COMPETITON AUTHORITY

The Impact of Digital Transformation on Competition Law

I. SUPERVISION AND ENFORCEMENT DEPARTMENT

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ABBREVIATIONS

EU	: European Union
TFEU	: Treaty on the Functioning of the European Union
USA	: United States of America
API	: Application Programming Interface
Bundeskartellamt	: German Competition Authority
CMA	: British Competition & Markets Authority
DOJ	: US Department of Justice
DMA	: Digital Markets Act
DSA	: Digital Services Act
EDPB	: European Data Protection Board
FTC	: Federal Trade Commission
GDPR	: EU General Data Protection Regulation
IAA	: Italian Antitrust Authority
IoT	: Internet of Things
JFTC	: Japan Fair Trade Commission
Board	: Competition Board
Authority	: Competiton Authority
KVKK	: Personal Data Protection Law
OECD	: Organization for Economic Co-operation and Development
Stigler Center Report	: Stigler Committee on Digital Platforms- Final Report
Law No.4054	: Law No.4054 on the Protection of Competition
Law No.5651	: Law on regulation of publications on the internet and suppression of crimes committed by means of such publications
Law No.6698	: Law on Protection of Personal Data

1 INTRODUCTION

(1) Rapid developments in internet technologies have radically changed the business models in many sectors in Türkiye as in all over the world. These advancements in internet technologies have become the norm, playing a key role in shaping consumer and company preferences. Digitalization affects every aspect of our lives and is becoming increasingly influential day by day. Digitalization plays an essential role in various areas, including communication, shopping, access to information, and socialization. It enables the constant addition of new fields while continuously changing and improving existing ones. The impact of digitalization on business models and methods requires existing regulations and legislation to be transformed and developed to accommodate these changes.

(2) Given that digitalization primarily results in radical changes in business models and operations, thereby transforming consumer and corporate behaviors, one can assert that it will significantly impact competition in the goods and services markets. Competition law is therefore one of the primary legal areas impacted by the digital transformation. Many competition authorities around the world, as detailed in the following sections of the Working Paper, have recently been conducting studies that demonstrate the necessity for additional competition law regulations in this area. These studies conducted by competition authorities result in specific legislative actions.

(3) As a result of this digital transformation, it is essential to research and implement complementary regulations to the competition law rules in Türkiye in line with the requirements. This will ensure that the legislation adapts to the development of the sector. In fact, in this context, the Economic Reforms Booklet dated 12.03.2021, under the heading of 'PURPOSE 9', includes the target of "Taking steps in line with Free Market Principles and European Union Regulations to Promote Fair Competition in Digital Markets." In this framework, the following sub-objectives are outlined under the aforementioned heading.

"9.1.Measures will be taken to promote fair competition in digital markets in accordance with free market principles and European Union regulations. In this context,

9.1.a. To foster a competitive and equitable environment for digital markets and prevent dominant platforms from abusing their power.

9.1.b. To introduce regulations aimed at preventing the misuse of data stored on platforms or in a manner that restricts competition.

9.1.c. To establish regulations to protect the rights of member companies selling their products on marketplace platforms. [1] The Competition Authority (the Authority) is responsible for achieving the objectives outlined as sub-objectives.[2]

(4) The second chapter of this working paper will summarize the main indicators related to the current status and potential of the digitalization process in Türkiye, while the third chapter will focus on competition issues arising from digitalization. The fourth chapter will cover the inquiries and decisions made by the Competition Board (the Board) regarding digital markets, while the fifth chapter will discuss the studies, regulations, and practices of competition authorities in various countries. The concerns about competition and potential violations observed in digital markets will be presented, along with insights from the markets for core platform services. Ultimately, considering all these developments, the need for regulation in digital markets will be thoroughly justified.

2 DIGITALIZATION IN TÜRKİYE: TRENDS, CURRENT SITUATION, AND POTENTIAL

(5) The key indicators that offer insight into the speed, current status, and potential of digitalization in a country include figures on internet infrastructure development, internet and social media usage rates, digital usage habits and perception, and the age distribution of the population. According to the Digital 2023 Report[3], the current data in Türkiye in the context of these variables are as follows:

[1] https://ms.hmb.gov.tr/uploads/2021/03/Ekonomik-Reformlar-Kitapcigi.pdf, Access Date: 21.04.2022.
[2] https://ms.hmb.gov.tr/uploads/sites/2/2021/06/Ekonomi-Reformlari-Eylem-Plani-1.pdf, Access Date: 21.04.2022.
[3] https://datareportal.com/reports/digital-2023-global-overview-report Access Date: 12.04.2023; https://datareportal.com/reports/digital-2023-turkey Access Date: 12.04.2023.

- Internet Users: The number of internet users in Türkiye has reached 71.38 million people. This number represents approximately 83.4% of Türkiye's population. The global internet user penetration rate was 64.4%, while in Europe it was 91.55% during the same period. According to these figures, the number of internet users in Türkiye is higher than the global average but lower than the European average.
- Median Age: The median age is 31.6 years. This statistic indicates that half of Türkiye's population is below 31.6 years of age. The median age of the world population is 30.4 years, and Türkiye is a country known for its predominantly young population in terms of median age.
- The number of mobile internet users amounted to 67.3 million. This figure represents 94.3% of total internet users. The worldwide rate is 92.3%.
- Internet users between the ages of 16-64 in Türkiye spend an average of 7 hours and 24 minutes daily on the Internet, compared to the global average of 6 hours and 37 minutes. Türkiye ranks 15th out of 47 countries in the world in terms of the amount of time spent on the Internet, while EU countries have a lower average time compared to the global average. This indicator highlights that Turkish society spends extended periods of time on the internet and has high screen exposure as a result.
- The number of active social media users has increased to 62.55 million. This number represents 73.1% of the population. The proportion of active social media users increased by 3% to 59.4%, reaching 4.76 billion users globally. Türkiye is above the world average when considering the proportion of active social media users.
- The average daily time spent on social media was 2 hours and 54 minutes. The global average for this time period was 2 hours and 31 minutes. EU countries ranked below the world average, with less than 2 hours. This indicator shows that social media users in Türkiye spend more time on these platforms than both the EU and the global average. Therefore, it reveals that social media users in Türkiye are relatively more exposed to the impacts of these platforms.
- The top five most used social media platforms in Türkiye are Instagram (90.6%), WhatsApp (88.8%), Facebook (72.6%), X (formerly known as

Twitter) (66.5%), and Telegram (52.5%).[4] Globally, the top five most used social media platforms are Facebook, YouTube, WhatsApp, Instagram, and WeChat, in that order.

- In Türkiye, the top five social media applications that users spend the most time on are YouTube, Instagram, WhatsApp, Facebook, and TikTok. Globally, the top five social media applications that users spend the most time on are YouTube, Facebook, WhatsApp, Instagram, and TikTok.
- Digital ad spending accounted for 56.5% of the total annual advertising expenditure across all channels, both online and offline, amounting to USD 306 million.
- The weekly online shopping participation rate of internet users aged 16-64 in Türkiye was 64.6%. With an annual growth rate of 7.9%, 44.26 million end-users made their purchases using digital payment methods. Türkiye's rate is above the world average of 57.6% in terms of such statistics.

(6) The primary indicators mentioned above show that Türkiye surpasses the global average in the process of digitalization, and the pace of development will further accelerate by addressing infrastructure deficiencies. Türkiye is not only an important market for core platform service providers, but also a market with a "wide range of opportunities due to high internet usage rates and practices. The fact that Türkiye ranks higher than EU countries on several indicators implies that the reach of influence of undertakings providing core platform services in Türkiye is more extensive than in other countries. Naturally, this situation highlights the need to regulate digital markets in Türkiye, as in other countries. This will be explained in detail in the following chapters.

3 COMPETITION ISSUES EMERGING FROM DIGITALIZATION

(7) Digital markets have numerous characteristics that present challenges and even limitations to the application of competition law in this domain. These characteristics can be listed as a first-mover advantage, high entry/investment

[4] It was observed that the survey on the top five most utilized social media platforms in Türkiye did not incorporate YouTube as a choice. Nevertheless, in the comprehensive evaluation question that encompassed YouTube as an option, the frequency of its usage among Turkish users was accurately represented.

costs, economies of scale and scope, network effects, and data ownership that have been frequently analyzed in the competition law literature. The evolving tipping structure of the markets, high barriers to entry and market growth, rapid expansion of undertakings to extraordinary sizes, the ability to seamlessly shift activities to different sectors, and the hosting of numerous business models significantly impact competition law enforcement in these markets and often pose challenges. This challenge is observed in four main areas. These conditions make it more challenging to define the relevant market, accurately identify the market power of the economic entities, pinpoint the behavior subject to infringement, and ultimately find a remedy for the violation.

(8) As regards the definition of the relevant market presents several challenges. Classical market definition methods are not directly applicable and need to be adjusted. Considerations of supply and demand substitution become more intricate, and the accuracy of typology-based definitions is reduced by diverse and dynamic business models. However, it is argued that the problems caused by these markets in terms of accurately determining the market power of undertakings are more acute. It is probable that traditional indicators can be modified to reflect the dynamics of digital markets to show market dominance. However, accurately determining market shares on a platform-by-platform basis may require a different method. It can be challenging to determine the constantly changing market shares and, consequently, the dominant position within the dynamic nature of the market. Given the nature of these markets, market shares may not be very reliable. Therefore, it should be possible to conduct a dominant position analysis without being subject to overly absolute limits. Although various economic advantages of the undertaking (such as conglomerate activities, recognition effect, economic dependence on third parties, data ownership, market dominance, etc.) are used as indicators of market power, there is a concern that many competition breaches remain unaddressed.

(9) Understanding the violation act and planning the intervention in terms of timing is another aspect of the challenge in digital markets. A delayed anticompetitive intervention in these markets could result in market closure, while an early intervention may undermine the innovation and investment motivations of the undertakings in the market. However, identifying competition issues in these

markets is more challenging compared to other markets, and intervention is often delayed, which harms the competitive environment and can lead to irreversible consequences. Furthermore, because of the market structure, there may be uncertainty about which existing types of infringement conduct will be considered breaches and this may lead to discussions about the need to define new violation types. Indeed, the competition problems arising in the digital realm have surpassed the limits of traditional theories of harm. For example, competition may be undermined by methods that increase the number of products and services, such as offering their own products and services more advantageously (e.g., pre-installing the search service in the operating system, making it difficult to install another application store, etc.), unfair practices self-preferencing (self-preferencing, manipulation, etc.) in the result rankings shown by the platforms, blocking access to data or interoperability, excessive data collection and use of data for other purposes, unfair conditions imposed on economically dependent parties, which are not sufficiently clear and prevent the simultaneous use of competing platforms (multi-homing), the display and density of advertisements, and high commission rates.

(10) Last but not least, digital markets pose a significant challenge when it comes to identifying violations and devising remedies to address them. Designing a solution to eliminate an identified violation in digital markets is a specific challenge. Furthermore, it is often challenging to effectively implement the solution and to monitor/supervise it as requested by the authority. In addition, the relevant solution can only adjust the markets prospectively and cannot eliminate the effects of the violation in the market. In some instances, the measures proposed by the authorities fail to effectively promote competition in the market.

(11) In this context, it is evident that additional regulations should be implemented in this market sector to address situations where competition law is inadequate. In fact, many more steps are being taken in this direction every day around the world. Competition law practitioners are implementing regulations that aim to establish and protect market competition.

4 INVESTIGATIONS AND DECISIONS BY THE COMPETITION BOARD REGARDING DIGITAL MARKETS

(12) An analysis of the Board's investigations and decisions on digital markets reveals that the majority of these decisions have been made in recent years. According to similar decisions, it is understood that the focus is mainly on whether the core platform service provider entities have abused their market power. The investigations have been conducted in accordance with Article 6 of Law No. 4054 on the Protection of Competition, which prohibits the "abuse of dominant position" in the market. This situation arises from the fact that competition law intervention is aimed at addressing the exclusionary and/or exploitative practices of core platform service provider undertakings that have attained significant market power (dominant position) in the relevant market. These practices affect their end-users, consumers, and/or commercial users (undertakings). It has been observed that market power in the digital markets in Türkiye has only been achieved in recent years. This is because the ability of core platform service provider undertakings to attain a level of market power that enables them to influence the competitive parameters in the market is directly proportional to their consumer and commercial user base. Consequently, it can be stated that competition concerns related to market power in digital markets have been one of the most pressing issues for competition authorities in recent years and are increasingly included in the agenda of the Board.

(13) The decisions and investigations conducted by the Board regarding digital markets, along with concise details about these actions, are outlined below.

Final Decisions[5]

- *Decision-1 regarding the company Yemek Sepeti*: The Board imposed an administrative fine on the undertaking with its decision dated 09.06.2016 and numbered 16-20/347-156. The Board stated that the undertaking must cease its "most favored customer clause (MFC)" practices as a result of the investigation into the allegation that these practices used by Yemek

[5] During the specified timeframe, initial inquiries were conducted alongside the investigations referenced in this chapter. If the preliminary examinations of the records did not uncover any substantial information warranting further investigation, the cases were concluded without commencing a formal inquiry. Given the comprehensive nature of this Working Paper, only the investigation determinations pertaining to the examined files have been incorporated.

Sepeti Elektronik İletişim Perakende Gıda Lojistik AŞ (Yemek Sepeti) and the prevention of offering better/different conditions (such as price, discount, promotion, menu content, payment method, delivery region, and limit) on competing platforms led to the exclusion of competing platforms from the market

- *Decision-2 regarding the company Yemek Sepeti*: Yemek Sepeti has committed to canceling the mandatory minimum basket amount and mandatory joker practices. The valet pricing policy will be maintained to cover the related cost items in the investigation of exclusivity, discrimination, unfair pricing, and most favored customer clause practices in the narrow margin of Yemek Sepeti in the online food ordering-service platform services market. Furthermore, Yemek Sepeti indicated that the mentioned commitments would be fully implemented within nine months after the reasoned decision is notified. Under the decision of the Board dated 28.01.2021 and numbered 21-05/64-28, it was determined that the commitments submitted by the company in question would address the competition issues outlined in the Investigation Report. Considering that the timeframes specified in the commitment text are reasonable terms at the point when the commitments are realized, the decision was made to accept and enforce the submitted commitment, and to terminate the investigation.
- *Decision regarding Booking.com*: The Board imposed an administrative fine on the mentioned undertaking with its decision dated 05.01.2017 and numbered 17-01/12-4. It stated that the undertaking must cease its wide MFC practices as a result of the investigation into the allegation that Booking.com B.V.'s best price guarantee for accommodation facilities is anti-competitive.
- *Decision regarding Google Android*: The Board imposed an administrative fine on the undertaking with its decision dated 19.09.2018 and numbered 18-33/555-273 and introduced behavioral obligations to terminate the relevant practices following the investigation into allegations that Google's conduct regarding the provision of services related to the Android mobile operating system and mobile applications restricts competition.

- *Decision regarding Google Shopping*: The Board, in its decision dated 13.02.2020 and numbered 20-10/119-69, imposed an administrative fine on the undertaking and behavioral obligations on the undertaking to cease such practices as a result of the investigation regarding the allegation that Google excluded its competitors in the online shopping comparison services market by offering its own shopping comparison service more advantageous than its competitors on the general search results page.
- *Decision on Google Algorithm and AdWords:* The Board, in its decision dated 12.11.2020 and numbered 20-49/675-295, imposed an administrative fine and behavioral obligations on the undertaking to cease the relevant practices in connection with the investigation regarding the allegations that Google abused its dominant position by making it difficult to operate in the content services market with organic results with the updates it made in general search services and by placing indefinite and intensive text advertisements at the top of the overall search results page.
- *Decision on Google Local Search*: The Board imposed an administrative fine on the undertaking and behavioral obligations to terminate the acts in question with its decision dated 08.04.2021 and numbered 21-20/248-105, based on the investigation into the allegation that Google abused its dominant position in the general search services market and promoted its local search services to the exclusion of its competitors.
- *Decision on Çiçeksepeti*: The Board has decided to accept the commitment submitted by Çiçeksepeti with the letter dated 05.04.2021 and numbered 16790. This decision aims to address competition concerns and make it legally binding for the relevant company. It also marks the termination of the investigation in line with the Board's decision dated 08.04.2021 and numbered 21-20/250-106. The investigation was related to allegations that Çiçeksepeti İnternet Hizmetleri AŞ abused its dominant position by impeding the activities of its competitors and engaging in practices that created de facto exclusivity, thereby limiting competition.
- *Decision on D-Market-Anka Mobil*: The Board, in its decision dated 15.04.2021 and numbered 21-22/266-116, as a result of the investigation conducted regarding the allegation that D-Market Elektronik Hizmetleri ve

Ticaret AŞ and Anka Mobil Tedarik AŞ discriminated against the applicant undertaking, imposed an administrative fine on Anka Mobil Tedarik AŞ and determined that D-Market Elektronik Hizmetleri ve Ticaret AŞ did not violate Article 4 of Law No. 4054.

- *Decision-1 regarding Sahibinden*: The Board decided to impose an administrative fine on the undertaking with its decision dated 01.10.2018 and numbered 18-36/584-285 according to the results of the investigation into the allegation that the practices of Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret AŞ (Sahibinden) covering the period 2015-2017 regarding the online platform services offered in the fields of vehicles and real estate are restricting competition due to excessive pricing. As a result of the new investigation conducted upon the cancellation of the related Board decision by the Ankara 6th Administrative Court dated 18.12.2019 and file numbered 2019/946, which became absolute under the number 2019/2625, the Board, with its decisions dated 08.07.2021 and numbered 21-3 and 4/475-237, decided that the undertaking in question did not violate Article 6 of Law No. 4054.
- *Decision-2 regarding Sahibinden*: Following the investigation into the allegation that Sahibinden's practices covering the period 2018-2020 regarding the online platform services offered in the fields of vehicles and real estate are restricting competition due to excessive pricing, the Board decided on 05.08.2021 and numbered 21-37/540-263 that the undertaking did not violate Article 6 of Law No. 4054.
- *Decision on Nadirkitap*: The Board imposed an administrative fine on the undertaking with the number 22-15/273-122 dated 07.04.2022 following an investigation into the allegation against Nadirkitap Bilişim ve Reklamcılık AŞ. The activities of competing undertakings more difficult by withholding the data of vendor members who want to market their products through competing intermediary service providers. Furthermore, the Board has determined that the company must furnish the book inventory data to the respective vendor members in a precise, comprehensible, secure, complete, and appropriate format, free of charge,

upon request from the vendor members. This is intended to cease the violation and promote effective competition in the market.

- *Decision on Facebook-WhatsApp:* The Board has decided to impose an administrative fine on the company with reference number 22-48/706-299 dated 20.10.2022. Additionally, the company is required to submit the necessary measures to the Authority within one month of receiving the reasoned decision. Furthermore, the company must fulfill the necessary measures within six months of receiving the reasoned decision in order to terminate the violation and establish effective competition in the market. This decision comes in the aftermath of an investigation into the "take-it-or-leave-it" coercion of consumers by Facebook and WhatsApp, as well as the ongoing data-sharing practices between Facebook companies. These practices involve sending notifications to each user requesting their consent to share their personal WhatsApp data with Facebook Inc. companies in order to continue using WhatsApp under the terms of the update announced by WhatsApp, a subsidiary of Facebook (Meta), regarding the update of the terms of use and privacy principles in January 2020.
- *Decision on Dolap:* The Board considered the commitments submitted by DSM Grup Danışmanlık İletişim ve Satış Tic. AŞ (Trendyol) as capable of addressing the competition issues identified during the investigation. This is in line with the investigation into the alleged abuse of the Dolap service, which provided a competitive advantage over its competitors through Trendyol leverages its dominant position in the multi-category online marketplace to support the Dolap service in the online second-hand goods sales market by utilizing consumer data. Additionally, it utilizes its financial strength in the multi-category online marketplace to cross-subsidize its competitors in the platform service market, which facilitates the online sale of second-hand goods. Furthermore, Trendyol is included in its mobile application. The relevant Board decision dated 27.02.2023 and numbered 23-11/177-54 accepted the commitment package, making it binding for the undertaking and terminating the investigation process.

- *Decision regarding Elon R. Musk-Twitter:* The acquisition of Twitter by Elon R. Musk was found to be subject to Board authorization , as Twitter was determined to be a technology company and thus the turnover threshold requirements did not apply. Since the transaction was not notified to the Authority despite being subject to authorization, it was taken under *ex officio* examination as per Article 11 of the Law No. 4054. Following the Authority's examination of the transaction, the decision dated 02.03.2023, numbered 23-12/197-66 was taken, noting that the transaction was subject to authorization under the relevant legislation and should be authorized, but that an administrative fine should be imposed on the acquiring party, Elon R. Musk, as the transaction was carried out without the authorization of the Board.

- **On-going Investigations**

  - *Investigation on Trendyol:* Upon the allegation that Trendyol violated Law No. 4054 by implementing unfair contract provisions and engaging in discriminatory conduct, the Board decided to initiate a preliminary investigation into Trendyol in accordance with Article 40(1) of Law No. 4054, as per the Board Decision No. 21-36/487-M. Based on the information and documents gathered during the initial investigation, the Board has decided to initiate an investigation against Trendyol and other undertakings within the same economic framework in accordance with Article 41 of Law No. 4054. This decision was made at the meeting held on 23/09/2021 and numbered 21-44/650-M. As part of the investigation, an interim measure was imposed by Decision No. 21-46/669-334 of the Board on 30 September 2021. In the interim measure taken by the Board, "Pursuant to the fourth paragraph of Article 9 of Law No. 4054", the following decision has been made regarding DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ.

    "1. Within the scope of marketplace activity, the company must cease all actions and practices, including interventions through algorithms and coding, that could provide it with an advantage over its competitors and impact the economic integrity of other products and services. The company must abstain from these behaviors during the investigation process.

2. During the investigation process, the company will suspend the sharing and use of all data obtained and produced from marketplace activity for other products and services in order to maintain economic integrity.

3. Ceasing all actions, behaviors, and practices, including interventions carried out through algorithms and coding, that could result in discrimination among the sellers on the marketplace, and refrain from such behaviors while the investigation is ongoing.

4. Taking all necessary technical, administrative, and organizational measures to ensure the control of the above interim measures.

5. Maintaining accurate records of all algorithm model changes applied to product search, seller listings, seller score calculation, and other related models used by DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ, for a minimum of eight years, recorded in a non-erasable versioning format.

6. Keeping the source codes of all software developed specifically for use within DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ for at least 8 (eight) years in a versioned and verifiable manner.

7. DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ is taking interim measures to retain user access and authorization records, as well as administrator audit records for all software used in the execution of business processes, for a minimum of 8 (eight) years. This is to ensure accuracy and prevent denial.

- *Investigation-1 on Sahibinden:* The investigation, conducted in accordance with the decision of the Board dated 30.09.2021 and numbered 21-46/655-M, aims to determine whether Sahibinden has violated Law No. 4054 by obstructing data transfer and other methods in the market for real estate/vehicle sales/rental platform services.
- *Investigation-2 on Sahibinden:* The investigation, conducted in accordance with the Board decision dated 30.06.2022 and numbered 22-29/469-M, aims to determine whether Sahibinden has violated Law No. 4054 by implementing excessive prices in online platform service markets for real estate and vehicle sales/rental services.
- *Investigation on Google:* Based on allegations against Google Reklamcılık ve Pazarlama Ltd. Şti. (GOOGLE TÜRKİYE), Google International LLC,

Google LLC, Google Ireland Limited, and Alphabet Inc. (collectively referred to as GOOGLE) have been found to abuse their dominant position in the general search services market through specific features available on the search engine results page. As a result, the Board has decided to initiate an investigation against GOOGLE pursuant to Article 41 of Law No. 4054 with the reference number 23-03/27-M during its meeting held on 12.01.2023. In relation to the claims that organic search results were displaced on the search results page, leading to a decrease in website traffic due to the inclusion of visual and video results, users have also raised concerns about the positioning and visibility of Google's translation service on the search results page. This investigation will also address these issues.

- *Investigation on Krea:* On 29.09.2022, the Board has made the decision to initiate an investigation against KREA in accordance with Article 41 of Law No. 4054, under the reference number 22-44/652-M. Additionally, an interim measures have been taken under the reference number 22-44/652-281 based on allegations that Krea İçerik Hizmetleri ve Prodüksiyon AŞ (KREA) has violated Article 6 of Law No. 4054 by selectively offering sub-broadcasting rights, particularly "news footage" and "highlights," to other broadcasting organizations within the framework of the broadcasting rights of Turkish Super League and 1st League football competitions exclusively owned by KREA. As per the fourth paragraph of Article 9 of Law No. 4054, the decision is outlined as follows: "*To prevent potential competition violations in the Turkish Super League and 1st League Competitions Broadcasting Rights market, and to mitigate any resulting irreparable harms, an interim measure has been implemented for Krea İçerik Hizmetleri ve Prodüksiyon AŞ. This measure prohibits the broadcasting of news footage by any broadcaster before the specified time outlined in the comprehensive summary footage and the news footage specifications for each week and match airing to the public. This applies to broadcasters who have purchased or are seeking to buy the broadcasting rights for the ongoing 2022-2023 football season*",

Sector Inquiries

(14) The unique challenges faced by digital markets, which operate differently from traditional markets, raise concerns about the applicability of conventional competition law rules. Sector inquiries are widely used in our country and around the world to identify potential issues within the sector and their potential effects, and to determine the areas where intervention may be necessary under existing competition law regulations or where new tools are required. The Final Report for the "E-Marketplace Platforms Sector Inquiry," initiated by the Authority, was completed, and published on 14.04.2022. The preliminary report for the "Online Advertising Sector Review," currently in progress, was completed and shared with the public on the Authority's website on 07.04.2023, with the aim of soliciting stakeholder feedback.

(15) The initial report, conducted as part of an examination initiated by the Board on 11.06.2020, was made available for public input on 07.05.2021. Its purpose was to identify potential competition issues in the sector and effective policy measures to address them, with the aim of safeguarding the long-term benefits for consumers and sellers generated by the rapid expansion of e-marketplaces, which have emerged as key players in e-commerce in our country. A workshop was convened on 06.07.2021 to gather feedback on the report's findings, assessments, evaluations, and policy recommendations. The insights shared by stakeholders in the sector and those expressed during the workshop were carefully reviewed and consolidated. Subsequently, the Final Report, incorporating these perspectives, was compiled, and submitted to the Board, and it was publicly released on 14.04.2022.

(16) The Board initiated the Online Advertising Sector Inquiry on 21.01.2021 to identify behavioral and/or structural competition issues in the sector and to develop solutions/policy proposals to address these problems. The inquiry closely follows current national and international developments in the field of online advertising, which has gained significant momentum in recent years due to rapid advancements in information technologies and widespread internet usage. As part of the inquiry process, stakeholders from the public and industry sectors were invited to provide feedback, and information was collected from companies operating in the online advertising sector. The report writing phase

of this inquiry has already concluded. Furthermore, interviews with industry stakeholders and the findings from a survey on consumer internet usage habits and their awareness of online advertising were assessed. The initial report was released on July 4, 2023, to gather the viewpoints of the industry's stakeholders.

(17) The decisions, investigations, and sectoral inquiries mentioned above show that the Authority is closely monitoring digital markets through its existing tools and processes, while also seeking new methods. Finally, as mentioned earlier, the fundamental changes in business models and methods of conducting business brought about by digitalization fundamentally impact competition in goods and services markets. As the public authority responsible for establishing and protecting effective competition in goods and services markets, the Authority is closely monitoring the impact of digitalization on market functioning and continuing its efforts to fulfill its duty to protect and maximize the public interest in this evolving environment.

5 GLOBAL PRACTICES OF COMPETITION AUTHORITIES

(18) As emphasized in the Working Paper, digital markets exhibit distinct structures, operations, and evolutionary patterns compared to traditional markets. Consequently, competition authorities worldwide have prioritized addressing issues related to digital markets. This heightened attention is attributed to the inadequacy of the current competition law framework, which was established based on outdated models and assumptions dating back nearly a century for the United States of America and 50-60 years for the EU, a model for Türkiye. Given the increasing prevalence of digital markets in the past 5-10 years, the conventional regulations are insufficient to effectively intervene in these markets.

(19) Numerous competition authorities, including the Commission, have placed emphasis on the adaptation of existing regulations to accommodate digital markets, while upholding the conventional legal framework and perspective. However, there has been a surge in practices by core platform service providers in recent years that, if left unaddressed, could result in monopolistic dominance of the supply chain. The escalation in investigations and inquiries into companies offering core platform services reflects the growing societal apprehensions, and these inquiries have brought to light issues that traditional

regulations are unable to tackle. In fact, the Commission, which had previously refrained from intervention due to concerns that digital markets might diminish the incentive to innovate, has now chosen to take an active role.

(20) Regulatory efforts aimed at digital markets are underway in various countries across the globe. The Commission has observed that nations such as the United Kingdom, Germany, the United States, Australia, Japan, and India have voiced similar apprehensions and concentrated their attention on this domain. This situation indicates that competition issues in digital markets are pervasive on a global scale. This outcome is expected, given that the operations and conduct of firms in digital markets are influenced by the actions of international digital conglomerates. These global digital giants already hold a significant position in shaping the development of these markets, both at a global and local level. If public intervention is delayed or ineffective in addressing competition concerns stemming from the conduct and practices of core platform service providers, which are essentially profit-driven commercial entities, it is foreseeable that digital markets will continue to be molded to the advantage of these companies rather than the broader society, and competition issues will persist. The subsequent section of this chapter delves into the regulations that competition authorities have formulated and put into effect for digital markets.

5.1 European Union

(21) The European Commission, as the primary enforcer of competition regulations within the European Union, has intensified its scrutiny of digital markets in recent years. Concurrently, it is actively involved in extensive policy development in collaboration with all EU institutions as part of the EU Digital Strategy initiative, aimed at ensuring alignment with the demands of the digital era.

(22) Due to recent inquiries and investigations indicating that competition law measures are inadequate for addressing issues in digital markets and that proactive intervention is required in this domain, the Commission has released two distinct draft legislations outlining regulations for digital markets.

These bills are (i) the DMA[6] and (ii) the DSA[7]. The subsequent passage provides a broad overview of the proposed legislations.

(23) The EU Commission's draft Digital Markets Act (DMA) has been enacted, encompassing substantial revisions pertaining to the designation and responsibilities of gatekeepers, the involvement of national competition authorities, and potential restrictions on mergers.

5.1.1 Digital Markets Act

(24) The Draft DMA has been prepared on the basis that in some areas of digital markets, (i) the terms of trade in concentrated two-sided markets are determined by a few large companies, (ii) some of the companies operating in digital markets act as gatekeepers in terms of access of business users to end users and vice versa, and (iii) this power is abused in some cases. The proposed legislation seeks to safeguard the competitive nature of digital markets and to deter unfair practices by dominant platforms.

(25) The pertinent proposed legislation was approved by the European Parliament on July 5, 2022, officially published in the Official Journal of the European Union on October 12, 2022, and became effective on November 1, 2022.[8] After the implementation of the DMA, Member States have initiated the development of preliminary legislation to grant national competition authorities the authority to oversee adherence to the DMA and to enforce its provisions. The initial legislative amendment in this regard is the modification to the Hungarian Competition Act, which became effective on January 1, 2023. This amendment furnishes the competition authority with enhanced capabilities and tools to supervise the compliance of gatekeepers with the DMA.[9] In the Netherlands, a draft amendment to grant similar powers to the competition authority was subsequently prepared and published for public consultation.[10] In Luxembourg,

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[6] https://ec.europa.eu/competition-policy/sectors/ict/dma_en, Access Date: 26.10.2021.
[7] https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package, Access Date: 26.10.2021.
[8] https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2, Access Date: 28.09.2022, https://competition-policy.ec.europa.eu/dma_en, Access Date: 04.04.2023.
[9] https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/changes-in-competition-law-expanding-gvh-toolbox-and-less-administrative-burden-for-undertakings, Access Date: 06.04.2023.
[10] https://www.internetconsultatie.nl/uitvoeringswetdma/b1, Access Date: 06.04.2023.

the amendment to the law, which entered into force on 23.03.2023, empowers the Commission to provide implementation support for the DMA.[11] Finally, the draft amendment to the German Competition Act, including the authorization of the Bundeskartellamt/Federal Cartel Office to implement the DMA, was published on 05.04.2023.[12]

(26) In certain digital services, there is a higher prevalence and visibility of inadequate competition and unfair practices compared to others. Therefore, the legal and regulatory focus within the digital environment is confined to core platform services, which are enumerated as follows:

- *Online intermediation services*,
- *Online search engines*,
- *Online social networking services*,
- *Video-sharing platform services*,
- *Number-independent interpersonal electronic communication services*,
- *Operating systems*,
- *Cloud computing services*,
- *Advertising services* offered in connection with all these core platform services,
- *Web browsers*,
- *Virtual assistants*

(27) The legislation does not place civil responsibility on all digital market platforms, except for those designated as gatekeepers in specific domains. Gatekeepers are identified as companies with the ability to govern and impact digital markets. The definition of gatekeepers incorporates objective criteria centered on transparency, impartiality, and ease of identification.

[11] https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2023/03-mars/24-reglements-europeens-concurrence.html, Access Date: 06.04.2023.
[12] https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6, Access Date: 06.04.2023.

(i) *Have a significant impact on the internal market* (The criterion of having significant influence in the European market is presumed to be fulfilled if the undertaking to which the relevant company **belongs has achieved an annual turnover of EUR 7.5 billion in Europe in the last three years** or if the **average market valuation of this undertaking exceeds EUR 75 billion** and this company is active **in at least three Member States**),

(ii) *Management of one or more network thresholds in terms of reaching the client* (If each network threshold/service offered by the core platform service provider has **more than 45 million European resident consumer users** per month and **more than 10,000 European resident business users** per year, the relevant entity shall be deemed to fulfill the criterion of acting **as a threshold**.),

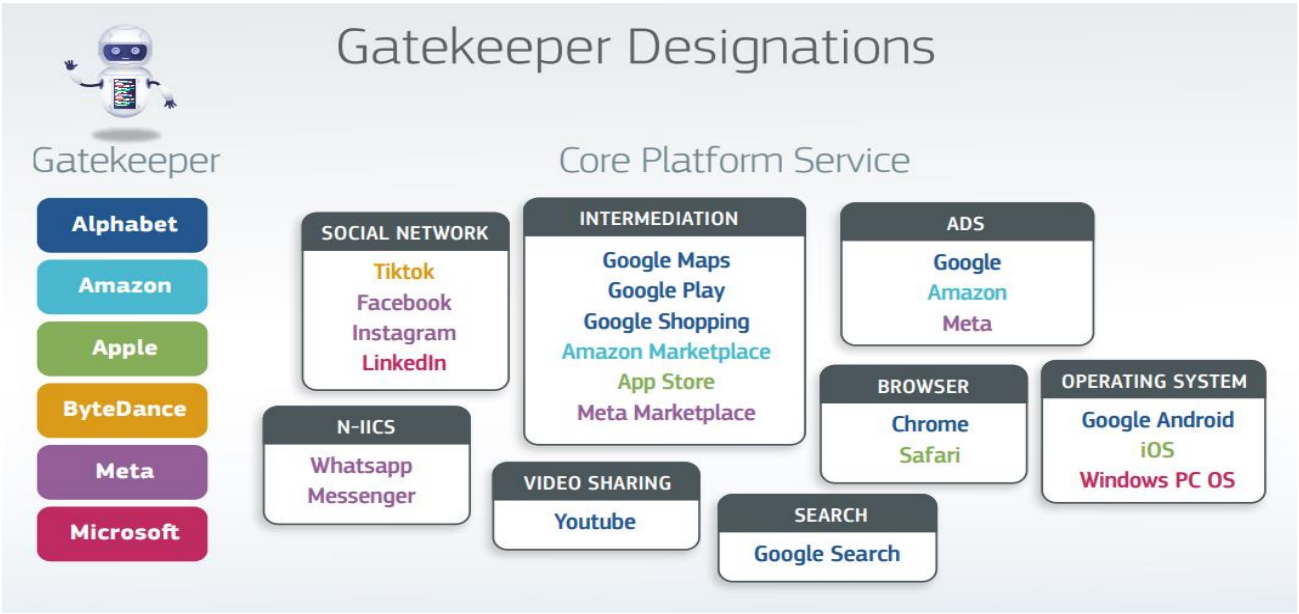
(iii) *for which the position has been stable and unchanging over a long period of time* (The established and continuous position criterion is met if the threshold for the number of users referred to in (ii) has been **exceeded continuously over the last three years.**),

(28) Under the Bill, providers of core platform services that cumulatively fulfill these requirements qualify as "gatekeepers." The Law provides that this qualification is determined as an ordinary presumption and that the undertakings concerned may be exempt from gatekeeper obligations by proving otherwise.

(29) Conversely, the Bill specifies that the Commission has the authority to identify entities as gatekeepers through a market inquiry, even if they do not meet the specified quantitative criteria but fulfill the fundamental qualifications for gatekeepers. In such instances, the Commission will consider the size of the core platform provider, the quantity of business users and end users, barriers to entry arising from network and data advantages, as well as scale and scope effects, lock-in effects, and other structural aspects of the market.

(30) The Commission is mandated to conduct regular inquiries, at least annually, to assess whether the designated gatekeepers continue to meet the specified criteria, or if new providers of core platform services satisfy these criteria. The Commission is also responsible for publishing and updating the list of gatekeepers and core platform services that are subject to the obligations outlined in the Regulation. Companies that surpass the thresholds outlined in

Article 3 of the DMA are obligated to inform the Commission. In its announcement on July 3, 2023, the Commission disclosed that it had received notifications from "Alphabet, Amazon, Apple, Byte Dance, Meta, Microsoft, and Samsung." The announcement also indicated that the Commission would notify, within 45 working days, on September 6, 2023, whether the concerned companies had exceeded the thresholds.[13] Following the announcement released on September 6, 2023, the Commission has identified six major technology companies (Alphabet, Amazon, Apple, Byte Dance, Meta, and Microsoft) as gatekeepers under the DMA for the first time. Furthermore, a total of 22 core platform services offered by these gatekeepers have been specified. The gatekeepers are required to adhere to the obligations outlined in the DMA for each core platform service within a six-month period. The designated platforms and core platform services are listed below.



(31) Furthermore, the Commission initiated four market inquiries to evaluate the assertions made by Microsoft and Apple that specific core platform services may not meet the criteria for being considered gatekeepers, despite meeting certain thresholds.

- Microsoft: Bing, Edge, and Microsoft Advertising
- Apple: iMessage

13 https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en

(32) These inquiries are initiated under the DMA to evaluate whether the undertakings have presented a well-supported presumption that the core platform services in question are still unidentified. It is anticipated that these investigations will be completed within a maximum timeframe of 5 months.

(33) The Commission has initiated a market inquiry to thoroughly evaluate whether Apple's iPadOS should be classified as a gatekeeper, even though it does not meet the specified criteria. Consistent with the DMA, this inquiry is expected to be concluded within a maximum period of 12 months.

(34) Moreover, the Commission determined that Gmail, Outlook.com, and Samsung Internet Browser met the criteria outlined in the DMA. However, Alphabet, Microsoft, and Samsung presented compelling justifications that these services should not be classified as gateways to the pertinent core platform services. Consequently, the Commission opted not to designate Gmail, Outlook.com, and Samsung Internet Browser as core platform services. Additionally, the Commission found that Samsung did not meet the requirements to be considered a gatekeeper for any core platform service.

(35) The proposed legislation aims to address the actions of gatekeepers that hinder competition or are deemed unfair, and places an obligation on gatekeepers to abstain from such practices. Within this framework, gatekeepers are expected to adhere to the requirements outlined in Articles 5, 6, and 7 of the regulation. Additionally, Article 6 allows for a discussion between the Commission and gatekeepers regarding the measures they have taken or intend to take to ensure compliance with the obligations specified in Article 6.

(36) The obligations under Article 5 of the Regulation include the following:

- Avoiding combining personal data obtained from the core platform services with personal data obtained from other services operated by the gatekeeper or third-party services, or linking to other services provided by the gatekeeper without the explicit consent and choice of the end users, processing to provide online advertising services, and cross-use of such different personal data,
- Avoidance of wide and narrow MFC applications,

- Enabling commercial users to communicate free of charge with end users accessed through the core platform service or other channels, permitting the promotion and sale of products to end users, including different terms of purchase,
- Providing end users with the ability to access and use content, subscriptions, features, or other items through the gatekeeper's core platform services, including items obtained from the relevant commercial user without using the gatekeeper's core platform services, using a commercial user's software application,
- Preventing or limiting, directly or indirectly, commercial users or end-users from contacting public authorities, including national courts, regarding the gatekeeper's practices,
- Abstaining from mandating the use, provision, and interoperability of an identification/identification service or any other ancillary service by commercial users or end users as part of the core platform services offered by the gatekeeper,
- Ensuring that the use of the core platform service by commercial or end-users is not made conditional on the gatekeeper's registration for another core platform service,

    a. Pricing terms to advertisers and publishers, or third parties authorized by advertisers or publishers, to whom digital advertising services are offered, on the visibility and availability of the advertising portfolio and bids placed by advertisers and advertising intermediaries,
    b. Parameters used to calculate prices, including non-price criteria in the auction process
    c. Charges paid by the advertiser and the publisher, including deductions and surcharges,
    d. Payment to the publisher for the publication of a specific advertisement,
    e. Providing, at the request of the broadcaster, access to complete information daily, in a high quality and efficient manner, free of charge, based on the costs paid to the broadcaster for each of the relevant advertising services delivered by the gatekeeper,

(37) The obligations under Article 6 of the Regulation include the following:

- Data provided to the relevant platform by commercial users of the core or ancillary services of the platform, or end users of such commercial users, or non-public data generated as part of the activities of such parties on the relevant platform, shall not be used in competition with commercial users.
- Unless the gatekeeper has taken measures to ensure that they do not harm the integrity of the hardware or operating system of the relevant host service, the installation and effective use of third-party software applications or app stores must be permitted or technically feasible. Where appropriate, the gatekeeper must also allow end-users to decide whether to make the downloaded application or app store their default. In addition, technical means must be in place to ensure that end-users who choose to make the downloaded application or the relevant app store their default can simply implement this change.
- It is necessary to avoid self-preferencing in data sorting, browsing, and indexing to provide transparent, fair, and non-discriminatory conditions for third-party services or products.
- It shall be avoided to technically restrict end-users using the gatekeeper's core platform services from switching between or using different software, applications, and services.
- In the case of ancillary services provided under the supervision of the gatekeeper, commercial users and ancillary service providers must be granted access to and interoperability with the applicable operating system, software, and hardware functions.
- To provide advertisers and publishers and third parties authorized by advertisers and publishers, on request and free of charge, with access to the gatekeeper's performance measurement tools and with the information necessary for the self-monitoring of their advertising inventory (including aggregated and non-aggregated data and performance data to enable advertisers and publishers to operate their own verification and measurement tools to assess the performance of the core services provided by the gatekeepers).

- The provision of cost-free and practical portability, upon request, of commercial user data and data generated as a result of end-users actions, and the provision of tools to facilitate free data portability,
- To enable commercial users or third parties authorized by them to access personal data free of charge, upon request and where commercial users have end-user consent, for efficient, high quality, continuous, and real-time aggregated or individual data generated as a result of commercial users' use of core platform services,
- Providing to general search service providers, upon their request, with ranking, query, click, and view data from free and paid searches by end-users on the gatekeeper's general search engine on FRAND (fair, reasonable, and non-discriminatory) terms,
- Ensuring that FRAND conditions are in place for commercial users to access software application stores, search engines, and online social networking services,
- Failing to set general conditions for the termination of the provision of core platform services and ensuring that the conditions for termination are easily enforceable,

Article 7 of the Regulation, regardless of its article number, contains the obligations imposed on gatekeepers to ensure interoperability of interpersonal communications services in detail.

(38) The Bill stipulates that the Commission may initiate an investigation to determine (i) the core platform services and (ii) the gatekeeper role of a core platform service provider, as well as (iii) whether an undertaking acting as a gatekeeper violated its obligations under the applicable articles of the Bill. If the market investigation reveals a violation of the relevant obligations stipulated in the treaty, the Commission may impose behavioral and structural measures.

(39) Gatekeepers must notify the Commission of their intent to participate in M&A transactions in digital markets, regardless of thresholds in the framework of other obligations.

(40) The Commission is authorized to enforce the Competition Act concurrently with the administrative process. In this regard, individuals with a legitimate interest in the Act's non-compliance may file a complaint with the national competition authority. The legislation governs the authority's ability to carry out interviews, request information and documents, conduct on-site inspections, impose interim measures, and oversee compliance with regulations. Notably, the authority's new and distinct power to request access to undertaking databases, algorithms, and explanations represents a significant development.

(41) The Commission may decide on a violation and impose sanctions in case of detection of the behaviors listed below:

- Failure of the gatekeeper to comply with the obligations set out in Articles 5, 6, and 7 of the bills,
- Violation of the measures taken by the Commission when it is detected that the obligations are not being effectively complied with (Article 8(2)),
- Failure to comply with behavioral or structural measures (Article 18(1)),
- Failure to comply with interim measures (Article 24),
- Failure to comply with legally binding commitments (Article 25).

(42) In accordance with the legislation, a company that breaches the aforementioned regulations may be subject to a penalty of up to 10% of its total revenue (including both domestic and international) from the preceding year. In the event of a repeated violation within the past eight years, the maximum penalty rate increases to 20%. Administrative penalties may be enforced under specific circumstances, such as the provision of false, misleading, or incomplete information (as per Articles 3, 14, 15, 21, and 22), refusal to provide information, denial of access to databases or algorithms (as per Article 21(3)), or obstruction of on-site inspections. These penalties may amount to 1% of the company's annual revenue or a fixed sum for a specified duration. The sanction provisions of the Law are generally consistent with the administrative procedure of the Competition Law.

(43) The DMA is believed to be a crucial milestone in addressing the question of *whether the current competition regulations are adequate to ensure fair competition* in digital markets. This issue has been widely debated at all levels

worldwide in recent years. The law is a reaffirmation by the Commission that the existing rules are not enough to regulate digital markets. It calls for complementary supervision to competition law rules and significant prior supervision. The Commission has been cautious in its approach to this issue. According to the law, the Commission has the sole responsibility and duty to implement it. This implies that the areas governed by the law are regarded as a component of competition law, and the national competition authorities will assist the Commission in carrying out this responsibility. It is important to consider the Law as it extends the legal framework of competition law with ex-ante supervision, in addition to ex-post supervision of market power.

5.1.2 Digital Services Draft Law and Its Enforcement

(44) Since the adoption of the EU E-commerce Directive 2000/31/EC in 2000, there have been notable shifts in consumer behavior, business practices, and communication patterns, alongside the emergence of new and innovative digital services. Consequently, digital products and services have begun to have significant impacts on consumers and society. However, the E-commerce Directive 2000/31/EC is now deemed inadequate as it only reflects the technologies and services of its time. In response to this issue, the European Commission has developed the DSA with the goal of establishing a reliable online environment that safeguards fundamental rights, ensures the effective functioning of digital internal markets, removes illegal content while respecting fundamental rights, and provides consumers with adequate information and transparency. The relevant draft legislation was approved by the European Parliament on July 5th, 2022, published in the Official Journal of the European Union on October 27th, 2022, and came into effect on November 16th, 2022.[14]

(45) The Directive defines digital service provider undertakings under five categories, namely (i) intermediation service providers, (ii) hosting service providers, (iii) online platforms (excluding e-mail and private messaging services, and those that offer these activities alongside another service), (iv) online platforms that allow users to enter into distance contracts with merchants, and (v) very large

[14] https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package, Access Date: 04.04.2023.

online platforms (platforms with 45 million or more monthly active users in proportion to the EU population). These five categories of undertakings are subject to different sets of rules regarding the detection of illegal content and the action taken against it. The obligations imposed on the first of these categories, intermediary service providers, are set out below:

- Establish a clear point of contact for implementing the Regulation, allowing direct communication between service providers, users, and Member State authorities,
- Have a legal representative in one of the Member States in which the service is provided that is not established in the EU but offers services,
- Equip legal representatives with such powers and resources as may be necessary to ensure compliance with the regulation, implement decisions, and respond on time,
- Inform the public in clear and concise language within the scope of user terms and conditions and notify users when there is a significant change about all policies, procedures, measures, and tools used in the management and control of content under the service,
- Report the activities carried out in relation to content management at least once a year in a clear, easily understandable, and detailed manner,

(46) Below are the additional obligations that hosting service providers, including online platforms, are required to comply with.

- Allow individuals and organizations to report illegal content on service providers via user-friendly action mechanisms,
- Inform the user regarding the reasons for any decision to block access or disable, certain content provided by the user,
- Notify the competent authorities of the Member State concerned if they become aware of information leading to the suspicion of an offense involving a threat to the life or safety of persons may have been committed,

(47) Below is a list of additional obligations[15] that online platforms must adhere to.

- Establishment of a complaints monitoring/management system, in particular concerning issues such as suspension of accounts, removal of content or making it inaccessible,
- Use out-of-court dispute resolution mechanisms to resolve disputes and complaints related to the implementation of the Regulation,
- Deal promptly with notifications from trusted flaggers,
- Suspend the accounts of users who post illegal content or make unfounded complaints,
- Make the necessary notifications in the event of suspected illegal activity,
- Maintain certain information (identity, contact, and financial information) on dealers to track dealers using the platform,
- Report on out-of-court dispute resolution and account suspensions for providing illegal content or making false complaints,
- Design and use online interfaces in a way that prevents users from making informed and free choices or misleads them,
- To increase transparency in online advertising, provide information on the used main parameters/profiling to determine that the information displayed is an advertisement, the real/legal identity of the advertiser and the recipient to whom the advertisement is displayed,
- Specify the rules and options for recommendation systems in clear language within the terms and conditions section.
- Take appropriate and proportionate measures to ensure the privacy and safety of children.

(48) The following are additional obligations[16] for online platforms that allow users to enter into distance contracts with dealers.

- Maintain certain information (identity, contact, and financial information) about the dealers in order to be able to trace the dealers using the platform,

[15] The rule will not apply to online platforms that qualify as micro or small businesses.
[16] Micro or small enterprises are also exempted from this group of undertakings.

- Design the online interface in such a way as to enable merchants to fulfill their obligations,
- In the event that a merchant using the Platform sells an illegal product or service, inform the user who purchased the service or product that the product or service is illegal and provide any remedies,

(49) Additional obligations for very large-scale online platforms and very large-scale search engines are listed below.

- Identify, analyze, and assess (illegal content, situations that may undermine fundamental personal rights, harm public life, public health, and safety), at least once a year and prior to the introduction of new features with the potential for risk, significant systemic,
- Take reasonable, proportionate, and effective measures to mitigate identified systemic risks, considering their impact on fundamental rights,
- In times of crisis, comply with Commission decisions to determine whether the service has contributed to the crisis, to identify and implement effective and proportionate measures if so, and to report regularly on the effectiveness of the measures,
- Be subject to an independent audit at least once a year,
- Describe the main parameters used in recommendation/ranking systems and allow users to influence/change them, and provide at least one option for each recommendation system that does not rely on data profiling,
- With a guideline on online advertising, disclosure to the public of information such as the content of the advertisement, the real/legal identity of the advertiser, the period of display, whether targeting used, the total number of recipients of the service, etc. for (1) year following the period of display and the last display of the advertisement,
- Provide access to the data necessary to monitor and evaluate compliance,
- Establish a compliance monitoring mechanism, separate from the general administrative structure, consisting of at least one official with sufficient resources and powers,
- Publish transparency reports every six months,
- Pay the annual audit fee to be determined by the Commission,

(50) Each Member State must appoint one or more competent authorities to enforce the regulation. Under specific conditions, the Commission has the authority to act against large-scale online platforms and employ competition law mechanisms, including information requests, on-site investigations, and access to files. In the event of a violation, Member States are empowered to impose fines not exceeding 6% of the digital service provider's annual revenue. Furthermore, the Commission is entitled to levy fines of up to 6% of the revenue of large-scale online platforms.

(51) In Türkiye, the regulation of online content, hosting, and access providers to combat specific internet offenses is governed by "Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of such Publications". Based on the aforementioned law, it is believed that the regulations can be linked to Law No. 5651. Therefore, there is no need for the Authority to conduct a separate study regarding these regulations.

5.2 United Kingdom

(52) Competition concerns within digital markets are a notable focus in the United Kingdom. The CMA issued an advisory report in December 2020, addressing the competition law and regulatory aspects of digital markets.[17]

(53) As per the report, the existing competition regulations are insufficient in addressing the distinct characteristics of digital markets and the associated competition issues. The report emphasizes that the dominant market position and impact of established entities in these markets require a proactive regulatory framework to prevent potential misuse of their dominance and to promote robust competition and innovation.

(54) The CMA has put forward a proposal for the implementation of a regulatory framework, known as the SMS regime, targeting established digital companies in the market. This regime aims to evaluate whether a company holds strategic market status and to identify potential factors that could lead to harm, necessitating regulatory intervention. If a company is found to possess strategic market status, it will be required to adhere to a specific set of conduct rules.

[17] https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf Access Date: 21.12.2020.

These rules are designed to enable companies with strategic market status to manage their market power by prohibiting practices that exploit consumers and businesses, or that exclude innovative competitors. The government has dismissed suggestions for a more comprehensive legal framework, emphasizing that the legal obligation in this context is to foster competition in digital markets for the benefit of consumers. The primary focus will be on regulating companies identified as having strategic market status.

(55) An examination is carried out to ascertain if a company possesses a Safety Management System (SMS) as a component of the regulatory procedure. If a company meets the criteria of the SMS assessment, it will be obligated to adhere to the Code of Conduct, Pro-competitive Interventions, and the SMS Merger and Acquisition Rules, as stipulated by the CMA.

(56) The CMA has stated that the SMS test consists of two main criteria. Firstly, it assesses if a company has a strong market position. Secondly, it examines whether that position provides a strategic advantage. In other words, it evaluates if the effects of its market power are likely to be particularly widespread and/or significant. The CMA proposes that the determination of whether a company has significant and entrenched market power should be applied to a *specific digital activity*[18] of the SMS-owning company, rather than to the company as a whole.

(57) According to the CMA, when a company has widespread or significant market power, a company is regarded as having a strategic position if its market power is widespread or considerable. The CMA has provided the following criteria for such a position:

- The company must be of a considerable size or scale in a particular activity. For example, if a large percentage of the population regularly uses certain products or if the value of transactions for a specific product is significant.
- The company must be a significant gateway for other companies to reach their customers, or its activity must be essential for other companies.

[18] As per the CMA, an activity denotes a collection of products and services provided by a company that either serve a similar purpose or collectively fulfill a specific function. For example, Google offers a variety of products (Google Open Display) that manage the purchasing, selling, and selection of advertisements for display on websites.

- The company should be able to use its activity to extend its market power from one activity to other activities and/or develop a product "ecosystem" that maintains the company's market power.
- The company must be able to use its activity to set the game rules within its ecosystem and beyond.
- The company's actions must have significant effects on markets that may have broader social or cultural implications.

(58) The CMA has set out a list of factors, which should be considered when prioritizing potential SMS companies. These factors include;

- Prioritizing firms of particular sizes, with a focus on firms with a UK annual turnover of over €1 billion and a global annual turnover of over €25 billion.
- Initially prioritizing companies that operate in specific areas, including online marketplaces, app stores, social networks, internet browsers, online search engines, operating systems, and cloud services.
- Before prioritizing, consider whether a sectoral regulator is more appropriately placed to address concerns.

Code of Conduct

(59) The CMA outlines the objective of the code of conduct as aiming to prevent companies with significant market power from exploiting their position. The code will establish pre-emptive regulations to safeguard consumers and businesses from potential exploitation by such companies, and to address any actions that may lead to unfair competition. In pursuit of this goal, the CMA puts forward the following proposed objectives:

- *Fairtrade:* Ensuring fair treatment of users and enabling them to trade with SMS-owning undertakings on reasonable commercial terms.
- *Open choices:* Ensuring that users face no barriers in easily and freely choosing between services provided by SMS-owning undertakings and other firms.
- *Trust and transparency:* Providing users with clear and relevant information to understand the services provided by SMS undertakings and make informed decisions about how to interact with them.

Pro-competitive Interventions

(60) The CMA believes that addressing the root cause of market power requires pro-competitive interventions (PCIs). The CMA recommends that PCIs should be based on solid evidence and focused on addressing the particular harm that needs to be remedied. It is essential to ensure that the PCI is proportionate to the issue at hand. The CMA recommends that there should be no restrictions on the type of PCI remedies other than full ownership separation. A rigid approach like full ownership separation can pose significant risks in digital markets, where evolving technology may create new challenges and potential solutions.

The CMA has outlined the various types of PCI for promoting competition in digital markets. These include:

- *Data-related interventions*: it aims to give consumers more control over their data, mandate third-party access to data, and enforce data segregation.
- *Interoperability and common standards*: it can be used, for example, to provide data-related solutions or software compatibility, such as to support personal data portability, or to enable systems to interoperate,
- *Consumer choice and default interventions*: it addresses concerns about the design of choice architecture that might affect consumer decision-making and the power of defaults.
- *Obligations to provide access on fair and reasonable terms*: for example, obligations to provide access to an operating system or online marketplace,
- *Unbundling solutions*: it involves limited operational and functional unbundling, where various units of the undertaking with SMS are operated independently from each other.[19]

Monitoring and Enforcement

(61) According to the CMA, it is essential to keep an eye on firms' activities to detect any breaches of the code of conduct or any violations of the code or remedies introduced under the PCIs. To ensure compliance with the SMS regulation, the

[19] The CMA suggests pursuing operational and functional unbundling rather than full ownership unbundling. It emphasizes the need for the authority to enforce these regulations following a market study. Essentially, the CMA proposes the ability to advise or mandate a market study if full ownership unbundling seems to be the only feasible solution.

CMA recommends the availability of various tools to monitor and understand emerging issues. These tools may include collecting periodic and specific information from SMS undertakings and other parties, requiring SMS undertakings to report certain information, producing compliance reports that can be published, conducting behavioral checks or reviews of SMS undertakings' practices, conducting confidential interviews with stakeholders, establishing a secure whistleblowing channel for employees of SMS undertakings, and reviewing any complaints made.

(62) The CMA conducts inquiries to ascertain potential violations of codes of conduct. If a violation is found, the SMS owner is required to adhere to the Code by modifying their practices to ensure compliance and taking necessary measures. Unlike antitrust laws that impose sanctions, the primary aim of these inquiries is to rectify non-compliant behavior. While the CMA does not advocate for automatic penalties for breaches of the Code, it does propose that substantial penalties would serve as a deterrent. Accordingly, the guidelines stipulate that fines should only be imposed for serious breaches likely to cause significant harm. The CMA recommends that the maximum fine should not exceed 10 percent of the company's global turnover.

(63) The CMA has also indicated that, in the course of examining SMS regulation, it is recommended to employ penal measures in cases of non-disclosure or provision of inaccurate information.

A Framework to Ensure Effective Competition for the Leading Digital Companies

(64) The CMA's report also states that there should be a separate merger and acquisition regime in which undertakings with SMS are subject to additional merger and acquisition requirements. Accordingly, a regime is envisaged in which the strong position of the undertakings and the potential losses that may arise as a result of the transaction are considered concerning mergers of undertakings with SMS. The report refers to the relevant studies and analyses carried out by the competition authorities. It notes that the acquisitions by the five major digital companies pose particular risks for consumers. It also notes that strategic mergers and acquisitions carried out by these companies further

strengthen the already dominant position of the company concerned and can be used to create and strengthen ecosystems in terms of complementary products and services of the companies.

(65) The report states that the current turnover test and share of supply test used by the CMA for the review of M&A transactions can cause difficulties in identifying potential competitive harms. Additionally, the discretionary nature of the M&A regime in the UK poses risks. As a solution, the report suggests that all merger and acquisition transactions of undertakings with SMS should be notified. It is also recommended that the transaction be evaluated based on the value of the relevant transaction. Competitive concerns should be assessed in the context of the existing SLC (substantial lessening of competition) test but with a lower and more cautious standard of proof.

A Modern Competition and Consumer Regime for Digital Markets

(66) The report highlights the importance of the government strengthening its competition and consumer protection laws and adapting its processes to the digital era. It also mentions that a proposal for the reform of competition, consumer protection, market, and M&A legislation was submitted to the relevant state minister in February 2019. Furthermore, it emphasizes the need for intervention against illegal content, more effective consumer choice intervention, and enhanced enforcement of platform-to-business regulation.

(67) The report recommends that the government should undertake specific reforms to allow for more effective competition and innovation in digital markets, for example, by introducing measures on data portability and interoperability.

(68) According to a report, companies operating in competitive markets are expected to prioritize the interests of consumers when designing their products. However, a market study conducted by the CMA in the realm of online platforms and digital advertising has uncovered numerous worrying practices. Among these are the use of dark patterns, default settings that favor the provider, automatic renewals of cloud storage, and statements that push consumers to make quick purchases. These tactics are employed to manipulate consumer behavior and influence their choices.

(69) In June 2021, the UK's CMA declared its intention to bolster its consumer law mechanisms to correspond with its competition policy, with a specific focus on digital markets. While definitive regulations have not yet been established in the UK, the government released draft proposals for a digital markets framework in July 2021, inviting public feedback through a consultation process.[20]In July 2021, the government unveiled measures aimed at strengthening the technology industry, safeguarding consumer interests, and stimulating economic expansion in accordance with the suggestions outlined in the report. These measures encompass a revised strategy for codes of conduct to foster equitable trade, freedom of choice, trust, and transparency, as well as an approach to pro-competitive interventions designed to tackle the underlying factors contributing to market dominance.

A Consistent Regulatory Framework

(70) The report proposes close collaboration with other regulatory authorities. In this context, it is suggested that the Digital Regulation Cooperation Forum (DRCF) can develop an understanding to ensure regulatory harmonization across different regimes.

(71) The DRCF was created in July 2020 by the UK Sectoral Regulator for Telecommunications, Post, and Broadcasting (The Office of Communications - Ofcom), the UK Information Commissioner's Office (ICO), and the CMA. Later in April 2021, the forum added the Financial Conduct Authority (FCA) as a permanent member.[21]

Draft Law on Online Security

(72) On May 12, 2021, the UK government released a draft Online Security Bill, which obliges social media platforms such as Facebook, Instagram, and Twitter, file hosting sites, messaging services, and search engines to combat harmful content on their platforms.[22] The draft law aims to proactively prevent users from exposure to harmful content by the platform rather than removing such content

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf , Access Date: 16.08.2021.
[21] https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum#full-publication-update-history, Access Date: 06.04.2023.
[22] https://committees.parliament.uk/publications/8206/documents/84092/default/, Access Date: 17.02.2022.

upon notification by users as per the current legal regime. In addition, the draft law includes provisions to empower platforms to take down harmful content. Finally, the draft, which states that "age verification" features will be added, has been updated to include newly identified harmful content since its publication.

5.3 Germany

(73) Yet one other regulation targeting powerful platforms in digital markets has been introduced by Germany. The German Federal Ministry for Economic Affairs and Energy (BMW) published a draft amendment to the German Competition Act (German Competition Act-Gesetz gegen Wettbewerbsbeschränkungen -GWB) (Digitalization Act).[23] The relevant draft amendment entered into force on 19 January 2021. [24] The amendment introduced significant changes to the Competition Act, including the definition of a dominant position and the prohibited conduct of undertakings in a dominant position. In addition, certain acts of undertakings of paramount importance for competition between markets referred to as a third category of market power, are subject to prohibition. In this context, Google, Meta, Amazon, and Apple are identified as companies of exceptional importance for inter-market competition, while Microsoft is subject to an assessment.[25]

(74) As a result of the changes made to Article 18 of the German Competition Act, titled "Market Dominance", "access to competition-related data" has been included in the parameters to be considered when assessing an undertaking's market position. Furthermore, in the case of multilateral markets, in addition to the parameters existing for other markets, direct and indirect network effects,

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[23] Please refer to the German version.https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html, Access Date: 22.12.2020. Please refer for detailed information. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575629, Access Date: 22.12.2020.

[24] https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.html;jsessionid=1B10BB35B36C2BA0329AA4121FF0B731.1_cid390?nn=4136442,Access Date:02.09.2021.

[25] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html,
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2022/28_09_2022_Entscheidung_Meta.html,
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2022/26_10_2022_Entscheidung_Amazon.html,
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/05_04_2023_Apple_Abschluss.html,
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_03_2023_Microsoft.html, Access Date: 06.04.2023.

parallel use of different services from different providers, replacement costs for users, economies of scale resulting from network effects, access to competition-related data, and innovation-driven competitive will also be considered in assessing the market position of undertakings. Regulatory frameworks for multilateral markets mandate that intermediary firms' intermediation services should also be considered when assessing their market position in supply and sales markets.

(75) According to the amendments made to Article 19 of the relevant law, *Prohibited Behavior of Undertakings in a Dominant Position*, refusal by dominant undertakings to provide any goods or commercial services to another undertaking for a reasonable fee, in particular refusal to provide access to data, networks or infrastructure facilities, unless the refusal is based on objective justification by the dominant undertakings, where the provision of supply or access is necessary to operate in the downstream/upstream market, where such refusal threatens to eliminate effective competition in the market, constitute abuse of a dominant position constitute abuse of dominant position.

(76) The most significant amendment made to the German Competition Act as part of the amendment is Article 19(a), entitled *Abusive Behavior of Undertakings of Exceptional Importance for Intermarket Competition*. The relevant article stipulates that the German competition authority (Bundeskartellamt) may issue a decision declaring an undertaking to be an undertaking of exceptional importance for inter-market competition and that the decision shall be valid for five years from the date on which it becomes a final decision. Among the factors to be considered in such a decision are the dominant position held by the undertaking on one or more markets, its financial strength or access to other resources, its vertical integration and other activities on the relevant market, its access to competitively sensitive information and the importance of its activities in terms of access to third parties' supply and demand markets and its impact on the commercial activities of third parties. The German Competition Authority may prohibit specific actions of undertakings that are of particular importance for inter-market competition under the new legislation. These actions are listed below.

- Self-preferencing: treating competitors' products/services differently from one's products/services when gaining access to supply and sales markets,
- Taking measures that hinder other companies in their commercial activities in the supply or sales markets: engaging in conduct that results in exclusive pre-emption of its products/services, preventing or hindering access to customers other than through access points provided or facilitated by it,
- Excluding competitors by using the leverage of market power: direct or indirect foreclosure of competitors in a market in which the position can expand rapidly without being dominant,
- Using third-party data to create barriers to entry: creating or increasing barriers to entry or otherwise preventing other undertakings from entering the market by processing competitive data collected in a dominant market or by imposing conditions that lead to this conclusion, in particular by
  a) Making the use of services offered by itself conditional on the collection and/or processing of data in the context of the services provided by itself or by third parties without adequately informing consumers of the content and scope of such collection and/or processing or without giving them a sufficient choice; or
  b) to collect and process data in the context of the services provided by third parties in a way that goes beyond what is necessary for the services supplied without adequately informing consumers of the content and scope of such collection and without giving them sufficient choice,
- Impeding interoperability and data portability: preventing competition by denying or making it difficult for products or services to interoperate or data portability,
- Lack of transparency: failing to provide sufficient information about the scope, quality, or success of the service provided to or purchased from other companies, or otherwise making it difficult to evaluate that service,

- Demanding disproportionate benefits as a condition for consideration of third-party products and services: requiring other undertakings to transfer data or rights that are not necessary for the provision of the product or

service in question in order to evaluate their products/services, making the provision of its products/services conditional on the transfer of such data or rights, which is not reasonably necessary.

(77) The relevant amendment makes the provisions prohibiting abuse of a dominant position applicable to undertakings with relative or superior market power in addition to the previously stated articles. In other words, according to the amendment, if undertakings that are suppliers or purchasers of a particular good or commercial service are dependent on certain undertakings or associations of undertakings, if there are no adequate and reasonable possibilities of switching to other undertakings, if it is not possible to offset this dependence by the compensatory power of suppliers or customers whose position in the market is considerable because of a significant imbalance, the behavior of the undertakings or associations of undertakings that are parties to the dependency relationship may also be considered to constitute an abuse of a dominant position.

(78) This amendment shows that additional competition problems arise in Germany as a result of the market power of platforms in digital markets, which cannot be settled under existing competition law, and that additional competition rules are necessary to address them.

5.4 Italy

(79) The Draft Law prepared by the Italian Antitrust Authority (IAA), which proposes to amend the Italian Competition Act, includes changes affecting companies operating in the digital sector[26]. The IAA recommends introducing of a new provision to address distortions of competition in markets where a digital platform is active or where market players need a digital platform to reach end-users or suppliers. The draft law proposes to extend the scope of the Italian Competition Code, which corresponds to Article 102 of the Treaty on the Functioning of the European Union (TFEU). Under this new draft provision, the IAA is authorized to adopt a decision designating certain undertakings as of primary importance for competition in more than one market, and such

[26] https://en.agcm.it/en/media/press-releases/2021/3/ICA-proposals-for-pro-competitive-reforms-Annual-Competition-Law-proposal-have-been-sent-to-Palazzo-Chigi, Access Date: 15.08.2021.

decisions would be valid for (5) years. The draft law also contains a non-exhaustive list of criteria that may lead to the designation of an undertaking as being of primary importance for competition in more than one market. These criteria are as follows; (i) a dominant position in one or more markets, (ii) degree of vertical integration and/or activities in adjacent markets, (iii) access to data affecting competition, (iv) being a gateway to downstream or upstream markets, or (v) influence over the economic activities of third parties.

(80) Upon establishing that an undertaking holds significant importance for competition across multiple markets, it may be prohibited from engaging in behaviors deemed highly anti-competitive and outlined in the following blacklist:

- Self-preferencing in particular by prioritizing its own products in terms of presentation or by pre-empting its own products or services or by integrating them into other supplies, while constituting a network threshold to downstream or upstream markets,
- Preventing the activities of other undertakings in upstream or downstream markets, in particular where the undertaking's own services relate to access to those markets,
- Blocking other companies in markets where the company can expand rapidly (even if not in a dominant position), notably through package deals or binding offers,
- Increasing barriers to entry by means of data processing strategies that have an anti-competitive effect,
- Preventing products and services from interoperating or from porting data,
- Providing inadequate information to other undertakings about the services offered or restricting their ability to evaluate those services,
- Demanding disproportionate benefits for the products or services of other companies subject to evaluation,

(81) Under the draft, undertakings have the opportunity to provide evidence that their behavior is objectively justified. In case of non-compliance, the IAA may impose fines and/or behavioral or structural remedies on the undertakings concerned to terminate the infringement and its effects or to prevent the recurrence of the conduct.

(82) The IAA also proposed to update the existing rules on the **abuse of economic dependence**. Italian Law 192/1998 on "subcontracting" or "economic dependency" prohibits the abuse of economic dependence. According to Law 192/1998, economic dependency arises when an undertaking is able to create an excessive imbalance of rights and obligations in its commercial relationship with another undertaking, i.e., it has relative market power. The abuse of economic interdependence does not require a dominant position in the market but only a significant imbalance of power among the market participants, and it can take many forms. The law cites, without limitation, the refusal to buy or sell, the imposition of unfairly onerous or discriminatory contract terms, or the arbitrary interruption of existing business relations as examples of such conduct. The final version of the draft law described above came into force on 27 August 2022. It includes some amendments and some additions to the provisions of the draft law. It states that "*unless proven otherwise, economic dependence shall be presumed when an undertaking uses the intermediary service of a digital platform that plays a key role in accessing users or providers*"[27]. On the other hand, the potential cases of abuse listed in the Act have been expanded to include additional examples applicable to digital platforms. These examples are listed as (*i) providing insufficient information regarding the scope or quality of the service provided, (ii) imposing unilateral obligations that are not related to the nature or content of the activity performed, and (iii) restricting the possibility of using different providers for the same service by imposing unilateral conditions or additional costs or by other means.*

(83) The enacted law also includes some amendments to the merger and acquisition regime in the Italian Competition Act. The IAA has the authority to review mergers and acquisitions that fall below the threshold, subject to certain conditions being satisfied under the amendments. This means that transactions that may have a potentially harmful effect on the development of small companies with innovative strategies will also be subject to examination[28].

[27] https://www.gop.it/doc_pubblicazioni/922_o2mhs05m6j_ita.pdf Access Date: 06.04.2023
[28] https://www.clearygottlieb.com/-/media/files/alert-memos-2022/italian-competition-law-reform.pdf Access Date: 06.04.2023

(84) In addition, the enacted law also contains provisions on the "conciliation" procedure. Accordingly, in the case of anticompetitive agreements and abuses of dominant position, undertakings that have infringed may benefit from the conciliation procedure. The IAA will separately publish the procedural rules for the conciliation procedure and a regulation defining the scope of the fine reduction.

- However, on 5 April 2023, the IAA announced that it has opened an investigation into Meta Platforms Inc, Meta Platforms Ireland Limited, Meta Platforms Technologies UK Limited, and Facebook Italy S.r.l. (Meta Group) for abuse of a dominant position[29]. The Notice stated that the investigation has opened on the basis of allegations that Meta Group abused its market power by unjustifiably breaking off negotiations with the Italian Society of Authors and Publishers (SIAE) and removing from all its platforms all musical works for which SIAE represented the authors' rights. The announcement also stated that the investigation had been opened because Meta Inc.'s behavior could have harmful effects on consumers and competition in the relevant markets. On the other hand, the authority announced that interim measures may apply until 31 December 2024, when the investigation concluded, in view of the possibility of serious and irreparable harm, and stated that it may adopt such measures after hearing the parties.

5.5 United States of America

(85) The United States is the country of origin of the platforms that have become giants in the digital markets, it has adopted a more liberal approach to competition law than other countries. That is why, until recently, it has taken a position against subjecting digital platforms to stricter competition rules. Despite this position, the US has been unable to resist the widespread expression of concern about digital markets in recent years. Official studies have begun to conclude that digital markets should be subject to a more stringent competition regime. In this context, the following are some recent studies that have garnered attention in the US and worldwide.

[29] https://en.agcm.it/en/media/press-releases/2023/4/A559 Access Date: 06.04.2023

5.5.1 Report of the Subcommittee on Antitrust of the House of Representatives[30]

(86) The House Judiciary Subcommittee on Antitrust conducted an in-depth review of anti-competitive concerns regarding the services of Facebook, Amazon, Google, and Apple in various sectors. As part of the findings in the report, a number of solutions have been proposed by members of the Committee.

(87) The report states that the dominant companies analyzed by the Committee control one or more major distribution channels and integrate their businesses. According to the Committee, these platforms, while operating in related markets, create conflicts of interest by competing directly with companies that depend on them to access users. To address these conflicts of interest, the Committee recommends that Congress consider legislation using the two main pillars of anti-trust, structural separation, and business scope restrictions[31].

(88) As a result of its report, the Committee identified numerous instances of preferential or discriminatory treatment by dominant platforms. There may be cases where the dominant platform favors its products or services, while in other cases, it may discriminate by favoring one trading partner over another. The Committee recommends establishing non-discrimination rules to promote fair competition and online innovation. As part of a non-discrimination rule, dominant platforms would be subject to the same terms for the same service, including access conditions and price levels. The report also recommends considering interoperability and data portability to reduce barriers to entry and switching costs.

(89) Finally, regarding concerns related to mergers and acquisitions, the Committee recommends changes for future acquisitions by dominant platforms. Therefore, the Commission should consider any acquisition by a dominant platform as anticompetitive unless the merging or acquiring firms can demonstrate that the

[30] https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf, Access Date: 22.12.2020.

[31] The limitations on business scope typically restrict the markets in which a leading company can engage, while structural separation prevents dominant intermediary platforms from competing with firms that are linked to their infrastructure.

transaction is necessary for the public interest and that similar benefits are not possible through internal growth or expansion.

5.5.2 Stigler Committee on Digital Platforms - Final Report[32]

(90) The report on digital platforms, published by the George Stigler Centre for the Study of Economics and Government at the University of Chicago Business School, starts by describing the characteristics of the digital market and, like other reports, finds that strong economies of scale and scope and network effects create barriers to entry. It also notes that consumers can ironically create barriers to access through their behavior, such as not scrolling down the results page to see more search results, accepting the settings chosen by the service provider, using a single platform, etc.

(91) The report's findings suggest that some markets are self-correcting, but that rapid self-correction is unlikely in markets dominated by major digital platforms. In this framework, the report details specific areas where specific reforms are necessary to ensure competition in digital markets. It distinguishes between certain types of regulation that apply to all market players and those that apply only to companies with "bottleneck" power. It also defines "bottleneck power" as a situation where consumers use a single service provider (single homing), rely on a single service provider, and make it too costly for other service providers to provide access to the consumer for the relevant activity. It is envisaged that the competent authority responsible for implementing the regulation will have the power to define bottleneck power and to update the definition regularly or as necessary.

(92) The report sets out a menu of regulations that can be used, from the least to the most interventionist. It proposes that the authority responsible and empowered to implement regulation should generally have the power to collect data on digital transactions and interactions to assess the performance of the sector, to create "light touch" rules to make markets more competitive, to establish open standards, to ensure data portability and interoperability, and to conduct

[32] https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf , Access Date: 22.12.2020.

reviews of acquisitions concurrently with reviews by the US Federal Trade Commission (FTC) and the US Department of Justice (DOJ).

(93) Ultimately, the report suggests implementing regulations that would enable the assessment of all mergers and acquisitions involving digital bottleneck companies, as well as the prohibition of anti-competitive tying and discriminatory practices by such undertakings.

5.5.3 Draft Legislation

(94) Following the studies mentioned above, it is noted that some draft legislation on digital sectors has been developed in the US. The purpose of the draft legislation is to control the market power of the relevant digital platforms by establishing the principles for the new merger and acquisition review for digital platforms, establishing obligations to prevent anti-competitive activities, and clarifying the measures available to digital platforms, including giving the public authority more power to divide or separate large undertakings.

(95) The term "covered platform" is used to refer to digital platforms that are subject to the American Innovation and Choice Online Act, the Ending Platform Monopolies Act, the Open App Markets Act, the Platform Competition and Opportunity Act, and the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act. The FTC or DOJ will have the authority and power to determine which platforms are within the scope of any draft legislation. Accordingly, in-scope platforms:

1. Cumulatively meet the following criteria
   a) At the time of the relevant assessment, or in any of the 12 months prior to that date, or in any of the 12 months prior to the filing of the complaint regarding the alleged violation:
      i. Have at least 50,000,000 US-based monthly active users of the online platform, or
      ii. Have at least 100,000 US-based monthly active commercial users on the platform,
   b) Be owned or controlled at any time during the two years on or before the date on which the FTC or DOJ makes the appointment or during the two

years preceding the filing of the complaint for the alleged violation of this Act by a person whose annual net sale, adjusted for inflation, exceed US$550.000.000.000 in market capitalization, and

c) Be a critical trading partner for the sale or provision of any product or service provided on the online platform or directly related to the online platform[33],

2. Be in written form and published in the Federal Register, and
3. Must remain in effect for seven years after publication, regardless of any change in control or ownership, unless the FTC or DOJ revokes the appointment,

(96) It will be possible to consider whether the appointment needs to be revoked before the expiry of the seven years in case the operator of the covered platform submits a request to the FTC or DOJ indicating that the online platform is no longer a critical trading partner.

(97) One of the first draft laws created in the USA is the American Innovation and Choice Online Draft Legislation No. 3816. This draft legislation was adopted by the US Senate Judiciary Committee on 20.01.2022. The purpose of the draft law is to define certain discriminatory conduct of covered platforms as unlawful. Accordingly, the draft law prohibits covered platforms from (i) favoring their products, (ii) forcing third parties to purchase their products to be prominently displayed on their platforms, (iii) ensuring the interoperability of their products with third parties' products, (iv) using a company's data on the platform in competition with that company, and (v) influencing search results in their favor. In addition to these obligations, the draft law also contains provisions limiting its scope, such as not sanctioning various measures that enhance confidentiality even if they restrict competition, or excluding subscription-based services from the scope of the draft law.[34]

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[33] A critical trading partner is defined as a person who is capable of restricting/eliminating a trader's (i) access to its customers/users, or (ii) access to a tool or service that is necessary to provide services and products to its customers/users.

[34] https://content.mlex.com/#/content/1350223?referrer=portfolio_openrelatedcontent, Access Date: 14.02.2022.

(98) Another draft law, the Ending Platform Monopolies Draft Law No. 3825, aims to eliminate conflicts of interest arising from the fact that dominant online platforms simultaneously own or control the online platform and certain other businesses, and to promote competition and economic opportunities in these markets. In this context, the FTC and DOJ are empowered under the draft law to take all kinds of actions, including structural remedies.[35]

(99) The Platform Competition and Opportunity Draft Law[36] No. 3826 also aims to promote competition and economic opportunities in these markets by establishing that certain acquisitions by dominant online platforms are unlawful. Accordingly, the draft law shifts the burden of proof from the authorities to the relevant platforms to show that the transaction would harm competition. It also places the burden of proof on the platforms concerned to show that mergers and acquisitions by dominant platforms in digital markets do not distort competition.

(100) Through Draft Law No. 3849, Augmenting Compatibility and Competition by Enabling Service Switching[37], online consumers and businesses will benefit from greater competition and lower entry barriers. Additionally, the it addresses interoperability and data portability. Furthermore, the draft law contains provisions supporting user privacy and data security, which are non-price competition elements. As a result of the relevant provisions, (i) users will have the option of choosing who can access and how their data is shared, and (ii) undertakings offering interoperability under the law will use data minimization to avoid collecting, using, and monetizing excessive amounts of data.[38]

(101) As part of the Open App Market Draft Law No. 5017, passed by the US Senate Judiciary Committee on 03.02.2022, a person who controls or owns an app[39] store with more than 50,000,000 users in the US will fall within the definition of

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[35] https://content.mlex.com/#/content/1303701?referrer=portfolio_openrelatedcontent, Access Date: 14.02.2022.
[36] This legislation has not yet been approved by the US Senate Judiciary Committee.
[37] It has been submitted to the Senate for consideration.
[38] https://content.mlex.com/#/content/1303466, Access Date: 14.02.2022.
[39] "Application" means a software application or electronic service capable of being run or controlled by a user on a computer, mobile device, or other general-purpose computing device.

a covered company.[40] This draft law aims to promote competition in the app economy, reduce gatekeeper power, increase consumer choice, improve quality, and reduce costs. Thus, the relevant draft law introduces provisions for apps and app stores to address concerns about anti-competitive practices, such as exclusivity, binding, interoperability, and self-preferencing. Following are the steps planned to address these concerns; (i) opening up the app store market and in-app payment market to competition, (ii) clarifying sideloading[41], which allows users to sideload applications directly from the internet, and enables the development of other alternative methods of application installation, (iii) prohibiting the imposition of sanctions on app developers because they sell at different prices and conditions in various app stores, (iv) preventing policies that favor the platform owner's own applications and app store, and (v) preventing the use of non-public commercial information from a third-party application to compete with that application[42].

(102) Finally, the Digital Platform Commission draft law was introduced in the US Senate on 18.05.2023. It envisages the establishment of a commission with the power to regulate access to digital platforms, competition between platforms, and consumer rights concerning platforms. The commission will set up a committee of technical experts. It also authorizes the Commission the power to identify systemically significant platforms and proposes to require mergers and acquisitions of such platforms to notify the Commission. Under the draft law, the US competition authorities will need to (i) consider the views of the Commission on mergers and acquisitions notified to the Commission, and (ii) cooperate with the Commission on competition and consumer rights issues in its proceedings relating to digital platforms.[43]

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[40] "Application Store" means a publicly accessible website, software, or other electronic service that provides applications from third-party developers to users of computers, mobile devices, or other general-purpose electronic devices.

[41] Uploading refers to transferring files between two local devices, particularly between a PC and a mobile device such as a mobile phone, smartphone, PDA, tablet, portable media player, or e-reader.

[42] https://content.mlex.com/#/content/1356463?referrer=content_seehereview, Access Date: 14.02.2022.

[43] https://www.congress.gov/bill/118th-congress/senate-bill/1671, Access Date: 06.09.2023.

5.6 Australia

(103) Australia is another country dealing with competition problems caused by digital markets. In its report, the Australian Competition and Consumer Commission (ACCC)[44] examines the impact of digital platforms on consumers, undertakings that use platforms to advertise and reach customers, and news media businesses that use platforms to disseminate their content. A special focus is also placed on the impact of digital platforms on the selection and quality of news and journalism and offers recommendations for digital markets as a whole

(104) The report also suggests that advantages such as Google and Facebook's acquisition of potential competitors and the data sets, they contribute to their dominant positions in the relevant markets and these factors ought to be addressed and necessary regulatory changes made accordingly. In addition, given that the complexity of digital markets makes it difficult to identify problems, it is recommended that a dedicated proactive investigation, monitoring, and enforcement unit be established within the ACCC, in addition to the existing competition and consumer law investigation tools, to deliver better outcomes for business and consumers. The report also proposes a mandatory code of conduct to govern commercial relationships between digital and media companies.

(105) The Australian Government requested the ACCC to initiate an inquiry of the digital platform services market (Digital platform services inquiry 2020-2025)[45] on 10.02.2020. The relevant Digital Platform Services Inquiry includes internet search engine services, social media services, online private messaging services, digital content aggregation platform services, media recommendation services, and electronic marketplace services. The inquiry also covers digital advertising services provided by digital platform service providers and data applications of digital platform service providers and data intermediaries. It is stated that the factors considered in the inquiry will be the level of concentration in the market, mergers and acquisitions, barriers to entry or expansion, practices that may

[44] https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry, Access Date: 22.12.2020.
[45] https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025, Access Date: 14.04.2022.

harm consumers in digital platform service markets, and market trends that may affect the nature and characteristics of digital platform services.

(106) As part of this, the ACCC released its first interim report on online messaging applications in September 2020[46]. This first provisional report focused on competition and consumer issues concerning online private messaging services. In the context of social media and online search services, the report generally reiterated the consumer protection and privacy concerns and recommendations made by the ACCC in its previous final report.

(107) It is noted that different platforms offer online messaging applications in the form of text, voice, and video and that with standalone messaging services, messages or calls from one service can neither be sent to nor received from another service, and, therefore, the services are generally not interoperable.

(108) In the context of private online messaging services, the ACCC identified that even if the content of messages between users is confidential, several platforms can collect a range of other data from users, including their location, account, device information, and other online activities, which may then be used for targeted advertising. It is noted that this raises concerns about the collection, use, and disclosure of data by messaging services and that the disclosure of these practices (e.g. in privacy policies) is not clear and does not provide enough information for consumers to understand which data about them is gathered, and how it is used and sold to whom. In light of concerns about consumer preferences and data collection practices, the ACCC considers that the terms and conditions and privacy policies of online private messaging services tend to exacerbate information asymmetries and bargaining power imbalances between these platforms and consumers. In this context, the ACCC considers that the increased tracking and profiling of consumers by platforms and third parties (including data from private messaging services, mobile applications, websites, video games, etc.) has a number of potential and substantial harms. Such harms range from reduced consumer welfare and privacy to increased discrimination and exclusion.

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[46] https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report, Access Date: 07.09.2021.

(109) The report makes recommendations to address these concerns. The report states that better consumer choice and data sharing, consent requirements, and opt-out controls for consumers are necessary to address consumer concerns about the platforms' data practices including strengthening protections in the Data Protection Act and an enforceable code requiring platforms to be more transparent on these issues.

(110) The second interim report of the five-year inquiry of digital platform services examined competition and consumer issues relating to the distribution of mobile applications to users of smartphones and other mobile devices.[47] The report notes that app stores control the essential network thresholds through which app developers can reach consumers on mobile devices, and there are limited effective alternatives for accessing consumers on mobile devices. It concludes that app stores are a "must-have" for most app developers in Australia and, therefore, have significant market power in the distribution of mobile applications. In this context, the main concerns expressed by app developers regarding access to app stores include the following;

- Unfair terms and conditions, including restrictions on app developers' ability to access users of their apps,
- Lack of transparency in application review and approval processes and policies,
- Inadequate recourse for dispute resolution,

Although the ACCC does not propose any regulatory intervention about these concerns at this stage, it identifies six "potential measures" to address these issues. It also states that regulation may be required if the following measures prove impracticable.

- Allowing developers to inform users of alternative payment options other than the application,
- Providing greater transparency about the underlying algorithms and processes that determine detection so that application developers can adapt promptly,

[47] "Digital Platform Services Inquiry Interim Report No.2–App Marketplaces" March 2021, https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf, Access Date: 07.09.2021.

- Providing consumers with the ability to vote and comment on all applications,
- Enabling consumers to select default apps and replace pre-installed apps that are not a core feature,
- Ensuring that data collected as an app store operator is kept separate from other operations and decisions,
- Taking further steps to protect users from malicious applications, including children who may be exposed to age-inappropriate applications,

(111) This report also reflects the findings of the ACCC's Final Report of the Digital Platforms Inquiry 2019. It is, therefore, noted that specific recommendations in that report *(Recommendations 20 and 21 - Prohibition of unfair contract terms and particular trading terms, Recommendations 22 and 23 - Internal dispute resolution mechanisms and an ombudsman scheme to resolve disputes)* may also apply to the concerns raised in this report. At this point, a discussion paper was published by the ACCC on 28.02.2022, seeking stakeholder views on whether new tools are needed to address competition and consumer protection concerns associated with digital platforms. In September 2022, the ACCC published its fifth interim report, in which it discussed whether new regulatory tools are needed to address recent competition and consumer law concerns and if reform is needed, what the options for regulatory reform might be.[48]

(112) The ACCC also released its interim report on its inquiry of digital advertising services.[49] It specifically examined worries regarding lack of transparency in the functioning and pricing of advertising technology and advertising agency services. It also determined that the primary concerns in the online advertising industry included monopolistic behavior, market inefficiency due to excessive market control, complexity, and lack of clarity in the bidding and pricing mechanisms for programmatic advertising, restrictive practices, and limited negotiating power for advertisers.

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[48] https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf, Access Date: 30.09.2022.

[49] "Digital advertising services inquiry-interim report",December 2020, https://www.accc.gov.au/system/files/Digital%20Advertising%20Services%20Inquiry%20-%20Interim%20report.pdf, Access Date: 07.09.2021.

(113) The report notes that the level of competition in the ad tech supply chain is low and that there are also problems such as conflicts of interest, favoring of proprietary products, and transparency in the supply chain, and makes the following suggestions to address these issues:

- Suggestions to reduce data-driven barriers to entry and increase competition in the market;
  a. Introducing measures to improve data portability and interoperability,
  b. Establishing data parsing mechanisms,
- Recommendations for the provision of advertising technology services to avoid conflicts of interest and self-preferencing;
  a. Preventing the sharing of information between companies providing advertising technology services and imposing obligations, such as acting in the interests of publishers or advertisers,
  b. Imposing obligations to ensure equal access to advertising technology services,
- Recommendations for improving supply chain transparency;
  a. Implement a voluntary standard to ensure complete and independent verification of demand-side platform services,
  b. Introducing a common transaction identity,[50]
  c. Implementation of a unique user identity in a way that protects consumer privacy,

5.7 Japan

(114) In Japan, the Headquarters for Digital Market Competition was established in September 2019 to raise discussions on the transparency and privacy protection of agreements entered into by digital platforms. The anti-competitive concerns raised in this context include (i) concerns about digital platforms affecting competition through data collection and network effects: concerns about nontransparent and unfair contract terms and the acquisition of startups by digital platforms, and (ii) privacy concerns: concerns about how broadly and

[50] The sector should adopt a distinctive system that assigns a unique identifier to each transaction within the advertising technology supply chain, enabling traceability while safeguarding consumer privacy

deeply digital platforms collect and use personal data.[51] In June 2020, the Headquarters for Digital Market Competition published an interim report recommending the application of ex-ante regulation to digital platform.[52] The report makes several recommendations for the future on how digital markets can develop into competitive markets.

(115) The Law on Promoting Transparency and Fairness of Digital Platforms and the Law on Consumer Protection of Digital Platforms were adopted in 2021 to complement these developments.[53] The Transparency Law imposes certain obligations on digital platforms, such as publishing any changes to their operations before making changes, establishing appropriate internal procedures to ensure the fairness of transactions, or resolving disputes with users. These platforms must also submit annual self-assessment reports on these obligations to the Minister of Economy, Trade, and Industry. The law also stipulates that the minister will refer the report to the Japanese Fair Trade Commission (JATK), the country's competition authority if the report suggests that competition law has been violated. The Consumer Protection Law, on the other hand, mainly aims to address the power imbalance between consumers and the platform by introducing rules on the platform's obligation to provide a contact point for consumers, the cases where contracts may be canceled, and the use of data obtained from consumers.

(116) In addition, the Guidelines on Abuse of Superior Bargaining Position, which are related to the Antimonopoly Law and regulate parties with superior bargaining power that engage in exploitative behavior, are considered the most notable regulation affecting digital platforms in Japan.[54] For a company to be subject to the provisions of the Guidelines, it is sufficient for the company to have superior bargaining power compared to sellers or third parties, and it is not necessary to determine whether the company has a dominant position in the markets in

[51] https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_190927.pdf Access Date: 07.09.2021.
[52] https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html Access Date: 07.09.2021.
[53] https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200218.pdf Access Date: 07.09.2021; https://www.japaneselawtranslation.go.jp/en/laws/view/4195/en, Access Date: 06.04.2023
[54] https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html Access Date: 07.09.2021.

which it operates. In addition, the M&A Guidelines have been amended to reflect mergers and acquisitions which, although not notifiable, were examined by the JATK as taking place in digital markets. The amendments analyzed the characteristics of digital platforms, including multilateral markets, and the fact that competition in these markets relies on quality and data rather than price; the definition of relevant markets in digital markets; and the situations where transaction parties in digital markets carry out R&D activities for overlapping products and services.[55] The new version of the guidelines states that criteria such as data, which are essential for competition, should be analyzed even if they do not significantly impede competition in a particular market. The new version of the guidelines also indicates that the possibility of restricting competition following a concentration is higher in single-homing markets than in multi-homing markets and that the authority will analyze transactions by considering direct and indirect network effects. Lastly, it is stated that in markets where data is relevant, the analysis will consider by asking questions such as how often the parties to the transaction collect user data and for what purposes.[56]

(117) Additionally, the Digital Market Competition HQ published the conclusive report on the digital advertising market on April 27, 2021.[57]

5.8 India

(118) With the growth of foreign-owned online sales platforms such as Amazon and Flipkart in India, regulatory measures became necessary with complaints that these platforms increased their pressure on third parties. Due to these complaints, the Ministry of Commerce of India amended[58] its foreign direct investment policy in February 2019. The amendment prevents foreign-owned online platforms from selling their own branded products. Additionally, the amendment prohibits sellers from selling on the platform if they own shares in

[55] https://www.whitecase.com/publications/insight/global-merger-control/japan Access Date: 07.09.2021.
[56] https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf Access Date: 07.09.2021.
[57] https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_210427.pdf Access Date: 07.09.2021.
[58] https://www.reuters.com/article/us-india-ecommerce/walmart-amazon-scrambling-to-comply-with-indias-new-e-commerce-rules-idUSKCN1PP1PN Access Date: 07.09.2021.

the company that controls the platform or its subsidiaries. Additionally, this prohibition applies to cases where a platform controls over 25 percent of a seller's inventory. Besides selling its products, Amazon and Flipkart also sell products of third parties. As a result of the amendment, platforms such as Amazon and Flipkart will no longer be able to sell their own branded products online. Furthermore, these platforms cannot include exclusivity clauses in their contracts with sellers.

(119) The government has not made any official announcements regarding amendments or additional regulations to the Competition Act. However, the competition authority has released a report on e-commerce.[59] The report highlights unfair business practices by e-commerce platforms towards sellers. These practices include self-preferencing by platforms when they offer the same products or services as the sellers. Moreover, it is worth noting that a sector inquiry into mergers and acquisitions in digital markets is currently underway.[60]

(120) A proposed regulation, published in September 2023, will introduce new criteria for determining whether an applicant has significant commercial activities in the domestic market for "significant" mergers and acquisitions, including those in the digital field. The criteria may include factors such as the number of users and subscribers, as well as the company's turnover. Currently, the opinions of sector stakeholders are being gathered as part of the process[61].

(121) In the technology sector, the Competition Commission of India has issued draft norms to scrutinize high-value mergers and acquisitions, especially those involving significant Indian operations.[62]

5.9 China

(122) In January 2020, the State Administration for Market Regulation (SAMR)- China's Competition Authority- released a draft amendment to the law. The

[59] https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf Access Date: 12.09.2021.
[60] Ashok Kumar Gupta, "Regulating the Digital Economy", U.S.-India Business Council, Virtual Roundtable Keynote Address, Access Date: 29.07.2020.
[61] https://content.mlex.com/#/content/1497767/revamped-merger-rules-could-see-indian-regulator-capture-more-high-value-killer-acquisitions?referrer=search_linkclick, Access Date: 06.09.2023
[62] https://www.businesstoday.in/latest/corporate/story/cci-releases-draft-norms-for-regulation-of-combinations-397004-2023-09-05, Access Date: 06.09.2023

amendment proposed criteria for assessing abuse of dominance in digital markets, with particular emphasis on network effects, economies of scale, and lock-in effects. In February 2021, guidelines on platform economics were published to prevent monopolistic behavior of online platforms and direct them to comply with national competition law.[63]

(123) In addition, the draft of the new amendments to the Law on the Protection of Personal Information proposes specific regulations for the excessive collection of data by mobile applications.[64] Furthermore, the draft prohibits the use of automated decision-making algorithms to create unfair discriminatory treatment in pricing and other transaction terms, thereby addressing the issue of data discrimination. If the draft is approved, those who process data must obtain the consent of users who wish to participate in automated decision-making processes. This includes user profiling or recommendations based on algorithms. In addition, users will be able to opt out of automated decision-making. The draft also includes the concept of the right to data portability, which is also part of the EU's General Data Protection Regulation. If the draft is adopted, individuals will be able to access, re-use, and transfer their data.

(124) Additionally, in April 2023, a draft document was proposed that includes a set of obligations for content security, data security, algorithm security, and cybersecurity. As part of the draft, it emphasizes the need for providers in China to prevent disinformation. According to the draft regulations, they should be responsible for the legitimacy of the data source before AI training and for data used for optimized training, as well as limiting users' access to data.[65]

(125) In May 2023, the National Standardization Administration of China released guidelines that establish principles, measures, and procedures for personal data processors who are required to inform and obtain consent from the individuals whose personal data they process before performing any data processing activities. Following the guidelines, data processors are required to inform data

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[63] UNCTAD, 2021, Competition Law, Policy and Regulation in the Digital Era, pp. 8-9; https://www.cnbc.com/2020/11/12/morgan-stanley-chinas-draft-anti-monopoly-rules-impact-on-internet-firms.html Access Date: 03.09.2021.
[64] https://content.mlex.com/#/content/1316221 Access Date: 03.09.2021.
[65] https://content.mlex.com/#/content/1462885/generative-ai-products-service-providers-in-china-face-new-rules-in-proposed-administrative-measures?referrer=portfolio_openrelatedcontent, Access Date: 06.09.2023

subjects when using Big Data or artificial intelligence technology to analyze, correlate, or generate personal information. As well as highlighting the importance of receiving explicit consent from data subjects, the guidelines provide for the assumption of consent based on individual practices.[66]

5.10 South Korea

(126) A bill approved by the South Korean Parliament on 31.08.2021 prevents app stores from forcing developers to use their payment systems.[67] The law allows app developers to use their preferred payment system for in-app purchases. It also prevents app store operators from causing unreasonable delays when reviewing or deleting apps.

(127) In addition, the Korea Fair Trade Commission (KFTC) issued an amended guideline setting out new standards for assessing M&A transactions in digital markets.[68] In evaluating the level of concentration in innovation markets, the KFTC will take into account the following criteria: the amount of R&D investment made by the relevant parties, the R&D-specific assets owned and operated by the respective parties, the total size of the relevant parties' patent portfolio and the number of significant patents, and the number of competitors active in the relevant R&D field. The Guidelines also state that in assessing the competitive effects of mergers in innovation markets, the following criteria should be taken into account; whether the parties are significant innovators in the relevant markets; the closeness of R&D competition based on the parties' past and current R&D activities; whether there will be a sufficient number of players in the relevant innovation market after the transaction; the likely technological gap between the merged entity and its competitors after the transaction; and whether the transaction will lead to the elimination of potential competition in the relevant product market. The Korean Fair Trade Commission (KFTC) has established Guidelines for assessing mergers and acquisitions involving companies with significant data advantages. These guidelines will help evaluate

[66] https://content.mlex.com/#/content/1474991/china-issues-guidelines-on-notice-consent-in-personal-information-processing?referrer=portfolio_openrelatedcontent, Access Date: 06.09.2023
[67] https://content.mlex.com/#/content/1319450 Access Date: 03.09.2021.
[68] http://competitionlawblog.kluwercompetitionlaw.com/2019/03/01/kftc-introduces-standards-for-reviewing-innovation-market-and-big-data-mergers/ Access Date: 03.09.2021.

the level of competition in the data market. Furthermore, the KFTC is also working on creating new standards for reviewing concentration transactions in digital markets, specifically in the information and communication technology and online commerce sectors. These new standards will apply to transactions that fall below the threshold set by the existing regulations.[69] The study has brought about an amendment that will change the regulations regarding transactions in the Korean market. As per the amendment, it will be mandatory to notify the KFTC (Korea Fair Trade Commission) about transactions that exceed a certain amount. Additionally, the target company must be significantly active in the Korean market for the notification to be required.

(128) Furthermore, the Korean Fair Trade Commission (KFTC) has put forward an Online Platform Draft Law, which is presently under review by the parliament. This law mandates that online platform service providers must establish written contracts with commercial users and provide advance notification of any alterations to the terms and conditions.[70] The legislation will be applicable to a range of platform services, including online marketplaces, delivery services, app stores, accommodation services, car-sharing apps, price comparison sites, second-hand property, and car sales apps. The proposed law seeks to establish a transparent and equitable business environment for online platforms and to prevent platform providers from abusing their dominant negotiating position.[71]

5.11 Russia

(129) The nation has introduced a comprehensive digital economy initiative, leading to revisions in competition regulations aimed at addressing anti-competitive behaviors within digital marketplaces.[72] The recent amendments to Russia's competition laws, effective as of September 1, 2023, included updated provisions related to digitalization. These changes introduced several new arrangements to the existing legislation;

[69] https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/korea Access Date: 03.09.2021.
[70] https://www.winston.com/en/competition-corner/antitrust-scrutiny-of-digital-platforms-continues-globally.html Access Date: 03.09.2021.
[71] http://www.koreaherald.com/view.php?ud=20210912000157 , Access Date:30.09.2022
[72] http://en.fas.gov.ru/documents/documentdetails.html?id=15345 Access Date: 04.09.2021

- The criteria for identifying whether a company that owns a digital platform is in a dominant position have been defined. The definition of network effects in the current legislation has been broadened, and network effects are now a mandatory consideration in determining the dominant position of digital platforms and any abusive conduct. Additionally, the following criteria are used to determine dominance: the platform's transactions must exceed 35% of the total transaction volume, and the platform owner's revenues must be over RUB 2 million in the last two years.
- In cases of businesses operating in digital markets, the authorities may consider the *actual value* of the undertaking, in addition to its turnover, when reviewing mergers or acquisitions. Moreover, the evaluation period for such transactions may extend up to 3 years. The applicant also has the right to submit a commitment as part of the evaluation process.
- In cases of digital market concentration or potential competition law violations, the competition authority (as well as the applicant) may request an expert opinion.
- In digital markets, the use of programs that interfere with decision-making (automate the process) during the implementation of an anti-competitive agreement is considered an aggravating circumstance.
- Finally, "administrative liability" has been introduced that holds employees of companies accountable for failing to comply with decisions made by the Competition Authority within the given period or not implementing the measures taken. This law also authorizes the withdrawal of the concerned person's authorization and imposes a fine on the company.

6 POTENTIAL BREACHES OF COMPETITION REGULATIONS IDENTIFIED IN THE DIGITAL MARKET

(130) As highlighted in the initial sections of this Working Paper, detecting anti-competitive behavior in digital markets is challenging, and it is difficult to determine the appropriate timing for intervention. Late intervention in these markets may lead to market closure, while early intervention may stifle innovation and investment incentives for companies operating in the market. Moreover, it is more challenging to identify competition issues in digital markets

than in other markets, leading to delayed intervention. Unfortunately, this delay in intervention can harm the competitive environment in the market, often resulting in irreversible consequences. The competition issues arising in the digital arena have surpassed the boundaries of traditional theories of harm. For instance, competition can be impacted by various methods, which are ever-increasing in number and can have harmful effects. These methods include the presence of unfair practices (self-preferencing, manipulation, etc.) in the result rankings shown by the platforms, blocking access to data or interoperability, excessive data collection and use of data for other purposes, imposing unfair conditions on parties that are economically dependent on it, these conditions are not sufficiently clear, preventing the simultaneous use of competing platforms (multi-homing), the way and intensity of the display of adverts, high commission rates, more advantageous offering of its products and services (search service pre-installed in the operating system), and making it difficult to install another application store, etc.

(131) In the subsequent section, we will examine the primary competition issues in digital markets, the international measures and regulations enacted to mitigate these concerns, and conclude with an overview of the situation in Türkiye.

6.1 Data Collection, Processing, and Use

(132) When we closely examine today's economies, we can easily identify a small group of big tech companies that operate using data-driven business models.[73] These digital platforms collect a vast amount and variety of user data, which often goes beyond the data users provide while using the platform. [74] This data is used to improve the business and services offered by the platforms and also plays an essential role in related markets. Additionally, it allows platforms that offer "free" services to monetize their services through targeted advertising. In this

[73] In recent sources on digital market competitiveness, Google, Apple, Facebook, Amazon, and Microsoft receive special assessments. Please refer to the link. https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, Access Date: 17.08.2021.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf Access Date:17.08.2021.https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf Access Date:17.08.021.
[74] ACCC, Digital Platforms Inquiry Final Report, p. 23.

framework, data is considered a crucial input for digital markets, including online services, production processes, logistics, smart devices, and artificial intelligence. It is predicted that the access and use of data will have an increasingly significant impact on the competitiveness of businesses.[75] In fact, the competitiveness of companies is now being measured based on the quantity, variety, and quality of data that they possess.[76]

(133) Companies with access to large amounts of data have a significant competitive advantage in the marketplace. However, the collection and use of data can distort competition and raise concerns about data confidentiality and privacy. The activities of large technology companies with access to very large, diverse, and voluminous data raise the need for many legal disciplines to address the definition of data, the meaning of data, the uses of data, the effects of data-based superiority and advantage, data protection standards, and the need to regulate and monitor these issues. Therefore, competition issues arising from the use of data fall within the scope of competition law and consumer protection. To identify these issues, we first need to examine the methods of data collection and the purposes for which they are used. We also need to analyze the intersection of data concerns with other legal disciplines. Furthermore, we need to discuss in detail the main competition law concerns related to data, such as data aggregation, excessive data collection, data portability, and data usability issues.

(134) Digital platforms have the advantage of being able to collect data more easily and at lower costs compared to other types of businesses. With the fast-paced development of digital technologies and data storage capacity, it is now possible to create large databases that were previously not possible. It is difficult to measure the exact amount of data collected and stored at any given moment, but the growth of digital platforms has led to the creation of massive databases.[77]

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[75] European Commission, Competition Policy for The Digital Era, 2019, p. 7, 16 https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf Access Date: 17.08.2021.

[76] GRAEF, I. (2016), "Data as Essential Facility", PhD Thesis, KU Leuven. https://core.ac.uk/download/pdf/34662689.pdf, Access Date: 30.11.2020. Robert H Lande, 'The Microsoft-Yahoo Merger: Yes, Privacy is an Antitrust Concern' (2008) 714 FTC: Watch 1; Natascha Just, 'Governing Online Platforms: Competition Policy in Times of Platformization' (2018) 42 Telecommunications Policy 386, 388.

[77] OECD, (2020), Big Data, p. 2.

Online platforms gather data through various methods to create databases.[78] Some information is provided actively by the users during registration, such as their name and contact details. Other data is collected passively, for instance, through Wi-Fi networks, location information, IP addresses, and user activity on third-party websites. Additionally, these platforms also use analytics to generate inferential data based on the actively or passively collected information. Data collection methods are implemented both online and offline. Online data can be collected from various sources such as online transactions, browsing and search history, social media and email activities, IP addresses and device specifications, and mobile application stores accessed through computers or mobile phones. Offline data, on the other hand, can be obtained from service records like payment card transactions and mobile phone records, personal records maintained by different authorities, and information provided during participation in surveys.[79]

(135) It is worth discussing the difference between first-party data and third-party data. First-party data is the information that an undertaking collects directly from its users when they use its services. However, third-party data is the information collected by other companies, not the company itself.

(136) Data, which is collected from various sources by various methods and provides near real-time information about users' behavior and purchasing decisions, contributes in five different ways to the improvement of services by undertakings with relevant data;

a. Improving the quality of the products and services offered, as it enables a better understanding of user demand, habits, and needs,

b. Enhancing the quality of products and services based on the feedback obtained from the products purchased by consumers and consumer reviews,

c. Increasing productivity through the more efficient organization of undertakings' production and distribution processes as a result of better forecasting of user demand and market trends,

[78] OECD, Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value, OECD Digital Economy Papers, 220(2013), p. 10.
[79] ACCC p. 378.

d. Exploration and utilization of new business areas,

e. Adoption of more targeted business models, such as personalized promotions[80],

(137) There are also current debates about the most appropriate means of intervention in legal problems arising from the use of data in digital markets. [81] In this context, in addition to competition law, there are areas where more than one branch of law can intervene in the face of infringements that give rise to data protection and consumer protection concerns.[82] It is also possible to interpret these areas as intersections between these three legal disciplines. For example, the activities of a dominant digital platform in tracking, collecting, and processing user data are likely to be scrutinized under the concept of privacy. However, when the concept of big data first emerged, data-related concerns were more likely to be addressed under privacy and therefore data protection or consumer protection law. More recently, though, the issue has increasingly been seen as falling within the scope of competition law.[83] There are three main areas of competition law practice where data plays an important role.[84] The first is the definition of the relevant market and the determination of the dominant position. The second is the assessment of mergers and acquisitions, and the third is the abuse of dominant position. Abuse of a dominant position can be divided into two types: exclusionary abuse and exploitative abuse. Exclusionary abuse involves the foreclosure of competitors or the creation of barriers to entry through practices such as discrimination in access to data or consolidation of data. It is also often discussed how the essential facilities doctrine elements can be applied in data economies. Exploitative practices include violating privacy policies, reducing the quality of services consumers receive, or demanding more

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[80] Furman Report, p. 23.
[81] The legal debate mentioned above is likely to have picked up pace due to the Bundeskartellamt's decision against Facebook for merging user data gathered through its multiple products and services. For the relevant decision, please visit the following link https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5, Access Date:17.08.2021.
[82] ACCC, Digital Platforms Inquiry, Final Report, June 2019, p. 5. https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf Access Date:17.08.2021.
[83] OECD, Big Data: Bringing Competition Policy to the Digital Era, p. 5; OECD, Consumer Data Rights and Competition.
[84] OECD, Big Data: Bringing Competition Policy to The Digital Era, pp. 14-24.

data to benefit from existing services. In competition law assessments, how data is interpreted is crucial.

(138) In the context of competition law, data can be evaluated in two distinct ways when assessing its misuse. Firstly, the concept of confidentiality and privacy can be viewed as a quality element or a competitive parameter.[85] This means that practices that compromise the confidentiality of data collection and usage processes can be seen as reducing the quality of the service, thus decreasing consumer welfare. Secondly, data can be regarded as an input, which is increasingly recognized in the literature. Excessive data collection, intense data use, or aggregation can be considered harmful practices because they may lead to increased market power, the creation of barriers to entry, or locking consumers into a platform. It is essential to clarify certain aspects of the data during these assessments, for instance, whether the data can be reproduced, collected from other sources, or substituted with the alternative data sets. Other significant factors to consider are how soon it becomes irrelevant, and how much data is needed to enter the market.[86]

(139) Answering these questions requires considering the value that undertakings place on the data, its nature, and its use within the scope of relevant market characteristics. In this context, the data type may also affect the competence of competing undertakings to access or collect the same information in terms of competition law. [87] It is considered that, as a natural requirement of the data-oriented approach in the context of competition law, the classification of data plays a crucial role in determining which data is potentially competitive.

(140) When considering data protection law, the first categorization that comes to mind is personal data and non-personal data. However, when it comes to competition law, this categorization is not sufficient to consider the data-based business models of large technology companies operating in digital markets.

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[85] OECD, Consumer Data Rights and Competition, 2020, pp. 5-6. https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP (2020)1&docLanguage=En Access Date:17.08.2021.
[86] OECD, Big Data, Executive Summary, p. 4.
[87] Competition Policy for The Digital Era, p. 8.

In this context, it is essential to address the competition law infringements that emerge due to such business models and take appropriate actions.

(141) The 2017 report[88] by the European Commission highlights that data can be collected and utilized in various ways and for different purposes. The report lists the types of data falling under the category of data economy in a table format.[89]

Table 1: Classification of Data

Classification based on data acquisition channels		**Classification based on data usage**
1	Volunteered	Non-anonymous use of individual-level data
2	Observed	Anonymous use of individual level data
3	Inferred	Aggregated data
4	-	Contextual data

(142) It is possible to classify data into examples of real-time and past-time data, as well as individual and aggregated data. The OECD report[90] from June 2020 provides the following classifications for data:

- User-generated content,
- Activity or behavioral data,
- Social data,
- Locational data,
- Demographic data,
- Identifying data of an official data,
- Biometric data.

(143) These changes in data characteristics have an impact on the ability of competitors to independently collect or obtain the same data.[91] It is important to note that in some cases, having access to real-time or past-time data as voluntarily provided information is crucial for maintaining competitiveness. Similarly, individual-level data may be necessary to provide additional services or change the way information is delivered.[92]

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[88] Ibid.
[89] Ibid., pp.24-25.
[90] Consumer Data Rights and Competition-Background note, 10-12 June 2020, p. 7-8, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)1&docLanguage=En, Access Date: 20.08.2021.
[91] CREMER et al. (2019), p. 8.
[92] Ibid., p. 25.

(144) As a result of these explanations, data-based competition law concerns will be analyzed under the headings of data aggregation and excessive data collection, taking into account the decrease in data privacy and the consequent decrease in quality, the increase in exploitative practices due to decreased quality, and the observation of exclusionary practices based on creating the dominant position and market entry barriers and making it difficult for consumers to switch to competitors, based on the fact that data is input. While the remedies that may arise in the context of the mentioned problems will be discussed under the relevant sections, data portability and interoperability[93], which essentially constitute a legal remedy on their own, will be examined under a separate heading, including both the competition problems caused by the bottlenecks and the evaluations on how they will be structured.

6.1.1 Data Aggregation

6.1.1.1 Assessing Data Aggregation from a Competition Law Perspective

(145) The data collection practices of digital platforms extend beyond the user's use of the application or service provided by the platform. In other words, the collection of data provided or observed as a result of the user's interaction with the platform. This is because digital platforms can combine data collected as a result of the user's use of the platform's services within the platform, as well as data collected from the user's interaction with other websites or applications, with data collected from the platform's services or applications. For example, Google may combine data collected from its services with data collected from the device if the user uses a device with an Android operating system, or Facebook may combine data collected from third-party websites with data collected from Facebook services and associate that data with the user's Facebook account.[94]

(146) Data aggregation involves collecting and processing data, which can be considered exploitative abuse under competition law, particularly in the context

[93] OECD, Data Portability, Interoperability and Digital Platform Competition, 2021, pp. 8, 14. https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf, Access Date:17.08.2021.
[94] Australian Competition and Consumer Commission, Digital Platforms Inquiry Final Report, p.7, 86, 417; Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, p. 207; Online Platforms and Digital Advertising p. 49.

of "excessive prices" and "unfair commercial conditions"[95]. This practice raises concerns about the violation of consumer privacy and the potential decrease in service quality.[96] The business model that relies on data-driven advertising is associated with the theory of harm in the context of exclusionary effects. To put it simply, data is a vital input for digital advertising. Digital platforms offer their services to users either for free or at low cost, but they also aim to generate revenue by offering advertising space to advertisers. The value of this advertising space can be enhanced by collecting data that enables better targeting, measurement, and attribution of the ads served.[97] However, the collection and use of large amounts of data can give companies a competitive advantage over their competitors. This is due to the existence of direct and indirect network effects, where data can hinder entry and foreclose the market by giving its owner opportunities that are not available to other companies. Therefore, dominant firms that collect and aggregate data can strengthen their position. The more data they collect and analyze, the more sophisticated user profiles they create and the more effective products and advertising they offer. Consequently, the more users they attract, the more data they collect and process.[98]

(147) The Facebook decision of the Bundeskartellamt is considered to be the most significant decision on data aggregation in the context of competition law.[99] In this decision, the merging of data obtained from Facebook services such as WhatsApp, Instagram, Masquerade, and Oculus, as well as data collected through websites that contain Facebook interfaces like the "Like" or "Share" button, into Facebook accounts examined without the consent of users. The Bundeskartellamt found that Facebook is in a dominant position in the social

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[95] BUITEN M. C. (2020), "Exploitative Abuses in Digital Markets: Between Competition Law and Data Protection Law", p. 6.

[96] Stigler Center Report, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report,https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C, p.44, Access Date: 16.08.2021.

[97] Competition and Data Protection in Digital Markets: A Joint Statement between the CMA and the ICO, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987358/Joint_CMA_ICO_Public_statement_-_final_V2_180521.pdf, p. 8, Access Date: 16.08.2021.

[98] COLANGELO, G. and MAGGIOLINO, M. (2018), Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook case for the EU and the U.S., TTLF Working Papers, pp.39-40, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/02/colang_elo_maggiolino_wp31.pdf, Access Date: 17.08.2021.

[99] Bundeskartellamt, Decision B6-22/16.

networking market and emphasized that it is inevitable to examine the behavior of undertakings in a dominant position with respect to their data processing policies, especially if they are relevant to competition law. The Bundeskartellamt concluded that users having to accept Facebook's terms and conditions to participate in Facebook's social network cannot be considered voluntary consent. Ultimately, it concluded that Facebook had abused its dominant position in the social networking market by improperly combining the user data it collected. It restricted Facebook from combining data from WhatsApp, Oculus, Masquerade, and Instagram, as well as data collected through Facebook Business Tools, with data from Facebook.com user accounts without the "voluntary consent" of users.

(148) The decision made by Bundeskartellamt regarding Facebook was primarily based on exploitative misuse. However, it also highlighted the impact of Facebook's data aggregation practices on its competitors. The decision noted that the collection and processing of data plays a crucial role in the social networking market as it allows companies to target their advertisements effectively. Facebook already has an advantage over its competitors due to its access to competition-relevant data. However, this advantage is further strengthened by the illegal processing of data from other sources into Facebook user accounts, making it even harder for competitors to enter the market. Additionally, Facebook's market power extends to the online advertising industry, where it can offer more attractive options for targeted advertising thanks to its illegal data processing practices.[100]

(149) However, the Bundeskartellamt's decision in Facebook in the present case, the Düsseldorf High Court referred the case to the European Court of Justice (ECJ) on the application of the data protection provisions to the case, Meta's acquisition of data from the interfaces it added to Facebook and its combination of this data with other data.[101]

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[100] Ibid., para. 885-888.
[101] Case C-252/21, Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 – Facebook Inc. and Others v Bundeskartellamt, https://curia.europa.eu/juris/documents.jsf?num=C-252/21, Access Date: 06.04.2023.

(150) In its opinion, the Advocate General of the ECJ stated that competition authorities may, within the limits of the competition rules, examine companies' compliance with data protection legislation as secondary evidence and that the acquisition of data or the combination of data obtained through interfaces added to Facebook would be lawful if there is an objective necessity for Facebook's services. It also concluded that it was possible to assess the compliance of Meta with data protection rules in the context of the competition investigation.[102] The European Court of Justice has not yet ruled on the case.

(151) In the second half of 2020, the Bundeskartellamt initiated a further review of Meta. It was due to the Oculus virtual reality helmet requiring a Facebook/Instagram account to use it. As part of the proceedings, Meta took measures to address the Bundeskartellamt's competition concerns. On 23 November, the Bundeskartellamt stated that Meta is a significant player in social media and the virtual reality helmet markets. Not to distort competition in these markets, it is crucial that users are free to choose which account they use to use Oculus. As a result of Meta's preference for an amicable resolution, users shall be able to use Oculus through their Facebook/Instagram account or by opening a separate Meta account. However, the statement noted that the case was not closed as it was still pending as to whether data was merged across Meta's services and, if so, how it was processed.[103]

(152) Finally, it is necessary to mention the investigations already conducted by various authorities regarding data-based violations. The Bundeskartellamt initiated an investigation into Google's data processing policies on 25.05.2021.[104] In the statement made by the Bundeskartellamt, it noted that the use of Google services requires users to always consent to Google's data processing conditions and that the file will address whether Google/Alphabet binds the use of the services to users' acceptance of the processing of their data without providing users with sufficient choice as to whether, how and for what purpose the data is

[102] Case C-252/21, 20.09.2022, Opinion of Advocate General Rantos, para. 78.
[103] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/23_11_2022_Facebook_Oculus.html, Access Date: 06.04.2023.
[104] It is noted that the relevant investigation will be conducted pursuant to the provision of subparagraph (a) of the fourth paragraph of the second article of Section 19a of the Act, which was added to the Act as a result of the 10th Amendment to the German Competition Act.

processed. It is also stated that the undertaking will clarify its data processing policies for user data obtained from third-party websites and applications.[105]

(153) On 23.12.2022, the Bundeskartellamt published its initial findings (statement of objections) regarding its investigation into Google's data processing policies.[106] At this stage of the proceedings, the Bundeskartellamt found that the new provisions for large-scale digital companies (Section 19a of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen-GWB) apply and that Google must therefore amend its data processing terms and conditions and related practices. In addition, the Bundeskartellamt came to the preliminary conclusion that, based on the current terms, Google does not offer users sufficient choice as to whether and to what extent they consent to the extensive processing of their data across services and that the choices offered so far are not sufficiently transparent and remain general. According to the Bundeskartellamt's current assessment, Google should provide users with sufficient options, offer users a limited possibility to consent to the services and purposes for which their data may be processed, and not make the options for users giving consent more favorable than the options for users not to giving consent. Additionally, Google plans to modify the options it offers for users by stating that general and indiscriminate collection and processing of data between services cannot be carried out without the user's consent unless there is a specific purpose, such as preventive measures, including security.

(154) In addition, on 04.06.2021, the Commission and the CMA initiated an investigation into Meta. In the statement made by the Commission, it was stated that one of the subjects of the investigation is whether Facebook has gained an advantage over its competitors, in particular by using the advertising data collected from advertisers in the classified ads market, where it also operates through Facebook Marketplace.[107] In a statement made by the CMA, it was stated that similar to the Commission, it will examine whether the data collected

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[105] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html;jsessionid=CC52F37E11958F49216896869B55B9E0.2_cid371?nn=3591568, Access Date: 16.08.2021.

[106] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html, Access Date: 06.04.2023.

[107] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848, Access Date: 20.08.2021.

by Facebook within the scope of its advertising services and the data it obtains at login provide an unfair advantage over its competitors in Facebook Marketplace and Facebook Dating services.[108] It is possible to state that the CMA's investigation into Facebook's data collection and use is more comprehensive than the Commission's investigation, which deals with similar issues. On 19.11.2022, the Commission concluded that there was sufficient suspicion to initiate an investigation against Meta. The investigation is focused on the distortion of competition in the online classifieds market through the linking of Facebook Marketplace with the dominant social networking service Facebook.[109]

(155) It is worth noting that data mergers have only been found to be anti-competitive in a limited number of cases. Therefore, the competition assessments of mergers and acquisitions involving data-based activities are considered helpful in identifying competition concerns in this area. In some decisions, the Commission has considered whether a merger would affect competition in the market by providing access to new data sets that are likely to be combined with data controlled by the merged entity. The combination of different data sets can have pro-competitive effects by allowing the provision of new services through access to richer data sets. However, the merger raises competition concerns if it allows the merging party to obtain data that cannot be replicated or duplicated by its competitors in the market, or if it creates a risk of market foreclosure if it forms the basis for the use of market power as leverage.[110]

(156) In Google/Double Click[111], the Commission assessed whether the aggregation of Double Click's and Google's data on users' online behavior could lead to a foreclosure effect in the context of non-horizontal effects. The Commission concluded that the transaction would not lead to a foreclosure effect and cleared the transaction without conditions, given that Double Click's contracts with its customers contain restrictions on the use of the data, that many competitors

[108] https://www.gov.uk/government/news/cma-investigates-facebook-s-use-of-ad-data, Access Date: 20.08.2021.
[109] https://content.mlex.com/#/content/1298537?referrer=search_linkclick, Access Date: 06.04.2023
[110] European Commission, Competition Policy for the Digital Era, pp. 108-110.
[111] COMP/M.4731, *Google/Double Click (2008)*, para. 359-366.

already have access to the data in question and that the data can be obtained from third party data collectors or ISPs. The FTC's decision in the same merger case made similar assessments to the Commission's decision. It also found that there was no evidence that the data held by Double Click would confer market power and that Google already had many alternatives for generating potential customers, even if the relevant data would provide potential customers.[112]

(157) Another decision involving data aggregation considerations is the Facebook/WhatsApp acquisition decision. In this transaction, the Commission considered the possible role of WhatsApp that WhatsApp could be a potential source of user data to improve Facebook's advertising in the online advertising market. However, at the time of the transaction, the Commission cleared the transaction because the data collected by WhatsApp consisted of names and mobile phone numbers associated with accounts, Facebook did not intend to change WhatsApp's data collection and use policies, that Facebook had indicated that it could not establish reliable automatic matching[113] between its users' accounts and WhatsApp users' accounts, and that even if WhatsApp user data were to be used for Facebook's targeted advertising activities, there was valuable user data on the market that was not under Facebook's exclusive control.[114] In addition, the Commission stated that data protection concerns that may arise from the increase in data under Facebook's control as a result of the transaction do not fall within the scope of EU competition law and that this issue is subject to EU data protection rules.[115]

(158) The FTC cleared the merger in the US on the condition that WhatsApp obtain users' explicit consent when it decides to use the data it collects, and not misrepresent the extent to which it protects or plans to protect the privacy or security of WhatsApp users' data. It was further recommended that any changes

[112] FTC File No. 071-0170 (2007), *Google/Double Click.*
[113] Facebook was fined €110 million for making false/misleading statements about its ability to perform reliable automatic matching between users' accounts and WhatsApp users' accounts, about three years after the decision. For details refer to the link COMP/M.8228, *Facebook/ WhatsApp (2017).*
[114] COMP/M.7217, *Facebook/WhatsApp (2014)*, para. 180-189.
[115] Ibid., para. 164.

to WhatsApp's data collection, use, and sharing policies should give users the right to opt out of those changes.[116]

(159) In the decision regarding the merger between Microsoft and LinkedIn[117], the Commission stated that the merging of their data could create two concerns, to the extent permitted by data protection rules. The first concern is that the combined data sets may increase the market power of the merged company in terms of data provision, or erect market entry barriers for existing and potential competitors. This means that competitors may need to gather more data to compete effectively. The second concern is that the merger may eliminate competition between Microsoft and LinkedIn, which used to compete with their data. However, the Commission evaluated that the merger should not raise concerns regarding the online advertising market. This is because Microsoft and LinkedIn do not provide data to third parties for advertising activities, there is a significant amount of user data in the online advertising market that is not under Microsoft's control after the transaction, and Microsoft and LinkedIn have a market share of less than 5% in the online advertising market, and are only in limited competition in this market.

(160) In the Verizon/Yahoo [118] decision, the Commission emphasized the same theories of harm as in the Microsoft/LinkedIn decision at the point of data combination and made similar assessments, concluding that the transaction did not raise competition concerns. In the Apple/Shazam [119] decision, the Commission concluded that Apple's access to Shazam's data did not raise competition concerns because Shazam's data is not unique, Apple's competitors have access to similar databases, and the effect of using the data to switch customers from Apple's competitors is negligible.

(161) Finally, it is worth mentioning the recent decision on Google's acquisition of Fitbit[120], which is active in wearable health devices. In the context of the horizontal effects of the transaction, the Commission assessed the post-merger

[116] https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf, Access Date: 16.08.2021.
[117] COMP/M.8124, *Microsoft/LinkedIn*, para. 176-181.
[118] COMP/M.8180, *Verizon/Yahoo*, para. 80-93.
[119] Case M8788, *Apple/Shazam.*
[120] Case M.9660, *Google/Fitbit.*

integration of Fitbit's data into Google's database. Fitbit mainly collects users' profile and account information, weight and body fat, device information, activity types and durations, health, sleep, nutrition information, and information about the user's social environment. According to the Commission, Fitbit's data is of great value for competition in the market for online display advertising services and search-based advertising services and is a new addition to Google's data set. The Commission has observed that this also applies to Google's advertising technology services, as the advertising value chain ultimately serves the purpose of delivering effective and targeted advertising. Based on this observation, the Commission has concluded that Google's acquisition of Fitbit's data and data collection power is likely to increase the barriers to entry or growth for competitors, thereby strengthening Google's dominant position in the online search-based advertising market. Although Google has a relatively lower market share in the online display advertising market and advertising technology services, it cannot be excluded that the transaction raises competitive concerns in these markets.[121] As per the Commission's findings, even though there are data protection regulations in place to prevent the illegal merging of data sets, such rules do not eliminate the risk that the parties' data ownership may impede competitors from entering or expanding in the market. Hence, subject to with regards to the advertising market, the data processing is conditionally authorized, subject to Fitbit's health and similar data not being utilized by Google for advertising purposes. Additionally, Fitbit and Google data will be technically separated and stored in a data silo/repository separated from the data used by Google for advertising purposes. Furthermore, users will have the option to allow or refuse the use of their health and similar data stored in their Google accounts or Fitbit accounts by other Google services. The Commission noted that these commitments would be for (10) years, but could be extended for a further 10 years, if necessary, because of Google's position in the online advertising market.[122]

[121] Ibid., para. 399-455.

[122] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484, Access Date: 17.08.2021.

(162) The information provided above highlights the significance of theories related to exploitative and exclusionary harm in the context of data combination. These theories suggest that combining data may result in consumers losing control over their data, creating, or increasing barriers to entry, hindering competitors' access to data of comparable quality, and enabling the exertion of leverage through data.

6.1.1.2 Recommendations for Türkiye

(163) The above-mentioned regulations/draft regulations and the gatekeeper/ undertaking with significant market power aim to prevent data aggregation/data processing activities that may lead to the exploitation of consumers and the exclusion of undertakings by raising or creating barriers to entry. This will give consumers more control over the data they provide when using the service and enhance the competitiveness of competitors/potential competitors or other undertakings.

(164) As set out in the previous sections of this working paper, the actions of gatekeepers/substantial market power undertakings to process/merge the competition-relevant data they collect is an area that requires regulation due to the competition concerns it raises. In this context, and considering both the competition concerns raised by these actions and the existing international regulatory examples, it is considered that regulation should be implemented to prevent gatekeepers/companies with significant market power from creating or significantly increasing barriers to entry by processing/aggregating personal data unless such processing/aggregation is necessary for the performance of a contract to which the end-user is a party.

(165) In this context, it may be more favorable to adopt the DMA approach that is based on obtaining consent. It means that companies can aggregate data without limiting competition in the market as long as they have the user's approval. However, several studies[123] have shown that consumers have limited knowledge about the amount and nature of data they provide to platforms and how it is

[123] ACCC, Digital Platforms Inquiry Final Report, pp. 393-433.

processed. Hence, it can be argued that even with consumer consent, data aggregation can still limit competition and create entry barriers in the market.

(166) Furthermore, apart from personal data, it would also be appropriate to introduce a regulation that would prevent undertakings with significant market power from processing competition-sensitive data obtained from commercial users for purposes other than the provision of the relevant service unless they provide the commercial user with clear and sufficient options.

6.1.2 Excessive Data Collection

6.1.2.1 Assessment of Excessive Data Collection from a Competition Law Perspective

(167) It is becoming increasingly clear that non-price factors, which are highly valued by consumers, are just as crucial as pricing for companies to remain competitive in the relevant markets. One such non-price factor for digital market players is the amount of data they possess, as mentioned earlier. When it comes to data collection, overdoing it can lead to the creation or strengthening of a dominant position. This can prove to be a significant barrier to entry or eliminate possible competitive opportunities for companies that are not able to collect as much data as the incumbent or do not have access to the data held by the incumbent or its substitutes. Furthermore, excessive data collection can also lead to consumer exploitation, owing to the increased concerns over privacy or the payment of a higher price (data and price) to obtain the service.

(168) When assessing an abuse of a dominant position, it is essential to determine whether the data is collected appropriately. In the context of competition law infringements, a key challenge is to distinguish between legitimate and excessive data collection.[124] To better understand this issue, we need to look at the development of data protection. It is, therefore, better to explain data protection before discussing excessive data collection from a competition law perspective.

(169) It can be observed that users who generally participate in digital markets without paying do not show the same sensitivity to services for which they pay with their

[124] Robertson, V. (2019), "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", *Common Market Law Review*, Vol. 57, pp. 161-189, https://ssrn.com/abstract=3408971.

data. In other words, although users value privacy, they do not set their preferences accordingly. They do not act accordingly or prioritize privacy when purchasing the service.[125] This situation is referred to as the privacy paradox.[126] Therefore, it is not possible for consumers to have a real say on privacy-related issues because of the weak will of consumers not to prefer a digital service provider that has significant market power in the relevant digital market.[127]

(170) The collection or aggregation of data is already subject to different areas of law and legislation in European law.[128] This situation requires harmonization of the authorities and legislation implementing the relevant areas of law. There is no doubt that competition law, which has a broad scope of application, is one of these areas because of its impact on competition policy.[129]

(171) The European Commission has recognized that privacy issues may be considered in the competition assessment where consumers deem them to be a significant quality factor.[130] Indeed, the European Data Protection Board (EDPB) issued a statement on the Apple/Shazam deal, recognizing the importance of the data concentration created by the transaction.

(172) Besides other data-related issues, excessive data collection in digital markets can also be assessed under abuse of dominant position. In competition law, the focus has long been on exclusionary conduct in the context of abuse of a dominant position.[131] However, with the digital and data-based economic model, it is clear that data collection has become a noteworthy issue within the scope

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[125] Pasquale (n 2) 1010; Peter Swire, 'Protecting Consumers: Privacy Matters in Antitrust Analysis' (19 October 2007) accessed 9 January 2019; Theodor Thanner, 'Rethinking Competition Law for the Digital Economy' 11 Austrian Competition Journal (2018) 79, 81; Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S.' TTLF Working Paper No 31/2018 (2018) § 4.2.

[126] Robertson, V. (2019), "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", *Working Paper,* p.5, https://ssrn.com/abstract=3408971.

[127] Pasquale (n 2) 1022.

[128] European Data Protection Supervisor (n 59).

[129] Helberger, Zuiderveen Borgesius and Reyna (n 18) 1427-1429; Viktoria HSE Robertson, 'Consumer Welfare in Financial Services: A View from EU Competition Law' 11 YARS (2018) 29.

[130] European Commission, 'Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions' IP/16/4284 (6 December 2016). See also on the fact that reduced privacy protection means reduced quality, Stucke (n 9) 287.

[131] Please refer to European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

of competition policy, and exploitative practices that may arise in this context should be examined accordingly.

6.1.2.2 Excessive Data Collection as an Excessive Pricing

(173) Today, data is considered the new currency of the digital age.[132] Therefore, there is a tendency in academia to liken excessive data collection behavior to the harm theory of unfair price practices in competition law.[133] In such a case, it is possible that the price is excessive and unfair despite the economic value of the product, and excessive data collection is possible despite the economic value and need of the service provided.[134]

In other words, it is claimed that it can be determined whether or not data sets are excessive by assigning a value to them in terms of price. Therefore, data collection is assumed to have a monetary value, and the excess is applied to determine whether it is excessive.[135] This conclusion relies on the fact that overcharging is the most typical example of exploitative behavior. However, the adoption of such a theoretical approach is debatable. The reason for this is that there is a problem with the definition of what is an excessive limit. On the other hand, viewing data as monetary ignores non-monetary values because of their relationship to issues such as privacy and morality.[136] It should be noted that although privacy appears to be a fundamental right, it is not appropriate to assess it in this context, particularly about personal data.

(174) In assessing excessive pricing practices, the first thing is to identify whether the difference between the actual costs incurred and the price charged is abnormally high. This is followed by an analysis of whether the situation is unfair within itself or a comparison with competing products. In this case, the question arises

[132] Stucke, M. (2018), 'Should We Be Concerned About Data-opolies?' 2 Georgetown L Tech Rev 275.
[133] Budzinski, O. 'Wettbewerbsregeln für das Digitale Zeitalter? Die Ökonomik personalisierter Daten, Verbraucherschutz und die 9. GWB-Novelle' (2017) 43 List Forum für Wirtschafts- und Finanzpolitik 221, 228-230.
[134] European Data Protection Supervisor (n 59) 29; Konstantina Bania, 'The Role of Consumer Data in the Enforcement of EU Competition Law' (2018) 14 European Competition Journal 38, 42.
[135] Kerber, W., 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection' 11 J of Intellectual Property L & Practice (2016) 856, 860.
[136] Nathan Newman, 'The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google' (2014) 40 William Mitchell Law Review 849, 857; Buttarelli (n 24) 3.

as to how to decide whether the data collected is excessive. In applying the above assessment method to excessive data collection, it is possible to consider the amount of data collected on user basis (the price paid by the user) and the value received by the user. What the user gets in return can be determined based on the cost and economic value of the product to the service provider. It is ultimately the adequacy of this relationship that needs to be assessed. However, this stage requires a highly subjective judgment.[137]

6.1.2.3 Excessive Data Collection as Unfair Commercial Practice

(175) Excessive or unfair pricing is one type of unfair commercial practice. Under European competition law, other unfair commercial practices may also restrict competition. Data-dependent ecosystems may adapt to these practices and be considered an abusive under competition law.[138] In cases where the dominant company offers lower data protection standards or collects excessive data, it may be argued that the data use policy is unreasonably extended.[139]

(176) The terms and conditions that set out the data policies of digital service providers and regulate their relationship with users are significant in the context of restrictions of competition arising from unfair commercial practices. The first question to be addressed is whether the user and privacy policies that contain these terms and conditions are commercial provisions. Although this characterization may seem controversial, it is not feasible to consider data in digital markets in isolation from economic activity.[140] The literature states that terms and conditions that are "*unjustifiably irrelevant to the purpose of the contract, unnecessarily restrictive of the liberty of the parties, disproportionate, unilaterally imposed or seriously ambiguous*" should be examined in this context.[141]

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[137] David S Evans and A Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' 1 JCL&E (2005) 97, 108.
[138] Zingales N., 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law' (2017) 33 Computer Law & Security Review, pp. 553, 557.
[139] Gebicka A., Heinemann A., 'Social Media & Competition Law' (2014) 37 World Competition 149, 165.
[140] Schneider, G., 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' (2018) 9 JECLAP 213, 220.
[141] Colangelo G., Maggiolino M., 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S.' TTLF Working Paper No 31/2018 (2018) § 4.2.

(177) On the other hand, determining whether there is unfairness is also seen as a problem. Accordingly, an assessment needs to be made according to the structure of the digital sector or competing products. In this case, criteria such as the essentiality of the behavior, proportionality, and application to the weaker party should be evaluated separately concerning exploitation. Moreover, in the case of excessive data collection, the apparent asymmetry in bargaining power between the data collector and the user should be considered. Data collection that exceeds the user's expectations and intended use may be an unfair commercial practice.[142] Indeed, similar protection is provided by data protection law. It may also be possible for competition law rules to make an assessment based on data protection rules. According to data protection law, data must be collected for specific and legitimate purposes and must not be further processed in an incompatible with those purposes. In addition, the data collection activity must be adequate, relevant, and not excessive concerning those purposes.[143] In other words, the principle of data minimization now has a normative basis in EU law. Given the special liability of undertakings in a dominant position, it may be possible to base restrictions under competition law on instruments specific to data protection law.

(178) In summary, excessive data collection can be assessed under competition law in the context of unfair commercial practices. The principle of proportionality and fairness, the essentiality of a trade condition, and the bargaining power of the parties provide several parameters on which to base the assessment. These criteria, established by case law, are deemed valuable in determining the theory of harm of excessive data collection from a competition law perspective.

6.1.2.4 Recommendations for Türkiye

(179) There is no doubt that excessive data collection can be considered an exploitative practice within the scope of abuse of a dominant position. The literature suggests that assessments can be made within the framework of existing competition law rules and theories of harm. However, as stated above, it is seen that there are

[142] Robertson, V. (2019), "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", *Working Paper,* p.14, https://ssrn.com/abstract=3408971.
[143] European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD(2016) 163 final (25 May 2016), p. 23.

controversies in terms of the application of the theory of harm in excessive price. In fact, the German Federal Cartel Office, in its Facebook decision, did not establish the theory of harm based on unfair price. It concluded that since the data is unique, it cannot be likened to money. It means that consumers can share the same data repeatedly and have less difficulty in budgeting this resource than money.

(180) However, it is worth noting that concrete recommendations for a legislative process on excessive data collection are not available in other country practices. It is because the unfairness of actual practice can only assess ex-post. Besides, the framework in which data collection activities operate is already regulated by data protection law.

(181) The *principle of data minimization* is introduced in the context of data protection law. According to this principle, when collecting personal data, a data controller should limit itself to what is directly relevant and necessary to achieve a specific purpose. It should also retain the data only for as long as needed to meet that purpose. In other words, data controllers should collect only the required personal data and keep it only for as long as it is needed. The data minimization principle, explained in Article 5(1)(c) of the EU General Data Protection Regulation (GDPR) and Article 4(1)(c) of Regulation (EU) 2018/1725, provides that personal data must be *adequate, relevant, and limited to the purposes for which it is processed*. Other non-personal data that may provide a competitive advantage should also be collected in a way that is *adequate, relevant, and proportionate* to the economic activity. As part of these discussions, it is considered appropriate for the Authority, within its existing powers, to intervene ex-post where it is observed that market competition suffers as a result of data collection that is disproportionate to the economic activity.

6.2 Data portability and Interoperability

6.2.1 Data Portability

(182) Data portability refers to the ability of a data subject or machine user to move their data from service A to service B.[144] It is a right recognized for the first time

[144] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p.63. The concept of "number portability" is an important precursor to the concept

by the European Union's General Data Protection Regulation (GDPR) to strengthen data subjects' control over their data and facilitate the transition between data-based services.[145] According to Article 20 of the GDPR, the data subject has the right to obtain the personal data relating to them, which has been made available to a controller, in a structured, commonly used, and machine-readable format, and to transmit it to another controller without hindrance from the controller. The Article also provides that the data subject shall have the right to request the transmission of personal data directly from one controller to another, where technically feasible.[146]

(183) Such a right serves two potential purposes. The first is in the context of privacy, allowing individuals to control their data by removing it from a platform they do not trust and replacing it with a platform (service provider) they have greater trust in. In this respect, data portability focuses on user-initiated data transfers rather than the handling of larger data sets between service providers. It, therefore, excludes the transfer of multi-customer datasets requested in the context of a *"refusal to supply"* action under competition law.[147]

(184) Competition emerges as a secondary objective of data portability. Data portability allows people to move their data to another service provider and to transfer between services at a low cost. [148] Competition policy facilitates switching between services and, to some extent, multiple access.

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of data portability in theory and practice. (HERT P., PAPAKONSTANTINOU V., MALGIERI G., BESLAY, L., SANCHEZ I., "The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services" p.2). Number portability is the ability of a natural or legal person to change their electronic communications service provider or network operator and the type of service they receive without changing their telephone number. It is made possible by the infrastructure of the current service provider operating under authorization. In the EU, number portability is regulated by the Universal Service Directive 2002/22/EC, while in Türkiye it is regulated by the Number Portability Regulation.

[145] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Article 20, https://eur-lex.europa.eu/eli/reg/2016/679/oj.

[146] The GDPR was adopted on 27.04.2016 and published in the Official Gazette on 04.05.2016, and entered into force on 25.05.2018. In Türkiye, there is currently no provision on data portability in Law No. 6698 on the Protection of Personal Data, which was adopted on 24.03.2016 and published on 07.04.2016, prior to the GDPR.

[147] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 10.

[148] RILEY C., (2020), "Unpacking Interoperability in Competition" Journal of Cyber Policy p. 96.

In this context, the effectiveness of the right to data portability depends on how this right is exercised in practice, i.e., what types of data are considered portable.[149]

(185) Data portability schemes are classified according to the extent of the provided data. The World Economic Forum categorizes data into three classes according to the means of data collection, i.e., voluntary, observed, and inferred data.[150] Voluntary data is the data obtained by the conscious contribution of the user of the product. A name, e-mail, picture/video, or a post on social media is considered voluntary data. Likewise, rating a film or liking a post is considered voluntary data. Observed data refers to data automatically obtained from the activity of a user or a machine. Examples include mobile phones that can track the movements of individuals, the roads a vehicle uses, and driver behaviors. Inferential data is data obtained by non-trivial transformation of voluntary and/or observed data relevant to the behavior of a particular person or machine.[151] Inferential data requires more effort to develop than the other two data types and may involve special analyses and technologies. Data purchased, acquired, or licensed from any third party, such as a data intermediary, may also be included in this classification.[152]

(186) It is partly unclear which types of data are covered by Article 20 of the GDPR, the interpretation and implementation of the right to data portability, the exact format regarding the design of the portability process, the information on the data set, and the frequency with which data portability can be requested from a data controller and the period for providing the data. The data provided by the data subject primarily relates to the category of *voluntary* data. While the GDPR does not explicitly cover inferential data, the extent to which the right to data portability applies to observed data has yet to be determined.

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[149] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 58.
[150] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 24.
[151] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p.24.
[152] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p.11.

6.2.2 Interoperability

(187) Interoperability refers to the ability of different digital services to interoperate and interact among themselves. Although some forms of interoperability are progressively imposed under existing competition law rules (e.g. refusal to supply under the essential facilities doctrine, binding/packaging[153]), these detailed and case-specific procedures are considered too slow, unpredictable, and insufficient to provide a narrow framework for effective digital competition.[154]

(188) Indeed, while the broad application of interoperability to digital markets and the establishment of ex-ante regulation in this area is a new tool, there is a long history of using interoperability to overcome network effects and high switching costs in dense markets such as telecommunications and banking.

(189) Following the introduction of liberalization of the telecommunications market in the EU[155] and Türkiye[156], operators of public communications networks are obliged to provide interconnection of their networks to enable users in different networks to communicate with each other. In this context, operators who receive requests for interconnection of their networks have the right and the obligation to negotiate and conclude agreements on a commercial basis to ensure the provision of communications services.

(190) The retail banking sector has also been an example of *open banking*, data portability, and interoperability initiatives involving digital platforms. Despite recent digital innovation in retail banking, there is evidence of low competitive intensity in these markets. In its banking market investigation, the CMA noted that competition was impeded by consumers' reluctance to switch banks to consider alternatives, lack of information and awareness barriers to the availability of options, the complexity of comparing offers, and concerns about the risk of switching providers. Notably, these consequences persisted in the

[153] For example, a dominant digital platform competing with third parties for the provision of a complementary service may modify its API to be compatible only with its complementary service. (OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p.30), European Commission Decision No T-201/04.
[154] BROWN, I., (2020), "Interoperability as a Tool for Competition Regulation" p.48.
[155] Directive 97/337EC on access , https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997L0033, Access Date: 10.08.2021.
[156] Law No. 5809 on Electronic Communications (Art. 16), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5809.pdf, Access Date: 11.08.2021.

market despite the availability of data portability. In response to these concerns, the Payment Services Directive 2 (2015/2366) came into force in the EU. The directive requires the European Banking Authority to develop *-open standards-* that should ensure interoperability of different technological communication solutions. In Türkiye, the Eleventh Development Plan[157], published in 2019, stated that *legislative harmonization with the EU Payment Services Directive 2 shall ensure the strengthening of the legal infrastructure for open banking*. A year later, the Regulation on Information Systems and Electronic Banking Systems of Banks published by the Banking Regulation and Supervision Agency included the definition and implementation of open banking.

(191) Following the above specific examples of interoperability, the concept of interoperability can generally be divided into horizontal and vertical interoperability, depending on the nature of the relationship between the platforms on which interoperability takes place.[158] Vertical interoperability refers to the ability of digital services to combine data, content, or functionality from an upstream provider, i.e., the interoperability of a product, service, or platform with complementary products and services.[159] For example, a social media platform that provides vertical interoperability with an e-commerce platform may allow its users to easily share their purchases on the e-commerce platform with their connections and enable their connections to make the same purchase. In like manner, an operating system may provide services on several different servers, or an application store may have multiple competing applications. Vertical interoperability permits users to opt for a combination of various digital products and services rather than for a single service provider.[160]

(192) Horizontal interoperability refers to the ability of digital services to communicate/connect with competing services. For example, horizontal interoperability can enable users of various messaging applications to communicate with each other without the need to use the same application.

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[157] Eleventh Development Plan of the Republic of Türkiye (2019-2023), https://www.sbb.gov.tr/p-content/uploads/2019/11/ON_BIRINCI_KALKINMA-PLANI_2019-2023.pdf, Access Date: 11.08.2021.
[158] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 12.
[159] KERBER ve SCHWEITZER (2017), "Interoperability in the Digital Economy", p. 4.
[160] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 12.

Horizontal interoperability allows users of various e-mail services to communicate with each other.[161]

(193) The European Commission also divides interoperability into protocol interoperability, data interoperability, and complete protocol interoperability.[162] Within these subtypes, the interoperability relationship can be vertical or horizontal.

(194) Through protocol interoperability, two systems can fully interoperate and provide complementary services. Protocol interoperability can exist between platform A and complementary services B, C, and D requiring to connect to that platform (e.g. applications B, C, and D in operating system A), or between a set of complementary services A, B, C, and D (e.g. multiple devices interoperating in the context of the Internet of Things, such as a robotic vacuum cleaner and a smartphone).[163] It enables the development of complementary services and competition between them.[164] It is also known as open standards and refers to the availability of common standards for sharing data.[165] Such standards may be set by standard-setting organizations, consortia, or standards defined by a company.[166]

(195) Data interoperability is a similar concept to data portability. However, data interoperability provides real-time and potentially standardized access for the data owner and the entities acting on its behalf. It is possible to achieve data interoperability through privileged APIs[167], where a user authorizes Service B to access its data using Service A's API.

(196) Data interoperability enables the development of complementary services on platforms and allows users to choose each service freely and independently. It

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[161] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 12.
[162] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 6.
[163] Ibid., p. 83.
[164] Ibid., p. 84.
[165] HAUPT A., (2019) "The Economics of Social Network Interoperability" p. 3.
[166] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 83.
[167] Privileged APIs are special interfaces that permit a specific set of networks to access data that is not otherwise available through public APIs. For instance, Twitter and Facebook use a privileged API to enable users to post status updates on one platform that can be shared on the other. It is important to note that these privileged APIs can be terminated at any time by the respective platforms and are not available to other companies in the market. (HAUPT A., (2019) "The Economics of Social Network Interoperability" p. 4.)

can also help to ensure multiple access by permitting users to use different services or platforms with complementary services. However, data interoperability can lead to potentially anti-competitive information exchanges, depending on the type of data and the access methods.[168]

(197) One of the main challenges of achieving data interoperability is ensuring that the user agrees to the sharing of their data and controls the way the data is used following the sharing. Nevertheless, appropriate technical and legal standards, including data protection laws, can mitigate risks and costs.

(198) A complete protocol interoperability refers to the interoperability of two or more replacement services. It requires much deeper integration and standardization than protocol interoperability. In some cases, it is imposed by regulatory requirements. In contrast to protocol interoperability, the network effects depend on the number of users of all services, and the need for standardization is higher, as multiple services must all agree on a common standard. Telephone and e-mail communications are significant examples of complete protocol interoperability. By ensuring interoperability (with interconnection obligations), a user of any telecommunications company can communicate with any other user without interruption. In addition, thanks to the IETF (*The Internet Engineering Task Force)* protocol, any Internet user can send email to any other Internet user, regardless of the Internet Service Provider, the device, and the email service server used by the user or the recipient (for example, a Google Gmail user to a Microsoft Outlook user).[169] A complete protocol interoperability reduces the lock-in effect due to network effects. However, the need for deep standardization between a large number of companies competing directly with each other risks reducing innovation and encouraging collusion.[170]

(199) In its 2019 interim report on online advertising, the UK Competition Authority added *the concept of content interoperability* to these definitions.[171] Content interoperability is defined as the ability of users to publish, view, and interact

[168] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 85.
[169] KADES M., F.S MORTON, "Interoperability as a Competition Remedy for Digital Networks" p. 14.
[170] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 84.
[171] RILEY C. (2020), "Unpacking Interoperability in Competition" Journal of Cyber Policy p. 94.

with content across platforms not requiring them to switch services. An example of this would be the ability of a user's messages to be viewed by their connections on different social media platforms, or the ability of their connections to access the user's messages from various social media platforms. The report concludes that although content interoperability has the potential to be the most effective interoperability intervention to overcome network effects, it is not recommended for implementation in the current circumstances due to the risks associated with this intervention (reduced incentive to innovate and invest, excessive standardization, privacy concerns), the need for a more comprehensive regulatory regime and the lack of support for the intervention from existing market players.[172]

6.2.3 Relationship Between Data Portability and Interoperability

(200) Although interoperability and data portability, closely related concepts in competition law, have many similarities, they also have different characteristics.[173] The GDPR has designed data portability not as a right to request continuous data access or interoperability between two or more services used by the data subject, but as a right to receive a copy of the accumulated history. This makes it easier for the data subject to move between services but does not serve the purpose of facilitating multiple access and the provision of complementary services, which frequently rely on *real-time and continuous* data access.[174] Data portability requires a certain degree of interoperability between different data formats rather than full interoperability. While data portability, unlike interoperability, does not eliminate network effects in favor of a dominant platform, it can mitigate data-related bottleneck effects.

(201) Some concerns are that requiring data portability for new market entrants may reduce competition and ultimately harm consumers. In this respect, a data portability regime may be applied to a dominant/significant market power undertaking to overcome significant lock-in effects.[175]

[172] CMA, (2020), "Online Platforms and Digital Advertising" p. 374.
[173] RILEY C. (2020), "Unpacking Interoperability in Competition" Journal of Cyber Policy p. 96.
[174] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 82.
[175] Ibid, p. 82.

6.2.4 Market Disruptions Requiring Portability and Data Interoperability

(202) The network effects, scale, and scope of economies raise many new concerns in digital platforms relative to traditional markets. First of all, user lock-in, where users are discouraged from switching to alternative providers or using multiple providers due to high switching costs and loss of network effects, may be particularly pronounced in such markets and reduce competition.[176] Secondly, while digital platforms may offer efficiencies through vertically integrated or clustered business models, they also may lead to anti-competitive conduct by dominant companies, which have substantial market power. A third factor that may affect competitive dynamics is the demand side of digital platforms. In such markets, users may prefer to be reluctant or not purchase products when offered for free. It can prevent competition even in the absence of a single incumbent. Finally, the competitiveness of digital platforms, in some cases, may be limited by the importance of data.

As the ability to use data to develop innovative services and products is a competitive parameter of increasingly growing importance, it may not be sufficient for new entrants to offer better quality services and/or lower prices than long-established undertakings.[177] In markets with network externalities and increasing returns to scale, where data portability or interoperability is limited, there may be a limited number of platforms in the market.[178]

(203) In the following, we will first look at the cases encountered in the past to identify the theories of harm that necessitate data portability and interoperability measures. It then discusses the practices currently under discussion, which are the subject of complaints or investigations by some authorities.

(204) A relevant case is the 1985 *Aspen Skiing* case[179], which was the first to address a (horizontal) interoperability obligation between competitors. The case concerned Aspen Skiing, which owned three of the four ski resorts in Colorado, and Aspen Highlands, which operated the other resort. These companies had a

[176] OECD, (2020), "Data Portability, Interoperability and Digital Platform Competition", p. 7.
[177] CRÉMER, J., Y. DE MONTJOYE AND H. SCHWEITZER (2019), "Competition Policy for The Digital Era" p. 2.
[178] Ibid., p. 6; BEUC (2021), Digital Markets Act Proposal, p. 5.
[179] Aspen Skiing Co. v. Aspen Highlands Skiing Corp.1985. 472 US 585.

long-standing practice of selling their customers a single ticket, valid at the two companies' resorts at a discount, compared to the price of buying the ticket separately. There were topographical and legal barriers to the competitor's request for interoperability to provide ski services in another area. Operating in an alternative ski area would require the competitor to find and finance a new site. However, in the relevant period, such areas required the approval of the Ministry of Forestry and then the Government. The Ministry of Forestry had a policy of limited growth in this area due to environmental concerns. In this respect, Aspen Skiing's termination of the joint venture for selling tickets for the Four Hills was considered an impediment to the competitor's activities. Despite the absence of a clear economic justification, Aspen Skiing's decision to terminate the joint venture and cease selling the combined tickets was ruled by the US Supreme Court to be an illegal act of monopolization because it had the purpose and effect of excluding an equally efficient[180] competitor from the market.[181]

(205) A second case deals with requiring access to interfaces or platforms to pursue competition and innovation (vertical interoperability), where a dominant undertaking has incentives to restrict competition in adjacent markets by preventing interoperability with third-party complementary products and services. In that case, Microsoft's refusal to continue to provide interoperability information for its personal computer operating system to independent suppliers active in a separate market for its work group server operating system was the subject[182] of court in the EU[183] and USA.[184]

(206) Although Microsoft had for some time made this information available to third parties free of charge, it stopped doing so in 1998 after it had entered the server market and gained some experience with this product. Microsoft's competitors in the server market have attempted to achieve some compatibility between their

[180] WEISER (2009), "Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond", pp. 272-273.
[181] See for detailed information., https://www.tandfonline.com/doi/full/10.1080/23738871.2020.1740754, Access Date: 16.08.2021.
[182] KERBER ve SCHWEITZER (2017), "Interoperability in the Digital Economy", p. 21.
[183] EU Commission, Decision of 21 April 2004, COMP/C-3/37.792 – Microsoft; CFI, Judgment of 17.9.2001, Case T-201/04 – Microsoft Corp.
[184] US v. Microsoft Corp, 253 F. 3d 34, 46 (D.C. Cir. 2001).

software and Microsoft's operating system using change engineering techniques.[185] However, the level of compatibility, and therefore the quality and value of the server software to users, has declined significantly. Competitors needed full access to Microsoft's interface features to compete effectively in the server market.

(207) In these circumstances, it was concluded that Microsoft's refusal to disclose relevant interoperability information to competitors breached Article 82 of the Treaty of Rome. In addition, the Commission concluded that the non-disclosure of interoperability information could restrict competition[186] in the adjacent market by threatening to stifle innovation and characterized Microsoft's conduct as a refusal to supply personal computer operating system software.[187] As a result, the Commission imposed a sanction requiring Microsoft to disclose the interfaces provided by Windows user operating systems and to license the protocols used to communicate between Windows user and server operating systems.[188]

(208) After the sanction, the Commission audited Microsoft's compliance with interoperability requirements and imposed fines on Microsoft several times between 2005 and 2009. On the other hand, Microsoft's appeal against the level of interoperability required by the Commission was rejected in 2004.[189] Microsoft published an announcement that it would make interoperability information available to third parties through licensing in 2009.[190]

(209) In contrast to EU competition law, where the essential facilities doctrine is well established, the issue has been met with much more skepticism[191] in the US, and the same practice has not been addressed under US competition law. The US has acknowledged that there are numerous methods to enhance

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[185] *Re-engineering techniques*. Change engineering is most commonly defined as the redesign of business processes, associated systems, and organizational structures to achieve a dramatic improvement in business performance.
[186] Andreangeli, A., (2009), 'Interoperability as an "Essential Facility" in the Microsoft Case: Encouraging Stifling Competition or Innovation?', European Law Review, Vol. 4, p. 7.
[187] KERBER and SCHWEITZER (2017), “Interoperability in the Digital Economy”, p. 21.
[188] Commission Decision of 24 May 2004, Microsoft Corp, C(2004).
[189] Andreangeli, A., (2009), 'Interoperability as an "Essential Facility" in the Microsoft Case: Encouraging Stifling Competition or Innovation?', European Law Review, Vol. 4, p. 10.
[190] Please refer to https://news.microsoft.com/2009/01/19/update-microsoft-releases-openxml-implementation-notes/ Access Date: 16.08.2021.
[191] CFI, Judgment of 17.9.2001, Case T-201/04 – Microsoft Corp.

interoperability with Windows user operating systems without the necessity of extensively sharing information about other vendors' software.[192] As a result, the court considered the advantages of promoting user/server interoperability in comparison to the potential harm of granting access to Microsoft's proprietary information. The court concluded that a broad interpretation of interoperability would allow Microsoft's competitors to replicate Windows and would undermine the incentive to compete and innovate.[193]

(210) As demonstrated in the two previous decisions, some authorities categorize interoperability impairment as a form of refusal to supply. Additionally, dominant companies may limit interoperability to reduce access to multiple platforms and raise switching costs. For instance, the FTC investigated the 2013 *Google AdWords* case, where Google provided APIs to advertisers for direct access to the AdWords platform to monitor and control advertising campaigns. As a result, advertisers using the AdWords APIs were restricted in their capacity to manage their campaigns on alternative advertising platforms. Consequently, the FTC reached a settlement with Google to eliminate the contractual terms between Google and advertisers.[194]

(211) In the European Union, the Commission has launched a probe into claims that Apple restricted access to third-party payment apps and mandated apps in the App Store to utilize Apple's payment system. This was while allowing its payment app, Apple Pay, to use the NFC technology necessary for transactions on iPhones and iPads. The matter is currently being investigated.[195]

(212) To maintain or enhance their competitive edge, established undertakings are driven to ensure they have access to data[196], interoperability, and data

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[192] One of the methods identified in the Decision is Microsoft's licensing to its competitors of the communication protocols used to operate Windows user operating systems.
[193] KERBER and SCHWEITZER (2017), "Interoperability in the Digital Economy", p. 26.
[194] Federal Trade Commission (2013), Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search, https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc
[195] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075, Access Date: 27.08.2021.
[196] *Data Openness*. The Furman Report suggests that companies should promote the necessary conditions for data sharing to increase competition. For more detailed information, please refer to the following source. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, p. 74.

portability.[197] For instance, in a 2016 legal case in the United States, Arista, a new player in the network hardware and services market, accused Cisco, an established company, of initially promoting openness and interoperability but then seeking copyright protection for the previously open user interface when faced with severe competition, leading to user lock-in.[198] Cisco denied the claims, stating that it never encouraged Arista to adopt its technology and acted reasonably in the copyright infringement case. Both companies issued a joint statement, *agreeing not to file new lawsuits for patents or copyrights related to existing products for five years, with a few exceptions*.[199]

(213) The area where data portability and interoperability measures are most debated today is social networking services, which are characterized by high concentration rates and significant network effects. The more members a social network has, the more attractive it becomes for users and gains market power. However, especially compared to search providers, the switching costs for users in social networking services are high. Users may experience a lock-in effect because they cannot freely transfer their connections, personal data, and content when switching social network providers. Likewise, when users cannot communicate across social network platforms, they tend to show motivation to join the large-scale network. These barriers to data portability and interoperability can lead to entry barriers and the inability to survive in the market.

(214) As a consequence of these characteristics of social networks, the interoperability requirement for telephone companies to connect calls between different operators, previously introduced in the telecoms sector, should be applied to social media, which creates network externalities with the phenomenon of *"I want to be on social media with my friends"*.[200] Different messaging systems can be connected not only by an open API but also by a common API. A shared API

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[197] Stigler G.J., "*Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report*", (2019) p. 41.
[198] https://www.reuters.com/article/us-cisco-arista-settlement/arista-to-pay-400-million-to-cisco-to-resolve-court-fight-idUSKBN1KR1PI, Access Date: 17.08.2021.
[199] https://www.reuters.com/article/us-cisco-arista-settlement/arista-to-pay-400-million-to-cisco-to-resolve-court-fight-idUSKBN1KR1PI, Access Date: 17.08.2021.
[200] Stigler G.J., "*Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report*", (2019) p. 16.

would ensure interoperability and eliminate the network externalities that drive the *"winner takes all"* nature of the social media market.

(215) According to the Stigler Report, Facebook has used its power to eliminate potential interoperability solutions to gain market power, thereby eliminating data portability and interoperability measures. According to a statement by the Electronic Frontier Foundation, in 2008, Facebook filed a lawsuit under the Computer Fraud and Abuse Act and the California Penal Code to successfully attack a young startup called Power Ventures Inc. that was trying to connect different social media platforms. The lawsuit alleged that Power Ventures created duplicates of Facebook's website by extracting user information, resulting in both direct and indirect copyright infringement.[201] In February 2012, the district court found Power Ventures liable for both claims and in September 2013, the company was ordered to pay Facebook more than $3 million in damages.[202]

(216) It noted that Facebook allows users to download their personal information (photos, profile information, etc.) but strictly protects its social graphics. On the other hand, it pointed out that Google refers to Facebook's policy of not sharing data with other social networks as *"data protectionism"*. It added that Google's use of closed APIs in strategic layers (search ranking algorithm, almost all advertising services) but open APIs in non-strategic layers (mobile operating system, social graph, Google docs) appears quite sophisticated.[203] To support this argument, Dixon noted that when Google launched its long-awaited new social network, Google Me, it expected to emphasize open APIs that enable interaction. This API openness creates a rich ecosystem that could put pressure on Facebook for interoperability.

(217) Some people believe that Facebook should be required to enable the transfer of users' friend lists to other social networks, a concept known as social graph data interoperability.[204] There are also suggestions to extend this regulation to other applications with large user bases, with over a billion users, and even to those

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[201] Ibid.,
[202] Please refer to website. Https, Access Date: 17.08.2021.
[203] https://www.businessinsider.com/the-interoperability-of-social-networks-2011-2, Access Date: 19.08.2021.
[204] https://techcrunch.com/2019/05/12/friends-wherever/ Access Date: 19.08.2021.

with over 100 million users, such as YouTube, Twitter, Snapchat, and Reddit, to prevent these platforms from retaining their users.[205]

(218) Furthermore, alongside the implementation of data portability policies on social media platforms, the focus has shifted to interoperability measures within the realm of IoT (Internet of Things). The practical execution of integration processes that facilitate interoperability among various elements of an IoT environment is predominantly managed by prominent smart (mobile) device operating systems and voice assistant suppliers. As a result, seamless integration with providers like Amazon, Google, and Apple is deemed essential for maintaining competitiveness. Access, exposure, and effective performance within the technology platforms provided by relevant suppliers are crucial for achieving success and connecting with users.[206] The report of the Subcommittee on Antitrust of the House Judiciary Committee in the US states that, just like in many other products and services, Apple limits interoperability by restricting the operation of digital voice assistants on Apple devices and by preventing Siri from working with non-Apple devices, thus adopting a walled-garden approach in the smart voice assistant market to direct users towards its products and services.[207]

(219) Different kinds of software that allow compatibility with popular operating systems and/or voice assistants are typically provided to third parties through various agreements. These agreements usually have standard terms and conditions and are generally not open to negotiation with other parties, except for major players with significant bargaining power.[208] A survey included in the Internet of Things Preliminary Report published by the Commission revealed that most participants[209] in the consumer IoT sector identified technology

[205] https://techcrunch.com/2019/05/12/friends-wherever/ Access Date: 19.08.2021.
[206] European Commission (2021), Preliminary Report- Sector Inquiry into Consumer Internet of Things, pp. 7-8.
[207] Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, p.207, Online Platforms and Digital Advertising, p. 374.
[208] European Commission (2021), Preliminary Report- Sector Inquiry into Consumer Internet of Things, p. 8.
[209] The selection of stakeholders for the Sector Survey aims to cover only a part of the EU consumer IoT sector, including (i) voice assistants, (ii) smart home entertainment products, smart comfort and lighting systems for living spaces, and smart security devices, (iii) wearable devices such as smartwatches and fitness trackers, as well as ear-worn devices, head-mounted displays, and wearable cameras, and (iv) creative content services, information and search services, health and fitness services, and intermediary services. The majority of participants are

fragmentation, the absence of common standards, and the dominance of proprietary technology owned and controlled by a few major consumer IoT players like Apple, Amazon, and Google as the primary obstacles to interoperability.

(220) Finally, issues such as increasing portability between vendors in the cloud services market and allowing customers to use multiple clouds[210], migrating data such as messages, contacts, and photos in the smartphone market, and in the e-commerce field, transferring the reputation of sellers (ratings and customer reviews over a long period of time) to a different platform are also on the agenda to reduce entry barriers and transition costs in the relevant markets.[211]

6.2.5 Data Portability and Competitive Impacts of Interoperability

(221) Interoperability is not an end goal but rather a means to an end. The advantages and drawbacks of this requirement can vary based on the economic and technological conditions in the relevant market.[212] This section will primarily focus on the competitive impacts of collaboration.

(222) Primarily, the most essential competitive impact of these requirements is related to the externalities generated by network effects. While network effects typically enhance consumer welfare in the short run, they can also lead to outcomes such as reinforcing barriers to entry, which could have adverse effects on competition and innovation in the long term. Additionally, they can enable companies to establish dominant positions, making competition between platforms more challenging. [213]

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associated with multinational groups, with over 70% having a turnover exceeding 500 million euros globally. The presence of small and medium-sized enterprises (SMEs) is minimal, primarily comprising newly established companies and specialized consumer IoT service providers.

[210] Stigler G.J., "*Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report*", (2019) p. 119.

[211] *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, p. 384.

[212] KERBER W. and SCHWEITZER H., "*Interoperability in The Digital Economy*", (2017), p. 5.

[213] Frels, J.K., Shervani, T. & Srivastava, R.K., (2003), "*The Integrated Networks Model: Explaining Resource Allocations in Network Markets*". *Journal of Marketing*, (January), p.29.; "*Competition and platform regulation: case study on the interoperability of social networks*", (2020) p.13; Nadler J, Cicilline D. N., *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, p.385; *Mandating portability and interoperability in online social networks: regulatory and competition law issues in the European Union*", (2015), p. 15.

(223) Secondly, digital markets have significant switching costs, making it difficult for new competitors to enter and for users to leave. Interoperability and data portability can promote the entry of new companies into digital markets and grant users the ability to switch platforms. Allowing consumers and businesses to effortlessly transfer or replicate social connections, profiles, and other essential data can help overcome these obstacles.[214] For instance, in the case of social media, it allows users to easily connect with others on the platform they initially joined and switch between services without losing their social connections. This gives users the freedom to choose and helps to lessen the power difference between platforms and users.[215]

(224) The ability to transfer data is the initial step in allowing users to easily switch between services and connect with users from the original service. However, simply transferring data is not enough if users are unable to utilize their data in the new service. For instance, while data portability permits users to move their profiles to a different social network, it does not grant them access to individuals who are not on the same social network. Additionally, to enable users to connect regardless of social network providers, social network interoperability may also be required. [216] Therefore, data portability alone may not fully address concerns about network effects, as it would necessitate consumers to recreate their network interactions on a new platform, and they would be unable to communicate with users on the existing platform.[217] Nevertheless, when data portability and interoperability are combined, the costs of switching decrease significantly, and consumers have more freedom to transition between companies.[218] Specifically, the number of people a user can connect with is no longer restricted to the number of users on the social network they choose to join, reducing social lock-in for users.[219]

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[214] *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, p. 386.
[215] *Competition and platform regulation: case study on the interoperability of social networks*", (2020) p. 14.
[216] "*Mandating portability and interoperability in online social networks: regulatory and competition law issues in the European Union*", (2015), p. 14.
[217] *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, p. 386.
[218] CHAO, B., SCHULMAN, R., Promoting Platform Interoperability, (2020), pp. 21-22.
[219] *Competition and platform regulation: case study on the interoperability of social networks*", (2020) p. 14.

(225) Thirdly, interoperability and data portability empower users to have control over their data. A survey on the influence of online platforms on consumer choices and privacy, as well as their potential to hinder innovation and entrepreneurship, found that 60% of respondents favor increased government regulation in this area. It includes requiring online platforms to have interoperability features that allow users to manage their data and easily transfer important information or connections from one platform to another without any loss.[220]

(226) Fourthly, interoperability enables the division of product components into modules that can be utilized in various specialized products.[221] It facilitates the seamless integration of products from different companies and can lower costs for consumers by allowing sharing across different devices or platforms. Specifically, interoperability achieved through open standards and platforms can boost innovation in related products and services. [222] Shared identity authentication and account login processes across digital services, user interface accessibility, integration of one service's functionality into another, and various connections such as package downloads and pre-installs can offer substantial advantages to users, including convenience and ease of use. [223]

6.2.6 Challenges in Implementing Data portability and Interoperability

(227) The effectiveness of data portability and interoperability measures in impacting competition will depend on their design and implementation, regardless of their primary goals. [224] This section will address essential questions and challenges related to their implementation.

(228) One challenge is that data protection laws may restrict the scope of data portability. Obtaining consent from other users may be difficult or impossible due to these rules, which could limit the effectiveness of overcoming transition

[220] On September 24, 2020, a study was conducted by Consumer Reports on "*Platform Algıları: Online Platformlarda Rekabet ve Adalet Konusunda Tüketici Tutumları*" survey. Please refer to *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, p. 12.
[221] This permits the combination of various components, the creation of new or altered arrangements, the substitution of vehicles or entire facility modules, and facilitates quicker maintenance and service.
[222] KERBER W. and SCHWEITZER H., "*Interoperability in The Digital Economy*", (2017), p. 5.
[223] OECD, (2020), "*Data Portability, Interoperability and Digital Platform Competition*", pp.22-24
[224] Ibid., p. 45.

costs and entry barriers. Additionally, small businesses and new players may be impacted by the costs of strict data protection rules on the value of the data to be transferred.[225]

(229) While the idea of interoperability may seem straightforward, it poses practical challenges. One of the main hurdles is establishing technical capabilities between platforms to enable user communication while also addressing the needs of various stakeholders, promoting market competition, ensuring user satisfaction, and safeguarding privacy. Any proposed solution must prevent dominant companies from unfairly influencing the market and should incorporate standards that make it easier for new players to enter. Furthermore, a mechanism should be put in place to identify and address any manipulation by established companies, with a swift process to provide support to affected competitors.[226]

6.2.7 Challenges in Establishing Data Portability and Interoperability Standards

(230) Establishing standards for data portability and interoperability can present challenges at two key levels: determining how standards will be applied and resolving disputes, as well as financing the implementation of these standards.

(231) Public authorities are responsible for developing and implementing these standards. However, they may lack the necessary resources and expertise to create detailed technical specifications. It can pose difficulties for competition authorities in implementing and monitoring technical interoperability or portability solutions. To address it, standard-setting organizations (SSOs) or other third parties may be tasked with coordinating and overseeing the standard-setting process involving various stakeholders in the market. An example of this approach is the establishment of the Open Banking Implementation Entity as part of the UK banking reforms.

(232) Data portability and interoperability mechanisms may involve technical challenges and legal responsibilities that complicate applications. Therefore,

[225] OECD, (2020), "*Data Portability, Interoperability and Digital Platform Competition*", pp. 45-46.
[226] Unlocking Digital Competition, Report of the Digital Competition Expert Panel (Furman Report), (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, p. 7.

active monitoring will be necessary in operating these mechanisms. Additionally, disputes are likely to arise during implementation, and in such cases, it may be necessary to establish a dispute resolution mechanism within the scope of the prohibition of discrimination.[227]

(233) Secondly, the implementation of interoperability and data portability measures may result in additional expenses, especially if they involve new features rather than the upkeep of current regulations. While the extent of these costs may differ across different markets, they are likely to be a point of concern for those responsible for implementation. As a result, public authorities tasked with implementing these measures may need to think about how to fund them.[228]

(234) According to the Furman Report, from a process perspective, it is seen as the most reasonable option to establish a technical committee supervised by an antitrust enforcer to address the challenges of this practice. Such a committee should include all representatives of the relevant industry segment, and collaboration with the enforcing authority is also necessary to prevent the domination of the process by established undertakings.[229]

6.2.8 Data Portability and Interoperability Obligations Scope

(235) The successful implementation of data portability while ensuring legal certainty requires defining the scope.[230] Initially, the scope will typically be restricted to the data associated with the user making the request. The specific definition of what qualifies as user data can vary significantly. For example, data portability requirements under privacy laws may focus on personal data, while competition policies may have a broader scope, including data provided by businesses in their procurement activities. In this context, the scope of the data subject to data portability from a competition law perspective includes consumer data used in

[227] OECD, (2020), "*Data Portability, Interoperability and Digital Platform Competition*", p. 47.
[228] Ibid., pp. 47-48.
[229] In the situation of AT&T's division, a comparable process was implemented, and in the Microsoft case, similar duties were assigned to a technical committee. Unlocking Digital Competition, Report of the Digital Competition Expert Panel (Furman Report), (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, p. 7.
[230] OECD, (2020), "*Data Portability, Interoperability and Digital Platform Competition*", p. 45.

any commercial relationship, commercialized, or collected, and even encompasses data belonging to commercial users on digital platforms.[231]

(236) The significance of data portability lies in its potential to benefit other services, provided that they can do so without incurring substantial costs. It relies on various factors, including the structure, format, schema, and semantics of the data. Service providers will find transparent schema and highly structured data more valuable than unstructured data or data lacking schema descriptions.

(237) It is essential to establish the method for facilitating the portability of data, as well as the extent and structure of the data. It encompasses determining whether the data will be transferred as a one-time event or if there is potential for a continuous data flow from the data controller. A one-time transfer may necessitate significant user involvement and result in substantial delays, thereby diminishing the appeal of data portability. Conversely, continuous data transfers necessitate a certain level of alignment between the data sender and the receiving platforms, providing significant benefits in rapidly changing markets for data-driven services compared to single transfers that may become obsolete. Granting third parties the ability to execute algorithms and programs directly on the data stored on a data controller's server could serve as an equivalent measure to continuous data portability.[232]

(238) Other essential factors in assessing portability include whether data is made available to users upon request, the frequency and timing of data transfers, and the immediacy of the transfer. These elements will differ based on the specific objectives of a data portability measure within a particular market. For instance, if simultaneous access to multiple linked services on a digital platform is not feasible, a one-time data transfer may be satisfactory.[233]

(239) Ultimately, the circumstances in which data portability occurs are crucial. For instance, the significance of a dataset may vary based on whether it is presented in a structured or unstructured manner, and whether its format is easily understandable for the recipient.

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[231] Ibid., p.11.
[232] Ibid., p.11.
[233] Ibid., p.45.

(240) Undertakings operating in a specific market compete with different business models and varying degrees of interoperability. Some users prefer products and platforms that offer a more closed complementary product and service system (and therefore work less interoperable with other systems).[234] As a result, interoperability will not be a comprehensive solution for all platforms and will be subject to a restrictive approach depending on the target sustained in a specific economic segment.

(241) One aspect of the scope of interoperability measures is the degree of transparency. Access to specific systems and data, especially sensitive information such as banking details, may be limited to a specific set of companies or stakeholders. Therefore, while acknowledging the need for certain limitations, it may be necessary to design interoperability measures to promote as much transparency as possible.[235]

6.2.9 Recommendations for Türkiye

(242) As can be seen, the importance of data in digital markets is increasing, and as a result, the prevention of data portability and interoperability has become one of the competition issues. Anti-competitive behavior in digital markets can result in the market evolving in favor of a single provider and this provider gaining unique access to data due to network effects, scope, and scale economies.

(243) In this context, it is crucial to establish a data portability rule that applies to platforms with significant market power, allowing both individual and commercial users to transfer their data from the platform, either directly or indirectly to transfer to another platform or authorized third party. It is deemed appropriate for this requirement to include options such as users retrieving their data from a platform, transferring data they obtained from one platform to another, or requesting the direct transfer of their data from one platform to another. At this stage, it may be advantageous to create a broad regulation without specifying certain markets and/or data. As for realizing the anticipated benefits of data portability regulation, it is considered that the data eligible for transfer should encompass voluntarily provided and observation-based data and

[234] KERBER ve SCHWEITZER (2017), "Interoperability in the Digital Economy", p. 7.
[235] Ibid., p. 46.

even data based on inference under specific circumstances. The specifics of these technical requirements are expected to be addressed in additional regulations.

(244) In the context of social media, there is a lot of discussion about interoperability, but it is seen as more beneficial for the requirement to be broadly applicable rather than specific to the sector. It is essential to specify which markets the obligation will apply to, define the mandatory interoperability, and identify the parties to share this data. Full protocol interoperability between protocols should only occur when there is a significant market breakdown. The requirement should be commensurate with market failures, should not impede the creative and financial endeavors of companies, should avoid sharing unnecessary data with external parties, and should uphold data privacy. Considerations such as consent and anonymization should be considered. It is also crucial to determine how the interoperability requirement will be implemented and overseen. Consulting independent experts, specialists, or third parties may be required. It is believed that these matters can be addressed through additional laws.

(245) Given these points, it is deemed suitable to establish regulations for data access, data portability, and interoperability practices for platforms that hold substantial market power.

6.3 Favoring and/or Highlighting its Product/Service

(246) Self-preferencing occurs when undertakings with significant market power position their own products or services more favorably than their competitors within the same core platform service.[236] It means that self-preferencing is a way for companies with significant market power to transfer their market power to another related market.[237] It is essential to note that self-preferencing is evident in many business models, traditional markets, and physical sales channels, but it is especially concerning when it comes to the competitive environment of the markets of core platform services. The reason for this is that for undertakings active in core platform services, due to the network effects, economies of scale, and other economic characteristics of these markets, it is much easier and more

[236] CREMER, J., et al. p. 7.
[237] CREMER, J., et al. p. 7; AYHAN B. (2020), "Rekabet Hukuku Perspektifinden Çevrim içi Platformlarda Kendini Kayırma Sorunu ve Çözüm Önerileri", Rekabet Kurumu, Unpublished Specialization Thesis, Ankara, p. 1.

cost-effective to transfer market power in a shorter period of time, so it is more likely to prevent the entry of better/lower-priced rival products/services from different sides into the market.[238] When self-preferencing behavior is carried out by undertakings with significant power, especially in the markets of core platform services or those playing a crucial role in commercial users' market access, it can make it difficult for competitors to operate and even lead to their exclusion from the market. Furthermore, self-preferencing actions cause uncertainty and concern related to dynamic efficiency and consumer welfare.[239] In this situation, actions that seem to focus on increasing market control without offering any competitive advantage, innovation, and/or benefit to consumers are more likely to be seen as violations.[240] Companies with substantial market power may give preferential treatment to their products and services in different ways. The possible behaviors that companies can undertake are mentioned below in order.

- **Ranking**

(247) The first of the self-preferential practices in ranking is to highlight one's products or services in a way that will be advantageous compared to competitors and to bring them to the forefront/top ranks. The design of the 'algorithm' that will determine the results to be displayed in searches performed by end users and the principles of its operation are directly at the discretion of the undertaking providing the relevant core platform service. Therefore, the relevant algorithm may also act to bring the undertaking's products/services to the forefront/top ranks in the ranking of results displayed in response to a search. For example, one of the core platform services, search engines, may prioritize their customized services (flight search, shopping comparison, local search, etc.) over products and services of competitors in the result rankings displayed in searches made by end users, or an e-marketplace may show its products/services in the

[238] WIETHAUS, L., p.510; GRAEF, I., (2019), p. 450, SARIÇİÇEK C. (2020), "*Me, Myself and Amazon*", Master's Thesis, Berlin, pp. 32-33.
[239] KRÄMER, J., et al., "Internet Platforms and Non-Discrimination Project Report", CERRE, (2017), pp. 51-52.
[240] CREMER, J., et al., p. 7.

forefront/top ranks on the product/service search result page or in the purchase box (Buy Box)[241] compared to products and services of competitors.

(248) The core platform services rely on the approach of offering services based on the ranking of products or services. Being at the top of such rankings is crucial for commercial users to reach consumers. Due to the nature of ranking, end users tend to pay more attention to the top or front results when searching within any core platform service. End users are also inclined to select the top results solely based on their positions, regardless of their relevance, price, or quality. However, the details of the algorithms and mechanisms that are fundamentally determinative in shaping the ranking, which is crucial for competitiveness, are not transparent to users (before commercial and end users). Therefore, concerns about competition increase if undertakings providing core platform services promote their products/ services in the ranking, in other words, favor themselves. In particular, when consumers are unable to directly detect the biased practices of a company, they may not realize that their actions are being influenced to some degree. It can hinder their ability to make informed decisions and diminish the system's ability to correct itself.[242]

- **Data**

(249) Another type of self-preference occurs when companies with substantial market power leverage the data, they gather through their core platform services for their own benefit. The relevant data collected within the scope of the core platform services provided by these undertakings constitutes a significant competitive factor in terms of volume and quality. The data collected by the undertaking providing the relevant service, voluntarily obtained by commercial users benefiting from the core platform service, or transactions carried out by end users/third parties using the relevant core platform service, is quite sensitive and provides information from a broad perspective such as the price, price elasticity, supply situation, and consumer perspective of the product/service. An undertaking with significant market power that possesses this data can start

[241] It allows a customer to add a seller's products directly to their shopping cart and proceed with their purchase.
[242] "*Market Study on E-commerce in India,*" (2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf, Access Date: 01.02.2021, p. 21.

selling/offering the identical product/service solely based on the advantage of data ownership, without bearing any commercial risk or entry cost, and may also choose to produce/develop the same product/service itself.[243] This concern essentially relies on the possibility of identifying and imitating (copycat) profitable and popular products based on the data that provides extensive insights into consumer behaviors and preferences. In addition to its data advantage, the undertaking in question appropriates the innovations created by undertakings dependent on it in terms of accessing end users, benefiting[244] from economies of scale and scope.[245] Under these conditions, undertakings with significant market power may also offer lower prices to third-party commercial users of the said products/services.[246]

(250) In data-driven self-preferencing behaviors (also known as *forced free-riding* in the literature), multiple competitive concerns emerge. Benefiting from the innovative practices of its competitors without taking any risks weakens the competitors' drive for innovation, hinders the introduction of new products and services, and thus reduces consumer welfare.[247] On the other hand, the data collection, when similar data is not accessible to third-party commercial users, can create information asymmetry and harm competition.[248] Moreover, depending on the degree of market concentration, it could even result in the exclusion of business users from the market. The second concern regarding innovation is that a company with substantial market power can reap the benefits of innovative outcomes without taking on any risk or cost, potentially discouraging competitors from pursuing innovation and offering innovative

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[243] KAHN, L.M., pp. 781-782.
[244] AYHAN, B. (2020), p. 7-8.
[245] The incentives of platforms to imitate and enter the product spaces of successful complementors; ZHU, F., LIU, Q., p.2620.; FARRELL, J., KATZ, M.L. (2000), "Innovation, rent extraction, and integration in systems markets", 48(4) Journal of Industrial Economics 413, JIANG, B., et al., (2011) "Firm strategies in the "mid tail" of platform-based retailing", 30(5) Marketing Science 757,; PARKER, G., ALSTYNE, M.W. (2017), "Innovation, openness, and platform control", 64(7) Management Science 3015, DHL (2018), Onlinehändler im Spannungsfeld von Wachstum und Marktkonzentration, , https://www.dpdhl.com/content/dam/dpdhl/de/media-center/media-relations/documents/ 20 18/ dhl- e-commerce-studie-ifh-koeln-onlinehaendler-102018.pdf (Last Access:20.08.2020), SHELANSKI, H.A., p. 1699.
[246] SARIÇİÇEK C. (2020), p. 22.
[247] SARIÇİÇEK C.(2020), p. 31
[248] *Investigation of Competition in Digital Markets*", (2020), Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, Access Date: 02.02.2021, pp. 283-284.

products or services.[249] As a result, innovation and product/service diversity in upstream and downstream markets may decrease, ultimately leading to higher prices and reduced consumer welfare.

(251) The behavior in question can be scrutinized in terms of its impact on consumer welfare, as it involves initially offering counterfeit products and services at lower prices. Primarily, it is significant to remember that these low-priced products can only be provided by collecting and using data from third-party commercial users/competitors. In this sense, data facilitates the reduction of risks associated with the launch of a new product and makes it easier to customize production according to actual demand. Furthermore, even if it is accepted that consumers initially benefit from lower prices, it is not possible to assert that consumers only benefit by focusing solely on low prices in the context of decreasing quality, product variety, and innovation.

- **Blocking Access to the Platform and Other Related Issues**

(252) Undertakings with substantial market power may, when vertically integrated, have the ability to restrict or entirely deny their competitors' access to the core platform service in the upstream market to protect their business interests in the downstream market.[250] For instance, an application store that also functions as an application developer (the core platform service) may impede rival applications' access to the store and, consequently, to end users through various means. These may include imposing onerous contract terms such as mandatory subscription or membership, applying discriminatory or exclusionary commission rates, or technological tactics like delaying updates and complicating interoperability. These behaviors give rise to competitive concerns.

- **Pre-installing or Integrating the Platform's Product/Service**

(253) The phenomenon of self-preference can also occur in certain business applications where companies have substantial market power in relation to devices.[251] These undertakings may gain a competitive advantage for their

[249] SARIÇİÇEK C., (2020), p. 31.
[250] AYHAN, B. (2020), pp. 6-7.
[251] The term "device" encompasses a range of gadgets such as smartphones, tablets, wearable technology (like smart watches, earphones, and glasses), voice assistants, and smart home devices (including electrical appliances, TVs, sound systems, lighting, and security systems).

products/services over those of their competitors by pre-installing or integrating their products/services into devices. When specific core platform services or products provided within these services are pre-installed on end consumers' devices, it can discourage consumers from switching to different alternatives (such as an alternative internet browser, a different search engine, etc.), especially when they have limited awareness of these alternatives, thereby negatively impacting competition. Furthermore, actions that restrict the removal/deletion of such products and services from the relevant device, or the loading/execution of third-party products on the relevant device, will exacerbate concerns about anti-competitive behavior. Indeed, the pre-installing of products and services, such as operating systems, application stores, and search engines, by undertakings with significant market power, can lead to users becoming locked into these services and the exclusion of rival products/services from the market.[252]

(254) The behaviors of self-preferencing mentioned earlier, which can take various forms, may also stem from the actions of powerful businesses. For example, when these businesses present their products or services in a pre-installed manner, it could also involve tying the product/service, allowing for assessment of the business's conduct within the context of "tying." [253] Similarly, companies with significant market power may engage in self-preferencing by restricting or denying their competitors in the sub-market access to core platform services in the broader market, or by preventing them from offering services in a way that is compatible with these services. Therefore, the acts of self-preferencing not covered in the preceding information are further discussed under relevant headings, as they could be a potential result of other behaviors outlined in this Working Paper.

Commission Staff Working Document, Preliminary Report – Sector Inquiry into Consumer Internet of Things, SWD(2021) 144 Final, 09.06.2021, Brussel, pp. 20-29.

[252] Executive Summary Of The Impact Assessment Report, (2020), https://op.europa.eu/en/publication-detail/-/publication/57a5679e-3f85-11eb-b27b-01aa75ed71a1, Access Date: 10.08.2021.

[253] Please see. Google Android (Google Android, Case AT.40099, [2018]; Decision of the Board dated 19.09.2018 and numbered 18-33/555-273) and Microsoft (Microsoft, Case COMP/C-3/37.792, [2004]) decision.

6.3.1 Decisions and Investigations Related to Self-Preferencing

(255) The decisions and investigations conducted by the competition authorities of the European Union, the United States, and other countries regarding the actions of platforms engaging in self-preferencing are listed below.

6.3.1.1 EU

- **Amazon**

(256) The Commission began investigating Amazon in 2019, focusing on the company's "dual role" as a marketplace for independent sellers to reach consumers and a retailer selling products on the same platform. The investigation highlighted that Amazon, as a marketplace, has access to sensitive information about the products and transactions of commercial users (sellers) who rely on its core platform services. As a result, the Commission announced its intention to examine the data usage terms in Amazon's agreements with third-party sellers, with a specific focus on how relevant data influences the selection of the 'Buy Box' winner.[254]

(257) The Commission initiated a second inquiry in 2020 due to similar concerns. In this context, it was announced that the Commission would investigate whether the criteria determining the winner of the "Buy Box" on Amazon or the opportunity for third-party sellers to use Amazon's own logistics and delivery services due to selling to "Prime" users, a loyalty program, would lead to self-preferencing towards the undertaking's retail services or sellers.[255]

(258) The joint examinations concluded on 20.11.2022 with the acceptance of the commitment package offered by Amazon. In line with these commitments, Amazon has stated that it will not use the data obtained as a dominant marketplace in any retail service. It will also remove the conditions that give commercial users who use Amazon's retail services and Amazon Logistics service an advantageous position to participate in the Prime program and to determine the products featured in the Buy Box with the Featured Offer. Additionally,

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254 https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291, Access Date: 27.01.2021.

255 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, Access Date: 27.01.2021.

Amazon will ensure the presentation of a second offer alongside the Buy Box. The decision also stated that, in line with the Amazon Logistics decision of the Italian Competition Authority (AGCM), the provisions of this Commission decision regarding Amazon Logistics will not be applied in Italy.[256]

- **Google**

(259) The Commission examined the claim that in a decision published in 2017, Google disadvantaged rival shopping comparison websites by displaying its shopping comparison service (Google Shopping) more prominently and in a more elaborate format on the general search results page compared to the services of its competitors.[257]

(260) In the decision, it was concluded that Google reduced the visibility ranking of competing shopping comparison services in search results in favor of its service called Shopping. Google also positioned and displayed its service more favorably in general search results compared to competing shopping comparison services. Additionally, Google designed special algorithms (such as the Panda update) to prevent low-quality content sites from appearing in the top search results, which affected the rankings and visibility of competing services while exempting its service from these algorithms. The decision determined that Google had exploited its dominant position as a search engine to favor another Google product, the shopping comparison service, thereby breaching competition rules.[258]

- **Apple**

(261) The Commission has initiated an investigation into Apple following a complaint from an e-book/audiobook distributor. The distributor alleges that Apple's App Store rules affect competition in music streaming, e-books, and audiobooks. Additionally, Spotify, a music streaming provider, and a competitor to Apple's

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[256] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023AT40462(01)&from=EN, Access Date: 06.04.2023.
[257] Google Search (Shopping),Case AT.39740, [2017].
[258] Please refer to the link for complaints containing similar allegations about Google's other vertical search services, Google for Jobs and Google Vacation Rentals, submitted to the Commission.https://www.openinternetproject.net/news/113-open-letter-call-of-e-recruitment-services-for-intervention-against-google-s-favouring-of-google-for-jobs; https://www.deutscher-ferienhausverband.de/wp-content/uploads/2020/02/Travel-Sector-Raises-Concerns-Against-Favouring-of-Google-Vacation-Rentals_10-02-2020.pdf, Access Date: 27.01.2021.

Music app, has raised fees for rival applications by taking a 30% commission from in-app purchases and subscriptions, restricted Spotify's technical development through various means, and prevented users from receiving information about discounts or promotions from alternative channels outside of Apple. Apple's practices of (i) mandating the use of its in-app purchase system for the distribution of paid digital content and taking a 30% commission from all subscriptions obtained through IAP, and (ii) preventing app developers from informing users about out-of-app alternative purchase options will be examined.[259]

6.3.1.2 USA

(262) In 2013, the FTC investigated allegations that Google was unfairly promoting its content and demoting its competitors' content on the search engine results page, a practice also known as search bias. The investigation focused on claims made by some vertical search sites that Google was prioritizing its products in specific types of searches, such as shopping or local searches, through universal search units, and suppressing competing vertical search websites with its search algorithms. The FTC stated that Google's promotion of its content could be viewed as an enhancement of the quality of its general search product and closed the investigation due to insufficient evidence.

(263) In 2020, a comprehensive complaint was filed against Google by the Department of Justice (DoJ) and 11 state[260] attorneys general.[261] The complaint requested the court to determine that Google's actions related to search and advertising services violated Section 2 of the Sherman Act, to take structural measures to remedy anticompetitive harms, prevent Google's anticompetitive behavior, and ensure appropriate and permanent measures to restore competition in the affected markets. Furthermore, the complaint raised concerns about the benefits Google obtained from the Android operating system. It noted that certain applications cannot be removed, and the Google search engine is automatically

[259] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073, Access Date: 11.08.2021.

[260] State of Arkansas, State of Florida, State of Georgia, State of Indiana, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of South Carolina, State of Texas.

[261] https://int.nyt.com/data/documenttools/doj-google-suit/c21c1a2b24b81aa1/full.pdf, Access Date: 11.08.2021.

set as the default homepage due to contracts between Google and Android device manufacturers. A trial for this matter is scheduled to take place in September 2023.[262]

(264) On January 24, 2023, the DOJ, and attorneys general of 8 states[263] filed a complaint against Google, alleging that it had monopolized multiple digital advertising technologies by violating Sections 1 and 2 of the Sherman Act. The complaint alleges that Google has made its competitors in the advertising technology sector ineffective or eliminated them by acquiring them over the past 15 years. It has used its dominance in digital advertising markets to compel more publishers and advertisers to use its products, prevented its customers from using rival products, and strengthened its dominance in the digital advertising exchange. In the lawsuit, the DOJ has sought triple damages for non-monetary relief on behalf of the American public and damages suffered by federal government agencies that overpaid for online display advertising.[264]

6.3.1.3 Other Countries

6.3.1.3.1 Italy

- **Amazon**

(265) The Italian Competition Authority announced that it will assess allegations that third-party sellers who do not utilize Amazon Logistics (Fulfillment by Amazon-FBA) are at a disadvantage. It is claimed that those who use the service have better access to reach end consumers, higher visibility in search results, and improved visibility for their offers.[265] Following the investigation, the AGCM concluded that Amazon abused its dominant position by giving preferential treatment to commercial users who opt for Amazon Logistics when joining the Prime program, which offers significant visibility in the marketplace.[266] In its decision, the AGCM imposed a fine of 1.1 billion euros and prescribed behavioral

[262] https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies, para. 12, Access Date: 06.04.2023
[263] California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia.
[264] https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies, Access Date: 06.04.2023.
[265] https://en.agcm.it/en/media/press-releases/2019/4/A528, Access Date: 11.08.2021.
[266] https://en.agcm.it/en/media/press-releases/2021/12/A528, Access Date: 06.04.2023.

remedies. These measures include ensuring equal visibility and benefits for all commercial users who meet certain fair and non-discriminatory conditions. Additionally, Amazon is prohibited from engaging in contractual negotiations with third-party courier companies on behalf of commercial users included in the Prime program. Amazon has filed appeals with the Italian appellate court and the European Court of Justice (ECJ) in response to the AGCM investigation and the Commission's investigation, citing duplication as the basis for the appeals. The Italian appellate court has considered the ECJ's decision as pending since the ECJ has not yet decided on the case.

- **Google**

(266) The Italian Competition Authority has investigated the allegation that Google refused to integrate the Enel X Recharge application into the Android Auto[267] environment.[268] Enel X is an application that provides consumers with the information necessary for charging electric cars. The Authority has stated that Google is interested in enhancing and protecting the Google Maps application, which offers a wide range of services to consumers, including location and route guidance for electric car charging.[269] Additionally, it has been noted that Google's dominant position with the Android operating system and Google Play app store gives it control over how developers reach users, favoring Google.[270] It has been argued that prioritizing Google Maps and refusing to allow Enel-X to operate under Android Auto unfairly restricts the relevant application. As a result, Google has been mandated to provide programming tools for applications that can integrate with Android Auto to Enel X and other developers.

6.3.1.3.2 Kingdom of Netherlands

(267) The Netherlands Authority for Consumers and Markets (ACM) has initiated an investigation into the access of electronic payment applications to the NFC chip (Near-Field Communication chip).[271] The NFC chip enables consumers to make

[267] Android smartphones allow users to easily and safely use certain applications and mobile phone features while driving.
[268] https://en.agcm.it/en/media/press-releases/2019/5/A529, Access Date: 11.08.2021.
[269] https://en.agcm.it/en/media/press-releases/2019/5/A529, Access Date: 11.08.2021.
[270] https://en.agcm.it/en/media/press-releases/2021/5/A529, Access Date: 11.08.2021.
[271] https://www.acm.nl/en/publications/acm-launches-investigation-users-freedom-choice-regarding-payment-apps-smartphones, Access Date: 11.08.2021.

contactless payments using their smartphones in physical stores. However, the operating system/software on some smartphones only allows the NFC chip to connect to the electronic payment application developed by the undertaking that created the relevant operating system/software. ACM has emphasized that this situation could stifle innovation in electronic payment applications and limit the freedom of choice for consumers and businesses in electronic payments. The investigation concluded that the Interchange Fee Regulation was inadequate in addressing competitive concerns related to the NFC chip. Therefore, it was recommended that the Digital Markets Act be urgently implemented in the Netherlands.[272]

6.3.1.3.3 Germany

(268) The Federal Cartel Office has launched an investigation under Section 19(a) of the new German Competition Act to assess whether the proposed integration of the online news service and the general search function will result in preferential treatment of Google's service.[273]

6.3.1.3.4 Korea

(269) The Korea Fair Trade Commission (KFTC) has concluded that the search engine NAVER has been altering its search algorithms since 2012 to prioritize its own shopping/comparison services and video streaming services, thereby impeding the activities of its competitors in the online shopping/comparison and video platform markets, restricting competition, and limiting consumer choices.[274] Following the algorithm changes, which were not disclosed to competitors, the visibility of NAVER's services increased in both markets, while the visibility of rival services decreased.

6.3.1.3.5 Russia

(270) The Federal Antimonopoly Service (FAS) has concluded, following an investigation prompted by a complaint from Kaspersky Lab, an application developer, that Apple restricts the distribution of third-party applications on the

[272] https://www.acm.nl/en/publications/closure-investigation-payment-apps-confirms-need-new-rules, Access Date: 06.04.2023.
[273] https://globalcompetitionreview.com/european-commission/germany-opens-another-google-probe-using-new-powers Access Date: 11.08.2021.
[274] https://content.mlex.com/#/content/1230648, Access Date: 11.08.2021.

App Store in favor of its applications. As a result of this investigation, Apple has taken steps to eliminate clauses in the App Store contracts that restrict third-party access to the application store for any reason, and to discontinue internal policies that give priority to its applications.[275]

6.3.1.3.6 Japan

(271) The Japan Fair Trade Commission (JFTC) is investigating allegations that the e-marketplace Rakuten is impeding the activities of third-party sellers and favoring its services by manipulating data, product rankings, and penalty systems.[276] It is claimed that Rakuten can offer popular products at lower prices compared to rival sellers, thanks to the data it has on products, sales, and store inventory levels. It is also stated that Rakuten prioritizes its affiliated or preferred sellers in product searches. Moreover, there are allegations that Rakuten compels sellers to utilize Rakuten Bank for payments. Those who resist may encounter penalties, reduced rankings, and contract termination.

6.3.1.3.7 Hungary

(272) The Hungarian Competition Authority has launched an investigation into Google's practice of prioritizing its service when displaying song lyrics. They suspect that this practice may conceal other search results and promote Google's YouTube service.[277]

6.3.2 Recommendations for Türkiye

(273) The primary objective of the legal regulations/proposals implemented to prevent self-preferencing in the international arena is to create fair competition between the core platform service providers and the commercial users who rely on the core platform service. The aim is to prevent the behaviors of undertakings with significant market power, especially self-preferencing, which may raise anti-competitive concerns. In this context, all regulations impose an initial obligation on undertakings with significant market power regarding potential self-preferencing behaviors, which is to refrain from using the data they obtain/own

[275] https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1288574&siteid=225&rdir=1, Access Date: 03.05.2021.
[276] https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1249398&siteid=244&rdir=1, Access Date:13.12.2020.
[277] https://content.mlex.com/#/content/1299348 , Access Date: 11.08.2021.

through commercial users benefiting from the core platform service. As a result, companies with substantial market power will be unable to gain an unfair competitive advantage and will be limited in their ability to expand their market dominance into related markets through unfair practices. Furthermore, commercial users will be protected from applications that exclusively favor undertakings with substantial market power, providing them with greater confidence in their online activities. All these benefits will enhance the innovative and competitive structure of the market. On the other hand, consumers will continue to benefit from products/services provided through various channels, providing them with more choices, lower prices, and innovative products.

(274) Therefore, it is considered appropriate to establish regulations to prevent undertakings with significant market power from using non-public data while competing with commercial users, similar to the DMA.

(275) Secondly, it is also considered appropriate to enact regulations that prohibit undertakings with significant market power from discriminating in the ranking or other conditions between their goods or services and those of commercial users. As a result, limiting the ability and incentives of undertakings with significant market power to favor themselves through vertical integration will allow commercial users offering high-quality and/or competitive products/services to gain more visibility in rankings and benefit from increased competition. Furthermore, ensuring equal competition among competitors will increase investment and innovation incentives. Consumers will also have the opportunity to make more informed and impartial choices, rather than being influenced by unfair practices.

(276) However, as previously stated, it would be inaccurate to address the issue of self-preferencing by influential companies solely through prioritizing rankings. Indeed, there are direct or indirect ways in which these undertakings with significant market power can hinder or impede the activities of their competitors by favoring their products or services. Hence, it is deemed suitable to incorporate a clause in the applicable legislation that forbids companies with substantial market power from offering advantages to their goods or services when entering

supply and sales markets. This mirrors the modification implemented in the German Competition Act and could be integrated into the ranking or other terms.

6.4 Practices of Tying and Bundling

(277) The concept of "tying" typically refers to the practice of selling one product contingent on the purchase of another product. In this scenario, the primary product requested by the buyer is referred to as the "tying product," while the additional product that must be bought alongside it is known as the "tied product." The tying is divided into "contractual tying" and "technological tying." Contractual tying occurs when the buyer agrees to purchase the tied product in addition to the tying product, meaning they agree not to purchase the respective product from competitors. Technological tying refers to the joint sales practice in which products are technically or mechanically connected and cannot easily separate from each other. The tying product can only function properly with the tied product. There are various forms of contractual tying, such as static tying, where the purchase of (B) is linked to the purchase of (A). In this scenario, only (A) and the (A-B) package can be sold to the customer rather than (B), which is only possible separately. Dynamic tying takes place more frequently when office machines and consumables are interconnected. The quantity of tied products consumed can vary based on the level of machine usage.

(278) Bundling is the practice of selling multiple products together. In the context of bundling, selling various products together is possible while selling the same product in multiple quantities. There are two types of bundling: pure bundling, where the products are only sold as a package, and mixed bundling, where the products are available for purchase individually or as a package. In mixed bundling, the package is offered at a lower price than the combined total of the individual product prices.

(279) Although they refer to different concepts, it is generally observed in the literature that the terms bundling and tying are used interchangeably. Technically, tying is not a type of bundling method, but the effects of tying can be similar to the effects of pure or mixed bundling strategies.

(280) The act of tying allows a company with monopoly power in one market to control sales and dominate a second market. Consequently, the company shifts the

profit from the tied product to the monopolist of the tied product by adjusting the price equilibrium. Tying also eliminates price constraints for the tied product, potentially increasing sales and reducing competition in the market where the tied product is present, a practice known as "strategic closure." Moreover, this practice deters potential competitors who are unable to achieve the minimum efficient scale economies from entering the market. In the long term, tying impedes competition in the tied product market. Therefore, the primary anti-competitive effect of bundling and tying applications is the exclusion of competitors from the tied market.[278]

(281) The EU's assessment of market closure involves two stages: (i) identifying "tied" customers and (ii) determining if these tied customers represent a significant market share. Fundamentally, the closure effect is determined by the extent of "tied sales" in the tied product market, and significant network effects, learning curves, or economies of scale can further amplify this effect.[279]

(282) The practice of tying is defined as the imposition of conditions related to the purchase of one good or service together with another good or service in Article 6 (c) of Law No. 4054. It is cited as an example of abuse of dominant position by the dominant undertakings. The Guidelines on the Assessment of Exclusionary Conduct by Dominant Undertakings state that when evaluating whether a dominant undertaking in the tied market abuses its dominant position through tying, two factors must be considered: i) the tied and tying products or services being distinct, and ii) the likelihood of the tying practice leading to anticompetitive market foreclosure.

(283) When examining European practices, the European Commission generally accepts that for tying practices to be considered anti-competitive under Article 102 of the Treaty on the Functioning of the European Union, five conditions must be met: (i) the tied and tying products must be in different relevant product markets, (ii) the undertaking implementing the tying practice must be in a dominant position in the tying product market, (iii) the undertaking does not offer consumers the option to purchase the tied product separately from the tying

[278] Andrade, 2019, *Tying: An Economic Analysis of the Google-Android Case*, pp. 11-12.
[279] Ibid., pp. 9-10.

product, (iv) anticompetitive effects arise in the market as a result of the tying practice, and (v) the tying practice cannot be objectively justified or does not provide efficiency gains.[280] This approach, first adopted by the Commission in the Microsoft (WMP)[281] decision, has also been endorsed by the General Court. [282] The relevant approach is preserved in the Guidelines for the application of Article 102.[283] When analyzing the decisions of the Commission and the courts, it is widely acknowledged that if the first three conditions of tying practices (two separate products, dominant position, and coercion) are satisfied, the market is typically deemed to be foreclosed to competitors, and the conduct is considered to fall within the scope of Article 102. It is difficult to say whether the justifications or efficiency defenses presented by businesses have been considered up to this point.[284]

6.4.1 Conditions for Tying Application

6.4.1.1 Dominant Position in the Tying Market

(284) In order to develop the theory of tying, it is essential to initially establish the dominant position of the undertaking in the relevant market. The Microsoft/WMP[285] and Microsoft/Internet Explorer[286] decisions confirmed the company's significant and enduring market share in the operating system market for personal computers. Entry barriers related to network effects have also been identified in the relevant market. Conversely, the Commission's decision on Google Android[287] considers the open-source structure of Android as an indication of the absence of entry barriers and network effects in the market. This complicates the conclusion that Google holds a dominant position in the relevant market. Nevertheless, the Commission maintains its determination that

[280] The first four elements related to the tying test are clearly listed in the Commission's Microsoft (WMP) decision. However, although not explicitly mentioned as an element of the tying test in the decision, the Commission has acknowledged that a prohibited tying practice may be justified if a legitimate reason is provided.
[281] Case COMP/C-3/37.792 Microsoft (2004).
[282] T-201/04 Microsoft v Commission.
[283] DOĞAN C., ÜSTÜNEL C., (2016) "Competition Authority's Approaches to the Tying and Bundling Practices of Dominant Undertakings" p. 25.
[284] AKTEKİN E., (2012) "Microsoft Davaları Işığında Yazılım Pazarlarında Bağlama Uygulamalarına Yaklaşım ve Öneriler" Competition Authority expertise thesis series" p. 33.
[285] Case COMP/C-3/37.792 Microsoft (2004).
[286] Case COMP/39.530 Microsoft (2009).
[287] Case COMP/C 402/08 (2019).

Google holds a dominant position in general search services, licensable mobile operating systems, and application stores for Android mobile operating systems.[288]

(285) In the literature, when assessing the dominant position in digital markets, it is recognized that it is essential to consider the interactions facilitated by the platform to determine if the company holds a dominant position, particularly when platform expansion is referenced in the specific case under examination.[289] For instance, Booking.com is a platform that provides various services catering to multiple consumer groups.[290] It is challenging for a platform offering only hotel rental services to compete with Booking.com, as the latter offers a wide range of interactions. In other words, platforms that provide flight and hotel reservations may not be direct competitors, but because they largely serve the same consumer groups, these platforms can be considered as adjacent platforms. Therefore, the expansion of undertakings to different platforms will increase the significance of these platforms in the relevant market.

(286) When determining a dominant position in a tied market, it is also essential to consider whether the market exhibits characteristics of a two-sided market. For instance, if two platforms are tied and the undertaking does not impose an additional fee for the service it provides, the probability of excluding an effective competitor from the market is very high. Because the rival company will not be able to provide a service within this scope. This situation depends on whether the tied and tying services exhibit characteristics of a two-sided market. If the tied service operates in a one-sided market, the tying process may not be profitable.

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[288] Nazzini, R. (2018), "The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms", Journal of Transnational Law and Policy, Vol: 27, No: 2018-2, p. 63.

[289] Expansion of platforms refers to the strategies of horizontally and vertically expanding platforms.

[290] It is known that there are overlapping customer groups between the operating system and media player customers in the Microsoft/WMP decision. Similarly, in the Google Android decision, the existence of tying applications covering Search App, Play Store, and Google Chrome is seen as indicative of Google's market share within the operating system.

6.4.1.2 Structural Characteristics of the Tied Market

(287) As a result of the tying action, it is not enough for the dominant undertaking in the relevant market to have a dominant position to exclude its competitors from the tied market. Given that the exclusion occurs in the tied market, it is essential to consider the structural characteristics of the tied market.

(288) In the Microsoft/WMP decision, the Commission defined the media player market as a tied market and did not find any evidence that Microsoft was in a dominant position in the tied market at the time of the violation. In the Microsoft/Internet Explorer decision, the Commission concluded that by analyzing the indirect network effects in the tied market, the tying arrangement eliminated the incentive to provide content and software for other web browsers. However, based on the Google/Android decision, under the theory of potential harm, the closure of competing internet browser applications and the pre-installation of Google's browser's search application generated a significant increase in search traffic, thereby reinforcing Google's dominant position in the overall online search market. Nevertheless, the structural characteristics of the potential Android internet browser market do not appear conducive to anticompetitive tying. It is because there are numerous browsers in the market, and the value derived from each user of a browser does not increase in proportion to the number of users of the same browser. The number of browser downloads by consumers indicates low barriers to entry in the market. Consequently, excluding competing suppliers of Android web browsers is not supported by an analysis of the market's structural characteristics.[291]

6.4.1.3 Tying and Tied Product

(289) To classify tying actions as a violation, it is necessary to establish the existence of two distinct products: the tying product and the tied product. However, when a new feature or function is added to a digital product, there is debate about whether this addition should be considered a separate product that comes with

[291] Nazzini, R. (2018), "The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms", Journal of Transnational Law and Policy, Vol: 27, No:2018-2, pp. 63-66.

the original product or as a part of the same product. One way to resolve this issue is to determine if the new feature or function is offered independently by other companies in the market. Additionally, the literature mentions a two-product test that measures whether there is distinct demand for each product in the tying package. For each product, it is essential to have a clear understanding of its consumer usage, functionality, potential complementarity (as opposed to substitutability), as well as its marketing to customers and whether customers would purchase them separately.[292]

(290) In the Microsoft case, it has been emphasized that "product differentiation should be evaluated based on customer demand." According to this understanding, if two products are in the same market, it can be said that there is no independent demand for one of the products. Instead, the demand for one product is dependent on the demand for the other. From the supply side, the presence of undertakings that independently produce and sell the tied product, separate from the tying product, would suggest the existence of two distinct products. In the Microsoft case, the European Commission concluded that the existence of multiple independent media players suggests that media players and operating systems should be treated as distinct products.[293]

(291) The determination of whether two products are considered separate products depends on the significance and differentiation of the tied product for consumers, the extent to which the tying and tied products fulfill distinct consumer needs or serve different functions, the technical integration of the tying and tied products, and the performance of a separately produced tied product within the integrated system and in conjunction with the tying product. This will vary according to each market and product group, necessitating a distinct evaluation for each.[294]

(292) It is worth mentioning the Caldera decision of the Utah District Court in the literature on the two-product test. Approximately 15 years after the Jefferson

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[292] OECD, (2020), *"Abuse of Dominance in Digital Markets"*, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf, p. 43, Access Date: 23.08.2021.
[293] Stefan Holzweber (2018): "*Tying and bundling in the digital era*", European Competition Journal, https://doi.org/10.1080/17441056.2018.1533360 , p. 14, Access Date: 23.08.2021.
[294] Renato Nazzini, (2016) "*The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms*" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112557 p. 29, Access Date: 23.08.2021.

Parish and Image Tech decisions, in the Caldera v. Microsoft case[295], Caldera, one of Microsoft's competitors, sued Microsoft for integrating the MS-DOS OS and Windows 3.1 graphical user interface, which resulted in the Windows 95 application. At the conclusion of the case, the Utah District Court established a rather innovative rule for that period. According to this rule, if a business can demonstrate that the new product created through the integration of two products is developed for technological reasons, it will be exempt from liability for tying. In other words, if integration occurs as a result of technical development rather than a marketing action, it cannot be considered an abuse of dominance. In this decision, the court aimed to encourage innovative software tying that is a result of technological advancements and creates significant efficiencies, by updating the consumer demand test and prioritizing technological advancements over marketing practices.

(293) The approach adopted in this decision is considered to maintain its relevance in determining the tying in digital markets in relation to the application of two-product tests.[296]

6.4.1.4 Forcing the Sale of a Tied Product

(294) Article 102(d) of TFEU defines tying as "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations*." Tying refers to the practice of requiring the purchase of a tied product in order to buy the tying product.

(295) At this point, it is necessary to determine whether the sale of the product is mandatory or encouraged. This requirement has sparked debates in jurisprudence. Below are the interpretations of three possible scenarios.[297]

[295] Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295 (D. Utah 1999)
[296] Ponsoldt, J and David, J.D. (2007), "Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted", NW. J. INT'L L. & BUS. 421, https://scholarlycommons.law.northwestern.edu/njilb/vol27/iss2/16/, Access Date: 25.08.2021.
[297] Nazzini, R. (2018), "The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms", Journal of Transnational Law and Policy, Vol: 27, No:2018-2, pp. 34-35.

- If a dominant undertaking's conduct compels its competitors to offer their products for free to stay competitive in the market, this cannot be classified as mandatory tying.
- Under competitive conditions, a dominant business model in the market may not be considered as engaging in tying if it directs suppliers to other sources of income, such as the sale of complementary products, or if suppliers are compelled to distribute the tied product for free because they depend on the advanced versions of the tied product.
- If customers receive the tied product for free but have no alternative, the tying action will be considered as coercion. However, this does not necessarily mean that the market is closed to competition in any scenario.[298]

(296) In the case of Google Android, an original equipment manufacturer (OEM) seeking to utilize individual applications within Google's mobile services also incorporates other Google applications, such as Google Search and Google Chrome, in order to benefit from them.

(297) Similarly, for purchases made through eBay, buyer protection is only provided for payments made with PayPal. If the ability to cancel reservations without charge is contingent upon booking both flight and hotel accommodations through Expedia, and only individuals with a Facebook membership are permitted to share videos on Instagram, this circumstance may be deemed coercive. Moreover, the automatic opening of an Instagram account when a user opens a Facebook account could also be considered a form of coercion. The evaluation will not change if this application does not incur an additional cost for the consumer or if the consumer can still use competing platforms as the user is compelled to utilize their data on an alternative platform without explicit consent.

[298] According to the literature, it is commonly acknowledged that discussing context inherently involves some degree of coercion, although it is important to note that not all forms of coercion necessarily constitute abuse.

(298) On the other hand, it would be beneficial to categorize nudging applications[299] as part of market closure. If a user is exposed to an additional interaction while using a platform without requesting it, the user can be considered to be effectively compelled to receive this service. For instance, if a consumer searching on Google+ is redirected to YouTube search results when they press the search button, the nudging action here can be considered coercive.

(299) According to the literature, nudging strategies that prompt an additional function or interaction under Article 102 TFEU are considered to be coercive in nature. However, strategies aimed at familiarizing consumers with such functions are not deemed to be in violation. Examples of such strategies include pop-ups, emails, messages, and advertisements. For instance, Booking.com's practice of displaying advertisements for its flight booking service to a customer booking a hotel, or sending an advertisement email to a customer booking a flight, would not be classified as coercive.[300]

6.4.1.5 Potential of Tying Application to Cause Anti-Competitive Market Closure

(300) The final condition that must be met to conclude that tying constitutes a violation is the closure of the market to competition. The ECJ outlines the criteria necessary for establishing market closure, including the scope of market closure, duration of implementation, imposition of capacity limitations, and the cost structure of the undertaking.

(301) For a tied product market to be closed to competition, the investigated undertaking must have a dominant position in the aforementioned market, and economies of scope or direct or indirect network effects must be observed in that market. As a result, the dominant undertaking will be able to eliminate its competitors from the market by preventing them from benefiting from efficiency gains in demand.

[299] Nudging is a method used in behavioral economics to reinforce/direct the behaviors and decision-making processes of individuals and groups.
[300] For the examples provided, please refer to the link. Mandrescu, D. (2021), "Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices", Computer Law and Security Review 40, pp. 14-24, https://www.sciencedirect.com/science/article/pii/S0267364920301047, Access Date: 24.08.2021.

(302) The decisions to close the market in the Microsoft/WMP, Microsoft/Internet Explorer, and Google Android cases were examined to determine whether competitors adopted strategies related to alternative distribution channels in response to the dominant firm's tying strategy. In both Microsoft cases, the act of downloading the application was not considered an effective distribution strategy. However, in the Google Android case, the installation of applications was evaluated as a widely accepted action. At the time these determinations were made, the apprehensions regarding security and technical challenges associated with installation had been addressed in contrast to the period when the Microsoft decision was made. In terms of the differences in the applications of the two firms, the removal of the pre-installed Windows Media Player or internet browser in the Microsoft decisions eliminates the restrictive aspect of competition. In the Google Android decision, it should be noted that when consumers conduct advanced searches, applications such as Google+, Finance, and Maps will inevitably appear. Therefore, it would not be logical for consumers to remove these programs from their phones in response to the tying process carried out by Google. Even if the consumer chooses not to use the Google search service, links to the mentioned programs will still appear in front of the consumer.[301]

(303) However, it can be argued that in the context of the Microsoft/WMP and Microsoft/Internet Explorer decisions, the dominant undertaking was able to maintain and strengthen its market power through tying practices. Regarding the Microsoft/WMP decision, it can be said that Microsoft gained a significant advantage in adjacent business areas such as content-encoding software, format licensing, digital rights management solutions, and online music transfer within the operating system market for personal computers. The first instance court defined tying as a situation that "*significantly alters the competitive balance in favor of Microsoft and to the detriment of other operators, impacting market relationships between Microsoft, original equipment manufacturers, and third-party media player suppliers.*" Furthermore, it was emphasized that a tying effect can occur not only when competitors are eliminated but also when competition

[301] Edelman, B. (2014), "Leveraging Market Power Through Tying: Does Google Behave Anticompetitively?", Harvard Business School Working Paper, No. 14-112, p. 31, https://www.hbs.edu/ris/Publication%20Files/google-tying-2014-10-26_b703d250-0f41-4787-a34f-d3bdba522348.pdf, Access Date: 24.08.2021.

is weakened. This analysis suggests that tying should at least have the ability to exclude equally efficient competitors from the market.[302]

(304) The dual-sided nature of the market also impacts the evaluation of market closure. For example, if eBay integrates with PayPal, the resulting network effects will enhance the value of both platforms. The process of tying will develop security on eBay, attracting more customers who want to use eBay. This will lead to increased sales and, consequently, higher revenue through eBay. On the other hand, PayPal will attract a large customer base, leading to its use for expenses beyond eBay, thus generating additional revenue for PayPal.

(305) If the tied product is in a one-sided market, there will be no interaction between the two sides. For instance, if Google were to mandate that Google Docs users utilize the paid service of Google Drive, it might not necessarily lead to an increase in the usage of both platforms. Using Google Drive in conjunction with Google Docs can enhance its functionality, but the reverse may not be the case. Customers who are not committed to using Google Docs could opt for online storage from a competitor such as Dropbox and discontinue their use of Google Docs. In this scenario, Google would not only lose potential Google Drive users but also possible Google Docs users. This would also make Google less attractive to third-party users, such as computer manufacturers and website developers.

(306) Alternatively, if the link between products and services is replaced by the connection of platforms/packaged sales becoming a common industry practice, the necessity for competition intervention may decrease. For instance, if Expedia were to undergo a competition investigation due to its offering of flight search and hotel search services as a package, it is suggested that the business practices of rival platforms should also be scrutinized. In this context, it should be investigated whether the mentioned tying actions have become common practice in the sector.[303]

[302] Case T-201/04, 2007.
[303] Please refer to the link for relevant examples., Mandrescu, D. (2021), "Tying and bundling by online platforms–Distinguishing between lawful expansion strategies and anti-competitive practices", Computer Law and Security Review 40, pp. 14-24.

6.4.2 Tying/Bundling Sales in Digital Markets

(307) Originally designed for the bundled sale of multiple products, this principle has been utilized in various industries over the past ten years, such as the incorporation of software into an operating system. It was exemplified in the legal examination of the Microsoft cases, where the inclusion of Windows Media Player and Internet Explorer into the Windows operating system was scrutinized. In these instances, European Courts have determined that product integration can be equated with contract-based tying and thus could be viewed as an abuse of dominant position. Even if a consumer only buys one product, they may effectively receive two distinct products, which is considered akin to being compelled to enter into multiple contracts.[304]

(308) When it comes to the sales strategies of tying and bundling, digital markets are especially vulnerable. These markets are often described as winner-takes-all, with one company or technology typically dominating and taking the majority of the market share. As barriers to entry increase and incentives for innovation decrease, a temporary monopoly can become a lasting one. Tying and bundling sales practices can solidify the position of a powerful business in the market by discouraging innovation and impeding new competitors from entering.[305] The presence of economies of scale and scope, low marginal costs, network effects, and feedback loops particularly increase a firm's motivation to bundle its products together. Furthermore, the nature of digital products can greatly facilitate technical integration and bundled sales practices. These strategies can be utilized for product design, to limit interoperability, and to create a seamless interface or ecosystem between different products. For example, tying and bundling can expand the user base for a company's related product (i.e., a product in a competitive market) and generate network effects. Such a strategy can be especially effective if it demonstrates a feedback loop in which increases in users or outputs in the digital market reinforce each other. For example, specific content can attract users to the platform, enhance the platform's value to advertisers, and the funds collected from advertisers can be used to improve

[304] Holzweber, S., 2018, *"Tying and Bundling in The Digital Era"*, European Competition Journal, Vol: 14, pp. 345-346.
[305] Ibid., pp. 352-353.

the quality of the content. Thus, the user and advertiser base can be further expanded, restarting the cycle. [306] The mentioned features, along with "feedback loops," increase a business's motivation for tying and bundling practices. As a result, companies that dominate digital markets can benefit significantly from engaging in tying and bundling practices.[307]

(309) Another example of the flawed nature of competition in digital markets is the network effects that often occur with digital products. Network effects can be defined as the extent to which the benefit a specific user receives from a product or service depends on the number of other users within the same network. In the context of digital markets, network effects are a central focus for theories of harm related to tying. In areas where network effects are significant, the value of a product depends on the number of consumers using it. Network effects can incentivize firms to try to hinder competition by bundling and tying products. In particular, companies can use tying actions to acquire a user base and generate enough network effects to compete effectively with their competitors. Such tying actions may be considered anticompetitive when they result in higher profits for the company because competitors are forced out of the market rather than creating additional network effects.[308] For instance, in the software industry, application developers create their software for the most commonly used operating system, and users then select the operating system with the widest variety of applications. As a result, there is a higher probability of the operating system becoming dominant. This situation is referred to as the "*application network effect*."[309]

(310) Under the assumption that the indirect network effect is positive, a platform can boost the demand for its service/product (A) by tying it with zero-priced products, provided that there are price-sensitive consumers on the platform. It will lead to an expansion of the user base for the service/product (A). As a result, this will enable the platform to charge a higher usage fee for the service/product

[306] OECD, 2020, *Abuse of Dominance in Digital Market*, https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf, Access Date: 23.08.2021, pp. 42-43.
[307] *All You Should Know About Tying in Digital Markets*, https://blog.ipleaders.in/all-you-should-know-about-tying-in-digital-markets/, Access Date: 03.08.2021.
[308] OECD, 2020, *Abuse of Dominance in Digital Market*, https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf, Access Date: 23.08.2021, pp. 44-45.
[309] Andrade, 2019, *Tying: An Economic Analysis of the Google-Android Case*, p. 16.

(B) on the same platform, which is valuable for a high user base. It is essential to accurately calculate the maximum usage fee that can be paid for service/product (B) and the cost of subscribing to service/product (A). While this situation increases profits, it could also result in the tied product being removed from the market. In the event of a tie between two platforms, if the company does not impose an extra fee for the service it offers, there is a high probability that effective competition will be excluded from the connected market. It is due to the impracticality of the company providing such a service on a large scale. This situation depends on the extent of the two-sidedness of the tied services. If the connected service operates in a one-sided market, the linking process may not be profitable.[310]

(311) It can be challenging to identify the specific behaviors that lead to tying and bundling in an application. For instance, clauses in a contract that require consumers to buy a certain quantity of product (A) to purchase a related product (B) directly demonstrate tying. In digital markets, understanding tying and bundling behavior can be even more complex as it can manifest in new ways.[311] For example, consumers might be incentivized to buy specific products together rather than bound by contractual or technological tying.

(312) In digital markets with barriers to entry, tying can also be used as a strategy to prevent competitors from entering the market. It can occur when two complementary products are unable to be used independently. If a company with market power in the product (A) links it to its complementary product (B), it will discourage new competitors from entering the market for product (B). This is because there would be no demand for product (B) without product (A). As a result, any potential new entrant would have to produce both product (A) and product (B). This scenario can present a significant challenge for new potential competitors, particularly if there are already substantial barriers preventing entry.[312] Consequently, the expenses of entering the market and obstacles to entry will rise, leading to a decrease or even elimination of market entries.

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[310] Daniel Mandrescu, (2020), *"Tying and bundling by online platforms –Distinguishing between lawful expansion strategies and anti-competitive practices"* p. 12.
[311] OECD, 2020, *Abuse of Dominance in Digital Market*, https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf, Access Date: 23.08.2021, p. 43.
[312] Ibid., p. 45.

(313) One approach is to establish a dominant position in a different market and then leverage it to stifle competition in that market. This tactic, known as Platform Envelopment, often involves restricting user access through tying or bundle sales. It can be lucrative, particularly when there is substantial user overlap or significant scope economies that enable companies to provide discounted package pricing. Competitors can typically counter this strategy only if they can figure out how to introduce a rival into the market where the dominant firm holds sway. [313]

(314) One of the tying and bundling practices observed in digital markets is tying and bundling, where a platform mandates users of its products or services to also use the platform's other products or services. For instance, an application platform may require the use of its proprietary payment service for transactions conducted on the platform. Another example of tying and bundling practices in digital markets is when a business pre-installs its products or services onto other services. This has been the subject of numerous investigations involving companies such as Microsoft and Google. In this context, a business gaining an advantage over its competitors by pre-installing its products or services or preventing the removal of such services can be considered an example of tying practices. This action, essentially favoring oneself, also leads to bundling practices by pre-installing one product or service with another. Finally, an *anti-steering clause*[314], which prohibits a credit card company from encouraging a merchant's consumer cardholders to use another credit card company's card, can also be cited as an example of bundling practices. Through these tying practices, businesses can transfer their market power from one market to another, strengthen their positions in the second market, and negatively impact effective competition by forcing competitors out of the tied product market or impeding the entry of new businesses into the market.

(315) In summary, legally, there is no significant distinction between the tying and bundling practices in digital markets compared to those in traditional markets.

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[313] Ibid., p. 45.

[314] https://www.concurrences.com/en/bulletin/news-issues/june-2018/the-us-supreme-court-rules-that-anti-steering-clauses-are-not-anti-competitive, Access Date: 25.08.2021.

However, these practices are more common and have a greater potential to harm competition in digital markets than in traditional ones.

6.4.3 Decisions Regarding Tying Applications in the EU

(316) The Commission has made significant decisions regarding the binding of applications under Article 102 of the Treaty on the Functioning of the European Union.

- **IBM**

(317) The IBM case is one of the first instances in which the Commission addressed technological tying behavior.[315] The Commission found that IBM held a dominant position in the supply markets for the central processing unit (CPU) and operating system, which are the two essential products for System/370. It allowed IBM to control the market for the supply of all products compatible with System/370.[316] Among other things, the Commission examined IBM's practice of selling its System/370 computers integrated with central processing units and memory devices without offering a separate price for these products under Article 102 of the Treaty on the Functioning of the European Union.[317] In 1984, IBM committed to offering System/370 CPUs in the EU without memory devices or with the minimum capacity required for testing. The Commission accepted the commitment, thus concluding the case.[318]

- **Microsoft (WMP)[319]**

(318) The important decision related to technological tying is the Microsoft I decision. In the case under consideration, Microsoft offers users Windows Media Player (WMP)[320], a closed media player integrated into the Windows operating system. Users who buy the Windows operating system also receive the WMP media player pre-installed on the operating system. In the pertinent decision, the Commission

[315] MAZIARZ A. (2013) "Tying and Bundling: Applying EU Competition Rules for Best Practices" p. 6.
[316] EVANS D., PADILLA J., AHLBORN C. (2003) "The Antitrust Economics of Tying: A Farewell to Per Se Illegality" p. 30.
[317] AKTEKİN E., (2012) "Microsoft Davaları Işığında Yazılım Pazarlarında Bağlama Uygulamalarına Yaklaşım ve Öneriler" Competition Authority expertise thesis series" p.28.
[318] https://op.europa.eu/en/publication-detail/-/publication/3c93e6fa-934b-4fb9-b927-dc9fed71ccfe "14. AB Rekabet Politikası Üzerine Rapor" (1984) para.95. (Access Date: 25.08.2021).
[319] Case COMP/C-3/37.792 Microsoft (2004).
[320] MAZIARZ A. (2013) "Tying and Bundling: Applying EU Competition Rules for Best Practices" p. 7.

determined that Microsoft had abused its dominant position in the operating systems market by withholding essential information from competing server operating system manufacturers, hindering full interoperability with its operating system. Additionally, Microsoft was found to have exploited its dominant position in the personal computer operating systems market by integrating the WMP product into the Windows operating system. The decision ruling defines the tied product market as the "Personal Computer Operating Systems Market," and the tying product market as the "media players market" to address the anticompetitive effects of the practice, the Commission decided that Microsoft should (i) provide all necessary information to undertakings operating in the server operating system software market for full interoperability with its Windows operating system and (ii) offer a version of Windows that does not include the Windows Media Player program for sale. Microsoft's appeal to the General Court regarding the decision was rejected.[321]

- **Microsoft (IE)[322]**

(319) An investigation has been initiated against Microsoft following allegations that the company abused its dominant position by integrating Internet Explorer (IE) software into the operating system. The investigation found that similar to Microsoft's incorporation of Windows Media Player (WMP), the inclusion of IE with the operating system restricted competition in the internet browser market and gave Microsoft a distribution advantage over other manufacturers. As a result of the investigation, Microsoft agreed to the Commission's proposed remedies, which included allowing computer manufacturers and users to disable the IE function and presenting an initial screen in EU-sold Windows versions that enable consumers to install alternative browsers if desired.

- **Google – Android[323]**

(320) In its recent decision, the Commission has concluded that Google breached Article 102 by imposing specific conditions in its contracts concerning the use of its smart mobile operating system, Android, and certain exclusive mobile applications. The Commission has determined that Google has a dominant

[321] AKTEKİN E., (2012) "Microsoft Davaları Işığında Yazılım Pazarlarında Bağlama Uygulamalarına Yaklaşım ve Öneriler", "Competition Authority expertise thesis series" p. 29.
[322] Case COMP/39.530 Microsoft (2009).
[323] Decision 2019/C 402/08.

position in the markets for licensable mobile operating systems, application stores for the Android operating system, and general search services. Under the Mobile Application Distribution Agreement (MADA) with Original Equipment Manufacturers (OEMs), Google mandates that if an OEM uses the Android operating system and intends to pre-install the Google Play application on its devices, it must also pre-install the Google Search and Google Chrome applications. The Commission has found that Google abused its dominant position by tying the Google Search application to the Play Store.[324] The decision states that Play Store and Google Search are distinct products, and Google holds a dominant position globally for Android application stores, and that the provision of the tied product, Play Store, is not feasible without the tied product, Google Search. Furthermore, the Commission has determined that Google tied Google Chrome to the Play Store and Google Search applications, and concluded that this conduct constitutes an abuse of its dominant position.

(321) MADA does not prohibit original equipment manufacturers (OEMs) from including competing applications, but it mandates that Google applications must be set as default and prominently displayed on the screen. However, the limited space on mobile screens and the reduced visibility of upfront positions makes it difficult for similar-function applications to be installed. Moreover, the "default bias," a concept well-documented in the literature and evident in the IE case, has been a crucial aspect of the Commission's relevant decision. As per the Commission's 2016 study, 95% of search queries were conducted on devices with pre-installed Google Search. Conversely, on Windows Mobile devices without pre-installed Google Search and Google Chrome, less than 25% of all search queries were carried out using Google Search. The Commission's decision asserts that "*consumers seldom download applications that offer the same functionality as a preloaded application.*"

(322) The Commission has determined that the Revenue Sharing Agreements (RSA), which include financial incentives for Google to exclusively pre-install Google Chrome and Google Search on OEMs, and the Anti-Fragmentation Agreements (AFA), which prevent OEMs from selling mobile devices running alternative

[324] The Play Store is a digital store created and managed by Google for devices that use the Android operating system.

versions of Android not approved by Google, are part of Google's strategy to reinforce its dominant position in the general search services market.

6.4.4 Decisions Regarding Tying Practices in the USA

(323) The assessment of tying arrangements under U.S. antitrust law has experienced significant changes over time.[325] In the early stages of the per se approach, tying was considered a behavior that "*served almost no purpose beyond the suppression of competition.*" [326] However, after the Jefferson Parish case, tying arrangements began to be seen as a potential source of competitive harm and efficiency. [327] The U.S. approach to tying arrangements can be categorized into two based on the Supreme Court's Jefferson Parish decision and earlier cases, which are considered the basis of the current practice.[328] Therefore, to present the current U.S. perspective on tying arrangements, the Jefferson Parish case and subsequent recent decisions that underpin the current approach will be examined.

The Jefferson Parish Case

(324) The Jefferson Parish case involves the tying of hospital services with anesthesia services. The hospital has made an agreement with Roux & Associates, a professional medical organization, to provide all anesthesia services for the hospital, requiring all patients to use this contracted firm for anesthesia services. The Supreme and the lower courts have determined that East Jefferson Hospital does not have significant market power. However, the Supreme Court[329] sees this case as an opportunity to reconsider the per se approach, leading to differing opinions among the judges.[330] In contrast to previous cases, the Supreme Court in Jefferson Parish has recognized that tying could potentially enhance welfare

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[325] EVANS D., PADILLA J., AHLBORN C. (2003) "The Antitrust Economics of Tying: A Farewell to Per Se Illegality" p. 7.
[326] Ibid.
[327] Ibid.
[328] AKTEKİN E., (2012) "Microsoft Davaları Işığında Yazılım Pazarlarında Bağlama Uygulamalarına Yaklaşım ve Öneriler" Competition Authority expertise thesis series" p. 34.
[329] EVANS D., PADILLA J., AHLBORN C. (2003) "The Antitrust Economics of Tying: A Farewell to Per Se Illegality" p. 13.
[330] In the Jefferson Parish case, the hospital's 30% share of the market resulted in the determination that the defendant lacked enough market power, thereby exempting them from per se violation penalties. Although there was unanimous agreement on this ruling, four of the nine judges involved in the case had differing perspectives on the per se violation approach to tying practices.

in certain circumstances.[331] One judge expressed a different view, suggesting that all products could be considered separate markets and subject to prohibition. The Court has proposed the development of a test that considers the economic benefits of tied product sales, and if these benefits are substantial, the package should be treated as a single product, leading to the termination of tying analysis at that point.[332]

(325) There is a debate about how to determine if the products presented together in a tender are two distinct products or a single product.[333] The majority view links the existence of different products to consumer demand for the products rather than the functional relationship between them.[334] The court has stated that if there is significant demand for anesthesia services to be offered separately, it could be considered as tying.[335] The defendant hospital's argument that they offered a functionally integrated service package was not accepted, as anesthesia services can be separately demanded by consumers, creating a separate product market.[336]

Cases Related to Microsoft

(326) Microsoft's applications have been scrutinized on numerous occasions. In 1994, following an investigation initiated by the Department of Justice into Microsoft's exclusionary and anticompetitive agreements with computer manufacturers, which extended its dominant position in the personal computer operating systems market to other markets, a Settlement Decision was reached. It found that Microsoft had violated the Sherman Antitrust Act. The most important aspect of the Settlement Decision is the provision that Microsoft will not tie the licensing of one product to the purchase of another product. As accepted by the district court in the Microsoft I case, the relevant condition prohibits tying through contracts but tacitly allows for technological integration.

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[331] EVANS D., PADILLA J., AHLBORN C. (2003) "The Antitrust Economics of Tying: A Farewell to Per Se Illegality" p. 14.
[332] AKTEKİN E., (2012) "Microsoft Davaları Işığında Yazılım Pazarlarında Bağlama Uygulamalarına Yaklaşım ve Öneriler" Competition Authority expertise thesis series" p. 35.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid.

Microsoft I

(327) In 1997, the Department of Justice filed a lawsuit against Microsoft, alleging that the company's requirement for computer manufacturers to install a package containing the Windows 95 operating system and IE as part of a licensing agreement violated the Consent Decree. The Consent Decree stipulates that Microsoft is prohibited from making the licensing of one product contingent upon the purchase of another. Furthermore, it clarifies that "*this provision shall not be interpreted as preventing Microsoft from developing integrated products*." Although the court accepted the allegations of non-compliance with the Consent Decree, the decision was overturned by the Court of Appeals. The Court of Appeals established the original integration test, stating that the integration of two products in a manner that generates new features not found in either product should be regarded as a single product. The court further ruled that Microsoft's integration of the operating system and internet browser resulted in benefits that could not be achieved by computer manufacturers or consumers combining these two products. Therefore, the integration that meets the original integration test should be considered a single product, ultimately ruling in favor of Microsoft.

Microsoft II

(328) The Department of Justice, after its objection to Microsoft's failure to comply with the Settlement Agreement was rejected, filed a lawsuit in May 1998. This lawsuit was separate from the Settlement Agreement and claimed that the company had violated the first part of the Sherman Act by bundling its Windows 98 operating system with an internet browser. In response, Microsoft argued that the internet browser was an essential part of the operating system. Even if these products were considered separate, Microsoft argued that improvements in distribution and processing costs should be considered. Judge Jackson, who presided over the case, applied the separate consumer demand test used in the Supreme Court's *Jefferson Parish* case and concluded that consumers see operating systems and internet browsers as distinct products. Once the existence of separate products was acknowledged, it was not difficult to show that the other three conditions of the per se violation rule were met. Consumers

cannot buy the Windows product without IE, this practice significantly affects trade, and Microsoft holds a dominant position in the market for licensing personal computer operating systems with Intel processors. Therefore, with all elements of the *per se* evaluation met, Microsoft's practice was considered an illegal tying arrangement. The judge ordered Microsoft to be divided into two separate companies: one to produce the operating system and the other to produce other applications.

Microsoft III

(329) The Microsoft II decision has been appealed to the Court of Appeals by Microsoft. In the court decision, it was argued that the separate consumer demand test, as established by the Supreme Court in the Jefferson Parish case and also used in Microsoft II, would hinder the emergence of new features resulting from the integration of products that were previously offered separately and thus naturally had separate consumer demands. This hindrance would impede innovation to the detriment of consumers. The decision also stated that the Jefferson Parish separate product test would be ineffective for newly integrated products, as there would always be an impression that the connected product is a separate market at the time of integration. The Court of Appeals took an additional step and determined that the per se approach to tying arrangements was not appropriate for platform software markets, as the impacts of integration in these markets cannot be definitively predicted. The study concluded that the direct application of per se rules carried a high risk of harm. Therefore, the integration of software in these markets should be assessed within the framework of the rule of reason. The court also emphasized that the nature of platform software markets is not conducive to the per se approach and that this method would impede innovation in the market. As a result, the tying aspect of the decision was sent back to the lower court for evaluation under the rule of reason. However, the Court of Appeals did not provide an explanation on how this test should be conducted; it only requested the lower court to compare the benefits of the package to consumers with its costs.

Microsoft IV

(330) Following the Court of Appeals' ruling, a settlement was reached with nine states and the Ministry of Justice involved in the case. However, certain states opposed the settlement, citing concerns that Microsoft had not stopped its tying arrangements. The essential demand from these objecting states was for Microsoft to create versions of its operating system that would allow computer manufacturers and consumers to remove Windows, Internet Explorer (IE), and Windows Media Player (WMP). However, the regional court did not find these demands to be valid. Instead, it accepted solutions that aimed to ensure the smooth operation of competitors' programs on the operating system and the ability of competitors to distribute through computer manufacturers. These solutions did not involve Microsoft removing existing additional functions from the operating system. Furthermore, Microsoft agreed to a regulation that allowed default programs, including IE, to be turned on and off by computer manufacturers or consumers, and for the icons of these programs to be hidden by computer manufacturers. In 2004, the Court of Appeals approved the proposed solutions presented by the lower court, stating that forcing Microsoft to remove features from the operating system would be harmful to both software producers and consumers.

6.4.5 Recommendations for Türkiye

(331) As mentioned earlier, the practice of tying or bundling sales enables companies to use their strong position in one market to limit competition in another market and gain market power in the second market. Consequently, it is prohibited under specific circumstances.

(332) However, as outlined above, companies with substantial market power in digital markets may harm consumers by monopolizing the market for tied products, even if they are not in a dominant position. Through tying, companies with significant market power can decrease the number of potential customers for their competitors in the tied market, drive existing competitors out of the market, create barriers to entry, and impede new entrants.

(333) In this situation, it is deemed suitable to establish a rule to prohibit the tying practices of companies with substantial market power, particularly in digital markets.

6.5 Exclusive Dealing and MFC Practices with Unfair Contract Terms

6.5.1 Exclusive Dealing Practices

6.5.1.1 Theoretical Framework

(334) Contracts with exclusivity clauses can prevent competitors from entering the market or limit their ability to compete by blocking access to the products or services being offered, as well as to potential customers. However, exclusivity arrangements may not always be considered illegal, as they can also lead to improved efficiency. Therefore, when assessing such conduct, it is important to consider both the impact of the behavior and its potential exclusionary effects.[337]

(335) Exclusive dealing practices are being scrutinized under traditional competition law and within the context of digital platforms. These practices are closely examined by competition authorities. The detailed examination of exclusive dealing practices in digital markets is important due to the tendency for tipping, which can result in the dominance of one or a few firms in multi-sided markets. When network effects are strong enough, users tend to gravitate towards the network with the largest number of users, making the platform more attractive. The main reason for concern about market tipping in digital markets is the powerful network effects present in these markets.[338] Furthermore, market tipping can occur due to the structural[339] dynamics in markets with network effects, as well as when market players restrict users from accessing multiple platforms or switching to alternative platforms.[340] The probability of market tipping decreases as digital platforms distinguish themselves more from their

[337] Congressional Research Service Report, Antitrust and Big Tech, 11 September 2019. https://fas.org/sgp/crs/misc/R45910.pdf, Access Date: 19.08.2021.
[338] JENKINS, H.(2021), Tipping: Should regulators intervene before or after? A policy dilemma, Oxera, April 2021, https://www.oxera.com/wp-content/uploads/2021/04/Tipping-should-regulators-intervene-before-or-after-A-policy-dilemma-2.pdf, Access Date: 20.08.2021.
[339] KHAN, M.L. (2017), Amazon's Antitrust Paradox, The Yale Law Journal, Vol.126, No:3; p. 785
[340] SCHWEITZER, H.; HAUCAP, J.; KERBER, W; WELKER,R. (2018), Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742, Access Date: 20.08.2021, p. 3.

competitors and as customers on one or both sides of the platform gain greater multi-sided access.[341] Therefore, the structural characteristics of the markets in which digital platforms operate, combined with the exclusive contracts of established players or behaviors that may lead to de facto exclusivity, can create barriers to entry, strengthen existing barriers, and result in rival firms being excluded from the market due to an inability to reach a sufficient customer base/product/service.

(336) The Stigler Report suggests that in digital markets, exclusive agreements, and loyalty discounts, which are common, need to be subject to more rigorous antitrust scrutiny. The report highlights that these markets tend to naturally become monopolistic, meaning that practices that may be beneficial in other markets could pose issues in digital markets. It emphasizes that large technology platforms may engage in aggressive tactics against their competitors, taking advantage of economies of scale and network effects, and may enter into exclusive agreements with single access obligations. Additionally, the report points out that globally-scaled exclusive agreements could impede the growth of potential competitors and their ability to achieve economies of scale.[342]

(337) However, the literature suggests that pure exclusivity applications, which provide exclusive distribution rights to a single digital platform and are known as "pure exclusives," may not harm competition, depending on the extent to which they compete with other distribution channels, such as retail through online distribution. Furthermore, it is argued that this form of exclusivity can prevent other digital platforms from freeloading, decrease the prevalence of counterfeit products, and promote competition among producers. Furthermore, when evaluating these applications, it is emphasized that the issue of i) whether exclusivity is imposed by the platform or ii) whether it is demanded by the producer/user. It also suggests that a mandatory exclusivity requirement imposed by the platform could benefit established e-commerce platforms at the

[341] COLLYER K.; MULLAN, H.; TIMAN,N. (2018) Measuring Market Power In Multi-Sided Markets http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf, p. 73, Access Date: 19.08.2021.

[342] Stigler Center for the Study of the Economy and the State, Stigler Committee on Digital Platforms Final Report, pp. 17, 72, 90. https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report, Access Date: 19.08.2021.

expense of new market entrants. It may be viewed as more questionable than the exclusivity imposed by the producer.[343]

(338) The Anti-Monopoly Commission of the State Council of the People's Republic of China released the "Antitrust Guidelines for Platform Economies" on July 2, 2021.[344] The guidelines address exclusive practices on platforms, defining exclusivity as the requirement for one party to choose between two competing platforms. The guidelines also discuss the assessment of potential abuse of dominant position in two different scenarios. They state that punitive measures such as traffic restrictions, demotion in rankings, blocking access to the platform, and deposit deductions by a platform to directly harm the market and consumers would be considered an abuse of dominance under normal circumstances. Additionally, the guidelines mention that a platform may impose restrictions through incentivizing practices such as offering discounts, supporting traffic sources, and providing subsidies. While these behaviors may benefit users and consumers, evidence that such practices can eliminate or have eliminated competition could be considered a violation. The guidelines also highlight the importance of protecting intellectual property rights and ensuring the sustainability of the platform's business model as potential reasons for exclusivity.

(339) The preliminary report on e-marketplace platform sector inquiry, published by the institution in April 2021, also states that one of the issues that could disrupt inter-platform competition is the practice of exclusivity.[345] The report includes the following points:

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[343] Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019, Common Issues Relating to the Digital Economy and Competition, 27 February 2020, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf, Access Date: 20.08.2021.

[344] Antitrust Guidelines for the Platform Economic Industry. Please refer to the link for the information. http://english.www.gov.cn/policies/latestreleases/202102/07/content_WS 601ffe31c6d0f72576945498.html See for summary information. https://www.lexology.com/library/detail.aspx?g=cd45a02f-c408-4715-bb6c-3c96f109f2f4, https://www.anjielaw.com/en/uploads/soft/210224/1-210224112247.pdf, Access Date: 20.08.2021.

[345] E-pazaryeri Platformları Sektör İncelemesi Ön Raporu, April 2021, Ankara, https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf, Access Date: 19.08.2021.

- Non-compete obligations and exclusivity practices are not necessarily considered a violation of competition law, as these practices can create efficiency gains, and prevent free-riding, and abandonment problems.
- Conversely, exclusive practices can result in the closure of relevant market(s) by blocking access to essential channels for current and/or potential competitors and/or raising entry costs.
- It can indirectly prevent competing marketplaces from acquiring an adequate seller base, thus impeding the development of a substantial consumer base, and diminishing market competitiveness.
- Consequently, the exclusivity conditions imposed on sellers by marketplaces could potentially impede sellers' access to multiple platforms, thereby affecting consumers and speeding up the evolution and pace of markets.

6.5.1.2 Decisions/Investigations Regarding Exclusive Practices on Digital Platforms

6.5.1.2.1 EU

- **Google/AdSense Decision[346]**

(340) In its 2019 decision, the Commission examined the exclusivity provisions in the GSA-Google Services Agreements. These agreements were entered into by Google with Direct Partners for the provision of the online search advertising mediation platform known as AdSense for Search (AFS). The AFS product in question enables publishers to display Google search ads on their websites when users enter search queries into a search box on internet sites. Upon reviewing the contracts, the following points have been identified.

- The GSAs dated 2006 introduced an exclusive supply obligation that covers all advertising inventory of Direct Partners. In other words, publishers were required to fulfill all search network advertising requirements for internet sites included in the GSAs from Google. These provisions prohibited publishers from placing any search ads on their competitors' search results pages.

[346] Case AT.40411, *Google Search (AdSense)*, 20.03.2019.

- The 2009 GSAs have updated the exclusivity clause to include a "Premium Placement and Minimum Google Ads Clause." This means that partners must allocate the most prominent and lucrative space on search results pages for Google Search Network ads and refrain from displaying competitor search network ads near or above Google search ads.
- Since 2009, an additional clause has been included in contracts that mandates Direct Business Partners to seek written permission from Google before altering the appearance of competitor search network ads, including elements such as number, color, font, size, and placement. This provision grants Google the authority to regulate the appeal of competitors' ads.

(341) In this context, Google has imposed a specific restriction that initially prevents competitors from placing any search ads on the most significant commercial websites. Subsequently, the company has implemented a strategy called "relaxed exclusivity" to reserve the most valuable positions for its search ads and control the performance of competitor ads.[347] The commission stated that Google's actions deterred direct partners from providing/supplying resources for competitors' search network ads. The Commission concluded that Google restricted access to a substantial portion of the online search advertising intermediary services market. It was found that Google exploited its leading position in the market for "online search advertising" intermediaries. Google was fined 1.49 billion euros as a consequence of the decision. Furthermore, they were required to eliminate exclusivity clauses from their contracts.

- **Google/Android Decision[348]**

(342) In 2018, the Commission's decision analyzed Google's Mobile Application Distribution Agreement (MADA), Anti-Fragmentation Agreement (AFA), and Portfolio-Based Revenue Sharing Agreements with device manufacturers and mobile network operators. The decision concluded that Google has a dominant position in the markets for general search services, licensable mobile operating systems, and application stores for the Android mobile operating system.

[347] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770
[348] Case AT.40099, *Google Android*, 18.07.2018.

According to the Commission, Google: (i) requires device manufacturers to pre-install Google Search and the browser application (Chrome) to license Google's app store, Play Store, through MADA; (ii) makes payments to certain large manufacturers and mobile network operators through portfolio-based revenue sharing agreements with the condition of exclusively pre-installing Google Search application on devices, and (iii) prevents the sale of mobile devices running on alternative Android versions (Android forks) not approved by Google through AFA. In this situation, the Commission has determined that Google has misused its dominant position by tying Google Search and Google Chrome to Google Play, offering significant financial incentives to device manufacturers with the condition that Google Search is exclusively pre-installed on devices, and prohibiting the creation and sale of devices with Android variations. The Commission states that revenue-sharing agreements based on portfolios significantly diminish the motivation for device manufacturers to pre-install competing search applications on devices. Additionally, even if a competing search engine is pre-installed on some devices, it requires the device manufacturer or mobile network operator to compensate for the revenue loss they would incur from Google on all devices. As a result of the investigation , the Commission has imposed a fine of 4.34 billion euros on Google. Furthermore, Google has been instructed to cease the mentioned three practices within 90 days and to refrain from similar practices in the future.

6.5.1.2.2 Germany

- **CTS-Eventim Decision[349]**

(343) In a significant decision in 2017, the Bundeskartellamt investigated the exclusive agreements made by CTS EVENTIM, a company involved in live entertainment and ticketing, with event organizers and ticket offices. The decision revealed that the company's market share in ticketing services is between 55-75% in terms of revenue and 65-85% in terms of transactions, demonstrating its dominant position in the market.

(344) Based on the decision's findings, CTS EVENTIM has made agreements with event organizers and ticket outlets, with contract lengths ranging from 1 to 10 years

[349] Case No: 6-35/17, Bundeskartellamt.

and averaging (4) years, which include exclusive clauses. The authority has determined that CTS EVENTIM has abused its dominant position through these contract provisions. Furthermore, the authority has required CTS to modify the contract terms to permit event organizers to sell 20% of their yearly sales through alternative platforms if the contracts last (2) years or more.

- **Apple/Audible-Amazon Investigation[350]**

(345) The German Publishers and Booksellers Association filed a complaint with the Bundeskartellamt and the Commission, prompting an investigation of the long-term contracts between Apple and Audible. Audible, a key producer of downloadable audiobooks and spoken content in Germany and Europe, was acquired by Amazon in 2008. The iTunes store, which is integrated into Apple devices, allows users to buy and download various content, including audiobooks. The contract between Apple and Audible was found to include exclusive supply and distribution obligations, meaning that Apple exclusively purchased audiobooks from Audible for sale in the iTunes store, and Audible did not supply products to digital music platforms outside of the iTunes store. After the authorities initiated an investigation of the contract, the parties removed the exclusivity provisions, bringing the process to an end.

6.5.1.2.3 Brazil

- **iFood Investigation[351]**

(346) The Brazilian Competition Authority (CADE) is investigating the exclusive contracts that the food delivery application iFood has made with bars and restaurants. The investigation is currently ongoing, and CADE issued an interim measure in March 2021. According to this decision, iFood will refrain from entering into new contracts with bars and restaurants that include exclusivity clauses and will not modify existing contracts to include exclusivity clauses until CADE's final decision. In this context, iFood may renew its existing contracts with exclusivity clauses for one year, provided that it is beneficial to both parties.

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[350] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_audible.html, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_97, Access Date: 19.08.2021.

[351] Please refer to the link. https://www.competitionpolicyinternational.com/disruptive-innovations-on-digital-platforms-lessons-from-epic-games-v-apple-in-the-u-s-and-rappi-v-ifood-in-brazil/,https://globalcompetitionreview.com/digital-markets/brazil-imposes-interim-measures-food-delivery-app

CADE has expressed concerns that iFood's dominant position in the food delivery app market, with an 86% market share, combined with exclusivity contracts, could result in market closure and increased barriers to entry.

6.5.1.2.4 India

- **Amazon-Flipkart Investigation[352]**

(347) The Competition Commission of India (CCI) launched an investigation into Amazon and Flipkart on 13.01.2020 following a complaint from small and medium-sized businesses in the smartphone and related accessories sector. The investigation focuses on the alleged preferential treatment given by the platforms to specific sellers in terms of discounts and ranking, as well as exclusive sales agreements between smartphone manufacturers and the platforms on only one platform. The CCI's initial findings revealed that Amazon exclusively launched 45 smartphone models from companies such as One Plus, Oppo, and Samsung while Flipkart exclusively launched 67 smartphone models from companies like Vivo, Realme, and Xiaomi. Despite Amazon and Flipkart's appeal to the High Court to halt the investigation, citing no detrimental impact on competition, the High Court ruled in favor of continuing the investigation.[353]

6.5.1.2.5 China

- **Alibaba Decision[354]**

(348) The Chinese Competition Authority (SAMR) launched an investigation in 2020 into the limitations imposed by Alibaba on its sellers. Alibaba has maintained a dominant position in the Chinese online retail platform services market, with a market share exceeding 50% for many years, and has strong brand recognition and customer loyalty. The investigation found that since 2015, Alibaba has

[352] Please refer to the link. https://elplaw.in/wp-content/uploads/2020/01/ELP-Competition-Law-Alert-Amazon-Flipkart.pdf, https://indianexpress.com/article/explained/explained-sc-ruling-on-antitrust-investigations-into-amazon-flipkart-its-impact-7446970/, https://taxguru.in/wp-content/uploads/2021/06/Amazon-Seller-Services-Private-Limited-Vs-Competition-Commission-of-Inida-Karnataka-High-Court.pdf Access Date: 20.08.2021.
[353] Please refer to the link. https://indianexpress.com/article/explained/explained-sc-ruling-on-antitrust-investigations-into-amazon-flipkart-its-impact-7446970/, Access Date: 20.08.2021.
[354] Please refer to the link. https://cms.law/en/chn/publication/samr-imposed-record-fine-on-alibaba-for-abuse-of-dominant-position, https://www.reuters.com/business/retail-consumer/china-regulators-fine-alibaba-275-bln-anti-monopoly-violations-2021-04-10/ Access Date: 19.08.2021.

enforced a policy of "either Alibaba or no services," preventing sellers from operating on competing platforms or participating in promotional activities. Alibaba used incentives and penalties to enforce this policy. The authority determined that Alibaba's actions not only created a lock-in effect but also impeded innovation and the healthy growth of the platform economy. The SAMR investigation concluded on 10.04.2021, resulted in a fine of around 2.3 billion euros imposed on Alibaba for abusing its dominant position through exclusive agreements since 2015.

6.5.1.2.6 Türkiye

- **Google/Android Decision[355]**

(349) The board investigated Google's contracts with OEMs, similar to the Commission in 2018. The decision concluded that Google had a dominant position in the market for licensable mobile operating systems. According to the board's findings, device manufacturers must sign MADA and AFA agreements with Google to use the Commercial Android Operating System. Besides, Google may also engage in an Optional Revenue Sharing Agreement (RSA) with device manufacturers. The AFA prohibits manufacturers from distributing devices with "Android forks" while the MADA requires them to pre-install Google search, Google search widget, and certain Google applications, and set Google search as the default. The RSA allows Google to share a percentage of advertising revenue from user searches with the device manufacturer in exchange for being the exclusive search provider on the devices.

(350) The decision found that the practices in MADA related to setting Google search as the default, placing the Google search widget on the home screen, and using Google WebView as the default and only component for a specific function meet all the criteria for tying practices, which is considered a violation under Article 6 of Law No. 4054. The rules in the RSA requiring only Google Search to be pre-installed on devices have been found to violate Article 6 of Law No. 4054 and to strengthen and prolong the anticompetitive effects of tying the application to Google Search. As a result, the company has been fined 93,083,422.30 TL. Furthermore, it has been decided that there will be mandates to remove

[355] Decision dated 19.09.2018 and numbered 18-33/555-273.

provisions in contracts that mandate the exclusive placement of the Google search widget as the default on the home screen for all search access points, to foster competition in the market. Moreover, there will be obligations to eliminate the requirement that the Google WebView component must be the default and sole in-app internet browser in contracts, including Revenue Sharing Agreements with device manufacturers. These agreements currently prevent competitors' search products from being pre-installed on devices and prohibit device manufacturers from using rival products on any search points on the devices.[356] The decision in question has caused some concerns about potential self-preferencing at some stage.

- **Biletix-7 Decision[357]**

(351) The relevant decision pertains to the allegations that Biletix is abusing its dominant position by imposing additional costs on ticket prices in the form of service fees, transaction fees, and shipping fees. The decision concluded that Biletix held a dominant position in the "market of intermediation services for the sale of event tickets (except football competitions) through the platform," and then Biletix's actions were analyzed in terms of exploitative abuses. Although no violation was found for Biletix's actions, it was stated that Biletix has significant market power , allowing it to implement a distinct business model for consumers compared to other entities in the market. This market power is attributed to the exclusive agreements Biletix entered into with event organizers for two years, as outlined in the Board's Biletix-6 decision in 2013.[358] In this framework, the exclusive contracts Biletix has concluded with event organizers for two years are subject to exemption assessment under current conditions. During the exemption assessment , it was determined that BİLETİX exclusively collaborates with a significant portion of the organizers in the market. This exclusivity results in the closure of a substantial share of the market in terms of ticketing revenues,

[356] Google submitted proposed amendments to meet its obligations to the Authority. However, the Board determined that the obligations were not completely satisfied and imposed a temporary administrative fine on Google on 07.11.2019 with decision number 19-38/577-245. In response, Google presented a compliance package with new amendment proposals to the Authority. Subsequently, the Board issued a decision on 09.01.2020 with number 20-03/30-13, stating that Google had fulfilled its obligations.
[357] Decision dated 21.01.2021 and numbered 21-04/53-22.
[358] Decision dated 05.11.2013 and numbered 13-61/851-359.

the number of events and tickets due to exclusive contracts. The lock-in effect created by indirect network effects in the market already poses a significant obstacle for rival undertakings to establish a sufficient portfolio, and exclusive contracts further reinforce this effect. Furthermore, it was emphasized that the exclusive agreements increased the barriers to entry resulting from indirect network effects and eliminated the ability of event organizers to access multiple platforms for selling tickets. It was determined that the agreements did not meet the requirements for exclusivity. In this context, BİLETİX is required to refrain from entering into agreements with event organizers that include exclusivity or de facto exclusivity provisions.

- **Çiçek Sepeti Decision[359]**

(352) The recent investigation decision of the Board concluded that Çiçek Sepeti holds a dominant position in the online flower sales market. The company's verbal warnings to its dealers not to collaborate with competing online flower sales sites, imposition of high sales targets on special occasions, and excessive delivery practices of flowers and consumable materials have resulted in de facto exclusivity and hindered the activities of competing online flower sales sites. On the other hand, Çiçek Sepeti submitted commitments addressing the identified competition problems, and the Board found these commitments to be appropriate. As a result, the process concluded without any violation decision.

6.5.1.3 Recommendations for Türkiye

(353) As discussed in the preceding sections of this Working Paper, the presence of strong network effects in digital markets increases the risk of market tipping, and exclusivity practices exacerbate this risk by limiting commercial users' access to multiple options. However, it is acknowledged in the literature on competition law that exclusivity practices also generate efficiency. In both the EU and Türkiye, some regulations permit certain agreements with vertical restrictions, including exclusivity clauses, to qualify for block exemption under specific conditions, or individual exemption if block exemption is not feasible. When investigating violations of exclusivity practices, factors such as the provider's market power, competitors' ability to exert competitive pressure, entry

[359] Decision dated 08.04.2021 and numbered 21-20/250-106.

barriers, the duration of the exclusivity practice, and market closure rates indicate the extent to which the exclusive agreement closes off the market are considered accordingly.

(354) Given the above, the practices of companies with significant market power, whether contractual or de facto exclusivity, need regulation due to the competitive issues they create. This regulation would ensure that businesses can access a broader customer base by operating on multiple platforms, leading to increased competition among these platforms. Furthermore, consumers would have greater access to goods and services through various channels, increasing their ability to choose platforms offering favorable prices and terms. Therefore, the text will discuss the exclusivity practices and competitive concerns of powerful market platforms, and it is suggested that regulation be implemented to address the MFC terms and unfair commercial conditions.

6.5.2 MFC Clause Applications

(355) The MFC clause, also known as the price parity clause, best price clause, or most favored nation clause, requires the supplier to provide the favored buyer with the same favorable price and contract terms offered to other buyers. This clause is commonly found in traditional vertical contracts for the purchase, sale, and resale of products, but it has also been addressed in contracts between online retailers with platform features and their product suppliers.[360]

(356) These terms may not only lead to reduced competition, but they may also include features that promote efficiency. Therefore, when evaluating such conditions under competition law, it is crucial to consider the market position of the party benefiting from the condition and its effects within the context of market characteristics. However, in most cases, the MFC clause used in online markets focuses on retail prices and terms, unlike the traditional MFC clause used in wholesale markets. As a result, it may directly impact consumers by causing a loss that cannot be mitigated by competition in the sub-market.[361] The MFC clause exacerbates existing market imperfections in favor of established

[360] Board decision dated 05.01.2017 and numbered 17-01/12-4, pp. 43-50. The relevant decision has been consistently applied in this section of the study regarding the MFC clauses.
[361] Amelia Fletcher and Morten Hviid, "*Broad Retail Price MFN Clauses: Are They RPM 'At its Worst'?*", Antitrust Law Journal 81(1) American Bar Association, 2016, p. 68.

businesses due to its structural and operational features. It raises concerns about competition and may hinder the possibility of a competitive market functioning properly.[362]

(357) The MFC clause is classified in the literature as either wide MFC or narrow MFC, depending on the distribution channel targeted by the restriction. Narrow MFC ensures that the prices and non-price terms offered on the platform are not more unfavorable than those offered on the provider's website or physical store while wide MFC extends this protection to all sales channels, including competing platforms, and expands the scope of protection.[363]

(358) In the upcoming sections, we will first examine the potential competitive and anti-competitive impacts of both wide and narrow MFC clauses. Next, we will provide case examples related to this matter, and then we will present the regulations concerning these clauses based on international reports. Lastly, we will propose a regulation for Türkiye regarding the relevant terms.

6.5.2.1 Wide MFC Clause and Potential Competition Concerns

(359) The potential negative effects that could result in the loss of competition in the market due to the implementation of a wide MFC clause by online platforms can be classified into three main categories: (i) Reduced market competition leading to higher retail prices based on commission rates (ii) Market price inflexibility and anti-competitive collaboration (iii) Hindered market entry, easier market exit, and/or inhibition of market expansion.

- **(i) Decrease in Price Competition - Increase in Retail Prices**

(360) The wide MFC clause prohibits providers from offering more favorable prices and terms to platforms other than one benefiting from the clause. In the absence of this provision, in a competitive market, online platforms could reduce fees such as commission and publishing fees[364], which would attract providers and make their offers more appealing to consumers. This would intensify competition

[362] Please refer to the report. "E-Pazaryeri Platformları Sektör İncelemesi Nihai Raporu", pp. 200-220. This report has been used in the study of the MFC clause.
[363] Board decision dated 28.01.2021 and numbered 21-05/64-28. European Commission (2020), "Support studies for the evaluation of the VBER Final report"; Ezrachi A. (2015), "The competitive effects of parity clauses on online commerce", European Competition Journal, 11:2-3, 488-519.
[364] In the furtherance of this research, the term "commission rate" encompasses all charges received from providers in return for platform services.

among platforms to capture market share, leading to reduced commission rates, and ultimately lower retail prices.

(361) If the MFC clause is enforced, the provider's incentive to offer better prices and conditions to other platforms will be greatly reduced due to the increased costs associated with applying these favorable conditions to the platform benefiting from the MFC clause. It is because if the provider participates in a platform that offers lower commissions and better conditions due to cost reductions, the provider will have to bear significant costs to offer the same conditions to the platform benefiting from the MFC clause.[365] Consequently, the platform that utilizes the MFC will receive more advantageous terms and conditions at no expense.

(362) The protection mentioned above will also be applicable if the platform utilizing the MFC clause raises the commission rates charged to the provider. Specifically, even if the platform benefiting from the MFC clause increases the commission rate it receives from the provider, the provider will be unable to pass on this cost increase to its prices and terms on that platform due to the MFC clause. As a result, the provider will have to absorb this cost or pass on the cost increase to the prices and terms in all other sales channels. It will eliminate the ability of providers to set prices specific to each platform, restrict the ability to sell on platforms with lower costs and more favorable terms, and ultimately reduce price competition in the market.[366]

(363) In this procedure, the protection of MFC clause will enable the platform to raise commission rates without incurring the cost of the increase, thus avoiding any demand reduction.[367] Consequently, the reduction in market competition based on commission rates will cause retail prices to rise.[368]

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[365] OFT, *Lear Report*, 2012, "Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements", https://www.learlab.com/publication/1145/, para. 0.17-0.18, p.7, Access Date: 15.04.2021

[366] Doğan C., (2021), (2021), *"E-Ticaret Platformları Özelinde Çok Taraflı Pazarlar: Rekabet Hukuku Ve İktisadı Açısından Yaklaşım*", Unpublished Doctoral Dissertation, p.410.

[367] Padilla J., Salvatore Piccolo, and Nadine Watson (2020), "Price and Content Platform Parity: A Tale of Two Industries". Boick A. and Kenneth Corts (2016), *"The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry"*, Journal of Law and Economics, 2016, vol. 59, issue 1, pp.105-134.

[368] Edelman B. and Julian Wright (2015), "Price Coherence and Excessive Intermediation", Quarterly Journal of Economics, 130(3). Ezrachi, A. (2015), "*The competitive effects of parity*

(364) The MFC clause is a requirement placed on the provider, so it is crucial to recognize that the platform must have significant market power to enforce the respective clause. The platform's ability to enforce these terms can be evaluated based on absolute and relative market power criteria. If the platform serves as the primary gatekeeper to a specific consumer group based on their preferences, it may possess absolute market power. In such cases, providers are expected to view the platform as the only viable channel. The relative criterion considers the asymmetric bargaining power between the platform and its providers, and the MFC clause may be imposed on the provider if they are economically reliant on the platform.

- **(ii) Establishing Price Rigidity in the Market and Creating Grounds for Anti-Competitive Collaborations**

(365) In the presence of a wide MFC clause, the provider would face significant expenses if it were to provide more favorable terms on a less expensive platform. For instance, if a seller chooses to offer competitive prices for a demand of five units from customers on a new marketplace that charges zero commission to establish an alternative sales channel, the seller would also need to offer the same terms on a platform with a scale of a hundred customer demands, due to the MFC clause. This would lead to the seller incurring a cost by sacrificing profits for the demand of a hundred units. In this scenario, the wide MFC clause imposed on the provider would discourage the offering of lower prices on a less expensive marketplace, instead requiring them to apply the same price across all sales channels.

(366) Furthermore, it is challenging for a platform to offer lower commissions to providers while knowing that its competitor is using the MFC clause. This is because implementing such a strategy would not only fail to benefit the platform in the market but also bring about disadvantages. In other words, attempting to attract consumer demand through this strategy would not result in the desired increase, as the platform that enforces the MFC clause would also reap the same favorable terms. Consequently, the platform in question would not gain any market share in the product it facilitates the sale of and would generate reduced

clauses on online commerce", European Competition Journal, 11:2-3, 488-519., Padilla et al. 2020.

commission income. The MFC clause would mitigate price competition between platforms by preventing others from capitalizing on the competition.

(367) The wide MFC clause provides a competitive advantage to the platform, which may prompt other platforms to adopt similar conditions to avoid being at a disadvantage. [369] As platforms are crucial for providers to reach consumers, those who have already accepted this condition are likely to comply with similar demands from other platforms. This could lead to the widespread adoption of the wide MFC practice across all platforms in the market, especially those with less bargaining power compared to the provider.

(368) As a result, it is considered that wide MFC clauses, especially if implemented by gatekeeper platform(s), may (i) eliminate the provider's incentive to apply different prices and conditions in different channels, (ii) reduce the incentive of rival platforms to engage in price competition, (iii) cause price rigidity in the market, and facilitate anti-competitive cooperation between platforms as a result of its widespread implementation by rival platforms.[370]

- **(iii) Preventing Market Entry and/or Market Growth**

(369) In the absence of the MFC clause, a new platform in a competitive market can enter and expand by providing better offers to consumers than existing platforms. However, if the wide MFC clause is in effect, even if the new platform offers lower commission fees, it will struggle to gain market share and may ultimately exit the market.[371]

6.5.2.2 Narrow MFC Clause and Potential Competition Concerns

(370) In a narrow MFC clause, the platform receiving the commitment cannot ensure that the provider will not offer lower prices on other platforms, unlike in a wide MFC clause. As a result, the incentive to negotiate with other platforms for a reduced commission rate and, consequently, a lower price is maintained.[372]

(371) However, if the platform subject to the narrow MFC clause is essential for the provider and can be substituted for the provider's direct sales channel (such as

[369] Doğan, C., p. 412.
[370] OFT LEAR Report 2012, para. 0.20, p. 8.
[371] Evans D.S (2020), "*Vertical Restraints in a Digital World*"; Ezrachi 2015.
[372] European Commission-VBER studies 2020; Ezrachi 2015.

its website) for a significant majority of consumers, the narrow MFC clause is likely to produce similar effects as the wide MFC clause.[373] In this situation, it would not make sense for the provider to offer a lower price on the other platform than the selling price on its own direct sales channel unless the competing platform offers a commission rate equal to or lower than the selling cost on the provider's direct sales channel, and the sales volume that the provider will obtain from this platform is not sufficient to abandon the essential platform.[374] From another perspective, when the essential platform with a narrow MFC clause raises its commission fees, the provider will raise its retail price on the platform due to the increased cost and will have to raise its retail price in its direct sales channel due to the MFC clause. However, recognizing that consumers are indifferent between the platform and its direct selling channel, the provider will be motivated to raise its prices on other platforms to maintain the attractiveness of its direct selling channel with lower costs. Therefore, an increase in the commission fee of the platform that imposes an MFC clause may result in higher retail prices in all other channels. Under the aforementioned conditions, the introduction of a narrow MFC clause has the potential to reduce competition based on commission fees, create a ground for cooperation in the market, and prevent market entry and growth in the market, as in the case of a wide MFC clause.

6.5.2.3 Decision/Reports on MFC Clause Terms

HRS Decision - Germany[375]

(372) In 2013, the Federal Cartel Office determined that the MFC clause terms in agreements between the online accommodation booking platform HRS and facilities violated Article 101 of the Treaty on the Functioning of the European Union and the corresponding provisions of the German Competition Act. The MFC clause in question ensures that facilities will provide prices for HRS that are as competitive as those offered through their channels or to online platforms that are competitors of HRS. Due to the MFC clause, facilities are required to

[373] European Commission-VBER studies 2020; Padilla et al.2020).
[374] OECD (2018), "*Implications of E-commerce for Competition Policy - Background Note*"., Padilla et al. 2020.
[375] HRS-Hotel Reservation Service Robert Ragge GMBH, BKarA, B.9-66/10.

compensate HRS's customers for the price difference between HRS and other distribution channels.

(373) The Bundeskartellamt found that the relevant requirement hinders competition among online platforms and services. Competing online platforms cannot offer hotel rooms to their customers at lower prices, even if they agree to accept lower commissions than HRS. This results in higher prices and obstacles for new entrants in the market. Additionally, facilities are unable to freely adjust their prices and booking conditions through their distribution channels. The Bundeskartellamt also highlights that the anti-competitive effects of MFC clauses are worsened by the fact that agreements between HRS's major competitors (booking.com and Expedia) and the facilities also include MFC clauses.

(374) Additionally, in that decision, the Bundeskartellamt evaluated HRS's claims about the efficiency created by the MFC clause. The Bundeskartellamt considered the platforms' incentive to invest and the limitation of the free-riding problem by the MFC clause. However, it concluded that the MFC clause had a minimal impact on the platforms' investment incentive. The decision did not definitively determine whether the MFC clauses constituted an objective restriction of competition under Article 101. Regardless of whether the relevant provisions restricted competition in terms of purpose, it was determined that they significantly restricted competition in terms of effect and could not be individually exempted. As a result of the investigation, the Bundeskartellamt instructed HRS to remove the MFC clauses from its contracts without imposing any penal liability. The Higher Regional Court in Düsseldorf upheld the decision.[376]

Price Comparison Websites: PCW Decision – United Kingdom[377]

(375) The CMA conducted market research on the motor vehicle insurance sector, differentiating between narrow MFC and wide MFC clause conditions. Under the

[376] Düsseldorf Higher Regional Court confirms Bundeskartellamt's prohibition decision, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html? nn=3591568, Access Date: 02.05.2016.

[377] Private Motor Insurance Market Investigation, Final Report, 24.09.2014, https://assets.digital.cabinetoffice.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf, Access Date: 02.05.2016.

narrow MFC clause, the insurance company is prohibited from offering more favorable prices exclusively on its website. The wide MFC clause prohibits the insurance company from offering more favorable prices on other price comparison websites, in addition to its website. The CMA stated that the narrow MFC clause is necessary to ensure the reliability of price comparison websites and prevent free-riding issues. However, it indicated that the same does not apply to the wide MFC clause, which could harm competition. As a result, the CMA has prohibited the inclusion of wide MFC clause conditions in contracts between motor vehicle insurance companies and price comparison websites. The regulatory body theoretically analyzed the potential anti-competitive effects of narrow MFC clause conditions that target the provider's channel but did not find empirical evidence in the market under review to support this theory.

Amazon Decision-United Kingdom[378], Germany[379]

(376) In 2012, the CMA initiated an investigation under Section 1 of the UK Competition Act 1998 and Article 101 of the TFEU regarding the MFC clause imposed by Amazon. Following Amazon's decision to discontinue its MFC policy, the CMA terminated its investigation. The Bundeskartellamt has also concluded its investigation into Amazon's compliance with the instructions to remove MFC clauses from its agreement terms and to notify sellers of the changes in the terms. Booking.com and Expedia Decisions - France, Italy, Sweden, Germany

Booking.com and Expedia Decisions, France, Italy, Sweden[380], Germany[381]

(377) In the investigations initiated by the French, Italian, and Swedish Competition Authorities into the MFC clause in Booking.com's contracts with accommodation providers, a joint market test was conducted upon the proposal of Booking.com. In this process, as per the commitment made by booking.com, the contracted facilities will be permitted to provide their rooms at reduced rates through other

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[378] Amazon online retailer: investigation into anti-competitive practices, Case reference: CE/9692/12, 2013.
[379] Amazon announces end to price parity, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/27_08_2013_AmazonPreisparit%C3%A4t.html?nn=3591568, Access Date: 02.05.2016
[380] Commitments offered by Booking.com: Closed the investigation in Italy, France and Sweden, http://www.agcm.it/en/newsroom/press-releases/2207-commitments-offeresd-by-bookingcom-closed-theinvestigation-in-italy-france-and-sweden.html , Access Date: 03.05.2016.
[381] Meistbegünstigstenklauseln bei Booking.com, BKarA, B.9-121/13.

online booking platforms and offline channels (telephone, fax, e-mail) wide (MFC clause), but not through their own online channels (narrow MFC clause). Upon this commitment, in 2015, the French, Italian, and Swedish Competition Authorities jointly accepted the relevant commitments and terminated the investigation, stating that they did not find any practices that contravened EU or national competition law rules. The French, Italian, and Swedish competition authorities also initiated an investigation into Expedia regarding the MFC clause.

(378) Nevertheless, the Bundeskartellamt has initiated legal proceedings against Booking.com and Expedia for using similar terms in their agreements with accommodation providers. In its decision on Booking.com's use of the MFC clause, the Bundeskartellamt determined that the practice violated Article 101 TFEU and the provisions of the German Competition Act, in conjunction with the HRS decision. In the pertinent decision, it was noted that, unlike the French, Italian, and Swedish Competition Authorities, both narrow and wide MFC clauses were found to restrict competition between accommodation facilities and online platforms. According to the Bundeskartellamt, this clause primarily restricts the freedom of accommodation providers to set prices through their online channels. It does not incentivize accommodation providers to offer lower prices to new and smaller platforms, makes market entry difficult, and is not beneficial for consumers. Similar to previous decisions, Booking.com was directed to remove the MFC clause from its contracts.[382]

(379) In this context, it can be noted that the European Union's decisions vary in terms of the need for MFC clauses to address the issue of free-riding. Outside of Germany, it is acknowledged that it is essential for accommodation providers to be obligated not to offer lower prices exclusively through their online platforms (narrow MFC clause) to resolve the problem of free-riding. Conversely, subsequent to these commitment decisions, in 2017, several European

[382] The Düsseldorf Court (OLG Düsseldorf, 4 May 2016, VI-Kart 1/16 (V) - booking) overturned the German Competition Authority's decision, which also found Booking.com's restrictive Most Favored Nation (MFN) clause to be a violation, in favor of booking.com in 2019 (OLG Dusseldorf, 4 June 2019, VI-Kart 2/16 (V) - booking). After an appeal against the reversal, the Federal Court of Justice in 2021 deemed Booking.com's narrow MFN practices illegal and overturned the Düsseldorf Court's ruling. (https://www.bundeskar tellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/18_05_2021_BGH_KVR_54-20_Booking.com.html?nn=3591568 Access Date: 20.06.2021).

countries, including France and Italy, enacted legislation that prohibited online travel agencies from applying narrow or wide MFC clauses.

Booking.com Decision- Türkiye[383]

(380) Booking.com's MFC clause, which applies to accommodation providers, was also examined in Türkiye. The investigation concluded that the MFC clauses limited competition under Article 4 of Law No. 4054. As a result, the company was fined and instructed to stop its wide MFC practices. Additionally, a 5-year exemption was given for the terms of the narrow MFC clause.

Yemek Sepeti Decisions-Türkiye[384]

(381) During the 2016 investigation of Yemek Sepeti's use of MFC clause terms in Türkiye, the company's extensive MFC practices were found to be in violation due to their exclusionary impact. As a result, the company was fined and instructed to discontinue these practices. However, the investigation did not address the company's narrow MFC practices during that time.

(382) In the investigation conducted against Yemek Sepeti in January 2021, it was found that their narrow MFC practices raised anti-competitive concerns. As a result, the investigation was concluded using the commitment mechanism. The decision stated that restaurants are motivated to offer products to consumers at more favorable prices through their channels. It was also mentioned that the narrow MFC clause may restrict consumers' ability to access products/services at more favorable prices. Additionally, the narrow MFC clause should not only be applied to prices but also to all kinds of conditions, such as menu content, promotions, and delivery regions. The decision also mentioned that the requirement may limit consumer welfare by not only preventing access to more affordable products, but even by affecting other factors such as variety. It was noted that the requirement may impact not only take-away prices but also in-salon prices of restaurants, as compliance is verified through brochures, which are generally the same as the lounge menus. In the aforementioned decision, it was also assessed that the condition may lead to an increase in the prices of food in general. It is because restaurants are aware that they will need to apply the

[383] Board decision dated 05.01.2017 and numbered 17-01/12-4.
[384] Board decision dated 28.01.2021 and numbered 21-05/64-28.

same low prices to Yemek Sepeti as they do in their channels. Additionally, despite the restaurants' efforts to develop their channels to avoid commission costs incurred through Yemek Sepeti, the narrow MFC clause may prevent consumers from benefiting from more advantageous offers that could result from these efforts.

(383) It has been argued that restaurants rely on Yemek Sepeti because the company holds significant market power in the takeaway services industry through its network of restaurants and users. It is also claimed that the majority of these restaurants' takeaway services are provided through Yemek Sepeti and that there is no effective competitor in the market. Additionally, it was emphasized that narrow MFC clauses may prevent restaurants from developing their channels, further strengthening Yemek Sepeti's user network, and thus increasing the current dependency of restaurants on Yemek Sepeti. Given these impacts, other platforms may be at a disadvantage compared to Yemek Sepeti because of its large user and restaurant base. It has been proposed that the narrow MFC application could pose a challenge for competing platforms to enter the market.

E-Marketplace Platforms Sector Inquiry Report - Türkiye

(384) In the April 2022 report, it was noted that Trendyol, Hepsiburada, and N11 held market shares of % (....), % (....), and % (....) respectively, among the eight companies under investigation. The report also highlighted the dynamic nature of the sector's balances and the ongoing competition between the top three companies based on their market shares.

(385) The report states that, apart from Hepsiburada, other marketplaces in the industry did not enforce MFC clauses in their contracts with sellers for sales channels. While Hepsiburada previously applied a wide MFC, the current contracts reviewed in the industry now only include a narrow MFC clause.

(386) On the contrary, even though the contracts between Trendyol and the sellers do not include such a provision, it is mentioned that Trendyol has certain pricing practices that are not explicitly covered by the MFC clause. These practices are intended to benefit sellers by increasing sales and consumers by offering competitive prices. Sellers have the freedom to set prices below or above these

practices and are not obligated to accept them. Since Trendyol's practices consider prices across all e-commerce platforms, it is believed that they could have similar effects to the wide MFC clause. Furthermore, there is a concern that these practices could result in price rigidity and diminish competition in commission rates among platforms, as they apply to all online sales channels.

(387) Given the current situation and market development, it has been evaluated that the use of the de facto or contractual MFC condition by the dominant market player(s) cannot be offset by efficiency gains due to its significant anti-competitive impact. On the other hand, it is essential to evaluate whether the MFC condition can be utilized by other marketplaces within the framework of the condition's nature (broad/narrow) and the potential anti-competitive, and competitive effects it may generate while considering the bargaining power of the parties. It is also significant to clarify the principles regarding platform MFC conditions through an amendment to the secondary legislation. This approach should also be applied to the use of the narrow MFC condition by the gatekeeper marketplace(s).

(388) Based on the decisions and reports mentioned, it has been determined that the wide MFC clause conditions, as seen in all decisions, limit competition. However, there have been different approaches to the specific MFC clause conditions. The narrow MFC clause requirements for lodging establishments have been observed to restrict competition in Germany, but have been found to encourage competition in instances leading to commitments for online platforms of providers in other European nations. In Türkiye, narrow MFC clause conditions for booking.com have been granted an exemption for (5) years, while Yemek Sepeti has terminated these conditions through commitment.

6.5.2.4 Recommendations for Türkiye

(389) The exclusionary impact of wide MFC clauses in online markets has become evident in theory and practice. Therefore, it is necessary to prohibit these clauses for undertakings with significant market power in digital markets, which require special regulation due to the market characteristics and failures mentioned above. Furthermore, while the mentioned conditions have been approached differently in doctrine and the application in our country and around the world,

it is believed within the context of the discussions of the final report of the sector analysis of e-marketplaces policy recommendations and this Working Paper, that delayed intervention will not resolve market problems in digital markets, where externalities emerge as the most fundamental market failure. Therefore, it is believed that wide MFC clause terms should be prohibited for gatekeepers, and even narrow MFC clause terms should be included in this prohibition.

(390) In light of these explanations, it is considered appropriate to implement a regulation for addressing unfair commercial terms collectively, including exclusivity, MFC clause conditions, and competitive concerns, to avoid platforms with significant market power from using MFC applications.

6.5.3 Unfair Commercial Terms

(391) Even when not holding a dominant market position, platforms can engage in unfair commercial practices against third-party sellers due to their superior bargaining power.[385] As the power imbalance between the platform and the seller grows, the likelihood of the seller being subjected to such practices also increases. In cases where a platform attains a dominant market position, sellers and consumers may be compelled to accept contract modifications that include unfair commercial terms. Platforms that rely on market power can dictate unfair actions or contract terms to consumers or sellers with a "take it or leave it" policy.

(392) The previously mentioned unequal bargaining power allows platforms to unilaterally establish trade terms, presenting sellers with substantial uncertainty and commercial vulnerability. However, sellers may be shielded from this power imbalance if there is effective competition among platforms. In such a scenario, if competing platforms offer a viable alternative to the dominant platform's commercial terms, the dominant platform will be unable to dictate these terms, and sellers will not be compelled to accept them.

(393) Unfair commercial conditions can manifest as an increase in access fees imposed on sellers, such as commission fees, shipping costs, and additional fees (e.g., listing fees, membership fees, store opening fees, and service fees). These

[385] Graef I. (2019), "Differentiated Treatment in Platform-to- Business Relations: EU Competition Law and Economic Dependence", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597678, Access Date: 22.04.2020.

conditions may also involve the unfair imposition of non-price elements (such as account closure and/or suspension, payment terms, etc.) on the seller in the contract or agreement concluded between platforms and sellers, as well as a lack of transparency between platforms and sellers regarding these matters, in other words, the presentation of unfair contract/agreement conditions. While these practices may initially be considered exploitative, they can sometimes involve both exploitative and exclusionary effects. In some instances, exploitative behaviors can also serve as a form of exclusionary behavior.[386] In this context, it should be noted that there is no strict requirement to rigidly distinguish whether the relevant behavior is exploitative or exclusionary.

(394) To assess unfair contractual terms, it is necessary to identify the commercial contractual terms that may be in question within a competitive market structure.[387] The assessment of unfair contract terms has been formulated as a two-stage test within the framework of EU case law. The first stage of the test assesses whether the terms are essential to the purpose of the contract, while the second stage assesses whether the terms are proportionate to the relative interests of the contracting parties. This assessment of proportionality is based on balancing the purpose of the contract, the contractual terms, and the justifications of the contracting parties for these terms. In this context, the conditions in the contract must: (i) have a lawful purpose other than the exploitation of the consumer, (ii) be 'effective', meaning they can achieve the lawful purpose in question, (iii) be 'necessary', meaning there is no alternative with the same effectiveness but with less restrictive or less exploitative effects in terms of achieving the lawful purpose of the contract, and (iv) be 'proportionate', meaning the exploitative effect on the other party to the commercial relationship must not outweigh the lawful purpose that the dominant undertaking wishes to achieve. If any of these conditions are not fulfilled, it is acknowledged that the contractual terms established between the platforms and third-party sellers cannot be deemed unfair, and the conduct will not amount to exploitation.[388]

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[386] Ünal Ç., Rekabet Dergisi (2010), 11(4): 111-164, "*Rekabet Hukukunda Tek Taraflı Sömürücü Davranışlar*", p. 121.
[387] Ibid., p. 130.
[388] O'Donoghue R. ve Padilla A.J., (2006), The Law and Economics of Article 82, Hart Publishing Oxford and Portland, Oregon, p. 654.

(395) In addition, it can be argued that the absence of clear and transparent contract provisions and seller-platform interaction conditions may be deemed unfair practices in the commercial relationship between the platforms and their sellers. It is crucial for the contractual provisions and practices governing the interaction processes between platforms and sellers to be clear, transparent, and predictable. This is essential to ensure a healthier competitive process within the platform and to safeguard the competitiveness of the sellers without adverse effects. In this context, it is crucial to uphold the principles of "transparency," "openness," and "predictability" to facilitate fair competition and ensure that everyone receives their fair share of the costs and benefits associated with commercial activity.

(396) In this context, essentially unfair commercial conditions may include, but are not limited to, the following elements:

a) Practices that result in a significant imbalance in the contractual rights and obligations of the parties,
b) Actions to avoid or limit the obligations of one party (without affecting the other) under the contract,
c) Arrangements for one party (but not the other) to terminate the contract,
d) Pricing tiers that restrict sellers from freely setting the product prices or services,
e) Conditions that prevent or make it difficult for sellers or consumers to use third-party service providers,
f) Unilateral changes to the terms of service made by the platforms without reasonable notice,
g) Conditions that prevent or make it difficult for sellers or consumers to exercise their legal rights (e.g. preventing them from lodging complaints with the administration or courts, provisions for litigation in locations unfavorable to the seller or consumer, etc.),
h) Requiring permits that are excessively intrusive or disproportionately burdensome concerning the functionality they provide,
i) The termination of vendor or user accounts without legitimate justification or prior notification that leads to the denial of access to accumulated data,

j) Applications that restrict users from withdrawing their consent to the processing of personal data by not providing the option to delete user accounts within the application,

k) Actions that exploit commercial practices to substantially hinder the consumer's ability to make an informed decision that leads the consumer to make a transactional decision that they would not have otherwise made (e.g. persuading consumers to purchase by using phrases such as "last 1 item in stock" when in reality this is not true).

(397) These activities have the potential to pose challenges in the competitive process by exposing both consumers and sellers to significant vulnerabilities on online platforms.

(398) In this context, the decisions made in Germany and Austria regarding the unfair commercial conditions imposed by Amazon on its sellers, as well as the information about the Facebook decision in Germany, are provided below.

Austrian Federal Competition Authority (BWB) Decision on Amazon

(399) The Austrian Federal Competition Authority has announced that it has received numerous complaints from Austrian retailers regarding Amazon's unfair commercial practices over the past three years. In December 2018, after a complaint was filed by the Austrian Retail Association on behalf of a marketplace seller, the authority launched an investigation into Amazon's business practices. The investigation led to Amazon revising the terms and conditions of the contract.[389]

(400) The findings derived from a survey of 400 sellers conducted during the examination process is outlined as follows:

- Austrian sellers are compelled to utilize amazon.de as their primary selling platform.
- Despite assertions of having alternative sources, the majority of sellers still derive the bulk of their total turnover from amazon.de.

[389] https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf

- Even in the event of commission fee increases by Amazon, sellers exhibit little inclination to transition to an alternative marketplace.
- A minority of sellers consider their own online and physical channels as viable substitutes for the Amazon marketplace.
- The study concludes that Amazon maintains a dominant position in providing online retail intermediation services for Austrian sellers.

(401) The revised contract provisions and associated modifications are outlined as follows:

- **Immediate termination/suspension of merchant accounts**

– Amazon reserves the right to restrict, suspend, or terminate the seller's privileges on the platform with a 30-day advance notice. Immediate termination may occur under the following circumstances:

a) Amazon finds that the seller has significantly violated the contract and has not rectified the breach within (7) days after receiving notice,

b) The seller or its account is involved in deceptive, fraudulent, or unlawful practices,

c) The vendor's utilization of affiliate APIs and API resources results in harm to its clientele,

- **Authorizing the use of materials supplied by the Seller through the provision of rights and licenses**

– Restrictions on rights and licenses are applicable only for the duration of the original and derivative intellectual property rights,

- **Compensation at Amazon**

– Enhancement of the sellers' legal standing in relation to any claims, losses, damages, settlements, costs, compensation, and other liabilities stemming exclusively from adherence to relevant legislation,

- **Disclaimer of Liability**

– Removal of the disclaimer clause from the Amazon contract,

- **Amendment of Contract**

– Amazon is required to provide a minimum of 15 days' advance notice for any revisions to the Agreement,

- **Applicable law and jurisdiction**

– Any disagreement regarding the utilization of the services or the contractual agreement will be resolved by the judicial authorities of the Luxembourg region,

- **Compensation in line with the Amazon Logistics Guidelines**

– The removal of the disclaimer related to the Amazon Logistics Guidelines for the current Amazon platform,

- **The designated timeframe in which the seller can dispute Amazon's decisions regarding customer reimbursement**

– Amazon will expeditiously notify sellers of their responsibility for a customer refund, and sellers have the opportunity to contest Amazon's decision within thirty days of notification.

Bundeskartellamt Amazon Decision[390]

(402) On July 17, 2019, the Bundeskartellamt completed its investigation of Amazon's seller contract terms on its platform following Amazon's agreement to modify various aspects of its contracts with sellers.

(403) As per the decision, Amazon will enact these modifications within 30 days, not only in Germany but also across all marketplaces in Europe, North America, and Asia. This process ran concurrently with the investigation conducted by the Austrian Federal Competition Authority (BWB) and was concluded on the same day through collaborative efforts.

(404) In November 2018, an official investigation was initiated in Germany in response to complaints from vendors, alleging that Amazon had abused its dominant market position by imposing onerous contractual terms and various practices on sellers. These terms encompass a wide array of issues, including product evaluations and seller ratings, jurisdictional clauses (Luxembourg), extensive seller liability, account blocking and termination, returns and refunds, and

[390] https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4

confidentiality obligations. Furthermore, the Bundeskartellamt scrutinized the existing regulations and potential lack of transparency in contractual modifications. The investigation appears to have been concluded without a formal commitment process after Amazon indicated its intention to implement practical updates to the contract terms.

(405) The theory of harm discussed in the concise decision relies on the regulations concerning a dominant position in the market. The decision provides a broad evaluation without clearly differentiating whether the actions could be considered exploitative or exclusionary abuse. It suggests that Amazon's imposition of unfair business conditions on sellers could be exploitative and excessively restrict the competitive activities of sellers in the market. Additionally, it notes that the cancellation and blocking of seller accounts, usage rights, price parity provisions, product reviews, and seller ratings are exclusionary practices.

(406) In addition, the concept of relative/superior market power in Austrian and German competition law has been taken into consideration in these cases. However, it is not clear for which concerns this concept is used. There is no concept of relative/superior market power in Turkish law.

Facebook Decision

(407) The investigation in Germany began at the end of 2017 with allegations that Facebook, assumed to have a dominant position in the social networking market, abuses its dominance by making the use of social media conditional on collecting excessive and extremely detailed data on users and linking it with the user's Facebook account. This decision reflects the consumer aspect of unfair contract terms. The main issue within the scope of the investigation is Facebook's collection and processing of data related to user behavior on third-party websites. The authority examined the allegation that Facebook engaged in unfair practices by offering users a choice of either using Facebook or not using it at all, on the condition that users agreed to provide Facebook with very detailed data. The absence of bargaining power for Facebook users, who must either accept or reject the terms set by Facebook, creates the impression of a shift in market power in the traditional sense. In fact, as a result of these practices,

Facebook has acquired a distinct database for each user, giving it significant market power. In the Facebook case, the Bundeskartellamt concluded that Facebook had abused its dominant position in the social networking market by exploiting consumers through unfair contractual terms.[391]

6.5.4 Recommendations for Türkiye

(408) In light of the explanations provided above, it can be stated that these concerns can be assessed within the framework of Article 6 of Law No. 4054 if digital platforms possess a specific market power. Conversely, it is evident that regulating unfair practices of certain businesses that lack dominance in the market but have attained a certain level of power is crucial for fostering effective competition in the market. These instances include the inability of business users to dictate specific commercial terms when collaborating with competing platforms or offering products and services through their own sales channels. In this context, it is deemed appropriate to address exclusivity, unfair commercial terms, and MFC conditions imposed by businesses with significant market power.

6.6 Lack of Transparency

(409) One of the essential requirements for perfect competition is having complete information. This means that when consumers and producers have complete knowledge about the goods and services, they can make rational decisions that lead to efficient market functioning and equilibrium, ultimately maximizing total utility. Consequently, market transparency is crucial for the market to operate effectively. In fact, information asymmetry is a form of market failure that justifies government intervention.

(410) Digital markets are characterized by strong network effects, winner-takes-all dynamics, and intense competition, often within a vertically integrated ecosystem, with a constant need for data flow. Given these market traits, a key challenge for economic policy is to establish a fair and transparent competitive environment on platforms, allowing both new and existing market players to

[391] Please refer to the full press release of the German competition authority BKA for access to the relevant information. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

thrive.[392] Transparency is especially crucial in digital markets, as it enhances consumer awareness and encompasses information about platform policies, terms, and ranking preferences. However, the absence of complete information or manipulation of consumer preferences can lead to market disruption, raising concerns not only under consumer protection law but also under competition law. In cases where the market is dominated by a single or a few major players, uncertainty about their policies can hinder the formation of consumer preferences and create barriers to entry for new players or switching for consumers. This lack of transparency can become a competition issue, highlighting the importance of *transparency as a matter of competition policy*.[393]

(411) In recent years, there has been a growing emphasis on promoting transparency in digital markets, particularly concerning consumer and competition policies. This has resulted in the implementation of various regulations aimed at enhancing transparency. For instance, the EU has introduced multiple regulations to improve transparency in digital markets. One such regulation is Regulation [394] (EU) 2019/1150, which focuses on promoting fairness and transparency for commercial users of online intermediation services, along with the accompanying Guidelines on Rating Transparency. These regulations contain provisions designed to increase transparency in the operations of e-commerce intermediary platforms and search engines. Furthermore, the Digital Services Draft Law, published in 2020, seeks to establish a more transparent, predictable, and secure online ecosystem. It includes several provisions aimed at enhancing transparency in the online advertising market. In Japan, the Law on Enhancing Transparency and Fairness of Digital Platforms came into effect in February 2021. This law imposes obligations such as disclosing platform terms of use and any changes to these terms, establishing internal processes for resolving user disputes, submitting self-assessment reports on these obligations to the relevant ministry, and ensuring transparency in ranking services.

(412) In this context, discussions about transparency in digital markets are mainly divided into three categories. The first involves transparency about how e-

[392] CERRE (2020), Digital markets and online platforms: new perspectives on regulation and competition law, p. 16.
[393] European Commission (2019), "Competition Policy for the digital era Final report", p. 64.
[394] Also known as the P2B Regulation.

commerce platforms and search engine providers make decisions about the ranking of products or businesses they feature. The second pertains to ensuring that users of digital platform services, both commercial and end users, have sufficient information about the terms and responsibilities of the services they use. The third category focuses on the transparency of the supply chain in online advertising services.

6.6.1 Transparency Regarding Rankings

(413) The rapid development and expansion of the Internet have enabled users to access a wide variety of new services and products. However, searching for a product or service online requires a significant amount of time and effort. At this point, companies have begun to offer ranking-based services that can provide added value to consumers by collecting and organizing the options that best meet their needs.[395] Ranking algorithms are utilized in numerous digital services today to deliver the products and services that users demand. In accordance with paragraph 22 of Article 2 of the Definitions section of the DMA, which is currently one of the most recent proposals, "ranking" is defined as "*the relative prominence given to goods or services offered through online intermediation services, online social networking services, video-sharing platform services or virtual assistants, or the relevance given to search results by online search engines, as presented, organized or communicated by the undertakings providing online intermediation services, online social networking services, video-sharing platform services, virtual assistants or online search engines, irrespective of the technological means used for such presentation, organization or communication and irrespective of whether only one result is presented or communicated.*" As can be understood from this definition, ranking is commonly used in various digital services and products, including search engines, online shopping sites, shopping comparison services, and app stores.

(414) The presentation order of search results on online platforms holds considerable significance. Due to the inherent nature of ranking, users tend to focus more on

[395] CMA (Competition & Markets Authority) (2021), "Algorithms: How they can reduce competition and harm consumers", p. 21; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954331/Algorithms_++.pdf, Access Date: 12.08.2021.

the top or front results when conducting digital searches. This positioning often influences their selection, irrespective of the relevance, price, or quality of the options. As per the findings of the Commission and the Board in the Google Shopping decisions, consumers are inclined to click on the top results displayed in search outcomes. Consequently, the order of ranking significantly influences the preferences of end users utilizing rankings to find products and services, as well as the sales of commercial users leveraging rankings to promote their offerings. Notably, in cases where rankings serve as a crucial sales channel, the higher placement of a seller's products and services in the rankings becomes a pivotal competitive factor.

(415) Although ranking has become a crucial parameter in competition due to the aforementioned characteristics, the specifics of ranking mechanisms, such as ranking algorithms, are not clear to commercial and end users. In this context, it is well known that there are various international regulations and/or regulation proposals aimed at enhancing the transparency of rankings, which is essential for users.

(416) One of these is the Japanese "*Law on Enhancing Transparency and Fairness of Digital Platforms*." The Act defines "certain digital platform providers" as digital platform providers whose transparency and fairness need to be improved. In terms of ranking, it obligates these providers to disclose the factors used to determine the rankings for searches made by consumers, including any influence of advertisements on the rankings.[396]

(417) Another regulation is the Commission's "*Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services*."[397] Within the context of the applicable regulation, it is stipulated that transparency is essential for identifying the key parameters that define the "ranking" as regulated under Article 5, as well as the relative significance of these parameters. According to the preamble of this article, the ranking by providers of online search engine services and online intermediation services significantly influences consumers'

[396] https://www.omm.com/resources/alerts-and-publications/alerts/new-regulation-of-digital-platforms-in-japan/

[397] European Commission (2019), "On promoting fairness and transparency for business users of online intermediation services", https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN, Access Date: 14.08.2021.

choices and the commercial success of businesses using these services. Although there is no contractual relationship with corporate website users, online search engine service providers may unilaterally engage in behavior that could be unfair and harmful to the legitimate interests of corporate website users and, indirectly, consumers. To prevent such behavior, according to the relevant article, intermediary platforms and search engines should formulate their ranking parameters in clear and understandable language and ensure they are easily accessible to the public. Furthermore, if there is any direct or indirect charging, it should be clearly stated to what extent and how this may impact the ranking. However, the regulation is not expected to reveal the ranking mechanisms and/or algorithms of the platforms. Online intermediation service providers and online search engine service providers are expected to disclose the key parameters that influence their rankings, striking a delicate balance to prevent algorithm manipulation.[398]

(418) The significance of ranking and its influence on users is even more pronounced on mobile devices, where online shopping, search services, and voice assistants are increasingly utilized as technology advances. In such a structure, platforms, as a type of ranking service provider, will be able to capitalize on the significant impact of ranking by placing more profitable options in prominent positions. If there is enough competition in the markets, well-informed and engaged users may switch to other platforms if they are unhappy with the ranking results of one platform. However, when platforms are not transparent about the criteria they use, this raises skepticism and concerns that rankings could potentially reflect what is in the interest of consumers. It is particularly true when consumers are prone to misperceiving the ranked results as objective recommendations, assuming that the ranking was conducted in an unbiased manner.[399]

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[398] The Commission has published guidelines on ranking transparency (*Guidelines on Ranking Transparency under Regulation (EU) 2019/1150 of the European Parliament and of the Council*) in order to provide further clarity on the regulation regarding the ranking included in its transparency regulation made in 2019. The guidelines aim to provide clarity to online intermediaries and online search engine providers regarding how paid rankings, the main parameters, and the relative importance of these parameters will be determined.https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC1208(01)&from=EN, Access Date: 14.08.2021.

[399] CMA (2021), "Algorithms: How they can reduce competition and harm consumers", p. 21.

(419) Platforms may frequently engage in commercial relationships with other companies that participate on their platform. For example, they may charge businesses a fee to include them in the rankings, or they may receive commissions or a share of the firm's revenues from consumers who find or transact with firms ranked on the platform. Some businesses may offer and/or agree to pay more than other firms in exchange for receiving greater weight in the rankings or for the ranking algorithm to work in their favor, compared to an algorithm that ranks based on factors valued by users. If there is insufficient transparency regarding these and similar practices that will impact the ranking, in other words, if users are unaware that the ranking is influenced by these and similar situations, it may lead to unfair commercial practices for commercial users and deceive end users. In markets where the platform has significant market power and users are less likely to switch to other platforms, the cost of non-transparent ranking is significantly higher for both business users and end users.[400]

(420) A more comprehensive understanding of this issue can be achieved by considering the findings of the CMA[401] and the ACCC's research.[402] These studies examined the prioritization of search results for hotels on various online hotel booking platforms. The CMA's investigation revealed that search results on specific hotel booking websites were influenced by the commission paid by hotels to the site, without disclosure to users. As a result of the investigation, the companies involved committed to transparency regarding these practices. Similarly, the ACCC determined that Trivago's ranking algorithm was structured to favor the site that offered higher payments, while misleading consumers into believing that it provided an impartial, objective, and transparent comparison of hotel prices, thereby violating Australian consumer law.[403]

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[400] Ibid., p. 22.
[401] CMA (2017), "Online hotel booking: CMA launches consumer law investigation into hotel booking sites".
[402] ACCC (2020), "Trivago misled consumers about hotel room rates".
[403] In these instances, modifying ranking algorithms without providing notification to users can be likened to undisclosed payments made by companies for advertising placement. Even when advertisements are disclosed, consumers may not fully comprehend the explanations. For example, in Google Search, users may find it difficult to distinguish between advertisements and organic search results, contending that the advertisements are not clearly identified.

(421) As evident from these explanations, the practices of a platform claiming to rank search query responses based on price, quality, and buyer's demands (using search terms or previous interactions), while prioritizing paid results, present issues that can be tackled within the scope of consumer protection and unfair commercial practices. However, this situation may also pose a competition problem if the company involved has significant market power. This lack of transparency regarding the ranking may potentially have anti-competitive effects. In such instances, the responsibilities of the undertaking with significant market power may go beyond the obligations mandated by unfair commercial practices or consumer protection law.[404] Furthermore, a lack of transparency in the ranking process is likely to raise concerns about self-preferencing. Self-preferencing is discussed in detail in a separate section of this Working Paper. However, it is important to emphasize that transparency in ranking is a competition policy issue, even in the absence of self-preferencing. This is because, as mentioned above, preventing users from making informed choices may disrupt the competitive dynamics in the market.

6.6.2 EU Regulations on Informing Users and Enhancing Transparency

(422) As previously stated, it is essential for market competition to thrive that consumers make informed decisions when selecting and utilizing platforms. To this end, upon a thorough examination of Regulation No. 2019/1150 and the EU's Guidelines on Ranking Transparency issued per the Regulation, it becomes evident that these regulations are designed to provide consumers with information about platform rankings and fundamental contract terms. The specific obligations outlined in the Regulation and Guidelines will be further scrutinized in the subsequent analysis.

(423) The initial and subsequent sections of Article 5 of the Regulation necessitate online intermediation service providers to clearly outline in their terms and conditions the primary factors influencing the ranking and their relative significance compared to other factors, along with the rationale behind these determinations. As articulated in paragraph 18 of the preamble of the

[404] European Commission (2019), "Competition Policy for the Digital Era Final Report", pp. 63-64; CERRE (2020), Digital markets and online platforms: new perspectives on regulation and competition law pp. 25-26.

Regulation, ensuring transparency in the general terms and conditions is essential for fostering sustainable commercial relationships and preventing unfair practices that may disadvantage commercial users. Hence, providers of online intermediation services must ensure that the contract's terms and conditions are readily accessible throughout the commercial relationship, including during the pre-contractual stage for potential commercial users, and that any modifications to these terms and conditions are sustainably communicated to relevant commercial users, with a reasonable notice period of at least 15 days. In cases where modifications to the terms and conditions require commercial users to make technical or commercial adjustments to adapt to the change (such as significant technical modifications to products or services), longer notice periods exceeding 15 days may be offered, as long as they are reasonable about the changes.

(424) Paragraph 3 of Article 5 imposes a clear obligation on providers to disclose information about direct or indirect remuneration, which is an essential factor in determining ranking (paid ranking), and to identify and demonstrate the potential impact of such paid ranking, along with its effects. According to the guidelines, the most effective way to provide the information required in the third paragraph of Article 5 is to complement written disclosures with technological tools, such as simulators demonstrating the impact of remuneration on ranking.

(425) According to the regulations specified in Article 5, paragraph 4, online search engine service providers must offer corporate website users the chance to review third-party notifications that prompt the provider to adjust its ranking algorithm or remove the linked website from its listings.

(426) According to paragraph 5 of Article 5, each provider must offer users a clear explanation of whether, and if so, how and to what extent, the ranking mechanism considers (i) *the characteristics of the goods or services offered through the provider's service; (ii) the relevance of those characteristics to consumers using that service; and (iii) solely as regards providers of online search engines, the design characteristics of the website used by the corporate website users.* As explained in paragraphs 24 and 26 of the preambles to the Regulation, such disclosure by providers is intended to enhance predictability and assist

users in enhancing the presentation of their goods and services or a feature of those goods and services. According to paragraph 27 of the preamble to the Regulation, disclosures must be tailored to the nature, technical capabilities, and needs of the average users of a specific service. Additionally, the nature of different types of services, which may vary significantly from one another, should also be considered to ensure meaningful disclosures for users. In this context, providers should avoid making overly brief statements that could be misleading. For instance, if a provider identifies quality as the primary parameter and understands that defining quality involves a complex analysis of multiple factors, its description should reflect this, even if it is simple and straightforward.

(427) According to Article 5(6), the objective is to achieve this without necessitating the disclosure of algorithms or any information that could reasonably lead to deceiving or harming consumers through the manipulation of search results by the relevant service providers. As stated in paragraph 27 of the preamble to the Regulation, *providers are not required to disclose the detailed functioning of their ranking mechanisms, including algorithms*. The ability of the ranking to act against malicious manipulation should not be impaired. Accordingly, the transparency requirements for ranking outlined in Article 5 have certain limitations. However, these limits are related to potential adverse effects on consumers and do not pertain to the commercial interests of providers.

(428) With regards to the implementation of Article 5, the Guidelines specify that the disclosure of essential ranking parameters will vary between providers of online intermediation services and providers of online search engine services due to differing legal requirements and the distinct nature of the services involved. Furthermore, as acknowledged in paragraph 25 of the preamble to the Regulation, the content, including the quantity and nature of key parameters, may significantly differ even among the online intermediation service providers.

(429) The online intermediation service provider is required to include a description of the auxiliary goods and services offered, as well as an explanation of the conditions under which commercial users can provide their auxiliary goods and services through the online intermediation services, in its terms and conditions, under Article 6 of the Regulation on *Ancillary Goods and Services*. It applies when

additional goods and services, such as financial products, are provided to consumers through online intermediation services by the online intermediation service provider or third parties.

(430) Article 7 regarding *Differentiated Treatment* emphasizes the requirement for providers of online intermediation services to incorporate within their terms and conditions a delineation of any disparate treatment that they offer or may offer to the provider or any commercial user under the provider's control, in comparison to other commercial users, concerning products or services presented to consumers via online intermediation services.

(431) Article 8, titled "*Specific Contractual Terms*," states that, with certain exceptions[405], retroactive changes cannot be imposed on terms and conditions. In addition to specifying the conditions under which the contractual relationship may be terminated, the contract also includes regulations to ensure that the contractual relations between online intermediation service providers and commercial users are conducted in good faith and based on fair trade.

(432) Article 9 on *Access to Data* regulates that online intermediation service providers must include in their terms and conditions a description of the technical and contractual access, or lack of access, of commercial users to any personal data or other data.

(433) Article 10, entitled *"Restrictions to Offer Different Conditions Through Other Means,"* stipulates that online intermediation service providers must disclose the rationale for restricting commercial users from presenting products and services to consumers under differing terms and conditions and through alternative channels while utilizing their services. This information should be readily accessible to the public and included in the providers' terms and conditions.

(434) According to Article 11 of the *Internal Complaint-Handling System*, online intermediation service providers are required to create an internal mechanism for addressing complaints from commercial users.

(435) The Digital Services Draft Act (Draft DSA) released by the Commission, imposes a range of responsibilities on specific groups of businesses, including

[405] With the exception of where they need to comply with a legal or regulational obligation or where retroactive changes are to the advantage of the business users.

intermediary service providers, hosting service providers, online platforms, and very large online platforms, to establish a transparent and secure digital environment. The proposed legislation also aims to enhance transparency in advertising and empower users to opt out of targeted advertisements by declining to create a profile for data protection reasons. Additionally, the draft law is designed to facilitate oversight by authorities and researchers into the display and targeting of advertisements.[406] Within the DMA, the provisions on transparency primarily pertain to the online advertising market and are intended to promote transparency among intermediary businesses involved in the advertising chain, such as advertisers, publishers, and ad techs rather than transparency provided by platforms to their users. Further discussion on the concerns within the online advertising market will be presented in the subsequent section.

(436) In this context, it is understood that the regulations generally pertain to contractual terms. Obligations are imposed to inform users, and these obligations apply to all companies offering online intermediation and search engine services in the market, regardless of their market power, except for those proposed in the DSA.

6.6.3 Transparency Issues in the Online Advertising Market

(437) The intricate nature of the online advertising industry underscores the heightened necessity for transparency within this market. Consequently, the issue of transparency in these markets has been highlighted in numerous national and international reports. It is evident that some of the transparency concerns mentioned pertain to consumers' lack of complete information about advertisements, while others underscore the uncertainty within the advertising chain, a topic that will be further explored in this section.

(438) In the report "*Competition in Digital Advertising Markets*" published by the OECD, which addresses market uncertainty, it is noted that the rapidly expanding digital advertising supply chain lacks transparency, particularly for small

[406] https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL_STU(2021)662913_EN.pdf Access Date: 24.08.2021.

advertisers and publishers, regarding the market players and their activities.[407] The report also highlights the lack of transparency in pricing auctions within advertising exchanges, which may contribute to market uncertainty. Additionally, the report discusses the lack of transparency in understanding the number of rejected bids due to delays in advertisement exchanges and the absence of common standards for measuring advertisement performance, beyond pricing transparency.

(439) According to the digital advertising report released by the JFTC, advertisers emphasized the need for refunds in cases of invalid advertising traffic resulting from ad fraud. On the other hand, publishers expressed concerns about the lack of transparency regarding the timing of the reduction in advertising revenue when ad fraud is detected.[408]

(440) In the section of the report addressing unfair and non-transparent practices, advertising agencies reported that digital platform operators (DPOs) suspended their ad distribution activities without justifying, despite meeting all criteria for ad display. Publishers, on the other hand, expressed that they lacked visibility into the fees received by other entities in the transaction chain until their turn, and estimated that they received less than half of the amount paid by the advertiser. Furthermore, advertisers highlighted discrepancies in the definitions of views in the media and raised concerns about ads being considered views even when placed in areas not visible to users. The report published by the JFTC also raised concerns about transparency related to pricing, stating that publishers are unaware of the full amount of fees paid by advertisers for advertising and that there is a lack of transparency regarding the fees distributed to other intermediary entities.

(441) In the CMA's report on online advertising, it is detailed that the intermediation practices within the online advertising industry rely on a highly intricate bidding system. Advertisers and publishers lack adequate information regarding fundamental aspects such as the mechanics of the bidding process, price

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[407] https://www.oecd.org/daf/competition/competition-in-digital-advertising-markets.htm Access Date: 24.08.2021.

[408] https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html Access Date: 24.08.2021.

determination, advertisement effectiveness, and the involvement of intermediary firms in the bidding process. Consequently, this results in a lack of transparency within the market.[409]

(442) The report highlights that digital advertisements are delivered to users of online search and social media platforms through sophisticated algorithms, posing challenges for market participants in comprehending the decision-making process, resisting the influence of these advertisements, and exercising their choices effectively. Furthermore, the report points out that over 90 percent of advertisers on Facebook utilize a default automatic bidding feature, which restricts their ability to set a maximum bid. Additionally, it underscores that advertisers lack transparency in pricing formation and have limited bargaining power in advertising agreements.

(443) The report underscores the importance of the proposed principles and regulations for businesses holding strategic market status (SMS) in achieving three primary goals: promoting fair and honest trade, fostering open choices, and enhancing trust and transparency. The trust and transparency objective can be achieved by ensuring that undertakings with a strategic market position provide adequate information to all users, including commercial and end-users.

(444) The French Competition Authority (Autorité de la Concurrence - Autorité) published a report on online advertising highlighting issues of transparency in advertising campaigns and unfair income distribution. The report revealed that many players in the online advertising market, excluding major players like Google and Facebook, view the lack of transparency as a significant problem. It also noted that technical intermediaries generate the majority of revenue in the online advertising market, leading to an unfair distribution of income that disadvantages publishers (content owners). Additionally, the report identified ad click bots and ad stacking as the most prevalent fraudulent methods in the online advertising market.[410]

[409] https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf, Access Date: 24.08.2021.
[410] https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2019-10/avis18a03_en_.pdf, Access Date: 24.08.2021.

(445) In the report published by the ACCC on digital platforms, concerns were raised about the lack of transparency in the operation and pricing of ad tech and advertising agency services. Specifically, the report highlighted the need to address the issue of how much of the advertising expenditure is retained by ad tech companies and how much is distributed to publishers. Furthermore, the report addressed concerns regarding whether advertisers and publishers have adequate information about the operation of the supply chain to make informed decisions about which suppliers to use. It also discussed how transparency and competition can be promoted in the supply of advertising technology services while safeguarding consumer privacy.[411] In the recommendations section of the report, it was suggested that regulations could be implemented to enhance the transparency of the supply chain.

(446) In the report titled "Competition Conditions in the Online Advertising Sector in Spain" published by the National Commission of Markets and Competition (CNMC), it is mentioned that there are asymmetric information problems that disrupt market power in favor of platforms and intermediaries, hindering other actors in the market from making the most suitable decisions.[412] Furthermore, it is stated that advertisers and advertising agencies are not informed about how their payments are distributed between publishers and intermediaries. Furthermore, it is worth noting that publishers also lack sufficient information about advertisers' willingness to make payments. It is important to note that the absence of transparent processes for advertisers/advertising agencies and publishers to make informed decisions when selecting their intermediaries creates a market environment that favors vertically integrated service providers.

(447) In the study titled "*Online Advertising*," which is part of the research on "*Competition and Consumer Protection in the Digital Economy*" by the Federal Cartel Office, it is stated that other stakeholders in the industry refer to online platforms managed by Google and Facebook as closed platforms (walled gardens) that impose user restrictions and prevent users from gaining in-depth knowledge

[411] https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, Access Date: 24.08.2021.
[412] https://www.cnmc.es/sites/default/files/3626361_10.pdf, Access Date:25.08.2021.

about advertising platforms.[413] The lack of transparency is identified as an essential anti-competitive concern in the industry. The study also emphasizes the importance of giving advertisers greater transparency and control over the placement of their ads on third-party websites.

(448) The study published by the European Parliament on the regulation of targeted and behavioral advertising in digital services predominantly addresses consumer-related concerns. Visual advertising presents visual content to users through text, logos, animations, videos, photos, or other graphics. Certain types of visual advertising, such as pop-ups, info bars, banner ads, and video ads, can disrupt the user experience. In particular, it is noted that certain types of visual advertising may lead to transparency issues because they involve adding, altering, hiding, or modifying content on a page or application. Examples of advertisements that have been mentioned as causing transparency issues include *native advertising, inline ads, and info bars.*[414]

(449) In this context, it is believed that measures to enhance transparency in informing consumers about advertisements may involve adopting regulations akin to those discussed in the preceding section. It is recognized that a range of regulations could be put in place to tackle transparency concerns within the supply chain. The regulations outlined in the DMA primarily aim to address the deficiency of transparency in the market, rather than placing consumer protection at the forefront. These regulations have been introduced to specifically address this issue.

(450) In light of the aforementioned explanations, it is evident that ensuring transparency for advertisers, publishers, and intermediaries in the advertising market regarding performance measurement criteria, access to necessary information for performance measurement, and fees paid is crucial for the effective operation of the market and the enhancement of consumer welfare. Hence, it is imperative to elucidate the extent of the transparency issue for stakeholders involved in the online advertising market in Türkiye. If, upon

[413] https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_III.pdf?__blob=publicationFile&v=5, Access Date: 24.08.2021.
[414] https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/694680/IPOL_STU(2021)694680_EN.pdf, Access Date: 24.08.2021.

evaluation, it is found that there is a lack of clarity that hinders competition in the market, it is deemed that regulations akin to those outlined in the DMA may be implemented in Türkiye.

6.6.4 Recommendations for Türkiye

(451) In accordance with the aforementioned concerns, it is recognized that transparency, essential for the efficient operation of digital markets, is primarily addressed through three distinct approaches. The initial approach involves providing consumers with information regarding the terms and conditions, ranking criteria of the service they are receiving, and the advertisements they encounter during the provision of this service. Regulations aimed at achieving this objective are anticipated to be applicable to all businesses in the market in the form of a code of conduct. Consequently, it is deemed that these regulations can also be overseen by the pertinent public authorities in Türkiye.

(452) Furthermore, it is believed that the concept of "ranking" presents a competitive issue that could be addressed within the context of self-preferencing toward the business, particularly if the undertaking in question holds substantial market power. Appropriate regulations may be implemented to address this concern.

(453) Ultimately, concerning the online advertising industry, there is a consensus that regulations targeting transparency issues about pricing and performance measurement criteria stemming from the platforms utilized by advertisers, publishers, and intermediary businesses in the supply chain, as well as efforts to enhance transparency, could be put into effect.

6.7 Issues Related to Mergers and Acquisitions Operations

(454) The challenges associated with digital markets in ascertaining market dominance and evaluating competitive conditions complicate the assessment of merger and acquisition transactions. Additionally, the data-centric nature of digital markets and the feedback loop generated by data have made merger and acquisition transactions a prominent area of concern in competition law practice.[415]

[415] OECD, Big Data: Bringing Competition Policy to The Digital Era, pp. 14-24.

(455) The activities of the key platforms serving as gatekeepers in digital markets, along with their presence in related markets, also amplify the market power of these players, making it challenging to delineate the market with interconnected services. Markets are now being defined not in terms of individual services, but as "ecosystems" consisting of interconnected services. Therefore, conventional harm theories and merger and acquisition assessments may be insufficient for gauging the potential impact on innovation or consumer welfare that could result from the transaction.

(456) These ecosystems are largely sustained by the process of mergers and acquisitions. According to the Furman Report, over the past decade, major tech companies including Google, Apple, Facebook, Amazon, and Microsoft, collectively known as GAFAM, have completed around 400 acquisitions. Additionally, these companies have invested approximately 31.6 billion USD in acquiring startups.[416] While specific details of these transactions, such as the nature of the acquired business, the markets it operates in, the transaction price, and the transaction date, are not publicly available, a synthesis of information from various reports has led to the following conclusions.[417]

- Google has completed a total of 256 acquisition deals in the areas of cloud computing, online advertising, artificial intelligence, video, analytics, software, and hardware between 2001 and 2020.
- Facebook has completed 86 acquisition deals in the areas of virtual reality, artificial intelligence, video, messaging, social networking, photo sharing, software, and advertising from 2007 to 2020.
- Apple has made 120 acquisition deals in the fields of software, artificial intelligence, photo/visual recognition, music, advertising, social media, and information technology between 1988 and 2020.

[416] Economist Report, 2017.
[417] Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report, 9 May 2019, pp. 142-148. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf Access Date: 17.08.2021. Subcommittee on Antitrust, Commercial and Administrative Law of The Committee on The Judiciary, Investigation of Competition in Digital Markets, 2020, pp. 406-450. https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, Access Date: 17.08.2021.

- Amazon has completed a total of 104 acquisition deals in various sectors including advertising, cloud computing, e-commerce, artificial intelligence, software, social media, books, and publishing from 1998 to 2020.

(457) Recent concerns have been raised regarding the oversight of merger and acquisition activities in digital markets worldwide. Specifically, there is apprehension that transactions involving the acquisition of start-ups by major platforms may not be subject to notification requirements and thus evade scrutiny by competition authorities. Start-up companies typically do not initially command significant market share or generate substantial turnover. However, their potential to become influential market players due to innovation, expertise, or user value is recognized. It is noted that only a small fraction of the numerous transactions conducted by large digital platforms in recent years have undergone scrutiny by competition authorities, with many falling below notification thresholds. The Federal Trade Commission (FTC) has recently called for notification of all acquisitions made by five major companies over the past decade.[418] Consequently, there is growing discussion among national authorities about the need to explore alternative approaches beyond turnover-based thresholds and to develop sector-specific merger and acquisition review regulations tailored to digital markets.

(458) Hence, it is feasible to classify the objections commonly voiced by competition law professionals regarding consolidation transactions conducted by dominant businesses in digital markets into two primary categories. The initial set of objections pertains to the argument that the transactions made by the aforementioned businesses either fall below the thresholds specified for consolidation oversight in the legislation of most nations or fail to meet the requisite criteria for review. The second set of objections revolves around the contention that, despite the fact that acquisition transactions conducted by dominant businesses are subject to notification to at least one competent competition authority, the pertinent transaction is approved. In essence, this implies that the market power, barriers to entry, or potential anticompetitive

418 https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies, Access Date: 01.09.2021.

effects that may arise post-transaction are disregarded, or that the assessments conducted from a conventional standpoint are inadequate in anticipating potential competition concerns in this market.

(459) Insufficient ex-ante supervision of concentration transactions further solidifies the market position of undertakings that were dominant in digital markets before the transaction in question. After the acquisition, competition authorities commonly face challenges in detecting violations of competition law, particularly regarding privacy, data collection, and processing policies. Finding appropriate legal measures to address these issues is also a common challenge. Once the resources gained from a merger/acquisition are obtained, it becomes significantly more difficult to reverse the benefits or market power gained from it. For instance, once data obtained through an acquisition is in possession, digital platforms have extensive control over its use.[419] Therefore, it is crucial to ensure that acquisitions subject to competition law supervision are reported to the relevant authority and to conduct evaluations of transactions that consider the unique characteristics of digital markets. Further detailed explanations on this topic are provided below.

6.7.1 Assessment of Notification Thresholds

(460) As mentioned earlier, prominent entities in digital markets attribute their ecosystem to the mergers and acquisitions they have undertaken. One rationale for their preference to acquire newly established companies is to avoid scrutiny by competition authorities, as these transactions often fall below the notification thresholds.

(461) In this particular scenario, a notable transaction occurred among prominent entities in the digital market, which did not trigger the notification requirement as it fell below the turnover thresholds. This transaction involved the acquisition of *Facebook/WhatsApp*. The acquisition of WhatsApp did not meet the turnover criteria for notification in Türkiye, and it also did not exceed the turnover thresholds set by the EU Commission. However, it was subject to examination

[419] ACCC, Digital Platforms Inquiry, Final Report, June 2019, p. 23.

due to meeting the market share threshold in three EU member states (Portugal, Spain, and the United Kingdom), where notification was required.[420]

(462) The report[421] published by the *Centre on Regulation in Europe* (CERRE) emphasizes the need for additional criteria to complement turnover thresholds in this sector, such as transaction value, market share, and the identity of the transaction party (mandating notification of all acquisition transactions by specific parties). However, it is stated that the chosen method should be determined considering the cost/benefit analysis, and the identified threshold should only bring before competition authorities the transactions with the highest likelihood of restricting competition.

(463) In order to prevent the avoidance of competition law scrutiny for acquisition transactions that have significant effects on the market, many countries have incorporated alternative thresholds into their relevant legislation or shared their proposals with the public through amendments. It is understood that alternative thresholds are primarily categorized into four groups: transaction value, market share, sectoral thresholds, and sequential interventions. However, in practice, it is observed that transaction value and sectoral threshold alternatives are more widely adopted. The market share threshold is inadequate for capturing the acquisitions of start-ups, and sequential interventions are not preferred due to the challenges of reversing the effects already present in the market as a result of the transaction. Transaction value and sectoral thresholds are further explained below.

6.7.1.1 Alternative Additional Thresholds Applied in Digital Markets - Transaction Value

(464) In 2017, Austria and Germany implemented a transaction value threshold for merger and acquisition transactions, aiming to encompass transactions beyond turnover, including those in digital markets. However, the implementation of this threshold has been met with criticism. To address uncertainties and provide

[420] CaseCOMP/M.7217-Facebook/WhatsApp, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf, Access Date: 01.09.2021.
[421] Bourreau, M ve A. de Streel, "Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control", ISSUE PAPER February 2020, https://cerre.eu/publications/big-tech-acquisitions-competition-and-innovation-effects-eu-merger-control/, Access Date: 24.09.2021.

clarity to businesses, the two countries have jointly issued a guideline regarding the threshold. [422] The anticipated three-year evaluation reports on the threshold's implementation have not yet been released. France, Sweden, and the UK are observing the practices of Germany and Austria before deciding on their own implementation of the threshold. The Crémer Report, published by the Commission, suggests that the turnover thresholds currently in use may not be suitable for transactions in digital markets. It is recommended to monitor developments as transaction value-based thresholds are not yet sufficiently developed for inclusion in merger control.[423] The primary concerns regarding the transaction value threshold are the calculation of the value and potential additional costs for monitoring reported transaction values. Additionally, if the threshold is not industry-specific, there is a risk that international transactions exceeding a certain value, but not raising competition concerns, would still need to be reported to the Authority.

6.7.1.2 Alternative Thresholds Applied in Digital Markets-Reporting of All Transactions of Identified Undertakings in the Market

(465) However, as an alternative approach, it is possible to require notification for all transactions conducted by firms holding significant market power in digital markets. The initial suggestion in this direction was presented in the Furman Report by the UK, which recommended that all transactions *by companies with strategic market status*[424] should be reported to the CMA.[425] This "notification" is considered a flexible model that would allow the authority to monitor all transactions and examine those deemed necessary without constituting a formal notification or triggering an automatic review. This model ensures that the authority is informed about every acquisition made by these companies and promptly determines which acquisitions necessitate thorough scrutiny. A similar proposal is also outlined in the Stigler Report, which specifies that all acquisitions of any magnitude by companies with bottleneck power should be

[422] https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2 Access Date: 03.01.2021.
[423] EU Commission, Competition Policy for The Digital Era, 2019, pp. 113-115.
[424] Companies possessing strategic market power are those capable of regulating market entry and exerting influence on market dynamics. Ibid., p. 55.
[425] Ibid., p. 95.

reported for prior authorization. In the report, "*bottleneck power*" is defined as a scenario where consumers exclusively use a single service provider, depend on a single service provider, and make it prohibitively expensive for other service providers to offer access to the relevant activity.

(466) The CMA has also taken a similar approach to the aforementioned reports in its advisory report dated December 2020.[426] The authority has proposed assessing the strategic market status of undertakings and requiring these undertakings to notify all merger and acquisition transactions. This assessment relies on a test that considers whether the undertaking has significant and entrenched market power in a specific digital activity, providing the undertaking with a strategic position. The report suggests creating a separate regulatory framework for companies with substantial market power in the SMS sector, imposing additional merger and acquisition regulations on them. Accordingly, it is important to consider the strong market positions of these undertakings and the potential risks associated with the transaction in the context of merger and acquisition deals. Furthermore, it is noted that the current turnover and market share tests used by the CMA to assess merger and acquisition transactions for potential competitive harms could present challenges. Furthermore, it is noted that the voluntary nature of the merger and acquisition system in the UK poses specific risks for transactions involving companies with strategic market positions.

(467) The report recommends that all business transactions having SMS be reported under a specialized merger and acquisition framework. The report suggests that the preferred approach is to assess the transaction based on its material value. Additionally, it proposes that competitive issues should be assessed within the framework of the existing SLC test, but with a lower and more cautious burden of proof. In cases where non-competitive concerns arise in mergers and acquisitions, the report also advises involving other regulatory agencies and cooperation mechanisms in the interest of public welfare.

[426] A new pro-competition regime for digital markets Advice of the Digital Markets Taskforce, 2020.https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf

(468) As previously mentioned, companies classified as gatekeepers under the DMA are required to notify the Commission of their planned and completed mergers and acquisitions in digital markets, irrespective of the notification thresholds at the EU and national levels.[427] The relevant article is outlined as follows.

> *"A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004, where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules. A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest."*

(469) As per Article 30 of the applicable legislation, failure to submit this notification may result in a penalty of up to 1% of the overall turnover.

> *"…3. The Commission may adopt a decision, imposing on undertakings, including gatekeepers where applicable, and associations of undertakings, fines not exceeding 1 % of their total worldwide turnover in the preceding financial year where they intentionally or negligently:*
> *(f) fail to supply incorrect, incomplete, or misleading information or explanations that are requested pursuant to Article 21…"*

(470) The guidance issued by China's State Administration for Market Regulation (SAMR) regarding the platform economy outlines that the determination of revenue in the digital economy may differ based on the business model of a platform. Additionally, it underscores the need for scrutiny of transactions that, while not meeting China's merger thresholds, could potentially impact competition adversely. The document highlights that agreements within the platform economy falling below the thresholds may have anticompetitive effects if one of the involved parties is a nascent or evolving platform, if their revenue is

[427] DMA, art. 14.

limited due to a free or low-cost model, or if the pertinent market is highly concentrated.

(471) On 07.05.2021, South Africa released the Draft Guidelines concerning the Notification of Small Merger Transactions. In South Africa's merger control system, the thresholds for mergers are established based on the turnover and assets of businesses operating within specific industries. While mandatory notification is required for large and medium-sized transactions, there is no such obligation for small transactions that fall below the specified thresholds. Nevertheless, the Competition Commission holds the authority to impose a notification requirement for small-scale transactions under the competition law. The draft guidelines also highlight concerns regarding the growing trend of digital players acquiring new and innovative companies, and how these transactions by market gatekeepers have a negative impact on innovation in the market. The draft underscores the potential for transactions that could raise anti-competitive concerns to evade competition scrutiny. Additionally, the Competition Commission shall be motified if either the acquiring or acquired entities are involved in digital markets, the acquisition's value exceeds 190 million rand (equivalent to approximately $13 million), the acquisition's value is below 190 million rand, but the buyer appraises the target company at that amount (e.g., due to access to commercially sensitive information post-transaction), and if at least one of the parties involved in the transaction holds a market share of 35% or more in digital markets or the post-transaction structure gains dominance in the market.

6.7.2 Factors to Consider in Assessing Mergers and Acquisitions Activities

(472) In terms of acquisition transactions in digital markets, another concern is actually the unpredictability of the development of markets due to the creation of competition constraints as a result of the transaction. Similarly, in this context, excessive confidence in the ability of innovative ventures to displace established ventures in these markets is allowed. In the assessments leading to these decisions, it is considered that the two-sided nature of platform markets, the fact that market shares may not fully reflect the market power of undertakings, the fact that undertakings derive their power from their

ecosystems consisting of their affiliates in related or unrelated markets, the tendency of markets to tipping, the importance of data ownership and the power it provides for undertakings, and the power of platforms in the advertising market are not fully reflected. Hence, another point of discussion in the scholarly discourse on mergers and acquisitions in digital markets pertains to establishing assessment criteria for this matter.

(473) In this framework, it is essential to first examine the assumptions regarding the dynamic structure of markets. While innovation remains crucial in digital markets, the probability of a small innovative undertaking displacing an established incumbent has decreased. Therefore, it would not be appropriate to claim that the market readily benefits from dynamic competition relating to transactions in these markets. For example, *Sokol* and *Comerford*[428] highlight the prevalence of examples in the digital economy, such as Slack, Facebook, Snapchat, and Tinder, where small insights into user needs have facilitated market entry and rapid growth despite established network effects. However, it is challenging to argue that innovative companies capable of displacing giants like Google and Apple can simply emerge today. In fact, the concept of big data is relatively new compared to past successful market entry stories. In the current situation, where technological developments and business models based on deep learning are prevalent, it is increasingly challenging for undertakings to develop disruptive innovations competing with established businesses.[429] Therefore, particularly in the context of mergers and acquisitions by established undertakings, it is essential to consider that each new element added to the firm's capabilities will pose challenges for competitors seeking to compete with the undertaking in the future.

(474) Furthermore, it is crucial to define relevant markets accurately and assess the power of undertakings in those markets correctly. This presents challenges for all competition law enforcement in digital markets. In fact, in some cases, even though these undertakings may not have a significant presence in the markets identified as relevant at that stage, they may actually have a stronger position in

[428] Sokol, D. and R. Comerford (Forthcoming - 2016), "Does Antitrust Have a Role to Play in Regulating Big Data?", in *Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Cambridge University Press, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723693.
[429] OECD (2016), Big Data: Bringing Competition Policy to The Digital Era, p. 22.

the market than expected due to their ecosystems and data sets. As a result, market shares calculated based on the number or quantity of sales may lead to misleading analysis for undertakings in digital economies. In this context, the number of users, the number of visits, the ecosystems and particularly, the scope and size of the data owned become significant parameters for measuring market power.

(475) Besides, a crucial factor to consider when establishing evaluation criteria is the significance of data ownership and utilization in digital markets. The increasing importance of data in these markets has sparked discussions about whether the data outlined in the preceding sections should be deemed a *"compulsory component."* In markets reliant on data feedback loops for success and survival, data is often likened to the "new oil."[430]

(476) As a matter of fact, in the "*"Investigation of Competition in Digital Markets*" report [431] prepared by the US Antitrust Subcommittee addresses the consideration of data power in mergers and acquisitions. It states that mergers and acquisitions by dominant platforms must serve the public interest. Unless it is demonstrated that similar benefits cannot be attained through internal growth and expansion, it is advisable to assume that the transaction is anticompetitive. The regulatory recommendations of the report include *per se* prohibiting future mergers and acquisitions by dominant platforms, establishing interoperability and data portability to enable dominant platforms to integrate their services with various networks, and make their content and information easily transferable for new market players. The report lists data as one of the barriers to entry, noting that accessing and owning data is costly for new market entrants.

(477) The Stigler Report recommends implementing more stringent merger and acquisition regulations to reduce the influence of data. It also suggests empowering the FTC to oversee data access and developing frameworks for various data access scenarios. According to the report, as platforms gain more

[430] The Economist (2017), *Regulating the internet giants: The world's most valuable resource is no longer oil, but data*, https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.
[431] https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

control over data, they are able to offer better services to users. The report also mentions that players with extensive data sets can increase their advertising revenue by targeting ads, using this revenue to dominate other markets, taking measures to maintain their current position, and suppressing new players.

(478) Japan has recently updated its guidelines for evaluating digital market acquisitions, outlining specific criteria to be considered. The revised guide emphasizes the importance of defining the market based on the user base brought together by intermediary platforms in platform economies. It also highlights the significance of considering the geographical market scope in which users can benefit from services offered by online providers. The updated version places particular emphasis on analyzing variables such as data, even if the merger does not significantly hinder competition in a specific trade area. Additionally, the guide now includes monitoring of research and development activities conducted by the involved parties. It also recognizes the potential for increased competition restrictions in markets with single-homing compared to those with multi-homing following a merger. The JFTC will examine transactions, considering direct and indirect network effects. Furthermore, in data-driven markets, analyses will be conducted to inquire about the types of user data collected, the frequency of collection, and the purposes for which it is used by the transaction parties.[432]

(479) In this framework, it is possible to state that the consideration of data-related concerns or violations under competition law constitutes a relatively new area of debate in terms of which theory of harm applies. As mentioned earlier, data can be approached in two different ways in the context of competition law practice: (i) as a quality element along with data confidentiality, and (ii) as a critical input for competition. This leads to a dual theory of harm in acquisition transactions involving data mergers: (i) the loss of consumer welfare caused by the reduction in data privacy following the transaction, and (ii) the welfare losses due to market closure and/or the difficulty for competitors to operate with the resulting data power.[433] While it seems theoretically plausible to consider both welfare losses in the analysis, it is argued that including privacy in the analysis of a

[432] https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf
[433] OECD (2020), Consumer Data Rights and Competition, p. 25.

concentration transaction may pose two difficulties. The first is to measure the decrease in the quality of data protection as a result of a concentration transaction in a meaningful manner. The second challenge is the difficulty of evaluating the functioning of consumer decision-making processes in data-driven markets.[434] Incorporating privacy considerations into the assessment of acquisitions requires recognizing privacy as a valued attribute by consumers. It is emphasized that competition authorities have not authorized any acquisition solely on the basis of privacy concerns.[435] However, there is a growing recognition of the significance of privacy issues within the realm of competition law.[436]

(480) *Ben Holles de Peyer*[437] outlined three conditions that competition authorities should consider when evaluating confidentiality in merger cases: (i) confidentiality should be a non-price factor of competition supported by qualitative and quantitative evidence, (ii) any potential reduction in confidentiality protection should stem from alterations in the competitive process or structural conditions arising from the merger, and (iii) the harm or impairment should specifically pertain to confidentiality as a competitive factor.

(481) On the contrary, when data is considered as an input, it becomes apparent that data related concerns are often influenced by exclusionary and exploitative theories of harm resulting from the power wielded by the dataset. These theories of harm are also crucial for assessing the potential impacts of mergers and acquisitions in markets. The OECD has indicated that limitations on interoperability can be analyzed within the frameworks of harm such as refusal to supply, bundling, exclusionary practices, or exploitative practices. It also noted that constraints on data portability can be examined under the categories of price squeezing, bundling, refusal to supply, and exploitative practices as theories of harm. The OECD also highlighted that acquisitions of digital platforms may give rise to practices that align with these theories of harm.

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[434] Lynsky, O (2018), Non-price Effects of Mergers, https://www.oecd.org/officialdocuments/public_displaydocumentpdf/?cote=DAF/COMP/WD(2018)70&docLanguage=En Access Date: 23.08.2021.
[435] OECD (2020), Consumer Data Rights and Competition, p. 26.
[436] OECD (2016), Big Data: Bringing Competition Policy to The Digital Era, pp. 18-19.
[437] Ben, Holles de Peyer, (2018)*EU Merger Control and Big Data*, Journal of Competition Law, and Economics.

6.7.3 Decisions Regarding Mergers and Acquisitions in Digital Markets

(482) In the 2008 acquisition of Google/DoubleClick, both the Commission and the FTC determined that privacy issues were not significant enough to prevent the transaction. The commission approved the acquisition on the condition that the new company would comply with fundamental data protection and privacy regulations. Ezrachi and Robertson argue that the benefits arising from the data merger were undervalued in this transaction. [438] Similarly, in the TomTom/TeleAtlas acquisition and its aftermath, the Commission appeared to use data protection laws to address concerns about the potential reduction in privacy resulting from the merging of user data.[439] A similar approach was taken in the Microsoft/LinkedIn decision, where the Commission stated that privacy concerns do not fall within the scope of competition law, but may be considered if consumers perceive privacy as a significant factor in quality and if the merging parties compete with each other in this area.

(483) In the *Facebook/WhatsApp* decision, the most well-known acquisition in digital markets, the issue of data portability was addressed. However, it has been acknowledged that there are no concerns regarding data portability because it is easy to keep the communicated individuals confidential, and the conversation history does not hold long-term value for the users. Nevertheless, the decision in question has been criticized in many circles for data aggregation, privacy concerns, and for not considering WhatsApp's maverick unique position.[440] As highlighted in the update announced by WhatsApp in January 2021, another concern related to the acquisition in question is the use of user data acquired from one service in the provision of other services, especially in the online advertising market. The integration and utilization of data from diverse sources across various services can provide businesses with a competitive edge in both direct service markets and online advertising markets. This allows them to monetize their services in ways that their competitors currently do not have and are unlikely to have in the near future. Concerns about data transfer have led to

[438] Ezrachi, A. and V. Robertson (2019), "Competition, Market Power and Third-Party Tracking", *World Competition*, Vol. 42/1, pp. 5-20, https://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2019002, p. 11.
[439] Please refer to the link, OECD (2020), Consumer Data Rights and Competition, p. 27.
[440] Ibid.,

the conditional approval of the same process in the US. Each company is required to maintain its privacy regulations and processes, obtain explicit consent from users for data transfers between companies or for changes in privacy principles, and refrain from transferring data between parties without obtaining explicit consent.[441] Additionally, users should be given the right to refuse acceptance of any changes in the rules governing the collection, use, and sharing of data on WhatsApp.[442] In June, the Commission began investigating whether Facebook's data is being used in the advertising market to benefit other Facebook products.[443] Similarly, the CMA is investigating whether Facebook is abusing its dominant position by using its data policy in the advertising and social media market.[444] Based on all this information, it is understood that the excessive collection of data, the aggregation of data from various sources, and the utilization of data in diverse markets, particularly in advertising, also raise concerns about anti-competitive behavior and are primarily addressed under the *leveraging* theory.

(484) In the present scenario, it is also possible to assert that privacy concerns, as well as barriers to entry resulting from data aggregation or challenges in competitor activities, are more prevalent in acquisition evaluations. In the *Apple/Shazam* acquisition, the Commission highlighted the growing significance of user data in the music industry. However, it stated that this concern would not hinder market entry, as there were numerous players operating in the industry. Another example of evaluating data-driven barriers to entry is the decision made by the US DoJ regarding the *Bazaarvoice/Power-Reviews* acquisition. The DoJ's refusal to authorize the transaction was based on its assessment that the transaction would create barriers to entry by potentially monopolizing data in the market for review and rating platforms. The acquisition of PowerReviews Inc. by Bazaarvoice Inc. was deemed illegal, and an application was filed for the acquisition of

[441] Nevertheless, Facebook breached the condition of "no data transfer between the parties" outlined in the conditional approval from the FTC. As a result, the FTC imposed a $5 billion fine in 2019 for failing to meet its responsibilities regarding user privacy and security, in violation of section 5 of the Federal Trade Commission Act. https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions
[442] https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf
[443] https://ec.europa.eu/competition/antitrust/cases/dec_docs/40684/40684_1812_3.pdf
[444] https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data

PowerReviews Inc.[445] The grounds for the compulsory sale of the acquired undertaking are that both Bazaarvoice and PowerReviews operate in the online product *rating* and *review* (*R&R*) platform services field, and there are no significant competitors in this market as a result of the transaction. This decision indicates that in zero-price markets, it would be more appropriate to calculate market power based on a share calculation derived from data checks, rather than market shares calculated based on sales figures or similar traditional methods.[446]

(485) The CMA has stated that Facebook's acquisition of Giphy, a platform for sharing GIFs, could potentially harm competition and innovation in the social networking and online advertising sectors.[447] Facebook's integration of Giphy into Instagram and its efforts to block competitors like TikTok and Snapchat from accessing Giphy, a service they already use, raise concerns about Facebook's economic integrity.[448] These actions may lead to the removal of Giphy from Facebook and its forced sale. When analyzing decisions on mergers and acquisitions, it is evident that greater emphasis has been placed on the potential decline in privacy and the access barriers to data that may arise after the transaction. Theories of data portability and interoperability-induced harm are also considered in acquisition decisions. The theories of data portability and

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[445] https://www.justice.gov/opa/pr/justice-department-and-bazaarvoice-inc-agree-remedy-address-bazaarvoice-s-illegal-acquisition Access Date: 16.08.2021. https://venturebeat.com/2014/02/21/the-doj-wants-to-squash-reviews-network-bazaarvoice-and-the-company-has-it-coming/ Access Date: 16.08.2021. https://www.digitalcommerce360.com/2014/04/08/bazaarvoice-gives-its-merger-powerreviews/ Access Date: 16.08.2021. https://globalcompetitionreview.com/guide/the-obama-trials/the-obama-trials/article/reflections-us-v-bazaarvoice Access Date: 16.08.2021.https://www.wsj.com/articles/SB10001424052702304347904579311382642456104 Access Date: 16.08.2021. https://www.lexology.com/library/detail.aspx?g=1f3c7513-ca1d-4b78-ab9c-1af8f7ca7347 Access Date: 16.08.2021.

[446] OECD (2016), Big Data: Bringing Competition Policy to The Digital Era, p. 17.

[447] https://www.gov.uk/government/news/facebook-s-takeover-of-giphy-raises-competition-concerns Access Date: 16.08.2021. https://globalcompetitionreview.com/digital-markets/cma-looks-reverse-facebookgiphy-deal Access Date: 17.08.2021. https://www.reuters.com/technology/facebook-may-have-sell-giphy-britains-competition-concerns-2021-08-12/ Access Date: 16.08.2021. https://www.cnbc.com/2021/08/12/facebooks-takeover-of-giphy-raises-competition-concerns-says-cma.html Access Date: 16.08.2021. https://www.competitionpolicyinternational.com/uk-regulator-says-facebooks-giphy-deal-raises-competition-concerns/ Access Date: 16.08.2021.

[448] https://www.theguardian.com/technology/2021/aug/12/facebook-could-be-forced-by-uk-watchdog-to-sell-gif-creator-giphy Access Date: 17.08.2021. https://www.forbes.com/sites/iainmartin/2021/08/12/facebook-could-be-forced-to-sell-giphy-over-uk-antitrust-ruling/ Access Date: 17.08.2021. https://www.lesechos.fr/tech-medias/hightech/londres-pourrait-forcer-facebook-a-revendre-giphy-1338517 Access Date: 17.08.2021.

interoperability-based harm were considered in the decisions regarding the *Google/Fitbit*, *Daimler*, and *BMW* car sharing, *Microsoft/LinkedIn*, and *Facebook/WhatsApp* acquisitions. In the *Google/Fitbit* acquisition, Google committed to maintaining the use of the Fitbit API, which allows users to access their data from various software applications, promoting interoperability.[449] During the re-evaluation of the joint venture between Daimler and BMW, which enabled users to rent a car through an app and then park it in designated areas, it was mentioned that the joint venture might leverage its influence in the car-sharing market to exclude competitors that provide *multi-modal transport aggregation* services by restricting interoperability. The commitment to provide non-discriminatory access to the API for companies offering multi-modal transportation aggregation services through a joint venture, if there is demand, has been approved.[450] In the acquisition of *LinkedIn by Microsoft*, the Commission raised concerns that Microsoft might have the ability to prevent LinkedIn's competitors from accessing the market by integrating LinkedIn into the Windows operating system or Microsoft's productivity applications.[451] As part of the deal, commitments were made to not initially integrate LinkedIn into the operating system and to provide access to the Outlook calendar API to competing professional social networks on fair terms.

(486) An illustration of assessing the improvements in transaction effectiveness can be seen in the *Microsoft/Yahoo* decision. The decision highlighted that the parties would be able to merge, process, and utilize their databases to improve the accuracy of their algorithms, ultimately delivering enhanced search results to customers.[452] As a result, this would expand the company's user base and data processing capabilities, thereby strengthening its position in the relevant market. Nevertheless, the Commission determined that the merger was pro-

[449] Case M.9660 https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf Access Date: 01.09.2021.
[450] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6321 Access Date: 01.09.2021.
[451] Case M.8124 https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf Access Date: 01.09.2021.
[452] Case COMP/M.5727 (18.02.2010) https://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_26120_2_EN.pdf Access Date: 01.09.2021.

competitive because it was believed to enhance the ability of the transaction parties to compete more effectively with Google.[453]

6.7.4 Recommendations for Türkiye

(487) Based on the aforementioned explanations, it is evident that a comprehensive analysis process is essential for merger and acquisition transactions in data-driven economies. It is apparent that potential challenges arising in the market due to data aggregation or restrictions on data portability can be effectively and thoroughly addressed by taking these impacts into consideration in merger and acquisition transactions. This is because once this data is acquired, digital platforms have significant control over its utilization.[454] Therefore, it is crucial to factor in data-related concerns in merger and acquisition transactions, including market dominance, barriers to entry, and potential violations of competition laws. In these evaluations, the value of the data held by businesses in the relevant market should be disclosed.

(488) In the realm of competition law, the literature acknowledges that data can be viewed in two distinct ways. Firstly, privacy is recognized as a component of quality and a competitive factor.[455] Consequently, practices that compromise privacy in the collection and utilization of data may be perceived as a deterioration of service quality and a detriment to consumer well-being. Secondly, data is increasingly regarded as an input, a concept that is gaining traction in scholarly discourse. In this context, concerns such as excessive data collection, extensive data usage, and data integration can be analyzed within the framework of harm theories, such as the expansion of market power, the creation of entry barriers, or the entrenchment of consumers within a platform.

(489) In light of these evaluations, it is essential to ensure that transactions in digital markets are reported to the Authority to prevent behaviors that restrict competition from the outset. Therefore, alternative thresholds are needed to

[453] Nevertheless, it is challenging to assert that the benefits derived solely from the activity under consideration are the sole determining factor in facilitating the aforementioned transaction. Furthermore, the assessment has also factored in the parties' low market shares, their declining market share, and the impact of the transaction on advertisers and publishers.
[454] ACCC, Digital Platforms Inquiry, Final Report, June 2019, p. 23.
[455] OECD, Consumer Data Rights and Competition, 2020, pp. 5-6. https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)1&docLanguage=En Access Date: 17.08.2021.

ensure the reporting of transactions that are not subject to notification, considering the current turnover thresholds. In this context, several changes and regulations have been implemented under the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (2010/4) the Guidelines on the Assessment of Horizontal Mergers and Acquisitions (Horizontal Guidelines), and the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions (Non-Horizontal Guidelines) as part of the legislative review on concentration control by the Board. Within the framework of these regulations, the definition of "*technology undertakings*" was added to Regulation No. 2010/4, and an additional notification obligation was introduced for transactions in which these undertakings are the target. In the context of acquisition transactions, it is regulated that if the target company is a technology undertaking operating in Türkiye, conducting R&D activities, or providing services to users in Türkiye, the threshold set for the target asset will not be required. "Technology undertakings are defined as "*operating in the field of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and healthcare technologies or the assets thereof.*" With this regulation, the aim is to subject the transactions related to the acquisition of technology undertakings to a thorough review by the Authority and to prevent predatory acquisitions targeting these undertakings. At this point, it is evident that Türkiye has implemented a specific practice that introduces an additional notification obligation for transactions related to the acquisition of technology undertakings operating in the Turkish geographical market, conducting R&D activities, or providing services to users in Türkiye. This measure aims to address concerns about the acquisition of newly established and developing undertakings, which differs from the EU practice and the examples of Germany and Austria.[456]

(490) Amendments and additions have been implemented in Directive No. 2010/4, the Horizontal Guidelines, and the Non-Horizontal Guidelines to conduct a comprehensive analysis of relevant markets. Amendments and additions have been made to the Horizontal Guidelines, addressing issues such as potential

[456] https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulundan-izin-alinmasi-gereken-82269c8a8f9bec11a21c00505685ee05, Access Date: 07.04.2022.

competition, proximity of competition analysis, theories of harm related to digital markets, and innovation-based markets. In light of the current theories of harm applicable to mergers and acquisitions (such as potential competitor/ competition harm theory and predatory acquisition harm theory), this study incorporates general principles that can be considered in the evaluation of acquisitions of newly established and emerging companies. In addition, consumer data, which is increasingly important in competition law due to digitalization, and its effects on competition, has been added to the Guidelines. Similarly, the Non-Horizontal Guidelines outline the anticipated changes in evaluating vertical and multi-market merger transactions, with a focus on updates related to digital markets. These changes are detailed under the headings of unilateral and coordination-inducing effects. It is believed that these developments will be beneficial in providing clarity regarding the factors to be considered in regulating concentrations in digital markets.

7 MARKET PERSPECTIVES ON CORE PLATFORM SERVICES

7.1 Intermediation Services

7.1.1 Overview of the Market

(491) The intermediation services market is a significant market that encompasses submarkets providing a diverse range of services tailored for various purposes. In essence, any service that facilitates connections between two distinct user groups can be categorized as an intermediation service. However, to be more specific, these services can be categorized into subgroups based on the primary service they offer and the user groups they bring together. However, there is no differentiation between intermediation services that allow users to directly access a service through the platform and intermediation services that direct users to the service provider for accessing the service.[457] In this context, intermediation services mainly include e-marketplaces, app stores, commercial features of social media applications used by businesses, and price comparison websites or applications, which also involve third-party sellers. This focus on intermediation services primarily considers services that facilitate interaction

[457] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1169, Access Date: 16.02.2022.

between user groups, at least one of which consists of end users. Services such as online advertising, payment processing, and search engine optimization, which do not directly involve consumers, constitute the second tier of intermediation services. However, online advertising auction services and online direct sales channels (such as supermarkets and brand-owned stores) that exclusively cater to commercial users, sell their products directly, do not facilitate third-party sales, and do not interact between third parties and consumers are considered outside the scope of intermediation services. Given this information, the market attributes and competitive considerations associated with intermediation services will be examined individually for the pertinent sub-services.

7.1.2 Price Comparison, Comparison (Customized Search), and Booking Services

7.1.2.1 Overview of the Market

(492) The online price comparison service is a search tool used to compare a specific set of similar products based on price or different features, as opposed to general search services. The service in question, when related to shopping, is mainly referred to as a price comparison service used for product search, price comparison, and/or comparing product features. However, if the comparison involves searching for hotels/accommodation facilities, comparing them in terms of price, availability, and features, and having the option to view photos and comments from previous guests, the service is known as a hotel comparison service. Another comparison service is the ticket comparison service, which is used to compare prices, schedules, and availability for flights or bus tickets. Furthermore, services that allow users to search and compare meals offered by restaurants based on criteria such as price, ingredients, service quality, and customer satisfaction can be defined as restaurant comparison services. Finally, it is possible to define the services used for searching real estate, vehicles, and similar second-hand products, as well as for comparing criteria such as price, features, and location, as advertisement comparison services. Furthermore, within the scope of their provided features, all these specialized comparison services can be further classified based on whether they facilitate the booking

and/or ordering or purchase of the selected product. According to this, some of these services only offer comparison services, while transactions are primarily conducted in the physical world or through other channels owned by the seller directly. These comparison services mainly consist of advertising comparison services, and it is known that some hotel and ticket comparison websites operate in this manner. However, most hotel, ticket, and restaurant comparison service providers also offer the option to directly purchase the compared product through their platform.

(493) Within the scope of this legislative study, the opinions of the service providers were consulted on issues such as loyalty programs, pricing principles, and bundling practices. Some of the players stated that they do not provide any loyalty program to their users. However, some of the initiatives mentioned that users can earn points for their bookings and/or purchases and take advantage of various opportunities. Some undertakings, on the other hand, claim to offer loyalty programs based on specific conditions, such as reaching a certain threshold of transactions (in terms of amount or quantity) on the platform and/or utilizing various functions. They also provide discounts and similar benefits to eligible users participating in these programs.

(494) It is understood that market players charge variable commission fees to commercial users who benefit from the comparison service. These fees are based on the volume of sales or the price of the product sold/reserved by the user. They primarily provide their services for free to individual users. It is also understood that they generate revenue through advertising activities on the same platform and use the funds to finance related services. When only comparison services are provided, the pricing is primarily determined by listing fees (fixed service fee) and/or referral fees, which direct consumers to the relevant final provider's site. However, in cases where transactions are conducted on the platform, commission fees and/or additional charges come into play. In addition, some undertakings may request varying fees for additional services/functions they offer, such as campaigns, shipping, and fulfillment, or as specified in contractual agreements with users, including penalty clauses. Undertakings state that the pricing policy is generally applied equally to all users, but variations can occur due to the nature of the users. Undertakings also state that the use of products

or services is not mandatory. However, in exceptional cases, services may be gifted to customers, and discounts and campaigns may be offered on ancillary services to ensure customer satisfaction.

7.1.2.2 Market Players[458]

(495) In this context, the primary companies offering price and/or product comparison services in Türkiye are Cimri, Akakçe, and Epey. The main companies offering hotel comparison services include Neredekal, Jolly Turizm, ETS Tur, Expedia, EnUygun, Trivago, Trip Advisor, Hotels.com, and Google (Google Hotels). The primary companies offering ticket comparison services include Obilet, Hepsiburada (Hepsifly), EnUygun, and Google (Google Flights). The primary companies offering restaurant comparison services are YemekSepeti, Getir (Getir Yemek), and Trendyol (Trendyol Yemek). The main companies providing comparison services for classified ads are Sahibinden, Letgo, and Trendyol (Dolap).

7.1.2.3 Market Competition Issues

- ***Market Entry Concerns***

(496) The majority of the companies surveyed assert that entities possessing substantial market power, particularly those capable of swift vertical integration and the provision of tailored quality comparison services, are creating market bottlenecks that hinder operational and market growth. Furthermore, it is noted that if such entities exhibit self-preferencing towards their products and services and engage in discriminatory practices, it will significantly obstruct competitors' market access.

(497) The undertakings stated that they rely on search engines for a significant portion of organic and paid user traffic. However, the practice of users initiating their searches with the general search function enables the search engine to divert relevant traffic from comparison and/or price comparison sites to its own competing vertical search products. They stated that this vertical search hinders the visibility of service providers operating in similar fields by positioning their

[458] The companies listed in the "players in the market" section of this document have not been selected based on a specific market definition and do not pertain to any specific market definition. These companies have been identified with a broad perspective to offer comprehensive information about the sector.

products at the top of the results page. The undertakings stated that this situation grants significant power to the relevant search engine, creating a bottleneck that hinders innovation in the market. It also hampers the ability of comparison and/or price comparison websites to distinguish themselves and generate revenue, ultimately diminishing competition, innovation, and consumer choice. However, undertakings have stated that relying solely on competition law for intervention is not sufficient to detect and deter anti-competitive behavior in such bottleneck situations. They have also stated that ex-post enforcement should be complemented by ex-ante rules that can address specific limitations of competition and ensure that markets remain fair and competitive for the benefit of consumers. Instead of relying on highly detailed and normative rules for ex-ante regulation, they suggested that some fundamental principles of ex-ante regulation should be established, which will develop during the implementation process. In this context, it is stated that all measures should be taken to prevent behaviors such as bottlenecks, (i) self-preferencing; (ii) combining and using the data they collect internally between their products and services; (iii) solidifying their positions by preventing multi-homing, and creating entry barriers by "locking in" users.

(498) Some of the undertakings state that the unique characteristics of digital markets impact the competitive landscape within the industry. The wide consumer base that multi-category e-marketplaces can access allows them to capitalize on a substantial indirect network effect. The undertakings also state that multi-category e-marketplaces with strong financial backing expand into various vertical or related markets by leveraging economies of scale and scope. By rapidly gaining market power in these sectors, they could potentially have a detrimental effect on competition within the relevant vertical or related market. This could occur through the use of market power as leverage or by engaging in aggressive behavior. Furthermore, it is emphasized that undertakings that have evolved into ecosystems gain a competitive advantage by cross-utilizing their data across various activities. Some of the undertakings express concern that self-preferencing is prevalent in all aspects of the digital markets.

(499) The undertakings highlight the prevalent use of tying and bundling in the market. They assert that there may be services included in users' packages in a

non-transparent manner, which do not provide additional value (as they are already offered for free by competitors) or for which there is no benefit.

(500) The undertakings indicated that they may use MFC and exclusivity practices within their respective sectors, with variations based on contract type, commercial relationship requirements, and industry standards. Some undertakings may employ narrow MFC clauses to protect investments and encourage fair competition. However, wide MFC clauses are largely discontinued, and de facto exclusive practices aimed at market domination are deemed detrimental.

- ***Regulatory Concerns***

(501) It has been stated that the exclusion of global platforms' activities, which do not have a representative office in Türkiye, from all regulatory obligations negatively impacts competition for local players. Similarly, it is argued that foreign companies not fully incorporated in Türkiye incur additional costs such as withholding tax and legal operating expenses for advertisers. These companies consider GDPR compliance adequate and do not adhere to regulations such as the Law on the Protection of Personal Data (KVKK), which domestic companies must fully comply with. This situation disrupts the competitive balance in the market. Some undertakings, on the other hand, state that the mentioned concerns about harmonization may apply to various regulations in Türkiye, including tax and e-commerce. In this context, the competitive environment becomes less equitable.

(502) Undertakings argue that the innovations resulting from advancements in digital markets have positive and negative effects on the market, but ultimately contribute to the overall increase in societal welfare. Therefore, they emphasize that public interventions in these markets should be designed to preserve this situation. Both ex-ante and ex-post interventions have the potential to create new market failures. They argue that some interventions could result in unfavorable long-term outcomes for societal welfare due to the dynamics unique to multi-sided markets. Therefore, it is essential to consider these market dynamics when implementing interventions and to carry out thorough impact analyses. Some undertakings have emphasized the priority of addressing

competition issues in digital markets using the current rules and tools of competition law. It has been suggested that applications of competition law should be cautious not to undermine innovation and investment incentives and that companies should not be burdened with additional and disproportionate financial obligations. It is also noted that the competition issues stemming from large global platforms and barriers to market entry should not be attributed to all platforms. Furthermore, it is important to note that the competitive strength of local platforms should not be underestimated. Sectoral regulation initiatives in various jurisdictions (such as the European Union, Germany, etc.) should be carefully monitored, and the regulations introduced in these areas should only be implemented if they align with local interests. However, some undertakings point out that those with substantial market power in digital markets are disrupting the competitive landscape by solidifying their current positions through unfair practices and pursuing strategies that harm their competitors and users. Therefore, it is essential to emphasize that regulations for the relevant sector should include measures to prevent practices that disrupt the competitive environment and establish a fair competition environment for everyone.

(503) Many undertakings also argue that their inability to offer products and services prohibited by law online ultimately diminishes consumer welfare and reduces the quality and variety of services available in the market. They emphasize the need to minimize such restrictive regulations.

- ***Issues Regarding Search Algorithm***

(504) Some of the undertakings state that the algorithm underlying the search function they provide on comparison websites is determined by factors such as the revenue generated per click or in return for the presentation, purchase, or reservation of content, the most clicked, viewed, or favorited product/hotel/restaurant, the quality of deals offered by the website itself (price, location, category, publication date, popularity, relevance, similarity to the search), and the quality or rating of the content (product/hotel/restaurant) subject to the deal and the number of clicks/views of the related deals by users. and the quality or rating of the product/hotel/restaurant of the content subject to the opportunity and the number of clicks/views and user engagement with the related opportunities. In this sense, the content in the platform's portfolio is

ranked according to the level of interest. Some of the undertakings, on the other hand, claim that the algorithm primarily ranks based on price, but consumers also have the option to list according to region, preference, and other criteria. Finally, it is essential to note that search rankings are not static; they are constantly evolving and can be influenced by users through various ranking options.

(505) Certain undertakings offer paid listings in specific areas on the search results page, with users bidding in an auction for ad placements and paying based on cost per click. Some undertakings claim to provide the chance for products or services to appear at the top positions, benefiting all users. However, other undertakings specify that they do not offer advertising space for products or services to appear at the top positions, instead clearly labeling the advertising spaces on the site.

- ***Data Portability and Interoperability Concerns***

(506) Several undertakings suggest that the possibility of data portability and interoperability for users can be approached from two perspectives: commercial users and individual users. For commercial users, achieving data portability can involve various methods, including extracting data directly from the platform's provided panel or utilizing integration programs. Interoperability, on the other hand, is described as being accomplished by facilitating system integration and enabling two-way integration through APIs, connecting the platform's system with the user's system.

(507) Some undertakings, however, claim that they have not experienced such a request and do not have any procedures related to this matter.

7.1.3 Application Stores

7.1.3.1 Overview of the Market

(508) Application stores are platforms that enable users to search for various application software, compare related apps by reading comments and/or ratings, install them on their devices, and update the installed applications.

(509) Application stores are gaining importance, especially in the context of mobile devices. Advancements in technology, particularly the Internet, data science in

terms of storage and processing, and mobile devices, including smart technologies that can connect to the Internet, have contributed to the widespread use and adoption of smartphones.[459] Smartphones are mobile devices that utilize mobile operating systems and offer additional functionality through a wide range of applications.[460] Applications, on the other hand, are software programs that focus on specific functionality within a more limited framework than operating systems or other software programs. As a result of this business model, the market for application stores should be considered and evaluated in conjunction with the mobile operating systems market and the smartphone/ device market.

(510) This functionality of the app stores is also reflected in the organization of the players in the market. In this sense, it is understood that the major players in the market, in terms of mobile phones/devices and mobile operating systems, also provide services in the application stores market. The primary undertakings offering this service in Türkiye are Apple, Google, Microsoft, and Samsung. However, in addition to the app stores provided globally by these undertakings to run on their mobile operating systems, third-party app stores also offer services. These third-party app stores are developed to operate on mobile operating systems provided by other undertakings. However, application store providers also function as application developers. In this context, both platforms offer their applications to users and provide an intermediary service for third-party application developers to deliver their apps to users. Furthermore, some app store providers also furnish app developers with the necessary tools for development.

(511) Application stores are becoming increasingly important due to the growing consumer use of mobile phones and internet access, as well as the enhanced functionality provided by applications. As a result, consumers are increasingly prioritizing access to content, products, and services through applications, leading to a growing significance of application stores.

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[459] The Netherlands Authority for Consumers & Markets, Market study into mobile app stores, Case no: ACM/18/032693, 11.04.2019, pp. 19-21.
[460] Basole, R.C. & Karla, J. "On the Evolution of Mobile Platform Ecosystem Structure and Strategy" Business & Information Systems Engineering, 2011, 3:313, https://link.springer.com/article/10.1007/s12599-011-0174-4.

(512) Based on information from industry players, the apps available in stores are typically offered as either paid or free. It means that while some apps can be downloaded and used for free, others require payment for downloading and using them. However, free apps can differ in their approach. For instance, some free apps are supported by displaying ads within the app, allowing users to download and use them at no cost. Furthermore, certain free applications can be utilized to a limited degree and provide the option to make in-app purchases for extra digital features and content. Certain free downloadable apps may necessitate payment for their usage. This can be done through the purchase of subscriptions within the application and/or the renewal of such subscriptions.

7.1.3.2 Market Competition Concerns

- **Market Entry Issues**

(513) Access to app stores is crucial for app developers in the market. It is essential to guarantee that developers can access the app stores and meet the required conditions for their applications. It is also significant to prevent indirect obstacles such as technical issues, unjustified deletion, or suspension that could hinder fair competition in the market.

(514) The undertakings declare that they communicate to app developers the terms and conditions for accessing the platform as outlined in the contract or written form, ensuring transparency in the market. Additionally, they specify that they inform developers about the criteria for approving or rejecting applications, the process for removing non-compliant apps from the store, and the circumstances under which developer memberships may be terminated.

(515) The consulted companies also confirm that they do not incorporate MFC clauses or exclusivity provisions in the agreements they make with application developers.

- **Side Loading and Interoperability Concerns**

(516) Some of the consulted undertakings have indicated that their app stores are only accessible through smartphones/devices with specific operating systems. Similarly, some third-party application store providers have stated that their services are only accessible through smartphones/devices with specific operating systems. However, some third-party application store providers have

also pointed out that their application store can be accessed through smartphones/devices with various operating systems. A few undertakings in the market have mentioned that multiple application stores can be downloaded onto smartphones/devices with certain operating systems, and applications from these stores can be on their respective devices. Side loading can occur either as a result of the preference of the device manufacturers or when consumers actively install the relevant store on their devices. Therefore, it is understood that the level of market-side loading and interoperability is relatively low.

(517) In this framework, it is understood that some undertakings allow the installation of alternative application stores in addition to the pre-installed and/or built-in application store on smartphones/devices, while others restrict this due to security and quality concerns.

- **Concerns Regarding Payment Transactions in the App Store**

(518) The agreements specify that the decision to offer third-party applications in the store to consumers for a fee or free of charge is at the discretion of the relevant application developer. Furthermore, the agreements indicate that it may be possible to provide discounts or offer paid applications for free as part of negotiations with third-party application developers.

(519) When the app is purchased, a revenue-sharing agreement is in place between the app store and the app developer. As a result, app store providers charge a specific commission on in-app purchases and subscriptions. Although the commission rates in the market indicate relatively stiff competition, it is also observed that a few undertakings can offer more competitive rates. In addition, it is also observed that sector players can vary the commission rates they charge after a certain period or for developers in specific categories. This situation suggests the presence of an incentive to compete, although it may be limited. It is also understood that some stores may charge one-time publishing or subscription fees.

(520) Another issue in the market pertains to payment transactions between app store providers and third-party app developers. These providers mandate the use of their electronic payment method within their ecosystem, thereby hindering or complicating developers' access to other payment methods. Consequently,

developers are unable to utilize alternative payment methods and inform their users about these options. This restriction imposes an additional financial burden on developers, as they are reliant on a single payment method and subject to high commission fees within the framework of this method, favoring the payment system of the app store in question. Ultimately, this situation is expected to result in increased prices and reduced choices for consumers.

- **Issues Regarding Search Algorithm**

(521) The search algorithm for the app store is based on several criteria, including the relevance of the searched word, app review/score, number of downloads, app launch date, and adherence to app store rules. Some undertakings state that factors such as the relevance of the user's search, content quality, value, and user experience are also important. However, undertakings predominantly point out that they do not provide sponsored results or paid listings to manipulate search rankings and prioritize certain apps in search results. However, some undertakings offer a paid advertising space for developers, which is displayed alongside other content and clearly labeled as advertising. The undertakings, however, stipulate that it is not feasible to prioritize applications through advertising and that such advertising space should be evaluated independently in this regard.

7.1.4 Electronic Payment Systems (TechFin Services)

7.1.4.1 Overview of the Market

(522) Advancements and changes in technology have a significant impact on financial services, as well as other service sectors. In addition to traditional financial services, there is a rise in financial services entirely based on technological infrastructure. These services can be categorized into two groups. Financial services provided digitally are known as financial technology services, or FinTech if they are exclusively offered by undertakings operating in this field.[461] non-bank undertakings that provide innovative financial services, in addition to traditional banking services, fall under this category. Furthermore, some

[461] To find comprehensive details about this topic, refer to the "Examination Report on Financial Technologies in Payment Services" released by the Competition Authority in December 2021. https://www.rekabet.gov.tr/Dosya/sektor-raporlari/odeme-hizmetlerindeki-finansal-teknolojilere-yonelik-inceleme-raporu-20211209145616284-pdf, Access Date: 07.04.2021.

undertakings operating in this market may leverage their influence in other markets, particularly in online shopping, to expand into financial areas, even if their primary business is not financial services. Consequently, digital financial services offered by technology undertakings primarily focused on providing various digital platform services are termed TechFin.

(523) For the purpose of this working paper, it is essential to note that these two subjects are distinct from each other. FinTech companies typically emerge as small startups and directly compete with banks. They are currently recognized as businesses that enhance competition in the banking and finance industry and provide additional services to consumers. However, the fact that companies that have gained significant financial influence within their primary platform service are beginning to operate as TechFin may raise competition law concerns. Therefore, this Working Paper focuses on TechFins, rather than FinTechs, about electronic payment systems.

7.1.4.2 Market Players

(524) On a global scale, it is understood that digital platforms such as Alibaba, Amazon, Apple, Microsoft, Samsung, Google, and Facebook do not provide electronic payment services (online payment, digital wallets, payment cards, etc.) in Türkiye as TechFin. Nevertheless, it is known that the primary companies providing services in this sector in Türkiye are Trendyol, Hepsiburada, and YemekSepeti.

7.1.4.3 Market Competition Concerns

- **Market Access Related Concerns**

(525) The primary competitive challenges in the TechFin industry stem from the fundamental traits of other markets in which the leading technology companies in this sector are involved.

(526) Undertakings with substantial market power that provide platform services typically function as an ecosystem across various sectors. Additionally, the interplay of direct and indirect network effects and feedback loops within platform economies amplifies the market dominance of these companies, making it challenging for competitors to compete. The ecosystem-based operation also

draws in more users by offering a wide range of services and fosters a more loyal user base through network effects. Consequently, this can limit market access for others and establish obstacles for competitors looking to enter or expand in the market.

(527) Over the years, these TechFins have gained an advantage over their competitors in providing financial services. Technology has worked in their favor, allowing them to expand their user base and gain recognition through various services within the ecosystems. In addition, their capacity to gather, analyze, and utilize user data gives TechFin a competitive advantage. However, for the financial services provided by TechFin, the significance lies not in the data itself, but in how the data is utilized to comprehend user behavior. In this sense, TechFin services essentially serve as a means to enhance the services provided by undertakings. TechFin services create the possibility of connecting users to other relevant services and strengthening the position of the undertaking in the platform services it offers. Linking financial services to non-financial services distinguishes TechFin from other financial service providers.

(528) These characteristics, which stem from the market structure and confer a significant advantage to TechFin, may pose an obstacle to market entry or growth. However, there is also a concern that these features may not only support the undertaking's activity but also enhance its market position through an active action of the undertaking. In this context, the fact that the undertakings link the payment services, which can be classified as supplementary services, with the core platform service they offer, prevents consumers/other users from accessing alternative options or makes it challenging for them to do so. This situation may raise concerns about the unfair advantage gained through the transfer of market power.

- **Concerns Regarding Self-Preferencing Behavior**

(529) As noted in the app stores section, the platform service provider's offering of a distinct electronic payment service raises concerns about potential self-preferencing. It is primarily because these payment services are largely linked with app stores and are primarily designed for buying apps or making in-app purchases from these stores. This approach raises concerns that the specific

payment method is already installed on devices and automatically set as the default payment option.

(530) The undertakings consulted indicated that the electronic payment services they provide are not pre-installed and that multiple payment services can be installed or defined on smart devices. Additionally, they also mentioned that they do not compel the use of their payment system or offer preferential treatment (such as better ranking or lower commission fees) to users of their other services, particularly app stores. The undertakings also stressed that they accept a variety of payment methods within the scope of the platform services they offer. However, some of the undertakings noted that in such instances, the payment service available on different operating systems may have restricted functionality.

7.2 Search Engine Services

7.2.1 Overview of the Market

(531) An online search engine service is a digital platform that enables users to search all websites in a specific language by entering queries in various formats, including keywords, voice requests, and phrases, to find information about the desired content. Search engine operators that provide this service play a central role in accessing internet-based content. Online search engines are typically advertising-based platforms that offer content (search results) at no cost and are supported by advertising revenue.

(532) The impact of online search engines on the selection and ranking of displayed pages, and consequently their role in directing the flow of information, can raise concerns about competition due to their vertical specialized services and the concentrated structure of the market.

7.2.2 Market Players

(533) The players in the online search engine service market are typically default search engines in various browsers or mobile operating systems. These include the Google search engine integrated into the Chrome browser on devices with the Android operating system, the Bing search engine integrated into the Edge browser on devices with the Microsoft operating system, and the Yahoo search

engine in the Firefox browser. These search engines operate in the market. On devices with the iOS operating system, Safari is the integrated browser, and the default search engine in Safari is Google. Huawei devices come with the company's proprietary search engine called Petal Search pre-installed. In addition to these, there are other search engines such as Baidu, which operates in China, and DuckDuckGo, which is available in 60 countries worldwide, but they are not accessible in Türkiye. Yaani, developed by Turkcell, operates in the market as a local search engine.

7.2.3 Market Competition Concerns

(534) The presence of pre-installed search engines in mobile operating systems, internet browsers, and technology products like voice commands is a significant issue of anti-competitive concern in the market. The high usage rates of these default applications and programs on devices, as reported by the undertakings, mean that most users do not seek out alternative options. This put competing services at a disadvantage.

(535) The submission addresses concerns about the potential abuse of power by search engines in other markets. It states that the provision of other services by search engines could raise anti-competitive issues, such as leveraging their position in markets like online advertising. The undertakings also argued that a dominant search engine that provides both algorithmic search results and paid search results creates challenges for other search engine services to attract advertisers and users.

(536) One issue of competition is the insufficient transparency and detailed disclosure of algorithm changes by search engines. When asked about this, one search engine explained that not every algorithm change is communicated to users due to impracticality, but they do provide information about the main parameters on their website and update users in case of significant changes. Another search engine mentioned that frequent changes in the ranking algorithm and the ongoing maturation of the index size prevent them from providing information to users, but they expressed willingness to share changes once the algorithms mature and become less frequent.

(537) The information provided on websites generally indicates that search engines frequently modify their algorithms, often without announcing these changes. However, it is noted that search engines typically implement significant updates several times a year, and they usually announce these updates on social media. While these announcements may not provide specific details, they often include guidance on what to review if there is a potential impact on rankings or traffic after the update. Undertakings state that search engine changes can affect search result page rankings and that the uncertainty surrounding search engine mechanisms may lead to irregularities in traffic. Understanding these mechanisms can help undertakings take necessary measures to improve system efficiency.

(538) The undertakings also indicate that updates to search engine algorithms can result in fluctuations in website traffic, with potential decreases or increases. Positive algorithm changes may lead to an increase in organic traffic, while negative changes may result in a loss of ranking and subsequent traffic loss. In the past, there were fewer advertisements in search engine result rankings and snippets, which gave more weight to organic traffic. However, currently, the presence of ads and snippets has led to a decrease in organic traffic, necessitating increased advertising to make up for the lost traffic. Additionally, due to algorithm updates, organic searches may become less appealing as a result of changes in the appearance frequency of the maps widget in search results or alterations in the widget's design. This can result in a decrease in traffic volume, even if the website maintains the same visibility on the search results page for relevant keywords.

(539) Another area of competition is whether websites are aware of the criteria used for organic ranking on search engine results pages. Some websites indicated that information on effective ranking factors can be obtained from search engine optimization sources. The information on ranking factors, which includes over 200 factors, explains how search engines provide users with information on relevant ranking factors, their usage, and how users can implement them on their websites. However, it does not provide information on the significance of ranking factors.

(540) One issue regarding the ranking and presentation of search results on the general search results page is the distinction between search engines' proprietary content and content from other websites. The sources consulted on this matter generally indicated that search engines prioritize their content with more prominent designs and page placement in various queries, compared to the organic results from websites. For instance, it was noted that in common searches like weather forecasts and currency exchange rates, the search engines' responses are positioned at the top of the results, which hinders traffic to other websites. It is also indicated that the search engine's widgets may occupy a significant portion of the screen, particularly on mobile devices. Furthermore, it is noted that websites not included in the relevant widget due to search results may fail to capture user attention, despite hosting content related to the search term, and that there is a design featuring a blend of advertisements and organic results. Following modifications to the ad design by the search engine, it is reported that the number of adverts displayed above organic results has increased from three to four. The search engine's proprietary services are said to diminish the visibility of organic results, with the hotel advertisement service, for instance, providing price comparison and occupying approximately four advertisement spaces, particularly in mobile searches. This service is positioned as the top result, receiving the most views, and preventing users from scrolling down. Additionally, due to its perceived reliability, it enables users to swiftly assess options without consulting other sites, resulting in significant traffic loss for companies offering price comparison services.

(541) The undertakings were also asked for their views on whether search engines obtain consent for the content of websites. The undertakings indicated that, in general, search engines crawl website content without requiring consent and that it is possible to prevent certain content from being crawled using technical methods. Regarding the use of website content for news, it was mentioned that search engines do not seek consent but receive the content in anticipation of its use for their news service. Given that search engines drive the majority of website traffic, it was noted that there have been no observed negative impacts from the use of website content by search engines. Additionally, it was stated that website

owners have no choice but to allow search engines to use their content, as failure to do so would result in a significant loss of visibility in search results.

(542) In response to the question as to whether search engines facilitate interoperability and/or data portability in terms of operating in rival search engines, the undertakings stated that they do not provide these capabilities. Even if search engines do not engage in prohibitive practices in this regard, it is stated that it is technically challenging to implement structured data other than meta-structures. This is because structured data varies and needs to be designed differently for each search engine. However, this situation does not negatively impact website activities.

7.3 Social Media Services

7.3.1 Overview of the Market

(543) Social media services encompass platforms that facilitate user connections with friends and family, access to news and current events, and the sharing of creative content.[462] These platforms enable users to engage in communication, discover and share content, and interact with others. These platforms share several common features, including the ability to create an account and/or profile for establishing an online identity, a feed and/or home page for interacting with diverse content such as posts, photos, or videos, and messaging functionality for direct communication with others. However, while these platforms share a lot of basic functionality, they differ in terms of the user needs they address and/or aim to fulfill, as well as the design of the features and/or functions they offer.

(544) In this particular setting, the level of competition between different social media platforms is influenced by the degree to which users consider them to be interchangeable options rather than by the similarity of their features. Social media platforms that fulfill similar functions are perceived as more direct replacements by consumers, and therefore, are regarded as closer rivals.[463]

[462] CMA (2020), "Online Platforms and Digital Advertising", Market Study Final Report, p. 42, https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-studys, Access Date: 18.11.2021.
[463] CMA (2020), "Online Platforms and Digital Advertising", Market Study Final Report, pp. 118-119.

(545) The literature acknowledges the challenge of precisely delineating the boundaries of the social media market and recognizes that the aforementioned functions represent the fundamental roles of these platforms. Nevertheless, it is widely acknowledged that the requirements for "social networking platform services" (such as Facebook, LinkedIn, and dating portals), "content sharing and entertainment platform services" (such as YouTube, Instagram, and Pinterest), and platforms like Twitter, which is typically categorized as "microblogging," constitute distinct sub-markets within the social media market.[464]

(546) In this framework, social networking platforms, through the various functions they offer, provide a "rich social experience," enabling their users to find other people they already know online, interact with them, create a social network, and exchange experiences, opinions, and content with specific individuals defined by identity. In contrast, content sharing and entertainment platforms primarily facilitate[465] the distribution and consumption of content and are characterized by this function, can utilize these platforms to create and share content related to their personal lives or interests, or a combination of the two, and/or to passively consume content produced by other users. On these platforms, users may have acquaintances with whom they share or consume content, or they may interact with completely unknown individuals. In this context, it is possible to evaluate other platforms that are classified as microblogs, whose primary function is to share information, either independently or as a sub-category of content-sharing platforms.

(547) Even though social media platforms are typically provided to users at no cost, it is common knowledge that these services generate income through advertising within the applications. While some undertakings claim that they do not offer paid memberships or additional paid features, others acknowledge that they provide basic services for free but offer premium features for a fee. Additionally, some companies offer professional functionality to users for a fee.

(548) Social media service platforms are typically available via mobile applications, web browsers, or both.

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[464] Bundeskartellamt, Decision B6-22/16, para. 168-170.
[465] Subcommittee on Antitrust (2020), “Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets”, p. 91.

7.3.2 Market Players

(549) In this context, it is understood that the main undertakings providing social media services in Türkiye are Twitter, TikTok, Snap (Snapchat), Pinterest, Facebook (Facebook, Instagram), Microsoft (LinkedIn), and Match Group (Tinder, Hawaya, Ablo, Twoo, Azar, Hakuna, OkCupid).

7.3.3 Market Competition Concerns

- **Concerns Regarding Innovation**

(550) In the context of the opinions of undertakings in the market feedback on their efforts to improve the services they offer; it is clear that products in the market are constantly evolving. However, it is also evident that new additional features offered by some platforms are not embraced and/or successful among users, leading to their removal.

(551) It is understood that the new functions introduced on social media platforms are primarily ancillary features that are related and/or complementary to the essential functions provided. In the market, undertakings also introduce functions that are not directly related to the core service they offer. In this sense, they follow the features and functions offered by other platforms and trends. Due to this trend, the number of common features/functions offered by platforms is gradually increasing. This situation is expected to result in the convergence of platforms based on the functions they offer, regardless of its impact on the fundamental demand for the platforms by consumers. At this point, it is understood that the features that distinguish the undertakings from their competitors are based on their core functions, which fundamentally influence consumer demand. The protection of this difference constitutes the fundamental parameter of competition in the market.

- **Concerns Regarding Interoperability and Multiple Access**

(552) The market participants indicated that there is a significant degree of multiple access within the market, which is crucial for fostering competition. Additionally, nearly all of the participants expressed that the content or videos disseminated through their social media channels can be cross-posted on other social media platforms.

(553) Some of the undertakings mentioned in this context have indicated that they provide their users with the ability to utilize their credentials from the respective application to access third-party applications and/or websites. However, other undertakings consulted have stated that they do not provide services for logging into third-party applications or websites.

(554) In this scenario, undertakings assert that the exchange of information and compatibility among social media platforms can be accomplished through the implementation of account verification functionalities, utilization of open source software, collaboration with application programming interface developers, specialized integrations, and/or APIs.

(555) However, undertakings state that their social media platforms do not require the use of any other product/service to access or fully utilize all the features of the relevant service/application. In this context, some undertakings state that they do not offer only one service, while others assert that users are free to choose whether or not to use multiple services they provide.

- **Regulatory Concerns**

(556) Several undertakings claim that the current competition law enforcement framework is capable of addressing potential competition challenges in digital and digital-enabled markets. They argue that this framework has shown significant competence and adaptability in handling new and complex issues that may arise in digitally-enabled markets, such as two-sided markets, zero-price products and services, and highly innovative markets. They assert that there is no proof of any enforcement gap in terms of the inability to address issues related to the digitalization of the economy. Additionally, they argue that some undertakings do not currently need specific regulation as the relevant market is highly competitive.

(557) Some of the undertakings stated that in today's competitive environment, businesses with access to the most data have a competitive edge and stand out both in their core operations as well as online advertising. It is therefore argued that regulations promoting transparency and interoperable systems can diminish this advantage and protect freely competitive markets. Requiring access to essential services under fair, reasonable, and non-discriminatory

conditions is crucial in this regard. In this framework, it is also stated that potential regulations for undertakings with substantial market power should encompass obligations to ensure transparency, refrain from using data from the service provided to promote their services, avoid mandating the use of their payment systems, abstain from imposing exclusivity and MFC, and refrain from imposing unfair conditions on commercial users. Furthermore, it is recommended to establish regulations governing the transfer and compatibility of data to prevent dominant companies from impeding data access to strengthen their market dominance and reduce network effects that contribute to their dominance. Moreover, it is emphasized that the regulations should be informed by comprehensive sector-specific expertise and consider the significance of innovation. Enhanced communication between regulators and technology firms, regardless of whether they offer social media services, would be beneficial for public policy. It is important to emphasize that engaging in dialogue with regulators will help mitigate adverse effects on companies' activities, ensure compliance with regulations, and ultimately contribute to the growth of the sector.

(558) The undertakings also pointed out the belief that major digital platforms, which serve as gateways for commercial users to reach end-users and are, therefore, essential trading partners for these commercial users, should be more effectively regulated. Thus, the belief that these platforms prevented them from engaging in behavior that would harm their dependent commercial users, competition, innovation, and ultimately consumers was expressed accordingly. In this context, undertakings state that competition law is a substantial tool for combating anti-competitive practices while highlighting its limitations in addressing the harmful behavior of large online platforms with significant market power in fast/dynamic digital markets on its own, due to (i) competition investigations are often lengthy and protracted and (ii) competition investigations being limited in scope, making them insufficient to address the challenges posed by these platforms.

(559) In this context, it is also mentioned that the presence of various regulations impacting online platforms carries the potential for heightened operational and compliance expenses for businesses. Furthermore, the accumulation of intricate

regulatory frameworks could impose onerous burdens and adverse effects on small and medium-sized undertakings, ultimately favoring established incumbents. The undertakings also acknowledge the market's innovative and dynamic nature, underscoring the challenges of regulating in this domain and the potential for regulations to quickly become obsolete, diminishing their effectiveness and prompting market participants to opt for safer choices, thereby stifling innovation. In this regard, it is suggested that more targeted regulations, as opposed to broad rules applicable to all undertakings, would alleviate the burden on new market entrants and smaller players, and effectively advance the goal of fostering competitive markets.

7.4 Video Sharing Services

7.4.1 Overview of the Market

(560) The video-sharing platform service involves the provision of at least one piece of visual-audio content that is uploaded to or played on the platform. This type of service may resemble a television broadcast or an on-demand visual-audio media service. Consumers have the ability to view videos through a variety of platforms that offer visual-audio content, including on-demand video streaming platforms, video-sharing platforms, and social media platforms, without any restrictions based on demand. These services can be funded through advertising, subscription models, or one-time payments.

(561) The models of video streaming platforms dependent on demand are classified as Video on Demand (VOD) (demand-based video platform), Subscription Video on Demand (SVOD) (subscription-based demand video platform), Advertising-Based Video on Demand (AVOD) (ad-based video platform), Transactional Video on Demand (TVOD) (renting and purchasing content-based video platform), and Broadcaster Video on Demand (BVOD) (websites of TV channels' video platforms).

(562) Videos can be shared on video-sharing platforms and social media, in addition to the video-sharing platforms mentioned earlier, based on demand. In this field, undertakings operate under very different business models. While it is often possible to upload and share the same video on multiple platforms, some undertakings have stated that they do not offer this option to their users.

7.4.2 Market Players

(563) According to the explanations and information obtained from the aforementioned initiatives, although their operating models differ, the main initiatives that provide visual and auditory content to users in Türkiye are as follows:

- YouTube is a global video search engine that operates with both ad-supported and ad-free models, showcasing user-uploaded content as its primary business model.
- Dailymotion is an ad-supported video search engine that operates on a user-uploaded content business model.
- İzlesene.com is an ad-supported video search engine that operates on a business model of showing user-uploaded content without licensing.
- Facebook is a social media platform that allows users to share videos and utilizes an advertising revenue model.
- Foxplay is an over-the-top (OTT) platform that primarily licenses and broadcasts Fox TV content.
- Gain is an OTT platform that licenses content and reaches users through both paid and free memberships.
- Exxen is a subscription video-on-demand (SVOD) platform that licenses content and offers both ad-supported and ad-free features to users.
- Official websites of TV channels refer to the websites of television channels that operate on a free and open advertising revenue model, reaching users through various platforms.
- Netflix is a video platform that operates on a subscription model, licensing and producing content. Netflix collaborates with content providers to obtain internet broadcasting rights for a variety of TV shows and movies. It also creates its own content and broadcasts material for which it holds exclusive broadcasting rights.
- Apple TV is a video platform that offers options for purchasing and renting content.
- Mubi is a paid subscription-based video platform that offers 20 films per month.

- Amazon Prime is a video platform that operates on a subscription model, licensing and producing content.
- Beinconnect is a subscription-based video platform.
- Bigo Live is a global social live video platform where users can create live broadcasts, make live video calls with friends, and engage in live video chats.
- Blutv is a video platform that provides paid subscriptions and rental options.
- Vimeo is a US-based video sharing platform.
- TikTok is an ad-supported video sharing platform.
- Disney+ is a subscription-based video streaming platform.
- Puhu is a platform owned by the initiative that provides video content from content distribution companies, television channels, series production companies, and licensing companies.

7.4.3 Market Competition Concerns

(564) In the video-sharing industry, the actions of vertically integrated companies with significant market power that attract viewers' attention may raise concerns about anti-competitive behavior. This includes favoring their products and services, influencing advertising purchases, and directing consumer attention. Conversely, the companies consulted generally assert that they do not have specific competition concerns beyond those already discussed in the EU and the UK regarding digital advertising. It is emphasized that video-sharing platforms are a rapidly evolving and innovative sector. Regulatory proposals should consider input from a wide range of industry stakeholders to avoid disadvantaging or favoring specific players in this rapidly changing industry.

(565) The responses to the information requested regarding how the undertakings provide privacy policies, terms of use, and related terms to the users and enlighten the users in terms of the product/service or applications they offer, it is generally stated that the undertakings provide users with a privacy policy, cookie policy, disclosure text, terms of use, user membership agreement, preliminary information form, and distance sales agreement through the video sharing platform. Furthermore, it is emphasized that clear and transparent

information about data processing activities is shared, and easy methods are provided for customers to control and access their data.

(566) Responses from undertakings about the potential for compatibility with other video-sharing platforms generally indicate that such compatibility is not feasible. They argue that each platform has unique licenses and features, and making them all interoperable would stifle innovation and differentiation, ultimately limiting user choice. They suggest that interoperability is only viable for specific services like telephone, email, internet, and banking. Additionally, they note that users can already share videos across platforms without requiring interoperability protocols. Some platforms also allow sharing of content through their APIs.

7.5 Number-Independent Interpersonal Communications Services

7.5.1 Overview of the Market

(567) The communication services used by independent individuals typically include instant messaging, email, and video conferencing. These services generally enable communication with individuals and businesses. They differ based on the fundamental communication method used. Users can benefit from messaging, email, and voice/video calling options according to their communication preferences. Service providers can offer these options through separate applications or in a single application with various combinations.

7.5.2 Market Players

(568) The main companies providing instant messaging services in Türkiye are Apple (iMessage), Google (Google Chat, Google Messages), Facebook (WhatsApp, Facebook Messenger), Snapchat, Epic Games (Houseparty), Telegram, Turkcell (BiP Messenger), WeChat, Clubhouse, TikTok, Discord, Twitch, DingTalk, QQ, Kik, KakaoTalk, Viber, Yabb Messenger, LINE, Discord, and Signal. The main companies providing email services are Google (Gmail), Yahoo! (Yahoo! Mail), Apple (iCloud Mail), Yandex (Yandex Mail), Microsoft (Outlook), Zoho, Samsung Mail, and AOL Mail. The companies providing video conferencing services are Apple (FaceTime), Google (Google Meet), Microsoft (Teams, Skype), Zoom, Slack, and Cisco (Cisco Webex).

(569) The consulted undertakings have stated that the relevant market should be considered on a global scale and that it would not be realistic to divide or categorize the market based on potential areas of use or any other static factor. Furthermore, it has been argued that making such a distinction would not accurately represent the competitive dynamics experienced by the services in the market, considering that users mainly communicate through non-messaging applications.

(570) Market players provide their services to individual users chiefly for free, but they generate revenue and finance the services through advertising activities on relevant applications. However, some services may offer additional or more professional features (such as dialing phone numbers, break rooms, surveys, Q&As, requesting the floor, attendance monitoring, meeting recording, live streaming, and noise cancellation) for a fee, primarily targeting commercial users. The primary feature of the market is seen as the offering of complimentary goods and services.

(571) It is commonly known that the majority of products and services in the market can be easily accessed on both desktops (through web browsers or desktop applications) and mobile devices such as phones and tablets (through web browsers or mobile applications).

7.5.3 Market Competition Concerns

- **Data and Privacy Concerns**

(572) The pertinent market functions on a data-driven model akin to other digital markets. Users register using usernames, email addresses, and/or phone numbers to access the relevant services. The data collected by the undertakings offering these services is comparatively limited, but they primarily function as an ecosystem. They can engage in targeted advertising by linking the relevant account with other user accounts and tracking their activities. However, the consulted undertakings indicated that they generally cannot access the content of user communications. Instant messaging applications are typically end-to-end encrypted, and efforts are underway to encrypt them further. Email providers assert that email content is not utilized for advertising purposes. Some

entities state that they do not display ads within these services and do not utilize user data for advertising.

(573) In terms of the instant messaging services they offer, undertakings in the industry claim that they offer end-to-end encryption, ensuring that only the sender and receiver can access the content exchanged between them, and no third party can intercept it. Some undertakings state that to guarantee this level of inaccessibility, the privacy feature must be activated. Despite the confidentiality and end-to-end encryption, undertakings also claim that they can collect data, such as which users message each other or at what times. They state that this data can be utilized to ensure user security, prevent abuse, and assist in providing the service. Some undertakings list the following data: name, contact details, identity information, demographic information, payment details, membership and licensing information, device access and usage data, interests and preferences, content consumption data, search and purchase history, voice recordings, typing patterns, images, contacts, relationships, social media data, location information, communications, recorded documents such as photos, music, films, software, videos, and recordings, feedback and ratings, and traffic and circulation information. It is stated that such data is necessary for service provision and that permission is obtained from users when necessary for messaging purposes, such as accessing the photo gallery, camera, and location.

(574) An additional concern related to data and privacy pertains to transparency. In this regard, the companies affirm that the terms of service are presented to users for their consent upon signing up for the service. Furthermore, the relevant terms are easily accessible to users, and in certain cases, to the general public, through both the mobile application and the website. It is also emphasized that users have the ability to review and modify their privacy and data settings at any time. Moreover, they are provided with the option to disable data sharing from the internet and application activities and exercise "privacy control" through straightforward on/off controls. In this context, it is also indicated that updates aimed at enhancing and advancing the services provided are made accessible to users, allowing them to review the updates before they are implemented. Additionally, it is highlighted that some companies may display a notification when users install or update their applications, informing them that the app will

access their data. Now, users have the choice to either acknowledge the notification and grant access or decline it and refuse access to their data.

- **Concerns Regarding Interoperability**

(575) One concern expressed by industry players is that some applications available in the market are only accessible on a limited number of devices. Therefore, even though consumers often use multiple access points, there are network effects caused by applications/services that do not interoperate with those of other providers. The undertakings also argue that some of them have not taken steps to ensure interoperability, thereby preventing consumers from using alternative applications. In addition to this allegation, undertakings argue that some number independent communication service applications are pre-installed on devices, which reinforces consumers' exclusive access behavior and limits competition in the market, the functionality and quality of the services offered, consumer preferences, and technical progress. In this context, it is stated that preventing pre-installing and ensuring interoperability cumulatively prevents inter-device switching and indirectly impacts competition in the device market.

(576) Another point highlighted by the undertakings concerning interoperability is that it varies depending on the products and services available in the market. Accordingly, because there is full interoperability between email services, network effects are not a significant factor in the adoption of an email service. Similarly, it is understood that video conferencing applications are mostly interoperable and can be equally effective on different systems and devices. However, this situation is different in instant messaging services, and network effects may make it difficult for competitors to grow and gain a foothold in the market.

- **Concerns Regarding Innovation**

(577) The undertakings state that the market has a high level of innovation, both in terms of the various features offered by different service providers and the integration of applications into the broader digital ecosystem. It also notes the presence of numerous key players in the market and emphasizes the need to eliminate barriers to innovation.

- **Regulatory Concerns**

(578) The parties consulted assert that the current framework for enforcing competition law already addresses potential competition challenges in digital markets. They contend that the widespread existence of redundant or potentially contradictory regulations in numerous countries could place substantial burdens on businesses, resulting in diminished competition and innovation, ultimately detrimentally impacting consumers and businesses. Some undertakings contend that the existing competition in the market is robust and effective, and therefore, additional market regulation is unnecessary. However, it is necessary to have a more active and coordinated approach by governments and regulatory authorities on in terms of regulations. The undertakings also emphasize that regulations should be crafted to prevent anti-competitive behavior among companies of a certain size. Rules that do not effectively regulate these undertakings and ensure their adherence to pertinent responsibilities will negatively affect competition.

(579) The undertakings also prioritize regulating areas of the market such as harmful content, privacy, and data portability, and emphasize the need to establish industry-wide standards in these areas. Some of the undertakings also indicated that regulations aimed at promoting fair competition and enhancing transparency for application stores and operating systems would have a positive impact on competition in the market for number independent communication services.

- **Market Entry Concerns**

(580) The majority of undertakings state that numerous new businesses have successfully entered the market, and multi-homing is prevalent, and this suggests that the barriers to entry and development in the digital sector are low. In this context, it is also anticipated that there will be new market entrants shortly, and these entrants are expected to provide multiple services. In addition, it is also stated that undertakings do not consider these issues to be significant barriers to entry or expansion, primarily due to the fixed costs, investments, and the range of alternatives available. However, it is noteworthy that the lack of interoperability is considered one of the leading obstacles in this regard.

(581) Access to data is crucial for market entry. It is important to note that user data cannot be consumed by competitors as it is widely available and can be obtained from third-party providers, collaborations between companies, publicly available sharing/databases, and similar sources. Furthermore, it is emphasized that data accessibility does not present a barrier to entry or expansion in this industry, as direct acquisition from users is feasible when offering a valuable service.

(582) The undertakings also emphasize that the primary determinant of a new service's success is the development of a compelling idea capable of attracting substantial user groups that are either voluminous or broadly significant (*e.g., in terms of interests*) to advertisers. In this context, it is stated that competition in digital markets is intense and unpredictable, with users having numerous choices and no single player holding a competitive advantage over others. In this context, it is emphasized that service providers compete with each other to attract and retain users' interests and feel the pressure to innovate.

(583) Most undertakings view the following attributes as essential factors for achieving success and visibility in the market for number independent communication services: providing a diverse range of features, attracting a large user base, offering global service coverage, being the first to enter the market, establishing a powerful brand presence, achieving market penetration, and delivering integrated services. Furthermore, it is noted that investment expenses and technical prerequisites may differ for each company and activity within the market, but overall, it is crucial to deliver uninterrupted services of consistent quality and performance, while also ensuring the security of data.

7.6 Operating System Services

7.6.1 Overview of the Market

(584) An operating system is a form of system software that oversees the essential functions of both hardware and software, enabling software applications to function on it. Operating systems are found on various computing devices, including mobile devices, tablets, personal computers (PCs), and servers.

7.6.2 Market Players

(585) The primary players in the operating systems market are Microsoft, Apple, Linux, BeOS, and Google.

7.6.3 Market Competition Concerns

(586) Concerning operating systems, information was requested from parties regarding the limitations on end-users ability to uninstall pre-installed software applications, install third-party software applications or application stores, and uninstall pre-installed services on operating systems. Additionally, information was sought on data collection, the use of collected data, and concerns about transparency in operating systems. Information was also requested from the manufacturers of personal computers or mobile phones and undertakings with operating systems in the market. The responses received from the undertakings are summarized below.

- **Concerns Regarding Interoperability**

(587) In the context of mobile devices, when asked whether consumers have the opportunity to use/download applications/services that are different from the applications/services developed by the undertaking on mobile devices with the installed operating system, the general response is that the vast majority of users delete, disable, or hide mobile applications, including pre-installed ones, from their devices. Users can download applications to their mobile devices through application stores, and they are free to download the majority of applications developed by third-party developers. Additionally, users can also download web applications. However, it is understood that some undertakings, within closed operating systems limit the ability to delete and/or modify certain applications to maintain the user experience.

(588) About personal computers, when asked whether consumers can uninstall pre-installed applications/services on personal computers with the operating system, undertakings stated that, in general, users face no obstacles in downloading and using other applications. They can download and install applications from any source and can also install the majority of competing applications from app stores. An undertaking stated that users can easily uninstall applications from their devices, but some pre-installed applications

cannot be uninstalled because they are essential to the operating system ecosystem. For example, this is the case for applications like the Web Browser, which the entire operating system is based on and through which most internet applications are accessed. Some pre-installed applications, like app stores, cannot be uninstalled but can be disabled to remove them from the list of applications on devices.

(589) In response to the question about the conditions for application and software developers to create applications and software that can run on operating systems, and whether these conditions are transparently disclosed to developers, one respondent stated that there are no specific terms or conditions for web developers to make websites available through the browser. The only requirement for application developers is to accept the relevant agreement. Another undertaking also stated that they do not impose any restrictions on software developers who create applications for their operating systems. Another undertaking indicates that the terms and conditions for developing applications and software be openly and transparently disclosed to application developers. Specifically, this information should be available on websites for developers interested in creating applications for operating systems.

- **Data and Privacy Concerns**

(590) In the context of operating system activities, the inquiry about the type and amount of data accessible by undertakings owning operating systems, specifically the accessibility of data related to the use of third-party applications, received a response. It was stated that companies collect data on user behavior and the devices themselves, contingent upon user permissions and controls, as well as their Privacy Policy. For instance, to transmit content to a device, application, or browser, it is essential to gather minimal basic information, such as the IP address. To facilitate these functions, device manufacturers also offer app store services that have access to specific data, such as location and contacts on the device. The data they have access to includes information such as usage statistics, preferences, button clicks, performance statistics, and memory usage. The company states that all users can access an explanation of how their data is collected, processed, protected, and used through the company's applications and services in their Privacy Policies. Users also can

review their privacy settings at any time. When a user downloads an application from the app store, specific system applications and features have the capability to transmit data to the developer regarding the user's usage of those applications. If the user opts to transmit information regarding the usage and performance of the company's laptops, the company will automatically have access to diagnostic and usage data related to the activities of its operating system applications, as well as crash reports. The operating system applications can download files from and read files in the user's laptop download location. Users can modify this by accessing an application's permissions page and disabling the storage permission. It was also noted that specific operating system applications, authorized to access a user's location, have the capability to retrieve this information from the user's laptop. Upon deactivating the application store on their laptop, all data and settings linked to the operating system applications are removed from the device. Additionally, users can review and modify the privacy and security settings that accompany the use of operating system applications on their devices.

(591) According to another undertaking, if authorized by users, the company collects data on the usage of operating systems to aid in troubleshooting and enhancing the product. This data may encompass details on running applications, which can assist in identifying application incompatibilities or other issues within the operating system or on specific devices where frequent application crashes are observed. It is important to note that the accessed information does not include specifics of user activities within the application.

7.7 Cloud Computing Services

7.7.1 Overview of the Market

(592) The concept of cloud computing refers to a rapidly developing service that has emerged over the last fifteen years. It provides on-demand remote storage and access to software programs over an internet connection. With cloud computing services, companies have the opportunity to lease information technology infrastructures instead of buying them. Instead of buying physical data centers and servers, and managing their upkeep, it is possible to utilize these resources as needed and for a specific duration and to pay based on usage.

(593) Various cloud computing service models differ among providers and are continually evolving. The three primary service models are Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS). In the SaaS model, users access applications through a lightweight client interface, such as a web browser or program interface. In the PaaS model, users develop new applications using the services and tools provided by the cloud provider. In the IaaS model, users can deploy and operate software, including operating systems and applications, while the cloud provider supplies the underlying computing resources, such as processing, storage, and network applications.

7.7.2 Market Players

(594) According to the information obtained from the undertakings, there are numerous players in the sector. On a global scale, it is understood that a wide variety of technology companies such as Amazon, Microsoft, Alibaba, Cisco, Google, IBM, Dell, HPE, Oracle, Iron Mountain, Hewlett Packard, Rackspace, Accenture, Fujitsu, VMware, Akamai, and Snowflake are actively competing, and many of them are also operating in Türkiye. Additionally, it is understood that local providers such as Bulutistan, Türk Telekom, NGN, Radore, Turkcell, and GlassHouse is also present in the market.

7.7.3 Market Competition Concerns

(595) The extensive volumes of data gathered through cloud services enhance the competitive edge of undertakings Within this framework, the primary antitrust issues that may emerge in the industry are related to data. Furthermore, challenges and drawbacks, particularly concerning privacy and security, also come to the fore.

(596) Based on the information gathered from the industry, the primary concerns that require attention are data transparency, portability, and interoperability. It has been noted that interoperability, utilization of open-source technology, and data portability will play a pivotal role in driving competition as cloud services continue to expand. Interoperability refers to the ability of products to function not only within a single cloud environment but across all cloud environments, thereby heightening competition among infrastructure providers. This approach aims to prevent customers from becoming locked into specific service providers,

allowing them to explore new offerings and switch providers. Furthermore, it will encourage providers to compete based on the quality and cost of their services, ultimately fostering greater innovation.

(597) The responses to inquiries regarding data sharing and confidentiality from the undertakings suggest that, overall, the contracts with clients explicitly outline the procedures for collecting and utilizing user data. The responses emphasize a commitment to safeguarding customer privacy and data security, prohibiting the sharing of customer data, and granting customers the ability to access, export, and delete their data.

(598) When considering market entry, cloud storage services need to have adequate infrastructure and storage capacity to effectively provide services to users and remain competitive. Other factors impacting market entry include security, privacy, and data transfer speed. Analysis of the market landscape and responses from industry participants suggests that there are no significant barriers to entry, including legal regulations. However, it is noted that local players (such as Vodafone, Turkcell, and Türk Telekom) may face potential technical and commercial dependence on larger companies operating in different sectors, which could reduce their competitiveness. Additionally, the conduct of specific industry participants in promoting their applications and services could have adverse effects on new entrants and local players. For instance, some companies have been observed to offer their cloud services pre-installed on their own devices.

(599) An undertaking operating in the sector asserts that the pricing policies for data center services offered in conjunction with mobile services by telecommunication/mobile operators need to be regulated by legislation.

(600) As a result, it is observed that numerous players are competing with each other in the sector, and there are no significant barriers to entry. Most players assert that there are no practices causing concern in the business and that the market is competitive. Given the volume of data at stake, it is crucial to advocate for data transparency, portability, and interoperability to uphold competition in the sector and address any potential concerns.

(601) Furthermore, aside from the competitive considerations, the initiatives also sparked concerns regarding the legislation on Personal Data Protection Law and underscored the importance of Türkiye being acknowledged as a trustworthy country in EU data centers for the progress of the sector.

7.8 Online Advertising Services

7.8.1 Overview of the Market

(602) Advertising involves promoting goods and services by purchasing space and/or time in various communication channels to stimulate or enhance demand. These activities can be categorized based on their content, target audience, geographical focus, and the tools used. The tools used for advertising can be classified into online advertising (digital advertising) and traditional advertising, depending on whether the advertisement is presented over the Internet.

(603) One of the key distinctions between online advertising and traditional advertising is the ability to target and measure the effectiveness of online campaigns. Online advertising allows for more precise identification of the target audience compared to traditional methods. Advertisers stated that they do not have a specific policy for allocating their budget between traditional and online advertising. They generally prefer the medium that the target audience uses intensively, and this optimization is often achieved through machine learning. However, it is understood that there are also advertisers who realize all of their advertising budgets to online or mobile channels. Advertisers also stated that the size of the user base is significant when selecting an advertising medium, and social media platforms are advantageous in this regard. Among channels with similar characteristics and reach volume, the most cost-effective channel is preferred.

(604) According to the discussion, the duration of user engagement on the platform is a significant factor for publishers and advertisers. Increased user engagement is linked to higher visibility of advertiser messages. Furthermore, determining the duration of user engagement can aid advertisers in selecting the appropriate platform and advertisement model, leading to more efficient allocation of advertising budgets.

(605) It is recognized that online advertising can be categorized into various subtypes, with the fundamental differentiation being search-based advertising, display-

based advertising, and listing advertising. Within the realm of display-based advertising, it encompasses banner, rich media, and video advertising. It is acknowledged that these types of advertisements are prevalent on websites that do not incorporate social media platform functionalities.

(606) It is understood that criteria such as click-through rate, viewing rate, and action rate are considered in measuring the effectiveness of advertisements, and these measurements are generally provided by advertising intermediary undertakings (AdTech).

7.8.2 Market Competition Concerns

- **Barriers to Market Entry and Growth**

(607) It is widely recognized that major international corporations hold a substantial market share overall. The extensive reach and diversity of their target audience provide them with significant advantages in the online advertising sector. Furthermore, the user data amassed by these entities is of a scale that surpasses that of competing publishers in the realm of targeted advertising. Notably, while these platforms can gather user data through user membership and platform usage, other publishers typically rely solely on cookie-based data collection. Only a limited number of publishers and advertisers acknowledge procuring data from third-party sources. Consequently, a primary competitive concern in the market revolves around the dominance of these global players. The utilization of the intermediary infrastructures owned by these players in the process of placing advertisements on their platforms results in these entities being involved in multiple stages of the online advertising chain and holding a significant market share.

(608) According to publishers, the predominant issue in the market is the dominance of global players. They emphasized that the integrated services offered by global platforms grant them significant leverage in utilizing advertising display capabilities and targeting options, thereby allowing them to maintain control over unit prices. Furthermore, there is apprehension that local players may face disadvantages in global-level contract negotiations.

(609) Likewise, advertisers have asserted that the market faces limited competition, despite the absence of overtly anti-competitive conduct by any specific

participant in the online advertising sector. They have emphasized the dominant position of major global players, attributing it to their control over crucial data, and have identified this circumstance as a barrier to entry for new entrants. Additionally, advertisers have highlighted their lack of bargaining power in negotiations with global players, in contrast to their relative influence over local broadcasters concerning advertising expenditures.

(610) Advertising intermediaries also noted that the information acquired from the complimentary services provided by international corporations gives them a substantial edge and that their vertically integrated activities bolster their standing in the marketplace.

(611) While some market players have claimed that the online advertising market is heading towards monopolization, others have stated that they expect new entrants to join the market. Furthermore, it has been suggested that the regulations regarding cookies will affect unit costs, potentially benefiting global undertakings. Therefore, it was suggested that regulations, especially on global platforms, may be beneficial for a more competitive market functioning. The significance of measuring and independent market reports, as well as the advantages of collaboration between industry players and public institutions, were emphasized.

- **Exclusivity and Tying**

(612) Both publishers and advertisers have confirmed that there are no legal or contractual obstacles to engaging with multiple advertising intermediaries in the market. However, it is commonly observed that publishers primarily collaborate with intermediary entities associated with a single dominant global player. Conversely, the intermediary entities providing services to advertisers exhibit greater diversity. It is understood that some advertisers engage with multiple intermediaries for the same service, while others, albeit fewer in number, prefer to work with a single intermediary. This preference is due to the challenges in reporting and performance measurement, as well as the complexities arising from using different technologies when working with multiple intermediaries. The majority of advertisers prefer to enlist the services of advertising agencies for their advertising campaigns. This preference is attributed to factors such as

the lack of in-house expertise in advertising, the benefit of agencies' industry knowledge and experience, and their adeptness in keeping abreast of new technologies. Both publishers and advertisers have emphasized that they have not encountered any instances of tying practices in this sector, and have expressed no concerns regarding such practices.

(613) Conversely, intermediaries within the advertising industry emphasized the necessity of utilizing specific technologies for advertising on particular channels. Furthermore, they underscored the importance of seamless communication among components such as ad server, DSP, and data server.

- **Transparency**

(614) One of the primary concerns within the online advertising industry pertains to the lack of transparency in the auction process. Undertakings have expressed that, particularly in auctions organized by global entities, the intermediary determines which advertisements are published and when, without disclosing the information used in the decision-making algorithm. This closed-circuit approach in auctions creates an unmonitored environment for competition and auction operations. Additionally, there is uncertainty regarding the allocation of advertising fees to media outlets, as well as a lack of awareness among broadcasters about the fees offered by advertisers. It has been suggested that the establishment of a system that measures competition transparently and equitably would be advantageous for all advertisers.

8 CONCLUSION

(615) In light of the regulatory requirements for digital markets, global best practices, and scholarly research, it is advisable to develop a preliminary framework outlining fundamental procedures and principles for regulating digital markets. Furthermore, it is recommended to supplement this framework with more comprehensive elucidations and regulations through subordinate legislation.

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