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CHALLENGES POSED BY DIGITAL PLATFORMS AND ACTIONS TAKEN BY THE EU AND TURKEY

Fatma Ceren Morbel[1]

ABSZTRAKT ■ A digitális platformok folyamatos fejlődésével párhuzamosan ez a dokumentum az általuk jelentett számos kihívást vizsgálja, különös tekintettel az Európai Unióra (EU) és Törökországra. A globális piacokat továbbra is a digitális gazdaság alakítja, ami megköveteli a döntéshozóktól, hogy egyensúlyt teremtsenek az innováció, a verseny és a fogyasztóvédelem, valamint a szabályozás között. Miután a digitális platformok különálló kihívásokkal szembesültek, mind az EU, mind Törökország megpróbálta szabályozni őket, ami rávilágít a tisztességes és versenyképes digitális környezet fenntartásának összetettségére. A kutatás konkrétan két kulcsfontosságú szabályozási kezdeményezésre összpontosít: a DMA és a hasonló problémákkal foglalkozó török módosítástervezetre. A DMA eredményeként a fogyasztók és a vállalkozások védelmet élveznek az ilyen platformok által támasztott tisztességtelen feltételekkel szemben. E tanulmány célja a DMA és a török versenytörvény javasolt módosításának összehasonlítása.

Kulcsszavak: Digitális piacok, uniós versenyjog, digitális piacokról szóló törvény, török versenyjog, 4054. számú törvény a verseny védelméről, kapuőrök, digitális gazdaság.

ABSTRACT ■ As digital platforms continue to evolve, this paper examines many challenges they present, with a special focus on the European Union (EU) and Turkey. Global markets continue to be shaped by the digital economy, which requires policymakers to balance innovation, competition and consumer protection with regulation. Having faced distinct challenges from digital platforms, both the EU and Turkey have attempted to regulate them, exposing the complexity of maintaining a fair and competitive digital environment. Specifically, the research focuses on two key regulatory initiatives: the EU's Digital Markets Act (DMA) and the Turkish draft amendment that addresses similar concerns. As a result of the DMA, consumers and businesses are protected from unfair conditions imposed by such platforms. The paper aims to compare the Digital Markets Act with the proposed amendment to the Turkish Competition Law.

Keywords: Digital markets, EU competition law, Digital Markets Act, Turkish competition law, Law No. 4054 on the Protection of Competition, Gatekeepers, Digital economy.

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1. Introduction

Digital platforms have revolutionised the way societies interact, conduct business, and share information in the dynamic landscape of the digital age. As digital ecosystems have grown rapidly, they have introduced severala number of new challenges, requiring regulatory bodies worldwide to reevaluate and adapt their approaches.

The digital economy has proven its transformative power, fostering innovation, global connectivity, and economic growth. Nevertheless, concerns have been raised about the concentration of power among a few dominant players, anti-competitive practices, and potential exploitation of user data. As a result, companies hold power that can be misused unfairly. This will likely lead to several undesirable consequences such as economies of scale, network effects, and high switching costs that may keep users locked into these platforms.[2]

As reported by *The Economist* in 2017, the world's most valuable resource is no longer oil, but data, since Big Data can be used to acquire customers, analyse competition/pricing, and optimise distribution, marketing and branding efforts. Due to this change, monopolies have also changed. During the 1800s, railway and subway companies dominated the landscape, whereas today big tech companies hold these positions.

Several EU countries have begun a legislative process in this area to address the challenges posed by big tech companies, but since these platforms provide services both within and across borders, a European instrument is needed to address these challenges. Consequently, these efforts created the DMA.

Other than the DMA, other countries are also taking steps to regulate digital platforms. As an example, Turkey's new proposal to amend its Competition Law (Law No. 4054 on the Protection of Competition) has a strong similarity to the DMA.

There are two primary objectives of the DMA, namely, contestability and fairness. Nevertheless, contestability is not solely about the ability of new competitors to enter markets and challenge incumbent firms. Rather, it also refers to the ability of markets to remain open and competitive. In this evaluation, the main objective differs from that of current competition law assessments,

[2] Francesco Ducci: Gatekeepers and Platform Regulation Is the EU Moving in the Right Direction? *SciencesPo Chair Digital, Governance and Sovereignty* (2021) 4. https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf.

which are designed to determine whether a particular behaviour adversely affects consumer welfare.[3]

As in the DMA, the Draft Amendment to Turkish Competition Law ("Draft Amendment") stated that one of the objectives of the Turkish Competition Law is to ensure that fair and contestable markets are established and protected.[4] Similar to the DMA, the Draft Amendment was drafted to keep the regulations current with the new business models that emerge from technological advancements and digitisation.

The DMA draws significant inspiration from past cases of competition law as complementary legislation to the EU competition framework. In addition to its explicit objectives, the DMA aims to foster more competition and innovation within the digital market to address market failures. The goal is to maintain coherence and legal certainty throughout the European Union, recognising the evolving nature of the digital landscape. Furthermore, the Draft Amendment expands the scope of Turkish competition law in a parallel manner. To prevent any potential abuse of power, it encompasses prohibited conduct and mandates obligations for entities with substantial market power in core platform services. By comparing the DMA and Draft Amendment, it is evident that both have similar objectives which reflect on a concerted effort to address the challenges associated with digital technology and to promote fair competition and innovation.[5]

This article aims to analyse comprehensively the DMA and its potential impact on the digital economy, through a comparison of its key provisions with those articulated in the Draft Amendment. The paper explores the intricacies of both regulatory frameworks. It aims to shed light on their intended purposes and potential impact on businesses and consumer protection in the European Union as well as in Turkey. Within this context, the article will define and elaborate upon the concept of a gatekeeper and outline the responsibilities assigned to them under the DMA. In this paper, a comparative analysis will be provided, outlining both the criteria established by the DMA and by Turkish law. Additionally, the

[3] Wolfgang Kerber – Louisa Specht-Riemenschneider: *Synergies between Data Protection Law and Competition Law*. Berlin, Verbraucherzentrale Bundesverband e.V., 2021, 65.

[4] Karaduman & Esin: Part 2: The Draft Amendment to the Law No. 4054 on the Protection of Competition in the footprints of the DMA?, 2022, https://www.lexology.com/library/detail.aspx?g=d67bdbcf-6f58-4dad-ba27-b44c0594211b.

[5] Bahadir Balki – Nabi Can Acar – Helin Yüksel – Mehmet Mikail Demir – Seda Eliri, Erdem Aktekin: *A New Age for Digital Markets in Turkey? The Draft Amendment to the Law No. 4054 on the Protection of Competition*. 2022, https://competitionlawblog.kluwercompetitionlaw.com/2022/10/25/a-new-age-for-digital-markets-in-turkey-the-draft-amendment-to-the-law-no-4054-on-the-protection-of-competition/.

article sheds light on the consequences of non-compliance and the measures envisaged by both legislations in response to such non-compliance.

2. Defining "Gatekeepers" and "Undertakings holding a significant market power" in both law

Article 3 of the DMA defines a gatekeeper as a company that has a significant impact on its internal market and provides a core platform service that allows business users to access the end user market. Furthermore, it has an entrenched and durable position in its business operations. Alternatively, it is foreseeable that such a position will be achieved in the near future.

The relevant company must meet the following quantitative thresholds to meet these three qualitative criteria:

"(a) it had annual EU turnover of at least EUR 7.5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value was at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b) it provides a core platform service that in the last financial year has at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU; and (c) the thresholds in (b) were met in each of the last three financial years."

To be defined as a gatekeeper, the company should provide one of the core platform services below:

"(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services provided by an undertaking that provides any of the other core platform services.[6]*"*

In the Draft Amendment, the core platform services are described in the same manner.

The term "gatekeeper" is not used in it. Instead, it is referred to as "an undertaking holding significant market power". Under the Draft Amendment, such an undertaking is able to provide one or more core platform services on a large scale and operates in a manner that significantly impacts end user or business user activities. Also it has the power or is expected to be able to maintain

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), Article 2 (2).

this impact over the long run. However, the Draft Amendment anticipates that the Competition Board will issue a further communiqué to determine the thresholds of the concept of "undertakings holding significant market power".[7]

Under the Draft Amendment, there are qualitative and quantitative criteria that should be considered in the designation of "an undertaking holding significant market power". The quantitative criteria can include the annual gross revenue, the number of end-users, or the number of business users. On the other hand, qualitative criteria can be network effects, ownership of data, vertical integration and conglomerate structures, economies of scale and scope, lock-in and tipping effects, switching costs, multihoming, user trends, and mergers and acquisitions that are conducted by the undertaking.

Both the DMA and the Turkish Draft Amendment exhibit notable convergence in their definitions of the term "gatekeeper" or "undertaking holding significant power", especially regarding quantitative and qualitative criteria such as size, durability, and gateway status. There exists a striking alignment between these regulatory frameworks concerning the parameters used to designate an entity as a "gatekeeper" or an "undertaking holding significant power" in digital markets. By applying this parallel approach, both the EU and Turkey stress the recognition of the nuanced challenges presented by entities with significant market power, while also establishing a harmonised framework for identifying and regulating gatekeepers, reflecting a collaborative approach to manage the complex dynamics of the digital landscape today. Therefore, the only difference seems to be the use of different terms to describe the same concept.

3. Similar core obligations in the DMA and the Draft Amendment

Both the DMA and the Draft Amendment have very similar objectives, which can be seen in interoperability, access to data, advertising, contracts outside the platform, and self-preferencing.

According to the Draft Amendment, interoperability should be effective and free between core platform services and related products or services.[8] Due to the importance of interoperability to the EU, Articles 6 (7) and 7 define the

[7] Balki et al. 2022, 5.

[8] Gen Temizer: Turkish Competition Law 2.0: Would you like your DMA with some Hot Turkish Spice?, 2022, https://www.lexology.com/library/detail.aspx?g=59256170-eb9a-44ce-9a91-b6691417d9d8.

obligations related to interoperability which regulate both interoperability in general and interoperability of messenger services.

In terms of non-public data, the two regulations are similar, as the DMA highlights in Article 6 (2):

"The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users."

Both regulations require gatekeepers (in the DMA) and undertakings with significant market power (in the Draft Amendment) to refrain from making the products and services they provide to businesses or end users dependent on other products and services they provide. It is also prohibited for business users and end users to be required to register or subscribe to any core platform services if this undertaking holds significant market power over accessing, logging in, or registering for these services.[9]

The Turkish amendment imposes separate obligations on advertisers, publishers, advertising intermediaries, and third parties authorised by them providing online advertising services. It is therefore necessary to have access to information regarding pricing conditions, auction processes, and pricing principles as well as to free, continuous, and real-time information regarding the visibility and usability of the advertising portfolio.[10]

According to Article 5 (9) gatekeepers must provide, "on request, advertisers and publishers to which it supplies advertising services with information about the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher for the publishing of a given ad; this must be provided for each of the relevant advertising services provided by the gatekeeper."[11]

Under the Draft Amendment, an undertaking holding a significant market power should allow business users to make agreements with other channels. Similarly, according to the DMA, a gatekeeper should allow their business users to conclude contracts outside the gatekeeper's platform.

Furthermore, regarding self-preferencing, the Draft Amendment requires undertakings with significant market power to refrain from discriminating against their products and services (whether by ranking, scanning, or indexing),

[9] Balki et al. 2022, 5.

[10] Temizer 2002, 8.

[11] Rosenauer Philipp – Jung Claudia: Concrete implication of the Digital Markets Act on "Big Tech". https://www.pwc.ch/en/insights/regulation/dma-implication.html

and to ensure fairness and transparency in the relevant circumstances.[12] Moreover, by Article 6 (5) of the DMA, gatekeeper platforms are prohibited from self-preferencing when self-preferencing involves a better treatment of first-party products and services in ranking and indexing and crawling as compared to third-party products and services.[13]

The Turkish amendment states that undertakings with significant market power should allow end users to easily uninstall software, applications or app stores that have been preinstalled into the operating system of the devices. Also, end users should be able to switch to another application, software, or app store, install and use third-party software, applications, or app stores effectively, to provide default settings to be easily changed. Furthermore, users are allowed to choose third-party software, applications or app stores by default according to their preferences and to fulfil technical requirements.[14] It is required under Article 6 (3) and (4) of the DMA to allow the uninstallation of pre-installed software and the modification of default settings as well as the installation of applications. Moreover, Article 6 (6) prohibits restrictions on the possibility of switching.

As stated above, it can be seen that the DMA and Draft Amendment share many similar objectives and obligations. It is because both laws seek to achieve fair, open, and beneficial markets for businesses and consumers.

4. Sanctions in case of non-compliance in the DMA and the Draft Amendment

The commission is responsible for enforcing the DMA. Gatekeepers who violate their obligations may be fined up to 10% of their worldwide annual turnover or up to 20% if they commit the same violation repeatedly. In addition, the gatekeeper may be required to pay a periodic penalty of up to 5% of its average daily turnover.[15]

An administrative fine may be imposed by the Ministry on providers of electronic commerce intermediary services in Turkey. Furthermore, if an

[12] Balki et al. 2022, 5.
[13] Peitz Martin: The Prohibition of Self-Preferencing in the DMA. *Cerre Issue Paper*, 2022, 5.
[14] Balki et al. 2022, 5.
[15] European Commission, The Digital Markets Act: ensuring fair and open digital markets, 12 October 2022.

undertaking violates the Competition Law, it may be subject to an administrative fine of up to 20% of its annual gross revenue.[16]

5. Conclusion

In conclusion, the DMA in the EU and the Draft Amendment share a common purpose in addressing the escalating dominance of digital platforms within the digital economy, emphasising the imperative of fostering fair competition. Despite being tailored to their respective jurisdictions, both regulatory frameworks share a commitment to ensuring fair and contestable markets. Their shared emphasis on defining core obligations that reflect on the unified goal of creating a regulatory environment that benefits both businesses and end users alike. This effort aims to ensure that consumers are protected from exploitation, platforms are held accountable for avoiding unfair bias, and businesses can engage in fair competition on an even playing field.

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[16] Karaduman & Esin 2022.

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