

Competition and antitrust in the digital age

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While the digital economy offers abundant opportunities to customers and retailers alike, it also raises a number of competition concerns, including the impact on bricks-and-mortar businesses, the potential for abuse of market power by major digital platforms and the challenge of fostering online competition while preventing free riding. Competition authorities must evolve and adapt traditional antitrust principles and approaches to meet the challenges of the rapidly changing digital market.

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What impact has the rapidly changing digital market had on competition in your jurisdiction, and how have legislators and competition authorities responded?

The rapidly changing digital market has had a significant impact on competition in Turkey. According to data obtained from the Turkish Statistical Institute, 61% of the population (ie, approximately 50 million people) used the internet in 2016.⁽¹⁾ Further, the number of internet users in Turkey is expected to rise to 56 million by 2019.⁽²⁾ Additional data from the Turkish Statistical Institute suggests that goods or services purchased online for private purposes represented 34% of the market in 2016. This underlines that online shopping and digital markets have become more popular.

The Competition Board recognises the effects of rapid changes in digital markets. In *D-Market* (November 10 2015; 15-40/662-231), the board stated that the volume of e-commerce in Turkey is increasing due to:

- recent technological developments;
- an increase in internet use;
- the expansion of consumer rights protection through consumer laws; and
- an increase in the reliability of credit cards following amendments to banking laws.

Further, the number of online platforms continues to increase in various sectors and this new trading channel has fundamentally changed traditional market structures. A significant number of consumers prefer to buy products and services online for practical reasons.

In order to keep pace with these new market structures, the Competition Board must consider new market definitions for products and services involving digital markets. Further, the board must examine the specific dynamics of digital markets while assessing the competitive or anti-competitive effects of relevant cases.

In terms of market definition, are online services considered to be in the same market as traditional services in your jurisdiction? What impact has this had on competition?

As mentioned above, the Competition Board has not eschewed adopting new market definitions for digital markets when necessary and based on the specific features of each case that it assesses.

In this context, the board previously introduced separate market definitions for online and offline services which provide the same goods and services. For example, in *Biletix* (November 11 2013; 13-61/851-359) the board separated the electronic and physical sale of event tickets by defining the relevant product market as "intermediary services for the electronic sale of event tickets over a

platform". The board stated that supply and demand substitutability in the relevant market must be considered when deciding the relevant market definition.

In *Çiçek Sepeti* (December 16 2010; 10-78/1623-623), the board stated that there was a distinction between bricks-and-mortar retailers and online florist services. The board concluded that the relevant product market was "online flower sale services".

Introducing a new market definition for online services affects the application of competition law principles and helps the board to:

- identify the characteristics of the relevant market in a more comprehensive manner; and
- determine the competitive landscape and the market power or position of the relevant undertakings.

This allows the board to examine cases on the substance and results in decisions which better reflect the competitive dynamics of the relevant markets.

What types of conduct constitute abuse of dominance in the online space and what practices are most likely to catch out unwary online players?

Abuse of dominance is regulated under Article 6 of Law 4054 on the Protection of Competition, which does not define 'abuse' *per se*, but does provide a non-exhaustive list of specific forms of abuse similar to Article 102 of the Treaty on the Functioning of the European Union, including:

- directly or indirectly preventing entry into the market or hindering competitor activity in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
- making contracts that place restrictions on other parties concerning resale conditions, such as:
 - the purchase of other goods and services;
 - the agreement by intermediary purchasers to display other goods and services; or
 - the maintenance of a minimum resale price;
- distorting competition in other markets by taking advantage of financial, technological and commercial factors in the dominated market; and
- limiting production, markets or technical developments to the detriment of consumers.

Turkish competition law does not define what constitutes an abuse of dominance online. Therefore, the abovementioned conduct is also applicable to the online space.

However, the refusal to supply and the use of most-favoured-customer clauses and tying arrangements are likely to catch out careless online players.

Yemek Sepeti (June 9 2016; 16-20/347-156) was based on claims that Yemek Sepeti, an online food-ordering platform, was abusing its dominant position by threatening or placing pressure on restaurants which did not offer Yemek Sepeti's discounts on their own websites or other platforms. The board examined Yemek Sepeti's most-favoured-customer practices and found that the restaurants which had been approached by Yemek Sepeti regarding the most-favoured-customer clause had generally preferred to cease providing discounts on other platforms and had in some cases left competitor platforms. As a result, the board concluded that Yemek Sepeti's most-favoured-customer practices had harmed other platforms and hindered the ability of competitors to offer different products and services. The board resolved that due to Yemek Sepeti's most-favoured-customer practices, competitors had struggled to compete. Accordingly, the board concluded that the most-favoured-customer clause had violated Article 6 of Law 4054.

What steps are competition authorities in your jurisdiction taking to prevent online retailers and service providers from free riding on the investments of bricks-and-mortar retailers and service providers?

The Competition Board has evaluated numerous cases of free riding. In these precedents, online

service providers raised the issue of free riding as a defence against antitrust allegations. For example, in *Yemek Sepeti*, Yemek Sepeti argued that its use of most-favoured-customer clauses prevented restaurants from free riding on its service. According to Yemek Sepeti, restaurants could easily use its platform to redirect customers to their own sales channels and therefore free ride on Yemek Sepeti if there was no most-favoured-customer clause. Yemek Sepeti further argued that competing platforms could also free ride on its platform if it did not impose a most-favoured-customer clause and that competing platforms could benefit from the information obtained from Yemek Sepeti, such as restaurant ratings and customer comments to help choose which restaurants to work with.

However, the board did not accept Yemek Sepeti's arguments and decided that its most-favoured-customer clauses had resulted in exclusionary effects in the relevant market and that it had abused its dominant position.

How can competition authorities best ensure that these steps do not hinder innovation or consumer choice and promote the continued evolution of online services?

Competition authorities should ensure that they accurately define the relevant market. The assessment of market definitions and the relevant undertakings' market power should be based on a detailed economic analysis which considers the relevant market's specific dynamics. Furthermore, consumer preferences and the position of competitors must also be considered.

Since undertakings in digital markets compete in terms of technological development and innovation, competition authorities should consider that an undertaking's market share is not enough to create a dominant position. Competition in online markets is always technology driven and dynamic. Even the market leader of a relevant market may lose its dominant position due to technological improvements introduced by a competitor.

The intervention of competition authorities may affect innovation, consumer preference and the evolution of online services. Competition authorities must carefully decide whether they need to intervene and be aware that the online services market generally has different dynamics than traditional markets. Market conditions and consumer preferences are different. In particular, business models in multi-sided markets are delicately balanced. If competition authorities intervene excessively or prematurely, the incentives for innovation will be dramatically reduced. Consequently, it cannot be totally excluded that attempts by competition authorities to maintain and promote competition in online markets could eventually hinder competition in the online market in the long run.

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Endnotes

(1) Information and Communication Technology (ICT) Usage Survey on Households and Individuals, 2016, available [here](#).

(2) Statista, Number of internet users in Turkey from 2013 to 2019, available [here](#).

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