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Consumer data rights and competition – Note by Turkey

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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1. Introduction

1. In recent years, together with the rise of digital economy and big data-driven industries, concerns related to privacy has increased enormously. This is mainly because ‘data’ is considered the oil of digital economy that feeds giant platforms in their personalized marketing activities, help them provide free online services on one side of the market while monetising data on the other side of the market. Therefore, it can be said that data constitutes a significant competition parameter in digital markets.

2. Big data, defined by 4Vs which are value, volume, variety and velocity, has complicated competition law analysis, by causing practitioners to question the effectiveness of traditional methods and tools in defining the relevant market and determining the market power of undertakings in competition law cases. Beyond that, an important concern has arisen: how privacy should be considered within the context of competition law? Do these two areas of law intersect? Is it possible to handle privacy as a matter of quality of the service offered by a platform? Can the competition authorities build theories of harm based on privacy concerns?

3. In this contribution paper, we will firstly provide brief information related to competition law and data protection law enforcement in digital markets in Turkey. Then, we will touch upon the interplay between the two areas of law and provide brief information about some of the actual cases in which data-related concerns were evaluated.

2. Competition Law and Data Protection Law Enforcement

2.1. Competition Law Enforcement

4. The Turkish Competition Authority (hereinafter the “TCA”) is responsible for enforcing competition rules and engaging in competition advocacy activities to promote competition in Turkey. Act. No. 4054 on the Protection of Competition (hereinafter the “Competition Act”) is to a great extent in line with European Union (EU) competition law and regulations, with the result that its case law also closely follows EU case law.

5. Article 4 of the Competition Act prohibits anticompetitive agreements between undertakings, which is closely modelled on Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 6 of the Competition Act prohibits abuse of dominance, which is modelled on Article 102 of the TFEU. Lastly, Article 7 of the Competition Act and Communiqué No. 2010/, as amended by Communiqué No. 2012/34 on Mergers and Acquisitions Requiring the Approval of the Competition Board regulate merger control.

6. TCA has been keeping a close eye on digital sector, especially on online platforms which are in dominant position, mostly through broad investigations starting nearly from 2015 to 2020. The most prominent cases in which online platforms were found to be restricting competition were Yemek Sepeti¹ and Booking.com². Yemeksepeti and

¹ TCA’s decision dated 09.06.2016 and numbered 16-20/347-156. Available only in Turkish at: <https://www.rekabet.gov.tr/Karar?kararId=0bd0157a-2b4d-43ce-85a3-2af821bb387b>.

² TCA’s decision dated 05.01.2017 and numbered 17-01/12-4. Available only in Turkish at:

Booking.com are the leading online platforms in online food ordering and online accommodation booking respectively. The Google Android³ and Google Shopping⁴ are also the landmark decisions of TCA in digital sector. These cases were conducted under Article 6 focusing on the abuse of dominant position, except for the Booking.com case which was conducted under Article 4. Besides, all four investigations resulted in administrative fines, together with a set of obligations for undertakings to comply.

7. Moreover, TCA recently announced on 30 January 2020 that it has initiated a sector inquiry named “The Report on Digitalisation and Competition Policy” to determine the competition policies in digital sectors by closely following the national and international developments in this field. In the announcement, it was also stated that digitalisation affects all sectors with an accelerating speed and in an unforeseen scope, thus transforming the competition and adding it new dimensions. Development of innovative digital products and business models pose a challenge for the enforcement of competition law, therefore TCA is going to be highly sensitive to new business models which have the potential to benefit and harm the consumers at the same time.⁵

8. In addition to that, TCA has recently empowered its already existing Strategy Development Department to catch up with the new developments in digital markets. It is stated by TCA that in recent years, there have been significant developments in digital economy both in national and international level, which requires competition authorities to closely monitor the effects of multi-sided platforms and the use of algorithms on both consumers and markets. Considering the huge effects of competition law infringements through big data and algorithms, traditional applications and approaches are predicted to be insufficient in dealing with the new problems in this field. In that regard, TCA redesigned the responsibilities of its Strategy Development Department, with the aim of ensuring to act proactively.

9. The new tasks of Strategy Development Department include assisting case handlers, providing opinions for investigations, providing support for competition probes relating to the digital economy, conducting trainings in relation to digital market-related matters, exchanging information and experience with national and international institutions, raising awareness regarding impacts of the digital economy and algorithm usage on both markets and consumers, contributing to the development of public policies in this regard by communicating with the relevant ministries, institutions and organisations⁶.

2.2. Data Protection Law Enforcement

10. Turkish Data Protection Law No. 6698 (hereinafter the “Data Protection Law”) has come into force on April 7th, 2016; after first and second draft prepared in 2003 and 2008 respectively failed to be enacted. By the time Data Protection Law came into force, the

<https://www.rekabet.gov.tr/Karar?kararId=d2bfb2c8-e517-498a-9542-07e3cad8a419> .

³ TCA’s decision dated 19.09.2019 and numbered 18-33/555-273. Available only in Turkish at: <https://www.rekabet.gov.tr/Karar?kararId=7d9ba7e3-2b8f-4438-87a5-26609eab5443> .

⁴ TCA’s decision dated 13.02.2020 and numbered 20-10/119-69. Available only in Turkish at: <https://www.rekabet.gov.tr/Dosya/nihai-karar-aciklamalari-tefhim-duyurulari/google-nihai-karar-20200214175226881-pdf> .

⁵ TCA’s Press Release dated 30.01.2020. Available only in Turkish at: <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-dijitallesme-ve-rekabet-p-874d77d25943ea118119005056b1ce21> .

⁶ TCA’s press release dated 08.05.2020. Available only in Turkish at: <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulu-dijital-ekonomiyi-mercek--61aedbe40a91ea11811a00505694b4c6> .

protection of personal data, except for certain regulated sectors, was regulated by a single provision in the Constitution of the Republic of Turkey and a few provisions in the Turkish Penal Code. These provisions were not adequate in responding to the needs of technology and rising platforms.

11. Data Protection Law, which is prepared based on Directive 95/46/EC on data protection (Data Protection Directive), was a step taken towards harmonising the Turkish legislation with EU legislation. The Data Protection Law is not an exact replica of Data Protection Directive but it is highly similar to it.

12. While Turkey adopted the Data Protection Law based on EU Data Protection Directive, the EU has recently introduced a new legislation on the protection of personal data; which is the 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, known as General Data Protection Regulation (hereinafter the “GDPR”). As a result, there seems to be a gap between the Data Protection Law and its EU counterpart.

13. Although the rights of the data subjects in the Data Protection Law and GDPR are similar to a large extent, the differences cannot be undermined. For example, the Data Protection Law does not involve the right of access by the data subject, right to be forgotten, right to restriction of processing and right to data portability to other consented data controller.

2.3. The Interplay between Competition Law and Data Protection Law

14. According to Zanfir-Fortuna and Ianc’s empirical research⁷, there are three phases of the development of the intersection between data protection and competition law. At the beginning, competition authorities handled data protection law as a separate issue and thus placed the two areas of law on parallel pathways. In the second phase, it was realised that the data protection rules might indeed promote or harm competition. Finally, the phase of ‘Uberprotection’ has started, in which the rights of individuals -as market participants and data subjects- are protected by the enforcement of consumer law, competition law and data protection law.

15. Currently in Turkey, competition law and data protection law are handled as parallel issues. Although there have been cases referring to the importance of data as a competition parameter, there have been no cases dealing with privacy related concerns so far. This is partially because the landmark mergers in which privacy-related concerns were most likely to be discussed such as WhatsApp’s acquisition by Facebook were below the revenue thresholds of TCA.

16. In addition to that, as stated previously, Data Protection Law does not involve the right to data portability, which might be a potential factor increasing the responsibility of TCA in eliminating the entry barriers for competitors and increasing the consumer welfare. In a specific case, an undertaking might be obliged to provide users with the right to data portability and ensure data interoperability.

⁷ Zanfir-Fortuna and Ianc, “Data Protection and Competition Law: The Dawn of ‘Uberprotection’”, *Research Handbook on Privacy and Data Protection Law: Values, Norms and Global Politics*, Edward Elgar Publishing 2019 (Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290824, accessed on 05.05.2020.

3. Actual Cases Touching upon the Concerns Related to Personal Data

17. TCA has considered the role of personal data in various cases involving investigations, merger reviews and exemptions. This chapter briefly represents some of these cases.

3.1. AEH- Migros Acquisition⁸

18. TCA conducted an in-depth Phase II review of the , regarding the acquisition of sole control of Migros Ticaret AŞ (hereinafter “Migros”), an important supermarket chain in the Turkish organised fast-moving consumer goods retail sector by Anadolu Endüstri Holding AŞ (hereinafter “AEH”), the holding company of the Anadolu Group. conducted an in-depth Phase II review of the transaction due to competition concerns. Finally, the board granted conditional approval for the transaction based on the commitments submitted by AEH.

19. TCA’s major concern was related to the beer market, as Anadolu Efes – a joint venture between the Anadolu Group and SabMiller OLC – is in a dominant position in the Turkish beer market. In its assessment, TCA highlighted the fact that Migros has the most comprehensive retail consumer data, called Customer Relation Management (hereinafter “CRM”) dataset, in Turkey. It is also stated that if Anadolu Efes is provided with an access to the CRM dataset of Migros, then it would earn a significant competitive advantage that can be used to exclude rivals by strengthening its dominant position.

20. AEH submitted a set of behavioural commitments for a period of three years after the consummation of the transaction to mitigate TCA’s concerns. One of these commitments was “regarding the beer market, Migros will refrain from sharing any commercially sensitive information regarding Anadolu Efes's competitors in the beer market or consumers who prefer competing products.” Finally, TCA granted the transaction conditional approval.

21. This decision is important in showing that consumer data –some of which is personal- is an important parameter of competition not only in digital markets, but also in traditional markets such as retail market. Moreover, behavioral commitments forbidding the access to that dataset might help mitigating the data-related concerns.

3.2. CK⁹ and EnerjiSa¹⁰ Investigations

22. Both in CK and EnerjiSa cases regarding the electricity supply and distribution market, sharing of data, which is qualified as strategic information, with Authorized Supply Companies (ASCs) by the distributors was found to be restricting competition through aggravating independent suppliers’ activities and preventing consumers from choosing their own supplier. The main reason behind this assessment was that if data was not provided by the distribution company, it would not be possible for ASCs to reach that information which provides them an important competitive advantage. The importance of consumer data is derived from the fact that while delivering an offer to a specific customer,

⁸ TCA’s decision dated 09.07.2015 and numbered 15-29/420-117. Available only in Turkish at: <https://www.rekabet.gov.tr/Karar?kararId=57e9efbd-fda1-4f78-b985-6a1542c88cd2> .

⁹ TCA’s decision dated 20.02.2018 and numbered 18-06/101-52. Available only in Turkish at: <https://www.rekabet.gov.tr/Karar?kararId=537b366a-8bd7-4821-8760-43592452b711> .

¹⁰ TCA’s decision dated 08.08.2018 and numbered 18-27/461-224. Available only in Turkish at: <https://www.rekabet.gov.tr/Karar?kararId=b6989e2e-27ce-4ded-8591-05b0b23c86c1> .

it is significant to have information about customers' address, phone number and also consumption habits, as stated by TCA in its EnerjiSa decision.

23. Since the distribution companies and ASCs were found to be abusing their dominant position in both decisions, in its decision TCA has forbidden ASCs to access the information within the body of their distribution companies.

4. Conclusion

24. Big data-driven sectors, algorithms and digitalization on one hand benefit consumers with more innovative and qualified products and services, but on the other hand they impose great risk in terms of the competition. The fact that storing and using consumer data provides a significant competitive advantage to an undertaking exacerbates the privacy concerns in digital markets. TCA has started to keep a close eye on digital markets recently with its ongoing digital sector inquiry and various big-tech company investigations, yet still handles the data protection law and competition law as two isolated fields of law. It also can be said that to ensure a healthy competition environment in digital sectors, TCA has a greater role than other competition authorities within the EU in compensating the shortcomings of the Data Protection Law, which lacks the right to data portability.