

New Complementary Tool to Strengthen Competition Enforcement

The Commission has published an inception impact assessment on the introduction of a new competition tool and Turkish Competition Authority (TCA) welcomes the opportunity to give feedback on the Commission's proposed new competition tool.

It is understood that there are two categories of structural concerns put by the Commission depending on whether harm is about to affect the market (*structural risks for competition, applying notably tipping markets*) or has already affected the market (*structural lack of competition*).

To address these structural competition concerns, there are different policy options outlined by the Commission. The first option is the “*baseline scenario*” that is simply based on continuing to enforce Articles 101 and 102 TFEU on a case-by-case basis against anti-competitive conduct of individual companies. Against this baseline scenario, four different options are considered.

Without expressing strong view on which of the options 1-4 is preferable, it is considered that the Commission's initiative in addressing markets that are not functioning properly due to structural competition issues (including tipping, unilateral practices by non-dominant firms or oligopolistic market structures) is an important development and will have its affects for the upcoming years.

It is well accepted that technological improvements and the structural transformation being shaped at the center of the digitalization effect the main areas of competition law. Those outstanding affects are putting pressure on competition agencies to reconsider their existing regimes from not only the perspective of dominance rules but also their evaluation of anti-competitive agreements and merger practices.

As the structural problems put by Commission show that, there might be a need of a new approach for markets, which show oligopolistic structures. Within this sense, it is important to make it clear whether new competition tool will put a new standard in terms of how and when the algorithms can be assessed as a mechanism of facilitating anti-competitive coordination between undertakings. As for the dominance rules, it can be said that the existing competition rules that are being applied to undertakings require high levels of thresholds for the finding of dominance. Alongside this, the market definition for digital markets can also be looked over as the traditional approach might be inadequate to tackle technical problems. It is well accepted that there might be little value in carrying out a market definition exercise in markets involving

multi-sided platforms. Therefore, it should be considered whether a market definition exercise for these markets is a necessary and proportionate use of resources¹ and if so, what will be the new approaches for defining markets. It is also argued that where multi-market firms hold a strategic gateway position in one market, they are then able to leverage that position in adjacent markets, give themselves an advantage through self-preferencing, and obtain an unfair advantage through holding of data and imitation of rivals' innovations². Another area that can be scrutinized under the dominance regime is that exploitative behaviors as it is likely that these types of behaviors will effect both consumers and suppliers. Therefore, the question of whether the traditional rules remain sufficient to address these competition problems or not is an important one and seems to remain on competition agencies' agenda until it is solved with a new approach covering these kinds of problems.

Last but not least potential mergers and acquisitions can be evaluated under the new approach with a new threshold that is to say transaction value accompanying the existing one.

There are also questions that can be raised considering the enforcement of these new rules. As stated in the summary the initiative addresses gaps in the current EU rules identified on the basis of the Commission's experience with enforcing the EU competition rules in digital and other markets. From this point, it might be helpful to make it clear the potential overlap between the new rules and Article 101 and 102. Besides, as the new policy options make it possible to impose remedies without finding of the competition law infringement it is clear that the existence of appropriate safeguards and due process will be very important.

¹ OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*, p.15

² 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. 37