markets), network effects, market tipping, lock-in effect, the existence of multi-homing, etc. are among the topics that need careful consideration when defining markets and establishing market power in digital markets.

12. Besides, another major discussion in relation to the application of competition law in digital markets is the subject of proportional intervention. This is because underenforcement/ overenforcement in these markets has the risk of affecting investment and innovation incentives of undertakings, which is one of the fundamental conditions staying in the market.

13. To conclude, the Turkish Competition Authority (the Authority) has been increasingly dealing with abuse of dominance cases in digital markets in the last 10 years. In building its capacity to successfully handle these cases, the Authority attaches the utmost importance to gathering constant, complete and up-to-date information, as well as detecting dominant position in line with the dynamic structure of the markets in question.